



DOL's Retirement Policy Agenda—What Plan Sponsors and Plan Advisors Need to Know

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- Mr. Campbell concentrates his practice in Employee Benefits advice and ERISA litigation, specializing in ERISA Title I issues, including fiduciary conduct and prohibited transactions. He also serves as an expert witness in ERISA litigation. The former Assistant Secretary of Labor for Employee Benefits, head of the Employee Benefits Security Administration, Mr. Campbell was ERISA's primary Federal regulator and law enforcement official. He played a key role in ERISA retirement and health reform initiatives of the prior decade, and his regulatory and policy decisions had a fundamental impact on the structure and operation of ERISA plans, including:
 - Proposing the initial 408b-2 service provider and 404a-5 participant disclosure regulations
 - Issuing final regulations establishing Qualified Default Investment Alternatives (QDIAs), electronic fee disclosure, and participant access to investment advice
 - Administering an enforcement program reporting more than \$2.6 billion in monetary results and more than 200 criminal indictments

The Action is (Likely) with the Regulators

- **Fiduciary Advice/IRA Regulation**—DOL Pushing Fiduciary Redefinition, SEC Pondering Fiduciary Harmonization, All Regulators Worried about IRAs.
- **Brokerage Windows**—What Does the RFI Mean, and What Might Come Next?
- **Lifetime Income**—Retirement Income Projection Requirement Moves to Proposal, DOL to Revise Safe Harbor for Selecting Annuity Provider for DC Plans.
- **408b-2 Round Two**: DOL Receives Critical Comments on its Less-Than-Clear Guide Requirement for Lengthy or Multiple Document Disclosures.
- **Target Date Disclosure**—ERISA Disclosures vs. SEC

Redefining Fiduciary Advice/IRA Regulation

- DOL comprehensive proposal published in 2010, withdrawn in 2011 following strong bipartisan criticism. Reproposal scheduled for January 2015, but likely to slip still further.
- SEC moves its fiduciary regulation to long term agenda—no clear date for moving forward.
- House passed bill to require DOL to wait on SEC—about 30 Democrats supported.
- House New Democrats sent letter raising concerns, including many who did not vote for the DOL/SEC bill.
- Congressional Black Caucus sent letter to DOL warning of “disparate impact” on minorities.
- New Republican Congress—will there be bipartisan action to slow DOL rule (Wagner bill or appropriations riders)?

DOL's Redefinition of Fiduciary Advice: The Big Three Issues

1. Prohibited Transaction Rules—Fiduciary status dictates business model and permissible payment arrangements. Will DOL offer new exemptions that help?
2. IRAs—DOL to apply new fiduciary standard to advice between IRA provider/holder.
3. Rollovers—Reproposed Rule Likely Will Put New Restrictions on Rollover Solicitations

Current ERISA Regulation on Fiduciary Advice

Investment advice is fiduciary investment advice only if it is regarding:

- Valuation, or
- Buy/sell/hold recommendations

AND meets all five of these criteria:

- Regularly provided (not just one-time advice),
- For a fee,
- Individualized to plan,
- Pursuant to a mutual understanding,
- That the advice will be a primary basis for plan decision-making.

2010 Proposal Expands Definition

Investment advice is fiduciary investment advice if it is regarding:

- Valuation,
- Buy/sell/hold recommendations, or
- Management recommendations (not defined, but “includes, for instance,” advice regarding proxy voting and asset manager selection)

AND is provided by one of these entities:

- Someone holding themselves out as a fiduciary investment advisor
- An RIA
- An ERISA fiduciary for another purpose, or
- Anyone else giving individualized advice, for a fee (direct or indirect), pursuant to an understanding that the advice “may be considered” in plan decision-making

What to Look for in Reproposal

- **Prohibited Transaction Class Exemption Changes**—Big Issue. If DOL makes certain changes, such as permitting broker-dealer principal transactions despite fiduciary status, may reduce objections.
- **IRA and Rollover Treatment**—Big issue. If DOL continues to apply expanded fiduciary standard to IRAs and restricts rollover solicitations, likely become most controversial portion of rule.
- **Sales Exception**—Could be significant. Original regulation provided that if the plan or participant knew/should have known that “advice” was a sales pitch then not fiduciary advice. Will modified version of this be retained? How narrow or wide?
- **Education Exception**—will DOL expand Interpretive Bulletin 96-1 regarding non-fiduciary educational information?

Why Washington Is Worried About IRA's

- IRAs hold \$5.7 trillion* in assets compared to \$6.1 trillion in ERISA plan assets, and are growing faster.
- 4 out of 10 US households own an IRA.
- About half of traditional IRAs contain rollover assets from employer-sponsored retirement plans.
- Of those rollovers, 85% rolled over all of the assets in their employer-sponsored retirement plan.
- Of those rollovers, the median percentage of total account value due to employer-sponsored plan assets was 70%.
- Rollover amounts are about 13 times direct contribution amounts.

* Data from ICI estimate as of 2nd quarter 2013

Regulators Become Concerned About IRAs

- GAO March 2013 report identified several issues with IRA rollovers and called on DOL and Treasury to address them:
 - Process biased towards rollovers due to procedural hurdles in plan-to-plan transfers
 - Participants given marketing material touting rollovers by service providers to the plan
 - Call centers recommend rollover without knowing financial situation of the participant
- FINRA issued December guidance on suitability for rollover recommendations, and FINRA and SEC identified rollovers as a 2014 enforcement priority.
- DOL likely to address rollovers in fiduciary rule, changing position taken in AO 2005-23A.

DOL on Rollovers, and How Policy May Change in Reproposed Fiduciary Regulation

- AO 2005-23A—DOL holds that if the person soliciting a rollover from a participant is not a fiduciary to the plan or participant, then ERISA does not apply. However, if the person soliciting the rollover is a fiduciary to the plan or participant, then it “may” be a prohibited transaction.
- 2010 proposed rule asked for comment on whether this standard was sufficiently protective of participants.
- Likely that the new regulation will change the standard from the AO to expand the agency’s reach. Not clear how, but one possibility is to propose that any solicitation is fiduciary advice about the disposition of assets currently held in a plan.

Is DOL Taking on Brokerage Windows?

- In FAB 2012-02 (Q&A's on participant disclosure rule) DOL first suggested that plans might have fiduciary duty to treat as DIAs investments that participants select through a brokerage window.
- Resulting outcry from plans and service providers (with Congressional allies) caused DOL to retreat. DOL said may revisit brokerage window issues later.
- New RFI asks 39 questions to help determine “whether and to what extent” DOL should issue “regulatory guidance...and safeguards” for brokerage windows.
- RFI is broad inquiry beyond disclosure, including fiduciary questions (how to determine scope of investments made available through window, etc.).

Lifetime Income Projections on Participant Benefit Statements

- DOL “pre-rule” proposal would require plans to provide lifetime income projections on DC plan benefit statements
 - Could use any reasonable estimate or safe harbor
 - Safe harbor projects current balance out to retirement age using 3% annual participant contribution increase, 7% rate of return, 3% inflation rate
 - Safe harbor calculates annuity on projected balance based on 10-year treasury rate and mortality tables
- Next step—proposed regulation scheduled for January
- Likely to be a mandate in proposal
- Methodology Issues Significant—current balance vs. projected retirement balance, annuity-only calculation, impact on current planning tool and education efforts.

Lifetime Income—DOL to Revise DC Plan Annuity Provider Selection Safe Harbor

- DOL issued safe harbor for selection of annuity provider for a defined contribution plan in 2008.
- Concerns expressed by plans that requirements “too subjective” to ensure compliance with safe harbor
- A key concern is how a plan:
 - “Appropriately considers information sufficient to assess the ability of the annuity provider to make all future payments under the annuity contract”
- DOL effort likely to focus on providing more objective criteria to assess annuity provider solvency, given inability to rely solely on rating agencies.
- Scheduled for January 2015 (likely delayed further)

408b-2 Round Two—Disclosure Guide

- Purpose of 408b-2 regulation is to ensure plan fiduciaries have the information needed to assess “reasonable” fees—current rule in effect since July 2012.
- DOL concerned that current disclosures may be too hard to read, making it difficult to find the information.
- Proposal would require “lengthy or multiple document” disclosures to offer a separate “guide” document showing where to find the information. Guide is not a summary, but, in effect, a table of contents. Issues:
 - “Lengthy”—Not defined. How long is too long?
 - “Locator”—Not defined. How specific is TOC?
 - “Multiple” include references to other documents?
 - Prospective only, or current arrangements?
- Proposal likely very expensive for some service providers—questions raised about regulatory process.

DOL Target Date Final Disclosure Rule

- DOL was scheduled to issue final target date disclosure rule in March, but not clear how long might be delayed for coordination with parallel SEC rule. Reopened for more comment.
- Proposal required QDIAs and DIAs to provide, among other things, graph of glide path, year of most conservative allocation, explanation of “to” vs. “through.”
- By contrast to SEC initiative, DOL proposed rule would apply to any plan investment with target date features, not just mutual funds. Definition based on QDIA definition, and could include collective trusts, model portfolios, etc.

Enforcement—Fee Scrutiny

- DOL’s EBSA is a regulatory and enforcement agency. In FY 2013, 3,766 civil investigations closed, 73% with violations, reporting \$1.7 billion. 320 criminal cases, 88 indictments.
- Participant Inquiries—237,000 participants called DOL, informal resolution yielded \$231 million in benefits, but also 775 cases referred for investigation (21% of total cases).
- Fiduciary Service Provider Compensation Project — “EBSA will continue to investigate the receipt of improper or undisclosed compensation...This project complements the Department’s regulatory and reporting initiatives intended to ensure...comprehensive disclosure about service provider compensation and conflicts of interest.”
- Major Case Enforcement Priority — “EBSA is strategically focusing...on professional fiduciaries and service providers with responsibility for large amounts of plan assets”

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