DOL Fiduciary Rule under Siege

In late April, the Department of Labor approved a rule that raises investment advice standards for retirement accounts. The rule requires financial advisers to act in the best interest of clients in connection with their 401(k)s, individual retirement accounts, and other qualified accounts. Then in May, the Senate and the House passed a resolution to kill the rule. On June 8th, President Obama vetoed the resolution, and neither the House nor the Senate came close to the supermajority that could override him.

In June, yet another group (including the U.S. Chamber of Commerce, the Financial Services Institute (FSI), and the Securities Industry and Financial Markets Association (SIFMA)) filed a lawsuit in a Texas district court seeking to strike the rule down. So, what's going on?

Bob Veres, a prominent writer and commentator in the financial services industry, helped me understand the opposition to the DOL fiduciary rule with a review of some of the litigation that preceded it…

"You might be surprised to learn that your pension and IRA assets are protected from fraud, malfeasance, and conflicts of interest by an entirely *different* government agency than your taxable and brokerage accounts. Under the Investment Advisers Act of 1940, the Securities and Exchange Commission polices investment advice and the fairness of recommendations and markets related to taxable accounts. Retirement accounts are policed by the U.S. Department of Labor, under the Employee Retirement Income Security Act (ERISA) of 1974,

"Recently, the Department of Labor created new rules which offer additional protections for retirement plan participants. The rules are spelled out in a document that runs to more than 1,000 pages, but the gist of it is that firms and individuals who provide investment advice to these plans, and recommend investments for the plan participants, must act as fiduciaries—which, broadly speaking, means that they are required to give advice that will be in the best interests of their clients, rather than lining their own pockets or selling what the brokerage firm wants to unload. The rules extend to rollovers into IRA accounts, and also specify the types of compensation that these advisors may charge when they make recommendations.

"In recent years, a variety of class-action lawsuits have challenged companies which were either accused of being careless about the fees they paid to consultants out of the accounts of plan participants, or included company stock as a prominent investment in the plan. The list of defendants reads like a Who's Who of the Fortune 500, including Lucent, WorldCom, Household International, Dynegy, AT&T, CMS Energy, HealthSouth, Macy's, New York Life, and Colgate.

"In the past, these suits were typically brought against corporate giants, but that trend may be changing with the change in rules and increasing scrutiny of fees. A recent class action suit was filed against the plan sponsor and fiduciary advisors of the LaMettry's Collision, Inc. 401(k) Profit Sharing Plan, which has only 130 participants and just $9.8 million in assets. The suit claims that the turn-key retirement plan package created and administered by Voya (formerly ING Life Insurance) was loaded with expensive investments, and that there were unnecessary revenue-sharing charges which, together, cost plan participants millions of dollars in lost retirement plan growth.

“Among the particular irritants was the fact that Voya assessed a daily asset fee whenever employees invested in non-Voya funds, and then added on a monthly administration fee which resulted in costs that ran to 112% more than the cost of similar funds in the marketplace. (ING, now Voya, had also been named in the HealthSouth ERISA lawsuit.)

“The lesson for businesses of all sizes (and for plan participants) is that it is more important than ever to take a hard look at the costs of your 401(k) plan provider, and see if there are hidden fees, preferential pricing for in-house funds, or too much emphasis on company stock as the preferred investment. Employees are more empowered than ever to use the courts to rectify situations that deviate from best practice pricing in the retirement plan marketplace.

“Bigger picture, does it make sense that assets in a 401(k) are better-protected than retail taxable investment accounts policed by the SEC? Should advisors to a qualified retirement plan have to be more careful, and frugal, in the advice they give than people who make investment recommendations to your taxable portfolio?

“Obviously not. The SEC is considering changes to its own regulatory structure, and has announced that it will propose new rules next April. Professional advisors have been waiting for decades for rules that would rein in sales practices where agents and brokers are posing as “advisors.” Based on the track record so far, nobody is holding their breath.”

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