

Straight from the Source

DOL speaks about fiduciary definition re-proposal

The effort by the U.S. Department of Labor (DOL) to restructure the definition of fiduciary investment advice has been one of the most significant regulatory initiatives affecting retirement plans in decades. As you may recall, the DOL initially proposed to amend the 35-year-old regulation in October 2010. That proposal would have considerably broadened the range of service providers who could be deemed fiduciaries subject to the Employee Retirement Income Security Act (ERISA). After significant pressure from Capitol Hill and the regulated community, the DOL publicly announced, on September 19, 2011, its intention to withdraw the proposal and issue a re-proposal.

The DOL's initial proposal was controversial for many reasons and received significant criticism from the defined contribution (DC) plan and individual retirement account (IRA) services industries. Notably, the proposed regulation would have eliminated requirements that fiduciary advice be provided to a plan or participant on a "regular basis" and with a "mutual understanding" that the advice would be the primary basis for plan investment decisions. The proposal also drastically limited the types of sales presentations investment professionals could provide to a plan or its participants without assuming ERISA "fiduciary" status. Because these professionals are understandably averse to assuming that liability, the drafted proposal may have inadvertently limited investor education efforts.

The proposal also imposed fiduciary liability on those providing appraisal or valuation opinions with respect to securities or other property held by a plan. Most of these appraisers are unfamiliar with ERISA and ill-equipped to comply with the fiduciary duties the statute imposes. This extension of fiduciary liability seemed particularly inappropriate, because appraisers often have a limited (or nonexistent) ability even to identify the ERISA plans to which they would owe fiduciary duties.

Since the DOL withdrew the proposed regulation, the department has offered little information on how the re-proposal may differ. However, DOL officials discussed the long awaited re-proposal at a recent ERISA Advisory Council Meeting and on Capitol Hill. To the Advisory Council, Phyllis Borzi, assistant secretary of the Employee Benefits Security Administration (EBSA), stated that the re-proposal will be issued alongside proposed modifications of several prohibited transaction class exemptions, with the goal of providing a "complete package for

people in the private sector to look at." From our standpoint, we think that the modifications to these exemptions are necessary to ensure that fiduciaries will be able to sell investment and insurance products to retirement plans without major disruptions.

Borzi also highlighted what will be a key difference between the proposed definition of fiduciary and the re-proposal—she suggested that the DOL plans to offer a greater distinction between services that constitute investment advice and those considered investment education.

DOL Secretary Hilda Solis appeared before the House Committee on Education and the Workforce to review the DOL's budget proposal for 2013. As part of the hearing, the committee questioned Solis about numerous DOL initiatives, including the expected re-proposal. The congressional panel complimented the DOL's decision to withdraw the proposed definition.

While Solis did not provide insight about details of the re-proposal, she did offer a few interesting comments related to the DOL's status in the regulatory process. For instance, in response to a question from Rep. Judy Biggert, R-Ill., about whether the re-proposal will be issued in May, Solis stated that the DOL is still collecting information and could not create a definite timeline for the re-proposal's issuing.

Solis also stated that the DOL plans to coordinate with the Securities and Exchange Commission (SEC) and U.S. Commodity Futures Trading Commission (CFTC) regarding the re-proposal. Citing a need to adhere to the Administrative Procedures Act, however, she did not discuss any specifics about changes to the definition.

For some time after the proposal's withdrawal, it was unclear whether the DOL would in fact re-propose the fiduciary-definition regulation. Now it seems the department fully intends to do so, along with proposing modifications to important class exemptions. The big question is, when will the re-proposal be released—but the bigger question is, what will the re-structured definition look like?

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