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Labor Department nixes Bush rule to let brokers advise 401(k) plans

Obama administration says it will review the rules and devise new advice plan

By **Sara Hansard**
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The Department of Labor is killing a regulation issued in the last days of the Bush administration that would have allowed advisers affiliated with mutual funds, brokerage firms and other companies that sell investments to provide investment advice to 401(k) participants.

“We believe the final investment advice regulation published in the Jan. 21, Federal Register went too far in permitting investment advice arrangements not specifically contemplated by the statutory exemption,” said Phyllis C. Borzi, assistant secretary of the Employee Benefits Security Administration, a unit of the Labor Department.

Ms. Borzi, made the announcement today at a conference in Washington that was sponsored by the American Society of Pension Professionals & Actuaries.

"Today’s workers will benefit from quality investment advice — advice that is both affordable and unbiased,” she said, adding that the Labor Department will now take a fresh look at regulations that govern investment advice and issue new rules.

The Obama administration and House Education and Labor Committee Chairman George Miller, D-Calif., had objected to the rules issued by the Bush administration on the grounds they would allow advisers who have a conflict of interest to provide advice.

Because of its opposition, the Obama administration had delayed the effective date of the Bush rules. It is not known when the administration will propose new rules.

The Pension Protection Act of 2006 included a provision aimed at making it easier for investment advisers to provide advice to 401(k) participants as long as fees earned by advisers are no different for investment options that are recommended, and as long as disclosures are provided.

The mutual fund industry has fought for allowing advisers affiliated with fund companies to give advice, arguing that the provision would make advice more accessible for 401(k) account holders. Many investment advisers opposed the Bush rule, arguing that fund companies and brokerage firms could exert pressure on advisers to recommend proprietary products.

Labor Secretary Solis Says Administration Will Work To Reassure Public
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(RTTNews) - Labor Secretary Hilda Solis said Tuesday that the Obama Administration needs to work over the next few months to reassure a potentially distrustful public.

Speaking to the 2009 DOL Speaks: Employee Benefits Conference, Solis said her department and the administration must "move in the next couple of months to try to really help provide the public with an assurance that we're on their side." She added, "That's really what my job is. That's what our role is. ... We need to be protecting people who feel insecure about what they and their employers have invested in."

Solis said that the current economic crisis, though she hesitated to use the word crisis, has many Americans worried about the security of their jobs, pensions and future prospects given the "skittishness" of the country's financial markets. "These times are tough and we know a lot of people are counting on us," she said. "I have the dubious distinction every month to have to report on unemployment rates."

She added, "I look forward when I do have the ability to talk about how progress is coming along, and it is coming along." The $787 billion economic stimulus and recovery bill has allowed the Labor Department to move quickly to protect workers and provide support and new training for those who have lost their jobs, Solis said.

"That's been a really exciting part of my job," Solis said. "It's giving hope and optimism. Because while we see a horrendous number of people that are unemployed, dislocated and have been for maybe more than two, even going on two and a half, three years, here's an opportunity for us to change the course of how we restructure our country in terms of the workforce."

Solis said other initiatives from DOL would seek to spark partnerships between businesses and community colleges and apprenticeship programs to ensure that the country has the workforce it needs.

"We are going to make those hard investments in helping to retrain our workforce," she said. "I don't create the jobs. I train for the jobs." She added, "While we continue to get criticized by other folks who are saying 'well, where are the jobs?' in fact we help to keep jobs."

Noting that she has already traveled to 25 states and 35 different cities during her tenure as Labor Secretary, Solis said the concerns were palpable.

"There is a strong interest in what the President is doing," she said. "I hear a great deal about security and the fact that many people feel insecure, that they might lose their job, they might lose their pension, their 401(k) is diminishing."

She added, "Our role is to try to be fair and provide the best information and the best judgments that we can."

by RTT Staff Writer

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DOL's Borzi Announces New ‘Criminal Project’ To Halt Failure to Forward Plan Contributions

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The Department of Labor's Employee Benefits Security Administration enforcement activities will include a “brand new contributory plan criminal project” to prosecute violators who fail to forward participant contributions to employee benefit plans, Assistant Secretary of Labor Phyllis C. Borzi said Sept. 14.

The program is designed “to target the most egregious and persistent violations and to protect the most vulnerable employee populations, by pursuing criminal prosecution of individuals who commit crimes involving contributory health and retirement plans,” Borzi told an employee benefits conference sponsored by the Labor Department and the **American Society of Pension Professionals and Actuaries**.

Examples of violations that would fall under this new enforcement project include embezzlement of plan assets, “primarily amounts withheld from employee checks but are never forwarded to their ultimate destination,” Borzi said. She said another violation is “knowingly filing false 5500 forms” regarding employee plan contributions.

The criminal project is in addition to the department's ongoing compliance efforts to address the issue of delinquent participant contributions, which Borzi said remains both a problem and a priority for the department.

Other Enforcement Priorities
Borzi said other department enforcement priorities include:
• multiple employer welfare arrangements (MEWAs) involving health care fraud because such arrangements are usually put together by those not qualified to do so, or by “crooks;”
• a rapid ERISA action team (REACT) project pertaining to bankruptcy and financially distressed plan sponsors with a focus on legal action on behalf of participants;
• employee stock ownership plans concerning the valuation of employer stock and the risk of self-dealing and conflicts of interest; and
• a consultant adviser project focused on improper and undisclosed compensation of pension consultants and service providers will be expanded to include situations involving consultants/service providers using their fiduciary status to increase compensation.

SunAmerica Decision
On another enforcement issue, Borzi said, “we will investigate and take action” regarding interpretations that go beyond what the department interprets as the intent and reach of its advisory opinion on SunAmerica.

The advisory opinion addressed a model asset allocation portfolio that would be the product of a computer program applying a methodology developed, maintained, and overseen by a financial expert independent of SunAmerica Retirement Markets Inc., as discussed in Advisory Opinion 2001-09A, dated Dec. 14, 2001 (238 PBD, 12/21/01; 29 BPR 8, 1/2/02).

Borzi said the department has received reports that the advisory opinion is being interpreted “very broadly.” She said some may be going beyond the intent and reach intended by the opinion. She added that the SunAmerica opinion was fact-specific and that advisory opinions cannot be relied upon beyond the specific fact situation.

Other Regulatory Activities
As she outlined recently, Borzi said the department will address investment advice and plan fee/expenses disclosure issues leftover from the previous administration (140 PBD, 7/24/09; 36 BPR 1738, 7/28/09).

The department is working to bring the investment advice rulemaking “in line with the statutory provisions of the Pension Protection Act,” Borzi said, adding that she hopes to complete the necessary reviews by the extended Nov. 18 deadline and reissue it as a proposed rule with a short comment period.

The department hopes to complete its review of the two plan fee/expenses disclosure rulemakings in the “near future,” Borzi added, notwithstanding a bill on fee disclosure (H.R. 2989) introduced by Chairman George Miller (D-Calif.) of the House Education and Labor Committee. That bill was approved by the full committee on June 24 (120 PBD, 6/25/09; 36 BPR 1537, 6/30/09).

By the end of 2009, the department hopes to determine what actions if any should be taken regarding target date funds, Borzi said. A joint hearing sponsored by the department and the Securities and Exchange Commission was held on target date funds on June 18 (116 PBD, 6/19/09; 36 BPR 1477, 6/23/09).

By Michael W. Wyand