
Political Football

By Kerry Pechter *Tue, Sep 20, 2011*

The Dept. of Labor's bid to strengthen the fiduciary standard for advisers to retirement plans and IRAs became a political football. Now the DoL has agreed to revise and "re-propose" its proposal. Was the football fumbled... or stripped?

The Department of Labor's Employee Benefit Security Administration, citing a need for "more input," has decided to modify and resubmit its nearly year-old proposal to toughen regulations that discourage conflicts of interest among those who both sell products and provide investment guidance to retirement plan participants or IRA holders.

In a [release](#) this week, the agency said that its re-proposal, for which no date has been set, would include a cost-benefit analysis of the proposal's industry impact and would:

- Clarify that fiduciary advice is limited to individualized advice directed to specific parties.
- Respond to concerns about the application of the regulation to routine appraisal.
- Clarify the limits of the rule's application to arm's length commercial transactions, such as swap transactions.
- Introduce exemptions addressing concerns about the impact of the new regulation on the current fee practices of brokers and advisers.
- Clarify the continued applicability of exemptions that have long been in existence that allow brokers to receive commissions in connection with mutual funds, stocks and insurance products.
- Craft new or amended exemptions that preserve beneficial fee practices while protecting plan participants and individual retirement account owners from abusive practices and conflicted advice.

In the wake of the DoL's announcement, observers were left guessing as to the meaning of the sudden postponement of a regulatory action that started last year as a move to stop brokers and advisors from recommending investment options that enriched themselves but increased the costs of 401(k) participants and IRA owners.

"Investment advisers shouldn't be able to steer retirees, workers, small businesses and others into investments that benefit the advisers at the expense of their clients. The consumer's retirement security must come first," said the DoL's September 19 release temporarily withdrawing the proposal.

But the proposal has become, especially since the Republicans gained a majority in the House of Representatives in November 2010, a lightning rod for criticism. Industry players who have a vested interest in the status quo, their lobbyists and trade organizations, and conservative opponents of federal regulations have all attacked it.

Eventually even Democrats abandoned the effort. Last Thursday, Rep. Barney Frank (D-MA), ranking member of the House Financial Services Committee, wrote a [letter](#) to Labor Secretary Hilda Solis to withdraw the proposed rule and "re-propose" it later. Some observers believe that that caused the DoL and Borzi, who had fended off heated questioning during Congressional hearings, to temporarily withdraw their

proposal.

“One can only guess about the reason,” said ERISA attorney Fred Reish. “But an educated guess would be that [it] was the result of the controversy stirred up by the proposed regulation, the urgings of the financial services community—and particularly the insurance companies and the broker-dealers—to re-propose a new regulation and, most importantly the concerns raised by House members. I believe the re-proposal will address some of those concerns but still be similar to the original proposal.”

One fiduciary expert suggested Solis and Borzi may have withdrawn the proposal to relieve President Obama of a political albatross as he enters a tough re-election campaign with an already-diminished average approval [rating](#) (42% among adults; 77% among Democrats and 12% among Republicans, as of July 31, 2011, according to Gallup).

“Borzi may possibly be caving to defer this until after the election next year. For all I know, Obama’s campaign may have said, take it off the table. She said something new will come out, but there’s no political support anywhere for it,” said Chris Carosa, chief contributor to [Fiduciary News](#).com and president of Bullfinch Fund.

One of the financial industry groups to oppose the proposal was the American Council of Life Insurers. Its president and CEO, Dirk Kempthorne, published an [advertorial](#) in the *Washington Post* citing the EBSA proposal’s potential to drive up costs and “shake the foundations of a system that is working well at the very time when Americans need it most.”

“There were main areas of concern to us,” said ACLI spokesman Whit Cornman. “In the IRA space, the proposal would change the way business is done, but there was no economic analysis in it. Another issue was that there was no coordination with the SEC, which is seeking to harmonize the standard of care between brokers and advisors. The other area regarded prohibited transaction exemptions. When DoL first put out the new proposal, they didn’t include the new exemptions from prohibited transactions.”

In one sense, the controversy comes down to a difference of opinion over whether the current system of 401(k) and IRA advice is broken or not, and whether it needs to be fixed.

Blaine Aikin, president of [fi360](#), a Pittsburgh-based organization that provides training for the Accredited Investment Fiduciary designation, thinks that it needs to be fixed—to close a gap in the law and to repair the public’s confidence in the financial industry.

“Under the existing definition, there are five parts, and all five parts have to apply for the broker or advisor to be considered a fiduciary,” Aikin said. “The DoL has a heck of a time making a case or taking an enforcement action when they have five things to enforce. It’s a loophole that needs to be closed.”

He also believes that the financial industry should favor of stronger regulations, not oppose them. “We’ve had a financial crisis of the past few years, and loss of faith is an important dimension of that crisis. There’s a crisis of public confidence in financial providers. So we’re making a huge mistake in not applying the fiduciary standard. When people feel that the game is rigged, the music stops.”

Chris Carosa worries that, even though Borzi promises a re-proposal, the administration may not get another opportunity for much-needed reform.

“My fear is that [the proposal’s opponents] will bend or push this off the same way that the SEC pushed off the 12b-1 fee discussion. We have had several entry points to eliminate conflicts of interest, and they’re being picked off. The [401(k)] fee disclosure proposal might be pushed back again too. If that happens, the investors will have lost.”

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