

## DOL Proposes Rule Broadening the Definition of 'Fiduciary' under ERISA

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The Department of Labor ("DOL") has issued proposed regulations that would more broadly define the circumstances under which a person is considered a "fiduciary" under the Employee Retirement Income Security Act of 1974 ("ERISA") by reason of giving investment advice.

The proposed regulations are designed to more closely reflect the statutory language of ERISA, as well as the realities of the current investment marketplace, by giving a broader and clearer understanding of when persons providing investment advice are subject to ERISA's fiduciary standards.

The current regulations under ERISA provide that in order to be considered an ERISA fiduciary as a result of providing investment advice, the following five-part test must be satisfied:

- advice is rendered as to the value of securities or other property, or recommendations are made as to the advisability of investing in, purchasing or selling securities or other property;
- the advice is provided on a regular basis;
- the advice is provided pursuant to a mutual agreement, arrangement or understanding with the plan or a plan fiduciary;
- the advice will serve as a primary basis for investment decisions with respect to plan assets; *and*
- the advice will be individualized based on the particular needs of the plan.

The proposed definition replaces the five-part test with a two-part test, which provides that a person would be an ERISA fiduciary if that person, for a fee (direct or indirect) or other compensation:

- provides advice, appraisals or fairness opinions as to the value of securities or other property, makes recommendations as to buying, selling or holding securities or other property, or provides advice or recommendations as to the management of securities or other property; *and*
- that person, either directly or indirectly-
- represents or acknowledges that it is acting as a fiduciary; *or*
- exercises discretionary authority or control over the management of the plan or plan assets; *or*
- is an "investment adviser" under Section 202(a)(11) of the Investment Advisers Act; *or*
- provides advice or makes recommendations pursuant to an agreement or understanding, with the plan, a plan fiduciary, or a plan participant or beneficiary, that the advice may be considered in making investment or management decisions with respect to plan assets, and the advice will be individualized to the needs of the recipient.

Some notable changes as a result of the proposed regulations include: (i) the advice no longer needs to be offered on a regular basis in order for it to be considered fiduciary advice; (ii) the advice does not need to be offered as part of a mutual understanding that the advice will serve as the primary basis for investment decisions; (iii) rendering advice for a fee includes any direct or indirect fees received by the adviser (or an affiliate) from any source, including transaction-based fees (e.g., brokerage, mutual fund or insurance commissions); (iv) appraisals and fairness opinions regarding the value of plan assets are considered fiduciary investment advice; and (v) the advice provided by an investment consultant regarding asset allocation or investment manager selection will be considered fiduciary investment advice.

It is worth noting that the proposed regulations provide that certain actions are not treated as rendering investment advice and, thus, would not result in fiduciary status. These actions include: (i) providing investment education materials; (ii) marketing or providing a menu of



investment options from which a plan sponsor may choose, and providing general financial information to assist in selecting and monitoring those options, so long as it is accompanied by a statement that the party is not providing impartial investment advice; and (iii) preparing general reports necessary to comply with the reporting and disclosure requirements of ERISA, the Internal Revenue Code, or regulations or forms issued thereunder.

Comments on the proposed regulations are due by January 21, 2011. Comments may be submitted by e mail to [e-ORI@dol.gov](mailto:e-ORI@dol.gov) (enter in subject line: Definition of Fiduciary Proposed Rule) or by using the Federal eRulemaking portal at [www.regulations.gov](http://www.regulations.gov).

If you have any questions regarding proposed regulations, please contact one of the members of the Reed Smith Employee Benefits team listed to the right or the Reed Smith attorney with whom you regularly work.

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