For Life Insurers and Agents – A Summary of Predicted Litigation Under the DOL's Proposed Fiduciary Rule

June 15, 2015 by James F. Jorden

I. Background

The Department of Labor's recent Proposed Rule (the "Proposal"), which defines the term "fiduciary" as it applies to persons who provide "investment advice" to ERISA plans and IRAs, will impact the likelihood and severity of fiduciary litigation against life insurers and their agents. This article summarizes that potential impact, and will be supplemented periodically with updates focused on particular elements of the Proposal not covered here.

Under ERISA's statutory scheme, fiduciary responsibility cannot be enforced against a defendant in litigation unless that defendant can be classified as a fiduciary *with respect to the wrongdoing* for which the remedy is sought. The statutory definition provides that a person is an investment advisory fiduciary with respect to a plan, only to the extent he or she, "renders investment advice for a fee or other compensation direct or indirect, with respect to any moneys or other property of [the plan] , or has any authority or responsibility to do so." (ERISA {} 3(21)(A))

In 1975, the Department of Labor (DOL) promulgated regulations further defining and limiting the status of an "investment advice" fiduciary to one who renders such advice on a regular basis pursuant to an agreement with the plan or participant with the understanding that such advice will form the primary basis for investment decision making.[1] This definition has enabled persons who sell insurance or securities to a plan—and who do not otherwise exercise discretion or control over plan assets, nor provide the regular advice referred to in the 1975 Rule—to avoid the designation and potential litigation exposure of being a fiduciary.

As promulgated, the Proposal would make significant changes to the two key fiduciary features of ERISA legislation: (1) fiduciary status; and, (2) fiduciary standards. The Proposal creates a new and complex construct for the continued sale of variable and fixed annuities and mutual funds, among other products, particularly in the IRA plan market. If enacted, it will require a costly "compliance" structure imposing new duties on insurance agents, brokers, and the insurers they represent. From a litigation analysis perspective, it is most relevant that insurers face a serious potential increase in litigation or arbitration as a result of the Proposal's new definition of "investment advice" coupled with a corresponding expansion of the definition of a "fiduciary," and a proposal, with respect to variable products (and potentially fixed as well) to effectively legislate a new cause of action for ERISA and IRA plans, participants, and owners.

This article focuses primarily on the impact the Proposal will have, if ultimately enacted, on ERISA and IRA litigation. But, where appropriate, I will also offer my views as to whether the Proposal is consistent with ERISA statutory authority, the substantial case law since its enactment, [2] and applicable precedents relating to the authority to promulgate such a fundamental change in the application of ERISA.

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1 The existing DOL regulation, issued in 1975, contains a five-part test for determining if a person is a fiduciary. Under the existing test, the person must be (1) rendering advice as to the purchase, sale or value of securities or other property; (2) doing so on a "regular basis"; (3) pursuant to a mutual agreement that the advice will; (4) serve as a primary basis for investment decisions with respect to plan assets, and (5) the advice being given will be individualized to the particular needs of the plan (the "1975 Rule").

2 Mr. Jorden is the co-author of the Handbook on ERISA Litigation, 3rd Edition, 2014 (Wolters Kluwer, Law and Business). Parts of the discussion herein reflect comments and citations appearing in that treatise.

II. The Proposal

Since the Proposal was issued in April, numerous articles, webinars, and other materials, have circulated. For purposes of this discussion, I will presume that, by now, the reader has general knowledge and a basic understanding of the Proposal, and I will only summarize the portions related to the ERISA litigation analysis.

The Proposal concludes that the 1975 Rule should be changed. As drafted, it would eliminate the "regular basis," "mutual understanding," and "primary basis" conditions to the 1975 Rule.[3] It would sweep into the definition of an investment advisory fiduciary any person who, "in exchange for a fee" provides any of the four specified categories of advice:

1. Advisability of acquiring, holding, disposing of, or exchanging securities or other property, including a recommendation to take distribution or to take a rollover from the plan to an IRA or a recommendation regarding investments to be made with rollover monies;
2. Recommendations as to management of plan assets, including assets to be rolled over into an IRA;
3. Appraisals, fairness opinions or similar, if provided in connection with specific transactions involving plan or IRA assets; and,
4. Recommending someone else, for a fee, to provide any of the types of advice described in 1 or 2, above.

The Proposal focuses on the advice and sales practices of parties in the IRA marketplace. Obviously, the question of what constitutes a "recommendation" under the Proposal is relevant to the issue of whether the normal activities involved in an insurance agent or broker's sale of annuities or mutual funds constitute a "recommendation." The Proposal defines "recommendation" as "a communication that, based on its content, context, and presentation would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action." The content of much of the rhetoric in the Proposal, particularly as it relates to IRA plans, would tend to indicate that as the DOL sees it, a normal process of communicating the features and value of annuities or mutual funds will, if the rule is enacted, likely result in such communications being treated as "recommendations." The Proposal does not specifically so state, but rather refers to FINRA's Rule 2111 as providing a reasonable approach which the DOL plans to consider. Reading the Proposal's footnote 16 and the FINRA Regulatory Notice discussed therein, supports this assumption that the information and communications in such sales transactions will be considered "investment advice." [4]

Since it is clear that annuities or life insurance used to fund an IRA or other benefit plan will be treated as "other property" for purposes of the definition of "investment advice," we can therefore safely assume that many of what today are normal sales transactions between a plan or IRA owner, participant or trustee, between an insurance agent and his customer, where neither likely would view the insurance agent as a fiduciary, will likely meet the definition of a transaction involving an "investment advisory fiduciary." The remainder of this paper proceeds on that assumption.

Finally, as further described below, the Proposal contains a mechanism, as a component of an exemption for agents and brokers to allow them to receive compensation as a fiduciary which will expand on the duties imposed on such agents and the "firms" they represent by creating certain contract obligations on investment advice fiduciaries who sell variable

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3 The Proposal argues that one reason for a change to the 1975 tests is the substantial growth in "participant directed" investment arrangements under ERISA plans and IRAs. The release accompanying the Proposal argues that currently, persons advising such plans and participants "may operate" with:

a. Conflicts of interest that need not be disclosed
b. No exposure to liability for harms resulting from their advice
c. The possible offering of imprudent and disloyal advice
d. The possibility that they may "steer plans and IRA owners to investments based on their own, rather than their customer's financial interests." (Proposal at 2--22)

4 The Proposal suggests that FINRA Notice 11-02 establishes useful guidance for distinguishing between "investment education" and "investment recommendations." A portion of this guidance is that "the more individually tailored the communication is to a particular customer…about a specific security or investment strategy, the more likely it will be viewed as a recommendation" (Proposal at 64)

annuities or mutual funds and in a separate exemption for fixed annuities, additional specific duties (but not direct contract obligations) on agents on agents and brokers who sell them. [5]

III. The "Best Interest" Exemption Under the Proposal

In addition to the new definition of investment advisory fiduciary, the Proposal sets forth a series of "carve-outs"[6] and an exemption from ERISA or IRC violations for "investment advisory fiduciaries" who otherwise would run afoul of the prohibited transaction rules.[7] The "Best Interest Exemption" according to the Proposal, is intended to allow "broker dealers, insurance agents and other investment advice fiduciaries" to continue certain compensation practices "such as commissions and revenue sharing" without violating their newly minted fiduciary obligations. The exemption is characterized by the DOL as "principles based."

> *Central to the exemption is the adviser and firm's agreement to meet fundamental obligations of fair dealing and fiduciary conduct – to give advice that is in the customer's best interest; avoid misleading statements; receive no more than reasonable compensation; and comply with applicable federal and state laws governing advice.*[8]

To meet the "principles" underlying the exemption, the DOL requires the following actions by the investment advisory fiduciary and the firm being represented by that fiduciary:

1. They must contractually acknowledge fiduciary status.
2. They must commit to basic standards of impartial conduct.
3. They must warrant compliance with federal and state laws.
4. They must adopt policies and procedures designed to mitigate the "harmful" impact of conflicts of interest.[9]
5. They must disclose baseline information on:
    a. conflicts of interest; and,
    b. the cost of the investment advice being given.
6. They must agree not to include any exculpatory language in the "contract" with the plan or participant.
7. They may provide that disputes must be arbitrated, but the "contract" may not prohibit classwide claims.

IV. The Change in Fiduciary Status

A. Agent and Insurer Status Under Current Case Law, ERISA Regulations, and Exemptions

Under current case law applying either ERISA or the common law, the sale of an annuity to a prospective IRA purchaser will not, absent unusual circumstances, constitute providing investment advice for a fee. Since adoption of the 1975 Rule, courts have held that fiduciary liability does not apply to insurance agents or the companies they represent merely when the conduct involves exclusively or primarily the sale of an insurance or annuity contract. Such results have been premised both on grounds of a failure to demonstrate that the salesperson had the requisite statutory discretion to be a fiduciary and also on the basis that the sales agent was not rendering "investment advice."

Courts have found that insurers or their agents were not acting as fiduciaries in (1) offering or selling an insurance contract to a plan; (2) advising a plan to self-insure; (3) adhering to the terms of an insurance or annuity contract with a plan; (4) providing professional actuarial advice to a plan; (5) exercising ministerial functions; (6) administering claims

5 See discussion below regarding the "best interest contract exemption"
6 Proposal at 47
7 Proposal at 45
8 Proposal at 6
9 If advisers are limited to proprietary products or to "pay to play" products, the adviser must provide notice of such and make a "written finding that such limitations do not preclude advisers from sales that are in the best interest of client." (Proposal at 6)

with the ultimate authority over the payment of disputed claims; or (7) preparing plan documents subject to the review and approval of others.[10]

> *"Simply urging the purchase of its products does not make an insurance company an ERISA fiduciary with respect to those products,"*[11]
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> *"To satisfy the 'authority or control" element ..., the Plaintiffs must demonstrate" that the insurance agent caused the plan trustee to "relinquish his independent discretion" ….the trustee "testified at trial that he did not seek [the agent] out and ask advice, but that, if [the agent} approached him, he was willing to listen."*[12]

In *Flacche v. Sun Life of Canada*, [13] the Sixth Circuit easily disposed of an argument that the offering and sale of an annuity contract constitutes the providing of investment advice under ERISA, relying solely on statutory construction without appearing to even consider the need to analyze the application of the 1975 Rule. The case involved the allegation that the sale of an insurance contract that resulted in a reduction in benefits to the plaintiff constituted a breach of the insurer's fiduciary duty to the plan. The court, in considering the basic fiduciary principles as applied to the facts presented by the plaintiff held, "[The expert's] *affidavit fails to support the Flacche's argument; selling [the plan trustee] an annuity contract does not constitute investment advice*." In this case, the court's reliance on ERISA's statutory construction, without regard to whether the 1975 exemption Rules were met, is relevant to our analysis given the court's further comments regarding federal courts' reluctance to develop federal common law, noting that it should do so only "where the federal statute does not expressly address the issue before the court."[14]

In addition to the ERISA limitation on the definition of fiduciary currently in the 1975 Rules, there are existing exemptions from the prohibited transaction rules that will be amended under the Proposal. PTE 84-24 is the exemption available for sales of mutual fund shares and insurance or annuity contracts sold to ERISA and IRA plans. It is available for those companies and their agents who in fact are deemed to be providing investment advice to such plans and allows the receipt of commissions, subject to the conditions in the exemption, particularly that commissions be "reasonable," and disclosed and approved by the plan or customer. This exemption will be amended and eliminated for variable annuities, but likely will remain important, but not a complete panacea to fixed annuity sales as discussed below.

B. Change in Status of Agents and Insurers - Sales of IRA Products

Easily the most significant change for agents and insurers under the Proposal is the status of the sales agent, broker, and insurer in a common transaction involving the purchase of an annuity or mutual funds to fund an IRA plan or as part of an IRA rollover. Today, agents, brokers, or insurers can be reasonably comfortable that their exposure for litigation would encompass the normal state and federal law causes of action involving fraud, unfair sales practices, breach of contract, etc. These causes of action have boundaries and pretty clear rules for imposing liability. Bringing claims under ERISA for purported violation of duties as a fiduciary under the same types of transactions has heretofore obtained no traction. The Proposal aims to change that:

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10 See ERISA Litigation Manual and cases cited at 4-59 et. seq. Insurers and their agents have been found to be fiduciaries when they (1) manage plan funds in nonguaranteed separate accounts or plan funds in their general account that are not part of a "guaranteed benefit policy;" (2) exercise discretion over the administration of claims when the plan appoints the insurer with ultimate authority over plan assets; (3) exercise power to unilaterally amend an annuity contract issue to a plan; and, (4) make administrative decisions on behalf of the plan.

11 American Federation of Unions Local Health Welfare Fund v. Equitable Life Assurance Society, 841 F. 2d 658 (5th Cir. 1988); Pappas v. Buck Consultants, Inc. 923 F.2d 531 (7th Cir. 1991).

12 Schloegel v. Boswell, 994 F.2d 266 (5th Cir. 1993), *cert. denied*, 510 U.S. 964 (1993).

13 958 F.2d 730, 734, (6th Cir. 1992) citing to American Fed'n of Unions Local 102 Health & Welfare Fund v. Equitable Life Assurance, 841 F.2d 658 (5th Cir 1988).

14 As discussed in the Conclusion of this article, there would appear to be serious grounds for challenging the authority of the DOL to issue this Proposed Rule and create entirely new and unprecedented grounds for defining the activities which constitute the rendering of "investment advice" and the role of a "fiduciary".

[T]here appears to be a widespread belief among broker-dealers that they are not fiduciaries with respect to plans or IRA's because they do not hold themselves out as registered investment advisers, even though they often market their services as financial or retirement planners. The import of such disclaimers – and of the fine legal distinction between brokers and registered investment advisers –is often completely lost on plan participants and IRA owners.[15]

While acknowledging that the earlier 2010 proposal contained a carve-out that may have provided for exemption for most retail sales of mutual funds and annuities securities to plan participants and IRA owners, the Proposal submits that "such retail customers do not fit the arm's length characteristics that the seller's carve-out is designed to preserve." The Proposal therefore concludes that "recommendations to retail investors and small plan providers are routinely presented as advice, consulting or financial planning services." The result—the agent and the insurer being represented will have the status of a "fiduciary" under the Proposal. For sales of variable annuities and mutual funds, the only available exemption in this marketplace will be the "Best Interest" exemption, requiring the agent or broker to enter into a contract confirming that status and making the promises as described above. Sales of fixed annuities by investment adviser fiduciaries will be subject to a revised version of PTE 84-24 which will require the adviser/agent to adhere to the "impartial conduct standards" in the Best Interest Exemption, the disclosure of commissions and other terms to an independent fiduciary and obtain a specific "approval" for the transaction. Details of these amendments to the existing PTE 84-24 will require further analysis, but, at a minimum, the Proposal places the sales agent into a fiduciary status regardless of whether the sale involves either a fixed or a variable annuity.

From a litigation perspective, this change to a fiduciary status for the sales agent is substantial and in many cases will afford litigants unhappy with investment results, or the ultimate characteristics of a particular form of annuity, the opportunity to second guess the original decision applying a significant range of issues (discussed in the following analysis of the change in standards and duties for fiduciaries). One potential saving grace, depending on your view of the desirability of "arbitration," is that it is permissible to limit disputes under the contract to arbitration.

For the insurer with a product being sold and the potential to be named in such litigation, the standards are unclear. The first, and most important, question is whether the insurer will be treated as "the firm" being represented by the individual adviser under the Proposal. The best interest exemption in the Proposal applies to "individual investment advice providers" and parenthetically notes this includes individual advisers and firms that employ or otherwise contract with such individuals. By footnote the DOL's release notes that the Proposal's new status and standards are not limited to persons who represent registered investment advisers, but will apply to individuals who are "representatives" of other institutions such as banks and insurance companies.

Assuming that the "firm" referenced in the "contract" required under the exemption signed with the IRA purchaser or ERISA plan is an insurer, then to comply with the terms of the exemption, the insurer will be required to meet the obligations set forth therein. This includes acknowledging fiduciary status, committing to basic standards of impartial conduct, warranting compliance with federal and state law, adopting policies and procedures reasonably designed to mitigate any harmful impact of conflicts of interest, and disclosing basic information on conflicts and costs of the advice.[16]

So this change in status would apply not only to the agent, but also to the insurer if it is deemed the "firm" that the agent/ adviser is representing, resulting in both parties becoming subject to litigation or arbitration based on their fiduciary status, and subjecting them to "contract" promises and fiduciary duties (spelled out further below) if a variable product or mutual fund and to unclear responsibilities as a "fiduciary" under 404(a) of ERISA, depending upon the ultimate description of the to be amended exemption 84-24.[17] In addition, the change in status for "firms" that limit the products their advisers can

15 Proposal at 25.

16 Proposal at 23

17 The Proposal notes that the contract may not contain "exculpatory provisions" and, adopting the approach taken by FINRA, the contract could require the parties to arbitrate individual claims, but it could not limit the rights of the plan, participant, beneficiary or IRA owner to bring or

recommend “based on the receipt of third party payments or the proprietary nature of the products” will impose further notice requirements on such firms.[18]

V. The Change in Fiduciary Standards

A. General Principles – Fiduciary Standards Under ERISA

Once a person assumes fiduciary status under ERISA, he will be liable for any act or omission on his part, during his tenure as a fiduciary, which violates the fiduciary responsibility rules. ERISA 404(a)(1) requires a fiduciary to “discharge his duties with respect to a plan” in accordance with five general standards:

1. “solely in the interest of the participants and beneficiaries;”
2. “for the exclusive purpose of (i) providing benefits to participants and beneficiaries; and (ii) defraying expenses of administering the plan;
3. “with the care, skill, prudence and diligence” consistent with the “prudent man” standard under common law;
4. “by diversifying investments…to minimize risk;” and
5. “in accordance with the documents… governing the plan.”

It has been recognized that these general fiduciary duties “evolved from the common law of trusts” and litigation involving ERISA plans and fiduciaries routinely refers to and applies trust principles.[19] Nevertheless, the Supreme Court has made clear that, in interpreting and applying ERISA’s fiduciary standards, “the law of trusts often will inform, but will not necessarily determine the outcome of an effort to interpret ERISA’s fiduciary duties.”[20] No doubt the most fundamental of the five standards above is the “solely in the interest” standard, derived from the trust law “duty of loyalty” imposed on trustees. Courts have said this requires all of the fiduciary’s decisions to be made “with an eye single to the interests of the participants and beneficiaries.[21]

B. The “New” Standards Applicable to Agents and Insurers as Fiduciaries Under the Proposal

The change in status for agents and insurers will result in a change in the standards governing the conduct of agents and brokers in the sale of insurance products, whether fixed annuities or securities such as variable annuities or mutual funds. The general standards described above under ERISA 404(a)(1) will now apply to them as investment advice fiduciaries in relation to ERISA covered plans. However, as the Proposal points out, “under the Code, advisers to IRAs are subject only to the prohibited transaction rules.” Today, an alleged violation of the fiduciary duties in relation to an IRA transaction might, if pursued by the IRS, subject the fiduciary to the payment of an excise tax, but, depending upon the fiduciary breach and the nature of the IRA, might or might not create a private right of action for the purchaser or participant. The Proposal acknowledges this point and addresses it by taking further steps:

> *Incorporating the best interest standard in the proposed Best Interest Contract Exemption effectively requires advisers to comply with these basic fiduciary standards as a condition of engaging in transactions that would otherwise be prohibited because of the conflicts of interest they create. Additionally, the exemption ensures that IRA owners and investors have a contract-based claim to hold their fiduciary advisers accountable if they violate these basic obligations of*

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participate in a class action against the adviser or financial institution.” This may portend that class actions need not be pursued through the arbitration mechanism.

18 *See* FN 9 above and accompanying text.

19 *See, e.g.,* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989).

20 Varity Corp. v. Howe, 516 U.S. 489 (1996). In Varity, the Supreme Court noted that “courts may have to take account of competing Congressional purposes, such as Congress’ desire to offer employees enhanced protection for their benefits, on the one hand, and, on the other, its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering … benefit plans in the first place.”

21 Donovan v. Bierwirth, 680 F.2d 263, 271 (2d Cir,) *cert denied,* 459 U.S. 1069 (1982).

prudence and loyalty. Under current law, no private right of action under ERISA is available to IRA owners. Proposal at 37.

The new Best Interest Contract, as prescribed in the Proposal contains contract promises, as well as specific fiduciary duties, as follows:

1. Contract Promises by Adviser and its Firm
    a. I/we are fiduciaries (and will so conduct ourselves).
    b. We will conduct ourselves with impartiality.
    c. We warrant compliance with federal and state laws.
    d. We have adopted procedures designed to mitigate the harmful impact of any conflicts of interest we may have.
    e. We have disclosed to you:
        i. conflicts of interest we may have
        ii. the cost to you of our advice.
2. Contract limitation promises
    a. We agree with you that any disputes will be resolved by arbitration.
    b. We agree that you may join in a class action (or bring one yourself).

From a litigation perspective, this raises concerns that these promises are made in the context of a "contract' imposing the requirement that the adviser represent that he is either a fiduciary or that "the advice is individualized or specifically directed to the recipient to be treated as fiduciary advice" and will be binding on the adviser in any later effort to avoid or temper normal common law fiduciary obligations, in addition to what may be imposed under ERISA. The questions surrounding this novel administrative requirement for creating contact obligations abound, including but not limited to the following: what state law applies with respect to the enforcement and interpretation of these contracts, or are they to be interpreted under some form of federal common law; how will state insurance departments view these obligations in relation to the state's own market conduct standards; what law actually governs the "fiduciary duty" being imposed under this contract; do the ERISA pre-emption provisions apply to these contract obligations, etc., etc.

Whether these standards are even workable and reasonably capable of being illustrated in later litigation/arbitration settings, is likely an even more important issue. Proving a fiduciary standard that imposes the type of comparative analysis envisioned by the Proposal—one that must be met in every instance of a sale of insurance or annuities—will be daunting. A case in point discussing the type of conduct that the Proposal will prohibit under the new fiduciary standards appears early in the release outlining the Proposal:

> *[T]he current regulation allows many advisers to avoid fiduciary status and disregard ERISA's fiduciary obligations of care and prohibitions on disloyal and conflicted transactions. As a consequence, these advisers can steer customers to investments based on their own self-interest (e.g., products that generate higher fees for the adviser even if there are identical lower-fee products available). Proposal at 21*

At trial or in arbitration, this standard would require the adviser's counsel to demonstrate either that no such products exist or that any lower fee products are not sufficiently "identical," not just that the product performed as it was intended and illustrated to perform, that all elements were fully disclosed, and that it was a reasonable product to meet the needs of the IRA or plan customer. Presumably this issue, as well as others involving the cross-currents of contract and fiduciary duties will be recognized as the Proposal is further refined. Hopefully, as the Proposal progresses through the comment period,

the DOL will develop more realistic and acceptable standards that protect IRA and plan customers while recognizing the importance and reality of also protecting the marketplace.

C. Carve-Outs and Other Exemptions Potentially Applicable to Insurers and Agents

The Proposal contains a number of carve-outs from the definition of "investment advice" in recognition of the fact that "in many circumstances, plan fiduciaries, participants, beneficiaries, and IRA owners may receive recommendations or appraisals that, notwithstanding the general definition in the proposal should not be treated as fiduciary investment advice."[22] They include: (i) the seller's carve-out; (ii) swap and security based swap transactions; (iii) employees of the plan sponsor; (iv) platform providers/selection and monitoring assistance; and (iv) investment education. The seller's carve-out is explicitly unavailable for sales in the small plan and IRA market.[23] Of the remaining carve-outs, investment education may have some application to the sale and marketing of annuities and mutual funds, but very little if the educational materials and discussions lead to a sale (which will, in most cases, be the objective). It will be potentially useful for the conduct of seminars when there are no "individual directed" communications as a component of the seminar.

For insurers who are concerned about the Proposal's impact on service providers, recordkeepers, and third-party administrators who offer a "platform of selected investment vehicles.," there is a specific carve- out for such parties who engage in the marketing of such investment vehicles. The carve-out requires that the plan fiduciaries make the initial decisions on the specified alternatives within the platform and that the provider does not engage in any individual needs marketing activities. However, this carve-out is unavailable to IRAs, so the rollover activity and subsequent role played by an agent or insurer will raise fiduciary issues under the Proposal.[24]

VI. Conclusion

Clearly the Proposal will have a significant impact on the marketing of annuities and other investment products into ERISA plans and IRAs and the consequential potential litigation under fiduciary and other standards that will apply in those circumstances that qualify as rendering "investment advice." In addition, the development of a separate cause of action, both for fiduciary breaches and potential breach of contract claims, raises numerous unanswered questions.

As one of numerous participants in the ultimately successful effort to overturn the SEC's proposed Rule 151A, I think the following issues warrant further consideration: (1) the DOL's authority to create new definitions of "fiduciary" and "investment advice" which are directly in conflict not only with prior interpretations and exemptions, but also with substantial case law supporting the proposition that the normal sale of an insurance product does not constitute the rendering of investment advice or make the sales agent a fiduciary – query whether such a rule is based upon a "permissible construction" of the ERISA statute as required under the *Chevron* doctrine. (2) Moreover, the creation of a new cause of action through the implementation of an exemption raises a serious question of whether the DOL is acting in violation of the McCarren Ferguson prohibition on federal action applying to insurance that is "in excess of statutory jurisdiction."

These issues remain for clarification and analysis and should be raised with the DOL as a part of the comment process.

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22 Proposal at 47

23 See FN 14 and accompanying text.

24 Proposal at 57