DoL knocked for rushing fiduciary rule replacement

By Jessica Mathews

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Insurance providers and consumer advocates agreed on little during the recent five-and-a-half-hour Labor Department hearing on its new fiduciary rule replacement, except this: The whole process was rushed.

Interested parties had 30 days to comment on the department's new proposal — less than half the time allotted to the Obama administration's iteration before it was given a 15-day extension. And they had a mere three days to submit oral testimony. Apart from SIFMA, which urged the department "to proceed without delay," speakers mostly expressed frustration at how little time they had to review and debate the 96-page proposal.

The speed of the process "is concerning," said Kim O'Brien, CEO of the Federation of America for Consumer Choice, which represents insurance agents and agencies. "The department has collectively received dozens of comment letters, raising a raft of issues. We cannot begin to address them all in a hearing like this," she said in the 10 minutes allotted to her.

While it's unlikely this criticism could delay adoption of the debated regulation, the comments resurfaced long-standing debate over the nature of fiduciary advice. Further, it demonstrated how much is at stake for planners, wealth management firms and retirement savers alike.

If enacted, the rule replacement would reinstate the five-part fiduciary test and add an exemption under ERISA in which fiduciaries could receive compensation for certain advice, including recommendations to roll over clients' plans to IRAs — as long as the advice was in the client's best interest. The original iteration was vacated in 2018 by a federal appeals court after SIFMA, the U.S. Chamber of Commerce and other business trade groups sued the Labor Department.

Twenty-three speakers presented to a panel of department officials, and feedback was largely critical. They emphasized the exemption's alignment with Reg BI — a plus for those who represented broker-dealers while a major con for investor advocates.

Broker-dealers have "a lot of work to do" to manage their conflicts of interest, said Andrea Seidt, commissioner and chair of the Reg BI Implementation Committee for the North American Securities Administrators Association. Seidt cited data from 2018 research on more than 2,000 firms intended to later measure the effectiveness of Reg BI.

Only half the firms polled had policies related to conflicts of interest, and fewer than a third had conflict committees or officers, she said.

"It is too soon to know if Reg BI will fix these problems, and consequently, it is premature for the department to rely upon Reg BI as an effective solution," Seidt said.

At the same time, the proposal was overstepping by requiring firms to say they were fiduciaries to qualify for the exemption, insurance company representatives said.

“The new class exemption may work for the securities industry, but it does not work for insurance representatives,” O’Brien said.

A single sale of an annuity policy does not equal a fiduciary relationship with a client, O’Brien told the panel. In addition, she added, insurance companies do not maintain control over all agents because they have a different set up than broker-dealers.

“[There were] a lot of pretty serious questions raised with this hearing,” David Certner, legislative policy director of AARP and presenter at the hearing, said on a call with reporters after the event.

He noted continuing confusion over who constitutes a fiduciary and how best interest differs from the fiduciary standard under ERISA, among other issues, he said.

Labor Department staff said they would take all statements into consideration as they moved forward with the proposal.

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The effective date could vary based on what changes they make — if any — from feedback, Phyllis Borzi, the former assistant secretary for the Labor Department’s Employee Benefits Security division, said on the call with reporters after the hearing. “It’s clear that they want it out before the election,” she said, in case there is a change in administration.

For many of the regulator’s objectors, reform would hardly be enough.

“[This proposal] will lead to increased betrayals of trust,” said Ron Rhoades, director of the personal financial planning program at Western Kentucky University, in his testimony. “The department should return to the drawing board, start over again and fashion a proposal that reflects the plain language of

ERISA."

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