

Potential Challenges to the DOL's Conflicted Advice Rule?

Following one of the most controversial regulations-setting processes the retirement industry has ever seen, the Department of Labor (DOL) issued a final rule and related exemptions defining fiduciary status with respect to retirement plans on April 6, 2016.

The DOL refers to this guidance as the “conflict-of-interest” rule. It’s designed to protect retirement savers from biased advice that may be passed along to them by financial advisors and investment professionals. Simply stated, the DOL wants to protect consumers from advisors who may be looking to take advantage of compensation arrangements that could potentially lead to abuses.

Final Rule a Long Time Coming

The rulemaking process has been both contentious and lengthy. It began with proposed rules initially issued in 2010, withdrawn in 2011, and then re-proposed with significant changes in April 2015.

Two written comment periods and several days of public hearings concluded in September 2015. The reconfigured guidance was sent to the federal Office of Management and Budget in January 2016, and has now been released as a final rule.

The final rule is generally applicable on April 10, 2017. However, certain elements won’t take effect until January 1, 2018.

The DOL made substantial changes to the proposed rule to accommodate the feedback it received through written comments and public hearings. Some have expressed concern that the DOL went *too far* and “caved” to the pressure of opponents. The fact that both proponents and opponents of the guidance have some issues with the final product is an indication that the DOL may have found some common ground.

Could Legislation Be Next?

What remains to be seen, though, is whether Congress will attempt to keep the final rule from taking effect. At this point, there have been relatively few comments from lawmakers on the regulation, and we have yet to see any serious threats of a new legislative challenge to the final rule. Nevertheless, bills that were previously introduced to block the rule are still lingering in the background.

One would require the Securities and Exchange Commission to issue its own fiduciary regulations before the DOL’s final rule could be implemented. Another would establish a Congressional version of a best-interest standard as an alternative to the DOL’s. Neither has been voted upon, and it’s virtually certain that—if passed—President Obama would veto them. A two-thirds majority would be needed in both the House and the Senate to override a veto.

Congressional Resolution of Disapproval? Not Likely

As of April 19, members of both houses of Congress had introduced resolutions under the Congressional Review Act of 1996 to stop implementation of the final rule. The President is expected to veto any such resolution presented to him, requiring affirmation by members of both the House and the Senate to override it. Many doubt whether enough support exists in Congress to achieve an override.

It should be noted that a resolution of disapproval has been successful only once. In 2001, Congress overturned a

proposed Occupational Safety and Health Administration (OSHA) regulation.

Legal Action? DOL Confident “Rule Will Survive”

There have also been suggestions of possible legal action to prevent the rule from being implemented. One argument would be that the DOL failed to conduct an adequate cost-benefit analysis on how the final rule could affect financial organizations and industry professionals.

In addition, at least one high-profile litigator is rumored to be preparing a challenge to DOL’s general authority to put the new standards in place, to interpret “fiduciary” so broadly, or both.

Speaking at the introduction of the final rule at the Center for American Progress in Washington, D.C., Secretary of Labor Thomas Perez told an audience the DOL’s public input process and changes made to the proposed rule would enable it to “survive any legal challenge.”

Some in the industry believe that the changes from proposed to final rule—and the lengthy implementation period—were designed specifically with survivability in mind.

Executive Orders? A Longshot at Best

There has also been speculation on the potential for a new administration to nullify the final fiduciary rule by presidential executive order.

While many executive orders address managerial or procedural matters, there have been high-profile executive orders that had more dramatic effects. One was the order that created the Department of Homeland Security following the terrorist attacks of September 11, 2001.

Some believe that the final rule’s effective date (June 7, 2016) may discourage a new President from taking action to delay or discard it. With the full applicability of the final rule more than 20 months away (January 1, 2018), it might be more difficult for a new President to justify its nullification.

It’s also likely that a new President would explore precedent and legal/constitutional authority—perhaps even political ramifications—before such an undertaking.

Plan for Compliance

Preventing the implementation of the rule at this stage of the process has little precedent.

Although it’s possible that those who oppose the final rule may continue their efforts to derail it, retirement industry players would do well to proceed in a manner that would prepare them for eventual compliance in the event that the rule becomes effective as the DOL and supporters envision.

Our Commitment to Providing Clarity & Guidance

As we continue to analyze this extensive and multi-faceted guidance, Ascensus remains committed to providing regular updates and counsel. Backed by one of the largest ERISA consulting teams in the country, our experts will work hand in hand with our valued partners, advisors, and their clients to offer support and guidance as they work to understand the implications that this ruling has on their businesses.

Ascensus stands ready to help our clients navigate the evolving landscape of the retirement industry.

Check the [Compliance & Industry News](#) section of www.ascensus.com regularly for updates regarding the DOL’s ruling from our regulatory experts.