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Employee Benefits Security Administration
Office of Exemption Determinations,
U.S. Department of Labor
200 Constitution Ave. NW
Washington DC 20210
VIA https://www.regulations.gov

Re: "Fiduciary Rule 2.0"[2]
Application No. D-12057 – Proposed Amendment to PTE 2020-02 ZRIN 1210-ZA32
Application No. D-12060 – Proposed Amendment to PTE 84-24, ZRIN 1210-ZA33
Application No. D-12094 – Proposed Amendments to PTE 75-1, 77-4, 80-83, 83-1, 86-128 ZRIN 1210-ZA34
Retirement Security Rule: Definition of an Investment Advice Fiduciary, RIN 1210-AC02

Summary

- Our dysfunctional regulatory structure leaves gaps in consumer protection for retirement accounts.
- This proposal attempts to fill the gap related to retirement rollovers.

[1] All opinions are strictly my own and do not necessarily represent those of Georgetown University or anyone else. I am very grateful to Georgetown University for financial support. Over the years I have served as a Visiting Academic Fellow at the NASD (predecessor to FINRA), served on the boards of the EDGX and EDGA stock exchanges, served as Chair of the Nasdaq Economic Advisory Board, and performed consulting work for brokerage firms, stock exchanges, other self-regulatory organizations, government agencies, market makers, industry associations, and law firms. I am the academic director for the FINRA Certified Regulatory and Compliance Professional (CRCP®) program at Georgetown University. I've also visited over 85 licensed financial exchanges around the world. As a finance professor, I practice what I preach in terms of diversification and own modest and well-diversified holdings in most public companies, including brokers, asset managers, market makers, and exchanges.

[2] Although these are technically separate proposals, I sometimes refer to them collectively as the proposal since they are all related and open for comment at the same time.

- The biggest gaps are in banking, insurance, real-estate, and crypto.
- It should explicitly address bank deposit accounts for IRAs that pay well below-market interest.
- It will impose additional unnecessary compliance burdens on broker-dealers and Registered Investment Advisers (RIAs) who already have a best-interest requirement. BDs and RIAs should be explicitly exempted.
- Rule proposals should use ~~strikeout~~ and *insertion* text to make proposed changes more understandable.

Dear DOL:

Background: This proposal deals with a gap in consumer protection.

The Department of Labor is proposing to amend its ERISA regulations to cover important gaps in consumer protection for retirement plans. In particular, when workers leave an employer, they need to decide what to do with their old 401(k) accounts. Such a decision is often the largest single financial decision a worker makes in their entire life, as it deals with their live savings. Numerous advice providers offer advice that is often subject to severe conflicts of interest.

Very different standards of care apply to different advice providers. At the highest level, Registered Investment Advisers (RIAs) have an explicit fiduciary requirement, followed closely by broker-dealers with a requirement to make recommendations in the best-interest of retail customers. Other purveyors of advice have looser standards, if any. The insurance industry is notorious for the practices of some of its sales reps in selling annuities. Some workers suffer from really bad advice from which it will be difficult or impossible to recover from.

These different advice providers are regulated in different ways due to the dysfunctional nature of the U.S. financial regulatory system. This dysfunction is not due to the many hard working and intelligent people who work in our regulatory agencies, but it is due to the US. Congress.

Our Congress has bestowed upon the United States a convoluted, expensive, and inefficient regulatory structure with literally hundreds of financial regulatory agencies at the state and federal levels. One would think that the Consumer Financial Protection Bureau (CFPB) would be protecting consumers in their retirement accounts. Alas, our CFPB has no jurisdiction over stocks, bonds, commodities, insurance, or car dealers. Go figure.

As retirement accounts are investment products, another logical regulator would be the Securities and Exchange Commission (SEC), but they only have jurisdiction over "securities" and "investment companies" and not over many of the other investment products sold by insurance companies, banks, realtors, coin dealers, and others. Bank regulation is a mishmash of state and federal regulation. Insurance has no federal regulator, just an incoherent patchwork quilt of state-by-state regulation.

The Department of Labor (DOL) has authority over retirement plans under ERISA, and is thus attempting to use its limited authority to plug this hole in consumer protection. I commend the DOL for doing this. The devil, of course, is always in the details. The existing proposal can and should be improved in ways to both improve worker protection and reduce unnecessarily redundant compliance costs for the financial industry that will be passed on to investors.

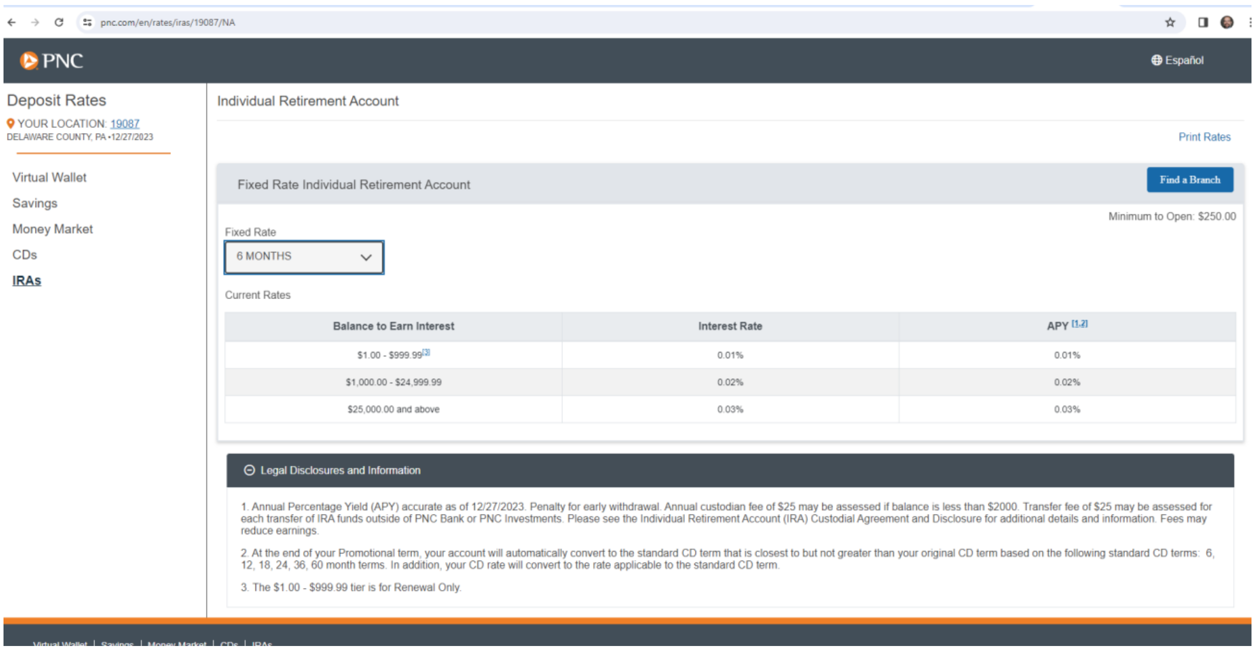
Banks often recommend unsuitable deposit accounts for IRAs.

Commercial banks generally offer IRA accounts. The proposals are not clear in how the new rules apply to banks and their account recommendations for IRAs. The fragmented nature of our regulatory system has created an extremely artificial separation of the commercial side from the investment side of banks. My brother recently walked into his bank, one of the ten largest in the US, and the bank representative could provide him information about his checking account but not his investment account at the same bank because the investment guy at that branch was out to lunch. The ghost of Glass-Steagall still haunts us.

Because the personnel at a commercial bank cannot recommend investments, they can only offer deposit accounts for an IRA while offering to set up an appointment with the investment guy. The commercial bank employee (not the investment guy) may be very unsophisticated about retirement investing.

Commercial banks are more than happy to let IRA money sit in an account that only pays 0.01% interest. This may be unsuitable for a worker who has many years to go before retirement, and who should be investing in a more diversified mix of asset classes. A worker whose retirement nest egg is sitting in such an account will be deprived of the benefits of decades of compounding returns on higher earning assets.

Here is an example from PNC as of December 27,2023. The bank is offering a 6-month CD for IRA accounts at a rate of at most 0.03%, when a six-month T-bill is yielding 5.26%


pnc.com/en/rates/iras/19087/NA

PNC

Español

Deposit Rates

YOUR LOCATION: 19087
DELAWARE COUNTY, PA •12/27/2023

Virtual Wallet
Savings
Money Market
CDs
IRAs

Individual Retirement Account

Print Rates

Fixed Rate Individual Retirement Account

Find a Branch

Minimum to Open: $250.00

Fixed Rate

6 MONTHS

Current Rates

Balance to Earn Interest	Interest Rate	APY [1,2]
$1.00 - $999.99[3]	0.01%	0.01%
$1,000.00 - $24,999.99	0.02%	0.02%
$25,000.00 and above	0.03%	0.03%

Legal Disclosures and Information

1. Annual Percentage Yield (APY) accurate as of 12/27/2023. Penalty for early withdrawal. Annual custodian fee of $25 may be assessed if balance is less than $2000. Transfer fee of $25 may be assessed for each transfer of IRA funds outside of PNC Bank or PNC Investments. Please see the Individual Retirement Account (IRA) Custodial Agreement and Disclosure for additional details and information. Fees may reduce earnings.

2. At the end of your Promotional term, your account will automatically convert to the standard CD term that is closest to but not greater than your original CD term based on the following standard CD terms: 6, 12, 18, 24, 36, 60 month terms. In addition, your CD rate will convert to the rate applicable to the standard CD term.

3. The $1.00 - $999.99 tier is for Renewal Only.

Note that the bank also offers "promotional rates" well below T-bill rates that automatically default to the low standard rates after the promotional rate expires. Such practices could easily lead a retirement investor who misses the maturity date of the promotional CD to be stuck in a 0.03% CD.

Here is an example of how bad the losses can be to a worker. Suppose a 25-year-old has just left his job and has $10,000 in his old 401(k). He walks into his bank and the teller opens an IRA account at the bank for his rollover. The account pays little interest and has a zero real return after inflation. After 40 years, the account is still worth $10,000 in real terms. If the worker had instead gotten better advice and invested in a diversified portfolio of assets with a mere 4% real return, the $10,000 would have grown to $48,010. At 5%, the funds would have grown to $70,400. The worker has thus suffered a big loss due to inadequate advice and inadequate financial literacy.

The final rules should explicitly address the standard of care that a bank has to IRA accounts.

<u>The retail activities of broker-dealers and RIAs should be explicitly exempted.</u>

The DOL has aimed to make the new proposal "generally consistent" with the SEC's Best Interest requirements. To minimize compliance costs to the industry and examination costs to DOL, the DOL should explicitly exempt broker-dealers and RIAs. The DOL should use a risk-based approach to rulemaking and impose new rules on the areas with the biggest risks. As the new rule is "generally consistent" with the SEC's approach, there is no need to apply a duplicative rule to activities already subject to SEC jurisdiction. Failure to carve out the SEC jurisdiction will divert DOL's limited resources into unnecessary and duplicative examinations of SEC-regulated entities. Furthermore, it will drive up costs to those entities with no added benefit to investors.

As the proposal states,

> "The proposals' compliance obligations are generally consistent with the best interest obligations set forth in the Securities and Exchange Commission's (SEC's) Regulation Best Interest and its Commission Interpretation Regarding Standard of Conduct for Investment Advisers (SEC Investment Adviser Interpretation), each released in 2019."

However, just being "generally consistent" is not good enough for a compliance professional tasked with ensuring compliance within a firm. I am very familiar with the compliance obligations from the SEC's Regulation Best Interest and the fiduciary requirements for RIAs. These are subjects I cover in the Certified Regulatory and Compliance Professional (CRCP®) program at Georgetown in conjunction with FINRA.[3] The tiny and seemingly inconsequential differences between the existing SEC rules and the proposed rules will cause costly compliance headaches with no benefit to investors. Those additional costs will be passed on to the workers whose accounts the DOL is trying to protect.

Record keeping requirements are different.

There are subtle differences in the documentation and record-keeping requirements between the proposed rules and the existing SEC rules. These can easily trip up an

[3] For more information about the CRCP program see https://www.finra.org/events-training/finra-georgetown And just to repeat the disclaimer: These are my opinions only and don't necessarily reflect those of FINRA or Georgetown.

honest firm that is attempting to comply. Compliance officers will have to separately examine the details of the new rule and adopt written policies and procedures for complying with the new rules, documenting compliance, and enforcing the documentation of compliance.

For example, the new rules have explicit six-year record-keeping requirements that are NOT the same as existing SEC and FINRA requirements. Some SEC records need only be retained for three years and others for longer periods.[4] The SEC rules also only require that they be "easily accessible" for the first two years. In contrast, the DOL's proposal is that the records be "reasonably accessible" for six years. Lots of compliance headaches (and thus expenses) will ensue as firms try to figure out the difference between "easily" and "reasonable." Can a three-year old record be moved from expensive on-line cloud storage to a slower backup medium and still be "reasonable?" Compliance professionals will have to keep track of compliance with both sets of record-keeping requirements and the costs of the most expensive interpretation will be passed on to the retirement investor.

Different interpretations of "recommendation" can be problematic.

Another difference stems from different interpretations of the key word "recommendation." This word is not formally defined in so many words in either the proposed rule or in Regulation Best Interest. The proposal states:

> "For purposes of the proposed rule, the Department views a recommendation as a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the retirement investor engage in or refrain from taking a particular course of action."

The SEC has a similar but not identical view of recommendations. From their Small Entity Compliance Guide:[5]

> "***What is a recommendation?*** The determination of whether a broker-dealer has made a recommendation that triggers application of Regulation Best Interest turns on the facts and circumstances of a particular situation, and therefore, whether a recommendation has been made is not susceptible to a bright line definition. Factors considered in determining whether a recommendation has taken place include whether the communication "reasonably could be viewed as a 'call to action'" and "reasonably would influence an investor to trade a particular security or group of securities." The more individually tailored the communication to a specific customer or targeted group of customers about a security or group of securities, the greater the likelihood that the communication may be viewed as a "recommendation.""

[4] See SEC Rules 17a-4 and 18a-6.

[5] https://www.sec.gov/info/smallbus/secg/regulation-best-interest#What_recommendations_are_covered

In other words, both the DOL and the SEC have an "I know it when I see it" approach to defining a recommendation that is up to differing interpretations. Notice that the SEC states that the "call for action" also is one that "reasonably would influence" the investor. The DOL's interpretation does not mention influence, only that it is a suggestion. These subtle differences can lead to different regulatory treatments at examination time.

As the proposed rules are "generally consistent" with the SEC's Regulation Best Interest, the DOL should explicitly exempt broker-dealers and RIAs in compliance with it and impose the compliance burdens on firms operating in areas without an explicit best interest standard such as banks, insurance companies, coin dealers, and crypto traffickers.

As noted in the release, Regulation Best Interest applies only to retail recommendations by broker-dealers and not to recommendations to plan sponsors. The proposal does not indicate that this is an area of major concern. If it is, the rule should be drafted narrowly to apply only to this niche use case and not to the overall retail operations of broker-dealers and RIAs that are not directed at plan sponsors.

RIAs already have a fiduciary obligation for the advice they sell to everyone, including plan sponsors, so this proposal is truly redundant for RIAs and they should be explicitly exempted when operating as an RIA.

The DOL will have its hands full enforcing these rules in the areas that need them the most, mainly insurance, banking, and areas other than SEC-regulated activities. The DOL will be able to make the most efficient use of its scarce enforcement resources by focusing on the areas with the biggest problems. It can and should exempt SEC-regulated activities, or at least provide a safe harbor so that a firm in general compliance with its SEC requirements will be deemed in compliance with its DOL obligations.

<u>Giving beneficiaries inspection rights will breach the privacy of account owners.</u>

The proposed rules also have inspection requirements that state that the IRS, the DOL, any fiduciary, participant, or beneficiary of the plan can inspect the records to determine compliance. It makes sense that regulators such as the IRS, DOL, and SEC can inspect a firm. However, the proposed rule gives additional inspection authority to people beyond what is currently the case with most financial accounts. This means that firms will have to have policies and procedures in place to allow appropriate access, and they will have to document the compliance with these procedures. This will create more paperwork expense with little or no benefit to society.

In particular, the wording that allows any "beneficiary" to inspect the records implies that the beneficiary of a particular account can demand information about it regardless of the wishes of the owner of the account. This can result in a serious breach of the financial privacy of the account owner.

For example, a SEP-IRA account owner may specify a list of beneficiaries for when they die, as well as contingent beneficiaries if the original beneficiaries predecease the account owner. The account owner may not want the beneficiary or the contingent beneficiary to know exactly how much money is in the account, or what fraction goes to whom. The owner may fear that the beneficiary may become profligate and spend recklessly knowing that a large inheritance is coming, or, worse yet, work on hastening the demise of the account owner.

The financial exploitation of senior citizens is becoming a big problem.[6] Many exploiters are those close to the senior citizen, including caregivers, family members, and potential beneficiaries. Giving more information access to potential exploiters without the approval or even knowledge of the account owner is not a good idea. This language needs clarification.

Execution exemption should allow for market orders.

The proposal rightfully exempts from the definition of a fiduciary the broker-dealers who only execute transactions for customers. Such broker-dealers are already subject to FINRA's Best Execution Rule 5310, and the SEC is proposing an even stricter rule at the SEC level. This is an area that is policed very thoroughly by the SEC and FINRA, and thus there is no need for the DOL to waste its time on broker-dealers who are only executing customer orders and not giving advice.

However, proposed exemption requires that the order contain

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[6] Senior financial abuse is also one of the topics covered in the CRCP® program. For more information about senior financial abuse see https://www.investopedia.com/terms/f/financial-elder-abuse.asp

"(B) A price range within which such security is to be purchased or sold"[7]

This implies that only "limit" orders that specify a price would be exempt. It is quite common for self-directed retail investors to place "market" orders that do not specify a particular price. Indeed, many if not most retail orders are market orders. The requirement that the order contain a price range should be deleted. Otherwise, brokers who are merely executing normal self-directed retail orders will be treated as fiduciaries under the proposed rule. This is another good reason to exempt broker-dealers in their retail activities.

Rule proposals should use ~~strikeout~~ and *insertion* text to make proposed changes more understandable.

The actual text of the proposed rules follows the standard federal format of using "insert this sentence here" and "delete that word or sentence there." This makes it very hard to really interpret the actual language of the proposed new rules. A much better format is to use ~~strikeout~~ text for items that are deleted and to *italicize* text to be added.[8] This makes it much easier to understand what changes are being proposed. Virginia does this with its proposed legislation and it makes a big improvement in readability. Here is an example:[9]:

§ 15.2-1127. Vacant building registration; civil penalty.

~~The Town of Clifton Forge, the Town of Pulaski, in a conservation and rehabilitation district of the town, the Town of Timberville, and any~~ *Any county,* city, *or town,* by ordinance, may require the owner or owners of buildings that have been vacant for a continuous period of 12 months or more~~,~~ and ~~which~~ *(i) that* meet the definition of "derelict building" under § 15.2-907.1, *(ii) that meet the definition of "criminal blight" under § 15.2-907, or (iii) in which a locality has determined a person is living without the authority of the owner or owners* to register such buildings on an annual basis and may impose an annual registration fee not to exceed $100 to defray the cost of processing such registration. The registration of buildings shall be on forms designated by the locality and filed with the agency designated by the locality. Failure to register shall be a $200 civil penalty; however, failure to register in conservation and rehabilitation districts designated by the governing body, or in other areas designated as blighted pursuant to § 36-49.1:1, shall be punishable by a civil penalty not exceeding $400. Notice shall be mailed to the owner or owners, at the address to which property tax notices are sent, at least 30 days prior to the assessment of the civil penalty.

Related rule proposals should be proposed and analyzed together.

The Department is concerned about the severability of its proposals in case a court rejects one or more parts. This may be one of the reasons that the Department promulgated these proposals as multiple different filings. However, this multiple-

[7] See page 273 of Retirement Security Rule: Definition of an Investment Advice Fiduciary,
[8] Underlining would also work.
[9] https://lis.virginia.gov/cgi-bin/legp604.exe?241+fuh+SB48+500067

warhead approach makes it much harder for the public to analyze and comment upon the proposals.

My observation of court decisions is that when proposed rules make common sense, the courts don't overturn the rules. Dropping multiple filings on the public just before the holiday season with a comment deadline of January 2 makes it look like the Department is trying hide something and rush through the public comment process. That will make judges suspicious.

The multiple filings do not appear to be part of a coordinated and well thought-through process. Whether or not that is the case, it appears to an outsider that multiple bureaucratic silos may have worked in parallel without sufficient collaboration, let alone input from the public comment process. That too will make judges skeptical of the common sense of the output.

Respectfully submitted,

James J. Angel,

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