

ERISA Experts See Regulation Pullback as Key Theme of Trump Rule

A Trump administration and likely Republican-led Congress will create opportunities in many areas of retirement advisement, but they will also bring setbacks, according to ERISA pros.

Reported by ALEX ORTOLANI

The return of President-elect Donald Trump to the White House, along with a potential Republican takeover of Congress, will have [sweeping ramifications](#) for the employer-sponsored retirement plan industry, according to experts on the Employee Retirement Income Security Act.

The return of a Republican-led White House and Senate—potentially with a majority in the House of Representatives as well—has experts in agreement on a few likely changes: the demise of the so-called fiduciary rule; a shift in approach to the role of [environmental, social and governance factors in investing](#); a continuation of tax cuts; and a further easing of alternative investments in defined contribution plans. While some of the changes may bolster services, others may put up stumbling blocks, including the potential for policymakers to look for revenue from tax-advantaged savings and the end of a proposed national individual retirement account mandate.

Bonnie Treichel, founder of and chief solutions officer for Endeavor Retirement, sees changes coming to ERISA-covered plans, but emphasizes the role plan advisers can have in working with with plan sponsors to manage the shifts.

“The outcome of the election is notable, but for retirement plan advisers, hopefully they can embrace the opportunity to reinforce their value with plan sponsor clients,” Treichel says.

Fred Reish, a partner in Faegre Drinker Biddle & Reath LLP, notes that under Republican leadership, the focus of regulatory guidance “will likely be more on relieving the regulatory burden on businesses and less on protection of participants.” But even that will depend, to some extent, on who the Trump administration names to be secretary of labor—and it could “easily be six months or more” before that is decided, he says.

Fiduciary Rule

The Department of Labor’s Retirement Security Rule, which expands fiduciary duty for retirement-related investment advice, will likely continue to have its future decided in the courts, Reish says. The rule has been stayed by two federal courts and is under appeal from the DOL.

“There is a good chance that, if the courts rule against the validity of the regulation, the new administration could [choose not to] appeal the trial court decisions,” he says.

Marcia Wagner, founder and managing director of the Wagner Law Group, Chartered, says she sees the potential for history to repeat itself from when the administration of former President Barack Obama had a new fiduciary rule denied by the U.S. 5th Circuit Court of Appeals.

“It is entirely possible that there would be a repeat of what occurred in 2018,” she writes via email. “The 5th Circuit will invalidate the Retirement Security Rules, and the Department of Labor will not request reconsideration of the decision by the entire 5th Circuit, nor file a petition for writ of certiorari requesting review of the 5th Circuit’s Decision. The Trump Administration would be of the view that the guidance presented in Prohibited Transaction Exemption 2022-02 was sufficient.”

Attorney Treichel agrees that the rule “will be effectively dead under this administration.” That would mean the five-part test that has been guiding fiduciary advice since 1975 will likely continue, which will provide “an area of opportunity for some advisers ... to understand how the existing [prohibited transaction exemption] 2020-02 can be used in ways beyond rollovers. Even though [PTE 2020-02](#) was primarily a focus on rollovers for most firms, there are other use cases beyond rollovers.”

Daniel Aronowitz, president of Encore Fiduciary, an underwriter for fiduciary liability insurance, believes the new DOL regime should defer to Congress in terms of how individual retirement accounts should be handled from a standpoint of fiduciary advice.

“As for whether DOL has authority to regulate IRAs under the ERISA fiduciary standard, that is something that Congress could clarify to eliminate this long-standing debate,” he writes via email. “We generally believe that individuals benefit when they are dealing with fiduciaries, including on IRA rollovers, but Congress needs to amend ERISA if they want this to happen.”

ESG

Among regulatory focus areas, Reish notes as significant the likely reworking of the DOL's guidance on ESG regulations, including the use of ESG factors in defined contribution retirement plans. The first Trump administration's DOL guided plan fiduciaries to restrict investment plan decisions to “pecuniary” measures, whereas under Democratic leadership, any restrictions to considering ESG factors were removed in January 2023, though using ESG factors is not mandated.

Treichel agrees that the most recent rule “may not survive,” particularly with it already facing pressure from the courts, which recently gained more power in ruling on federal regulation when the Supreme Court overturned the so-called *Chevron* doctrine of deference to federal agencies.

Plan advisers, however, may not see much effect in everyday practice, as they are already following a strict fiduciary process, Treichel notes.

“For retirement plan advisers, they have seen back-and-forth around ESG investing guidance for many years, and I am not sure that a change in the final regulation matters that much, so long as advisers continue to follow a prudent process and follow their [investment policy statement] in line with the duty of loyalty under ERISA Section 404,” she says. “Again, this is already required for all investments for ERISA-covered plans, and ESG has never gotten a ‘pass,’ so this doesn't change much, and advisers can reinforce that.”

Aronowitz, of Encore Fiduciary, is in favor of the administration restoring the Trump-era rule eliminating deference to ESG factors in choosing investments.

“We believe the Biden rule has been misinterpreted by [Republican state attorneys general](#), but restoring the Trump rule ensures that all investments are in the best interests of plan participants,” he says.

Tax Cuts, Auto IRA Act

Michel Kreps, a principal in Groom Law Group, Chartered, notes that those in the retirement industry should pay close attention to the way new Republican leadership prioritizes tax legislation. With policymakers looking to extend portions of the Trump administration's prior [Tax Cuts and Jobs Act in 2025](#), they will be looking to make up revenue elsewhere that may amount to trillions of dollars.

“There should be no question that the tax incentive for retirement savings is at risk,” Kreps says. “People forget that we narrowly avoided ‘Rothification’—meaning, mandatory Roth deferrals—in 2017. Members of Congress will say they support the retirement system, and they do, but when push comes to shove, someone's ox will have to be gored if they want to pay for extending the tax cuts.”

Kreps also says he believes it is unlikely that a Democrat-proposed bill, the Automatic IRA Act, or similar universal coverage proposals will pass under new leadership. That act and similar initiatives had been supported by many in the retirement plan industry as a way to expand and support national retirement plan access.

The big question for a Trump-led DOL, he says, is whether it will continue on a path, set out under the Obama administration, of prioritizing “policy through enforcement and big-ticket regulatory initiatives (such as the fiduciary rule) while backing away from industry engagement on sub-regulatory guidance (e.g., advisory options and individual prohibited transaction exemptions).”

He characterizes the DOL's relationship with the retirement industry as “more adversarial than it was for the first 35 years of ERISA” and says he will be watching to see if that changes under the new leadership.

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