# Consensus? Not in Washington

By Editor Test *Wed, Jul 10, 2013*

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There seemed to be few if any happy campers at the IRI Government, Legal and Regulatory Conference in Washington last month. To some extent, that's to be expected. Unlike the IRI marketing conferences, where attendees tend to be agreeable, the legal conferences involve lawyers, who tend to contend.

But this conference had to be a downer for anyone who still naively hoped that the various elements of the retirement industry and of the federal government might find constructive ways to solve the problems—inadequate saving, inefficient investing, lack of planning, insufficient retirement plan coverage, 401(k) "leakage," product opacity, high fees, financial illiteracy, etc.—that bedevil Boomer retirement.

Time is passing quickly and most of the industry's lobbyists, lawyers, regulators and legislators (represented at the IRI conference by their aides) still appear to be talking past each other and following their own narrow agendas.

A few specifics are in order:

**The regulatory agency view**

A panel of Securities and Exchange Commission officials sounded oddly ineffectual as the panelists voiced their displeasure with some of the variable annuity industry's product de-risking efforts since the financial crisis. Industry lawyers like to say that lower risk for issuers means lower risk for contract owners. ("That's our story," one lawyer told me.) But the SEC doesn't seem to buy it.

De-risking is perhaps the biggest trend in the variable annuity industry, and one of its manifestations has been the emergence of "buffered" strategies. These structured products resemble fixed indexed annuities, but the index crediting caps are higher than in FIAs because the contract owners accept more downside risk.

One SEC official suggested that these products—so far AXA Equitable and MetLife have introduced them and Allianz Life plans to—should not be allowed to have names that suggest protection against risk because, even though the insurer might absorb the first 10% or 20% in market losses, the client is on the hook for any further loss.

"Aspects of these products raise challenging disclosure issues," said William J. Kotapish, the assistant director of the SEC's Division of Investment Management Office of Insurance Products and Regulation. He called the product's structure a "trap door effect" that would require "crystal clear" explanations to prospects. He also described the market-value adjustment on mid-term withdrawals from the products as "very complicated."

**The executive branch view**

It wasn’t exactly a melding of the minds, either, when IRI CEO Cathy Weatherford met on stage for a chat with two executive branch officials, Phyllis Borzi, the Assistant Labor Secretary who runs the Employee Benefits Security Administration and Deputy Assistant Treasury Secretary Mark Iwry, a senior advisor to the Treasury Secretary on retirement issues.

Iwry is a champion of retirement income innovation, but not necessarily of the innovations that the industry is looking for. A few years ago, Iwry’s idea for a federal retirement bond default investment option for participants in compulsory automatic-IRAs in small companies without 401(k) plans was defamed in the right-wing blogosphere as a federal asset grab.

Borzi is also not a natural industry ally. Her initial proposal for a fiduciary rule that would essentially bar plan sponsor advisors from taking advantage of their positions—synergies would be redefined as conflicts of interest—drew substantial industry resistance and was withdrawn.

When Weatherford asked Borzi for a hint about the timing and contents of her long-awaited re-proposal, the latter was noncommittal. But her comments showed how different her values are from those in the private sector.

For instance, she rued the fact that intermediaries who portray themselves as objective advisors are likely to sell what third parties incentivized them to sell, and put the clients’ interests second. But one could also almost hear the third parties muttering, “I certainly hope so. Otherwise we’re wasting our money.”

Borzi’s point was no doubt deeply felt; she wants advisors to advocate solely for the client, as ERISA requires. But her version of a fiduciary rule would destroy the retirement plan business in its current form. In any case, it’s hard to see how anyone who isn’t self-employed can be a fiduciary, and not all of the people who sell plans or advise plan sponsors are self-employed.

**The legislative branch view**

The most perplexing of the panels at the IRI conference may have been the legislative one. Statements by aides to two congressmen and a senator convinced me that they don’t listen closely to or even respect the public policy initiatives of the folks in the executive branch.

During the Q&A period, I tried to find out who drives the retirement policy bus in Washington. “Which end of the worm”—*i.e.,* which agency or branch—should members of the retirement industry talk to in order to get their points across? I asked. Legislators like Iowa’s Tom Harkin, regulators like Borzi and executive branch officials like Iwry all had their own initiatives; were their efforts coordinated?

An aide to a Democratic congressman offered a polite reply that suggested his boss doesn’t pay much attention to what the executive branch thinks when crafting legislation. An aide to a Republican congressman used my question as an opportunity to disparage the administration’s alleged lack of leadership in general.

A third aide offered good news to the IRI audience. She foresaw no likelihood that Congress might reduce its long-range fiscal exposures by curtailing any of the tax expenditures that the retirement industry and people who are saving for retirement currently enjoy.

Aside from that encouragement, however, the aides' statements didn't inspire confidence. They didn't seem to know much about retirement issues. To be more precise, the retirement industry seemed to be just one of the countless special interests that came to beg favors from them. They used the word "annuities" in a generic sense, as people do when they don't understand the crucial differences between the products. Two of the aides also seemed to believe that a $100,000 single-premium income annuity premium bought a $200-a-month lifetime payout at current rates. That type of error suggested that they don't know much about the $8 trillion retirement industry.

The legislative branch, and especially the Republican House membership, is nonetheless where the IRI finds the most sympathetic and responsive ears. During the conference, even as Weatherford was asking Borzi for news about the fiduciary rule for retirement plan advisors, the announcement came that the House Financial Services Committee had voted 44-13 to approve Missouri Republican Rep. Ann Wagner's "Retail Investor Protection Act."

This Orwellian-named bill is based on the fantasy that a fiduciary rule for advisors would hurt low- or moderate-income investors. (That argument is probably only true if you think that low- and moderate-income investors benefit from sales presentations, or that sales presentations constitute advice or that fiduciary advisors never charge by the hour.)

[On July 9, Sen. Orrin Hatch (R-UT) announced a sweeping piece of legislative vaporware, not yet introduced, that would help privatize state and local public pensions, create low-maintenance "Starter 401k(s)" for small companies. Its content appeared lifted from an April 2013 white paper issued by the ASPPA (American Society of Pension Professionals and Actuaries)].

Both bills appear intended to frustrate Borzi. The first one prohibits her from issuing new fiduciary rules until 60 days after the Securities and Exchange Commission finalizes a new fiduciary rule. Hatch's bill moves all authority to determine standards of conduct for intermediaries to the Treasury Department. Tactics like these, regardless of their merit, could help keep the DoL's quixotic fiduciary crusade bottled up for the rest of the Obama presidency, if not longer.

Where there's a will, there's a way. But in Washington, the ways are all leading in different directions and they don't add up to much.