

Securities Regulation Daily Wrap Up, TOP STORY—ERISA fiduciary rule finalized: Is DOL stepping on SEC's toes?, (Apr. 6, 2016)

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The Department of Labor finalized its controversial rule installing a fiduciary standard for ERISA plan advisers. The rulemaking answers the Obama Administration's [call](#) for regulators to reduce the impact of conflicts of interest on Americans' retirement savings, but substantial questions remain about how the DOL and the SEC will coordinate efforts and avoid regulatory overlap. Some critics of the rule say that contrary to the goal of helping investors understand advisers' motivations and responsibilities, the dual-regulatory regime will only muddy the waters further.

Hallmarks of fiduciary rule. In addition to holding retirement plan advisers to a fiduciary standard, the rule creates a Best Interest Contract (BIC) exemption that allows firms to continue existing compensation and fee practices, as long as they disclose any conflicts and adopt anti-conflict policies and procedures. Compared to the rule proposed last April, the final rule eases the strictures of the BIC exemption and lowers the threshold at which firms become eligible.

Relevant to the broader securities industry, the regulations contain a carve-out ([29 CFR 2510.3-21\(c\)\(2\)](#)) for transactions in swaps and security-based swaps. A swap dealer, security-based-swap dealer, major swap participant, or swap clearing firm is not providing "investment advice" in connection with a swap or security-based swap if all of the following apply.

1. The employee benefit plan is represented by an independent ERISA fiduciary.
2. In the case of a swap dealer or security-based-swap dealer, the person is not acting as an adviser to the benefit plan in connection with the transaction within the meaning of Commodity Exchange Act Section 4s(h) or Securities Exchange Act Section 15F(h).
3. The person does not receive compensation directly from the plan or plan fiduciary for providing investment advice in connection with the transaction.
4. In advance of making recommendations, the person obtains a written representation from the independent fiduciary that the fiduciary understands the person is not undertaking to provide impartial advice or advice in a fiduciary capacity.

A detailed analysis of the ERISA aspects of the rule is available [here](#).

Regulatory overlap. The Labor Department's action on the rule is controversial in part because of duplication with the SEC's authority to regulate broker-dealers and investment advisers. Section 913 of Dodd-Frank directed the SEC to suss out any gaps, shortcomings, or overlaps in the regulation of broker-dealers and investment advisers. The resulting [study](#) recommended a

uniform fiduciary standard that would apply equally to brokers and investment advisers, but as SEC Chair Mary Jo White told the House Appropriations Financial Services Subcommittee last month, the rulemaking process will be "very hard, and not quick, to do ... well" ([relevant testimony](#) at 32:29 and 47:17).

Some lawmakers bristled at the Labor Department's proposing a rule before the SEC had a chance to craft its own regulations. The House [passed](#) a bipartisan bill that would have made the DOL wait 60 days after the SEC finalized its own broker-dealer fiduciary rule. The [Retail Investor Protection Act](#) would have slowed the SEC's rulemaking down as well, requiring it to conduct an analysis and report to Congress beforehand. The bill's sponsor, Rep. Ann Wagner (R-Mo), [vowed](#) to undo the DOL's final rule, which she said "will only raise costs, limit choices, and restrict access."

Lawmakers, industry react. Jeb Hensarling (R-Tex), chair of the House Financial Services Committee, agreed, likening the rule to the Affordable Care Act. "Just like Obamacare this complex rule will likely raise your costs and potentially limit your choices," he said in a [press release](#). The DOL rule does not contemplate the SEC's existing regulatory regime, Chair Hensarling said, citing Chair White's allusions to regulatory overlap in her testimony before the appropriations subcommittee. (The DOL's [fact sheet](#) stresses that the rule's carve-out for swaps and security-based swaps was coordinated with both the SEC and the CFTC.)

The fiduciary rule earned [praise](#) from Rep. Maxine Waters (D-Cal), ranking member of the House Financial Services Committee, who suggested the rule will close "loopholes that allow some advisers to choose to recommend an investment strategy that yields higher profits for themselves but lower returns for their clients." Senator Elizabeth Warren (D-Mass) [tweeted](#) her support: "Too often gov works for those who can hire armies of lawyers & lobbyists. But not always." Better Markets' Dennis Kelleher [called](#) the rule historic: "This is a great victory for the America[n] people who beat all the power, money and lobbying might of Wall Street, which waged a relentless war against this simple and sensible rule."

But others would differ with Kelleher's characterization of the rule as "simple." SIFMA and the [Chamber of Commerce](#) both declined to react before having had a chance to examine the regulations thoroughly, although each expressed initial skepticism. "This final rule is voluminous and every word matters," SIFMA's Kenneth Bentsen [said](#). "A poorly drafted rule could result in unnecessarily raising costs for investors while limiting their choice."

NASAA addressed concerns that implementation could hurt smaller investors by calling for cooperation among regulators and industry members. "Less prosperous investors need not be abandoned if we work together towards a solution," [said](#) NASAA's president, Judith Shaw.

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