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Important Development with DOL Fiduciary Rule Delay

Just this morning, the U.S. Department of Labor (DOL) rushed the final draft of the fiduciary rule's highly-anticipated delay to the Office of Management and Budget (OMB) for approval. Once approved by the OMB, the delay will become official and the new applicability date of the fiduciary rule will very likely be extended to June 9 (and likely beyond, as noted in item 5, below). Here are our current observations on where things stand:

1. There are only eight business days, including today, until the current April 10 applicability date. This leaves the OMB with a tight schedule to review and approve the final version of the delay. Unlike the DOL, the OMB is currently led by a Trump political appointee, Mick Mulvaney, which we think can only help with this expedited time table (see item 4 regarding DOL Secretary-nominee Alex Acosta's status). Once the OMB approves the final draft of delay, the DOL can quickly have it published so as to make it official.

2. Even if OMB is unable to approve the rule's delay within the next week, the DOL's (http://www.stradley.com/insights/publications/2017/03/im-briefing-march-13-2017) and Internal Revenue Service's temporary (http://www.stradley.com/insights/publications/2017/03/im-briefing-march-28-2017) relief of the potential consequences for not adhering to the fiduciary rule starting on April 10 will prove vital. However, as we have previously noted (http://www.stradley.com/insights/publications/2017/03/im-briefing-march-13-2017), private litigation alleging violations of the fiduciary rule remains a real risk until the delay becomes official.

3. The DOL ambitiously reviewed over 1,000 comment letters (https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79) in a mere two weeks in respect of the proposed delay. Potentially, there could be litigation alleging that the DOL violated the Administrative Procedure Act for not adequately taking into account the substantive comments of these letters, though we think this risk is somewhat mitigated by the fact that many, if not most, of the comment letters were short and relatively succinct; while 1,000+ comment letters is large, it is unlikely so great as to overwhelm DOL staff in their review.

4. DOL Secretary-nominee Alex Acosta is now closer to being confirmed. The U.S. Senate Committee on Health, Education, Labor & Pensions (https://www.help.senate.gov/hearings/nomination-of-alexander-acosta-to-serve-as-secretary-of-labor) is expected this Thursday to advance his candidacy to a full Senate vote in April.

5. As we noted last week (http://www.stradley.com/insights/publications/2017/03/im-briefing-march-23-2017), Acosta appears to take a dim view of the fiduciary rule and is eager to conduct a thorough re-examination of the rule to address President Donald Trump's

directive (Feb. 3) (https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-memorandum-fiduciary-duty-rule). In part because of this, we anticipate further delays of the fiduciary rule (beyond June 9).

6. As a reminder, April 17 is the deadline to submit comment letters to the DOL that address the substance of the fiduciary rule and whether it should remain or instead be repealed or revised (http://www.stradley.com/insights/publications/2017/03/im-briefing-march-23-2017).

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