Fidelity Files Second Comment Letter on DOL Fiduciary Rule

Reiterates Support for Best Interest Standard

Fidelity filed its second comment letter on the Department of Labor's ("DOL's") proposed Fiduciary Rule, reiterating Fidelity's support for the best interest standard and its proposed solutions to fundamental flaws in the proposal, and detailing some of the costs the proposal would impose if finalized without material changes.

As it stated in its first comment letter and again in testimony during the Public Hearings process, Fidelity supports a best-interest standard when delivering investment advice to investors, acts in the best interests of its customers, and believes that all financial services firms should operate in the same manner.

But Fidelity strongly believes that these goals should be met through a workable and cost-efficient method that does not prevent retirement investors from obtaining the critical investment assistance they want and need.

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Fidelity's Point of View

One of the central flaws in the DOL's proposal is that it would prevent investment advisors from promoting and establishing the scope of their own advice services. In its second comment letter, Fidelity summarized its proposed solution to this problem. Under Fidelity's new best-interest paradigm, an advisor would not be a fiduciary when promoting its own services. But once the terms of engagement have been established, all advice within the framework would be subject to a fiduciary best interest standard. This would meet the DOL's stated goals, and treat investment advice fiduciaries like all other types of fiduciaries known to the law.

Fidelity has also proposed many specific and concrete fixes to the proposal's burdensome and unworkable Best Interest Contract Exemption. In its second comment letter, Fidelity provided more detail on some of these solutions as well as some of the costs that would be imposed by the Best Interest Contract (BIC) Exemption if it were finalized in its proposed form.

- **Signed Contract Requirement** The proposed BIC Exemption requires the advisor, his or her firm, and the customer to sign a written contract obligating advice to be in the customer's best interest. Fidelity's second comment letter provides additional commentary on this requirement. A tri-party contract with wet signatures would often be unattainable and is unnecessary. For ERISA-governed plans, fiduciaries are already subject to a best-interest standard, and customers may already sue for breach of fiduciary duty without a contract. In the IRA context, a contract may be necessary to establish a best-interest obligation, but a unilateral contract by the advisor would establish a legally binding commitment to the investor equal to that established through a written, signed contract.

- **Annual Disclosure Requirement** The proposed BIC Exemption would require advisors to provide an annual disclosure within 45 days of the end of the calendar year listing of all assets bought and sold, as well as the price paid or received, and the total dollar amount of fees and expenses paid by each investor (directly or indirectly) for each investment over the course of the year.

  The DOL has estimated that this disclosure requirement, as well as all other requirements of the proposed BIC Exemption, would cost the entire retirement investment advice industry $77.4 million in the first year and $29.2 million in subsequent years. Fidelity's second comment letter demonstrates that these estimates are grossly inadequate. Fidelity has estimated that implementing the annual disclosure requirement for its own retirement customers (and without taking into account any of the other requirements of the proposed BIC Exemption) would cost more than $46 million during the first year, and more than $18 million annually.

  Finally, Fidelity reiterates that the proposal's annual disclosure would provide little, if any, new information that is not already provided to retirement investors as a result of the DOL's recently passed disclosure regulations to plan sponsors and participants under ERISA sections 404(a) and 408(b)(2).

- **Point-of-Sale Disclosure Requirement** The BIC Exemption would also require firms to provide a point-of-sale disclosure to all retirement investors that consists of a chart projecting the total cost of each recommended investment over one-, five-, and ten-year periods. In addition to the cost and enormous effort required to manipulate the data to produce such a document, Fidelity argues in its second comment letter that this type of analysis may not actually benefit investors in the way in which the DOL claims. The complexity and variability of this calculation makes it unlikely that the disclosure will ever provide a picture of the true cost of selecting any particular investment. In addition, cost is not the only factor in assembling an effective savings and investment strategy over time, but focusing the point-of-sale disclosure on costs may lead investors to overweight its importance.

Next Steps for the Regulatory Process

The DOL closed its Comment Period on September 24. The DOL is now reviewing all of the commentary it received, and is expected to finalize the rule in the coming months. As required, the DOL will then send the rule to the Office of Management and Budget for review, with a likely public release date of early 2016.

Fidelity will keep you apprised of additional developments on this issue. Please consult your Fidelity Representative with any questions.

Download a copy of Fidelity's letter filed electronically with the DOL on September 24, 2015.

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