

## Potential DOL Action on the Fiduciary Rule under Secretary Acosta

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This memorandum analyzes certain Administrative Procedure Act (“APA”) issues with respect to the new Administration’s review of the Department of Labor’s (“DOL”) regulation redefining the term “fiduciary” (“Fiduciary Rule” or “Rule”). Specifically, this memorandum considers what process the DOL could follow to extend implementation of the Fiduciary Rule for an additional review period, and to withdraw and permanently rescind, maintain, or revise the current Rule.

Pursuant to President Trump’s directive that DOL should review the Fiduciary Rule,<sup>1</sup> DOL must engage in a detailed review of the existing Rule. Such review must comply with APA requirements. Since the existing Rule was adopted pursuant to notice-and-comment rulemaking, reconsideration of the Rule will require collection and analysis of existing and additional comments from the interested public, followed by careful legal and policy deliberation by the new Administration. This review and reconsideration process will require considerable time given the complexity of the issues. Accordingly, further extension of the Rule’s implementation will be necessary for DOL to discharge its obligation to assure “reasoned decisionmaking” under the APA.<sup>2</sup>

This substantial reconsideration is entirely proper. The new Administration is entitled to review and revise the policy choices embedded in a regulation issued by its predecessor. Indeed, as the Supreme Court held in *Chevron*, “an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the

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<sup>1</sup> See Presidential Memorandum on Fiduciary Duty Rule, Exec. Order No. 13772 of Feb. 3, 2017, 82 Fed. Reg. 9,965 (Feb. 8, 2017), <https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-memorandum-fiduciary-duty-rule>.

<sup>2</sup> The Consumer Federation of America, a group opposing any delay of DOL’s Fiduciary Rule, conceded that “[w]e agree that the analysis required by the Presidential Memorandum will be time-consuming to complete – indeed will take far longer than has been allowed for it [in DOL’s initial delay of the applicability date]. . . .” Consumer Federation of America, Comment Letter on Proposed Rule Regarding the Definition of the Term “Fiduciary” (Mar. 17, 2017), <http://consumerfed.org/wp-content/uploads/2017/03/3-17-17-CFA-DOL-Fiduciary-Delay-Proposal-Comment.pdf>. Indeed, in 2015, the Obama Administration recognized the importance of taking time on this rulemaking. See Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice, 80 Fed. Reg. 21,928, 21,936 (April 20, 2015) (“After consideration of these comments and in light of the significance of this rulemaking to the retirement plan service provider industry, plan sponsors and participants, beneficiaries and IRA owners, the Department decided to take more time for review and to issue a new proposed regulation for comment.”).

incumbent administration’s views of wise policy to inform its judgments.”<sup>3</sup> The new Administration’s ability to change policy course in the present circumstances is buttressed by the fact that there is neither a relevant congressional deadline by which it must act, nor any specific statutory direction that mandated the particular policy choices of the prior Administration. Nonetheless, if DOL ultimately determines that the Fiduciary Rule should be rescinded, maintained, or revised, following a proposal to withdraw the Rule, DOL should explicitly acknowledge that it is changing course and provide a reasoned explanation for its new determination.

DOL’s actions with respect to the Fiduciary Rule should conform to its request for public comments issued on March 2, 2017. That request sought comments with respect to each of the following expressly identified possible actions: a “proposed 60-day delay of the applicability date, on the questions raised in the Presidential Memorandum, and generally on questions of law and policy concerning the final rule and [prohibited transaction exemptions].”<sup>4</sup> DOL will have received substantive comments on each of these options by April 17, 2017, and will thereafter be in a position to take action in accordance with its assessment of the comments.

Accordingly, following its review of the current set of comments, DOL may take the following actions:

- (1) Issue an interim final rule<sup>5</sup> for “good cause” extending the applicability date of the Fiduciary Rule for 180 days provided DOL:
  - a. Makes a finding that, given the notice already provided and comments received, further notice and solicitation of comment regarding the extension of the applicability date are “impracticable, unnecessary, or contrary to the public interest,” and that an orderly reconsideration of the Rule over a sufficient period of time would reduce confusion, uncertainty, and disruption for the industry and investors;
  - b. Accounts for its changed view of the assessment of the costs of delay beyond the 60-day delay contained in the April 7 Delay Rule;
  - c. Indicates that DOL intends to publish a proposed rule that solicits public comments on whether DOL should (1) let the Rule become effective, (2) withdraw the Rule, or (3) revise the Rule; and

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<sup>3</sup> *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 857-858, 865 (1984) (sustaining the EPA’s revised definition of the term “source” which the agency undertook pursuant to the new administration’s “Government-wide reexamination of regulatory burdens and complexities”).

<sup>4</sup> Definition of the Term “Fiduciary”, 82 Fed. Reg. 12,319, 12,325 (Mar. 2, 2017).

<sup>5</sup> See Office of the Federal Register, “A Guide to the Rulemaking Process,” [https://www.federalregister.gov/uploads/2011/01/the\\_rulemaking\\_process.pdf](https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf) (“When an agency finds that it has good cause to issue a final rule without first publishing a proposed rule, it often characterizes the rule as an “interim final rule,” or “interim rule.” This type of rule becomes effective immediately upon publication.”).

- d. Indicates that interested parties may provide comments on the 180-day delay during an appropriate comment period following publication regarding the additional delay, which DOL can take into account and which could lead DOL to revise the delay period as appropriate.
- (2) DOL should issue a notice of proposed rulemaking (“NPRM”) within 180 days regarding whether DOL should (1) withdraw the current Fiduciary Rule, (2) revise the Fiduciary Rule, or (3) allow the current Rule become effective. DOL should provide interested parties with at least a 30-day comment period and indicate that it intends to issue a final Rule as soon as practicable.<sup>6</sup>
  - (3) If, following notice and comment on agency action described above, DOL ultimately determines to permanently rescind or maintain the Fiduciary Rule, DOL may proceed to a final rule to that effect. If DOL determines to revise the current Rule based on its assessment of all comments received and upon its policy reconsideration, DOL should issue a supplemental NPRM setting forth its proposed revisions for comment from all interested parties.

In issuing the interim final rule extending the applicability date, DOL should acknowledge the significant public interest in the Fiduciary Rule, the substantial comments submitted in response to the agency’s March 2 NPRM regarding the substantive review of the Fiduciary Rule, and the importance of minimizing harm to all participants in the relevant marketplace—including, of course, investors and regulated entities. As a result, DOL could determine that the initial delay of 60 days was inadequate to consider all the comments received and make an informed policy decision regarding the Rule. The 180-day extension should also be predicated on a finding that substantial additional time is necessary to reduce confusion, uncertainty, and disruption for the industry and investors while DOL determines the appropriate final disposition of the Fiduciary Rule, while also permitting DOL sufficient time to reconsider the Rule commensurate with its complexity.

DOL could find that, to the extent 5 U.S.C. § 553(b)(A) applies to its action to extend the applicability date of the Fiduciary Rule, DOL is exempt from notice and comment rulemaking for “good cause” and justified under the exceptional circumstances presented here. To begin, DOL had previously provided express notice and sought comments on extending the Rule’s applicability date and the public suggested that 60 days would likely be inadequate to reconsider the Rule.<sup>7</sup> In addition, the delay will preserve the status quo, as many of the legal requirements have not yet gone into force, and will prevent potentially disruptive regulation that the new Administration is reconsidering. Finally, the new Administration’s agency head will not have an opportunity to adequately consider the Rule, required by a specific Presidential directive, prior to

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<sup>6</sup> To the extent DOL does not issue its final rule sufficiently in advance of the applicability date set out in the interim final rule, DOL would need to take appropriate action to further extend the rule.

<sup>7</sup> See Consumer Federation of America, Comment Letter on Proposed Rule Regarding the Definition of the Term “Fiduciary” (Mar. 17, 2017), <http://consumerfed.org/wp-content/uploads/2017/03/3-17-17-CFA-DOL-Fiduciary-Delay-Proposal-Comment.pdf> (“We agree that the analysis required by the Presidential Memorandum will be time-consuming to complete – indeed will take far longer than has been allowed for it [in DOL’s initial delay of the applicability date]....”).

the applicability date. As the Rule is not subject to any congressional deadline or specific statutory dictates, “good cause” should excuse notice and comment.

Significantly, all sides to the debate appear to acknowledge that, given the intricate policy judgments and economic impacts involved, getting the substance of this regulation right warrants extensive deliberation. By adopting an interim final rule that delays the applicability date of the Rule for 180 days, which DOL could revise in response to comments received, DOL could review and consider the policy justifications for the Fiduciary Rule in compliance with the APA.

## **I. Background on the Fiduciary Rule**

In 2015, the DOL published a notice proposing to revise the agency’s five-part test for determining when a person “renders investment advice” and the prohibited transaction exemptions.<sup>8</sup> Following a notice and comment period, the DOL published its final rule, the Fiduciary Rule, on April 8, 2016.<sup>9</sup> The original rule was effective on June 7, 2016, but its legal requirements would not go into force until the “applicability date” of April 10, 2017.<sup>10</sup>

On February 3, 2017, President Trump directed the DOL to “examine the Fiduciary Rule to determine whether it may adversely affect the ability of Americans to gain access to retirement information and advice.”<sup>11</sup> On March 2, 2017, DOL issued a NPRM to extend for 60 days the applicability date of the Fiduciary Rule.<sup>12</sup> In the same NPRM, DOL requested comments on “the questions raised in the Presidential Memorandum, and generally on questions of law and policy concerning the final rule and PTEs.”<sup>13</sup> The comment period on delaying the applicability date closed on March 17, 2017.<sup>14</sup> The comment period on the substantive review of the rule remains open until April 17, 2017.<sup>15</sup>

On April 7, 2017, after considering public comments on whether the Fiduciary Rule should be delayed, DOL published a final rule delaying the applicability date of the Fiduciary Rule for sixty days, until June 9, 2017.<sup>16</sup>

## **II. APA Process**

The APA prescribes the procedures an agency must use for “rulemaking,” defined as the process of “formulating, amending, or repealing a rule.” 5 U.S.C. § 551(5). When an agency

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<sup>8</sup> 80 Fed. Reg. at 21,932.

<sup>9</sup> Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20,946 (Apr. 8, 2016).

<sup>10</sup> *Id.* at 20,946.

<sup>11</sup> 82 Fed. Reg. at 9,965.

<sup>12</sup> 82 Fed. Reg. at 12,319.

<sup>13</sup> The comment period on this substantive question remains open until April 17, 2017. 82 Fed. Reg. at 12,319.

<sup>14</sup> 82 Fed. Reg. at 12,319.

<sup>15</sup> *Id.*

<sup>16</sup> Definition of the Term “Fiduciary”, 82 Fed. Reg. 16,902 (Apr. 7, 2017). The Rule also delayed applicability of certain aspects of various exemptions by 60 days and delayed applicability of certain other aspects and amendments of various exemptions until January 1, 2018. *Id.*

promulgates a so-called legislative rule,<sup>17</sup> it must follow the rulemaking procedures outlined in § 553. An agency is required to provide the public with adequate notice of a proposed rule followed by a meaningful opportunity to comment on the rule’s content. § 553(b)(1)-(3). Specifically, the APA requires that the notice of proposed rulemaking include “(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.” *Id.*

The APA, however, explicitly waives the notice and comment requirement in various situations, including for “(A) ... rules of agency organization, procedure, or practice; or (B) when the agency for good cause ... finds ... that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” § 553(b)(A)-(B).

The “good cause” exemption is appropriate when “(1) advance notice of rulemaking will defeat the regulatory objective, (2) immediate action is necessary to reduce or avoid health hazards or imminent harm to persons or property, (3) immediate action is required to prevent serious dislocation in the marketplace, and (4) delay in promulgation will cause an injurious inconsistency between an agency rule and a newly enacted statute or judicial decision.” Recommendation No. 83-2, Administrative Conference of the United States, *The “Good Cause” Exemption from APA Rulemaking Requirements*.<sup>18</sup> Courts differ and vary in their analysis of “good cause,” and the specific facts and relevant circumstances will likely determine the outcome of judicial review.<sup>19</sup> Here, the absence of specific statutory dictates underlying the Fiduciary Rule accords DOL greater discretion to take the time to deliberate over changes to the prior Administration’s policy choices.<sup>20</sup>

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<sup>17</sup> An agency is not required to follow the notice and comment process when promulgating an interpretive rule. An interpretive rule is “issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.” *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 89, 99 (1995). Because interpretive rules “do not have the force and effect of law and are not accorded that weight in the adjudicatory process,” *Id.*, an agency is not required to follow the notice and comment process. As the Fiduciary Rule was certainly a legislative rule, the notice and comment exception for interpretive rules, see 5 U.S.C. §553(b)(A), is inapplicable.

<sup>18</sup> To be sure, these exceptions are “narrowly construed.” *American Fed. of Gov’t Employees v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981) (quoting *New Jersey EPA v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980). The exceptions may not “be arbitrarily utilized at the agency’s whim.” *Id.* (quoting S. Rep. No. 725, 79th Cong., 1st Sess. (1945)). The “exceptions should be invoked only in emergency situations when delay would do real harm[;] ... [b]ald assertions that the agency does not believe comments would be useful cannot create good cause to forgo notice and comment procedures.” *Action on Smoking & Health v. Civil Aeronautics Board*, 713 F.2d 795, 800 (D.C. 1983).

<sup>19</sup> See generally, Congressional Research Service, “The Good Cause Exception to Notice and Comment Rulemaking: Judicial Review of Agency Action” (Jan. 29, 2016), <https://fas.org/sgp/crs/misc/R44356.pdf>; see also *Mid Continent Nail Corp. v. United States*, 846 F.3d 1364, 1381 (Fed. Cir. 2017) (rejecting “good cause” exemption to notice and comment because “mere pocketbook (or balance-sheet) harm to regulated entities is generally not sufficient to establish good cause”).

<sup>20</sup> See *Natural Resources Defense Council v. Abraham*, 355 F.3d 179 (2d Cir. 2004) (rejecting “good cause” delay where statutory dictates constrained agency’s ability to amend rule).

### III. “Good Cause” Exemption to Notice and Comment Regarding Applicability Date

As noted above, following a notice and comment period, DOL published a final rule delaying the applicability date of the Fiduciary Rule until June 9, 2017 (“April 7 Delay Rule”).<sup>21</sup>

In promulgating the April 7 Delay Rule, DOL complied with the APA’s notice and comment procedures.<sup>22</sup> As a result, DOL should ordinarily follow the same notice and comment procedures to further extend the applicability date of the current Fiduciary Rule. *See Perez v. Mortgage Bankers Ass’n.*, 135 S.Ct. 1199, 1206 (2015) (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (the APA “make[s] no distinction . . . between initial agency action and subsequent agency action undoing or revising that action”).

Despite a need for additional notice and comment to extend the applicability date of the Rule under the APA, DOL could be exempted from the notice and comment procedures if it determines that “good cause” exists. If it qualifies for the “good cause” exemption, DOL could issue an interim final rule that delays the applicability date for 180 days, provided that DOL determines that further notice and comment are “impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. § 553(b)(B). Here, the need for yet additional comment on extending the applicability date would not be likely to provide significant additional input to the agency given DOL’s prior collection of comments on “further extension” and the comments received in response to the substantive review of the Rule in response to its March 2 NPRM.

The “good cause inquiry is inevitably fact- or context-dependent.” *Mid-Tex Elec. Co-op, Inc. v. FERC*, 822 F.2d 1123, 1132 (D.C. Cir. 1987). In determining whether an agency’s decision to issue an interim rule can be sustained under the “good cause” exception, a court will examine whether: “(1) congressional authorization for the authorization for the issuance of interim final rules; (2) the difficulty in promulgating final rules with notice and comment prior to the effective date of the statute; (3) the affected community’s need for regulatory guidance; and (4) the interim nature of the rule.” *Coalition for Parity, Inc. v. Sebelius*, 709 F. Supp. 2d 10, 20 (D.D.C. 2010) (citing *Nat’l Women, Infants & Children Grocers Assoc. v. Food & Nutrition Serv.*, 416 F. Supp. 2d 92, 105-108 (D.D.C. 2006)). Because the agency will be engaged in a time consuming process to reconsider the existing regulation, the market needs a longer term framework to avoid regulatory confusion, *see Mid-Tex Elec. Co-op, Inc.*, 822 F.2d at 1132-34. In light of the approaching June 9 applicability date, and the ongoing review of comments on the substance of the Rule, “good cause” exists to exempt notice and comment. Moreover, to the extent that the interim rule is tailored, the need for public comment is less. *Tenn. Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144 (D.C. Cir. 1992). DOL could invoke the “good cause” exemption to issue an interim final rule without notice and comment.

Here, the potential harm to property and disruption to the marketplace is manifest. Accordingly, it would be the antithesis of “whim” for the DOL to conclude that it had “good cause” to forgo notice and comment regarding further delay of the Rule in order to allow the

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<sup>21</sup> 82 Fed. Reg. at 16,902.

<sup>22</sup> 82 Fed. Reg. at 12,319.

agency proper time for the new Administration’s policy review. *Compare Action on Smoking & Health v. Civil Aeronautics Board*, 713 F.2d 795, 800 (D.C. Cir. 1983) (“exceptions should be invoked only in emergency situations when delay would do real harm[;] ... [b]ald assertions that the agency does not believe comments would be useful cannot create good cause to forgo notice and comment procedures”).

Moreover, the financial planning industry needs guidance of its compliance obligations in light of DOL’s review of the Fiduciary Rule. While an agency’s desire to provide immediate guidance does not by itself constitute “good cause” to avoid notice and comment procedures, it is one factor to justify invocation of the good cause exemption. *See Nat’l Women, Infants & Children Grocers Assoc.*, 416 F. Supp. 2d at 107 (recognizing a “compelling need” to have an interim rule in effect before the effective date of statutory changes to a federal grant program so states could have guidance from the agency); *see also Mid-Tex Elec. Co-op*, 822 F.2d at 1132-33 (citing concerns about “regulatory confusion in the absence of an interim rule”). By issuing an interim rule to delay the applicability delay without notice and comment, DOL would be able to provide prompt guidance to the industry about its obligations under the regulations prior to the current June 9 applicability date.

Here, the need for yet additional comment on extending the applicability date would not be likely to provide significant additional input to the agency given DOL’s prior collection of comments on “further extension” of the applicability date in response to its March 2 NPRM, together with the comments received in response to the substantive review of the Rule. To begin, the interim final rule would essentially preserve the status quo to allow DOL to conduct a deliberate and least disruptive review of the substance of the Fiduciary Rule. The interim final rule would provide DOL an orderly opportunity to conduct a thorough review of the many comments it is receiving in response to the March 2 NPRM.<sup>23</sup>

It is worth noting that the additional extension period is necessary because DOL’s promulgation of the April 7 Delay Rule, and its provisional assessment of the important policy considerations underlying the Fiduciary Review and the corresponding costs of delay, occurred before the appointment of the new Administration’s Secretary of Labor or other key regulatory policymakers.<sup>24</sup> The President is entitled to review and consider changing the policy preferences of the prior Administration that are embedded in the Fiduciary Rule. *See Chevron, U.S.A., Inc.*,

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<sup>23</sup> Indeed, the first Obama administration proposed to extend the effective and applicability dates of rules promulgated by the prior administration and relating to investment advice under ERISA and the Internal Revenue Code for 60 days to allow public comment on questions of law and policy raised by the rules. *Investment Advice-Participants and Beneficiaries*, 74 Fed. Reg. 6,007 (Feb. 4, 2009). After receiving comments, the Department adopted the proposed 60-day extension, 74 Fed. Reg. 11,847 (Mar. 20, 2009 delay), and thereafter extended the deadline two more times, 74 Fed. Reg. 23,951 (May 22, 2009 delay); 74 Fed. Reg. 59,092 (Nov. 17, 2009 delay), before ultimately withdrawing the rule, 74 Fed. Reg. 60,156 (Nov. 20, 2009).

<sup>24</sup> *See* Labor Department Mutiny, WSJ (April 12, 2017), <https://www.wsj.com/articles/labor-department-mutiny-1492038464> (noting that the DOL does not have an acting head appointed by President Trump); *see* President Donald J. Trump Announces Intent to Nominate Personnel to Key Administration Posts (Apr. 7, 2017), <https://www.whitehouse.gov/the-press-office/2017/04/07/president-donald-j-trump-announces-intent-nominate-personnel-key> (noting that the President announced his intent to nominate Neomi Rao to be the Administrator of the Office of Information and Regulatory Affairs).



467 U.S. at 865 (“[A]n agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments.”). As a practical matter, the type of substantive policy review required to re-evaluate the Fiduciary Rule will entail the involvement of appointees at the Labor Department and Office of Information and Regulatory Affairs at OMB who have not yet been confirmed by the Senate. DOL could thus justify an additional extension to the applicability date without notice and comment to provide the Administration’s new head an opportunity to consider and review the complex policy considerations of the Fiduciary Rule.

As noted, DOL’s interim final rule must account for its changed view of the assessment of the costs of delay beyond a 60-day delay contained in the April 7 Delay Rule.<sup>25</sup> *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (an agency must “provide [a] reasoned explanation for its action [which] would ordinarily demand that it display awareness that it *is* changing position”). DOL’s interim final rule should therefore address the comments received in response to the March 2 NPRM addressing the substance of the Fiduciary Rule, and adequately explain the reasons for any change in the agency’s position regarding the costs and benefits of further delaying the Rule to allow time for adequate policy review by the new Administration.

As a result, DOL could invoke the “good cause” exemption to bypass the notice and comment process and issue an interim final rule to delay the applicability date of the Fiduciary Rule for 180 days. *See, e.g., Mid-Tex Elec. Co-Op, Inc.*, 822 F.2d at 1132 (noting that agency established good cause for omitting notice and comment procedures because the agency’s action was of a “temporally limited scope” while the agency proceeded its consideration without “dilatatory tactics”); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1486 (9th Cir. 1992) (permitting the Secretary of Agriculture to invoke good cause to bypass the APA’s 30 day publication requirement because it would cause harm by forcing the agency to predict proper restrictions in advance of when a reasonable determination could be made); *Nader v. Sawhill*, 514 F.2d 1064, 1068 (Temp. Emerg. Ct. App. 1975) (permitting invocation of the good cause exception when notice of a price increase would worsen oil supply shortages); and *DeRieux v. Five Smiths, Inc.*, 499 F.2d 1321, 1332 (Temp. Emerg. Ct. App. 1975) (permitting the invocation of the good cause exception when notice “of a future price freeze would generate a ‘massive rush to raise prices’”).

In addition, DOL can base its argument that it may forgo any additional notice and comment process for delaying and proposing to withdraw the Rule, based on its evaluation of the substantive comments received in response to the March 2 NPRM. That NPRM requested comments from interested parties on the Fiduciary Rule and noticed that DOL was considering whether:

[T]o allow the final rule and PTEs to become applicable, *issue a further extension of the applicability date*, propose to withdraw the

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<sup>25</sup> 82 Fed. Reg. at 16,906 (Apr. 7, 2017) (“a longer delay of the Rule and Impartial Conduct Standards cannot be justified based on the public record to date”); *Id.* (“[i]n the absence of the Impartial Conduct Standards, retirement investors are likely to continue incurring new losses from advisory conflicts,” and that “[I]osses arising from a delay of longer than 60 days would quickly overshadow any additional compliance cost savings”).



rule, or propose amendments to the rule and/or the PTEs. In addition to any other comments, the Department specifically requests comments on each of these possible outcomes.<sup>26</sup>

As a result, DOL may permissibly determine, without an additional notice and comment period that “withdraw[al] and “further extension of the applicability date” is warranted provided DOL recognizes it is changing course from the April 7 Delay Rule, provides a reasoned explanation for the change, and addresses any comments received.<sup>27</sup> In pursuing this course, as previously discussed, DOL could rely on the changed policy positions of the new Administration and the substantial comments received to justify a further extension.

#### **IV. DOL Authority to Revise/Rescind the Fiduciary Rule**

In addition to the applicability date, the March 2 NPRM invited comments on “the questions raised in the Presidential Memorandum and generally on questions of law and policy concerning the final rule and [prohibited transaction exemptions including the Best Interest Contract Exemption and amended prohibited transaction exemptions].”<sup>28</sup> The NPRM further stated that “[u]pon completion of its examination, the Department may decide to allow the final rule and PTEs to become applicable, issue a further extension of the applicability date, propose to withdraw the rule, or propose amendments to the rule and/or the PTEs.”<sup>29</sup> DOL “specifically request[ed] comments on each of these possible outcomes.”<sup>30</sup>

The NPRM thus envisions that there will be a further rulemaking regarding withdrawal or revisions if the DOL determines that the Fiduciary Rule negatively impacts individuals. *See* 82 Fed. Reg. 12,320 (noting the Presidential Memorandum’s directive that if “the final rule is inconsistent with the priority of the Administration ... *then* the Department shall publish for notice and comment a proposed rule rescinding or revising the final rule”). As a result, if DOL determines that it wishes to withdraw and permanently rescind the Fiduciary Rule, DOL should issue an NPRM proposing to withdraw the Rule, but also seeking comments on whether to allow the Rule to become effective, permanent rescission of the Rule, or possible revision. If DOL proposes to permanently rescind or maintain the Fiduciary Rule, DOL could proceed to a final rule. If DOL proposes to revise the Fiduciary Rule, however, the revised future NPRM will have to set forth the full text of the proposed rule, and provide an ample opportunity for public comment on the specific proposals.<sup>31</sup>

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<sup>26</sup> 82 Fed. Reg. at 12,325 (emphasis added).

<sup>27</sup> *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (ruling that an agency “need not demonstrate to a court’s satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates”).

<sup>28</sup> 82 Fed. Reg. at 12,319.

<sup>29</sup> *Id.* at 12,325.

<sup>30</sup> *Id.*

<sup>31</sup> *See Assoc. of Private Sector Colleges and Univs. v. Duncan*, 681 F.3d 427, 442 (D.C. Cir. 2012) (noting that the APA requires that all interested parties have an opportunity to comment on new regulations); *Mid Continent Nail Corp. v. United States*, 846 F.3d 1364, 1374 (Fed. Cir. 2017) (*quoting CSX Transp. Inc. v Surface Transp. Bd.*, 584

In issuing a final rule revising, rescinding or maintaining the Fiduciary Rule, DOL would have to “provide [a] reasoned explanation for its action [which] would ordinarily demand that it display awareness that it *is* changing position.” *Fox Television Stations, Inc.*, 556 U.S. at 515 (emphasis in original); *id.* at 535 (Kennedy, J., concurring in part and concurring in the judgment) (underscoring that “an agency’s decision to change course may be arbitrary and capricious if the agency sets a new course that reverses an earlier determination but does not provide a reasoned explanation”). DOL’s main obligation will be to demonstrate that any new or revised rule is the “product of reasoned decisionmaking.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 52 (1983). This requires that the agency examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made. DOL will be required to ensure that it evaluates all data and explains, in a thorough manner, its policy decisions and justifications for any new action.

DOL is free to consider new policy reasons to justify a new or revised rule. *See National Ass’n of Homebuilders v. EPA*, 682 F.3d 1032, 1037-1038 (D.C. Cir. 2012) (holding that “it was hardly arbitrary or capricious for EPA to issue an amended rule it reasonably believed would be more reliable, more effective, and safer than the original rule”). A change in administration is manifestly among the policy reasons courts have found to justify revising a rule. *See Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (holding that “[a]n initial agency interpretation is not constantly carved in stone” and that the agency “must consider . . . the wisdom of its policy” in response to “a change in administrations”); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (“[A]n agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments.”); *Motor Vehicle Mfrs. Ass’n of U.S., Inc.*, 463 U.S. at 59 (Rehnquist, C.J., concurring in part and dissenting in part) (noting that “[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations”); *National Ass’n of Homebuilders v. EPA*, 682 F.3d at 1043 (noting that the change in the administration can justify a new regulation if the rule remains in the bounds established by Congress). The new Administration is thus free to reevaluate the policy decisions made by the previous administration; however, in changing the rule, DOL must acknowledge the change and explain any new justification.

Finally, DOL is also free to reevaluate the facts justifying the Fiduciary Rule and is not required to identify and rely on new facts. *National Ass’n of Homebuilders*, 682 F.3d. at 1038 (“EPA did not rely on new facts, but rather on a reevaluation of which policy would be better in light of the facts.”). DOL is not required to “demonstrate . . . that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better.” *Fox*

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F.3d 1076, 1081 (D.C. Cir. 2009) (noting that the NPRM must ask for “comments on a particular issue or otherwise ma[ke] clear that the agency [is] contemplating a particular change”).

*Television Stations, Inc.*, 556 U.S. at 515 (emphases in the original). Once DOL provides a “reasoned explanation for its action,” *Id.*, and the action is within the bounds of Congressional authorization, DOL has met its burden.

In revising, permanently rescinding, or maintaining the Fiduciary Rule, DOL will have to address assertions in its April 7 Delay Rule with respect to delay.<sup>32</sup> In the April 7 Delay Rule, DOL asserted that “it would be inappropriate to broadly delay application of the fiduciary definition ... in disregard of its previous findings of ongoing injury to retirement investors.” Similarly, the Department asserted that “fundamental fiduciary norms help[] ensure that investment recommendations are not driven by adviser conflicts, but by the best interest of the retirement investor.” This language, which was promulgated during the current Administration but prior to the confirmation of the new Secretary of Labor and other senior policymakers,<sup>33</sup> asserts that there are some benefits to the Fiduciary Rule. DOL is not bound by this language, however. *See Chevron*, 467 U.S. at 866 (deferring to an Agency construction when the legal challenge “really centers on the wisdom of the agency’s policy”). Presumably the existence or not of the asserted benefits would be subject to policy review when the new Secretary of Labor and other Presidential appointees of the new Administration take office. Nevertheless, DOL must explain any departure from this language in its final Rule.

## V. Conclusion

DOL may forgo notice and comment and extend the applicability date of the Fiduciary Rule by interim final rule because it can demonstrate good cause or because the March 2 NPRM envisioned further delay as a potential agency action, as discussed above. DOL will have to justify its invocation of the good cause exemption to § 553 notice and comment process, acknowledge its changed position with respect to the cost-benefit analysis, and address the comments received. Provided DOL demonstrates “good cause,” DOL could issue this interim final rule extending the applicability date for 180 days effective immediately provided the agency reviews any comments on whether the 180-day delay is appropriate and revise if necessary. The interim final rule should also advert to a forthcoming notice of proposed rulemaking proposing to withdraw the Rule, and seeking comments on whether the Rule should be permanently rescinded, revised or maintained. This course of action will provide an orderly plan to avoid imposing considerable and unnecessary regulatory compliance costs that may not ultimately be required if DOL determines to permanently rescind the Rule. This approach will also allow appropriate substantive deliberation and the avoidance of undue disruption and dislocation in the relevant marketplace of investors and regulated entities. If DOL determines to

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<sup>32</sup> 82 Fed. Reg. at 16,902.

<sup>33</sup> While all new regulations were to be reviewed by the department or agency head prior to publication in the Federal Register, *See Memorandum for the Heads of Executive Departments and Agencies; Regulatory Freeze Pending Review* (Jan. 20, 2017), 82 Fed. Reg. 8,346 (Jan. 24, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/20/memorandum-heads-executive-departments-and-agencies>, DOL does not appear to have a presidentially-appointed official in place. *See Labor Department Mutiny*, WSJ (April 12, 2017), <https://www.wsj.com/articles/labor-department-mutiny-1492038464>. Therefore, in promulgating any final rule, DOL’s explanation of these statements as potentially inconsistent with the Administration’s policy position should be entitled to deference. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

revise the Rule, any future proposed revision of the Fiduciary Rule would of course need to be published for comment in a new NPRM.