From Law to Limbo

The Future of the Fiduciary Rule & What it means for Plan Sponsors

After much speculation, President Donald Trump signed a Presidential Memorandum[1] on February 3rd asking the Department of Labor to review the Conflict of Interest / Fiduciary Rule and assess its impact on both investors and the financial industry. Contrary to the initial buzz in the industry, the President did not actually delay the Rule. The applicability date for the finalized rule is still set for April 10, 2017.

Background

The Conflict of Interest / Fiduciary Rule was designed under the Obama administration to protect retirement plan investors from conflicts of interest. In short, the Rule, which was finalized in April of 2016, requires any adviser who provides financial recommendations to a retirement account to act as a fiduciary, operating solely in the client's best interest. Prior, some advisers were held to a suitability standard which simply required recommendations they made to be suitable to the client's needs. In some situations, this has resulted in conflicts of interest where the adviser's bottom line is put ahead of the client's best interest.

Assessing the Fiduciary Rule

According to President Trump, it is a priority of his administration "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." The Memorandum directs the Department of Labor to reexamine the Fiduciary Rule to determine if it will adversely affect the ability of Americans to obtain retirement information and financial advice needed to save for retirement. In part, President Trump asks that the examination include an updated economic and legal analysis which identifies if the following will likely occur.

- a reduction in access to retirement savings offerings, information, and advice;
- dislocations or disruptions within the retirement industry that could harm investors or retirees;
- increased retirement plan litigation;
- increased costs for access to retirement services.

Should the Department of Labor find that the finalized Rule is not consistent with its intent, they are directed to publish a Proposed Rule for notice and comment which will either rescind or revise the current rule.

President Trump was accompanied in the Oval Office by Representative Ann Wagner (R-Missouri, 2nd District) as he signed the Memorandum. Rep. Wagner has vehemently fought the legislation. When asked to explain the purpose of the President's actions, she explained, "What we're doing is we are returning to the American people, low- and middle-income investors, and retirees, their control of their own retirement savings. This is about

[1] Trump, Donald J. Presidential Memorandum on Fiduciary Duty Rule. Memorandum for the Secretary of Labor. Office of the Press Secretary. The White House. 03 February 2017.

Main Street, and it's been a labor of love for me for over four years as chairman…This is a big day, a big moment for Americans."[2]

Moving Forward

T.D. Ameritrade's Managing Director, Skip Schweiss, reminds that killing the finalized rule is much easier said than done. "One thing I think a lot of people have kind of forgotten or misplaced in the whole debate around the 'open-ended-ness' of the DOL Fiduciary Rule is that it was finalized in April of 2016. The Congressional Review Act gives Congress sixty (working) days to pass a bill, stopping a new regulation from going into effect. Congress did in fact pass such a bill. President Obama vetoed that bill - so that potential avenue to stoppage is gone. The rule is final and it is scheduled to go into effect or become applicable on April 10th of 2017." [3] Schweiss continues by explaining that the path to getting rid of the law is not as clear and simple as some have predicted. President Trump does not have the authority to issue an executive order to stop a finalized rule and the timeframe has passed for Congress to pass a bill to stop the regulation. However, a new DOL Secretary of Labor could potentially issue a proposal to amend the rule which would require a comment period. The resulting actions could cause the regulation to be delayed, changed, or repealed. President Trump's nomination for DOL Secretary of Labor, Andrew Puzder, is scheduled to appear before the Senate for his hearing on February 16th after being rescheduled several times.

Outside of governmental officials, much, if not all, of the criticism towards the Fiduciary Rule stems from the financial services industry; specifically from advisers that are required to drastically change their current procedures. Many firms in the industry have already begun to alter their service contracts and models to comply with the Regulation. However, some providers have used the rule as a means to make even more money off of their clients, charging higher fees in the name of "advice". The Conflict of Interest / Fiduciary Rule was designed to protect investors and ensure they receive advice in their best interest. Thus far, it has left investor's unclear of what they should expect from their adviser.

Advice for Plan Sponsors

If the rule is weakened or rescinded in full, it is important for Plan Sponsors to realize that their roles have not changed. With the barrage of fiduciary based litigation occurring against employer-sponsored retirement plans, Plan Sponsors must ensure they are prudently fulfilling their duties. This includes the duty to closely monitor and assess the performance of service providers to the Plan, regardless of their fiduciary status.

Even if the new DOL, under President Trump, decides to delay or repeal the Fiduciary Rule, they cannot undo the industry changes that have already occurred. After investing time, money, and effort into altering their business practices to comply with the finalized Rule, many firms will likely continue on this path, regardless of a delay. Moreover, operating in the best interest of clients would prove to be a strong competitive advantage for an adviser if a weaker standard is imposed. Only time will tell the fate of the DOL's Conflict of Interest / Fiduciary Rule.

---

[2] Remarks by President Trump at Signing of Executive Order on Fiduciary Rule. Office of the Press Secretary. The White House. 03 February 2017.
[3] Is the DOL rule DOA? (video). Investment News. 01 February 2017.