
From: Dennis [mailto:dennis@mainstaycapital.com]
Sent: Wednesday, May 05, 2010 2:51 PM
To: EBSA, E-ORI - EBSA
Subject: 2010 Investment Advice Proposed Rule

Ladies and Gentlemen:

My name is David Kudla. I am CEO of Mainstay Capital Management, LLC. I appreciate the opportunity to comment on the Department of Labor's (DOL) proposed investment advice rule.

It is imperative that any final legislation and DOL rulings and guidelines maintain that 401(k) advice be conflict-free. I have commented on this topic several times in the media, participated in a Wall Street Journal panel discussion on this topic, and have been invited to debate the subject on national television. I would be glad to elaborate further on my comments below and offer testimony on this subject.

In 2008, in an effort to provide easier access to investment advice, legislators penned into law a bill that had inherent conflicts of interest and enabled brokers and insurance companies to provide investment advice. Fee-only, independent, third-party advisors had already been providing unbiased 401(k) investment advice on a discretionary basis for years. Because the independent advisors' compensation was never driven by the investments they were recommending, they never ran afoul of ERISA. Unfortunately, the 401(k) advice rule was about to open the door to potentially conflicted advice for plan participants, thus eliminating the protections ERISA had in place that had protected 401(k) participants since the inception of defined contribution plans.

In 2009, others in Congress and the DOL recognized the inherent problem in the 401(k) advice rule and it was never implemented. This year, a new proposed investment advice rule implementing section 601 of the Pension Protection Act (PPA), whose goal is to ensure that advice is conflict-free, is now under consideration. One provision of the rule allows advice to be based on a computer model. The current DOL comment period asks a series of questions that would impact how the computer models should be designed and what criteria computer models would use for investment selection. This, in itself, reflects how complicated the computer model approach becomes. Is the computer model approach so complicated that this provision should not be carried forward as part of the new investment advice rule?

Even if the criteria can be established for standardized computer model advice, there are potential conflicts that remain. Who is allowed to pay the provider of the computer model? Who determines the criteria for an individual to be certified an "eligible investment expert"? Does the computer model allow the use of proprietary funds in the plan? If not, does the computer model then provide a non-conflicted, but sub-optimal recommendation? Is an actively-managed or passively-managed investment strategy the

preferred method for the computer model? Will the computer model favor a fund with lower fees over a fund with more favorable past performance? Who monitors all of this on a continuing basis? So many unanswered questions about the criteria and approach of a computer model points to a potential regulatory nightmare.

In fact, customized, conflict-free, advice can be delivered to a very large number of employees in an effective and thorough manner. And, it does not need to involve a complicated and potentially compromised computer model approach. Many independent, fee-only advisors already have years of experience providing advice to meet the needs of the individual 401(k) participant. Since they have no formal ties to any financial services company, they are oriented to work in the best interests of their clients and not in the best interests of a financial institution. It only gets complicated, or potentially compromised, when the approach requires a computer model to try to ensure that advice is conflict-free.

The only approach that is truly conflict-free and best for the consumer is a level-fee approach. That is the only approach the DOL should look to implement at this time. After nearly three decades of 401(k) investing, no legislation or DOL rulings should allow for potentially conflicted advice. The DOL's SunAmerica Advisory Opinion (2001-09A) allowing plan sponsors to provide third party, independent advice was a step in the right direction. The new investment advice rule is another good step, but it should not be compromised with a complicated computer model approach that itself could introduce conflicts or sub-optimal advice.

Some are concerned about which forms of investment advisory services win or lose in this proposed rule. In the end, it is not about whom in the financial services industry wins or loses. It is about right and wrong. It is about making sure participants receive conflict-free advice. It is about making sure that any rule that changes the provisions of ERISA and the DOL's SunAmerica Advisory Opinion, does not compromise the safeguards against conflicted 401(k) advice that have been upheld for decades.

Respectfully Submitted,

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