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DOL Proposes New ERISA "Fiduciary" Definition

The Department of Labor ("DOL") issued a proposed regulation on October 21, 2010 that would, if adopted, modify an existing regulation[1] to more broadly define the circumstances under which a person is considered to be a "fiduciary" under the Employee Retirement Income Security Act of 1974 ("ERISA") and Section 4975 of the Internal Revenue Code as a result of giving investment advice to an IRA, an employee benefit plan or a plan's fiduciaries, participants or beneficiaries. The DOL indicated that, by giving a broader and clearer understanding of the circumstances that will cause persons providing such advice to be subject to ERISA's fiduciary standards, the proposed regulation would better protect plan participants from conflicts of interest and self-dealing. The following is a brief description of the proposed regulations.

- Giving the following types of advice and recommendations to a plan fiduciary, plan participant or beneficiary may result in fiduciary status under the proposed regulation: 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 (including recommendations as to proxy voting and the selection of asset managers).

  The DOL acknowledged that the specific inclusion of appraisals and fairness opinions would supersede its current position (stated in Advisory Opinion 76-65A) that a valuation of closely-held employer securities would not constitute investment advice.

- If a person renders advice as described above, the person will be treated as a fiduciary under ERISA if any one of the following four conditions is met:

  - The person represents or acknowledges that it is acting as a fiduciary within the meaning of ERISA with respect to such advice or recommendations. (Thus, such a representation or acknowledgment in connection with providing advice would be sufficient under the proposed regulation to result in fiduciary status if provided for a fee or other compensation, direct or indirect.)

  - 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.

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[1] The current regulation contains a five part test that must be satisfied in order for a person to be treated as a fiduciary by reason of rendering investment advice. It requires that a person render advice on a regular basis to the plan pursuant to a mutual agreement, written or otherwise, between such person and the plan or a plan fiduciary, that such services will serve as a primary basis for investment decisions with respect to plan assets, and that such person will render 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.

- The person provides advice or makes recommendations described above pursuant to an agreement, written or otherwise, 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.

  The DOL emphasized that, unlike the current regulation, the proposed regulation does not require the advice to be provided on a regular basis. Thus, a service provider that provides discrete advice with respect to distinct investment transactions could be a fiduciary.

  Also, unlike the current regulation, the proposed regulation would not require that the parties have a mutual understanding that the advice will serve as a primary basis for plan investment decisions. It would be sufficient if the understanding of the parties is that the advice will be considered in connection with making a decision relating to plan assets.

The proposed regulation would not, however, apply generally with respect to a person (unless that person represented that it is a fiduciary) who 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 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.

Further, the following acts in connection with an individual account plan would not, in and of themselves, be treated as rendering investment advice:

- Making available a menu of investments from which a plan fiduciary may select a more limited menu that will be available under the plan for investment if the person making available such investments discloses in writing to the plan fiduciary that the person is not undertaking to provide impartial investment advice;

- In connection with making available a menu of investments as described above, providing to the fiduciary general financial information and data regarding matters such as historic performance of asset classes and of the investments available through the provider, if the person providing such information or data discloses in writing to the plan fiduciary that the person is not undertaking to provide impartial investment advice;

- Providing investment education information (within the meaning of the DOL safe harbor described in Interpretative Bulletin 96-1).

The DOL noted that it has taken the position in Advisory Opinion 2005-23A that, generally, a recommendation to a plan participant to take an otherwise permissible plan distribution (including a recommendation as to how the distribution should be invested) does not constitute investment advice. The DOL has requested comments on whether or to what extent the final regulation should define "investment advice" to encompass recommendations related to taking a plan distribution.

The general deadline for submitting written comments on the proposed regulations is January 20, 2011.

Practice group contacts

If you have questions regarding the information in this legal update, please contact the Dechert attorney with whom you regularly work, or any of the attorneys listed. Visit us at www.dechert.com/employeebenefits.

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