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DOL PROPOSES EXPANSIVE NEW DEFINITION OF "FIDUCIARY" UNDER ERISA

On October 21, 2010, the U.S. Department of Labor ("DOL") published a proposed rule that would amend the definition of "fiduciary" and would significantly expand the categories of persons who would be deemed to be fiduciaries subject to the Employee Retirement Income Security Act of 1974 ("ERISA").[1] In addition to its application under ERISA, the Proposed Rule would also apply for purposes of the prohibited transaction provisions in Section 4975 of the Internal Revenue Code of 1986, and thus would cover investment advisers to IRAs in addition to ERISA-covered plans.[2]

Section 3(21)(A) of ERISA defines the term "fiduciary" to include any person who "renders investment advice for a fee or other compensation" with respect to a plan.[3] The DOL's current rule defining what constitutes providing "investment advice" requires that a person: (1) render advice as to the value of securities or other property or the advisability of investing in securities or other property, (2) that is provided on a regular basis, (3) pursuant to a mutual understanding, (4) that the advice will serve as a primary basis for investment decisions, and (5) that the advice will be based on the individualized needs of the plan.[4]

The Proposed Rule would eliminate the above 5-factor test. If adopted, a person will be an ERISA fiduciary if, for a fee or other compensation: (1) it provides one of three types of advice to an employee benefit plan, a plan fiduciary, a plan participant or a plan beneficiary; and (2) the advice is provided under any one of four circumstances set forth in the Proposed Rule.[5]

Under the Proposed Rule, giving one of the following types of advice to an employee benefit plan, a plan fiduciary, a plan participant or a plan beneficiary may give rise to fiduciary status under ERISA: (1) advice, appraisals or fairness opinions concerning the value of securities or other property; (2) recommendations as to the advisability of investing in, purchasing, holding, or selling securities or other property; or (3) advice or recommendations as to the management of securities or other property (including recommendations as to proxy voting and the selection of asset managers).[6]

A person providing one of the types of investment advice listed above will be considered a fiduciary under the Proposed Rule if the person also meets *one* of the following conditions:

- The person represents or acknowledges that it is acting as a fiduciary within the meaning of ERISA with respect to such advice or recommendations;

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[1] Department of Labor, Definition of the Term "Fiduciary," 75 Fed. Reg. 204 (proposed Oct. 21, 2010) (to be codified at 29 C.F.R. pt. 2510) [hereinafter, *Proposed Rule*].
[2] *Id.* at Part B.
[3] 29 U.S.C.A. § 1002(21)(A) [hereinafter, *ERISA*].
[4] *Id.*
[5] *Proposed Rule*, *supra* note 1, at Part B.
[6] *Id.*

- 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" within the meaning of Section 202(a)(11) of the Investment Advisers Act of 1940, whether or not such person is actually registered with the SEC as an investment adviser; or
- The person provides one of the types of investment advice listed above pursuant to an agreement, written or otherwise, between such person and the plan, plan fiduciary, plan participant, or plan 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, plan fiduciary, plan participant or plan beneficiary.[7]

The Proposed Rule would eliminate the requirement under the current rule that the advice be provided on a "regular basis."[8] Therefore, under the Proposed Rule a person who provides advice on a particular investment on a one-time basis may be considered a fiduciary.[9] Moreover, the current requirement that the parties understand that the advice will serve as a "primary basis" for investment decisions would no longer apply under the Proposed Rule. Accordingly, the fact that the understanding of the parties is that the advice may be considered in connection with making a decision relating to plan assets is sufficient to impose fiduciary status.[10]

The Proposed Rule includes certain exceptions as to situations where a person would not be considered to be providing investment advice.[11] Nevertheless, if adopted substantially as proposed, the Proposed Rule will significantly broaden the scope of who will be considered an ERISA fiduciary, potentially exposing many financial services firms to significant obligations and increased liability.

The DOL is currently seeking public comment on the Proposed Rule. The comment period will close on January 20, 2011. To submit a comment, send an e-mail to e-ORI@dol.gov (enter into subject line: Definition of Fiduciary Proposed Rule). Full text of the proposed definition can be found here: http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=24328.

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[7] *Id.* at Part B, Subpart b. "Conditions."
[8] Compare *ERISA* (c)(1)(ii)(B) with *Proposed Rule*, *supra* at note 1, Part B, Subpart b. "Conditions."
[9] *Proposed Rule*, *supra* at note 1, Part B, Subpart b. "Conditions."
[10] *Id.*
[11] Two notable carve outs to the proposed definition are (1) where the retirement plan knows or should know that the service provider is acting averse to the plan's interests, and (2) where the service provider renders "investment education," as described under DOL Interpretative Bulletin 96-1. *See* 29 CFR § 2509.96-1(e).

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