



ACI Advisors Corner

“Life is Stranger than Fiction!”

By Pat Byrnes
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In pension speak, it has been a wild couple of weeks of intrigue as the Final DOL regulation that was almost certain to be released (Reasonable Contract Rules) wasn't and the DOL Reg that wasn't supposed to be finalized (Participant Level Investment Advice) was.

Add to that an Inauguration Day Memo from Rahm Emanuel to Department Heads and Agencies encouraging them to withdraw any proposed or final regulations that had not yet been published in the Federal Register as of January 20, 2009; only to find out that the DOL did publish them on the very next day, January 21, 2009.

It doesn't get any better than this!

I. Reasonable Contract Regulations

Facts

- DOL Issues Proposed regulations on interpreting ERISA Sec 408(b)(2) on December 13, 2007.
- DOL sends Final regs to the Office of Management and Budget (OMB) in Quarter 4 of 2008.
- OMB decides not to release regs by pulling them in mid January 2009.

What happens now?

- The fate of these regulations is in the hands of the DOL under the Obama administration and Congressman George Miller of the House Education and Labor Committee who may issue legislation.
- Congressman Miller early on thought that the DOL didn't go far enough in the disclosure of services and fees by “covered service providers” to “responsible plan fiduciaries”.

Observations

- If you already have a “reasonable contract” in place you probably have a competitive advantage. The non or inadequate disclosure of fees, services and conflicts of interest is a Genie that is not going back into the bottle.
- The Government Accountability Office is in the middle of examining how to modify the schedule C to the 2009 5500 form for fee disclosure.



II. Participant Level Investment Advice

Facts

- Fiduciaries are prohibited from rendering investment advice to plan participants regarding investments that result in the payment of additional advisory and other fees to fiduciaries or their affiliates.
- PPA set forth an exemption to the prohibited transactions rules in specific arrangements using “fee-leveling” or “computer models” (August 17, 2006).
- DOL Issues proposed regulations on August 22, 2008.
- George Miller, Chair of House Education and Labor and Rob Andrews jointly issue press release on January 16, 2009 which in part stated “We are disappointed that the Bush administration moved forward to enact a new regulation that will make it harder for workers to receive fair and honest advice when making key financial decisions about their futures...”
- Rahm Emanuel sent his memo on January 20, 2009.
- George Miller and Rob Andrews reissue their January 16th comments on January 20th.
- DOL publishes its Final regulation on January 21, 2009.

What Happens now?

- As Miller and Andrews also said in their press statements....”At a time when Americans are rightly concerned over their financial future, it’s unfortunate that the Labor Department is using its time to give special interests paybacks rather than working to actually help workers...As we transition to a new administration, we will use every tool at our disposal to block implementation of this harmful regulation.”
- Maybe the above says it all.

Observations

- The Final regulation is no doubt dead. It may, based on the above comments by Miller and Andrews, cause a new bill to be brought forth that will contain more teeth than the Final regulation now does.
- The final regulation was to go into effect on March 23, 2009. Mr. Emanuel is requesting that all regulations have effective dates that will be delayed 60 days which would put this regulation out to May 23, 2009 at the earliest.
- Many financial representatives are currently providing participant level investment advice as part of their business models. Arguably they are already fiduciaries, even if their broker/dealers contend that they are not. Care should be taken to keep an eye on these issues.

If you are familiar with the book from Melvin Malina titled “Life is Stranger than Fiction” which I used for my article title, you will understand that you must always be prepared for the unknown and possible turn of events which may soon come.

Please let us know if we can help you on any retirement plan matters or have further questions regarding this article.

