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Fiduciary Responsibility

Supporters, Critics, Gear Up for Fight Over Proposed Expanded Fiduciary Definition

Supporters and opponents of the Department of Labor's conflict-of-interest proposed regulation ramped up their campaigns soon after the Obama administration announced the rule's release.

The proposed rule (RIN 1210-AB32), released April 14, would require brokers to work under a fiduciary duty, meaning they would have to act in their clients' best interests. Although the official comment period on the rule won't begin until it's published in the Federal Register on April 20, some politicians and groups wasted no time issuing statements before then.

"It's a major victory for the millions of Americans who are trying to set aside some money for a decent retirement and a victory for the thousands of honest retirement advisors who no longer will have to compete against those who put their own interests ahead of their customers," Sen. Elizabeth Warren (D-Mass.) said in a statement to Bloomberg BNA on April 15.

Lining up against the rules are groups such as the Investment Company Institute, Financial Services Institute and National Association of Plan Advisors.

"We are disappointed that OMB only took 50 days to review this highly controversial rule that could negatively impact millions of investors. On average, Department of Labor rules are reviewed by OMB for 117 days," Dale Brown, president and chief executive officer of the FSI, said in a press statement.

Interests. Under current law, brokers are held to a "suitability" standard, meaning they can sell products that generally fit an investor's needs and tolerance for risk. Obama administration officials have said this allows brokers to recommend products that net higher fees or commissions without yielding better returns for investors, and that investors lose as much as \$17 billion a year as a result.

During a press call on April 14, Jeffrey D. Zients, director of the National Economic Council and assistant to President Barack Obama for economic policy, said the rule ensures that investment advisers put their clients' interests first (see related article in this issue).

The DOL's project to redefine the term "fiduciary" has been the target of sustained criticism and support since it was first proposed in October 2010, and then withdrawn in 2011.

Parties across the spectrum of the investment industry, employers that offer retirement plans covered by the Employee Retirement Income Security Act and

groups representing retirees and individual investors have been anticipating the rules ever since.

'Define a Single Word.' Warren, a member of the Senate committees on Health, Education, Labor & Pensions, and Banking, Housing & Urban Affairs, has been a vocal supporter of the DOL's project, and stood with President Barack Obama when he urged the DOL to move forward with it in February, at the AARP's headquarters in Washington (42 BPR 349, 2/24/15).

In the House, Education and the Workforce Committee Chairman John Kline (R-Minn.) and Health, Employment, Labor & Pensions Subcommittee Chairman Phil Roe (R-Tenn.), said in an April 14 press release that they have been supportive of the need to update the DOL's fiduciary regulations defining the term fiduciary, issued in 1975 before tax code Section 401(k) plans and individual retirement accounts had been introduced into the retirement landscape.

They said, "It's remarkable it takes a regulatory proposal spanning hundreds of pages to define a single word."

The Republican lawmakers also reiterated their demand, originally sent in a letter to DOL Secretary of Labor Thomas E. Perez in March, for proof that the DOL is coordinating its efforts with the Securities and Exchange Commission, which is also working on updating its definition of fiduciary. Citing concerns of conflicting and confusing regulations, the leaders said in the letter that the DOL shouldn't release its revised proposed rule until Congress is satisfied with the agency coordination (42 BPR 487, 3/10/15).

"It's deeply troubling the administration has refused to fully cooperate with our oversight requests to determine whether close coordination took place across the federal government to ensure a clear, consistent standard emerged," Kline and Roe said. "It is time for the administration to stop paying lip service to good government and start delivering the facts to prove it."

“We have heard loud and clear from our members and other older Americans who want to make sure that investment advisers give advice that is in their best interest. Though many already give sound advice, we hope to see the conflict of interest loophole closed for all who give investment advice to their clients.”

—DAVID CERTNER, AARP

The DOL said in the preamble to the proposed rule that while it was developing the new guidance, it did consult with the SEC, and other regulators, regarding whether the proposal “would subject investment advisers and broker-dealers who provide investment advice to requirements that create an undue compliance burden or conflict with their obligations under other federal laws.” The department also said that it will continue to consult with the SEC and other agencies as it moves forward with the rule.

SEC Chairman Mary Jo White confirmed during a House subcommittee hearing April 15 that the commission will forge ahead with its own similar rule for broker-dealers, and said SEC staff gave “extensive technical assistance” to the DOL on the issue (see related article in this issue).

Supporters. Groups swinging in favor of the rule include Save Our Retirement Coalition, comprised of 41 groups, such as the AARP, Pension Rights Center and Consumer Federation of America. Other supporters include the Committee on Investment of Employee Benefit Assets and National Coordinating Committee for Multiemployer Plans.

David Certner, AARP legislative counsel and legislative policy director for government affairs, said his organization was “pleased” with the DOL’s release of the proposed rule.

“We have heard loud and clear from our members and other older Americans who want to make sure that investment advisers give advice that is in their best interest. Though many already give sound advice, we hope to see the conflict of interest loophole closed for all who give investment advice to their clients,” Certner said.

Deborah Forbes, executive director of CIEBA, in Bethesda, Md., told Bloomberg BNA on April 15 that her first impressions of the proposal “are very good.”

The proposal seems to be appropriately protective of participants, especially with regard to rollovers, and seems to set clear lines between education and advice and makes clear that people who give advice on rollovers are fiduciaries, she said.

The rule shouldn’t go too far by interfering with advice that providers offer to large plan sponsors, she said.

“CIEBA members need the complex modeling and innovative ideas from service providers and the rule

shouldn’t get in the way of the free flow of information to large plan sponsors,” Forbes said.

“Mutual fund fees in retirement plans have fallen for two decades, even as the services provided to employers and plan participants have increased. The new rule must ensure that employers and savers still have access to that support and service.”

—PAUL S. STEVENS, INVESTMENT COMPANY INSTITUTE

Randy G. DeFrehn, NCCMP executive director, said the proposal will address the changes in the retirement landscape since ERISA was passed in 1974. The DOL’s project is “a welcome recognition of the vulnerability of investors and the need for service providers to be held to a standard of conduct commensurate with that reliance.”

Opponents. Paul S. Stevens, president and CEO of the ICI said in a press statement on April 15 the DOL proposal deserves a close study and that the organization will review the new guidance and proposed exemptions to make sure retirement savers can still receive information and guidance to make solid investment decisions.

“Mutual fund fees in retirement plans have fallen for two decades, even as the services provided to employers and plan participants have increased,” Stevens said. “The new rule must ensure that employers and savers still have access to that support and service.”

The ICI has challenged a report from the White House’s Council of Economic Advisors that savers who receive conflicted advice see returns drop by about 1 percent each year.

In an April 7 letter to the Office of Management and Budget, the ICI said that counter to the finding in the report that compensation structures prevalent in the financial services industry incentivize brokers and other financial advisers to encourage workers and retirees to shift assets out of 401(k)s and into high-cost IRAs, IRA investors’ assets are actually concentrated in funds with expense ratios less than the average expense ratio for all funds.

NAPA Executive Director Brian Graff said in an April 15 press release that his organization has been supportive of an update to the DOL fiduciary regulations but has had concerns about the potential impact on the relationship between retirement plan participants and their advisers and plan providers, as well as the implications for establishing new plans.

“While the devil remains in the details, it is clear that the dedicated staff at the Department of Labor have worked diligently to try and balance concerns about protecting the interests of consumers and the ability for those consumers to work with advisors of their choosing. We remain concerned that the compliance costs may outweigh the benefits, but look forward to continu-

ing to work with the DoL to further streamline and enhance this new proposal.”

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