

TRICK-or-TREAT? DOL Proposes Spooky New “Retirement Security Rule” That Would Expand the Scope of Fiduciary “Investment Advice”

Employee Benefits & Executive Compensation on **October 31, 2023**

Responding to the “terrifying” reality that conflicted investment advice is costing retirement savers billions of dollars each year, on October 31, 2023, the Department of Labor (“DOL”) issued [proposed rules](#) representing its latest attempt to expand what it means to be providing “investment advice” for a fee under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) and Section 4975 of the Internal Revenue Code of 1986, as amended (the “Code”). For some, the proposal will constitute quite the “treat”, while others will view it as a “trick” that, like prior DOL attempts to legislate in this area, might once again be subject to legal challenges.

As discussed in further detail [here](#), [here](#) and [here](#), for almost 15 years, the DOL has been attempting to expand what it means to be providing “investment advice” for purposes of determining whether a provider is a “fiduciary” to an ERISA plan or an individual retirement account (“IRA”) under ERISA and Section 4975 of the Code. For example, the DOL has long sought to treat advice regarding whether to roll over an account from an employer-sponsored plan (e.g., a 401(k) plan) to an IRA as fiduciary investment advice, notwithstanding prior DOL guidance indicating such advice was not so covered.

Although we will follow up with a more detailed analysis of the proposed rules, here are a few quick takeaways from the proposal:

- **Broader Definition of “Investment Advice”.** “Investment advice” would include a recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property (without regard to whether the advice relates to securities, commodities, annuities or other insurance products) if the adviser meets any of the following conditions:
 - The adviser has discretionary authority or control over investment decisions for the retirement investor;

- The adviser makes investment recommendations on a regular basis **as part of its business** (not necessarily on a regular basis to the retirement investor), and the recommendation is provided under circumstances indicating that it is individualized to the particular needs of the retirement investor and may be relied upon as a basis for investment decisions that are in the retirement investor’s best interest; *or*
- The adviser states that it is acting as a fiduciary when making investment recommendations.
- **IRA Rollovers.** The proposal would cover advice to roll over assets from an employer-sponsored plan (e.g., a 401(k) plan) into an IRA – i.e., rollover advice would now be ERISA-covered fiduciary “investment advice” regardless of whether the advice is provided on a “regular” basis; and
- **Prohibited Transaction Exemptions.** In separate (but related) proposals, the DOL has proposed amendments to certain prohibited transaction exemptions (including PTEs [2020-02](#) and [84-24](#), [among others](#)) which would provide some relief to investment advice fiduciaries for certain compensation arrangements that would otherwise be prohibited, provided that the advice is in the “best interest” of the retirement investor.

The DOL has invited comments on the proposed rules and exemption amendments. Comments are due on the date that is 60 days after publication thereof in the Federal Register.

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As always (except when we are trick-or-treating!), Proskauer is here to help fiduciaries and advice providers determine whether these proposed rules and exemption amendments apply to them and to assist with compliance with any applicable fiduciary responsibilities and restrictions under ERISA and Section 4975 of the Code.

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