Take-Away: A new Department of Labor Fiduciary Rule has been published that would cover advice to roll retirement funds into an IRA which is intended to address perceived conflicts of interest.

Background: On April 25, 2024, the Department of Labor (DOL) published its *Retirement Security Rule.* This Rule redefines who qualifies as a fiduciary under the Employee Retirement Income Security Act [ERISA.] This new rule clarifies when financial professionals must act in the best interest of their client. The DOL has also released a set of amendments to its Prohibited Transaction Exemptions, which are specific requirements for fiduciaries who engage in transactions that could create a conflict of interest. [PT 84-24.] It reflects the DOL's longstanding effort to bring all retirement plans and IRAs under ERISA, since ERISA only permits 'reasonable compensation' to service providers, including investment advisors.

Fiduciary Rule: This rule applies when an investor is saving for retirement through a qualified plan, such as a 401(k) plan, or an IRA. The rule introduces a new process to define who qualifies as a fiduciary. It focuses on the nature of the relationship between the advice provider and the investor. In short, anyone who holds themselves out as a trusted advisor when providing advice will become an *investment advice fiduciary,* which means that they must put the investor's interests ahead of their own. The claimed intent of this DOL rule is to limit conflicts of interest and to close perceived 'loopholes.'

> **Rule Substance:** The new Rule would require: (i) advisors to give advice that is in the best interests of the participant; (ii) advisors receive no more than reasonable compensation; and (iii) advisors make no materially misleading statements to the participant.

Example: Currently under ERISA, advice that is provided on a one-time basis, like the sole recommendation to roll assets from a 401(k) account to an IRA to purchase mutual funds or an annuity is *not* considered fiduciary advice. The DOL feels that such one-time advice is often of critical importance for investments, since those assets held in the participant's retirement account may constitute the investor's total life savings. Hence, such rollover advice would be covered under the new Rule.

Effective Dates: This new Fiduciary Rule is scheduled to take effect on **September 23, 2024.** The updated Prohibited Transaction Exemptions will take effect in **September 2025.** There is a grace period of one year before the new Rule will be enforced by the DOL. My suspicion is that the scheduled grace period was put in place with the expectation that there will be litigation that challenges the new Rule.

Who Will Benefit? Assuming this new Fiduciary Rule is here to stay, it will probably benefit two types of investors: (i) investors in small retirement plans; and (ii) investors who roll retirement assets into a fixed index annuity.

Participants in Small Retirement Plans: Some guesstimates associated with the new Rule suggest that the average costs for participants in a small retirement plan would drop to 75 basis points from 93 basis points. It is projected that these participants would save over $55 billion in the first 10 years and over $130 billion in the subsequent 10 years. Over 80% of the savings would be experienced by small-plan participants of which there are currently more than 20 million. An advisory firm that aids plan sponsors in the construction of their plan lineups- which would newly be considered *fiduciaries* under this new Rule- will need to comply with the amended Prohibited Transaction Exemptions to receive compensation that would otherwise be prohibited. In doing so, those advisors will need to ensure that their recommendations to small plan sponsors and their participants are prudent and that their fees are reasonable.

Participants Rolling into Fixed Index Annuities: It is expected that the new Rule will lead to significant savings for retirement investors who roll their retirement savings into a fixed index annuity, because those products are not currently covered by the SEC's Regulation Best Interest. It is projected that retirement investors who roll into fixed-index annuities will save over $32.5 billion in the first 10 years and over $32.5 billion in the subsequent 10 years. While most fixed-index annuities do not have explicit fees, an investor in the annuity still pays in the form of lower returns (credited interest rates.) This is how the insurance company usually pays commissions and covers its costs to distribute the annuity product.

Conclusion: There has been a long history of the DOL attempting to expand its Fiduciary Rule, starting back in 2010. Yet another new rule appeared in 2016, but a federal appeals court held that rule invalid in 2018. Since then, the DOL has spent considerable time attempting to redraft its Fiduciary Rule to accommodate the criticism of that federal appeals court. And as expected, litigation was filed by the Americans for Consumer Choice in a Federal District Court in Texas in early May, 2024. This lawsuit, joined in by several insurance companies, is yet another example of judicial forum-shopping, since this Texas federal District Court is covered by the United States Fifth Circuit Court of Appeals, the same federal appellate court that struck down the 2016 Fiduciary Rule as being inconsistent with the intent of Congress. An injunction to stop the new Fiduciary Rule has been requested. So stand by to see if the injunction is granted to postpone the new Rule's effective date.