

DOL Issues Final Fiduciary Rule, Does It Fall Short?

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By Ashley Ebeling

Sen. Elizabeth Warren cried out “Woo-hoo!” and praised Department of Labor Secretary Tom Perez after he announced the long-awaited final fiduciary rule meant to protect retirement investors from conflicted financial advice at the Center for American Progress. “Putting clients first is no longer a marketing slogan, it’s now the law,” said Secretary Perez. There will no longer be “slick-talking advisers pushing complicated products,” promised Sen. Warren (D.-Mass.).



Tom Perez, U.S. Secretary of Labor, championed the new fiduciary rule to protect retirement investors.

In short, the rule requires any investment adviser receiving compensation for making individualized investment recommendations to a retirement plan participant or Individual Retirement Account owner to put their client’s best interest first. As a fiduciary, they’ll be held to a higher standard than what most retirement advisers adhere to today—a lesser “suitability” standard that lets them recommend products that are suitable but not necessarily in their clients’ best interest.

The “streamlined” (per Secretary Perez) rule is a 1,028-page tome, with 208 pages devoted to defining who is a fiduciary, and 317 pages devoted to what’s called the best interest contract exemption. The BIC lets advisers continue to get otherwise prohibited compensation if there’s fine print in a contract that says they’re acting in the client’s best interest and the adviser adopts policies and procedures designed to ensure that the advice is provided in the client’s best interest.

“I’ve killed a small forest in my office,” says Erin Sweeney, an employee benefits lawyer at Miller & Chevalier who spent yesterday poring over a print-out of the new rule. Her initial take on it: “The proposal was terrifying to the industry, but the final version is so much more watered down.” Still, she predicts opponents (“Wall Street interests and their Republican colleagues” as Jeff Zients, director of national economic council for the president labeled them) will continue to try to block the rule.

“There will almost certainly be a wave of expensive and unpredictable litigation,” says Patrick DiCarlo, an employee benefits lawyer at Alston & Bird. The new rule is a dramatic expansion of fiduciary status and creates a lot of uncertainty, he says.

The DOL gave naysayers a big opening to attack the new rule. One of the major concessions was a delayed effective date. Under the proposal, the new rule would have been effective before President Barack Obama's term is up. But instead of being effective in eight months' time, some provisions are effective as of April 2017, with the rest going into effect on Jan. 1, 2018. That gives lawyers time to write new contracts and disclosures. It also gives time for a new political party to potentially dismantle the whole thing.

The DOL has a chart here that outlines the major changes from the proposed rule to the final rule.

The new rule eliminates some of the most contentious requirements from the proposal concerning the BIC exemption, making it easier for financial services firms and advisers to use. For example, it eliminates investment projections and annual disclosures to investors. It eliminates the contract requirement for 401(k) plans. And in the case of IRAs, it says that the contract can be completed at the same time as other paperwork, such as when you open an account or after a sales spiel when you're ready to sign on the dotted line and hand over your money.

The new rule also eliminates biases against proprietary products. Advisers recommending any asset—not just those on a specific list—can take advantage of the BIC exemption. It also makes some common sense clarifications. Marketing oneself or one's services without making an investment recommendation is not fiduciary investment advice. Newsletter or talk show commentary is also expressly not fiduciary advice. And employers can provide asset allocation models identifying specific investment products without that being considered fiduciary advice.

Still industry groups aren't sure their concerns have all been met. "We have to see if the BIC remains unworkable as in the proposal; with all these changes, we're going to dig in with an open mind," says Cathy Weatherford, president and ceo of the Insured Retirement Institute whose member companies offer lifetime income products including fixed indexed annuities and variable annuities which can only be sold under the BIC exemption under the new rule.

"Policymakers should do everything they can to help Americans be more prepared for retirement and not create red tape that makes saving for retirement more difficult," said Financial Services Roundtable ceo Tim Pawlenty, adding that the industry group will be analyzing the final rule to determine any appropriate further action.

Meanwhile, Secretary Perez and his friends are ready to defend the rule. At the Center for American Progress meeting, Sen. Cory Booker (D.-N.J.) took to the podium and declared that while there will be some who will try to undermine the rule, "Those of us who still believe, who haven't surrendered to cynicism, we have to be girded and ready for a fight!"