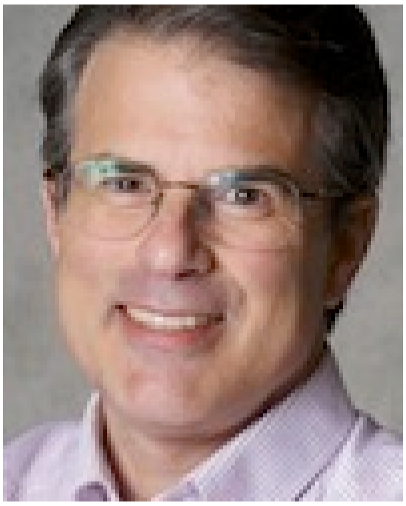
# Do Rollover IRAs Contain Pension Money?

By Kerry Pechter *Thu, May 25, 2017*

*The Labor Secretary did little this week to dispel the annuity industry's uncertainty about the future of the fiduciary rule. Neither did he demonstrate that he understands what the fight over the fiduciary rule is about.*



The new Labor Secretary disappointed the indexed and variable annuity distribution industry this week when he announced in a *Wall Street Journal* op-ed piece that he wouldn't try to prevent the Obama administration's fiduciary rule from reaching its partial-applicability date of June 9, 2017, intact and on time.

Secretary Alexander Acosta wrote: "We have carefully considered the record in this case, and the requirements of the Administrative Procedure Act, and have found no principled legal basis to change the June 9 date while we seek public input. Respect for the rule of law leads us to the conclusion that this date cannot be postponed."

That gives the cement around the fiduciary rule more time to harden and, presumably, will make it harder for the financial services lobby to dislodge the rule in coming months. Anybody who's still betting that the rule will be reversed may now feel as queasy as a short-seller in a rising market.

On the other hand, Acosta appeared to encourage the rule's opponents by saying that he would seek new public input on it. "Trust in Americans' ability to decide what is best for them and their families leads us to the conclusion that we should seek public comment on how to revise this rule."

Why does he think we should open up this can of worms again? Because the rule "as written may not align with President Trump's deregulatory goals. This administration presumes that Americans can be trusted to decide for themselves what is best for them," he wrote.

Acosta continued: "The rule's critics say it would limit choice of investment advice, limit freedom of contract, and enforce these limits through new legal remedies that would likely be a boon to trial attorneys at the expense of investors. Certainly, it is important to ensure that savers and retirees receive prudent investment advice, but doing so in a way that limits choice and benefits lawyers is not what this administration envisions."

So there's still a chance that the Acosta will, if not reverse the fiduciary rule, then eliminate the financial industry's most-hated elements: the right to file class action suits against brokerages that it gives investors, the requirement that commissioned agents and brokers act "solely" in a rollover IRA client's best interests, and the requirement that commissioned indexed and variable annuity sellers use the Best Interest exemptions.

The Secretary doesn't name those offending elements in his op-ed article. Instead, he raises all-purpose, evergreen pro-market objections that aren't relevant to this debate. The question, for example, is not whether Americans can be trusted to decide what's best for them. The question is whether Americans can trust the professionals whom they pay to help them make decisions about stuff they don't understand.

Second, the argument that the fiduciary rule will "limit choice" is tired and meaningless: That's what rules do. Third, investors aren't worried about the costs of lawsuits against brokerages; brokerages are worried. I can respect the brokerage firms' concerns about frivolous litigation based on the rule, but that's not the Labor Secretary's problem.

If it was unfair or unwise for the Obama DOL to have criminalized commissions and to have demonized indexed and variable annuities at the very moment when Boomers need income-producing products, then let's debate those alleged injustices or mistakes openly and directly.

What the Secretary's letter conspicuously lacks is any reference to rollover IRAs, and the fact that they are extensions of 401(k)s. He doesn't mention this debate's fundamental issue: The ambiguous regulatory status of rollover IRA accounts (which just happen to contain some $8 trillion that brokers and agents want unobstructed access to). Should we regard rollover IRAs as containers of pension assets (governed by the Labor Department) or as regular risk investments (governed by FINRA and the SEC)?

My view: If the financial services industry wants to argue that rollover IRA money isn't pension money, and that its owners don't need or require ERISA protections, then they should be ready to say that the sources of rollover IRAs—401(k) accounts—aren't really pension money either, and that their owners don't deserve or require ERISA protections.

To regulate the two of them differently—while leaving them both tax-deferred—makes no sense. As I understand it, federal courts have already affirmed the DOL's right to regulate rollover IRAs. The Secretary will discover that when he examines these issues more closely.