Is Time Running Out on the Fiduciary Proposal?

By Kerry Pechter *Fri, Jun 20, 2014*

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At the SPARK Conference in Washington, DC on Monday, a prominent employee benefits lawyer said that the prospects are growing dimmer that the Department of Labor will re-propose *any* new fiduciary rule for advisers to 401(k) plans or participants by the end of the Obama administration.

"The major question is whether we will have a new reg," Steven Saxon of Groom Law Group (below) told members of SPARK Institute, which advocates for the retirement plan industry. "It was supposed to be issued in August, and now it's put off to January 2015. After talking to a lot of folks, I have to wonder whether if it will get done by January, or if at all.

"If it takes six months for a comment period and another six months to get through hearings, and then more time to develop a final rule, by then we're running into 2016, an election year," he added. "There's going to be a lot of political pressure on the White House and the OMB [Office of Management and Budget]. It's questionable whether they will spring a controversial regulation in an election year."

Saxon pointed to a May 29 editorial in the *Wall Street Journal* by Mary Kissel as an indication of how nasty the debate might get—i.e., that the so-called race card has already been played.

In the editorial, Kissel asserted that the DoL's original proposal—intended to insulate participants from salespeople posturing as objective advisers—would "particularly hurt low-income Hispanics and African-Americans" who can't afford to pay directly for impartial professional financial advice.

"That's what the DoL, the White House, and the OMB will have to deal with," Saxon said.

The line between sales and advice

A fiduciary standard for interactions between advisers and 401(k) sponsors or participants could infuse previously business-as-usual sales and compensation practices with new legal and regulatory ambiguity, unless the new rules include specific exemptions from the rules.

“The question is, when I’m making a sales presentation, when do I become a fiduciary? And does that raise the possibility of prohibited transactions and does that affect the way I get paid?” Saxon said.

“There are two levels of concern,” he told *RIJ* in an interview. “One involves presentations to plan sponsors. Let’s say I’m an adviser who’s selling a 401(k) product. I’m meeting with plan sponsors and they ask me questions about the fund lineup. What if I start to talk about the performance of various funds, and the plan sponsor says, ‘What would you recommend?’

“Does the sales presentation become a recommendation? If the plan sponsor relies on that information and subsequently buys the recommended plan, does the sales person become a fiduciary” even though the sale hasn’t yet taken place? Saxon said.

“The second concern is about conversations with participants about financial education,” he added. “Let’s say I’m engaged to talk to retiring employees about rollovers. The sponsor isn’t paying me. I’m just using their conference room. What if I know that a certain employee has $600,000, and that he can either leave it in the 401(k) plan or roll it over to my firm’s IRA. If he rolls it over, I make a lot of money. If they leave in the plan, I don’t. At what point in time do I become a fiduciary? That’s what this whole fight is about.”

Understandable frustration

On the one hand, companies sponsor 401(k) plans voluntarily. They might be expected to be sophisticated enough to distinguish sales presentations (which are typically free) from impartial advice (which rarely comes free). But in interviews, deputy DoL secretary Phyllis Borzi, the champion of the fiduciary proposal, has emphasized that the caveat emptor standard and the implicit blurring of the sales/advice boundary is not appropriate when tax-deferred retirement savings are at stake.

Saxon acknowledged the DoL’s concern. What’s driving the Borzi initiative, he conceded, is regulators’ frustration over the fact that upwards of $6.5 trillion in tax-deferred savings has already migrated from low-cost, ERISA-regulated defined contribution plans to the rollover IRA arena, where the costs are sometimes much higher and oversight usually comes from SEC and FINRA.

“If I were a public servant and I wanted to do good by retirement programs and participants, I’d want to make sure I could wrap my arms around the biggest pool of savings in the United States,” he said. “The DoL feels that they need to exercise some control over the IRA space. FINRA and the SEC are doing some of the same things. There will be a lot more scrutiny of IRAs in the months to come.”

Saxon suggested that there might not be a need for a fiduciary regulation at all, because providers of advice are already, by definition, fiduciaries. Even if the fiduciary definition were expanded, the investment industry would certainly lobby for exemptions that would allow certain salespeople to provide certain kinds of advice without running afoul of the regulations.

Several such exemptions already exist, he said: “So, you have to ask, is all this really needed?”