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General Comment

The rule seems to have been crafted way too broadly by design, with too many unknowns that only trial lawyers, judges and juries can define and only then determine when advisors are in breach of the BIC exemption.

My understanding is that absent any statutory authority from the DOL, the BIC exemption will have to be enforced through private legal action. Is that the best way to determine when advisors are in breach of the rule? Shouldn't the outcomes be predetermined as to what is right and wrong to do and not do for the client? Or, should the first few years of client's losses in accounts be the true cost of the DOL not setting the actual rules to be followed so everyone understands them.

This 'private right of action' mechanism creates unwarranted litigation risk for financial advisors, who will face the threat of meritless class action lawsuits challenging their every move. The rule doesn't seem to really be about investor protection. It seems to be about enabling trial lawyers to increase profits.

The DOL fiduciary rule will let Lawyers and lawsuits make up whatever definitions they want for "fiduciary". Most financial services people will only find out these definitions after the lawsuit is won or lost and on an ongoing basis. Was or is this the intention of the rule?

"The more laws and rules the betterlet the lawyers figure it out", is NOT the answer.

My argument against this rule includes:
A. Procedural
1. Failure to adequately consider costs and benefits
B. Exceeding authority is arbitrary and capricious, including redefining terms and relationships without authority.
1. The plain language and structure of ERISA and the tax code confirm that "fiduciary" status exists in special circumstances that ordinarily do not include brokers and other sales agents
2. The Department's overbroad interpretation of "fiduciary" flouts that term's plain meaning and is unreasonable and entitled to no deference (including misused, limited exempted authority, created private right of action, violation of federal arbitration act, flawed cost assessment, lack of FIA change notice, first Amendment violation)
3. Placement of FIAs in BICE rather than 84-24 is arbitrary, capricious and contrary to law
4. The Department exceeded its statutory authority and acted in an arbitrary and capricious manner (including redefining of investment advice and fiduciary, contrary to congressional intent for IRAs, creates private right of action, treats FIAs as securities
C. Harm to Business
1. The Department failed to consider the detrimental, perhaps debilitating, effect of its actions on independent insurance agent distribution channels
2. The Department's determination that FIAs are covered by the BICE is irrational and unworkable, leading to devastating industry effects (including, carriers can't comply with BIC with respect to independent agents, carriers can't comply with the BICE without filing BICs with state insurance departments for approval, agents can't comply with BICE without acquiring securities registration)
3. Failure to adequately consider impacts and costs on small business
4. Failure to adequately consider impacts of costs of compliance
D. Bad Regulation
1. The BICE is fatally flawed based on void for vagueness grounds
2. The Department failed to provide a meaningful explanation for how the BICE can work with respect to FIAs, until the "last minute"
3. Carriers can't comply with BIC with respect to independent agents
4. Carriers can't comply with the BICE without filing BICs with state insurance departments for approval
5. Insurance Agents can't comply with BICE without acquiring securities registration
E. Bad Regulation Enforcement
1. The DOL does not have sufficient enforcement capability to implement this rule
2. The 'private right of action' mechanism creates unwarranted litigation risk for financial advisors, who will face the threat of meritless class action lawsuits challenging their every move
3. The DOL should not just rely on litigation to set the standards of this rule.

This is a vague regulation to the point of compliance impossibility in a retail marketplace. There are two types of regulation. One is very specific, it inhibits innovation and growth by being too prescriptive, but it is clear how to comply. Some regulation is general, it encourages innovation and free enterprise by being principles-based, yet you are never fully sure of complying, though there are often safe harbors for compliance to avoid capricious interpretations.

It is unduly general, and ultimately vague, with respect to meeting critical rule requirements, such as "best interests," "reasonable compensation," and "material conflicts of interest." No one knows what these mean for sure. DOL has provided no safe harbor, and instead of the typical remediation for non-compliance, a collaborative regulatory relationship and explicit statutory fines, they mandate creative (ironically, profit-driven) trial lawyers as the ultimate arbiters.