

As of 12/15/2010

DOL Proposed Expansion of ERISA Fiduciary Definition

Proposed Regulation Under ERISA § 3(21)(A)(11)

As of December 1, 2010

Under a proposed regulation issued by the Department of Labor (DOL), the definition of an ERISA fiduciary would be amended to expand the class of service providers providing fiduciary-level “investment advice” to retirement plans.

According to the DOL, change is necessary to:

- Protect participants from conflicts of interest and self-dealing of service providers to retirement plans
- Help eliminate perceived abuses related to undisclosed fees and misrepresentation of compensation
- Provide a more broad and clear understanding of when individuals providing investment advice are subject to ERISA’s fiduciary standards

Current Guidance

Section 3(21) of ERISA defines an ERISA fiduciary as anyone who:

- Exercises any discretionary authority or control over the management of the plan or its assets
- Has any discretionary authority or responsibility in the administration of the plan
- Renders investment advice for a fee or other compensation, with respect to any moneys or other property of the plan, or has any authority or responsibility to do so

It is only this last category of ERISA fiduciaries – those providing investment advice – that are at the heart of the proposed regulation.

Currently, an individual is considered an ERISA fiduciary by rendering investment advice to a plan only if the advice is for the purchase, sale or value of securities or other property for the plan. The individual either:

- Has discretionary authority or control related to the purchase or sale of securities or other property for the plan, or
- Renders advice on a regular basis. There must be a mutual agreement or understanding between the person and the plan that the advice will serve as a primary basis for investment decisions, based on the individualized needs of the plan.

Proposed Regulation

The proposed regulation defines an ERISA fiduciary as an individual providing investment advice to a plan if the individual:

- Renders advice, an appraisal or a fairness opinion concerning the value of securities or other property
- Makes recommendations about the advisability of investing in, purchasing, holding or selling securities or other property
- Gives advice or makes recommendations concerning the management of securities or other property (i.e., advises on the selection and monitoring of investment managers)
- Provides individualized advice or recommendations which, according to an agreement or understanding with the plan, may be considered in connection with investment or management decisions affecting plan assets
- Represents or acknowledges that he or she is an ERISA fiduciary (regardless of the nature of services actually provided to the plan)
- Is a registered investment advisor under the Investment Advisers Act of 1940

In all these cases, the person must be acting in exchange for compensation or a fee. Significantly, the regulation no longer requires that investment advice be provided on a regular basis or that the advice be a primary basis for making plan investment decisions.

Exclusions from the ERISA Definition

Although the proposed regulation expands the definition of ERISA fiduciaries, it also states that the following are **not** ERISA fiduciaries:

- Sellers of securities when the purchaser knows, or should know, that the sellers have interests adverse to the interests of the plan and its participants
- Those who provide investment education information and materials relating to individual account plans
- Those who market securities or other property, from which a plan fiduciary may designate investment alternatives for participants to direct their assets; these individuals must disclose in writing that they are not providing impartial investment advice

- Service providers, record keepers or TPAs who provide general information and data to assist plan fiduciaries in selecting and monitoring plan investments; these individuals must disclose in writing that they are not providing impartial investment advice
- Those who simply prepare a general report or statement that reflects the value of investments held by a plan or participant, for purposes of reporting and disclosure compliance under ERISA or the Internal Revenue Code

What's Next

As a proposed regulation, the expanded definition of an ERISA fiduciary is not yet effective. The DOL is accepting comments on the regulation through January 20, 2011. After that date, the DOL will issue a final regulation. The final regulation will be effective 180 days after it is published.

Mutual of Omaha will continue to monitor the developments with the definition, and determine its impact on our role with respect to our retirement plan products and those of our partners.