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Deja Vu: The Advice Regs Are Here, Now What?

By *Neil Anderson*

Yesterday Assistant Secretary of Labor **Phyllis Borzi** unveiled the finalized regulations for giving advice 401(k) participants and individual retirement account (IRA) investors[see *The 401kWire*, 10/24/2011], giving providers and advisors two ways to give such advice.

Yet, several industry insiders in Washington are skeptical about the new reg's impact on the retirement plan providers.

"We're not expecting any providers to take advantage of them," American Society of Pension Professionals and Actuaries (**ASPPA**) **Brian Graff***The 401kWire*.

"This is another lost opportunity to make meaningful reforms that would facilitate the availability of face-to-face investment advice," **Brad Campbell**, Borzi's predecessor who now serves as of counsel at **Schiff Hardin**, said in an e-mailed statement.

"I think it ultimately provides only marginally more relief than is already available under the law, and is unlikely to have a material impact on the availability of advice," added Campbell.

Fred Reish, an ERISA attorney with **Drinker Biddle & Reath**, countered by suggesting that at least one segment of the industry could take advantage of the newly defined advice methods.

"By and large, it wasn't going to be of much value to the broker-dealers, but it was going to be of value to the recordkeepers," Reish said, pointing to the appeal of computer model advice for recordkeepers with their own proprietary mutual funds and recordkeepers receiving different amounts of revenue sharing from different funds on their platforms.

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Another ERISA legal eagle, **Wagner Law Group** managing director **Marcia Wagner**, argues that it is the broker-dealers who should be excited about this new reg.

"This is their answer. This is what they've been waiting for," Wagner said. "I can't imagine the wirehouses saying, 'No, we're going to blow this off.'"

"There's always a good portion of the plan participants who want to be told what to do," Wagner added. "The Department of Labor is attempting to give the industry what it wants and what it needs. It's their way or the highway, but before this it was just the highway."

Insiders also weighed some of the smaller pieces of the new reg.

Larry Goldbrum, general counsel at the **Spark Institute**, said that he's "pleased" that the DoL's final version of the reg allows historical performance to be considered inside of advice computer models.

"We were concerned that language in the proposal could have limited advisers' ability to rely on historical performance in other situations. The DoL has clarified that was not their intent," Goldbrum told *The 401kWire* in an e-mailed statement. "We are also pleased that the Department decided not to define generally accepted investment theory and instead leave that up to investment professionals."

Campbell echoed Goldbrum's praise of the DoL's decision to leave "generally accepted investment theories" undefined, "and for removing the Proposal's blatant bias against actively managed investments."

Yet he worries about another piece of the computer model part of the reg: the requirement that computer models take into account, and make recommendations regarding, the plan sponsor's own stock where it's included in the plan lineup.

"In the three previous versions of this rule, DoL did not require the computer model to make a recommendation about employer securities," Campbell stated. "This was due to comments received during the Department's two formal Requests for Information and two Administrative hearings showing that participant advice models were not designed to make recommendations regarding a single, undiversified security, and that inclusion of such a requirement would reduce the availability of advice."

"Contrary to these comments, and without providing any evidence or analysis to the contrary, the Department simply states in the final rule that it believes it is feasible to develop such models and that the requirement is beneficial to participants," Campbell added.

The rule takes effect in two months, so prepare to watch for its results soon.

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