

Electronically Submitted

August 5, 2020

Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue NW
Suite 400 Washington, DC 2010

RE: Z-RIN 1210-ZA29, Improving Investment Advice for Workers & Retirees

Ladies and Gentlemen:

Principal Review, LLC (dba RetireAware) welcomes the opportunity to comment on the proposed class exemption “Improving Investment Advice for Workers & Retirees”

About RetireAware

RetireAware is an independent consulting firm. We are singularly focused on protecting plan participants and group sponsored retirement plans from conflicted service structures.

In recent years, increased focus on plan fees and downward fee compression has caused plan providers to reduce plan fees directly charged to retirement plans. However, this reduction in direct fees is accompanied by the increase in efforts to generate replacement sources of revenue for the provider. These efforts include a range of practices in which plan providers may promote and steer retirement participants into the purchase of non-plan related and non-plan approved products and services.

These practices, and the revenue they generate for plan providers, may not be identified or described in material provided to plan fiduciaries or participants. These practices are particularly insidious because they undermine the financial health of participants (and of the plan itself), occur outside of the plan (such as when a participant takes a nontaxable distribution from a plan), and are enabled by a vendor’s status as plan recordkeeper.

RetireAware provides plan sponsors and employees with information and insight into plan provider service structures that may undermine retirement savings. We are focused solely on conflicted service structures.

The Proposed Prohibited Transaction Exemption

The proposed prohibited transaction exemption (the “Proposal”) creates serious risks for the retirement security of millions of Americans. While purporting to create protections in the form of an “Impartial Conduct Standard” the Proposal offers numerous workarounds and gaps that will be exploited by (highly) motivated commissioned sales personnel who make can make hundreds of thousands (and, in some cases, millions) of dollars in annual commission compensation by promoting non-plan products and services.

For example:

- The preamble to the Proposal specifies that the best interest standard can be met by a financial advisor that provides advice only with respect to proprietary products or on a limited menu of products that generate third party payments to the financial firm. This represents a significant gap in the Proposal and means that a financial advisor can limit recommendations to poorly performing, high commission proprietary products—and still be considered as acting in participants’ best interest.
- The preamble to the Proposal lists the factors that would be included in considering whether to recommend a rollover from an employer-sponsored plan into an IRA, specifying that the recommendation should include “alternatives to a rollover, including leaving the money in his or her current employer’s Plan, if permitted, and selecting different investment options; the fees and expenses associated with both the Plan and the IRA; whether the employer pays for some or all of the Plan’s administrative expenses; and the different levels of services and investments available under the Plan and the IRA.”

These considerations completely disregard economically significant features (such as surrender schedules and index annuity cap and participation rates) that providers use in lieu of direct fees in order to mask the true cost of certain annuity products.

- The Proposal disregards non-financial structures utilized by conflicted providers to transfer funds from employer-sponsored plans into proprietary IRAs. For example, RetireAware has seen instances where providers require lengthy forms in order to transfer plan assets to outside entities—but provide simple and easy on-line mechanisms for rollovers from an employer-sponsored plan into a proprietary product maintained by the provider.
- As noted by the DOL in a 2016 report¹ underperformance and excessive fees resulting from conflicted advice will cost participants tens — or even hundreds—of billions of dollars. However, in issuing the Proposal the DOL was silent on the adverse impacts on participants of the practices that will be permitted if the proposal is adopted.

¹ <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf>

Structural Challenges to be Exacerbated by Proposal

As noted above increased focus on plan fees and downward fee compression has caused plan providers to reduce plan fees directly charged to retirement plans--and this reduction in direct fees is accompanied by the increase in efforts to generate replacement sources of revenue for providers. RetireAware has seen numerous instances where plan recordkeeping providers (who also sponsor proprietary investment products) are willing to provide hundreds of thousands of dollars in so-called discounts and no-cost services to retirement plans in order to gain access to participants, participants' trust, and participants' plan distributions. These structures undermine the fee disclosure mechanisms established by the Department under Sections 408 and 404 of ERISA.

The rollovers occurring as a result of the Proposal will further encourage conflicted providers to understate direct plan costs and, instead, seek additional revenue from rollovers to non-plan products. This will undermine fiduciaries' ability to evaluate the reasonableness of plan costs. In effect, employer sponsored retirement plans will become a means to an end for certain plan providers.

Conclusion

Shortcomings in the Proposal represent a significant risk to the retirement security of millions of American workers. RetireAware urges the Department to withdraw the Proposal and engage in a process that enables the Department to develop a set of protections to ensure that American workers can truly receive non-conflicted investment advice.

Very truly yours,

Daniel S. Alexander
Managing Director, Principal Review LLC

Allen Steinberg
Chief Legal Officer, Principal Review LLC