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Proposed Delay of the DOL Fiduciary Rule - What Should Financial Institutions do?

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On March 2, 2017, the Department of Labor's ("DOL") proposal to delay its change to the definition of the term "fiduciary" (the "Fiduciary Rule") was published in the Federal Register.¹ Against expectations, the proposed delay would only be 60 days. If finalized, the change to the definition of fiduciary, as well as the first compliance date for the corresponding new and amended exemptions would be pushed back from April 10 to June 9 (assuming additional delays are not implemented).

While we think a delay is likely, there are a number of steps that must be taken before a delay is certain. Please see the timeline below. First, stakeholders may submit comments regarding the proposed applicability date extension until March 17. Next, DOL must review the comments and prepare a draft final rule. Because this is now a "significant" rule, the draft final rule must next go to the Office of Management and Budget ("OMB") for review. It is unclear how long OMB's review will take, but it must move quickly if the delay is to be finalized in advance of April 10.

Once OMB is done with its review, the final rule is then published in the Federal Register. The Administrative Procedure Act typically requires a minimum of 30 days after publication of the Final Rule before a rule can be effective. A "major" or "significant" rule (as this now is) typically requires 60 days after publication. This period, however, may be shortened if DOL demonstrates "good cause." "Good cause" in this context would mean that the full notice and public procedure under the Administrative Procedure Act is impracticable, unnecessary, or contrary to the public interest in this case. DOL would need to incorporate that finding and a brief statement of the reasons therefor in the rule issued. If DOL demonstrates "good cause," the delay could become effective as soon as it is published in the Federal Register.

Continue to Implement Changes

Although many industry experts believe that the proposal for a 60-day delay is likely to be approved, and the ultimate fate of the Fiduciary Rule is in doubt, there is unlikely to be certainty until close to the originally scheduled implementation date. Therefore, it may be prudent for stakeholders to continue their work streams to implement changes to comply with the Fiduciary Rule. If and until the delay is finalized, the applicability date remains April 10 and stakeholders risk violating their duties if they are not in compliance by that date.

Irrespective of the proposed delay, or the future of the Fiduciary Rule, the financial services industry has already undergone considerable change that is affecting consumer expectations about retirement advice. Market forces and reputation are moving firms in the direction of acting more like fiduciaries when advising consumers, including reviewing conflicts and acting in the best interest of their clients. These market shifts are also impacting the

¹ Published in the Federal Register on March 2, 2016, 82 Fed. Reg. 12319 (Mar. 2, 2016)

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traditional compensation regime by moving from traditional commission-based sales charges toward fee-based retirement accounts. Accordingly, irrespective of regulatory action, market forces may nevertheless push stakeholders to continue moving forward with their work streams, including moving toward unbundling or zero-revenue-sharing share classes.

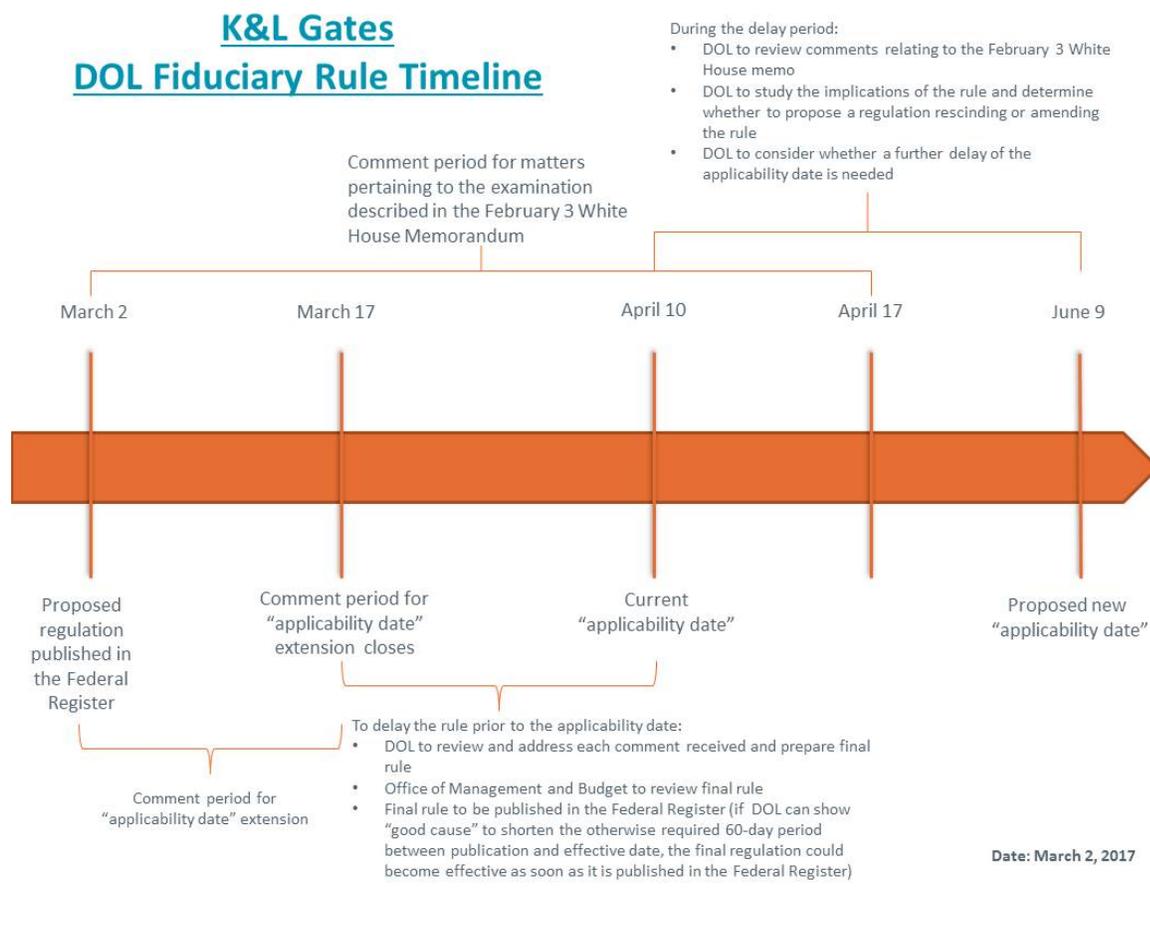
Consider Engaging in the Regulatory Process

The Fiduciary Rule is among the most salient and most controversial Obama era policies now being reconsidered, and it was among the first subjects ordered to be addressed by President Trump in his Executive Memorandum of February 3, 2017. Congressional Republicans will almost certainly continue to coordinate with the administration to further delay and ultimately revisit the Fiduciary Rule. The roadmap for these efforts continues to be a bill introduced by Rep. Ann Wagner (R-MO), Retail Investor Protection Act, H.R. 1090, which passed the House in the last Congress and was also incorporated into House Financial Services Committee Chairman Jeb Hensarling's Financial Choice Act. The Wagner bill would stay the DOL's rulemaking authority under ERISA to define the circumstances under which an individual is considered a fiduciary until 60 days after the SEC issues a final rule to implement Section 913 of the Dodd-Frank Act and requires the SEC to move first on a fiduciary rulemaking before DOL can implement its fiduciary rule. Until such time as legislation can be enacted, these objectives will continue to be pursued administratively.

How this process plays out will be informed by the stakeholder community. Therefore, impacted stakeholders should consider engaging as part of the rulemaking process. Comments on the applicability date extension are due on or before March 17, 2017. In addition to the proposed delay, the proposed rule also contains a series of questions to guide DOL's broader review of the Fiduciary Rule, as directed by President Trump's memorandum. Commenters have until April 17 to respond with information regarding this request. As noted in the proposed rule, these comments will drive how DOL moves forward, from "allow[ing] the final rule and PTEs to become applicable, issu[ing] a further extension of the applicability date, propos[ing] to withdraw the rule, or propos[ing] amendments to the rule and/or the PTEs."

Given the multifaceted nature of the considerations and the ongoing interplay between the administration and Congress, impacted stakeholders should also consider engaging directly with the Trump administration and with key members of Congress to provide input on these complex issues and potential solutions with an eye toward avoiding further uncertainty down the road.

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