No Quick End to Fiduciary Rule Story

By Kerry Pechter *Wed, Mar 1, 2017*

The DOL wants your comments again. It wants to know how much companies have spent on adapting to the rule, and whether it would be cheaper to abandon the sunk costs. Or maybe it's all a charade, leading to a preordained decision.

The Department of Labor has proposed an extension of the applicability date of the fiduciary (or "conflict of interest") rule and its controversial Best Interest Contract Exemption by 60 days, to June 9, 2017 from April 10, 2017. The **proposal** is announced in the Federal Register today, March 2, 2017.

The proposal specifies two new public comment periods: a 15-day period, during which the public can comment on the proposal to delay the applicability period for 60 days, and a 45-day period for comments on whether the Trump administration should keep or scrap the fiduciary rule—a signature project of the Obama administration—partially or entirely.

If, after these two comment periods, the Trump DOL (under acting secretary Ed Hugler; Trump's nominee, Andrew Puzder, withdrew his candidacy for the cabinet position) decides that the rule flunks a cost-benefit analysis, then it may introduce a new proposal to repeal (and perhaps replace) the rule, which will in turn a new comment and review period.

"Upon completion of its examination, the Department may decide to allow the final rule and PTEs to become applicable, issue a further extension of the applicability date, propose to withdraw the rule, or propose amendments to the rule and/or the PTEs," said the announcement in the Federal Register.

Last year, the DOL collected thousands of comments from the public about the merits of the fiduciary rule. Many of the same comments will presumably be resubmitted. The difference this year is that financial firms have already invested vast amounts of time and money adapting to the rule, on the assumption that it would be applicable on April 10.

Another difference between then and now is that, in the intervening months, several court decisions have upheld the validity of the Obama DOL's rule. Those decisions would presumably be invoked if consumer groups file lawsuits contesting a DOL decision to rescind the rule.

"The court rulings upholding the DOL rule will make it harder to ultimately overturn the rule," said Micah Hauptman, an attorney at the Consumer Federation of America. "When one takes an unbiased view of the rule, the conclusion is always that the DOL was on firm ground in promulgating the rule, that the DOL engaged in a proper process, that the rule is workable, and that it will benefit retirement savers in real ways."

Rescinding the rule, which requires brokers and insurance agents to agree to act solely in their clients' best interests (as registered investment advisors must do) could also create negative publicity for the Trump administration and financial firms that oppose the rule. And those firms' competitors are likely to seize the opportunity to emphasize their differences. This week, for instance, **Rebalance IRA**, a robo-advisor advised by investment gurus Burton Malkiel and Charles D. Ellis, published a downloadable pre-written letter on its website and urged investors to send it to their advisors under their own names.

The letter says in part:

- Are you, and your firm, operating under a fiduciary standard, and have a legal obligation to put my financial well-being first?
- Please provide a detailed accounting of all expenses applied to our retirement accounts during the past 12 months.
- Please present these costs as a total dollar figure, and as an annualized percentage of my retirement investments that your firm manages.
- Please provide a detailed accounting of all one-time expenses, such as fund-level front-end loads. In addition, please provide a detailed schedule of any potential "exit or surrender" financial penalties that might be imposed if I choose to have my retirement investments managed elsewhere.
- Please detail all conflicts of interest, current or potential, that you face as my financial advisor.

Lest anyone have forgotten what all the fuss is about: Billions of dollars in fees, as well as long-practiced brokerage business models and annuity distribution channels, are at stake.

The expressed purpose of the rule was to reduce the costs of financial services to retirement savers—particularly those with a collective $7 trillion in IRA savings. Those reductions, if they occur, will symmetrically reduce revenue and profits for the financial services industry by billions of dollars.

But it gets worse. Beyond the possibility of lower fee revenue, the financial industry faces the possibility of multi-million class action lawsuits over potential violations of the Best Interest Contract. Lacking its own ability to enforce the rule, the fiduciary rule empowered investors to sue service providers rather than confine their complaints to a closed-door arbitration process.

These events were triggered by a February 3 presidential **memorandum** in which President Trump directed the DOL "to conduct an examination of the final rule to determine whether the rule may adversely affect the ability of Americans to gain access to retirement information and financial advice. As part of this examination, the Department was directed to prepare an updated economic and legal analysis concerning the likely impact of the final rule."

The DOL subsequently asked the Office of Management and Budget to review the matter. The OMB reclassified the proposal for a delay as "economically significant" rather than insignificant—a change that raised the gravity of the situation and demanded a longer and closer examination of the matter.

Some history is in order. The original rule was motivated in part by the fact that savers have moved ("rolled over") trillions of dollars has moved in recent years from closely-regulated, low-cost defined contribution plans, such as 401(k) plans, to less-regulated retail IRAs, where the fees tend to be higher—high enough to reduce the value of tax deferral, which is the rationale for investing on a tax-deferred basis in the first place. Significantly, the rule extends the regulatory norms of the 401(k) world into the world of IRAs for the first time.

This was tantamount to a loss of turf for retail financial service providers. Groups representing brokers and insurance agents have argued against the rule in part because it makes it harder to earn commissions on the sale of mutual funds and annuities. The securities industry has also argued that the rule will reduce the availability of financial services to middle- or low-income retirement savers, claiming that the commissions paid by mutual fund and insurance companies (re-paid by investors in the form of annual fees) helped finance those services.

The DOL rule could also create new compliance duties for some advisors who already adhere to a fiduciary standard, potentially raising their cost of doing business. Hence the financial industry's opposition. "While a proposed 60-day delay is a good first step, we will continue to work with the administration, and through the legal process, to repeal and replace this rule," said the Financial Services Institute in a press release yesterday.

In a press release yesterday, the Financial Services Roundtable, an industry group, reiterated its position that the Securities and Exchange Commission, not the DOL should write a best-interest conduct standard "for all brokers accounts (including IRAs) held by retail customers, and the DOL should fully rescind its rule on this matter."