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Nobody Should Oppose the DOL's Proposed Investment Fiduciary Regulations

by Jeffery Mandell, Esq.

The United States Department of Labor is proposing a fantastic change to ERISA. Wall Street, big business and many in Congress are fighting it. The change should generate greater retirement savings for America.

Fueled in good part by my growing angst with the misrepresentations that are reaching the public, I write this article about the Department of Labor's proposed regulations on fiduciary conflicts of interest.

I have carefully considered articles against the proposed regulations, which regulations I have studied. This resistance recently included a piece from the U.S. Chamber of Commerce. It sets forth three reasons why the proposal will hurt small businesses. I do not know whether the Chamber cares about small business, but I do know that throughout my career I have extensively represented large and small businesses. Twisting matters every which way around, the article is generally fabricated, self-serving nonsense.

Here is my view. The DOL's fiduciary/conflict of interest proposal if finalized will:

(a) be good for America except possibly for some in the retirement plan/IRA financial industry (see below);

The rule will require advisors to be candid & honest with plans, participants and IRAs. Current law does not require this!

(b) prohibit lying and misrepresentations when advisors provide investment recommendations or advice to plans, participants and IRA owners;

(c) require advisors to disclose to its client if the advisor has a conflict of interest in its rendering of advice (for example, an advisor for personal gain recommends Investment A but the advisor knows that Investment B, where the advisor earns less, is best for the client, and the advisor does not disclose this conflict to its client);

(d) perhaps allow the investor to successfully sue the advisor if the advisor does not meet this new low standard of accountability and candor;

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(e) make Wall Street work a bit harder to obtain and retain plan and IRA assets under control;

(f) not burden the small or any employer but will make some advisors comply with common sense rules to encourage their honesty;

Most all arguments against the proposed rule are neither legitimate nor valid.

(g) just like with the 408(b)(2) and 404a-5 regulations, make retirement investors more informed which in turn should increase returns for them;

(h) not make investing harder and more expensive for plans and IRA owners unless Wall Street strategizes to do that;

(i) disrupt current business practices for certain advisors who hide the ball;

(j) validate advisors who do not compromise their integrity when providing ERISA and IRA investment advice or recommendations;

(k) have short term bumps that might (but I doubt it for readers of this article) include a temporary fee increase for a small slice of current, primarily IRA, investors (and possibly temporarily boost profits for Wall Street);

(l) encourage financial institutions' behavior that is best for the investor;

(m) not affect all in the retirement financial sector; many will not become fiduciaries, and many currently avoid the types of conflicts the new rules prohibit; and

(n) be the beginning of a dialogue with ERISA stakeholders, including with the financial industry so long as it accepts that business-as-usual where less than full candor is perfectly legal and acceptable is no longer tolerable.

A financial institution, advisors and related parties will for the first time possibly be held liable if their personal interests guide their advice and recommendations rather than what's best for their clients.

I see nothing above that is objectionable. My clients expected honesty from their advisors. And if a small or medium-sized business sustains success, I can rest assure you that candor and honesty is often a key element in that success. The Chamber of Commerce says the proposal treats small business as "babies". That is an offensive way of stating that small businesses do not have the time, often the temperament and even cynicism, and not the resources, regardless of how smart the business owner is, to research the advice the advisor made to confirm the advisor is not misrepresenting or hiding the ball as

to how the advisor will personally benefit one way with one investment yet benefit a different or worse way with an alternative investment.

Employers, participants and IRA investors might be surprised to learn that a lawsuit against an advisor or financial institution, regardless of how square the facts are against the advisor, has a snowball chance in hell to win, much less start, such a lawsuit. (Revising the institutions' standard services/investment contracts can sometimes reverse that inequity.)

In addition to representing all kinds of employers and other plan and trust sponsors, I also have for 34 years worked regularly with, for and value many who provide investment, consulting, TPA, brokerage and other services to plans and individuals. I do not by any means indict everyone in the industry; many (I speculate a small but growing minority) exist for whom these regulations are not necessary.

More educated consumers of plan and IRA investment advice should mean better decisions, better control and thus greater retirement savings.

Financial concerns earn the greatest returns in ERISA's marketplace. There is absolutely huge money in plans and IRAs. Financial institutions and their related parties should have some skin in the game when the only skin will be that the industry will not be allowed to deceive plans, fiduciaries, participants, and IRA owners. Advisors will have to act in their clients' best interests.

Finally, why do I write that nobody should object to the proposed regulations? Because it simply is the honest and the only right thing for financial institutions to do. Moreover, it shall level the playing field for those advisors who take advantage of vulnerable employers and IRA owners, and those who want to do right by them. We do not need to continue another Big Short.

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Employee Benefit Publications & Seminars, sister company to The ERISA Law Group, P.A., publishes, trains, educates and speaks about employee benefit issues to the employee benefits community, be it for employers, advisors, fiduciaries, etc. Jeffery Mandell is the President of EBPS and The ERISA Law Group, P.A. He speaks and writes frequently, and represents clients throughout the United States. He can be reached at 208-342-5522, 1-866-374-7252, or at jeff@erisalawgroup.com.

For a longer more colorful article on this issue, see Beyond Wall Street's Myth – The Little Guy Will Be A-OK http://www.erisalawgroup.com/documents/2016-March-Newsletter.pdf. For a technical explanation, contact Jeff Mandell.

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