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Trump administration targets class-action right in DOL fiduciary rule, but other legal avenues could remain for investors

If the best-interest contract remains in some form, action could switch to state courts; Finra still allows class actions



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Jr.

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Even before the Labor Department has finished its review of its fiduciary rule, the Trump administration has made clear that it is targeting a part of the measure that would make it easier for investors to pursue class-action lawsuits against financial advisers.

The latest evidence is a DOL **Field Assistance Bulletin** released on Wednesday, that said that the agency would not bring enforcement actions against advisers relying on exemptions in the measure if they include class-action bans in retirement account contracts.

The bulletin, which mentions that the Trump administration is **no longer opposing class-action bans** in a Supreme Court case, comes shortly after the DOL said in a **brief for a lawsuit** against the fiduciary rule that the class-action provision would "likely be mooted in the near future."

The class-action provision is part of the best interest contract exemption that would allow

brokers to receive variable compensation for investment products they put in individual retirement accounts as long as they sign the legally binding agreement to act in their clients' best interests. Also on Wednesday, the DOL released a **proposal to delay implementation** of the contract and two other exemptions from Jan. 1, 2018, to July 1, 2019.

It's not clear how much of the rule the DOL is going to change under a directive from President Donald J. Trump to reassess the rule. If the best-interest contract survives in some form, financial firms could still face significant liability risk.

Joshua Lichtenstein, an associate at the law firm Ropes & Gray, noticed this line in the preamble of the delay proposal: "IRA owners, who do not have statutory enforcement rights under ERISA [the federal retirement law] would be able to enforce their contractual rights under state law."

Although the Trump administration may not want investors banding together in a legal action, it might not be opposed to state cases.

"It seems like a clear intent to shift the enforcement mechanism away from class-action lawsuits toward state-law breach of contract claims," Mr. Lichtenstein said. "The actionable claims could differ from state-to-state. That could mean some behavior is a

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breach of fiduciary duty to an IRA in one state but not in another."

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When it comes to class actions, the Financial Regulatory Authority Inc., the broker-dealer self regulator, still looms. In Finra arbitration, class action waivers are banned. Presumably, a group of retirement investors who think their broker has committed a fiduciary violation would be able to pursue a class-action through the Finra system.

"Finra views [allowing class actions] as a reasonable step to protect investors," said George Friedman, an adjunct law professor at Fordham University and a former Finra director of arbitration. "I don't see the delay in the DOL rule having any effect on their thinking."

The DOL's decision not to enforce class-action waivers is still significant because the fiduciary rule would make IRA class actions possible, according to Marcia Wagner, managing director of The Wagner Law Group.

"You very, very infrequently see class actions with IRAs, and if this is the position of the administration, that will continue," Ms. Wagner said. "It may be a signal that when this regulation is modified there won't be a private right of action for class action lawsuits as part of the exemption."

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It's almost a certainty that class-actions will drop out of the DOL fiduciary rule. The question is how much of its legal bite will remain.

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