Newsletter re Trump Executive Order Delaying Implementation of the DOL Fiduciary Rule

The waiting and speculation as to the actions that the Trump Administration might take with respect to the Department of Labor’s fiduciary rule has ended. At noon today, President Trump issued an executive order that will delay the implementation of the fiduciary rule for 90 days while the DOL reviews the rule and determines whether it should go into effect. The possiblity exists that legal challenges to this action will be brought by proponents of the DOL fiduciary rule under various theories, such as a possible violation of the Administrative Procedures Act, although it is not entirely clear who would have standing today to mount such a legal challenge. Another possible result of the delay is possibility that the Securities and Exchange Commission may become involved in the processin order to create a uniform definition of fiduciary that would be applied by both the DOL and SEC. A bill known as the Financial CHOICE Act, passed by the House Financial Services Committee in September, proposes the incorporation of the fiduciary rulet into the Retail Investor Protection Act (a bill passed by the House in 2016) which requires the SEC to to take the driver’s seat on a fiduciary rulemaking.

It is premature, before the DOL has even commenced the review process imposed by the executive order, to speculate as to the conclusions that the DOL will reach, although it is highly unlikely that the fiduciary rule and its hallmark Best Interest Contract Exemption (“BICE”) will survive in their current form in light of President Trump’s clear willingness to dismiss government officials unwilling to conform to his agenda.. Along with the potential for the ruled to be completely altered, is the possiblity that the fiduciary rule would survive more or less in tact, but that there would be significant modifications to the BICE exemption.

While the DOL reviews the fiduciary rule and the BICE, however, organizations that have already devoted considerable time and resources to meeting the April 10th implementation deadline must consider what their next steps will be. Even if the DOL determines that the best course of action is to return to the rules in effect prior to the enactment of the DOL Ru;le and BICE, it is not necessarily the best course of action to undo the compliance actions that have already been adopted. First, to the extent that the analysis of the processes, protocols, and procedures necessitated by the expectation of the DOL rule’s applicability have shown areas of inefficiency and suboptimality, there is little reason to discontinue the implementation of these corrections. Examples of this would include the on-boarding process and the documentation that clients are required to review and sign If reducing the size of the investment platform is more efficient and easier to monitor, that process should continue as well, as should the training and education of financial advisors with respect to fiduciary responsibility and acting in the best interest of the client should continue. Also, some of the actions that may have been accelerated by the DOL guidance reflected an industry trend towards an advisory rather than a brokerage based platform. That is, the move towards levelized fees encouraged by BICE, although perhaps not as narrowly defined as by the DOL, was an action that would have incurred in any event.

Focusing more narrowly upon compliance issues, the transition documentation should be retained, although its final form may need to be modified to reflect the DOL action. Additionally, it is important to keep in mind that the primary enforcer of violations of the fiduciary rule and BICE were to be the private tort bar, rather than the DOL or IRS. They are aware of the best interest concept,and will seek to have it enforced under applicable state law. Even if BICE were to be repealed and IRA would lose the ability to commence a civil action if BICE were not followed, the tort bar will find causes of action For example, if your compensation grid has the effect, even if unintended, of incentivizing actions that may not be in the best interest of the client, that type of action will be challenged as a violation of state common law.

As the regulatory process continues, we will keep you posted with any and all changes and advice.