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**INVESTMENT MANAGEMENT
UPDATE****DOL Proposes Update to Definition of Fiduciary to Include More Advisers**

On October 22, the Employee Benefits Security Administration (EBSA) of the U.S. Department of Labor (DOL) released proposed regulations¹ that would revise the circumstances under which a person who gives investment advice to an employee benefit plan or participants in such a plan is deemed to be a “fiduciary” for purposes of the Employee Retirement Income Security Act of 1974, as amended (ERISA).²

In particular, the proposal seeks to amend a 35-year-old rule that, in the view of EBSA, may inappropriately limit the types of investment advisory relationships that give rise to fiduciary duties on the part of the investment adviser. To that end, the proposed regulations are intended to update and expand the existing rule to reflect the changes in the financial industry and the expectations of plan officials and participants who receive investment advice. According to EBSA, the new rule will better protect participants from conflicts of interest and self-dealing by giving a broader and clearer understanding of when persons providing investment advice are ERISA fiduciaries, subject to duties of loyalty and prudence.

EXISTING REGULATIONS

“Section 3(21)(A)(ii) of ERISA provides that a person will be considered a fiduciary with respect to an employee benefit plan to the extent that he renders investment advice for a fee or other compensation, direct or indirect, with respect to any monies or other property of such plan, or has any authority or responsibility to do so.”

In order to be deemed to be providing investment advice for a fee or other compensation to an employee benefit plan, the current regulations of the DOL under Section 3(21)(A)(ii) provide, in relevant part, that a person provides investment advice only if:

- Such person renders advice to the plan as to the value of securities or other property, or makes recommendation as to the advisability of investing in, purchasing or selling securities or other property; and
- Such person either directly or indirectly
 - Has discretionary authority or control ... with respect to purchasing or selling securities or other property for the plan; or
 - Renders any [such] advice ... on a regular basis to the plan pursuant to a mutual agreement, arrangement or understanding ... that such services will serve as a primary basis for investment decisions with respect to plan assets, and that such person will render

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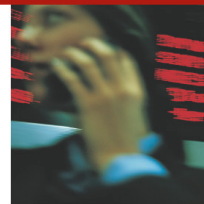
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individualized investment advice to the plan based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments.

Thus, under the current regulations a person will be considered to be providing investment advice where such person: (i) renders such advice (ii) on a **regular basis** (iii) pursuant to a mutual agreement, arrangement or understanding between the person and the plan or a plan fiduciary that (iv) this advice will serve as a **primary basis** for investment decisions with respect to plan assets, and that (v) this advice will be individualized based on the particular needs of the plan (the “Five-Part Test”). In order to be deemed to be a fiduciary, each element of the Five-Part Test must be satisfied.

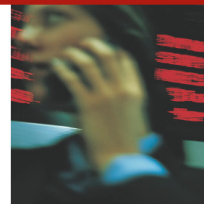
PROPOSED REGULATIONS

Under the proposed regulations, the scope of who would be deemed to be fiduciary as a consequence of providing investment advice to an employee benefit plan, fiduciary of an employee benefit plan or a participant in such a plan would be greatly expanded. Thus, a person who provides the following types of advice and recommendations to a plan fiduciary or participant may be deemed to be a fiduciary for purposes of ERISA:

- Advice, appraisals or fairness opinions concerning the value of securities or other property;
- Recommendations as to the advisability of investing in, purchasing, holding or selling securities or other property; or
- Advice or recommendations as to the management of securities or other property.³

In addition to the foregoing, at least one of the following alternative conditions also must be satisfied by a person described above in order for such a person to be considered a fiduciary for ERISA purposes:

- The person represents or acknowledges in writing or orally that the person is acting as a fiduciary;
- The person exercises any discretionary authority or discretionary control with respect to management of the plan, exercises any authority or control with respect to management or disposition of its assets or has any discretionary authority or discretionary responsibility in the administration of the plan;
- The person is an “investment adviser” under the Investment Advisers Act of 1940, as amended (the “Advisers Act”); or
- The person either provides the advice or makes the recommendations described above pursuant to an agreement, arrangement or understanding between such person and the plan, a plan



fiduciary or a plan participant or beneficiary that such advice may be considered in connection with making investment or management decisions with respect to plan assets, and will be individualized to the needs of the plan, a plan fiduciary or a participant or beneficiary.⁴

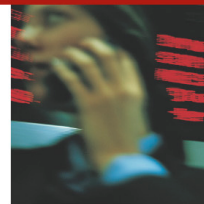
The foregoing alternative conditions generally relate to the degree of authority, control, responsibility or influence that is possessed, directly or indirectly, by the person rendering the advice, and the reasonable expectations of the persons receiving the advice. Satisfaction of any of these conditions may result in a person being deemed to be a fiduciary for ERISA purposes if that person is also providing investment advice for a fee.⁵ Under the proposed regulations, this will be true even if the person providing the investment advice does not provide that advice on a “regular basis” or does not intend for the advice to be a “primary basis” for making an investment decision. This is because the proposed regulations eliminate the requirement that the investment advice be provided on “regular basis” pursuant to a “mutual understanding” that the advice will serve as a “primary basis” for investment decisions (key components of the Five-Part Test under the current regulations).

It also is worth noting that, the fact that a person may be excluded from the definition of an investment adviser for purposes of the Advisers Act is not determinative of whether or not such a person would be deemed to be a fiduciary under ERISA. By way of illustration, a broker or dealer who otherwise may be excluded from the definition of an investment adviser under Section 202(a)(11)(C) still may be deemed to be a fiduciary under the proposed regulations if the advice or services provided by such person otherwise satisfies the expanded definition.⁶ Like the existing rule, the proposed regulations indicate that a person must provide advice for compensation (whether direct or indirect) to become a fiduciary for purposes of ERISA. However, such compensation may include *brokerage, mutual fund sales and insurance commissions*, as well as fees and commissions based on multiple transactions involving different parties.

Even “one-off” transactions can bring a service provider within the definition of a fiduciary under the proposed regulations, including entities that traditionally have fallen outside of the fiduciary definition. For example, under the proposed rules, a real estate appraisal firm providing an appraisal in connection with an isolated sale of a piece of real property held by an employee benefit plan may be deemed to be a fiduciary of such a plan even if the appraisal is one of several appraisals received by the employee benefit plan and there is no agreement between the plan and the appraisal firm regarding how the appraisal would be used or the degree to which the plan would rely on the subject appraisal.

EXCLUSIONS FROM THE EXPANDED FIDUCIARY DEFINITION

Under the proposed regulations, certain advice regarding investments held by an employee benefit plan may be given without the person providing the advice being deemed to be an ERISA fiduciary. Specifically, a person will not be deemed to be a fiduciary where



Such person can demonstrate that the recipient of the advice knows or, under the circumstances, reasonably should know, that the person is providing the advice or making the recommendation in its capacity as a purchaser or seller of a security or other property, or as an agent of, or appraiser for, such a purchaser or seller, whose interests are adverse to the interests of the plan or its participants or beneficiaries, and that the person is not undertaking to provide impartial investment advice.⁷

In addition, the DOL identified four specific types of information and materials which, if furnished, alone or in combination, to plan participants or beneficiaries would not result in the rendering of investment advice under either the current or proposed regulations. Specifically, providing plan information, general financial and investment information, asset allocation models and interactive materials would not be deemed to constitute investment advice.⁸

Subject to certain conditions, merely marketing a “platform” of investments from which a plan fiduciary may select investments that it deems suitable for the plan will not constitute investment advice and the person marketing such a platform will not be deemed to be a fiduciary where the platform is offered without regard to the individualized needs of the plan or its participants. However, in order to rely on this exception, the person marketing the platform must provide a written disclosure that the person is not undertaking to provide impartial investment advice.

Finally, the DOL is soliciting comments on the proposed regulations. To be considered, any comments on the proposed regulations must be received by the DOL on or before January 20, 2011.

FOR MORE INFORMATION

For more information, please contact:

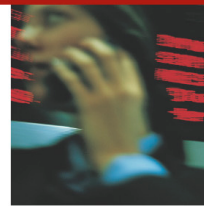
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¹ The proposed regulations can be found at <http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=24328>.

² Definition of the term “fiduciary,” 75 Fed. Reg. 65,263 (Oct. 22, 2010) (to be codified at 29 C.F.R. pt. 2510) (the “Proposing Release”). A copy of the Proposing Release can be found at <http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=24328>.

³ *Id.* at 65,265.

⁴ *Id.* at 65,266 to 65,267.

⁵ *Id.* at 65,266.

⁶ In relevant part, Section 202(a)(11)(C) of the Advisers Act excludes from the definition of an investment adviser, “any broker or dealer whose performance of such services is solely to the conduct of his business as a broker or dealer and who receives no special compensation therefor ...”

⁷ The Proposing Release, *supra* note 1 at 65,267.

⁸ *Id.* at 65,268.