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Washington Update — the DOL Regulatory Agenda

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The Department of Labor's recent regulation regarding association retirement plans could significantly affect retirement plan policy for many years to come. However, the most recent guidance plan filed by the Department of Labor (Department or DOL) with the Office of Management and Budget (OMB) reveals several other guidance projects that could also have a significant impact.

At the top of the list, a proposed regulation intended to improve the effectiveness of participant notices as well as reduce the costs of furnishing the required disclosures. This regulatory project is in response to President Trump's Executive Order on Strengthening Retirement Security issued in August of last year. In that order, the President directed the DOL, in consultation with IRS and Treasury Department, to consider what actions could be taken to make retirement plan disclosures more understandable and useful for participants and beneficiaries. The DOL was also specifically directed to consider broader use of electronic delivery to achieve this goal (as well as reduce costs).

This initiative is not new. In April of 2011, the Department issued a "Request for Information" (RFI). The RFI solicited comments from interested parties on whether and how the DOL could expand the existing electronic delivery safe harbor (which was adopted in 2002). Under the 2002 safe harbor, which remains in effect today, electronic delivery is permissible as the default method of delivery only if the participant is required to access the electronic delivery system as an integral part of his or her job duties. In addition, the participant must be able to effectively access the system at any workplace he or she is reasonably expected to perform services.

The DOL received 78 comment letters in response to the 2011 RFI. Many commentators complained that the safe harbor standard was too strict and of little use in the real world. In addition, the prior consent approach was costly to administer and invariably resulted in some employees being missed. In the words of the Publix supermarket chain's VP of Benefits, "The burden to obtain the employees' acknowledgements from all work locations was so great that Publix will not consider this same distribution method again." Other commentators who were in favor of the more restrictive standard were concerned that electronic delivery would not be easily accessed by certain populations, such as seniors who may not have ready access to the internet or understand how to use it.

Because of the diverging opinions of commentators and the DOL's increasing focus on the fiduciary regulation in the years following the RFI, no action was ever taken. An administrative record was created, however, which is an important first step in issuing a regulation. The DOL will use that administrative record, i.e., the comments submitted in response to the 2011 RFI, as the basis for issuing a proposed regulation (rather than another updated RFI).

Right on time, a proposed regulation was submitted to the OMB for review on August 16, 2019. OMB normally takes up to 30 days to conduct its review. As a result, the proposed regulation is expected to be published in the Federal Register any day now. In light of the President's directive, the proposal should be much friendlier to electronic delivery of participant notices. (I will discuss the proposal in a future column.)

Another important regulatory project, due out in December, is a newly re-proposed fiduciary regulation to replace the 2016 regulation that was vacated by the Fifth Circuit Court of Appeals in 2018. The DOL has been waiting to re-propose its regulation until the SEC finalized its new standards for brokers known as Regulation Best Interest. That regulation was finalized by the SEC in July of this year, although it will not become effective until June 30, 2020. The DOL intends to harmonize its regulation with the SEC guidance. A proposed prohibited transaction class exemption is expected as well.

Some commentators have speculated that the DOL will need to have that regulatory package finalized by May of 2020 to ensure it is not threatened by the 2020 election results. This is because, under the Congressional Review Act, a federal agency must notify Congress when it issues a final regulation that is determined to be a "major rule," i.e., one likely to result in an annual effect on the economy of $100 million or more. Congress then has 60 legislative days (i.e., days in session) to pass a joint resolution nullifying the regulation. (If the 60 day period extends into a new Congress, there is a further extension.) Accordingly, DOL may need to finalize the regulation by May of next year to make sure that it isn't vulnerable if the Democrats take control of both Houses of Congress and the White House in 2020. It will be difficult to meet this expedited schedule.

Two other retirement related guidance projects on the DOL's regulatory agenda are slated for release in April of 2020. But don't hold your breath as they have been around for some time and the DOL has regularly extended the projected action dates.

The first of these projects is an interim final regulation revising and restating the Voluntary Fiduciary Correction Program (VFCP). An update to VFCP first appeared on the DOL guidance plan in the fall of 2014. The stated objective of DOL is to expand the scope of some corrections already permitted and streamline correction procedures for others. Many hope that it will include, for the first time, an option to self-correct the late deposit of elective deferrals. The significant benefit of such a change is that it would officially sanction the use of the on-line calculator to compute earnings when making a self-correction. It should also be noted that if released as an interim final rule, it is likely to be effective when published in the Federal Register.

The other project due out next April is a final regulation which will expand the categories of entities who can serve as a qualifying termination administrator under the abandoned plan regulations. The proposed regulation was issued in December of 2012 and has gone nowhere since. Under the proposal, a bankruptcy judge could declare a plan abandoned as part of plan sponsor's bankruptcy proceedings. The bankruptcy trustee would then be eligible to terminate and wind up the plan by acting as the qualified termination administrator.

The Department of Labor has a full agenda and much to get done in the next 12 months. The guidance with respect to ERISA notices and disclosures could significantly impact retirement plan administration for many years to come. The regulation will be in proposed form and will likely have a 90 day comment period. Pension professionals should keep watchful eye on Washington in the months ahead.