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Trump Orders Reconsideration (But Not Repeal) of Fiduciary Rule

On February 3, 2017, President Trump issued a presidential memorandum "Memorandum", which was set forth in final regulations published on April 8, 2016 (the "Fiduciary Rule"). Action to delay, modify or rescind the Fiduciary Rule has been widely anticipated since the presidential election, but the form that this would take has been the subject of much debate. The Memorandum does not provide any conclusive answers on the future of the Fiduciary Rule, but suggests that a delay may be forthcoming and confirms the process by which the Fiduciary Rule may be modified or rescinded in the absence of congressional action.

The Fiduciary Rule is controversial in part because it broadly extends ERISA fiduciary status to actors in the retirement services market who may not be considered fiduciaries under prior DOL regulations by broadly expanding what constitutes the sort of "investment advice" that makes one a fiduciary. The Fiduciary Rule has been viewed by many as an overreach by DOL and a number of affected parties have filed lawsuits seeking to enjoin it from taking effect. Nevertheless, many actors in the retirement services industry have already taken action to conform to the new rule. As a result, even if the Fiduciary Rule is delayed, it will already have had an effect on the retirement services market. Further, any action to delay, revise or rescind the Fiduciary Rule can be expected to be contested by consumer groups and possibly by affected service providers who favor its implementation.

The Memorandum, to the surprise of many, recognizes the limitations of the Presidents power to unilaterally delay the application of the Fiduciary Rule by executive order. The Memorandum does not itself actually delay the April 10, 2017 applicability date of the Fiduciary Rule. However, the Acting Secretary of Labor issued a statement after the Memorandum was issued stating that the DOL would "consider its legal options to delay the applicability date as we comply with the Presidents memorandum." This recognizes that there are difficult legal questions that the DOL must address before it can ensure that it even has the authority to delay the Fiduciary Rule.

The difficulty in delaying, revising or rescinding the Fiduciary Rule results from how the implementation of the Fiduciary Rule was addressed in final regulations. The final regulations provided that the Fiduciary Rule would not become applicable until April 10, 2017 to give financial service companies and other service providers an opportunity to prepare for implementation of the rule. However, the final regulations provided that the Fiduciary Rule had an "effective date" of June 10, 2016. The earlier effective date was intended to limit the period in which Congress could overturn the rule under the Congressional Review Act. It also meant that an order issued immediately after the inauguration by Chief of Staff Reince Preibus to delay all regulations that had not yet become effective did not apply to the Fiduciary Rule.

Rather than delaying the applicability date, the Memorandum requires the DOL to prepare an updated economic and legal analysis considering whether implementation of the Fiduciary Rule will harm investors or retirees by restricting their access to retirement services or products, either directly or as the result of increased cost. The Memorandum invites the DOL to rescind or revisit the Fiduciary Rule following its review.

The Memorandum acknowledges that the DOL would have to go through the "notice and comment process" to revise or rescind the Fiduciary Rule, which is a time consuming process. The DOL must first publish a new proposed rule to modify or rescind the Fiduciary Rule, and can issue final regulations only after allowing for public comment. This process may be difficult to complete by the April 10, 2017 applicability date. Further, the DOL cannot nullify the effect of the Fiduciary by merely refusing to enforce it because parties may be able to bring a private right of action against service providers on the basis of the Fiduciary Rule. Accordingly, modifying or rescinding the Fiduciary Rule will be a difficult process for the DOL.

As a result, the Memorandum confirms that the DOL and the Trump administration are continuing to review all of their options in delaying, modifying or rescinding the Fiduciary Rule, but participants in the retirement plan community remain in limbo as to whether and when this delay will be announced.