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Final Fiduciary Rule Attracts Praise and Criticism

The long wait for the DOL's final fiduciary rule is over and congressmen were quick to react. This topic dwarfed all others — including the race for the White House and Supreme Court vacancy — with Republicans and Democrats strongly voicing their views and, in some cases, calling for action.

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Here at Last!

The DOL's final fiduciary (conflicts of interest) rule was unveiled last week with Secretary Tom Perez [announcing](#) its release in a press conference. It had been in the making for many years. Indeed, a proposed rule was issued, withdrawn and then re-proposed. The [final rule](#), and the entire regulatory package issued by the DOL, can be found in our [April 6 FYI Alert](#) and additional information on the proposed rule in our [April 21, 2015 For Your Information](#).

While awaiting the final rule, congressmen and other stakeholders expressed concern that the DOL's final rule would fail to reflect the issues raised during the four-day hearing in August 2015 and the thousands of comment letters submitted for review. As such, pending the release of the final regulation, members of Congress took action. Legislation was introduced, albeit none was enacted. Bills introduced to thwart the DOL's final rule and their sponsors included:



- Retail Investor Protection Act ([H.R. 1090](#) and [S. 2497](#)) — Rep. Ann Wagner (R-MO) and Sen. Roy Blunt (R-MO), respectively
- Affordable Retirement Advice Protection Act ([H.R. 4293](#) and [S. 2502](#)) — Rep. Phil Roe (R-TN) and Sen. Johnny Isakson (R-GA), respectively
- Strengthening Access to Valuable Education and Retirement Support (SAVERS) Act ([H.R. 4294](#) and [S. 2505](#)) — Rep. Peter Roskam (R-IL) and Sen. Mark Kirk (R-IL), respectively

The Wagner/Blunt bills sought to halt the DOL from finalizing the rule until after the SEC acts. As such, they will not move forward — at least not as currently drafted. The other bills, however, may gain traction and advance — as they include a requirement that the DOL receive Congress' approval before the final fiduciary rule can be effective and, if approval is not provided, would require a new fiduciary standard to be implemented based on [bipartisan principles](#) introduced last year. As currently written, the effective dates for provisions in the final fiduciary rule are in 2017 and 2018. (See our [April 6 FYI Alert](#) for more details.)

The Final Rule

The final rule redefines what is (and what is not) ERISA fiduciary investment advice and sets forth guidelines for handling conflicts of interest. We will evaluate the rule and provide further analysis in upcoming publications.

Fractured Congressional Response

While Democrats have generally reacted favorably to the final fiduciary rule, Republicans are largely opposed to it, with some vowing to take action to overturn it. Here are some highlights.

Praise from Democrats

- Rep. Nancy Pelosi (D-CA) [asserted](#) her support for the new rule and applauded the DOL, stating that the new rule “will enhance the retirement security of hard-working Americans across the country” and “is a vital step forward that will strengthen the retirement security and confidence of every American.”
- House Ways and Means Committee Ranking Member Sander Levin (D-MI), stating that the new rule is “vital to make sure Americans receive advice that is both conflict-free and in their best interest,” [noted](#) his appreciation “that the DOL has taken into account public comments, hearings, and hundreds of stakeholder meetings in drafting these final regulations.”
- Sen. Elizabeth Warren (D-MA) applauded the new rule, noting that it will allow “the struggle for retirement security [to] get a little easier for millions of Americans.”
- Sen. Patty Murray (D-WA) emphasized that it “is an important step” — noting further that, “to those ... who may be thinking about trying to reverse this rule in Congress — we are not going back!”
- Sen. Sherrod Brown (D-OH) responded favorably to the final rule, noting that it “creates a workable solution” and praised the DOL for crafting a rule that “considered the comments and input from stakeholders” and “protects retirement savers.”
- Sen. Corey Booker (D-NJ), in support of the new rule and the administration, [characterized](#) the rule as “a common sense step forward that will help protect the retirement security of countless American families.”
- House Financial Services Committee Rep. Maxine Waters (D-CA) commended the final rule, noting that it is “a crucial step to ensuring that Americans’ retirement savings will no longer be threatened by conflicts of interest.”

So Says Secretary Tom Perez:

“I have a lot of confidence that we've come up with the right policy and we've done it in a way that will withstand legal scrutiny.”

Criticism from Republicans

- House Majority Leader Kevin McCarthy (R-CA), in a press release, [reflected](#) that the final rule “would raise barriers on investment advice to unreasonable heights” and noted that, after a thorough review, House committees will “consider legislative options as appropriate.”
- House Majority Whip Steve Scalise (R-LA), referring to the new rule as “radical” and “destructive” — and one that would cause “harm,” [highlighted](#) that the “House will continue to fight this Washington-knows-best, one-size-fits-all radical regulation.”
- House Ways and Means Committee Chairman Kevin Brady (R-TX), Education and the Workforce Committee Chairman John Kline (R-MN), Oversight Subcommittee Chairman Peter Roskam (R-IL), and Health, Employment, Labor, and Pensions Subcommittee Chairman Phil Roe (R-TN) noted in a joint statement “serious” concern with the new rule and [stated](#) that they are committed to “review[ing] it thoroughly” and “to using the tools” available to “help all Americans retire” with “financial security.”
- Speaker Paul Ryan (R-WI) [praised](#) House Republicans Phil Roe (R-TN), Peter Roskam (R-IL) and Ann Wagner (R-MO) and made clear that they “will continue to look at every avenue to protect middle-class families and small businesses from government overreach.”
- Senate Majority Leader Mitch McConnell (R-KY), expressing concern that the rule will result in “restricted access to affordable advice — and fewer retirement savings as a result,” characterized it as “far-reaching” and one that “could jeopardize the retirement security of the very people it purports to help.”
- Sen. Orrin Hatch (R-UT), Chairman of the Senate Committee on Finance, [characterized](#) the DOL’s actions as “wrong-headed” and stated the rule will be reviewed for its “potential consequences.”
- House Financial Services Committee Chairman Jeb Hensarling (R-TX) [blasted](#) the new rule, characterized it as “burdensome” and stated that “Congress must act to stop” it because it is unfair to American families “who only want the freedom to plan for financial independence and the right to shape their own destiny.”
- Rep. Ann Wagner [stated](#) that the final rule “will only hurt those it claims to protect, jeopardizing the ability for millions of low- and middle-income Americans to receive sound investment advice” and that she is “working closely with House Leadership and members of the Education and Workforce Committee on using the Congressional Review Act (CRA)” to derail what she characterized as an “ill-advised rule.”
- Sen. Johnny Isakson (R-GA), a member of the Senate Finance Committee and the Health, Education, Labor, and Pensions (HELP) Committee, [reflected](#) that the rule “will harm” individuals and vowed to “do everything” to “overturn” it, including by resolution of disapproval as permitted under the CRA.

Congressional Review Act

The CRA allows Congress to pass a joint resolution to disapprove “major” rules issued by federal agencies before they take effect and stop them from being implemented. It also prevents the agencies from issuing a substantially similar regulation without congressional authorization.

- Sen. Lamar Alexander (R-Tenn.), chairman of the Senate HELP Committee, is reportedly collaborating with Sen. Isakson; however, Sen. Alexander's [press release](#) only indicates that he is reviewing the rule "to ensure that it is nothing like the proposed rule" and that he "will continue oversight in the Senate labor committee on this issue."
- Sen. Mark Kirk (R-IL), disappointed with the rule, [referred](#) to the DOL's action as a "misguided government takeover of Americans' retirement planning despite bipartisan opposition."

Next Steps

Congressmen and stakeholders will continue to plow through the final rule to determine its strengths and weaknesses. And, despite the potential to overturn the final rule by legislation, it is not likely during the current administration and Congress. Garnering enough votes to pass any such legislation would be challenging (at best). And, even if Congress were successful, President Obama would be sure to veto it. As noted in the White House [press release](#), the final rule, crafted in accordance with his direction, is intended "to ensure that retirement savers get investment advice in their best interest, so they can grow their nest egg and be better prepared for retirement." From the administration's perspective, the new rule is a "critical step in the President's ambitious effort to put in place the strongest consumer protections in American history."

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