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New DOL Fiduciary "Rule" Could Result in Fiduciary Status for Some Agents

Background

On February 16, 2021, a new DOL fiduciary "rule" became effective that could impact agents who sell insurance or annuity contracts to retirement plans and IRAs, particularly in the context of IRA transfers and plan rollovers. The rule is a combination of a new and expansive definition of fiduciary advice (and status) and an exemption from the prohibitions of the Employee Retirement Income Security Act ("ERISA") and the Internal Revenue Code (the "Code") for certain conflicts of interest arising from "nondiscretionary" fiduciary recommendations. "Nondiscretionary" means that the plan fiduciary or IRA owner makes the final decision as to whether to implement (or reject) the recommendation.

Scope of the New Rule

The DOL's guidance applies to advice to ERISA retirement plans and participants, and to IRA owners (which are referred to as "retirement investors") by financial institutions and investment professionals. The term "financial institutions" refers to registered investment advisers, broker-dealers, banks and trust companies, and insurance companies. "Investment professionals" refers to the representatives and agents of those financial institutions.

In the guidance, the DOL announced an expanded definition of when financial institutions and investment professionals become fiduciaries under ERISA and the Code. That expanded definition has a significant impact on IRA transfers and plan rollovers. Under the DOL's expanded interpretation of fiduciary advice, recommending a rollover that the investment professional anticipates will be the first step in an ongoing financial relationship concerning the retirement assets (e.g., an annuity that is a rollover or transferred IRA) and that results in compensation to the professional (e.g., commissions) will, in most instances, be considered a fiduciary act. For this purpose, the DOL interprets "rollover" very broadly to include a rollover from a plan to an IRA, from a plan to a plan, from an IRA to a plan, from an IRA to an IRA, or a change of account types for a plan or an IRA (*e.g.*, from commission-based to fee-based). The term "IRA" covers Individual Retirement Accounts, Individual Retirement Annuities, Archer Medical Savings Accounts, Health Savings Accounts and Coverdell Education Savings Accounts. And, the term "plan" covers ERISA plans and other tax-qualified plans, including solo 401(k) plans.

While this example is of a rollover recommendation, other advice to plans, participants and IRA owners is similarly impacted by the DOL's expanded fiduciary advice interpretation.

What this Means for You

Here are some examples of how this could apply to you. Let's suppose that you recommend that an ERISA plan participant roll into a fixed rate annuity under which you are paid commissions. If you have not had an ongoing financial relationship with the participant regarding retirement assets, the facts and circumstances may be that there is no anticipation of additional advice in the future. In that instance, the recommendation would not be considered fiduciary advice. However, if you recommend a fixed indexed annuity or variable annuity where ongoing advice is contemplated as part of the services to be provided to the participant, then this would be considered fiduciary advice. As such, you will need to ensure that your advice satisfies the ERISA prudence standard and duty of loyalty to the participant. And, because the fiduciary recommendations result in compensation that you would not have received absent the rollover recommendation (i.e., the commissions), this is a conflict of interest that is prohibited, and a prohibited transaction exemption (PTE) is needed.

Available Prohibited Transaction Exemptions

In this context, the PTE could be either the new PTE 2020-02 (which applies to all types of financial advice transactions and investments) or the existing PTE 84-24 (which applies to sales of insurance and annuity products). Each exemption has conditions that must be satisfied.

Overview of PTE 2020-02 vs. PTE 84-24

Suffice it to say that at this point, the conditions that must be complied with for PTE 84-24 are much simpler than those in PTE 2020-02. Also, under PTE 2020-02, both the financial institution and the agent must acknowledge co-fiduciary status, while that is not a requirement under PTE 84-24. However, PTE 84-24 is more limited; that is, it only applies to transactions involving the sale of insurance policies and annuity contracts to plans or IRAs.

During the months since issuance of PTE 2020-02, financial institutions whose investment professionals advise on both insurance and annuity transactions and other types of investment transactions, have had to make a choice. That is, should the firm have a single set of policies, procedures, and training for all transactions, *i.e.,* rely on PTE 2020-02, or rely on PTE 84-24 for insurance transactions? In our experience, most broker-dealers and investment advisory firms have elected to rely solely on PTE 2020-02 for all types of conflicted advice, whereas insurance companies have elected to continue to have agents rely on PTE 84-24 for insurance sales. The rationale for the decision by broker-dealers and investment advisers is that, since they are required to use PTE 2020-02 for their securities recommendations, it will be less cumbersome to use only one exemption, whereas the decision by insurance companies to continue to use PTE 84-24 stems from the fact that it is simpler process and one that agents have been familiar with for over 35 years.

It is important to know, though, that the DOL is revisiting the definition of fiduciary investment advice and the requirements of various prohibited transaction exemptions, including PTE 84-24. While there is no clear indication what changes the DOL may make to PTE 84-24, the likely changes would be to better define the types of compensation and benefits that are covered by the exemption, the addition of a standard of conduct that mirrors that of PTE 2020-02 as a condition to compliance (i.e., the impartial conduct standards, described further below) and limiting the types of insurance products that are covered by the exemption.

PTE 84-24

As noted earlier, the conditions of PTE 84-24 are much simpler. The agent must provide the following information in writing prior to the execution of the transaction:

- Whether the agent is an affiliate of the insurance company whose contract is being recommended or if the ability of the agent to recommend contracts is limited by any agreement;
- The sales commission paid to the agent, expressed as percentage of the gross annual premium payments for the first year and for each succeeding renewal year; and
- A description of any charges, fees, discounts, penalties, or adjustments that may be imposed in connection with the purchase, holding, exchange, termination, or sale of the contract.

An independent fiduciary of the plan or IRA must provide a written acknowledgment of receipt of this information and approval of the transaction.

Also, the following requirements must be met:

- The transaction must be affected by the agent in the ordinary course of business;

- The transaction must be on terms at least as favorable to the plan or IRA as an arm's length transaction with an unrelated party; and

- The combined total of all fees, commissions and other consideration received by the agent or insurance company for the provision of services to the plan or IRA and in connection with the purchase of the insurance or annuity contract cannot be more than reasonable compensation.

Until the DOL changes any of these conditions or adds new ones, PTE 84-24 is clearly much easier to comply with for insurance transactions.

Atlantic Coast Life's Guidance:

Scheduled to take effect on February 01, 2022, Atlantic Coast Life will offer our independent agents, who engage in IRA transfers and plan rollovers, samples of how to comply with the requirements of PTE 84-24 and Impartial Conduct Standards.

Please see the sample guide provided in the announcement.

Do not return form(s) to home office.

Please use one of the following communication methods shown on the website: https://aclico.com/contact-us/ for any questions.

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