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PENSION RESOURCE INSTITUTE

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PRI Policy Brief Update: November election and the DOL Fiduciary Rule

Immediately following the November 8th election, PRI released a Policy Brief describing potential impacts to the Department of Labor (DOL) Fiduciary Rule. This second brief contains updated information, as the situation and our understanding, continues to evolve.

Legislative Action

The opportunity to overturn this specific Rule through the Congressional Review Act (CRA) is not available. Congress used this streamlined legislative process earlier this year and the resolution was vetoed by President Obama. The same procedure may not be repeated in the next Congress.

Executive Action

The Rule can be suspended by the Trump Administration immediately after inauguration day, January 20th, by exercising the President's emergency authority to place a hold on new rules that are not yet "applicable." Even though the DOL Rule was effective in June 2016, the new Administration can use its emergency rulemaking authority to push back the actual compliance deadlines of April 10th and January 1st on the basis that Financial Institutions need more time to comply. This delay can be accomplished on an expedited basis by the President, even if there is not a DOL secretary in place.

Judicial Action

If the implementation dates for the DOL Fiduciary Rule are delayed by Presidential directive, that could allow the courts time for additional review before the Rule is applicable. Alternatively, the Trump-appointed DOL officials and Department of Justice could elect to discontinue defending the cases that are now pending. However, it would be difficult for the new Administration to simply ignore the Rule, given its high profile. Even if the new Administration attempted that action, it seems likely that the Rule's supporters would be willing to ask the courts to require the new Administration to move forward with implementation.

In the meantime, if the courts are split on the current legal challenges to the Rule, the result would likely be an expedited appeal to the circuits or Supreme Court by the Obama Administration. As noted, the Trump Administration could only elect to withdraw an appeal or other legal defenses after inauguration day, January 20, 2017.

New Rule Making Processes

If the implementation dates for the DOL Fiduciary Rule are delayed by Presidential action, the new Secretary of Labor can undertake a new rulemaking process to substantially reduce or eliminate many compliance requirements in the current Rule. This process can be lengthy and subject to legal challenges, as has been the case with the current DOL Fiduciary Rule. Unlike the President's emergency authority, the rulemaking process would likely result in an extensive "notice-and-comment" period, as occurred with the current Rule. An effort to adopt a modified rule in an abbreviated rulemaking process is unlikely, since it would give supporters of the rule a stronger legal claim in court that the Department's action was arbitrary and capricious.

Additional Legislative Options

Additional legislative options include:

- Follow the traditional legislative process. This appears to be a limited option, given that despite only having 48 votes, Senate Democrats can block most measures, due to the rule that requires 60 votes to halt a filibuster;
- Attach a legislative rider on the Labor appropriations bill to de-fund the Rule; however, this option has been blocked in the past; and
- Use the budget reconciliation process that requires only a majority vote in the Senate to pass legislation, not 60 votes. There are two major limitations to this approach:

    1. It is not clear whether the DOL Rule is eligible to be attached as an amendment to the reconciliation process; and
    2. Congress only has three shots each year with the reconciliation process, which involve bills addressing spending, revenue, or the federal debt limit. Passing a federal budget may be a higher priority for the incoming Congress than attempting to repeal the new DOL Fiduciary Rule.

Implications

The potential for a change in the Fiduciary Rule is now likely, although it is not clear whether these changes will come through the courts, through Congress, the Trump Administration, or some combination. PRI believes the most likely scenario in the short-term is one where the incoming Administration delays the implementation dates. This assumes that overturning the rule is a priority of the Administration, which seems plausible given the public positions of several known advisors to President-elect Trump. That said, if it's not a high-priority item, then the rule may become a "bargaining chip" between the Administration and Senate democrats.

In the event the Administration decides to delay implementation of the new DOL Fiduciary Rule, it cannot happen until after inauguration day, which is January 20, 2017. Even if the implementation dates are delayed, the longer-term fate of the rule remains uncertain.

Given the consequences of non-compliance, until there is a definitive direction to the contrary, **PRI recommends that members proceed with plans to comply with the April 10, 2017 and January 1, 2018 implementation dates.**