



Employee Benefits Law Information Memo

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WHO IS A FIDUCIARY? DOL PROPOSES AN EXPANSION OF THE DEFINITION

The U.S. Department of Labor (“DOL”) has proposed regulations that more broadly define the circumstances under which a person or entity will be considered to be a plan “fiduciary” by reason of giving investment advice to an employee benefit plan or to a plan’s participants or beneficiaries. If the proposed regulations are made final in their current form, the number of plan service providers that will be considered plan “fiduciaries” will increase significantly. Plan sponsors need not take any current action with respect to the proposed regulations, but should be aware that agreements with service providers may need to be reviewed and modified to conform to the regulations.

Background

Under the Employee Retirement Income Security Act (“ERISA”), a person is a fiduciary with respect to an employee benefit plan to the extent that the person (i) exercises any discretionary authority or discretionary control respecting the management or disposition of the plan’s assets, (ii) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of the plan, or has any authority or responsibility to do so, or (iii) has any discretionary authority or discretionary responsibility in the administration of the plan.

Individuals and entities, including plan service providers, who are considered plan “fiduciaries” are subject to a number of strict duties and responsibilities and are prohibited from engaging in a number of specific acts with respect to the applicable plan. Among other consequences, fiduciaries who fail to satisfy their plan-related duties, or who engage in plan-related prohibited transactions, can be subject to personal liability for losses suffered by the plan.

The Proposed Regulations

The DOL’s proposed regulation addresses the circumstances under which a person or entity is considered to be a plan “fiduciary” by reason of (ii) above; that is, by giving investment advice for a fee or other compensation to an ERISA-covered plan, to a plan fiduciary, or to the plan’s participants or beneficiaries. Two of the key elements of the proposed regulations are the scope of the terms “investment advice” and “fee or other compensation”.

“Investment Advice”

The proposed regulations generally provide that a person renders “investment advice” if the person:

- Provides advice, or an appraisal or fairness opinion, concerning the value of securities or other property;
- Makes recommendations as to the advisability of investing in, purchasing, holding, or selling securities or other property;
- or
- Provides advice or makes recommendations as to the management of securities or other property.

In addition to one or more of the activities noted above, a person renders “investment advise” only if the person also:

- Represents or acknowledges fiduciary status within the meaning of ERISA with respect to giving advice or making recommendations;
- Has or exercises discretionary authority or control with respect to the purchase or sale of investments for a plan, with respect to management of the plan, or with respect to the administration of the plan;
- Is an “investment adviser” under the Investment Advisers Act of 1940 (which generally includes any person who, for compensation, engages in the business of advising others as to the value of securities or the advisability of investing in, purchasing, or selling securities, or who promulgates analyses or reports concerning securities); or
- Provides advice pursuant to an agreement, arrangement or understanding, oral or written, between such person(s) 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.

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This part of the proposed regulations modifies current law in a number of ways, including the addition of appraisals and fairness opinions in the definition of advice. The DOL believes this change will align the duties of those who provide these opinions with those of plan fiduciaries who rely on them. Among other things, this brings valuations of closely held employer securities for purchase by an employee stock ownership plan, and appraisals of real property considered for purchase by a plan, into the realm of “investment advice.” The proposal also specifically includes advice and recommendations as to the management of securities or other property. This could include, for example, advice in connection with the exercise of stock rights (e.g., voting proxies), and advice in the selection of plan investment managers. Another significant change from current law would be that the “advice” need not be provided on a “regular basis.”

Limitations

Even if the person’s activities with respect to a plan may suggest that the person is a fiduciary, a person will not be considered a fiduciary under the following circumstances:

- Where it can be demonstrated that the recipient of the advice knows, or reasonably should know, that person is, or represents, a person 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;
- The person provides only investment education information and materials, pursuant to other DOL regulations;
- The person provides general financial information and data to assist a plan fiduciary in the selection or monitoring of securities or other property as plan investment alternatives, if the provider discloses in writing to the plan fiduciary that the person is not undertaking to provide impartial investment advice; and
- The person prepares a general report or statement that merely reflects the value of an investment of a plan, 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.

Fee Requirement

In order to be a fiduciary, the provider must provide investment advice “for a fee or other compensation, direct or indirect.” The proposal defines this fee requirement to include fees or compensation for advice received by the person from any source and any fee or compensation incident to the transaction in which the investment advice has been, or will be, rendered.

Effective Date and What’s Next?

The proposal will be effective 180 days after publication of the final regulations in the Federal Register. Thus, the expansion of the fiduciary definition will not apply for some time. The DOL has reportedly received many comments, some favorable, some not; these rules may change prior to being finalized. Stay tuned.

If you have any questions about this memorandum, please contact Amelia M. Klein in our Albany office (518-533-3217, aklein@bsk.com) or any of the other members of our Employee Benefits and Executive Compensation Practice Group listed below.

In Central New York, call 315-218-8000 or e-mail:
 Mark G. Burgreen mburgreen@bsk.com
 Susan L. Dahline sdahline@bsk.com
 Stephen C. Daley sdaley@bsk.com
 Brian K. Haynes bhaynes@bsk.com
 Richard D. Hole rhole@bsk.com
 Ted Lewkowicz tlewkowicz@bsk.com
 Aaron M. Pierce apierce@bsk.com

In Buffalo / Niagara Falls call 716-566-2800 or e-mail:
 John C. Godsoe jgodsoe@bsk.com

In the New York Metro Area, call 646-253-2300 or e-mail:
 Michael P. Collins mcollins@bsk.com

In the Rochester Region, call 585-362-4700 or e-mail:
 Robert H. Kirchner rkirchner@bsk.com