

December 29, 2023

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Ave. NW
Washington, D.C. 20210

Attention: Definition of an Investment Advice Fiduciary - RIN 1210-AC02

Subject: Comments on the DOL's Proposed Investment Advice Fiduciary Rule Regulatory Changes

From: Anonymous

The DOL's proposed regulatory changes with respect to Individual Retirement Accounts, including rollovers and transfers are ill-advised and illegal for many reasons. The DOL believes and argues it has been given authority to rewrite the law to apply the provisions of Title I of ERISA to Individual Retirement Accounts. Title I of ERISA is Protection of Employee Benefit Rights. One of the obvious goals of the DOL's proposed regulation is that the DOL will have new powers to regulate IRAs.

The DOL has not been given this authority and should not be given this authority. It is the IRS which has and should have the responsibility to regulate and administer IRAs. The DOL apparently believes individuals are unable to make informed decisions including investment decisions and are generally incapable of acting in their own best interest. There must be a third party who makes the determination that what he or she wishes to do is in their best interest.

Congress enacts the laws and not the Department of Labor. The DOL is in essence taking on the role of Congress and rewriting the law with monumental changes. If the law needs to be changed, Congress needs to make the changes and not the un-elected employees in the Department of Labor. The fact that Congress is functionally unable to enact new legislation does not mean that the DOL has the authority or the right to re-write the laws.

The tax laws applying to Individual Retirement Accounts are set forth in Internal Revenue Code sections 408 and 219. The law is clear that there was one set of prohibited transaction rules under Title I for pension plans sponsored by employers and another set of prohibited transaction rules under Title II and these applied and apply to IRAs.

The DOL is proposing that IRA custodians and trustees and IRA account holders will be subject to dual regulation from the IRS and the DOL. A party may be fined or taxed by both the IRS and the DOL. This dual regulation will be very burdensome and confusing.

Until recent, the DOL has never taken the position it has the right to regulate any IRA which does not have some relationship to an employer.

The DOL argues that because of the Reorganization Plan No. 4 of 1973, which Congress ratified in 1984 that the DOL has been given the general authority to define who is a fiduciary for purposes of applying the prohibited transaction rules for purposes of Title I and Title II of

ERISA and for other broad purposes. The DOL is proposing to increase its authority greatly by applying the rules of Title I to Individual Retirement Accounts. Congress did not write ERISA to apply the rules of Title I which apply to employer sponsored retirement plans to IRAs. And yet the DOL thinks it has the power to do so. I don't believe Congress has ever said to the DOL that we want the DOL to establish new rules for IRAs. This topic has been discussed since around 2015.

The DOL's new powers will cause massive confusion as to how IRA and pension plans are to be administered. The fundamental law for both IRAs and pension plans is that the terms of the plan document must be followed. Will the Department be taking over from the IRS the responsibility of determining if an IRA plan document complies with the law ?

The proposed regulation defines as a fiduciary advice recommendation any transaction of rolling over, transferring or distributing assets from an employee benefit plan or IRA. So, the DOL believes every distribution from an IRA or pension plan is a fiduciary transaction regardless if the person receiving funds from a plan or an IRA has an intent to make a rollover. This is ludicrous. Not every distribution involves the need to seek or use investment advice. The mandatory involvement of an investment adviser in many cases will be an invasion of privacy. If a person wishes to withdraw funds from his or her pension plan or IRA, he or she may not want to tell the pension plan administrator or the IRA custodian why the funds are being withdrawn and how they will be used. The individual has this right to not inform the IRA custodian or the plan administrator if he or she so decides. The person is entitled to use the funds for non-retirement purposes. The DOL may not like that fact ,but the person has that right.

There are real world differences between a direct rollover (plan to IRA), rollover (distribution to a person from an IRA who then makes a rollover contribution to an IRA) and a transfer from one IRA custodian to another IRA custodian. The DOL seems to assume these situations are similar and that there must be a formal review in each situation. The DOL needs to get in the real world. I am an accountholder and I have my IRA account with ABC. I don't need to explain or justify to ABC or DEF why I am moving my IRA to DEF. Nor does DEF need to determine that it is in my best interest that I have made the decision to move my funds to DEF.

The DOL has not discussed very well the job of a financial adviser in the following situations.

An IRA accountholder may take a distribution with the initial mind-set that he or she will roll it over and he or she does roll it over.

An IRA accountholder may take a distribution with the initial mind-set that he or she will roll it over but he or she never rolls it over.

An IRA accountholder may take a distribution with the initial mind-set that he or she will not roll it over and he or she does not roll it over.

An IRA accountholder may take a distribution with the initial mind-set that her she will not roll it over but he or she does roll it over.

The DOL makes the obvious statement that any fees charged to the person will lower the retirement funds which will be available for retirement. The same can be said about federal income taxes. The income taxes to be paid will reduce the amount an individual is able to use for retirement. The amount of taxes to be paid are more material than the amount of fees to be

paid, but the DOL ignores this subject. .

The IRS currently requires an employer plan to furnish a person taking a distribution with a section 402(f) notice and the IRS has provided safe harbor forms. In general this form does an adequate job of explaining to a person the rollover rules. There is no doubt that the rollover rules are complicated, but the most section 402(f) notices do an adequate job of explaining the tax consequences. There are changes which could be made to improve the form but the IRS as the DOL many times is not real receptive to making changes. It is noted that the IRS has never chosen to have any discussion in the section 402(f) notice regarding how the funds might be invested after the rollover has been made. The point being, there has not been close coordination between the IRS and the Department of Labor on the subject of rollovers.

I agree with the DOL that in some defined situations an IRA account holder or beneficiary should have an express right to sue an IRA custodian and that the law would define the damages. But Congress needs to make this change.

I agree with the DOL that there are situations where an IRA custodian should be able to receive compensation from a third party. The type of situations and the permitted amounts should be defined. It is time Congress revisits the prohibited transaction rules.

Rather than avoiding the subject and allowing the IRA custodian to charge any fee as long as it is reasonable, Congress should define with respect to IRAs the maximum amounts which may be charged for rendering certain services such as a distribution, a transfer, preparing IRS reporting forms, terminating the IRA, etc.

The DOL has not made clear - is it a duty of the fiduciary to consider all of the various tax aspects related to a person taking or not taking a distribution? Does investment advice include tax analysis advice?

In summary, the DOL's proposed regulation on fiduciary advice, rollovers and the changes to PTE 2020-02 and others PTEs should not be adopted. The DOL and the IRS should go to Congress and inform Congress how and why the IRA and pension laws should be changed. The public should be involved in the process. The DOL appears to have the attitude, we want to make these changes as fast we as we can. Most likely, there will be continued litigation as the current law does not support the DOL's position that it has the authority to redefine the term fiduciary as broadly as it has.

Thank you for considering my comments,

Anonymous