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Trump Orders DOL to "Reconsider" Fiduciary Rule

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On Friday, February, 3, 2017, President Trump issued a Memorandum directing the Secretary of Labor to "re-examine" the Department of Labor's final regulation defining "fiduciary" investment advice (sometimes referred to as the "Fiduciary Rule" or the "Conflict of Interest Rule"), and to consider whether the Rule should be revised or rescinded. The Rule, which significantly expands the circumstances under which an individual becomes a "fiduciary" by reason of providing investment advice for a fee, was finalized in April of 2016, and technically became effective last July, but was drafted such that its provisions generally do not become "applicable" to financial advisers until April 10, 2017.

Although an earlier draft of the Memorandum had specifically directed the Department of Labor (DOL) to delay the "applicability date" by 180 days and to seek a stay of any litigation regarding the Rule, the final Memorandum omitted those specific directives. However, the DOL immediately issued a written statement on its website that reads: "The Department of Labor will now consider its legal options to delay the applicability date as we comply with the President's memorandum." Therefore, the "applicability date" of the regulation remains April 10, 2017 (at least for the time being), and any delay will need to come from the DOL.

According to the DOL's Frequently Asked Questions (published just three weeks ago, on January 13, 2017, during the final days of the Obama administration), the Rule is designed to protect retirement investors by requiring advisers to adhere to a *fiduciary* standard of care, and to give advice that is in the investor's best interest. Under the Rule, after April 10, 2017, advisers who are paid to make recommendations about retirement accounts, such as individual retirement accounts (IRAs) and 401(k) plans, will be treated as fiduciaries, meaning they will be required to:

- Satisfy a professional standard of care when making investment recommendations (i.e., give "prudent" advice);
- Put their customer's interest first (i.e., give "loyal" advice);
- Avoid misleading statements about conflicts of interest, fees and investments;
- Charge no more than reasonable compensation for their services; and
- Disclose basic information about fees and conflicts of interest to investors.

Many players in the financial services industry (including banks, brokers, asset managers and insurers) have been fighting the Rule since it was first proposed over five years ago. Those groups argue that the Rule will increase the cost of providing advice, and make it harder to serve lower-income clients. Certain business groups, including the U.S. Chamber of Commerce and the American Council of Life Insurers, have sued to try to block the regulation. Other opponents argue that regulation of financial advisers falls under the authority of the Securities and Exchange Commission (SEC), not the Department of Labor.

The Memorandum begins by noting that one of the priorities of the Trump Administration is to" empower Americans to make their own financial decisions, to facilitate their ability to save for retirement and build the individual wealth necessary to afford typical lifetime expenses, such as buying a home and paying for college, and to withstand unexpected financial emergencies." But immediately after that statement, the President opines that the DOL's Rule "may significantly alter the manner in which Americans can receive financial advice, and may not be consistent with the policies of my Administration." The President then proceeds to direct the Department of Labor to:

1. "Examine" the Rule to determine whether it adversely affects Americans' ability to access retirement information and financial advice. As part of that examination, the DOL is directed to prepare an updated economic and legal analysis which will consider:

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- Whether the Rule will harm investors by reducing their access to certain retirement savings offerings, products, information, or advice;
- Whether the Rule will cause disruption within the retirement services industry that may adversely affect investors and/or retirees; and
- Whether the Rule is likely to cause an increase in litigation, and an increase in prices that investors and retirees must pay to access retirement services; and

2. Rescind or revise the Rule, if the DOL makes an affirmative determination with respect to any of the issues listed above, or even if it simply concludes that the Rule is inconsistent with the “priority” of the Trump Administration described above.

Although it now seems likely that the DOL will find a way to delay and revise the rule (if not rescind it entirely), it is difficult to predict exactly what impact the DOL’s actions will have, given that the directive to “reconsider” the rule comes more than six months after the effective date, and less than three months before the April 10, 2017, applicability date, of the Rule. Many players in the financial services industry have already spent countless hours and millions of dollars preparing to comply with the Rule. Some of those companies have already indicated that they intend to go forward with the majority of the work that they have done to comply with the Rule (which in some cases means changing the types of products they sell, and how their salespeople are paid). It is entirely possible that providing retirement investment advice that is in the “best interest” of the advice recipient will become a “best practice,” even if it is not mandated by regulation.

If you have any questions about the Fiduciary Rule or the President’s February 3 Memorandum to the DOL regarding the Rule, please do not hesitate to contact any of the attorneys in Spencer Fane’s Employee Benefits practice group.