Assessing the Final DOL Fiduciary Rule

On April 10, 2016, the Department of Labor (DOL) released the final version of its fiduciary rule, fundamentally changing how retirement investment assistance is provided to American workers and retirees. Following a year of intense debate about the major flaws rendering its proposed regulation unworkable, DOL issued its final rule without the benefit of any new public review and comment on its decisions.

The stakes are high—Americans have to live with the rule they are seeing for the first time, a rule that affects how investment advice is provided to every 401(k) plan, every IRA, and every rollover or distribution to or from either.

Labor Secretary Tom Perez and the Administration promised America's workers they would fix the many serious concerns raised during the comment period, including those highlighted by more than 100 Congressional Democrats.

Although the final rule accommodated a few concerns expressed by commenters, many of the critical fixes to the Fiduciary Rule called for by the U.S. Chamber of Commerce remain unaddressed or were made worse in the final rule. These include important issues such as whether the final rule discriminates against small businesses, limits the availability of investment education, substantially increases litigation risk to the detriment of savers and the retirement system, and gives insufficient time to implement the final rule. These critical fixes, which would reduce the extent to which the rule impedes access to quality investment advice and the choice of advisors, are among criteria against which the final rule is being assessed.

Small Business Impact

- End discrimination against small businesses by expanding the seller's carve-out to apply to all plans and Individual Retirement Accounts (IRA) regardless of size.

  ☐ YES ☒ NO

  No. In fact, DOL made things even worse. The proposal discriminated against small business plans with less than 100 participants—the final rule discriminates against all plans and IRAs where the fiduciary manages less than $50 million in assets, even if the plan has more than 100 participants.

- Ensure advisors can continue to sell and service small business plans without absorbing or passing on higher costs.

  ☐ YES ☒ NO

  No. The final regulation will still require most small business plan advisors to change their business models, incur major new transition and compliance costs, and in many cases, subject themselves to serious litigation risks. This cost will be paid by small businesses and their employees in the form of higher costs, reduced choices, and less access to advice.

Investment Education

- Allow educational information provided to plan participants and IRA owners to identify specific funds or investment options that correlate to model asset allocations appropriate for a participant or IRA owner.

  ☐ YES ☒ NO

  No. DOL did not permit IRA owners to benefit from this type of educational information. It did preserve this important educational tool for plans—but subjected those to additional conditions and limitations.

Best Interest Contract (BIC) Exemption

- Prevent frivolous litigation by removing the class action provision (especially given that the DOL has no statutory authority to create new causes of action through regulation).

  ☐ YES ☒ NO

  No. In what is one of the most significant problems in the entire regulatory package, DOL retains its troubling class action litigation enforcement mechanism, permitting meritless litigation based on the subjective conditions in the exemption. This will serve only to encourage frivolous litigation and undermine ERISA's goal of establishing uniform national standards.

- Replace the unworkable disclosure requirement with 408b-2-like standards, and eliminate conflicts with securities laws and regulations.

  ☐ YES ☐ NO *…a mixed bag*

  Not Really. DOL did set forth a final set of disclosures that advisors could comply with without violating the securities laws. However, the disclosure provisions in the final exemption are far more onerous than the 408b-2 requirements (the same new disclosures DOL put out just a few years ago), presenting significant ongoing cost and compliance challenges.

Individual Variable Annuities

- Incorporate individual variable annuities into PTE 84-24 or provide a workable safe harbor for compensation on annuity sales under the BIC Exemption.

☐ YES ☒ NO

No. In fact, DOL made the situation worse. DOL removed all variable annuities, including group, as well as individual annuities, and all fixed index annuities, from PTE 84-24. Instead, all of these must use the BIC Exemption, which was not meaningfully modified to provide a clear safe harbor for annuity transactions. This will make it more difficult for plan participants and IRA owners to access guaranteed income products that may fit their retirement needs.

Implementation and Compliance Timeframe

- Extend the compliance deadline to three years.

☐ YES ☒ NO

No. While DOL extended the compliance deadline from eight months to one year, this is not a meaningful extension of time given the sheer scope of the change that will be required to comply with the new rule. By comparison, DOL recently provided 22 months for a far less significant regulatory change. Artificially accelerating this process will serve only to increase costs and mistakes, both of which ultimately hurt the workers and savers DOL intends to help.

For more information, contact Alice Joe at ajoe@uschamber.com or (202) 463-5340