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DOL to Re-Propose Rule on Definition of Fiduciary

Author: John D. Martini, Partner, Philadelphia
Author: Russell J. Boehner, Partner, Pittsburgh
Author: Dennis R. Bonessa, Partner, Pittsburgh
Author: Craig P. Tanner, Partner, San Francisco
Author: John E. Cunningham, Associate, Philadelphia

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The Department of Labor ("DOL") has announced its intention to re-propose its rule that would have broadened the definition of a "fiduciary" under the Employee Retirement Income Security Act of 1974 ("ERISA").

The DOL is seeking to amend a 1975 regulation, which defines when a person providing investment advice becomes a fiduciary under ERISA, in order to adapt the rule to the current retirement marketplace and ensure that potential conflicts of interest among advisers are not allowed to compromise the quality of investment advice given to retirement plan participants.

In October 2010, the DOL issued a proposed rule to change the existing regulation to expand the scope of who is considered to be an ERISA fiduciary by reason of giving investment advice. This expansion would have caused many retirement plan service providers, such as registered investment advisers, broker-dealers and valuation firms, to be ERISA fiduciaries. However, the proposed rule generated considerable controversy and was subject to significant criticism, with many asserting that the proposal was overly broad and additional opportunity for input on the proposed changes was needed.

In announcing its intention to re-propose the rule, the DOL indicated it anticipates the revised proposed rule will:

- clarify that fiduciary advice is limited to individualized advice directed to specific parties;
- clarify the limits of the rule's application to arm's-length commercial transactions, such as swaps; and
- respond to concerns about the application of the rule to routine appraisals.

Also anticipated in the re-proposed rule are provisions related to exemptions, including:

- exemptions addressing concerns about the impact of the new regulation on the current fee practices of brokers and advisers;
- provisions clarifying the continued applicability of long-standing exemptions that allow brokers to receive commissions in connection with mutual funds, stocks and insurance products; and
- new or amended exemptions preserving beneficial fee practices, while at the same time protecting plan participants and IRA owners from abusive practices and conflicted advice.

Additionally, in responding to concerns about potentially overlapping or conflicting fiduciary regulations under ERISA and the Dodd-Frank Wall Street Reform and Consumer Protection Act, the DOL indicated it will continue to work with other regulatory agencies to ensure there would not be inconsistent standards for firms providing financial services to ERISA plans and IRAs.

The re-proposed regulation is expected to be issued sometime in early 2012.