

## In the Fiduciary Fight, Key Players are Biting Off as Much as They Can Chew

By Will Trout      Thu, Jul 23, 2015

*In reviewing a new bulletin from the DoL, a wealth management analyst at Celent sees “a heightened jockeying for position among regulators and other industry actors with an interest in guiding reform.”*



Amidst the summer lull, the Department of Labor (DoL) has issued [Field Assistance Bulletin 2015-02](#), a clarifying document that aims to open the door to the broader use of annuities within defined contribution (DC) plans.

While annuities have been allowed within DC plans for some years, a lack of guidance as to fiduciary obligations post-sale has tempered sponsor enthusiasm. The bulletin explains that while sponsors are considered under fiduciary obligation at the time of annuity selection and at each periodic review, they will not be held to this standard in the case of specific purchases by a participant or beneficiary.

This distinction is important in that it grants significant protection to sponsors, but the DoL leaves significant wiggle room as to the frequency of required reviews.

Clearly, published reports of the pending insolvency on an issuing insurer would trigger the need for a review. Otherwise, the degree of diligence that must be exercised by the sponsor post-selection will need to be evaluated on a case by case basis: First by the plan sponsor, presumably, and then by the DoL.

This may be a best-effort solution to an irreconcilable problem, but such a measured response by the DoL is unlikely to eliminate what it describes as “disincentives for plan sponsors to offer their employees an annuity as a lifetime income distribution.” Plan sponsors have little incentive, in any case, to assume the risks of offering annuities when these are readily available for purchase outside the pre-tax space, and so the DoL will need to aim higher.

What is noteworthy here is not so much the narrow scope of the little noticed bulletin, or its limited reach, but the degree to which it signals an acceleration of DoL efforts to clean up the DC business. To a large degree, this acceleration reflects a heightened jockeying for

position among regulators and other industry actors with an interest in guiding reform. The recent Supreme Court case of *Tibble vs. Edison International*, which affirmed the nature of the fiduciary responsibility of plan sponsors to participants on an ongoing basis, appears to have brought issues of power and control to a head.

The latest guidance from DoL attempts to boost clarity around sponsor obligations pursuant to the sale of annuities. This guidance is important because to date, regulatory attention has fallen disproportionately on the accumulation side of the DC business. Helping participants to successfully manage the payout function is a noble and (as I discuss in my recent [report on de-accumulation](#)) challenging goal. Time is of the essence if the US is to forestall a doomsday scenario of retirees outliving their savings.

At the same time, it is important to keep in mind that economics are not the only consideration driving the DoL push. Rather, the newfound urgency underscores the Department's desire to put its imprimatur on an issue that is being tackled by multiple actors (e.g. Treasury; the SEC, which announced last month its compliance-focused ReTIRE Initiative; and lobbying groups such as SIFMA and NAIFA) and from multiple standpoints. In particular, a torrent of litigation (the capstone of which was the *Tibble vs. Edison* verdict) appears to be shifting decision power to the courts.

Legal actions are also shining a spotlight on fees. This presents a cart-before-the-horse problem for DoL, in that excessive fees are an issue that a uniform fiduciary standard is supposed to address. Having assumed the mantle of defined contribution crusader, the DoL risks falling behind events. The pressure on DoL will only become more acute as we enter the twilight of the Obama administration.

The upshot? Look for a wave of bulletins and other forms of guidance from the DoL, particularly in the wake of the [upcoming August hearings](#). While the fiduciary debate to date has gotten less attention than it deserves, it will rise to the top of the political agenda this fall, despite resistance from industry lobbyists. Indeed, given the weight of the government and private sector entities (among them the AARP) behind reform efforts, the end result may actually have teeth.

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