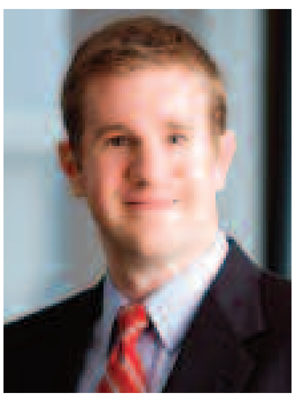
DISCUSSION TOPIC

Overview of the Department of Labor's Spring 2010 Regulatory Agenda

Roberta Ufford



J. Matthew Calloway

By Roberta J. Ufford and J. Matthew Calloway

On April 26, 2010, the Employee Benefits Security Administration of the U.S. Department of Labor ("Department") released its semiannual regulatory agenda, which lists regulations the Department expects to have under active consideration and its regulatory priorities. Although final action on these matters may be months (or even a year or more) away, financial institutions may wish to consider the effects of coming regulatory changes on the services they provide to ERISA-covered plans.

Fee Disclosure Initiatives

The Department has been focused on increasing transparency of pension plan fees and expenses for several years. Two fee disclosure regulations under development by the Department are expected to be issued in final form this year. The first would require pension plan service providers to make detailed disclosures about their compensation and conflicts of interest. This regulation was proposed in December 2007, and the Department expects to publish an interim final regulation by late Spring 2010.

The second fee disclosure regulation would require disclosure of information about plan fees and expenses to participants in 401(k) and other participant-directed plans. The regulation is expected to enhance the information currently required to be furnished to plan participants. A proposed regulation was released in July 2008, and the Department expects to issue a final regulation in September 2010.

Definition of Fiduciary

A longstanding Department regulation establishes criteria for determining when a person providing investment advice to a plan is an ERISA fiduciary. (See 29 C.F.R. § 2510.3-21.) The Department is considering amending this regulation to take into account current practices of investment advisers and the expectations of plan officials and participants, with the effect of broadening the kinds of activities that would be considered fiduciary investment advice. The regulatory agenda identifies June 2010 as an expected date for issuance of a proposed rule.

Lifetime Income Options

The Department is continuing to explore what steps it could take to facilitate access to and use of lifetime income arrangements designed to provide a stream of income to participants after retirement. The Department believes that participants in 401(k) and other defined contribution plans, who are generally responsible for directing their own retirement savings, could benefit from lifetime income arrangements to help reduce the risk that they will run out of funds during their retirement years. However, the Department has noted that use of lifetime income options is currently very limited. A request for information was issued on February 2, 2010 to obtain more information, and the comment period ended on May 3, 2010. No date has been provided for further action.

Participant Investment Advice

In March 2010, the Department re-proposed a regulation implementing ERISA's prohibited transaction exemption for the provision of investment advice to participants in 401(k) and similar plans, as well as individual retirement accounts. This "re-proposal" followed the Department's withdrawal of a final regulation and class exemption issued in January 2010, which would have provided somewhat broader relief for investment advice programs. The newly proposed regulation would permit participant investment advice where either (a) the fees received by the individual providing the advice, and the advisory firm employing that individual, do not vary based on the advice provided (the level fee approach), or (b) the fiduciary adviser provides advice using a computer model certified annually by an independent expert (the computer model approach). The final regulation is scheduled for December 2010.

Target Date Funds

More 401(k) and similar participant-directed plans are offering target date funds as investment options. Target date funds have become increasingly popular since being included as one of the types of investments that are qualified default investment alternatives under the Department's regulation for participants who do not provide investment direction. (See 29 C.F.R. § 2550.404c-5.) However, not all target date funds have the same design, a fact that was highlighted by varying losses among 2010 target date funds during the financial crisis. The Department and the Securities and Exchange Commission ("SEC") jointly engaged in an examination of target date funds for nearly a year to provide guidance for investors, including fiduciaries and participants of ERISA plans, in understanding the operations and risks of investing in target date funds.

On May 6, 2010, the Department and SEC issued a joint investor bulletin on target date funds. The investor bulletin emphasizes the importance of evaluating a target date fund's investment strategy, underlying investments, changes in underlying investments over time, and risks. In addition, the investor bulletin explains that it is important for investors to review the prospectus or other fund information, because similarly dated target funds offered by different managers may have different investment strategies and risks. The investor bulletin also identifies additional factors that investors should consider in deciding whether to invest in a particular target date fund, including fees and expenses.

The regulatory agenda describes two additional regulatory projects directed at target date funds. The first is a fiduciary checklist providing tips for ERISA plan fiduciaries in selecting target date funds for their retirement plan investment portfolios. The Department also intends to amend its existing qualified default investment alternatives regulation to enhance the information provided to participants in connection with plans that utilize a target date fund as the plan's default investment. The Department anticipates issuing a proposed rule in August 2010.

About the Authors:

Roberta Ufford is a principal of Groom Law Group, Chartered, where she concentrates on ERISA's fiduciary responsibility provisions and other laws governing employee benefit plans. Ms. Ufford is admitted to practice in the District of Columbia.

J. Matthew Calloway is an associate at Groom Law Group, Chartered, whose practice focuses on ERISA's fiduciary responsibility and prohibited transaction provisions and he advises both pension and welfare plan clients on compliance with Title I of ERISA. Mr. Calloway negotiates contracts on behalf of plans and service providers, helps financial institutions structure products and services, and assists clients in obtaining guidance and responding to inquiries from the Department of Labor.