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PRESIDENTIAL ACTIONS DIRECT RECONSIDERATION OF DOL FIDUCIARY RULE AND THE DODD-FRANK ACT

On February 3, 2017, the President issued a Memorandum on the Department of Labor Fiduciary Duty Rule (the "Presidential Memorandum")[1] and an Executive Order that set forth Core Principles for Regulating the United States Financial System (the "Executive Order"[2]). These executive actions appear to be the first steps towards repealing or revising the Fiduciary Duty Rule[3] and revising major portions of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). Taken together, the two executive actions seem to reflect the President's intention to remove or reduce regulatory burdens on the U.S. financial markets.

Presidential Memorandum Directs Examination of the DOL Fiduciary Rule

The Presidential Memorandum directs the Department of Labor ("DOL") to "examine" the Fiduciary Duty Rule to "determine whether it may adversely affect the ability of Americans to gain access to retirement information and financial advice." Unless revised or repealed, the bulk of the Fiduciary Duty Rule is set to become applicable on April 10, 2017, and would expand significantly the circumstances under which a person would be considered a "fiduciary" when providing investment advice to individual retirement accounts and pension plans covered by the Employment Retirement Income Security Act of 1974, as amended (ERISA). The Presidential Memorandum directs the DOL to prepare an updated economic and legal analysis concerning the likely impact of the Fiduciary Duty Rule, and if the DOL determines that the Rule is inconsistent with the ability of 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,

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[1] Presidential Memorandum on Fiduciary Duty Rule dated February 3, 2017 is available at https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-memorandum-fiduciary-duty-rule.

[2] Presidential Executive Order on Core Principles for Regulating the United States Financial System dated February 3, 2017 is available at https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-executive-order-core-principles-regulating-united-states.

[3] See our Client Alert dated April 29, 2016, entitled "Final Department of Labor Fiduciary Rules" for an analysis of the Rule.

and to withstand unexpected financial emergencies," the DOL is directed to propose a rule rescinding or revising the Fiduciary Duty Rule.

The Presidential Memorandum directs the DOL to consider in its analysis whether (i) the anticipated applicability of the Fiduciary Duty Rule has harmed or is likely to harm investors due to a reduction of Americans' access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice; (ii) the anticipated applicability of the Fiduciary Duty Rule has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees; and (iii) the Fiduciary Duty Rule is likely to cause an increase in litigation, and an increase in the prices that investors and retirees must pay to gain access to retirement services.

It should be noted that the Presidential Memorandum does not delay the April 10, 2017 effective date of the Fiduciary Duty Rule. However, following release of the Presidential Memorandum, the DOL has begun proceedings to delay the Rule's implementation and is seeking an additional round of public comment on the Rule. Further regulatory action regarding the Fiduciary Duty Rule can be anticipated.

Executive Order Sets Forth Core Principles for Regulating the U.S. Financial System

The Executive Order sets forth the Administration's "Core Principles" for regulating the U.S. financial system, which are designed to:

(i) empower Americans to make independent financial decisions and informed choices in the marketplace, save for retirement, and build individual wealth;
(ii) prevent taxpayer-funded bailouts;
(iii) foster economic growth;
(iv) enable American companies to be competitive with foreign firms;
(v) advance American interests in international financial regulatory negotiations;
(vi) make regulation efficient and effective; and
(vii) restore public accountability within Federal financial regulatory agencies.

The Executive Order directs the Secretary of the Treasury to consult with the member agencies of the Financial Stability Oversight Council (FSOC) and report to the President within 120 days (and periodically thereafter) on the extent to which existing laws and government policies promote the Core Principles, and on actions taken to promote and support the Core Principles.

The Executive Order is not self-effecting in that it does not achieve any direct change in law or regulation. Specifically, it does not affect any of Dodd-Frank's rules or regulations and it is not likely that Dodd-Frank will be repealed entirely. However, the Executive Order suggests that the Administration intends for various provisions under Dodd-Frank to be scaled back or revoked. It should be noted that some regulations can be rolled back by regulation, but some would require Congressional action.

Conclusion

The two executive actions reflect the Administration's pro-business and anti-regulation stance and its emphasis on removing regulations that it deems burdensome on the U.S. financial markets. We continue to monitor the responses to the executive actions and the ensuing developments.

If you would like assistance determining how the Presidential actions affect your business, please call Meryl Wiener, any of the undersigned or your regular Warshaw Burstein attorney.

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