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## Status of the Fiduciary Rule

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Last Friday, the White House issued a memorandum (the “Memorandum”) directing the Department of Labor to evaluate the fiduciary rule, and the related prohibited transaction exemptions (together, the “Fiduciary Rules”), to determine whether the guidance will adversely affect retirement investors. Contrary to popular perception, the Memorandum did not direct the Department of Labor (DOL) to delay the applicability date of the Fiduciary Rules. However, shortly after the Memorandum was signed by the president, the acting secretary of the DOL released a statement saying the DOL would be reviewing its legal options for delaying the applicability date. As a result, we expect an announcement, possibly within a matter of days, that steps are being taken to delay the April 10 applicability date.

What does this mean for retirement plan and IRA service providers, such as broker-dealers, RIAs, insurance companies and retirement plan recordkeepers?

Assuming that the applicability date is delayed, and that the delay survives potential legal challenges, the consequences will be as follows:

- The applicability date will likely be delayed, either immediately or through multiple subsequent steps, for six months or even a year. As a result, service providers to retirement plans and IRAs will likely not need to comply with the Fiduciary Rules on April 10.
- Instead, those service providers will be required to comply with the currently applicable fiduciary regulation and existing prohibited transaction exemptions (the “old” rules).

- In some cases, that will result in significant relief, for example, the one-time sale of investments to IRAs (since this presumably would not be advice on a “regular basis,” a condition of “fiduciary” advice under the current regulation). In other cases, the existing rules may result in fiduciary status for advisers and service providers, for example for those who provide initial and ongoing advice about investments to retirement plans. In yet other cases, the outcome is mixed: for example, recommendations of plan distributions and rollovers, as one-time recommendations, may not be fiduciary acts (except that DOL Advisory Opinion 2005-23A and FINRA Regulatory Notice 13-45 will continue to apply).
- The DOL has the option of ultimately implementing the Fiduciary Rules as drafted, with modifications, or the DOL could withdraw the Rules. The outcome is uncertain.
- There are several bills being drafted in Congress that would create an alternative definition of fiduciary advice and, in some cases, establish a fiduciary standard of care for advice to IRAs and plans. As with the Fiduciary Rules, the outcome of those proposals, as well as their requirements, is uncertain.

The reality is that we are in a period of uncertainty, but for the moment, we think that advice to plans, participants and IRAs will be subject to the “old” rules.”