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The Federal Government May Be Getting Serious About Retirement — Finally

It looks like, when it comes to federal legislation affecting retirement, the long waiting period may be coming to an end, with the introduction of one new bill, the reintroduction of another, and — finally — a decision on the controversial fiduciary rule.

Let's look at them in reverse order. The Department of Labor's (**DoL's**) fiduciary rule — which among other things held that anyone serving as a fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA) statute must do so solely in the best interests of plan participants and beneficiaries — essentially expired in June.

As we have written in the past, the "best interest" proviso of the fiduciary rule was viewed by many as a considerable stumbling block, with various issues surrounding potential conflicts of interest at play. Some five years in the making, the DoL had finally approved the rule in 2016 during the Obama administration.

But just two weeks into the Trump presidency, the fiduciary rule appeared to be on the ropes when President Trump ordered a review of the rule "to determine whether it may adversely affect the ability of Americans to gain access to retirement information and financial advice." The issue then continued to simmer for a number of months, coming to a head in March 2018 when a 2-1 decision by the 5th U.S. Circuit Court of Appeals agreed with the U.S. Chamber of Commerce, the Securities Industry Financial Markets Association and others that the rule could make providing retirement advice too costly, particularly for lower-income Americans.

In late April, the Trump administration allowed a deadline to seek a rehearing to pass without taking action. Later that same month, the 5th Circuit Court unanimously denied a motion by California, New York, Oregon and the American Association of Retired Persons (AARP) to replace the federal government in defending it. Finally, on June 21, 2018, after the federal government declined to ask the U.S. Supreme Court to reconsider the appeals court's decision, the fiduciary rule ended.

So does this mean that fiduciaries need not consider what is "in the best interests" of their clients? One would hope not; although no longer mandated by law, it seems unlikely that people who provide advice to retirement accounts will simply put their own interests first and run roughshod over those of their clients.

Further, federal and state securities regulators, the Financial Industry Regulatory Authority (FINRA), state attorneys general, and others are still able to make claims against financial services providers if potentially abusive sales practices are found.

And the Securities and Exchange Commission (**SEC**) has also become directly involved in the discussion around fiduciary standards, proposing a package of ideas that it feels would enhance the quality and transparency of investors' relationships with investment advisers and broker-dealers.

Under the SEC's proposed *Regulation Best Interest*, a broker-dealer would be required to act in the best interest of a customer when making a recommendation of any securities transaction or investment strategy involving securities to that customer. Regulation Best Interest is designed to prevent a broker-dealer from putting its financial interests ahead of the interests of a customer when making recommendations.

On another front, Senate Finance Committee Chairman **Orrin Hatch** (R-Utah) and Ranking Member **Ron Wyden** (D-Oregon) have introduced an updated version of the Retirement Enhancement and Savings Act (*RESA*), which would improve access to retirement savings.

Among other things, as I previously wrote, RESA would re-introduce the pooled employer plan (PEP) to the retirement savings conversation. Groups such as the Insured Retirement Institute, the American Council of Life Insurers, and AARP are among those supporting its passage.

Lastly, U.S. Senators **Todd Young** (R-Indiana) and **Cory Booker** (D-New Jersey) have introduced new legislation to establish a federal commission charged with reviewing private retirement benefit programs and submitting a report to Congress on how to improve private retirement security in the United States. The proposed *Commission on Retirement Security Act of 2018* would not review the Social Security program, as it is outside of its scope.

"With many individuals reaching retirement with little to no savings of their own, we must take a serious look at our current retirement programs and make the changes necessary to help secure the futures of so many hardworking Americans," said Young. "Our bill would enact a commission to better understand how we can strengthen private benefit programs and ensure our current and future generations have the tools necessary to plan for retirement."

"We must work to address the shortcomings that have resulted from the shift from defined benefit pensions to defined contribution plans like 401(k)s," Booker added. "This bill will advance the conversation on individual retirement savings at a time when far too many have been left without the retirement they've planned for."

This legislation follows a report last year by the Government Accountability Office that recommended the creation of an independent panel of experts to assess the current retirement system and make recommendations to improve the nation's collective retirement security. It has been nearly 40 years since a federal commission has conducted a survey of this scope.

Specifically, the Commission on Retirement Security Act:

- Calls for the creation of a commission comprised of the Secretary of Labor, Treasury, Commerce, two presidential appointees, six U.S. Senate appointees, and six U.S. House of Representatives appointees.

- The commission will be charged with:

-A comprehensive review of U.S. private benefit programs, with a particular focus on moving from defined benefit to defined contribution models.
-A comprehensive review of private retirement coverage, individual and household accounts balances, investment trends, costs and net returns, and retention and distribution during retirement.
-A comprehensive review of societal trends, including wage growth, economic growth, unique small business challenges, serial employment, gig economy, health care costs, life expectancy, and shrinking household size, that could lead future generations to be less financially secure in retirement compared to previous generations.

-A comprehensive review of other countries' retirement programs.
-Submitting to Congress recommendations on how to improve, or replace, existing private retirement programs upon the affirmative vote of at least 75 percent of the members of the Commission.

The futures of both RESA and the Young-Booker bill are unclear at the moment, but the mere fact that the federal government is continuing to seek ways to prudently address the nation's retirement savings crisis certainly is something to cheer about.

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