Comments on the Proposed Rule: Definition of an Investment Advice Fiduciary; Prohibited Transaction Exemption

Docket No. RIN 1210-AC02 (EBSA-2023-0014)

I am writing to express my views on the proposed rule issued by the Department of Labor regarding the definition of an investment advice fiduciary and the related prohibited transaction exemption (PTE). I believe that the proposed rule is useful as it would protect retirement investors from conflicts of interest and ensure that they receive advice that is in their best interest. However, I also acknowledge and understand the concerns and challenges that it may pose for financial professionals. I believe that there may be a middle ground position that would balance the interests of both parties. I offer the following six suggestions to that end:

- <u>Improve the Written Disclosure and Consent Requirement</u>: To ensure that investors understand and consent to the fiduciary relationship and the associated costs and risks, I suggest that the rule should enhance or supplement the requirement of providing a written acknowledgment of fiduciary status and a written description of services and material conflicts of interest, such as by requiring fiduciaries to obtain a written agreement or a signed disclosure from the plan or the participant.

- <u>Use a Different Term for the Investment Professional</u>: To avoid confusion and imply that the person is a fiduciary under ERISA, I suggest that the rule should use a different term, such as "investment advice provider" or "investment advice professional", instead of "investment advice fiduciary".

- <u>Narrow the Definition of Investment Advice</u>: To avoid capturing any communication that could be construed as a suggestion or opinion on investment matters, I suggest that the rule should narrow the definition of "investment advice", such as by excluding general financial education, market commentary, asset allocation models, or interactive tools.

- <u>Clarify or Modify the Conditions of the New PTE</u>: To avoid unclear or inconsistent requirements, I suggest that the rule should clarify or modify the conditions of the new PTE, such as by aligning them with the SEC's guidance, or by providing more flexibility or examples.

- <u>Eliminate or Revise the Exclusion of Certain Fiduciaries from the New PTE</u>: To avoid creating an uneven playing field and discriminating against certain fiduciaries, I suggest that the rule should eliminate or revise the exclusion of certain types of fiduciaries from the new PTE, such as by allowing them to use the PTE if they meet the same conditions as other fiduciaries.

- Limit or Prohibit the Receipt of Third-Party Compensation: To prevent fiduciaries from receiving excessive or hidden compensation that could compromise their impartiality and objectivity, I suggest that the rule should limit or prohibit the receipt of third-party compensation by investment advice fiduciaries. Alternatively, the rule could require fiduciaries to offset or rebate any third-party payments to the plan or the participant, to make such compensation transparent and fair.

In the following paragraphs, I will explain each suggestion in more detail.

Improve the Written Disclosure and Consent Requirement

This suggestion would improve the quality and clarity of the information provided to the retirement investors, and ensure that they have the opportunity and ability to review and agree to the fiduciary relationship and the compensation arrangements. For example, by requiring fiduciaries to obtain a written agreement or a signed disclosure from the plan or the participant, the rule would create a binding and enforceable contract between the fiduciary and the retirement investor, and provide a record of their mutual understanding and consent. This would also help fiduciaries to avoid potential disputes or lawsuits, as they would have evidence of their compliance with the rule. However, this suggestion might also increase the administrative costs and burdens for fiduciaries and investors, as they would have to prepare and process more documents and forms.

Use a Different Term for the Investment Professional

This suggestion would avoid confusion and imply that the person is a fiduciary under ERISA only when they provide investment advice for a fee or other compensation, direct or indirect, and meet the other criteria of the rule. This would also create a distinction between the fiduciary status under the rule and the fiduciary status under ERISA section 3(21)(A)(i) or (iii), or the Investment Advisers Act of 1940, which may have different implications and obligations. For example, by using the term "investment advice provider", the rule would indicate that the person is providing a service, rather than acting as a trustee or a manager of the plan or the assets. This would also help investors to understand the scope and limitations of the fiduciary relationship, and to compare and evaluate different types of investment advice providers. Nevertheless, this suggestion might only be practical if it would not interfere with existing laws and regulations that use the term fiduciary to define the duties and responsibilities of the person who provides investment advice.

Narrow the Definition of Investment Advice

This suggestion would exclude from the definition of investment advice those types of communications that are typically educational, informational, or illustrative, and do not involve specific recommendations or personalized advice. This would reduce the risk of over-inclusiveness and over-regulation, as many financial professionals who provide these types of communications may not intend to provide investment advice or influence the retirement investors' decisions. For example, by excluding general financial education, the rule would allow financial professionals to provide basic information and guidance on financial concepts, principles, strategies, or products, without triggering the fiduciary status. This would also benefit investors, as they would have access to more sources of financial education and awareness. However, this suggestion might also create ambiguity, as it may not be clear what constitutes general financial education, market commentary, asset allocation models, or interactive tools, and how to distinguish them from investment advice. This could result in uncertainty and inconsistency, as different financial professionals and investors may interpret and apply the definition differently.

Clarify or Modify the Conditions of the New PTE

This suggestion would make the conditions of the new PTE more clear and consistent, and avoid unnecessary or unreasonable burdens or restrictions. For example, by aligning the requirement to document and retain the reasons for rollover recommendations with the SEC's guidance, the rule would clarify what information and analysis fiduciaries should consider and provide when making such recommendations, and how long they should keep the records. This would also help fiduciaries to demonstrate their compliance with the rule and their fiduciary obligations, and help investors to evaluate the suitability and quality of the recommendations. However, this suggestion might also increase the compliance and administration costs and burdens for fiduciaries and investors, as they would have to collect and store more data and documents.

Eliminate or Revise the Exclusion of Certain Fiduciaries from the New PTE

This suggestion would allow certain types of fiduciaries, such as plan fiduciaries under ERISA section 3(21)(A)(i) or (iii), or investment advisers under the Investment Advisers Act of 1940, to use the new PTE if they meet the same conditions as other fiduciaries. This would create a level playing field and eliminate the discrimination against these fiduciaries, who may have more experience and expertise in providing investment advice to retirement investors. For example, by allowing investment advisers under the Investment Advisers Act of 1940 to use the new PTE, the rule would recognize that these fiduciaries are already subject to a fiduciary duty under the federal securities laws, and that they should not be penalized for their fiduciary status. This would also benefit investors, as they would have more access and choice to qualified and reputable investment advisers. Nevertheless, this suggestion might introduce complexity, as it may create conflicts or gaps in the regulatory framework and jurisdiction, and require coordination and cooperation among different regulators and agencies.

Limit or Prohibit the Receipt of Third-Party Compensation

This suggestion would eliminate or reduce the loophole created by the provision of the new PTE that would allow fiduciaries to receive compensation from third parties, such as commissions, 12b-1 fees, or revenue sharing payments, without any limits, restrictions, disclosure, or consent. This would ensure that fiduciaries do not have any incentives or conflicts of interest that could affect their advice. Alternatively, the rule could require fiduciaries to offset or rebate any third-party payments to the plan or the participant, to make such compensation transparent and fair. For instance, suppose that a fiduciary recommends a mutual fund to a retirement investor, and receives a commission from the fund company for doing so. Under the current provision of the new PTE, the fiduciary would not have to disclose or obtain consent for this commission, nor would there be any limit or restriction on the amount or source of the commission. This could create a loophole for the fiduciary to receive excessive or hidden compensation that could compromise their impartiality and objectivity. To avoid this, the rule could limit or prohibit the receipt of such commission, or require the fiduciary to offset or rebate the commission to the retirement investor. This would ensure that the fiduciary acts in the best interest of the retirement investor, and that the retirement investor is aware of and agrees to the compensation arrangement. However, this suggestion might also reduce investment options for retirement investors, as some fiduciaries may not be able to offer certain options or solutions that could benefit them.

Those are my six suggestions on how to improve the proposed rule. I hope that the Department of Labor will consider them carefully in finalizing the rule. I believe that these suggestions would provide demonstrably-needed fiduciary protections for investors without imposing excessive burdens on financial professionals.

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The impact of the proposed rule on different types of retirement investors

I also want to ask the Department of Labor to think about how the proposed rule would affect different kinds of retirement investors, like plan sponsors, plan participants, IRA owners, or rollover recipients, and how the rule could help them with their specific needs and concerns. For example, plan sponsors might need more guidance and support on how to choose and monitor the best investment advice providers for their plans, and how to make sure that they are looking out for the best interest of the plan and its participants. Plan participants might need more education and awareness on how to compare and evaluate different investment advice providers and products, and how to protect themselves from possible conflicts of interest or fraud. IRA owners might need more access and choice to affordable and quality investment advice providers and products, especially for those who have lower incomes or smaller accounts, and who might not be able to afford or qualify for fiduciary services. Rollover recipients might need more information and assistance on how to make smart and careful decisions on whether and how to rollover their assets from their plans to IRAs, and how to avoid unnecessary fees or penalties. The proposed rule should address these needs and concerns by providing clear and consistent standards and disclosures, improving the quality and availability of investment advice, and working together with different regulators and agencies.

The impact of the proposed rule on different types of investment products and services

I also encourage the Department of Labor to think about how the proposed rule would affect different types of investment products and services, like mutual funds, annuities, robo-advisers, or managed accounts, and how the rule could work with their features and benefits. For example, mutual funds might offer a lot of investment options and strategies, but they might also have different types of fees and expenses, like commissions, 12b-1 fees, or revenue sharing payments, that could create conflicts of interest or lower returns for investors. Annuities might provide guaranteed income and protection from market risks, but they might also have high costs and surrender charges, and they might not be suitable for everyone. Robo-advisers might provide low-cost and convenient investment advice, but they might also have limitations in terms of customization, interaction, or fiduciary duty. Managed accounts might provide personalized and comprehensive investment advice, but they might also charge higher fees and require higher minimum balances. The proposed rule should work with these features and benefits by allowing different types of investment products and services to be offered and recommended, as long as they are in the best interest of the retirement investors, and by requiring fair and transparent compensation arrangements and disclosures.

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