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Stakeholders speak out on DOL's proposed fiduciary exemption

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Bloomberg

The Labor Department's proposal to permit investment advice fiduciaries to receive compensation for their advice sparked a broad debate.

The Department of Labor heard from stakeholders Thursday on its proposed prohibited transaction exemption that would permit investment-advice fiduciaries to receive compensation for their guidance, with some welcoming the rule, others urging tweaks and many recommending a comment period extension.

The proposed exemption would include fiduciary investment advice to roll over a participant's account in an employee benefit plan to an individual retirement account and other similar types of rollover recommendations.

The Labor Department's virtual hearing Thursday, which was announced Aug. 25, allowed members of the retirement community to orally submit testimony on the proposal and for department officials to ask follow-up questions.

Panels with roughly four speakers apiece were held throughout the day and each group represented was given 10 minutes to provide testimony.

The day's first speakers, Dennis Simmons, executive director of the Committee on Investment of Employee Benefit Assets, and Robin Diamonte, chief investment officer at Raytheon Technologies and CIEBA board member, discussed the need for heightened standards concerning rollover advice.

Ms. Diamonte said that participants are often better off keeping their assets within a company's retirement plan but "all too often make the decision to roll out of the plan based on recommendations from financial professionals who may not have the participant's best interest in mind."

Under the proposal, the department affirmed its five-part test used to determine whether an adviser is a fiduciary and said advice on rollovers could be considered fiduciary investment advice, depending on the surrounding facts and circumstances, like whether the advice is part of an ongoing relationship or the start of an ongoing relationship.

Jason M. Levy, special counsel with law firm Covington & Burling, said during testimony that subjecting rollovers to the fiduciary standard would change the landscape for many retirement plan service providers that have historically taken the antithesis position. Also, that change would raise questions about the monitoring obligations of employer plan fiduciaries, he said.

"Reviewing, questioning and potentially challenging service provider legal positions on individual rollovers would require substantial plan resources and serve little purpose," Mr. Levy said. "Plans and their lawyers are not in a position to define how the department or a court will interpret the department's rollover guidance in a given circumstance and should not be forced to take sides in a hypothetical legal dispute."

He then suggested the department issue a safe harbor for plan fiduciaries to satisfy their ERISA obligations by having their service providers provide an annual certification regarding their rollover advice recommendations.

On Wednesday, Sen. Patty Murray, D-Wash., ranking member of the Senate Health, Education, Labor and Pensions Committee, and Rep. Bobby Scott, D-Va., chairman of the House Education and Labor