More on the DOL 'Best Interests' Rule

Wednesday, November 8, 2023

Take-Away: Is a one-time recommendation to make an *IRA rollover* covered by the SEC and DOL's *best interest fiduciary rule?* We will soon learn the answer to this question.

Background: As was recently reported in an earlier missive, the Department of Labor (DOL) on October 31 released its new proposed definition of the term *fiduciary.* The key change if this proposal becomes final is that when an advisor makes a one-time recommendation to a plan participant to rollover their qualified plan account to an IRA, that advice must be in the *best interests* of the plan participant. This change in coverage results from the DOL's removal of the phrase *on a regular basis* as part of the prior definition of *fiduciary,* which consists of a five-part test that is used to determine when a financial professional is considered as an investment advice fiduciary under the Employee Retirement Income Security Act [ERISA.]

A Brief History: Back in 2016 the Obama administration finalized a regulation commonly referred to as the *fiduciary rule* that broadened the definition of a person or entity taking on fiduciary responsibilities and replaced a 5-part test used to determine whether an investment professional or financial institution serves as a *fiduciary.* However, that rule was struck by a federal Court of Appeals panel in 2018. Then, in 2020, the DOL issued a final rule that reinstated the 5-part investment advice fiduciary 'test'. Later that same year the DOL finalized a prohibited transaction exemption that permitted investment-advice fiduciaries to receive compensation for more types of guidance, including the advice to roll over assets from a qualified plan to an IRA. In 2021, the Biden administration issued guidance in the form of frequently asked questions that sought to clarify the 5-part 'test' but one of those FAQs was vacated by a federal judge which had outlined when *rollover* advice is considered to be on a *regular basis.*

401(k) Investments: Also, as noted in the earlier missive, the updated DOL proposal would also apply the *best interest* standard to advice that qualified plan sponsors receive about which investments to include in their 401(k) and other employer-sponsored plans.

Prohibited Transaction Exemptions: The proposed DOL rule also includes proposed amendments to the prohibited transaction exemptions [2020-02 and 84-24] so that fiduciaries who use them must follow consistent and protective compliance requirements, including an obligation to act in the retirement investors' *best interests.*

60-Day Public Comment: The DOL's proposal has a 60-day public comment period after being published in the Federal Register, so we should know shortly after the new year if these proposed rules become final.

Insurance Advice: The intent of this proposed DOL rule change is to align the DOL's rules with the SEC's *Regulation Best Interests* to stipulate that retirement advisors must provide advice 'in the saver's *best interest*, regardless of whether the advisor is recommending a security or an insurance product. As the SEC's rules currently stand, they generally do not cover advice with respect to commodities or insurance products (which are normally covered by state law.) For example, the SEC's rules do not cover advice when an IRA owner purchases an annuity. The sale of insurance products would now be covered under the DOL's proposed rule.

Opposition: To be expected, there is considerable opposition from industry groups to this proposed rule change, including some in Congress. As one Congresswoman recently quipped: *"The latest DOL rule proposal is just new lipstick on the same old pig, and it will harm retirement plans, retirees, and savers. The DOL's proposal reaches well beyond its jurisdiction. Instead of regulating retirement plans, DOL is trying to regulate what individuals do with their own retirement savings. This kind of overreaching interference spells disaster."* Yet another Congressman had a different reaction to the DOL proposal: *"While most advisors put their retirement clients' interests first, unscrupulous retirement professionals continue to pad their own pockets by steering clients to high-fee investment products that produce lower returns for retirement savers."* The AFL-CIO and AARP support the proposed rule-change describing it as *"a major milestone in the long fight to bring millions of Americans one step closer to a secure, dignified retirement.*

Conclusion: If history is any indication, once some type of this proposed DOL rule becomes final, it will be challenged in the federal courts.