The Beacon

RETIREMENT SERVICES

THE PRESIDENT'S FIDUCIARY RULE MEMORANDUM LEAVES MORE QUESTIONS THAN ANSWERS

The incoming administration's promise to roll back and repeal much of the Obama era's regulations drove rampant speculation that implementation of the Department of Labor's (DOL's) new Fiduciary Rule would be delayed. The anticipation seemingly came to an end February 3, 2017, with a new Executive Memorandum from President Trump ordering a review of the Rule. But, the details of the memorandum create more questions than answers.

Trump's Executive Memorandum

On Friday February 3, the White House issued a **draft version** of an Executive Memorandum delaying the implementation of the Fiduciary Rule for six months while the DOL determines whether and how it should go into effect. If the DOL finds the Rule inconsistent with Trump Administration policy, it could propose a new Rule rescinding or revising the original Rule, which would open up a notice and comment period. Alternatively, it could propose to stay the litigation currently challenging the Rule and its exemptions (there are currently five cases pending).

These options will be available only if the DOL finds any of the following:

- The Rule has harmed or is likely to harm investors through reduced access to retirement savings offerings or information, retirement products, or related financial advice.
- The Rule has resulted in disruptions within the retirement services industry that may adversely affect investors or retirees.
- The Rule is likely to cause an increase in litigation or in the prices investors and retirees must pay to gain access to retirement services.

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BACKGROUND

For more than 40 years, a 5-part test defined an advisor as an ERISA fiduciary if his or her advice:

1. Recommended investment in securities.
2. Was provided regularly.
3. Constituted a mutual agreement or understanding between the investor and advisor.
4. Was the primary basis for the investor's decision.
5. Was individualized to the investor.

The new Fiduciary Duty Rule, originally planned for implementation on April 10, defines an advisor as a fiduciary when he or she provides a "communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action."

Fiduciary advisors are held to a higher standard of care. This means that their advice must be made in the best interest of the recipients and that there cannot be any conflicts of interest. While this standard has generally applied to plan sponsors, it now applies to anyone classified as a "protected investor" which includes:

- ERISA-covered plans.
- Plan participants and beneficiaries.
- Individual Retirement Account owners.
- Anyone seeking rollover advice.
- Retail fiduciaries (plan sponsors overseeing less than $50 million in assets).

Originally, the draft version of the Executive Memorandum also directed the DOL to consult with the Department of Justice to seek a stay of the litigation surrounding the Rule. In an odd twist, however, the **final version** of the Executive Memorandum removed the requirement of litigation stay and the 6-month delay. As a result, the administration effectively left the outcome entirely in the hands of the DOL and implementation will occur on April 10.

Lockton's View

It will be challenging for the DOL to show that the Rule causes harm and has an adverse impact on investors because the determination is subjective. It would be nearly impossible to do this by April 10.

In contrast, it would be relatively simple to show that the millions of new fiduciary contracts with individual investors could lead to breach claims and, by extension, increased product costs. This argument could be made almost immediately, making it the clearest path to overturning the Rule.

Assuming that the DOL makes any of these findings, what will the future of the Fiduciary Duty Rule be? Likely, the Fiduciary Duty Rule will not survive in its current form. Clearly, the administration expects DOL officials to make changes and, should they fail to do so, Trump has already demonstrated an unequivocal willingness to dismiss government employees who are unwilling to get on board. Even if the DOL rescinds the Rule and returns to the status quo, the impact of the past six years will remain. Recordkeepers and advisors have already spent untold amounts of time and resources analyzing processes, protocols, and procedures preparing to comply with the Rule. There is little reason or desire to go back.

We believe that, in most cases, contract amendments executed in anticipation of the April 10 deadline will stay put, as will service model changes. Portions of the Rule, though, notably the Best Interest Contract Exemption, are almost certain to go away or be amended significantly. Overall, however, the framework will and should remain. The retirement plan industry has embraced transparency in fees and a best-interest standard, and we would expect that trend to survive even if the Fiduciary Duty Rule does not.