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ERISA Newsletter

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Uncertainty of Fiduciary Regulations Under the Trump Administration

Jeffery Mandell, Esq.

Last Fall I heralded a very significant change in ERISA that was to be effective later this Spring. The Department of Labor had issued final regulations, called the fiduciary definition or conflict of interest regulations, which would have altered the required conduct of organizations and individuals providing investment services to not only retirement plans, but also to individual retirement accounts (IRAs).[1] Although the regulations were fought vigorously prior to their finalization, and have since been fought in litigation, the regulations merely require common sense honesty to individuals making investment decisions for their retirement plans or IRAs. They mainly require that the investment professional put its clients' interests before its own.

The Trump administration has put the effective date of the regulations on hold. Although many financial institutions have geared up to not only implement, but to embrace, the new regulations, at this point the matter is uncertain.

The important point for many of our clients -- consumers of retirement plan and IRA services -- is that employers, trustees, fiduciaries, inside staff of employers, and IRA owners should be aware of the correct questions to ask of those who offer investment services for their plans or IRAs. Whether the regulations are dismantled or not, their mere finalization has elevated the quality of service expected from financial institutions which will benefit informed consumers of retirement plan services.

I attach an article from the Bureau of National Affairs regarding the regulations. You might find it to be informative. If you want your voice to be heard, if you want simple honesty from those who provide investment services, contact your Senators and/or Representatives and President Trump as well.

[1] Some providers of investment services had already satisfied the standards of the regulations without the need for them.

Firm News

The ERISA Law Group is committed to provide the highest available quality of service to our clientele. Toward that end, please note the following:

1. **Jeffery Mandell has been inducted as a Fellow of The American College of Employee Benefits Counsel.** A fellowship in The American College is the highest and most selective award and recognition for an ERISA attorney in the United States. Only employee benefit lawyers who are recognized as maintaining an important national presence in ERISA, along with a long history of exceptional legal achievement, character, ability and professional responsibility, and who have demonstrated the greatest commitment to and leadership in the education and advancement of ERISA, are considered for this honor.

2. ERISA Now and Then – A Practical Understanding of Its 40 Year Evolution Intended to Strengthen Careers Involving Employee Benefits

Do not miss Jeff's take on ERISA's history and practical messages for you. Jeff presented the above subject matter at ASPPA's October National Conference in Washington D.C. Jeff's insights are useful, educational and should strengthen careers for anyone who works with retirement plans: fiduciaries; trustees; TPAs; CFOs; executives, plan consultants; in-house counsel; ERISA and non-ERISA attorneys; financial institutions and investment advisors/broker/dealers; HR, benefits and CPAs. To arrange an appearance for your group, please contact us.

3. **Jeff continues to serve as the attorney representing Idaho** in the IRS Tax-Exempt and Government Entities Division Pacific Coast Liaison Council which meets with the Internal Revenue Service and United States Department of Labor, and in his other ERISA national capacities and responsibilities.

4. Jeff and his partner, John Hughes, continue to manage and create **The 401(k) Advisor**, a widely distributed monthly journal published by Wolters Kluwer.

For more information, please contact Jeff Mandell (jeff@erisalawgroup.com) or John C. Hughes (john@erisalawgroup.com), or call 208-342-5522 or 1-866-374-7252.

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This *Newsletter* is intended to provide general information only and does not provide legal advice nor create an attorney-client relationship. The application of ERISA and other laws may vary from client to client. For information regarding the impact of these developments under your particular facts and circumstances, you are advised to seek qualified legal counsel. This material may also be considered attorney advertising under court rules of certain jurisdictions.

What Trump Could Do To Your Retirement

Millions of Americans struggling to save for retirement, or trying to live off their investments in old age, are hobbled each year by high fees on products recommended by financial advisers. Now, with Donald Trump's election, a bitterly debated regulation that requires advisers to put their clients' interests first could be derailed.

The Department of Labor rule, set to take effect in April, was pushed by President Barack Obama and resisted by Wall Street for five years before it was established this spring. Trump hasn't specifically referred to the regulation, known as the fiduciary rule, but unwinding what he argues is regulatory red tape was central to his campaign, and his adviser Anthony Scaramucci, founder of SkyBridge Capital, has argued that the rule should be revoked.

"It's a bad regulation that will kill jobs and hurt the very investors it purports to protect," Scaramucci said in an e-mail. "It should be scrapped or defanged."

Scaramucci's committee on Trump's transition team will influence who is named to lead the Securities and Exchange Commission and other financial overseers. For Treasury secretary, Trump has named Steven Mnuchin, a Hollywood dealmaker and veteran of Goldman Sachs.

With compliance set to begin in April, "a new labor secretary probably will delay the regulation," said Nathan R. Dean, government analyst for Bloomberg Intelligence. Although Trump can't immediately dismantle the rule—that would require drafting a new regulation rescinding the current one and allowing for a comment period—"he can ensure it's weakened," Dean said.

Hope Hicks, the president-elect's press secretary, couldn't be reached for comment.

In addition to requiring that investment recommendations be in the client's best interest, the fiduciary rule says brokers, retirement-investment advisers and insurers must inform clients about the products' fees and commissions. It was expected to accelerate the already substantial shift of client money into low-cost index funds and away from actively managed funds, especially those with sustained subpar performance and high fees.

Obama and consumer advocates have argued that the rule is needed to protect savers who hold some $12 trillion in individual retirement accounts and 401(k) plans, the retirement savings vehicles that have mostly replaced pensions. Without it, Americans saving for retirement have been losing $17 billion a year being pushed into investments that may be a better deal for brokers than for them, according to the White House Council of Economic Advisers.

Rule's Opponents. The rule was opposed by Republicans leading Congress and many Wall Street and insurance companies, including MetLife Inc. and Stifel Financial Corp. They have said its increased compliance costs will make it too expensive for financial service companies to manage money for low-income people with smaller accounts. The Securities Industry and Financial Markets Association said in a report that the $17 billion figure was derived using flawed methodology.

The rule was the first major overhaul of retirement savings regulations since the 1970s. It was meant to help consumers overwhelmed by a long list of investment choices and perhaps unaware of the profit their broker could make by offering one mutual fund over another. The Obama administration laid out an example of a worker with $100,000 in a 401(k) who rolls her savings into an IRA at age 45. Adjusted for inflation, her investment would grow to an estimated $216,000 by age 65 if it was in low-fee index funds and to just $179,000 if she was steered to high-fee mutual funds.

The Supporters. Supporters of the fiduciary rule point to people changing jobs, or retiring and weighing a rollover from a 401(k) to an IRA, as among the most vulnerable to advisers putting themselves first.

"That's where the big money is," said Barbara Roper, director of investor protection for the Consumer Federation of America in Washington, D.C. "And right now there's a lot of incentive to encourage people to roll over even when they'd be better off staying" in a lower-cost 401(k) plan.

A postponement of the ruling under Trump would hurt middle-income retirement savers, Roper said. While wealthy investors tend to use financial advisers who already are considered fiduciaries, middle-income clients are likelier to get advice from nonfiduciaries, she said.

"They'll be back at the mercy of advisers who are compensated and rewarded for giving advice that's harmful to their customers," Roper said. Middle-income savers "are the people who can least afford this," she added.

Middle-income Americans were also an emblem of Trump's campaign to win over economically beleaguered voters. At a rally in Cincinnati on Dec. 1, Trump said he would win tax cuts for the middle class. Mnuchin, meanwhile, promised "the largest tax change since Reagan."

"The Trump administration, working with our Republican majority in Congress, should make sure this harmful, bureaucratic rule does not go into effect as planned," Representative Jeb Hensarling, Republican of Texas and the House Financial Services Committee chairman, said on Nov. 16 in remarks at the Exchequer Club in Washington. "This is just one example of how unelected, unaccountable government hurts working people."

Height Securities expects the Trump administration to delay the fiduciary rule's effective date by six months to a year. Height analyst Edwin Groshans predicted in a Nov. 17 note that the rule is headed for the "guillotine."

By Carol Hymowitz and Katherine Chiglinsky

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