



AALU Alert: The Fiduciary Rule Under the Trump Administration

Change is Coming, But We Don't Yet Know What Kind, or When

As President-Elect Trump begins assembling his Cabinet, Washington is scrambling to read the tea leaves on the positions he and his staff will take on a host of issues not covered in the Presidential Debates. Unfortunately, the DOL fiduciary rule is one of these issues—no matter how important it may be to producers and other financial service providers, it did not rise to the level of a national presidential policy debate, and the Trump Transition Team has announced no official position on what they might do.

It appears likely that the people Mr. Trump selects to lead key agencies, like the Labor Department, will be making the decisions on the future of the rule. In all fairness, the Trump Transition Team has only had a month or so to begin assembling the core leadership of the agencies, and as much as the regulated community may want answers right away, the necessary people are not yet in place to decide how to proceed. That said, Mr. Trump recently named his Secretary of Labor nominee, Andrew Puzder, the CEO of the CKE Restaurants, which owns the Hardee's and Carl's Jr. chains. Mr. Puzder has been a vocal critic of excessive government regulation, but has not specifically addressed the fiduciary rule as of this writing.

In this Alert, we are going to provide a brief overview of the options for the rule going forward. Time is short—the rule is scheduled to become applicable on April 10, 2017, less than three months after President Trump's Inauguration. The biggest regulatory questions are whether the Trump Administration will seek to repeal the rule or modify it, and whether it will extend the deadline of April 10. There is also the potential for Congressional activity on the rule, and the Federal Courts are still considering litigation against the final rule.

Regulatory Options:

The fiduciary rule, unlike other Obama Administration actions taken more recently, is already "good" law. In other words, it became effective in June this year, even though its requirements do not become applicable until April 10. As a result, substantive change or repeal requires notice and comment rulemaking—it cannot be wiped away by executive order.

However, the Trump Administration could delay the applicability date with an "interim final" regulation that does not require public comment to go into effect. Under this scenario, the Trump Labor Department could issue a regulation shortly after January 20th delaying the applicability date, explaining the grounds for delay, and asking for comment on the rule itself. Whether the Administration decides to repeal or to modify the rule, this interim first step may be necessary to prevent the current rule from becoming applicable.

The grounds for delay could include letters already received by the Labor Department explaining that despite good faith efforts, the 12-month implementation period simply is too short to permit an orderly transition given the magnitude of the change. In other rules of much less significance, DOL has often provided more time, and the scramble to comply is resulting in decisions and policies that likely are not in the best interest of advice recipients, reducing access to advice for small plans and average retirement savers. The rule could also note the ongoing litigation, the lack of timely interpretive guidance promised by the Labor Department, and the need for the new Administration to assess the concerns about the rule as factors justifying a delay.

With respect to whether the Trump Administration will pursue repeal or amend of the rule, we simply do not have reliable information to predict their decision, in large measure because they have not selected most of the personnel who will be involved in the process. One factor may be the nomination process in the Senate. Senators supporting the rule, like Sen. Elizabeth Warren (D-MA), are likely to make the fiduciary rule a significant issue in the confirmation debates of all Labor Department appointees from Mr. Puzder on down. Expressing support for the goal of the rule—preventing conflicts of interest—while expressing concern about the way the rule actually operates, and pledging to review the rule and fix its problems, may be more effective in dealing with these nomination battles than defending the specifics of the 1975 version of the regulation. However, the Trump Administration appears willing to take on controversial issues and pursue them, so it may be prepared to defend a return to the prior rule without any amendment.

In either case, a delay in the applicability date will likely be necessary. However, it will require a fair amount of organization for the Trump Administration to be able to move such a regulation through the process before their senior leaders have been confirmed by the Senate.

Congressional Activity:

Congress could pass legislation that would restore the 1975 regulation, delay the applicability date, or otherwise change the fiduciary rule. However, achieving a legislative solution will be difficult. While Republicans support repealing the rule, Democrats are opposed to repeal – though some will be open to modifying the fiduciary rule. In addition, there are other major issues competing for Congressional attention, such as tax reform, reforming the Affordable Care Act, and the nominations for the new Administration and the Supreme Court—not to mention Trump initiatives like infrastructure, trade, and immigration. The rule could be addressed by attaching language to another bill being debated (a legislative “rider”), but we don’t yet know how Congress will proceed, and whether these kinds of procedural maneuvers will work. AALU will continue to monitor the Congressional environment for any potential opportunities.

Litigation Prospects:

There are four Federal courts hearing various objections to the fiduciary rule. Two of these four have upheld the rule in their initial rulings—these cases likely will be heard by higher courts on appeal. Two other courts have not yet ruled. As a result, there are two possibilities for change.

First, one of the two remaining courts or a higher court hearing an appeal may issue a decision affecting the timing of the rule. Second, the Justice Department, which is representing the Labor Department in the litigation, may change its strategy and positions. The Justice Department will also have new leadership after January 20th. Instead of defending the rule, it may engage in a settlement or otherwise seek a solution through the courts to address the applicability date (presumably in consultation with the Labor Department). However, just as with the Labor Department, the Justice Department's leadership team, led by Attorney General nominee Jeff Sessions (R-AL), is still being assembled and we don't have any official information about their intentions.

Summary:

Based on what we do know, it is very likely that the Obama Administration's fiduciary rule will not survive in its current form. However, it is too early to predict what change is coming, and how long it will take to achieve. Until more information becomes available, most in the regulated community are continuing to work towards compliance with the current rule, because the consequences of failure if the deadline is not extended could be significant. We will keep AALU members informed as more details become available.