Insight

Takeaways from Last Month's Hearings on DOL's Fiduciary Rule

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It's been about two weeks since the Department of Labor (DOL) concluded its final round of hearings on the proposed fiduciary rule, and DOL seems more intent than ever on finalizing the rule with little to no change. After four days of testimony from nearly 80 experts falling on both sides of the debate, few, if any, new arguments emerged.

Timothy Hauser, Assistant Secretary for Program Operations of the Employee Benefits Security Administration (ERISA) within DOL, led the hearings, where one question in particular asked over and over again: What is the difference between advice and sales, and can retirement savers distinguish between the two? This question came as no surprise considering the Obama Administration's repeated insistence that those individuals saving for retirement aren't sophisticated enough to make their own investment decisions.

Opponents of the regulation highlighted that ultimately it would crowd out exactly those retirees who desperately need investment advice as a result of significantly higher costs of compliance. By essentially disallowing commission-based accounts (save for the convoluted Best Interest Contract Exemption, which experts call "unworkable"), savers will be pushed into fee-based accounts, which come at a much higher cost.

One of the more interesting exchanges came when Ron Bird, senior regulatory economist at the U.S. Chamber of Commerce, called Hauser "the agent of Leviathan." For those of you not up to speed on your 17th century literature, Leviathan is the 1651 book by Thomas Hobbes that calls for a social contract and governance by an "absolute sovereign." Bird continued, telling Hauser that this rule is "[a] force for great good, but by its very hugeness, it brings forth great risk."

Several echoed Bird's feelings that DOL is overstepping its power and that this rulemaking might be a better fit for another agency, like the Securities and Exchange Commission. Kenneth Bentsen, CEO of the Securities Industry and Financial Markets Association (SIFMA), said that "[he] disagree[s] with the process whereby one agency is developing yet another standard that will apply to only one sector of the retail investment market. It simply makes no sense that the government would not develop a holistic standard."

Most recently, the National Black Chamber of Commerce (NBCC) came out in firm opposition to what it calls a "harmful regulation." NBCC President and CEO, Harry C. Alford said that the "DOL regulations will likely result in fewer commission based-services in the marketplace, leaving only fee-based and managed account services that are not affordable options for many individuals in our communities." He asked Labor Secretary Thomas Perez to "evaluate the economic impact of this proposal on small businesses and re-propose" the rule.

Responding to mounting concerns that this iteration of the fiduciary rule will result in loss of choice for investors and a loss of business for advisers, on the final day of hearings, and in subsequent interviews thereafter, Hauser assured investors that if they like their adviser, they can keep their adviser. Likewise, if advisors like their commissions, they can keep their commissions. Sound familiar?

Chances are that very little change to the proposal will come about as a result of the hearings. The DOL spent a week asking the same questions and hearing the same answers so that it can check the “due diligence” box when the fiduciary rule’s iniquities began to manifest down the road. As of this writing, 2610 comments have been submitted to DOL either for or against the rule, and commenters have until September 21st to give the remainder of their two cents.

Secretary Perez has expressed his commitment to finalizing the rule – possibly before the end of the year – much to the dismay of lawmakers, including 12 Senate Democrats, who have threatened legislation that would block the rule from being finalized. Assuming Senate Republicans are on board, those 12 Democrats would give fiduciary rule opponents the numbers they need to move forward and block the rule, making the ultimate fate of this fiduciary rule increasingly unclear.