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## U.S. Department of Labor Releases New Fiduciary Regulations

*By David J. Karasko and James F. Podheiser*

On April 14, 2015 the U.S. Department of Labor (DOL) released a proposed regulation (2015 Regulation) to revise the definition of fiduciary under section 3(21) of the Employee Retirement Income Security Act of 1974 (ERISA) and section 4975 of the Internal Revenue Code (Code). The proposed regulation replaces the prior proposed regulation published in 2010. Similar to the 2010 regulation, the new proposed regulation enlarges the scope of individuals and entities subject to the DOL fiduciary standard.

### Definition of Fiduciary

ERISA defines a plan fiduciary to include anyone who renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of a plan, or has any authority or responsibility to do so. In 1975, the DOL narrowed this statutory definition of fiduciary by issuing a five-part regulatory test for determining whether a person is rendering investment advice. The 2015 Regulation would eliminate this five-part test and instead subject a person to fiduciary status if that person:

1. provides certain types of advice directly to a plan, plan fiduciary, plan participant or beneficiary, IRA or IRA owner in exchange for a fee or other compensation; and
2. either directly or indirectly represents or acknowledges that the person is acting as a fiduciary within the meaning of ERISA with respect to such advice; or renders the advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is individualized to, or that such advice is specifically directed to, the advice recipient for consideration in making investment or management decisions with respect to securities or other property of the plan or IRA.

The four types of advice that could subject a person to fiduciary status are:

1. recommendations as to the advisability of acquiring, holding, disposing of or exchanging securities or other property, including recommendations to take a distribution of benefits or a recommendation as to the investment of securities or other property to be rolled over or distributed from a plan or IRA;
2. recommendations as to the management of securities or other property, including recommendations as to the management of assets to be rolled over to or distributed from a plan or IRA;
3. providing appraisals, fairness opinions or similar statements, whether verbal or written, concerning the value of securities or other property if provided in

connection with a specific transaction involving the acquisition, disposition or exchange of such securities or other property by the plan or IRA; and

4. recommendations of a person who will also receive a fee or other compensation for providing any of the three types of advice listed above.

### **Carve-Outs**

While the DOL proposes expanding the scope of persons subject to the fiduciary standard in the 2015 Regulation, it also provides several carve-outs (described below) that would allow a person to render advice to a plan without being treated as a fiduciary.

**Counterparties to the Plan.** Subject to satisfying various conditions, the 2015 Regulation carves out counterparties who provide advice to a plan fiduciary, including:

1. counterparties who provide advice to an independent plan fiduciary in connection with a sale, purchase, loan or bilateral contract if the plan has 100 or more participants or the plan fiduciary manages at least \$100 million in employee benefit plan assets; and
2. swap dealers, security-based swap dealers, major swap participants or major security-based swap participants who provide advice in connection with a swap or security-based swap.

**Employees.** The 2015 Regulation carves out employees who provide advice to a plan fiduciary if they receive no fee or other compensation in connection with the advice beyond the employees' normal compensation.

### **Platform Providers and Selection and Monitoring**

**Assistance.** The 2015 Regulation carves out persons who market and make available to a plan a platform of investment options (without regard to the individualized needs of the plan, its participants or beneficiaries) from which a plan fiduciary may select or monitor investment alternatives into which plan participants may direct their investment. Additionally, in connection with those platform provider services, the 2015 Regulation carves out persons who merely identify investment alternatives that meet objective criteria specified by the plan fiduciary (e.g., stated parameters concerning expense ratios, size of fund, type of asset or credit quality) or merely provide objective financial data and comparisons with independent benchmarks to the plan fiduciary.

**Financial Reports and Valuations.** The 2015 Regulation carves out persons who provide appraisals, fairness opinions



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or statements of value to (1) employee stock ownership plans, (2) investment funds (such as collective investment funds or pooled separate accounts) that hold the assets of more than one unaffiliated plan, and (3) ERISA plans and IRAs solely for purposes of compliance with the reporting and disclosure provisions under ERISA and the Code.

**Investment Education.** The 2015 Regulation carves out persons who provide investment education materials similar to those included in Interpretive Bulletin 96-1, including (1) plan information; (2) general financial, investment and retirement information; (3) asset allocation models; and (4) interactive investment material. However, the 2015 Regulation differs in some respects from Interpretive Bulletin 96-1. For example, asset-allocation models may not refer to specific investment products under the new carve-out.

### **Prohibited Transaction Class Exemptions**

As discussed, the 2015 Regulation would expand the scope of individuals and entities subject to the DOL fiduciary standard, and in doing so recharacterize many traditional nonfiduciary activities into fiduciary activities. To help address the conflicts that may result from such recharacterization, the DOL also proposed two new prohibited transaction class exemptions (“PTEs”) for “Best Interest Contracts” and “Principal Transactions.” These new exemptions would allow advisers to continue to receive payments that could create conflicts of interest if the conditions of the exemption are met. In addition, the DOL proposed amendments to several existing PTEs that were previously available for investment advice provided to plan sponsors and participants, including 86-128, 75-1, 77-4, 80-83, 83-1 and 84-24. Service providers have relied on these PTEs for years to structure their relationships with ERISA plans, and the amendments may require significant changes to their current compensation practices.

## Moving Forward

The essence of the DOL's proposals should not come as a surprise because they are generally consistent with President Barack Obama's preliminary announcement on Feb. 23, 2015, in connection with the referral of the proposals to the Office of Management and Budget for review. As with all significant regulatory undertakings, however, "the devil is in the details." There will be an opportunity for the public to

submit written comments on the proposals through July 6, 2015 (although, as has been the case with many significant DOL proposals, this period may be extended), followed by a public hearing on the proposals scheduled to occur within 30 days of the close of the comment period. Whether there will be significant changes to the proposals or only moderate tweaks here and there before they become final and effective remains to be seen. ■

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