

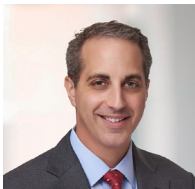
# TRICK-or-TREAT? DOL Proposes Spooky New “Retirement Security Rule” That Would Expand the Scope of Fiduciary “Investment Advice”

A Practical Guidance® Article by

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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. 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.

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.

## Law360 News

- [DOL's Fiduciary Rule Proposal Would Extend ERISA's Reach](#)

## Related Content

### Practice Notes

- [ERISA Fiduciary Duties](#)
- [ERISA Fiduciary Compliance for Investment Managers](#)

### Statutes & Regulations

- [88 Fed. Reg. 75890 \(Nov. 3, 2023\)](#)
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### **Ira G. Bogner, Partner, Proskauer Rose LLP**

Ira G. Bogner is the immediate former chair of the Firm's Tax Department and a member of the Employee Benefits & Executive Compensation Group and is currently a member of the Firm's Executive Committee. Ira represents a varied list of clients, including financial service companies, entertainment industry clients, and tax-exempt organizations, and also actively represents individual executives in executive compensation matters.

Ira counsels clients with respect to the tax, securities law disclosure, corporate governance, stock exchange and other requirements relevant to executive compensation arrangements. Ira also provides advice regarding equity arrangements, employment agreements, change in control agreements and all other types of executive compensation arrangements, including guidance regarding "409A," "162m," "457A," and "280G."

Ira frequently is called on to structure and analyze alternative investments for pension trusts and other exempt organizations. He also works with the Firm's corporate and real estate lawyers in structuring and maintaining investment funds that include participation by pension plans. Through his work in the investment fund area Ira has obtained substantial experience in applying the rules provided under the "plan asset" regulations, including the operation of venture capital operating companies and real estate operating companies. He has assisted in the formation of private equity, real estate, infrastructure and hedge funds, including "fund of funds." Ira also has advised clients on both avoiding ERISA "plan asset" status and operating an investment fund in accordance with ERISA.

### **Seth Safra, Partner, Proskauer Rose LLP**

Seth J. Safra is chair of Proskauer's Employee Benefits & Executive Compensation Group. Described by clients as "extremely knowledgeable, practical, and strategic," Seth advises clients on compensation and benefit programs.

Seth's experience covers a broad range of retirement plan designs, from traditional defined benefit to cash balance and floor-offset arrangements, ESOPs and 401(k) plans—often coordinating qualified and non-qualified arrangements. He also advises tax-exempt and governmental employers on 403(b) and 457 arrangements, as well as innovative new plan designs; and he advises on ERISA compliance for investments.

On the health and welfare side, Seth helps employers provide benefits that are cost-effective and competitive. He advises on plan design, including consumer-driven health plans with HSAs, retiree medical, fringe benefits, and severance programs, ERISA preemption, and tax and other compliance issues, such as nondiscrimination and cafeteria plan rules.

Seth also advises for-profit and non-profit employers, compensation committees, and boards on executive employment, deferred compensation, change in control, and equity and other incentive arrangements. In addition, he advises on compensation and benefits in corporate transactions.

Seth represents clients before the Department of Labor, IRS and other government agencies.

Seth has been recognized by *Chambers USA*, *The Legal 500*, *Best Lawyers*, *Law360*, *Human Resource Executive*, *Lawdragon* and *Super Lawyers*.

### **Adam Scoll, Partner, Proskauer Rose LLP**

Adam Scoll is a partner in the Firm's Tax Department and Private Funds Group.

He specializes in the area of Title I of ERISA and the investment of ERISA "plan assets," advising both pension trusts and their investment managers and advisers with regard to compliance with ERISA's complex fiduciary duty and prohibited transaction rules.

Adam regularly advises private investment fund sponsors regarding the structuring of their funds in order to accept investments from ERISA-covered pension trusts, including compliance with the ERISA "plan asset" regulations and the operation of venture capital operating companies (VCOCs) and real estate operating companies (REOCs).

Adam also represents both employers and senior executives in the negotiation and drafting of employment and separation agreements, deferred compensation plans, and equity and "phantom equity" arrangements, including compliance with the nonqualified deferred compensation rules under Sections 409A and 457A of the Internal Revenue Code.

### **Jennifer Rigterink, Senior Counsel, Proskauer Rose LLP**

Jennifer Rigterink is senior counsel in the Labor Department and a member of the Employee Benefits & Executive Compensation Group.

Her wide-ranging practice encompasses qualified retirement plans and non-qualified arrangements, health and welfare benefits, and fringe benefit programs. She counsels single-employer and multiemployer clients on matters pertaining to plan administration, design and qualification, as well as regulatory, legislative and legal compliance.

In recent years, Jennifer has advised employers and plan sponsors with fiduciary and governance matters applicable to defined benefit plans and pension de-risking activities, including lump sum window programs, annuity purchases, and pension plan terminations.

Jennifer frequently counsels clients on health and welfare arrangements, with a particular focus on all matters relating to family building and reproductive health care benefits. Her experience also includes working with employers and plan sponsors on mental health parity compliance issues.

Prior to joining Proskauer, Jennifer clerked for Judge Jacques L. Wiener, Jr., in the United States Court of Appeals for the Fifth Circuit and Judge Yvette Kane in the United States District Court for the Middle District of Pennsylvania.

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