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WILL THEY OR WON'T THEY...PROPOSAL OF A NEW DEFINITION OF FIDUCIARY UNDER ERISA

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For some time now, there have been rumblings of imminent issuance of guidance to amend the definition of *fiduciary* under ERISA.

This saga first began in October of 2010 when the Department of Labor's EBSA proposed a new rule that would broaden the current definition of the term fiduciary under ERISA and extend such status to "any person who provides investment advice to plans for a fee or other compensation."

Although the proposed rule mirrored the current definition of a fiduciary as stated in Section 3(21)(A)(ii) of ERISA in many regards, the prior DOL regulations limit the meaning of the term "investment advice" with a five-part test; all elements of which must be met before a person will be considered a fiduciary. The specificity of this regulation eliminates investment advisers from being considered fiduciaries under ERISA if they do not meet all the elements of the test.

The proposed EBSA rule caused consternation among investment advisors and brokers because it states, among other conditions, that any person who is an investment advisor under the Investment Advisors Act of 1940 will be a fiduciary as long as he or she provides investment advice for a fee. Also, one part of the five-part test (the requirement that advice be provided on a regular basis) was removed; under the DOL proposal, a single instance would suffice for a person to be considered a fiduciary under the proposed rule. The breadth of this rule was met with strong opposition and assertions that the proposed rule amounts to over-regulation and will lead to increased investment costs for middle class families.

Given the strong opposition to its proposal, EBSA withdrew these proposed regulations in 2011 with stated intentions to re-propose them. In the following discussion, we will summarize the current state of that promised guidance.

On October 29, 2013, the House of Representatives passed a bill (named the "Retail Investor Protection Act,") which, among other things, is intended to defer the release of new regulations by the DOL that modify the definition of the term fiduciary under ERISA. The bill states that the DOL cannot release any new ERISA regulations defining the term fiduciary until sixty (60) days after the Securities and Exchange Commission ("SEC") has issued a final ruling regarding the "standards of

conduct for brokers and dealers pursuant to the second subsection (k) of section 15 of the Securities Exchange Act of 1934 (15 U.S.C. 780(k)). The house bill would also require the SEC to publish formal findings in the Federal Register that the rule would benefit retail customers by minimizing any confusion surrounding standards of conduct for brokers and dealers, and to "consider the differences in the registration, supervision, and examination requirements applicable to brokers, dealers, and investment advisors." The bill has been referred to the Senate; however, even if it passes in the Senate, the President has indicated his intentions to veto it.

Barring some new legislation, we expect that the EBSA announcement from late 2013 that the rule would be re-proposed in August 2014 should carry the day. This August 2014 deadline was intended to accommodate talks between DOL Secretary Thomas Perez and representatives from both sides of the political divide (and, in doing so avoid the need for legislation like the Retail Investment Protection Act). Accordingly, August, 2014 would be the earliest date by which we could expect to have regulations that modify the current definition of *fiduciary* under ERISA.

MEET THE TEAM

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