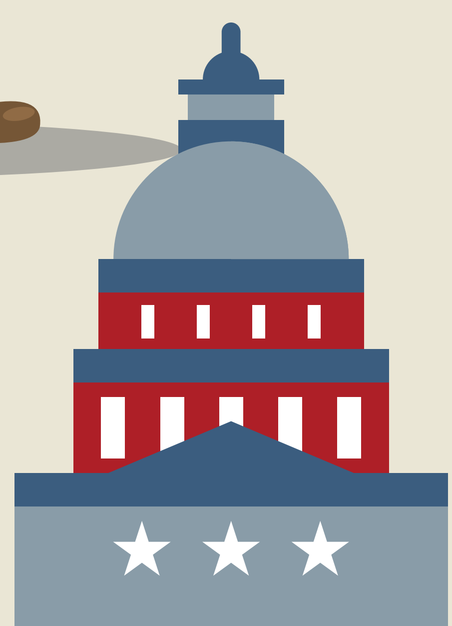
FEATURE

Unanticipated Consequences

Polls, pundits and politicians alike didn't see this coming.

BY NEVIN E. ADAMS, JD



In an upset the likes of which the nation hasn't experienced since 1948 (when Dewey *didn't* defeat Truman), not only did businessman, entrepreneur, reality talk show star and serial tweeter Donald J. Trump manage to capture the White House, but despite losing seats in both houses of Congress, the GOP maintained its majority hold on the House of Representatives and managed to hold onto a slim majority in the Senate, and thus keep control of Congress.

Along with that most unanticipated series of outcomes, the calculus of change on legislative and regulatory fronts for the retirement industry was also turned upside down. Overnight the odds of legislation coming out of the so-called "lame duck" session evaporated, while the prospects for change, and perhaps even outright appeal of the fiduciary regulation, went from something on the order of a meteor striking Washington, DC to — well, a real possibility.

The Fiduciary Regulation

Predicting the future is a treacherous business — particularly in print journalism, where the time gap between the composition of these words and your reading them is weeks. That said, as we head to press, President-elect Trump has yet to specifically weigh in on the fiduciary regulation, though he has consistently spoken of his intention to reduce the reach of government regulations, and it seems reasonable to think that he'd see the fiduciary regulation in that light. Indeed, campaign advisors such as Anthony Scaramucci, managing partner of Skybridge Capital, have been openly critical of the regulation, and claimed that it would be repealed.

Nor would it be all that hard for the Trump administration to do so, with an interim step of issuing an executive order indicating no enforcement of the rule while going through the administrative procedure process of actually repealing it.

That said, bear in mind that, while the DOL fiduciary rule is on a list of recent regulations to review, it is currently not on the list of regulations designated for immediate action by the Trump administration. The current thinking, at least now, is that unless President-elect Trump addresses the issue himself, which is not seen as likely given the other

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matters demanding attention, the Trump administration will want to wait for the Secretary of Labor nominee to make a determination.

Which brings us to Andy Puzder, who President-elect Trump has tapped as his nominee for Secretary of Labor. Puzder, chief executive of CKE Restaurants Holdings Inc., the parent company of the Carl's Jr. and Hardee's burger chains, has been a vocal critic of government regulation, notably the Affordable Care Act and the recent Labor Department overtime rules. He has not (yet) expressed an opinion on the fiduciary regulation, and while it seems reasonable to expect that he wouldn't favor such an extension, as a matter of political expediency he might keep his powder dry on that issue, rather than interject another controversial position into what is likely to be a contentious confirmation process. But then, that's what "common wisdom" would dictate.

Tax Reform

Another big issue – especially with the GOP maintaining majorities in both houses of Congress — could be tax reform.

"Our No. 1 priority is tax reform. This will be the largest tax change since Reagan," said Steven Mnuchin, the former banker who served as Trump's campaign finance chairman, in an interview on CNBC within a week of his being named as Trump's nominee for Secretary of the Treasury.

He was referring, of course, to the Tax Reform Act of 1986 (TRA '86), which significantly simplified and streamlined income tax rates. Of course, it also tightened the nondiscrimination rules, reduced the maximum annual 401(k) before-tax salary deferrals by employees by 70%, and required all after-tax contributions to DC plans to be included as annual additions under Code Section 415 limits. And what did all that do for — or rather to — retirement savings?

Yes, for all the concerns expressed by those in our nation's capital (and presumably those soon to be taking up residence there), tax reform is all about reducing the amount of revenue that the federal government takes in. But with a $20 trillion debt, Uncle Sam will need to find some way to offset the projected loss in revenue — and that's where the tax incentives to establish, fund and contribute to a workplace retirement plan inevitably find themselves in the budgetary crosshairs.

While those paying attention to such things realize that most of those tax preferences are temporary — that is, taxes will be paid on those pre-tax contributions and the earnings thereon when they are withdrawn at some point in the future — the government beancounters look at revenues and expenditures only within the prism of a 10-year budgetary window, and since the gap between the deferral of taxes on those contributions and the withdrawal of those funds upon retirement is generally more than that decade, the amount of taxes postponed looks, from a budgetary standpoint, to be taxes permanently foregone. And, on that basis, even though those so-called retirement "preferences" are completely different from other tax deductions (such as the mortgage deduction), from a budgetary scoring standpoint, it's not only a big, juicy target — it's one of the largest on the table of considerations.

Not that we have to look back 30 years to see how tax reform might manifest itself. We saw what that might mean as recently as 2014 when then-Chairman of the House Ways and Means Committee Rep. Dave Camp (R-Mich.) put forth a proposal that would pay for tax reform (or at least some of it) by freezing the COLA limits that apply to defined contribution plans for a decade and limiting the annual ceilings on elective deferrals so that only half could be made on pre-tax basis (weirdly, this would have applied only to employers with more than 100 workers). The first part of the proposal was deemed to raise $63.4 billion in revenue over 10 years, the latter an additional $144 billion, by basically forcing workers who would otherwise have taken advantage of pre-tax savings to pay taxes on those contributions upfront. And let's not forget that those burdens would have fallen particularly harshly on those who decide to offer these plans in the first place and to match employee contributions.

House Ways and Means Chairman Kevin Brady (R-Texas) is already championing moving aggressively on tax reform within the first 100 days of the Trump administration. Noting that Trump's tax proposal in many ways mirrors the "Better Way" tax reform blueprint released earlier this year by House Republicans, Brady has said that House Republicans are "ready with the agenda we've laid out, especially fixing this broken tax code, replacing Obamacare with real patient health care, and lifting taxes off businesses so they can grow again." And he has also previously invoked the spirit of the Tax Reform Act of 1986 as a model.

While the current blueprint pledges to "continue the current tax incentives for savings," it directs the House Ways and Means Committee to "consolidate and reform the multiple different retirement savings provisions in the current tax code to provide effective and efficient incentives for savings and investment." So while the current retirement savings vehicles — like the 401(k) — will not be removed from the tax code under the House Republican plan, those vehicles

FIDUCIARY ROLE: What's next for the fiduciary rule?

Of all the paths to amending, delaying, or even killing the Labor Department's fiduciary rule, it seems fair to say that the election of a Republican president and GOP-majority Congress seemed among the least likely. A week after the polls closed we asked NAPA Net readers what they think will happen.

First off, let's be honest. Anybody who tells you they know what will happen – certainly within a week of the election – is – well, let's just say they're more likely to be speaking from theory (or hope… or fear) than fact.

That said, a slim plurality (32%) of the responses said they were expecting the Trump administration to delay and amend the regulation, while nearly as many (29%) thought they would delay it – permanently.

"Nothing right away – they have bigger fish to fry," was the opinion of 17%, with about 15% splitting between "replace it with one of their own" and "nothing." The rest split between "kill it" and "delay it for awhile."

Wanted – Dead or Alive?

Interestingly enough, there was almost as much diversity in terms of what readers said they *wanted* the Trump administration to do. Again, a slim plurality (31%) went with "delay and amend," but just 25% opted for "delay it – permanently." Replace it with one of their own was the opinion of nearly one-in-five, while one-in-eight thought the Trump administration would do "nothing." The rest were pretty evenly split between "nothing right away," "kill it," and "delay it for awhile."

And then there is the matter of what reader firms will do while all this shakes out. Here the responses were much more consistent; nearly three-quarters (73%) said that their firm would "stay the course preparing for the fiduciary regulation until we know otherwise." As one reader explained, "ultimately, even if the election results in a delay or elimination of the fiduciary rule, many firms in the industry already have sufficient sunken costs that they will continue down the path they are on. New rule or not, the industry is already changed by it."

The second-most cited response – and it was distant second – were the 15% who expected their firms to "stay the course – but slow the pace of implementation until we know otherwise." Another 5% went with "stop and wait until we know the direction," with the rest split between "no earthly idea" and "work with our legislators to get rid of the rule."

Reader Comments

Yes, there were reader comments. Here's a sampling:

I wouldn't mind seeing a slowdown in regulatory burden on business. Doing so might even help economic growth, who knows?

The rule needs to be simplified. It's far too complex.

Initially I had hoped there may be room to push the pause button, delay it, and amend it to be easier to implement. But after a few days have passed and many opinions have been shared, I'm coming to the realization that the rule is effective and ready to go forward. It would be very hard to stop it. And any delay would probably just delay implementation, not amend anything.

Eliminate the damn thing altogether!

One of the more important ways a business operates effectively is to understand the rules. In some form fiduciary reform started in GWB's administration. We now have rules and effective could be combined into one "cookie cutter" approach. That might, or might not, mean significant changes for the 401(k), but 403(b)s, and potentially even 457(b) programs, could be subjected to changes that would render them more like their 401(k) brethren.

Additionally, the blueprint also directs the Ways and Means Committee to "explore the creation of more general savings vehicles" like so-called Universal Savings Accounts outside the employer based savings system in which account holders could withdraw both contributions and earnings at any time, and for any reason, without tax penalties. Legislation has been introduced in Congress that would create this new savings vehicle, which would seriously diminish the relevance of individual retirement accounts (IRAs) and possibly even workplace based savings arrangements.

The bottom line: There remains bipartisan enthusiasm for tax reform, though that interest is generally focused on reducing rates — and those efforts often "pay" tax reform's tab by undermining the incentives that promote, encourage and support the maintenance and creation of workplace retirement plans, specifically among smaller employers.

Just after his election in 2008, President Barack Obama famously said, "Elections have consequences."

They do indeed.

dates. Though not perfect they do correct some practices which needed adjustment and give us some clarity. We'll figure it out and everything will be fine.

It's nothing more than liberals trying to Obamacare the financial services industry.

Congress will repeal this rule. The DOL/EBSA overstepped its authority here.

The AARP has been the biggest proponent of the Fiduciary Rule and they are a pretty big lobbying group – lots of retired people with plenty of time to write letters. Also, should our industry give the message that we are against doing what is in the best interest of clients?

There were a lot of costly requirements of this new rule and many firms gearing up to supply assistance (and thus standing to make a lot of money). It will be curious to observe how many new DOL Rule backers suddenly become very vocal proponents for it to continue forward as is.

Sometimes our blessings come wrapped differently than we expected; we were looking for stripes, but got polka dots instead! We need a fiduciary standard, but one that makes sense, and that can be complied with. This surprise blessing may be the pathway to a more workable solution for all; principles, not heavy-handed regulation... let us pray!

The election demonstrates that the public is not interested in supporting a government that produces a pound of regulations to produce an ounce of protection.

Got a question you'd like to run by your peers? Curious as to the industry's "take" on something new or controversial? Email me at nevin.adams@usaretirement.org.

— Nevin E. Adams, JD

IMPACT 'ED': What's had the biggest industry impact in 2016?

With only a couple of weeks left in 2016, in mid-December, we asked NAPA Net readers to pick the trend/event that has had the biggest impact on our industry.

Perhaps not surprisingly, the fiduciary rule topped the list – and by quite a margin – as the event that had the biggest impact in 2016.

Second-most cited was last year's most disruptive industry event – a regulatory obsession with fees.

"Excessive fee litigation" was third-most cited (we'll leave it to you to decide if it "excessive fee" litigation or "excessive" fee litigation, while fourth-most cited was the man who (and whose firm) brought the topic of excessive fee litigation to the forefront of fiduciary concerns, Jerome Schlichter.

Coming in at number five was Employee Benefits Security Administration (EBSA) head Phyllis Borzi, who was obviously the force behind the fiduciary rule that topped this year's list.

And while arguably the top five contain both positive and negative aspects, the sixth item on this year's list was in a whole other category – a focus on financial wellness.

As for some of the things that weren't deemed to have as much impact this year (though they have in years past), they included:

- fee disclosure;
- industry consolidation;
- MyRAs;
- 403(b) university lawsuits; and
- The Trump election – but, as Cubs fans once said, "just wait till next year!"

— Nevin E. Adams, JD