

## Publications

# DOL Proposes Expanded Definition of “Investment Advice” Fiduciary

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## SERVICES

The United States Department of Labor (“DOL”) recently proposed amendments to its regulation defining “investment advice” used for purposes of identifying when a person who provides advice and recommendations regarding employee benefit plan matters may become a fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA). 75 Fed. Reg. 65263 (Oct. 22, 2010). The proposed regulation would apply to service providers to tax-qualified retirement plans, other ERISA-covered plans and also to individual retirement accounts (“IRAs”). If finalized, the proposed regulation would substantially expand the range of individuals and entities that could be fiduciaries of plans under ERISA (and the prohibited transaction excise tax provisions under section 4975 of the Code) and would likely make it easier for DOL (and plaintiffs’ attorneys) to establish the fiduciary status of investment service providers in DOL enforcement and ERISA litigation matters by making it easier to demonstrate fiduciary status.

While many financial institutions already act in a fiduciary capacity to ERISA-covered plans and IRAs, the proposed amended regulation could still have significant impact because financial institutions often take the position that some services they provide are not “fiduciary” in nature – e.g., assistance in selecting and monitoring investment options for 401(k) plans and preparing periodic reports showing the valuation of assets – and therefore not subject to ERISA’s fiduciary standards, including the prohibited transaction rules. The proposed amendments could expand the definition of fiduciary advice to include these types of activities in some circumstances, and in that event, financial institutions would need to review their employee benefit plan practices and operations to comply with new requirements. The attached article is an overview of the proposed regulation and some observations.