CFA Consumer Federation of America

DOL Conflicted Advice Rule will Help, Not Hurt Retirement Savers

In a last-ditch effort to prevent new rules to strengthen protections for retirement savers from being released for public comment, financial services firms and their lobbyists have launched a massive misinformation campaign. This fact sheet exposes the false assumptions behind the main arguments being mounted by industry in an effort to kill the Department of Labor's conflicted advice rules.

Myth: Low- and middle-income retirement savers will lose access to advice if the DOL forces brokers to operate as fiduciaries under ERISA when providing that advice.

Fact: Small account holders have the most to gain from a well-designed DOL rule. As the industry itself has noted, low- and middle-income workers, women, and minorities are disproportionately likely to get retirement advice from financial professionals who, because of loopholes in the rules, are not fiduciaries under ERISA. As a result, the workers and retirees who are most in need of making every dollar count do not get the same assurance that wealthier investors commonly receive that the advice they get will put their financial interests ahead of those of the financial firm providing that advice. Moreover, the fundamental assumption upon which industry bases this argument -- that brokers would be forced to move clients into fee-based accounts -- is also false. If the DOL acts as expected, brokers will be free to maintain their existing commission-based business model but will be required to act in the best interests of their customers despite their conflicts. This is something the broker-dealer community has said repeatedly that it is prepared to do.

Myth: DOL rulemaking will force brokers to move clients to fee-based accounts.

Fact: Until the revised rule is issued for public comment, any claims about the effect of a DOL rule are at best speculative, at worst deceptive. What we do know is that DOL officials have said repeatedly and publicly that the rule will permit commissions and other forms of transaction-based compensation subject to a requirement that recommendations are in the best interests of the investor. Thus, any industry claims that brokers will be forced to move clients to fee-based accounts are entirely unfounded. Moreover, the DOL has promised that, when it puts the revised rule out for public comment, it will simultaneously publish the draft guidance that will determine how the fiduciary standard is applied in these circumstances where compensation practices create conflicts of interest. Once the rule and guidance are made public, all interested parties can assess whether the DOL has achieved its goal of strengthening protections for retirement savers while accommodating a variety of business models. The question is why financial firms are working so hard, and spending so much money, to prevent a fact-based assessment of the revised rule.

[1] Fiduciary Duty and Investment Advice: Attitudes of 401(k) and 403(b) Participants, by: S. Kathi Brown, from: AARP Research, September 2013. Available here.

Myth: Fee-based accounts are more costly than commission-based accounts in the long run.

Fact: While the lack of transparency around broker-dealer costs make their services appear more affordable, there is no evidence that typical brokerage services to retirement savers are in fact more affordable than comparable fee-based services from investment advisers. On the contrary, in many if not most scenarios, brokerage services end up costing the customer either the same as advisory services or more for a lower level of service. This is particularly evident when the total costs to the customer, including the costs of the recommended investment products, are taken into account. (See here for a more detailed explanation.)

Myth: Customers choose to work with broker-dealers because they prefer this business model.

Fact: Surveys show that retirement savers overwhelmingly prefer to get financial advice that puts their interests first.[1] Their "choice" to work with broker-dealers reflects both their inability to distinguish between "financial advisers" who are fiduciaries and those who are not and their fundamental assumption that all financial advisers are required to act in their best interests. If the DOL acts as expected, retirement savers who prefer to pay for advice through commissions will no longer be forced to choose between the convenience of that payment method and their desire to receive advice that puts their financial interests first.

Myth: Competition in the market ensures that investors' interests come first, making regulation unnecessary.

Fact: In the broker-sold market, investment products such as mutual funds and variable annuities compete to be sold, not bought. Investments that can't compete on quality can still gain market share by offering generous financial remuneration to the financial professionals who advise retirement savers. By imposing a best interest obligation on all financial advisers providing retirement advice, adoption of a well-designed DOL conflicted advice rule would help force investment products to compete on quality, thus harnessing market forces to help not harm retirement savers.

Myth: Because the SEC has primary jurisdiction in this area, DOL should defer to the SEC's leadership.

Fact: In enacting ERISA, Congress gave the Department of Labor exclusive rule-writing authority under the statute. The problem DOL's rules are intended to address -- loopholes in the definition of investment advice under ERISA -- are entirely within its jurisdiction. Moreover, the changes DOL has proposed -- eliminating the exemption for one-time advice along with the requirement that there be a mutual agreement that the advice forms the primary basis for the investment decision -- will bring the DOL's definition into better alignment with the definition of investment advice under securities laws. Since the DOL has consulted extensively with the SEC in developing its proposed approach, there is no reason to fear a conflict between the two agencies' approach, should the SEC eventually get around to taking action.

Myth: The SEC and FINRA are already acting to address abuses associated with 401(k) rollover recommendations.

Fact: Recent announcements by the SEC and FINRA that they would be focusing on this issue of rollover abuses were very welcome. However, any actions they take will be based on the weaker suitability standard that applies to broker-dealer recommendations under the securities laws. So while this is an important step in the right direction, it is not sufficient to address the reasonable expectation among retirement savers that the recommendations they receive about the most important financial decision many will make would be designed to put their interests first.

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