

Aon Hewitt Statement

Introduction

As one of the world's premier human resources services companies, Aon Hewitt has extensive experience in both designing and administering retirement plans for mid- to large-sized employers, including helping employers to communicate with their participants about this increasingly important benefit. We are the largest independent provider of administration services for retirement plans, serving more than 11 million plan participants.

My name is Ted Novy, and I am the lead attorney of the Retirement Outsourcing team in Aon Hewitt's legal department. We are honored to provide comments to the Department of Labor today on its proposed regulations concerning the definition of the term "Fiduciary" under 29 CFR 2510.3-21(c).

Today many Americans face serious challenges concerning retirement. Americans are living longer today than in the past. Many rely solely on a 401(k) plan for their employer-provided retirement income, which can place them at greater risk of prematurely depleting their existing retirement assets. The overwhelming majority of Americans receive lump sum distributions of their retirement savings when they retire. These participants who take a lump sum are subject to serious risks--inflation, longevity and market. It is no wonder that many Americans are looking for assistance with their retirement challenges.

Too few are equipped to manage their retirement challenges alone, so they rely upon others for assistance. Within the mid-sized to large-sized qualified plan environment, many participants have access to unbiased advice, guidance, and education. Fiduciary protections are in place to help make sure the plan decision-makers are focused on the best interests of plan participants.

The individual retail market also offers a host of options to help address these retirement needs, but the choices can be overwhelming to even an informed consumer. No one is filtering through the options to make sure individuals are receiving appropriate information and advice that is in their best interest. Furthermore, retail fees are generally higher than what mid- to large-sized retirement plans can offer through their collective leverage. Consequently, when participants move from the qualified plan to the individual retail market, fees can erode savings, and confused participants are at greater risk of buying products that are inappropriate for their needs or making decisions without unbiased support. In some cases, there may be benefits to the retail market that make a move outside the plan worthwhile – but participants must be fully informed about the advantages and disadvantages, and conflicted advice about moving from qualified plan to retail can have a detrimental impact on the future financial security of American workers.

With Americans' retirement income needs in mind, we applaud the Department for moving to update the definition of fiduciary. In particular, Aon Hewitt wishes to focus its testimony this afternoon on the question that the Department posed in the preamble to the proposed regulation:

"Whether and to what extent the final regulation should define the provision of investment advice to encompass recommendations related to taking a plan distribution?"

As I will explain in this testimony, we recommend that the Department answer this question in the affirmative--namely that the final regulation should include recommendations to participants to take plan distributions from their plan accounts. We base this recommendation upon the following:

Inclusion of Recommendations to take a Plan Distribution in the Definition of Investment Advice

As discussed in our comment letter, we believe that the Department should include in the definition of investment advice any recommendation made to a participant to take a plan distribution of the assets in his or her account because:

- A participant's decision to take a plan distribution is comprised of two significant decisions affecting a participant's plan assets, namely: (1) whether to liquidate current investments, and (2) how to manage the distribution of the funds; and
- Failure to include distribution advice under the final regulation may result in the unintended consequence of creating a bias towards a recommendation to take a distribution because an advisor could both avoid ERISA fiduciary status and also recommend an investment in which the advisor has a financial interest.

A decision to take a plan distribution is comprised of two smaller but significant decisions. First, the participant must decide whether to liquidate current investments. Investment decisions to buy or sell a particular plan investment option are at the core of a participant's management of his or her plan account. This is true whether the sale of an investment is merely the prelude to investing in another plan investment option or the precursor to taking a plan distribution. Furthermore, the decision becomes even more complicated when the distribution recommendation does not encompass a total distribution of the participant's account. In such a situation the participant must decide which (or how much of each) investment to liquidate. In other words, the participant must decide on the suitability of which investments to liquidate and which investments in which to retain a position.

Second, a participant must decide how to manage the distribution of the funds from his or her plan account, including the time, manner, form, and future custody of the plan distribution. The decision of where to invest assets outside of the plan and to whom a participant should entrust with custody of those assets is a critical component of the participant's decision. A participant must make this decision, prior to the actual distribution, while the funds are still plan assets.

When an advisor provides advice with respect to either or both of these decisions such advice is provided while the assets in question remain within the plan. Together these two important and interrelated decisions regarding the investment of plan assets can play a significant role in a participant's future retirement savings.

In Advisory Opinion 2005-23A (December 7, 2005), the Department decided that a recommendation to take a distribution does not constitute investment advice because the assets will be invested outside of the plan. However, at the time the advisor provides a distribution recommendation the assets in question are still plan assets. Therefore, differentiating between a recommendation to invest in plan options or to invest outside of the plan creates an inconsistency in the application of the ERISA fiduciary rules. Why should the advice to liquidate an investment position and reinvest in another investment option within the plan be treated any differently than a recommendation to liquidate an investment position and then take a distribution to be invested outside of the plan? This inconsistent position appears to create a potential bias toward a recommendation to take a distribution because an advisor could both avoid ERISA fiduciary status and also recommend an investment in which it has a financial interest.

One might well suggest that the recommendation to take a distribution should be more closely scrutinized because not only is the participant making an investment decision, but the participant may be sacrificing the benefits of participating in an ERISA plan. We do not make such a suggestion here, but rather recommend that any advice to sell a plan investment be subject to the same standard of care, no matter the following disposition of the liquidated funds.

We submit that while a participant has assets invested in the plan any recommendation is a recommendation as to the management of a participant's securities in the plan. Such advice should therefore constitute investment advice under ERISA. In short, we view the application of fiduciary standards to advisors who recommend plan distributions as a logical application of ERISA's fiduciary rules, and certainly in the best interests of participants and beneficiaries.

Costs and Benefits Related to a Comprehensive Definition of Investment Advice

By extending the regulation to include the recommendations to take a distribution from the plan, we believe the associated costs would be minimal and that the benefits to participants and beneficiaries would greatly outweigh those costs. We also anticipate that treating all recommendations relating to the application and management of plan assets consistently may result in more participants retaining their assets in their employer-sponsored plans because the level of steerage and inappropriate advice will be reduced. Retention of assets within a plan provides a participant or beneficiary with a number of rights and protections that they may not receive outside of the plan. Examples include:

- Protective oversight of a plan fiduciary that must exercise its obligations and duties under a prudent expert standard, in the best interests of participants and beneficiaries;
- Access to unbiased advice and other decision support tools designed and operated with the best interests of plan participants in mind, often at prices significantly discounted from individual investment advice available in the retail market;
- More highly personalized and tailored plan communications, including account statements, educational material, and fee disclosure information; and
- Leveraged bargaining power of employer plans, resulting in lower investment costs within the plan when compared to similar investments outside the plan.

Any recommendations to participants and beneficiaries to take a distribution from their qualified plan should be considered in the context of these potential advantages. Including such recommendations in the definition of investment advice will result in more balanced and unbiased recommendations that consider all options. That said, we do believe the provision of general education and information about the advantages and disadvantages of taking a distribution should continue to be allowed without invoking fiduciary status.

Conclusion

We support the Department's goal of updating this rule for changes in the financial industry and the expectations of plan participants and beneficiaries, as well as the intent to better protect participants and beneficiaries from conflicts of interest and self-dealing. As I have explained we believe that these goals can best be achieved, in part, by expanding the definition of investment advice to include recommendations to a participant to take a plan distribution. We appreciate this opportunity to share our thoughts with the Department.