



Consumer Federation of America

DOL Rule Would Expose Vulnerable Retirement Savers to Harmful Advice

Pushers of High-Cost, High-Risk Financial Products Would Be Free to Siphon Billions of Dollars from the Retirement Accounts of Financially Vulnerable Workers and Retirees

On June 29th, the Trump Administration rolled out a new regulatory package for retirement investment advice that, if finalized, would allow brokers and insurers to siphon billions of dollars a year out of the retirement accounts of hard-working Americans, putting their ability to afford an independent and dignified retirement at risk.

The regulatory package from the Department of Labor (DOL) is a multi-pronged assault on Americans' retirement security. It would:

- Make it much easier for financial firms to avoid any fiduciary responsibility when advising retirement savers about their retirement plan and IRA investments.
- Deprive retirement savers of critical protections when the risks and conflicts are greatest.
- Substantially weaken protections against conflicts of interest when the fiduciary standard does apply.
- Render the standard unenforceable for IRA investors, leaving millions of retirement savers without recourse when they are victims of harmful advice.

In short, the proposal is designed to preserve financial firms' ability to place their own interests ahead of their customers' interests and profit unfairly at their expense. This is precisely what one would expect from Labor Secretary Eugene Scalia who, before coming to the Department of Labor, represented the brokerage and insurance interests whose practices are the subject of this rulemaking but who saw no need to recuse himself despite his significant conflicts of interest.

Conflicted Financial Firms Get an Easy Escape Hatch to Avoid Fiduciary Responsibility

As part of the regulatory package, the DOL reinstated a loophole-laden definition of fiduciary investment advice that financial professionals can easily exploit to provide conflict-driven retirement investment advice without being subject to the fiduciary duty that is appropriate to their advisory role.

Specifically, one-time recommendations, no matter how consequential, are carved out, because the definition only covers advice that is provided on a "regular basis." For example, although it is quite common for workers to seek one-time professional advice about what to do with their 401(k) when leaving a job, that advice will typically not be covered. Even when a firm does provide advice on a regular basis, they can still evade their fiduciary obligations by

claiming they never intended for their advice to serve as “a primary basis” for the retirement savers’ investment decision.

The result: Financial firms and their sales reps can act like they are providing high-quality, trustworthy advice when they are really providing conflict-driven sales recommendations that undermine retirement savers’ financial security.

Critical Protections are Stripped Away When They are Needed Most

Among the most consequential investment decisions retirement savers make is whether to roll their money out of a workplace retirement plan and into an IRA. Retirees are particularly vulnerable, as they may have limited opportunity to recover from a bad rollover decision. Meanwhile, financial firms eager to get their hands on the trillions of dollars held in workplace retirement accounts have a strong incentive to recommend rollovers.

The DOL pretends to extend new protections to rollover recommendations, but those protections only apply to rollovers where there is an ongoing advisory relationship. As a result, the only rollovers likely to be affected are those that are already covered by separate regulatory protections under the securities laws. When it comes to rollovers to non-securities, sold in a one-off sales transaction, the DOL standards will seldom if ever apply.

But this is precisely where the protections of a fiduciary standard are needed most. Non-securities, including certain annuities, commodities, and real estate, are among the most complex, opaque, illiquid, and costly investments sold to retail investors. They are typically sold subject to some of the most toxic compensation conflicts and the weakest sales standards. Instead of looking for ways to protect retirement savers from harm, the DOL gives these transactions a regulatory free pass.

Because of this loophole, sellers of these products can advise retirement savers to take a lifetime of hard-earned savings and plunge it into a high-cost, low-quality investment that saddles the retirement saver with excessive risks and substandard returns, unimpeded by the DOL rule. Workers and retirees will lose billions from their retirement nest eggs as a result.

It Would Expose Retirement Savers to Advice that is Tainted by Conflicts of Interest

In addition to re-opening loopholes in the definition of fiduciary investment advice, which the DOL did through a final rule, the Department is also proposing a new rule to permit conflicted compensation when the fiduciary standard does apply.

The proposal does little to protect retirement savers from advice tainted by conflicts. Specifically, the exemption would allow all forms of conflict-laden, transaction-based compensation subject only to conditions modeled on the vague and weak requirements in the Securities and Exchange Commission’s “Regulation Best Interest.”

The SEC’s industry-friendly rule was opposed by investor advocates on the grounds that it creates a best interest standard in name only and provides only minimal protections to prevent conflicts from tainting recommendations. Best interest is undefined in the rule and has been interpreted by the SEC in a way that is indistinguishable from the suitability standard it

replaces. The obligation to “mitigate” conflicts is similarly vague, but it clearly continues to allow incentives that encourage and reward harmful advice. And the SEC defers to firms that strenuously opposed stronger protections to decide how to implement both the best interest standard and the obligation to mitigate conflicts.

The DOL now proposes to use this non-fiduciary standard as a substitute for the high fiduciary standard Congress adopted under ERISA to protect retirement plans and retirement savers from conflict-driven advice. This represents a huge and unwarranted watering down of that standard.

The Proposal Makes the Fiduciary Standard Unenforceable for IRA Investors

The proposal is explicit in stating that it provides IRA investors with no remedies when they are the victims of harmful advice. Since the DOL has no authority to enforce the fiduciary standard as it applies to IRAs, this would render the standard a mere mirage for millions of retirement savers who will be misled into relying on its supposed protections. When these vulnerable workers and retirees suffer financial harm as a result of conflicted advice unleashed by the rule, the rule would provide them with no recourse to redress that harm.

The Trump Administration is Trying to Rush Through the Proposal

With the backing of the financial industry, the Administration is attempting to rush through this anti-investor rule without an opportunity for the millions of Americans who will be affected by the relaxed standards to weigh in. It has reinstated the loophole-laden definition of fiduciary investment advice without even considering whether revisions are needed. For the proposed revision to the fiduciary standard itself, the DOL has provided only a 30-day comment period for a rule proposal with the potential to affect millions of retirement savers and trillions of dollars in retirement savings. That gross abuse of process isn’t driven by a compelling need to enact the proposed changes quickly. Instead, it reflects a cynical attempt by the DOL to get the rule enacted before a new Administration has a chance to weigh in.

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With their retirement security on the line, workers and retirees need and deserve retirement investment advice they can trust. The DOL proposal would instead expose them to conflicted sales recommendations dressed up as advice. It should be withdrawn in its entirety and a new rule proposed that protects workers and retirees, not the excess profits of well-heeled financial firms.