Proposed Federal Regulation Could Squelch Popular Financial Advisers

Much ink has been spilled over whether the Department of Labor's proposed "fiduciary rule" will prevent small investors from obtaining financial advice. Equally concerning — but barely discussed until recently — are the rule's consequences for individuals who offer investment advice in a public forum, including radio and TV commentators, investment-seminar leaders, and newspaper columnists.

The Obama administration has proposed a regulation that the Competitive Enterprise Institute's John Berlau dubbed a "fiduciary rule for dummies." The administration justified the new rule on the basis that "individuals cannot 'prudently manage retirement assets on their own,' and that they 'generally cannot distinguish good advice, or even good investment results, from bad,'" wrote Berlau.

The highly complex rule vastly broadens the definition of a fiduciary. Up to now, someone was considered a fiduciary if he was in charge of managing another's assets; thus, quite naturally, he was charged with managing those assets in line with their owner's best interests. "Under the new rule," explained Berlau, "financial professionals who provide even one-time guidance or appraisal of investments could find themselves classified as 'fiduciaries.'" And under the rule, a fiduciary, if he is compensated in any way for providing advice, must act in his client's "best interest" — a requirement that economists Robert Litan and Hal Singer called "a vague open-ended obligation with seemingly no bounds."

"Under DOL's expanded definition, broker-dealers, insurance agents who recommend annuities, appraisers of a [sic] self-directed IRAs, and others who clearly are not entrusted to manage a portfolio — the classic definition of a fiduciary — may find themselves facing fiduciary liability and punishment under the new rule," Berlau maintained. "In fact, according to some observers, the rule may even extend to television and radio hosts who give advice to individual callers."

Michael Markey, an insurance agent and owner of Legacy Financial Network, argued in the online trade journal LifeHealthPro that radio and TV host Dave Ramsey should be "regulated" and "held accountable" for the advice he gives callers — advice with which Markey disagrees. Markey expressed his hope that the new rule would see to it that "entertainers like Dave Ramsey can no longer evade the pursuit of regulatory oversight."

"Experts both for and against the rule I have talked to agree its broad reach could extend to financial media personalities who offer tips to individual audience members, a group that includes not just Ramsey but TV hosts like Suze Orman and Jim Cramer, as well as many other broadcasters who opine on business and investment matters," Berlau blogged at Forbes.com.

Kent Mason, a partner at the Washington, D.C., law firm Davis and Harman, told Berlau in an e-mail, "Under the proposed regulation, investment advice from a radio host to a caller regarding the caller's own investment issues would appear to be fiduciary advice if the advice addresses specific investments." Mason also agrees with Markey that radio and TV commentators would qualify as fiduciaries under the new rule since they are being compensated for giving their advice, even if their callers are not the ones paying them.

Radio and TV personalities aren't the only advisers with something to fear from the proposed rule. Mason said that while the main portion of an investment seminar, which offers general advice, would be exempt from Labor Department oversight, "if during the seminar, someone from the audience asks a question about his or her situation and the speaker answers the question with respect to specific investments, that answer would be fiduciary advice." Furthermore, as RedState points out, the rule "hits local newspaper columnists who talk about financial subjects. It would, in its current form, apply to someone teaching a community college course on personal finance and offering solutions to problems posed by students." In short, anyone who is paid to discuss investments could find himself in hot water with the feds.

Of course, there is that little matter of freedom of speech that could impede the government's attempts to restrict investment advice. "I believe it would be a violation of the First Amendment and I think the Founding Fathers would think it would be a violation, but it could take years to decide this in court," Berlau told TheBlaze. In the meantime, small investors would be on their own when it comes to making investment decisions.

Indeed, the whole purpose of the regulation seems to be shutting out small investors. The rule would force brokers to charge their clients hefty fees in lieu of accepting commissions on investments they sell. This is supposed to protect clients from being sold unwise investments simply because they earn money for brokers, but it will also make investing prohibitively expensive for many, and in some cases brokers may decline to service portfolios that are too small to justify the cost.

The United Kingdom, for instance, banned third-party commissions to brokers in 2013. According to Berlau, "A June 2013 study by the Cass Business School at City University London found that brokers had largely stopped serving British savers with portfolios below £150,000 ($240,000), because the fees alone would not pay for servicing the accounts. This study and other research estimates that this 'guidance gap' will see 85 percent of British savers lose their brokers or get reduced services for their retirement accounts."

A July 2015 study by Litan and Singer suggested that the effects of the Obama administration's proposed rule would be similar and estimated that Americans could lose $80 billion in savings over 10 years as a result. So much for the Obama administration helping the middle class.

Ramsey recently ignited a Twitter war between opponents and proponents of the rule — the latter of whom include investment advisers who are expected to benefit from the rule — when he tweeted, "This Obama rule will kill the middle class and below['s] ability to access personal advice." Assuming Ramsey has also been critical of other administration actions when he gives financial advice to the masses, no wonder the administration wants to silence people such as him. Making it difficult for him to offer investment advice on the air would go a long way toward that goal.