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The 2023 DOL Proposal – A Significant Setback for Retirement Savers

- **It Expands the Definition of "Investment Advice Fiduciary" to All Producers Selling Qualified Annuities to ERISA Plan and IRA Investors**

  Under a new, much more expansive "three-part" test, an individual selling an annuity to a plan, plan participant, beneficiary or IRA owner would be deemed to be a fiduciary if:

  (1) the person either directly or indirectly (e.g., together with any affiliate) makes recommendations on a regular basis as part of their business;
  (2) the recommendation is provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the investor; and
  (3) may be relied upon by the investor as a basis for investment decisions that are in the investor's best interest.

  This new, more expansive test would result in nearly all recommendations of annuities to consumers being seen as providing fiduciary investment advice under ERISA.

  Thus, a single, one-time annuity recommendation to a customer would be considered fiduciary investment advice. Except for transactions involving "independent producers," i.e., those who offer insurance products from two or more insurers, it is important to note that insurers are considered an affiliate for purposes of the definition and thus a fiduciary to the sales transaction.

- **It Significantly Narrows Exemptive Relief Necessary to Receive Compensation**

  As the new definition would deem nearly all annuity recommendations as "fiduciary investment advice," ERISA's fiduciary compensation exemptions would play a key role in how and whether an insurance agent can be paid for selling an annuity. Absent a Prohibited Transaction Exemption (PTE), ERISA and the Code prohibits fiduciaries from receiving compensation based on investment advice recommendations. Not only does the proposal drastically expand the definition of "investment advice fiduciary" – it also dramatically alters the two exemptions that would need to be used by insurance producers and affiliated insurers: PTE 84-24 and PTE 2020-02.

  Under the proposal, PTE 84-24 is available solely for the receipt of commissions paid for the sale of non-securities annuities by independent producers. As with PTE 2020-02, the new PTE 84-24 would require conformance with the "impartial conduct standards," i.e., ERISA's fiduciary obligations, and various disclosure obligations, including a written acknowledgement of fiduciary status. Insurers would be obligated to establish and maintain processes and procedures to review each and every annuity sale, mitigate conflicts of interest, and prudently appoint and review producers' adherence to the impartial conduct standards.

  To receive compensation for all other transactions, producers (and affiliated insurers) must comply with a revised PTE 2020-02. A particular amendment of note states that in establishing policies and procedures to mitigate Conflicts of Interest, insurers and other financial Institutions may not use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives that are intended, or that a reasonable person would conclude are likely, to result in recommendations that are not in retirement investors' best interest.

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- **It Results in Private Rights of Action**

  To obtain exemptive relief under either of the PTEs, persons must acknowledge in writing that they are providing fiduciary investment advice under ERISA, the Code (for IRAs) or both. Fiduciaries to ERISA plans are at risk of legal action in federal courts. As for IRAs, an acknowledgement on the part of a producer to a customer that it is making a recommendation as a fiduciary under the Internal Revenue Code could afford a basis for the customer to assert that the producer is also acting as a fiduciary under applicable state common law. While the Internal Revenue Code does not provide for a private right of action with respect to fiduciary violations of the Code's prohibited transaction rules, private claims may be brought in state courts for alleged breaches by common law fiduciaries. Accordingly, the fiduciary acknowledgement may carry with it a risk of heightened exposure to legal action in state courts.

- **It Ignores the Federal Court Ruling That Invalidated DOL's 2016 Proposal**

  It is clear that DOL disagrees with the Fifth Circuit's ruling striking down its 2016 fiduciary package – indeed, it admitted so in its briefs in the *American Securities Association vs. DOL* fiduciary litigation (which DOL lost). The new proposal completely ignores the Fifth Circuits ruling, in several respects. The Fifth Circuit held that ERISA ties fiduciary status to circumstances in which a fee is paid "for" advice. In contrast, the DOL proposal would treat all compensation received at the completion of any sale for which a product is recommended as compensation paid for advice.

  Moreover, the Fifth Circuit found that "when enacting ERISA, Congress was well aware of the distinction...between investment advisers who were considered fiduciaries, and stockbrokers and insurance agents, who generally assumed no such status in selling products to their clients. The Fiduciary Rule improperly dispenses with this distinction." DOL completely snubs this conclusion, stating in the preamble (as it did in the preamble to its failed 2016 rule) that it "rejects the purported dichotomy between a mere "sales" recommendation to a counterparty on the one hand, and advice on the other, in the context of the retail market for investment products."