

# DOL Braces For Hostile Reception To Fiduciary Rule Rewrite

By **Kellie Mejdrich**

Law360 (September 12, 2023, 9:06 PM EDT) -- A top U.S. Department of Labor official pushed back Tuesday against criticism of a soon-to-be released proposal that could expand federal benefits law's reach over retirement plan advisers who give investment advice for a fee, saying the regulations shouldn't be judged until they've been publicly unveiled.

Speaking during a virtual panel discussion hosted by the American Bar Association, Lisa M. Gomez, the DOL's assistant secretary for employee benefits security, said she didn't have details about the timing of the proposal's public release because the agency submitted the proposal to the White House's budget office over the weekend.

But the Office of Information and Regulatory Affairs, which is part of the White House's Office of Management and Budget, is one of the last stops before a regulation's public release. The proposal's submission to the OMB has **already sparked criticism** from retirement industry trade groups hostile to the proposal's potential to raise costs and administrative burdens if finalized.

"We look forward to everyone being able to see it," Gomez said Tuesday during a question-and-answer session with one of the panelists, Andrew Oringer, partner and general counsel at The Wagner Law Group.

Gomez said she couldn't speak about the contents of the proposed rule before it becomes public, citing the interagency review underway.

The DOL said in its spring 2023 regulatory agenda that the proposal would amend the definition of the term "fiduciary" under the Employee Retirement Income Security Act to better account for conflicts of interest involved when someone gives investment advice for a fee to retirement plans and individual retirement accounts. The regulation would replace the DOL's earlier attempt to amend ERISA's fiduciary definition; the Fifth Circuit invalidated the earlier rule in 2018 based on a finding it constituted an administrative action that exceeded the agency's authority.

Gomez said Tuesday that the proposed rule is following "years and years of engagement with stakeholders" from both industry and consumer groups, and acknowledged the litigation history involved.

"We are really trying to make sure that the proposal is responsive to all of that," Gomez said.

She was also critical of news reports and public statements about the rule since the proposal was sent to the OMB over the weekend, and said that "no one outside of the government has seen what the proposal has to say."

"I think there's been a lot that has been published in news articles and whatnot where people are, you know, sort of anticipating the worst with this," Gomez said.

"And I understand that a lot of people have a lot of ... equities involved here, and hope that you can all kind of ...remain patient and then read it when it comes out with an open set of eyes, and we'll take it from there," she added.

The rule is expected to target advice rendered for a fee regarding rolling money out of an ERISA-

regulated retirement plan, according to descriptions from top officials and the proposal summary from the latest regulatory agenda. That's one of the most controversial aspects of the proposal, and it is fiercely opposed by retirement industry groups, particularly those representing insurance agents and other financial professionals who could be newly subject to ERISA fiduciary standards.

A Fifth Circuit panel's **decision to invalidate** the earlier fiduciary rule in March 2018 essentially reinstated the DOL's five-part test from 1975 for determining fiduciary duties. The five-part test is used to determine what constitutes investment advice subject to ERISA's fiduciary duties, based on certain factors of the advice including the type, frequency and purpose.

That led the DOL under former President Donald Trump in December 2020 to **finalize an exemption** to ERISA's prohibited transaction rules allowing investment managers to provide rollover advice for a fee and receive certain types of compensation.

A preamble to that exemption also explained the DOL's view on how the 1975 five-part test applied to rollover situations, **sparking a lawsuit** filed in Texas federal court in February 2022 by a trade group and insurance agents claiming the DOL's interpretation violated the Administrative Procedure Act. A magistrate judge overseeing that case **recommended invalidating** parts of that preamble in June.

--Editing by Abbie Sarfo.