



## **Summary of DOL Comments to IRI Advocacy Committee Quarterly Call**

On Tuesday, June 29, Ali Khawar, Acting Assistant Secretary of the Department of Labor's Employee Benefits Security Administration (EBSA) spoke to the IRI Advocacy Steering Committee. His remarks covered four primary topics: the ESG rule, the Lifetime Income Illustrations rule, the rules for providers of fiduciary investment advice, and cybersecurity. The following is a summary of Mr. Khawar's comments to the Committee on these topics:

### 1. "ESG" Rule

- The President's Executive Order on Climate-Based Financial Risk directed the DOL to review the so-called "ESG Rule" (formally known as [Financial Factors in Selecting Plan Investments](#)), which took effect on January 12, 2021.
- The DOL expects to issue proposals to amend the ESG rule (as well as the Proxy Voting rule) in September 2021.
- The DOL has engaged in extensive outreach to stakeholders for feedback on the ESG rule and found near-universal agreement from a diverse constituency as to the chilling effect the rule has had on the market.
- Stakeholders have generally told the DOL that they approach investment selection with a focus on choosing the best investments from a purely financial analysis, risk and return analysis.
- DOL wants to hear more from the regulated community and other stakeholders about the issues to focus on and changes to include in the forthcoming proposals.
- Proposed legislation on the Hill is well-known to DOL but will not impact its work or approach to ESG investing going forward unless and until such legislation is actually passed.
- The DOL's proposal will focus primarily on the treatment of ESG investments rather than the process of investment selection more generally.
  - In the securities context, the significant increase in ESG investments is material and taken into account for investment decision-making. Today's investors consider ESG investments as part of the investment selection decision-making process in a way that is different from decades past, it is integral to the process in addition to the environmental, social and governance goals they support.
  - Today's investors have quantifiable services, metric, academic papers, etc., that confirm and integrate ESG investments into investor's decision-making.
  - "ESG" is a bit of a misnomer, a factor that is increasing for investors, and the DOL must take that into account when evaluating a rulemaking on investment selection.
- As to other investment selection procedural issues in the ESG rule, such as a "tie-breaker," these are a separate set of considerations in revising an investment selection rule. For example, for large defined benefit plans, the collateral benefit for ESG investments appears higher than in the securities market.

## 2. Lifetime Income Illustrations (LIDA) – Interim Final Rule to Final Rule

- Timing: Under the SECURE Act, the DOL is required to adopt a final rule by September 2021. The DOL’s Spring 2021 Regulatory Agenda indicated that a final rule would be issued in July 2021, but that was a typographical error. The final rule will be released in September 2021, very close to the statutory deadline.
- The DOL understands that the industry is eagerly awaiting clarity on a number of key points:
  - When will the first illustrations have to be delivered to participants under the final rule?
  - What changes will be made to the approach taken in the interim final rule issued last year based on comments from stakeholders, including House Ways & Means Committee Chairman Richard Neal (D-MA)?
  - Will there be any transitional relief to provide time for industry to take the steps necessary to comply with the final rule?
- The comment period is closed, so the DOL is no longer actively engaging with stakeholders and is now focused on assessing the comments they have received and deciding how to proceed.

## 3. Fiduciary Rule

- As indicated in its Spring 2021 Regulatory Agenda, the DOL is developing a proposal to amend the rules for providers of fiduciary investment advice.
- The Trump Administration, in issuing PTE 2020-02 (formally known as [Improving Investment Advice for Workers & Retirees](#)), did not amend the five-part test for fiduciary status or any pre-existing prohibited transaction exemptions dealing with investment advice, such as PTE 84-24.
- The DOL is very concerned about the potential creation of an uneven playing field, given that some financial entities and/or professionals have access only to PTE 2020-02 while others can use PTE 84-24 or other exemptions.
  - This lack of equal access to exemptions creates “odd or perverse incentives for behavior,” and the DOL is considering whether consumers really understand which exemption their advisor relies on and how it affects their retirement plans and investments.
- The DOL continues to believe it is too easy to evade the 5-part test, and further, the test is not aligned with the relationship of trust and confidence that advisors have with their clients.
- Financial institutions and professionals are taking different approaches as to how to move forward with implementation of PTE 2020-02.
  - Many firms are actively working to prepare for compliance with PTE 2020-02, while others are looking to instead rely on alternative exemptions, and still others have decided they will avoid fiduciary status entirely and therefore believe they will not need to rely on any exemptions.

- There is a difference in how consumers are protected under the varying PTEs used in practice, and the outcome is very concerning.
- While Mr. Khawar acknowledged he was a proponent of the 2016 Rule, he concedes that the now-vacated 2016 Rule was not the only way to approach to address the issue of an uneven playing field.
- There will be no “Best Interest Contract” in the DOL’s new proposal. The 5th Circuit decision clearly and definitely closed the door to the use of a contract mechanism.
- IRI staff noted that, while our members are working diligently to prepare for implementation of PTE 2020-02 before the DOL’s non-enforcement policy expires in December 2021, significant work remains to be done by our members and third-party vendors. With this in mind, IRI staff asked if the DOL would consider extending the non-enforcement policy beyond December.
  - Mr. Khawar acknowledged the high-volume of work for compliance and recommended that industry stakeholders have their operations and compliance experts share their challenges and pressure points with the DOL.
  - He is interested in meeting with operations and compliance company experts, particularly as it relates to the implementation challenges of 2020-02, and IRI staff indicated they would work to arrange such meetings in collaboration with IRI’s operations and technology community.
  - He wants to better understand the challenges facing the industry with respect to implementation and compliance efforts, plans, programs, etc.
  - Without specific, real-world examples and explanations of compliance and implementation struggles, an extension of the December 2021 compliance date is unlikely.
- IRI staff also highlighted the challenges for independent producers under PTE 2020-02, and asked how the industry could most effectively help the DOL develop a workable path for that segment of the industry.
  - Mr. Khawar said it would be helpful to clarify the pressure points by answering the following hypothesis: if DOL proposed to copy all the conditions of 2020-02 into 84-24, which of those conditions would be the most concerning and problematic from a compliance perspective.
  - The DOL is interested in hearing from stakeholders about alternative ways to achieve the same levels of consumer protection while better accommodating different business models.
  - Mr. Khawar mentioned the IMO exemption that was proposed but not finalized in 2016 and suggested that industry also share feedback about that approach.
- The DOL strongly encourages industry representatives and stakeholders to come in for meetings with them to discuss the issues they are working through in developing their proposal.
  - The DOL will not be persuaded or find it helpful to hear from stakeholders asserting that further rulemaking is not needed because there is no problem to address.

#### 4. Cybersecurity

- In April 2021, the DOL issued Cybersecurity Guidance in the forms of online tips and best practices.
- Recent high-profile cybersecurity breaches have severely affecting the U.S. economy in other industries. While the retirement system has not been directly impacted to date, it represents a significant amount of money and is at high-risk and is a significant target for a cybersecurity attack by foreign bad actors.
- Therefore, the Biden Administration and the DOL have made cybersecurity protections and prevention procedures to ward off an attack on our vulnerable industry a national security high priority.
- Recent enforcement attention and audits of financial institutions are in the best interest of our industry and national security. Although the recommendations made by the DOL in April were presented as “guidance” and not a “rule,” Mr. Khawar stated the DOL’s Guidance includes online “hygiene” and best practices many of our member companies likely have or should have in place for their own good.
- The DOL may issue additional guidance in the future on topics not covered by the April guidance, such as tips and best practices for plan sponsors, especially smaller and medium sized enterprises.