

Corporate & Financial Weekly Digest

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DOL to Revise Definition of Benefit Plan "Fiduciary"

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On September 19, the Employee Benefits Security Administration (EBSA) of the U.S. Department of Labor (DOL) announced its intention to revise and re-propose amendments to its definition of "fiduciary." The new proposal is expected to be issued in early 2012.

Background. The regulations issued under Employee Retirement Income Security Act (ERISA) define the term "fiduciary" to include any person who provides investment advice with respect to assets of the plan for a fee. If an investment advice provider is considered a fiduciary for ERISA purposes, then such provider is then subject to increased ERISA compliance obligations primarily related to avoiding prohibiting transactions and satisfying heightened fiduciary duties.

First promulgated in 1975, the ERISA regulations set forth a multi-prong test for determining when an individual becomes a fiduciary as a result of providing investment advice for a fee. Under the 1975 rule, an investment advice provider would not be considered a fiduciary unless each of the prongs were met. In October 2010, the DOL proposed an amendment to the 35-year-old regulation based on findings that indicated that the rule's approach to fiduciary status may inappropriately limit its ability to protect plans, participants and beneficiaries in the current marketplace. Specifically, the DOL cited changes in the expectations of plan officials and participants who receive investment advice, unanticipated circumstances in which providing investment advice is subject to ERISA's fiduciary duties, industry changes, including, among other things, the variety of complex fee practices currently in use and the conflicts of interest that may arise from such practices.

The DOL's original proposal broadened the scope of service providers who would be classified as fiduciaries. The original proposal would have eliminated, for example, the requirement that there be a "mutual understanding" that the fiduciary's advice would form the primary basis for investment advice or that the advice be provided on a "regular basis." Significantly, the original proposal's elimination of such requirements would likely have caused an investment advice provider that appraised plan assets just one time to become a plan fiduciary. Classification as a fiduciary under the original

proposal would likely have resulted in higher transaction costs for benefit plans due to the increased exposure to liability. Because of the business costs associated with such an expanded view of fiduciary status, the DOL's original proposal was met with much resistance.

Revised Proposal. The recent announcement indicates that the revised proposal will clarify the issues of limiting fiduciary advice to "individualized advice directed to specific parties, responding to concerns about the application of the regulation to routine appraisals" and the "rule's application to arm's length commercial transactions, such as swap transactions." The revised proposal will include new or amended exemptions addressing broker fee practices that will endeavor to preserve beneficial fee practices while protecting plan participants and individual retirement account owners from abusive practices and conflicted advice. While the terms of the re-proposed amendment will not specifically be known until it is released in early 2012, it is expected that the pool of fiduciaries will not increase as dramatically as it would have under the original proposal.

For the DOL release, please click [here](#).

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