

Fact Sheet



U.S. Department of Labor
Employee Benefits Security Administration
March 30, 2011

Definition of the Term “Fiduciary”

The Employee Retirement Income Security Act (ERISA) requires plan fiduciaries to act prudently and solely in the interest of the plan's participants and beneficiaries, prohibits self-dealing, and provides judicial remedies when violations of these standards cause harm to plans. In enacting ERISA, Congress recognized that the security of America's employee benefit plans depends on their fiduciaries. The Employee Benefits Security Administration (EBSA) has proposed a rule to recast an existing regulation to better reflect relationships between investment advisers and their employee benefit clients.

Background

- EBSA is responsible for administering and enforcing the fiduciary, reporting, and disclosure provisions of Title I of ERISA.
- The agency oversees approximately 718,000 private pension plans, including 512,000 participant-directed individual account plans such as 401(k)-type plans.
- ERISA defines a plan fiduciary to include anyone who gives investment advice for a fee or other compensation with respect to any moneys or other property of a plan, or has any authority or responsibility to do so.
- In 1975, the Department issued a 5-part regulatory test for “investment advice” that gave a very narrow meaning to this term. Under the regulation, before a person can be held to ERISA’s fiduciary standards with respect to their advice, they must (1) make recommendations on investing in, purchasing or selling securities or other property, or give advice as to their value (2) on a regular basis (3) pursuant to a mutual understanding that the advice (4) will serve as a primary basis for investment decisions, and (5) will be individualized to the particular needs of the plan. An investment adviser is not treated as a fiduciary unless each of the five elements of this test is satisfied for each instance of advice.

Developments

- Since the mid-70’s, there have been significant changes in the retirement plan community, with more complex investment products, transactions and services available to plans and IRA investors in the financial marketplace, and a shift from defined benefit plans to defined contribution plans.
- With the shift to 401(k)-type plans, investment advice has become increasingly important to employers, particularly small and medium-sized employers, when choosing an appropriate menu of plan investments for their workers, and for workers when selecting among investments for their individual accounts.
- With the increase in the amount of assets held in IRAs, IRA holders shoulder a greater amount of investment responsibility, like 401(k) plan participants. But, unlike 401(k) plan participants, IRA holders are more vulnerable since no other plan fiduciary protects the IRA investments.
- EBSA believes it is time to re-examine the types of advisory relationships that give rise to fiduciary duties and to update the rigid 1975 regulation so that plan fiduciaries, participants and IRA holders receive the impartiality they expect when they rely on their adviser’s expertise.

Overview of Proposed Rule

A person gives fiduciary investment advice if, for a direct or indirect fee, he or she –

Provides the requisite type of advice:

- Appraisals or fairness opinions about the value of securities or other property;
- Recommendations on investing in, purchasing, holding, or selling securities; or
- Recommendations as to the management of securities or other property;

And meets one of the following conditions:

- Represents to a plan, participant or beneficiary that the individual is acting as an ERISA fiduciary;
- Is already an ERISA fiduciary to the plan by virtue of having any control over the management or disposition of plan assets, or by having discretionary authority over the administration of the plan;
- Is an investment adviser under the Investment Advisers Act of 1940; or
- Provides the advice pursuant to an agreement or understanding that the advice may be considered in connection with investment or management decisions with respect to plan assets and will be individualized to the needs of the plan.

Limitations recognizing that certain activities should not result in fiduciary status:

- Persons who do not represent themselves to be ERISA fiduciaries, and who make it clear to the plan that they are acting for a purchaser/ seller on the opposite side of the transaction from the plan rather than providing impartial advice.
- Employers who provide general financial/ investment information, such as recommendations on asset allocation to 401(k) participants under existing DOL guidance on investment education.
- Persons who market investment option platforms to 401(k) plan fiduciaries on a non-individualized basis and disclose in writing that they are not providing impartial advice.
- Appraisers who provide investment values to plans to use only for reporting their assets to the DOL and IRS.

Public Notice and Comment

DOL has encouraged full public participation in this rulemaking. Interested parties had 104 days to submit public comments, followed by a two-day public hearing on the proposal. The hearing record will remain open until April 12, 2011, which is 15 days after the date of posting the hearing transcript for additional comments, arguments, and information relating to matters raised at the hearing or with respect to any of the previously filed public comments.