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DEPARTMENT OF LABOR ANNOUNCES PROPOSED RETIREMENT SECURITY RULE

February 16, 2024

Rule Would Ensure Financial Advisors, Brokers and Insurance Agents are Each Held to a Higher Fiduciary Standard.

The Department of Labor (DOL) has unveiled its proposed "Retirement Security Rule" which redefines and expands those that qualify as an "investment advice fiduciary" under ERISA. Proponents of the Rule say the updated fiduciary rules can increase the integrity of both retirement plan management and plan performance by raising the standards for fiduciary investment advice.

The determination of "who is a fiduciary" is of vital importance under the Employee Retirement Income Security Act (ERISA) because ERISA contains specific standards of care required of those administering control over retirement plans and similar investment vehicles. Although not necessarily intended targets of this proposed Rule, it may impose unintended consequences on new categories of employer plan fiduciaries, including securities brokers and insurance agents. For example, the Rule expands coverage to capture one-time recommendations on account rollovers as "fiduciary investment advice."

The New Test for Identifying a Fiduciary

Under this proposed Rule, the DOL states that a person would be an "investment advice fiduciary" for purposes of ERISA if:

1. The person provides investment advice or makes an investment recommendation to a retirement investor, such as an individual retirement account, plan participant or plan fiduciary;

2. The advice or recommendation is provided for a "fee or compensation, directly or indirectly;" and

3. The advice is given by a person identifying themselves as a fiduciary, the person makes investment recommendations as a regular part of their business that are intended to be relied on by a

retirement investor; and the person has discretionary authority with respect to purchasing or selling securities or investment products for a retirement investor.

This new guidance is intended to enhance the DOL's current Five Part Test for identifying an "investment advice fiduciary." This test states that a financial institution or individual will be an "investment advice fiduciary" if the person or entity: (1) renders advice to a plan as to the value of securities or other property, or recommends as to the advisability of investing in or purchasing securities or property; (2) on a regular basis; (3) pursuant to an agreement or understanding; (4) the advice serves as a primary basis for investment decisions with respect to plan assets; and (5) the advice will be targeted based on the particular needs of the plan.

Implications for Investment Advisors, Securities Brokers and Insurance Brokers

The Rule is intended to more accurately capture those who administer investment advice that implicate retirement plans, including individual account plans such as 401(k)s and IRA plans. If this Rule passes, those individuals need to be aware of this Rule's definitions and the associated standards of care for their professional advice under ERISA.

The DOL proposed this Rule on Nov.3, 2023, with the goal of finalizing it in early 2024. We will keep you posted on these important developments.

Related Practices

Labor and Employment

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