

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

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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 (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.

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