The Fiduciary Rule: Going, Going...

By Kerry Pechter *Wed, May 28, 2014*

The longer the DoL takes to draft a new version of its proposed fiduciary rule, the likelier it is that the re-proposal—if one ever appears at all—will be timid enough not to provoke the blowback from the investment industry that the first one did.

Years ago, the reporters, kibitzers and idlers who watched jury trials at the courthouse in Yellowstone County, Montana, had a rule-of-thumb that rarely failed: "The longer the jury stays out, the more likely it is to acquit."

This truism, probably shared by courthouse loungers across America, comes to mind whenever the Department of Labor announces another delay in the re-proposal of its so-called fiduciary rule for 401(k) and IRA advisers (as it did this week, pushing the date back to at least the beginning of 2015).

The longer the DoL's Employment Benefits Security Administration takes to draft a new version of the rule, I think, the likelier it is that the re-proposal—if one ever appears at all—will be declawed enough not to provoke the blowback from the investment industry that the first one did. It will probably absolve broker-dealers and registered reps of the ethical crimes implied by the first draft.

Not that Phyllis Borzi, head of EBSA and the champion of a higher fiduciary standard for IRA advisers, wants it that way. I have spoken to her semi-privately on two occasions. Each time, she expressed her conviction that the money in rollover IRAs should be as safe from the potential predations of retail financial sales people as it was inside employer-sponsored plans.

She meant that as long as the money in an IRA enjoys the blessing of tax deferral, it represents *pension* assets, and should be handled with all the delicacy and restraint that a defenseless and irreplaceable nest egg deserves. If it were up to her, I think, by now she would have issued just as strong a proposal as the first one, critics be damned. Her position will not change.

But Ms. Borzi's powers are not unlimited. She's not the only member of the jury panel, so to speak, and it's unlikely that either the wording or the spirit of the final proposal will be up to her alone. She'll need support, and it's not clear where it might come from. Neither her boss, the new Secretary of Labor, nor the soon-to-be lame duck POTUS seems poised to make her fight their fight.

Her view isn't invalid. As far as I know, no other developed country with an employer-based, tax-favored defined contribution plan allows the participants of that plan to move their accounts (often containing not just their own deferrals, but also substantial employer contributions and government credits) over to the less regulated, often high-priced, accumulation-driven playing fields of retail finance prior to retirement.

Even in the U.S., it's not clear that anyone ever intended that most 401(k) money would eventually enter rollover IRAs and, consequently, pass through a period of custody in the retail channel before people began spending it in retirement. We should all marvel that such a state of affairs exists at all.

But is this situation marvelously good or marvelously bad? It's very good for the retail channel. It can be good or bad for the clients, depending on how smart they are and whom they decide to trust with their money. Personally, I cringe whenever I see a discount brokerage ad offering "up to $600" as a reward for rollovers; the thought of people day-trading with their retirement money must be one of Ms. Borzi's worst nightmares.

In any case, it's too late for her to change the rollover situation for Boomers. Trillions of dollars have already rolled from 401(k)s to IRAs. It will also take much more than a labor secretary, let alone an assistant labor secretary, to defeat the powerful investment industry on such a high-stakes issue. It would take a president with lots of political capital. Most importantly, owners of rollover IRAs (i.e., voters) aren't clamoring for federal protection from advisers. Case dismissed.