

## CLIENT MEMORANDUM

# White House Directs Review of DOL Fiduciary Duty Rule – April 10, 2017 Implementation Date Likely to Be Delayed

February 6, 2017

## AUTHOR

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On Friday, February 3, 2017, in a [memorandum](#) to the Secretary of Labor (the Memorandum), President Trump directed the Department of Labor (the DOL) to review its fiduciary duty rule to determine, based on certain factors, whether the fiduciary rule may adversely affect the ability of Americans to gain access to retirement information and financial advice, or whether the rule is otherwise inconsistent with certain stated priorities of the Trump administration.

On April 8, 2016, the DOL issued final regulations (the Final Rule) expanding the definition of fiduciary to employee plans and IRAs for purposes of the Employee Income Security Act of 1974 (ERISA), and related provisions under Section 4975 of the Internal Revenue Code. In addition to the Final Rule, the DOL also issued two new exemptions, as well as amended several existing class exemptions that were intended to complement the Final Rule, including Prohibited Transaction Class Exemption 2016-01 (the Best Interest Contract Exemption), Prohibited Transaction Class Exemption 2016-02 (the Principal Transactions Exemption), as well as amendments to Prohibited Transaction Class Exemptions 75-1, 86-128 and 84-24 (and several others). The Final Rule, which was set to become “applicable” on April 10, 2017, will likely be delayed for an unspecified period while the Secretary of Labor prepares an updated economic and legal analysis on the impact of the Final Rule.

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In connection with its review and analysis of the Final Rule, the Memorandum directs the Secretary of Labor to consider a nonexclusive list of three factors, including: (i) whether the Final Rule has harmed or will likely harm investors due to a reduction in access to certain retirement savings offerings, retirement product structures, retirement savings information or related financial advice; (ii) whether the applicability of the Final Rule has resulted in dislocations or disruptions to the retirement services industry in a way that may adversely affect investors or retirees; and (iii) whether the Final Rule is likely to cause an increase in litigation, and an increase in the prices investors and retirees pay for access to retirement services. If the Secretary determines that the Final Rule would cause the types of harm or disruptions or increases noted above, or if the Secretary finds that the Final Rule is inconsistent with the Trump administration's priorities noted in the Memorandum, including the ability of Americans to make their own financial decisions and to facilitate the ability to save for retirement, then the Secretary is further directed to publish for notice and comment a proposed rule that would rescind or revise the Final Rule.

While an earlier draft of the Memorandum included a provision requiring a 180-day delay to the applicability date of the Final Rule, that provision was not included in the final Memorandum. In addition, the final Memorandum did not identify a specific period of time during which the Secretary would be required to conduct its review of the Final Rule. The acting Secretary of the Department of Labor noted in a [press statement](#) that was released shortly after the Memorandum was published that “[t]he Department of Labor will now consider its legal options to delay the applicability date as we comply with the President’s memorandum.”

We will provide further updates as the impact of the Memorandum and the DOL’s review of the Final Rule becomes more clear, including the impact on the Final Rule’s April 10, 2017 applicability date.

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If you have any questions regarding this memorandum, please contact Peter E. Haller (212-728-8271, [phaller@willkie.com](mailto:phaller@willkie.com)) or the Willkie attorney with whom you regularly work.

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