**THE DEPARTMENT OF LABOR PROPOSES LONG-NEEDED REVISIONS TO THE DEFINITION OF "FIDUCIARY"**

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ERISA Section 3(21)(A)(ii) requires only that a person render investment advice for compensation, direct or indirect, with respect to plan assets for such person to be accorded fiduciary status. The DOL narrowed this definition 35 years ago through adoption of a five-part test, according to which fiduciary status attaches only if, among other things, advice is provided "on a regular basis" and serves as "a primary basis" for the investment decision. Counsel for multiemployer plans should be gratified that the DOL is proposing to revise the definition to more closely reflect the statutory language not only by removing the "regular basis" and "primary basis" components but also by revising and expanding the definition of fiduciary to reflect both today's (and yesterday's) marketplace. This comment addresses just a few of the proposed rule's many aspects.

First, Trustees seeking fiduciary advice for one-time transactions would obtain an increased measure of protection under the proposed rule. A not uncommon one-off transaction involves investment in a new asset class – for example, private equity – for diversification purposes. The Trustees may hire an investment adviser to research private equity managers and recommend finalists for selection by the Trustees, with the engagement ceasing upon the Trustees' selection. Under the current regulation, the investment adviser might argue that it is not a fiduciary because it does not provide advice "on a regular basis." The proposed rule forecloses that argument.

Second, the proposed rule raises many questions for broker-dealers ("brokers") who provide investment advice to fiduciaries. Suppose a registered representative successfully sells the use of his or her firm's investment platform and attendant bundled services to a participant-directed, individual account plan. The representative further recommends the investment line-up to the Trustees and the Trustees rely, in part, on those recommendations in selecting the investment options. However, there is no separate agreement with the broker to provide advice and the broker does not receive any monies other than commissions. Assume that a participant thereafter sues both the broker and the Trustees, alleging that they breached their fiduciary duties by imprudently recommending and imprudently selecting the specific investment options available to the participants.

Under the current rule, there seems little doubt that the broker would defend against a breach of fiduciary duty claim by arguing, among other things, that it had no fiduciary

responsibility because there was no mutual understanding that its advice would serve as the primary basis for the selection of the mutual funds (or other investment products) in the investment line-up. The participant would counter by arguing that the advice was "the" and, in the alternative, "a", primary basis for the Trustees' decisions and that in either case the broker-dealer should be held liable. The Trustees might argue, also, that the broker acted as a fiduciary in providing investment advice and that they reasonably relied on such advice. Under the proposed rule, the broker loses the "primary basis" defense and could become subject to fiduciary duties.

Thus, assume that the broker (1) has not acknowledged that it is acting as a fiduciary in providing advice; (2) is not a fiduciary under ERISA Section 3(21)(A)(i) or (iii); and (3) is not an "investment adviser"[1] within the meaning of Section 202(a)(11) of the Investment Advisers Act of 1940.[2] Fiduciary status would turn on whether the broker's actions fit within the scope of proposed regulation 29 C.F.R. § 2510.3-21(c)(3)(D), which greatly revises the current five-part test. The revised language places fiduciary responsibility on any person who for a fee or other compensation:

> (D) Provides advice or makes recommendations described in paragraph (c)(1)(i) of this section pursuant to an agreement, arrangement or understanding, written or otherwise, between such person and the plan, a plan fiduciary, or a plan participant or beneficiary that such advice may be considered in connection with making investment or management decisions with respect to plan assets, and will be individualized to the needs of the plan, a plan fiduciary, or a participant or beneficiary.

There is no question in the hypothetical that the broker (through its registered representative) provided individualized investment advice pursuant to an understanding that it would be "considered" in connection with the Trustees' choice of the investment line-up. It also seems clear that the broker would be receiving a "fee or other compensation incident to the transaction in which the investment advice has been rendered," including commissions. *See* Prop. Reg. 29 C.F.R. § 2510.3-21(c)(3). As a result, the broker would be considered a fiduciary unless the limitation described below applies.[3]

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[1] Depending on the facts, a broker could argue that it did not act as an "investment adviser" under the Investment Advisers Act of 1940, claiming that it provided advice solely incidental to the conduct of its business as broker and for which it received no special compensation. *See* Investment Advisers Act § 202(a)(11).

[2] Under the proposed rule, if a person provides advice as to investments (as described in the rule) for a fee or other compensation, and meets any one of these three criteria, or a fourth, which I quote in full below, then that person will be found to have rendered investment advice for purposes of Section 3(21)(A)(ii) of ERISA. Prop. Reg. 29 C.F.R. § 2510.3-21(c)(1)(ii)(A)-(D).

[3] Moreover, if the broker provided imprudent advice as to the selection of investment options, and an independent investment consultant also provided imprudent advice as to the selection of investment options, both the broker and the independent adviser could be held liable for breaching their fiduciary duties. "Primary basis" arguments would not exonerate either one of them.

The proposed rule contemplates that brokers and others may want to resist fiduciary status. It would allow the broker who is not otherwise a fiduciary to avoid fiduciary status if it "can demonstrate that the recipient of the advice knows or, under the circumstances, reasonably should know, that the person is providing the advice or making the recommendation in its capacity as a . . . seller of a security or other property . . . whose interests are adverse to the interests of the plan or its participants or beneficiaries, and that the person is not undertaking to provide impartial investment advice." Prop. Reg. 29 C.F.R. § 2510.3-21(c)(2). In practice, this means that the broker would have to disclose that its interests are adverse and that the advice is not impartial. The disclosure could be a bitter pill for brokers to swallow.[4]

The broker who does not make such a disclosure and who is willing to accept fiduciary status faces other challenges. Circumstances may be such that the broker simply cannot provide investment advice without running afoul of the prohibited transaction rules. Assuming for the sake of argument that an arrangement could be structured to avoid a *per se* prohibited transaction, the assumption of fiduciary status would heighten the broker's awareness of needing to avoid conduct that might give rise to prohibited transaction claims.

Third, the preamble raises an intriguing point regarding plan distributions. The DOL has previously taken the position that it is not investment advice for a person not already a fiduciary to recommend that a participant take a distribution, even when combined with a recommendation as to how the distribution ought to be invested. *See* Advisory Opinion 2005-23A. The DOL has asked for comment on whether it ought to change this position. A rule change would cause financial planners and advisers to reconsider whether they should be instructing their clients to roll over plan distributions into their own products. Trustees of multiemployer plans might welcome increased responsibility and scrutiny for advisers engaged by their plan participants.

Fourth, and finally, the proposed rule would make it clear that acknowledging fiduciary status, orally or in writing, when providing investment advice for a fee is sufficient to result in fiduciary status. This seems squarely directed against service providers who have attempted to deny fiduciary status even though they have expressly agreed to such status in their agreements with a plan. Counsel for plans will want to negotiate that much harder for the acknowledgments of fiduciary status that they have always sought.

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[4] Note, too, that under the proposed rule, to avoid the "investment advice" label regarding making available through a platform – on a non-individualized basis – the investment alternatives of a participant-directed, individual account plan, the person making these investments available must disclose "in writing to the plan fiduciary that the person is not undertaking to provide impartial investment advice." Prop. Reg. 29 C.F.R. § 2510.3-21(c)(2)(ii)(B). To accomplish the same end, a similar disclosure would have to be provided with respect to providing "general financial information and data to assist a plan fiduciary's selection or monitoring of such securities or other property as plan investment alternatives." Prop. Reg. 29 C.F.R. § 2510.3-21(c)(2)(ii)(C). These provisions, as well as other portions of the proposed rule, signal a move away from always requiring advice to be individualized in order to count as "investment advice."