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ACLI Analysis of Proposed Fiduciary Regulation

Technical Comments Presented to the U.S. Department of Labor: July 21, 2015

Overview

- The Department of Labor's proposed regulation regarding the definition of the term "Fiduciary," together with the Department's proposed "Best Interest Contract" Exemption (BICE), and proposed amendments to Prohibited Transaction Exemption (PTE) 84-24, will have a profound negative impact on retirement savers' ability to obtain the guidance, products, and services they need – including access to guaranteed lifetime income solutions – and will cause irreparable harm to small balance retirement plan savers, including many middle and lower income savers.
- Without substantial changes to the proposal, insurers and their distribution partners will no longer be able to engage small business owners to encourage them to establish savings plans for employees, resulting in workers being less likely to save and secure additional guaranteed lifetime income beyond Social Security.

The Definition of "Fiduciary"

- The Department's proposed new definition of the term "fiduciary" is too broad. The Department acknowledges that the definition will result in persons who provide services to retirement plans and IRAs becoming ERISA fiduciaries "in a wider arrange of advice relationships than the existing ERISA and Code regulations." The definition must be narrowed to focus on persons who provide individualized advice regarding investments.
- The proposed definition would appear to include general investment communications delivered via targeted sales calls or individually addressed marketing materials. Further, a recommendation to distribute benefits and/or rollover benefits would be considered to be fiduciary in nature therby significantly increase the service provider's legal risks, regardless of whether the recommendation identifies specific investments to purchase or sell.
- The proposed definition must be narrowed and clarified. As proposed, it would apply fiduciary status in connection with basic exchanges of information between providers and retirement investors, including the provision of investment education and the offering of platform products and services.
- Under the proposal, a service provider would not be able to provide a 401(k) participant with an asset allocation model that included specific investment alternatives available in the participant's plan without triggering fiduciary status.
- The proposed exceptions or "carve-outs" included in the proposed definition are too narrow and must be expanded in order to allow for the continued provision of investment education, selling and marketing activities, and the offering of platform products and services, without triggering fiduciary status.
- The proposal fails to recognize that simply marketing or selling an investment product or service is not a fiduciary act.

Prohibited Transaction Exemption 84-24

- The Department's proposed changes to PTE 84-24 must be revised to ensure sufficient exemptive relieve for annuities and other insurance contracts.
- The Department's proposal to revoke PTE 84-24's exemptive relief for advice provided to IRA owners with respect to transactions involving variable annuity contracts and other annuity contracts that constitute securities under federal securities law ignores certain critical risk characteristics of variable annuity contracts that align these contracts more closely with insurance than securities.
- Without such exemptive relief, IRA holders will have less access to guaranteed lifetime income solutions.

The Best Interest Contract Exemption (BICE)

- The Department's proposed Best Interest Contract Exemption must be revised and re-proposed in order to allow for the continued provision of investment advice and guidance to retirement investors.
- The exemption's impartial conduct standards are unacceptably ambiguous. For example, the exemption is not clear as to which forms of variable compensation are permissible.
- Due to the proposed exemption's prescriptive and costly compliance requirements, which must be met in order for a service provider to utilize the exemption, the BICE will have no utility for the insured retirement industry.
- The exemption's complex and costly technical requirements, such as its pre-recommendation contract requirement, and its three-level disclosure requirement, render it unworkable.

The Department's Regulatory Impact Analysis

- The Department's Regulatory Impact Analysis (RIA) is deficient and does not provide sufficient justification for the Department's proposal.
- Although the RIA acknowledges that 31 percent of IRAs include investments in annuities, the RIA makes no attempt to examine the impact of the proposed rule on insurers, the annuity market, or on the availability of lifetime income, nor does it attempt to assess the value of variable annuities or their role in retirement security.
- In fact, the proposed rule mentions annuities 172 times. Yet, the RIA contains no mention of the rule's impact on annuities.
- The RIA fails to prove the Department's assertion that there is a "substantial failure in the market for retirement advice."
- The Department's analysis (1) calculates the cost of conflicted advice and the benefits of the proposed rule through the selected and inbalanced use academic studies of mutual funds that are misinterpreted and misapplied to the entire market for retirement advice; (2) overlooks the impact of the proposed rule on lower-wealth investors, the likelihood that the supply of financial advice will decline as the price of advice increases, and the increased costs inflicted on employer plan participants; and (3) bases estimates of the proposal's direct costs on inadequate and incomplete data and insufficient consideration of the time required to implement changes necessary to comply with the proposal.

AUGUST 2015

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