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PENSION & BENEFITS

REPORTER

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Fiduciary Responsibility

At DOL Hearing, Officials Seek Answers About Value of Investment Advice Disclaimers

Department of Labor officials asked panelists during hearings March 1 and 2 whether requiring certain conflicts of interest involving investment advisers to be fully disclosed would be as effective at protecting retirement plans, participants, and beneficiaries as prohibiting those conflicts of interest.

''The mere fact that there was disclosure of the conflict may actually encourage them to believe, 'This guy really does have my interests at heart. Look how honest he was. He told me about the conflict,' '' Timothy Hauser, associate solicitor in the department's Plan Benefits Security Division, said on the first day of the two-day hearing on DOL's proposed fiduciary regulation (41 PBD, 3/2/11; 42 PBD, 3/3/11).

About 40 practitioners testified at the hearing on the department's proposed regulation (RIN 1210-AB32) to revise and expand the definition of the term ''fiduciary'' under Section 3(21)(A) of the Employee Retirement Income Security Act (203 PBD, 10/22/10; 37 BPR 2305, 10/26/10).

Practitioners speaking on behalf of the financial services industry generally said they favored a disclosure approach to regulating certain potential conflicts of interest.

Expanded Seller's Exemption. Hauser asked for practitioners' views on whether the proposed regulation could be improved by expanding its ''seller's exemption'' from fiduciary responsibility in exchange for comprehensive disclosure requirements along lines proposed by AARP in a comment letter submitted to DOL.

AARP proposed limiting the seller's exemption to situations in which investment advice is given to plans and plan fiduciaries and then only to investment advice backed by a statement of the conflict or conflicts of interest inherent in the proposed client-adviser relationship, full disclosure of all sources and amounts of fees or other compensation the investment adviser would receive, plan fiduciaries' clear and unequivocal acknowledgement of the conflicts of interest, and thorough recordkeeping to document the seller's exemption for a reasonable length of time.

Turning to Charles Nelson, president of Great-West Retirement Services, Hauser asked, ''If we wrote a regulation that required that level of disclosure [for the seller's exemption] and said if you have that disclosure, you're good to go and you're not a fiduciary, would that be something you would be willing to endorse,'' either as a safe harbor or as a mandatory provision?

''That's something we should look at,'' Nelson said. The greater extent to which the seller's exemption reflects the reality that buyer-seller relationships in the retirement services industry are not one-point-in-time relationships, the more favorably the regulated financial services industry will view the regulation, he said.

DOL Concerns. Returning to concerns about how relatively unsophisticated plan participants might act if they are told about conflicts of interest related to their investment savings for retirement, Hauser asked the question: ''How do you use the disclosure of the conflict to then protect yourself from advice that steers you into investments that are actually disadvantageous to you?''

Joseph Piacentini, director of the Employee Benefits Security Administration's Office of Policy and Research, said he had similar concerns about disclosure as a remedy for certain conflicts of interest related to certain investment advice.

Turning to Karen Prange, vice president and assistant general counsel at JPMorgan Chase in Kansas City, Mo., Piacentini asked, ''Is it your view that these kinds of disclaimers will change the way people will view the information they are getting? How will individual participants behave differently because of a disclaimer?''

Prange said that ''we all believe more disclosure, clear concise disclosure to the individuals who are making decisions'' based on investment advice will affect the investment decisions individuals make.

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Nelson of Great-West Retirement Services said that disclosing conflicts of interest is preferable to prohibiting certain transactions. ''I actually have faith in the American consumer as well as the distributors of products and services. . . that with good disclosure of what their fees might be and the contractual arrangements . . . being provided, a consumer can make an informed decision.''

Another speaker, testifying on behalf of the Pension Rights Center, said disclosing conflicts of interest related to investment advice would offer limited protections for retirement plan participants and beneficiaries. Norman Stein, professor of law at Drexel University's Earle Mack School of Law, said that ''disclosure could mitigate [the harm] with respect to some participants,'' but not all, especially those who are most vulnerable as financial decisionmakers.

Hearing Record Still Open. Phyllis Borzi, assistant secretary of labor for EBSA, said March 1 that the hearing record would remain open for 15 days after the close of the two-day hearing to allow time for additional public comments on the proposed regulation to be submitted to DOL.

By Florence Olsen

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