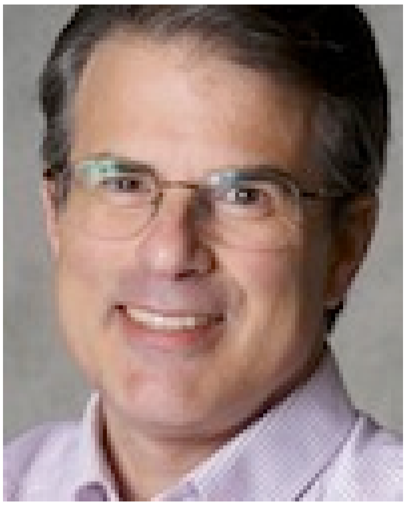
DOL's Perplexing 'Best Interest' Proposal

By Kerry Pechter *Thu, Jul 9, 2020*

Why is the Trump Labor Dept so determined to align its Best Interest standard with the SEC's 'Reg BI'? It claims that such an alignment will be more efficient. But if DOL doesn't protect participants, who will?



Does anyone understand the Department of Labor's final proposed fiduciary **rule** for retirement plan advisers, which was issued last week with an invitation for comment? Even the experts seem hesitant about its implications.

For instance, the American Retirement Association's chief content officer, Nevin Adams, a lawyer and former editor of *PlanSponsor* magazine, knows this subject as well as anyone.

When he wrote recently that the proposal is "a mixed bag and has a certain 'back to the future' feel," he seemed almost as nonplussed by it as I am.

I scanned the rule, but I didn't find what I was looking for: Examples or scenarios of exactly how it might affect the ability of plan providers either to "cross-sell" products (like health savings accounts, student loan refinancing tools or life insurance) to 401(k) plan participants, or to influence "rollover" decisions when people are ready to move their money from the plan to a brokerage IRA.

Regulators and lobbyists worry over each letter of a statute—knowing that the letter of the law is what matters, especially on appeal. (No one ever seems to pay attention to the "spirit" of a law. That's apparently for people who believe in ghosts.) Often, the whole idea is to create a kind of Trojan horse—to lull us to sleep and then catch us napping. I tried and failed to read between the lines of this rule.

If the purpose of the DOL's "principles-based" approach is to allow plan providers (and the advisers they employ) to decide on their own where to draw the line between advice and sales, it would be refreshing to hear.

One particularly confusing section of the proposal involves the so-called "Deseret Opinion." That's a 2005 DOL opinion that the provision of a rollover recommendation doesn't make the adviser a fiduciary. (The rollover decision is one of the pucks you need to follow in this sport; it often determines whether the current recordkeeper retains or loses custody of the participant’s investments.)

The Trump DOL evidently rejected the Deseret Letter, suggesting that rollover advice is sacred work. But that position seems incompatible with the administration’s apparent inclination to relax the regulation of advice about rollovers. If you understand this, please drop me an email about it.

“Thus recordkeepers—who weren’t fiduciaries to the plan but provide recommendations regarding rollovers, and drew comfort from the shield previously offered by the Deseret letter—now find that shield removed by the Labor Department’s proposal,” wrote Adams.

That’s confusing.

We spoke with an ERISA lawyer about the rule. “The question is what level of protection will you provide to the participants,” said Barry Slavin, an attorney at the Wagner Law Group in Boston, in an interview with *RIJ*. With respect to rollovers, protection is important because the stakes are high. “People are likely to be in an IRA longer than they’ve been in any plan,” he told me.

Another question: Why is the Trump DOL so determined to align its Best Interest standard with the SEC’s Regulation Best Interest? It claims that such an alignment will be more efficient. Yes, but for the plan providers, not the participants.

There’s a reason why qualified money, which the DOL supervises, has been regulated more closely than non-qualified money, over which the SEC and FINRA reign. Qualified money is different. In a sense, it has a higher purpose (essential consumption in old age) than non-qualified money (discretionary spending).

The Obama DOL seemed to understand that. It may indeed have overstepped its authority in its Best Interest rule by suggesting class action lawsuits against violators; it lost in court because of that. The Trump DOL seems to *under-step* its responsibility to participants when it tries to equate the ethical standards for advisers in retirement plans with the SEC’s standards for advisers in brokerages.

My position is that tax-subsidized defined contribution savings deserves more protection than brokerage money. That distinction seems to go unacknowledged and unappreciated in the current DOL “best interest” proposal.

Even if (in the few brief months before the November election) the Trump DOL succeeds in lightening the fiduciary standard as it pertains to compensation for advisers to plan participants, the retirement industry may have already raised the standard on its own.

Slavin pointed out that larger plan providers seem willing to embrace a “best interest” principle, as long as the regulations don’t (as the Obama DOL rule did) expose them to massive lawsuits.

“Four years ago, plan providers were prepared to implement the Obama rule,” Slavin told *RIJ*. “Before the Fifth Circuit [Court of Appeals] struck the rule down, those companies were well on their way to complying. I don’t know if we’ll necessarily see them cut back.”