
From: Scott Janko [mailto:scott@nafep.com]
Sent: Tuesday, May 24, 2011 5:44 PM
To: EBSA, E-ORI - EBSA
Subject: Definition of Fiduciary Proposed Rule

Regarding your proposal to definition of a fiduciary under section (c)(1)(i)(A)(1)

This proposal would include self directed IRA custodians who exercise no discretion, control, nor do they provide investment advice, as defined under the other sections of the proposal. Such an inclusion would not, in the case of a self directed IRA, provide any additional compliance, safety or security to the IRA. The general proximate cause of any harm from of a thinly traded, hard to value asset would be taking too much or too little from the account in the event that the client was of retirement age or just the fact that the account holder invested in the asset. In this case, the self directed custodian, did not provide the services to ascertain the value, did not recommend the investment, and does not exercise any discretion over the asset. In practice the IRA account holder secured third party experts to derive the necessary values. The mere act of reporting to the IRS as to account values is not the source of the harm nor did it mislead or misinform the account holder, nor did it induce or alter the decision of the account holder. If the values are incorrect, any insurance held by the custodian would not in all likelihood provide any measure of relief for the account holder due to the fact that the custodian did not develop the value, rather it reported it to the IRS. So, practically speaking, the IRA would be required to pursue the custodian, via legal means, to collect on insurance. The likely outcome of such legal action is usually a large legal bill for the account holder, as they fight against a large insurance company and a large custodian. This is hardly helps the IRA, given that the harm came from someone else, and from a public policy perspective its seems disingenuous to falsely create a revenue source for an IRA in the form of a innocent custodian's personal financial resources and insurance when their only involvement was to take the direction of the client themselves.

From a practical perspective, such a rule, and inclusion of Self directed IRA custodians will not increase protection for IRA accounts. In fact it will cost the IRAs through increased administrative costs. Custodians will be forced to do one of two things: 1) Increase fees for holding accounts in the form of annual fees plus other disclosures and put more more burden on the IRA/Account holder to shoulder some of the reporting; 2) Custodians will discontinue with such assets, which will impact the real estate, private lending, private equity and precious metals markets. Such an impact will be well in excess of \$100M per year in investment activity.

The burden for making a plan whole and keeping the plan's best interest in mind should be placed directly on the provider that develops the data through their own efforts, not the parties that merely provide a conduit for transmitting the data

to government agencies. Under the current language, even third party 1099, 5498 reporting services, and 5500 software providers would be deemed a fiduciary and subject to attack. A more optimal approach to the problem is to exempt service providers that merely transmit data and rely on the plan trustee, the account holder/beneficiary or their agents to provide the valuations of hard to value assets. This seems to be the intent of the proposed regulation, but seems to be overly broad as it relates to self directed IRAs and the custodians of such assets.

The Department recognizes that compliance with a number of ERISA's reporting and disclosure provisions requires information on the value of plan assets. The Department does not intend, as a general matter, for such information provided solely for compliance purposes to fall within the type of advice described under that proposal. Paragraph (c)(2)(iii) provides that advice described in paragraph (c)(1)(i)(A)(1) does not encompass the preparation of a general report or statement that merely reflects the value of an investment of a plan or a participant or beneficiary, provided for purposes of compliance with the reporting and disclosure requirements of the Act, the Internal Revenue Code, and the regulations, forms and schedules issued thereunder, unless such report involves assets for which there is not a generally recognized market and serves as a basis on which a plan may make distributions to plan participants and beneficiaries.



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