Overview of the Department of Labor's Proposed "Fiduciary" Regulations

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ERISA Definition of a Fiduciary – ERISA 3(21)

- A person is a fiduciary with respect to a plan to the extent:
  - Is named in the plan as a fiduciary
  - Exercises any *discretionary* authority or control over the management of the plan, or the management or disposition of plan assets;
  - Has any *discretionary* authority or responsibility in the administration of the plan; or
  - Renders *investment advice for a fee* or other compensation, with respect to plan assets.

Who is an ERISA Fiduciary?

- Named fiduciaries in the plan
- Employer / plan sponsor / Board of Directors
- Plan Trustees
- Plan Administrator (not third party administrators)
- Plan Committees (investment committee)
- Investment Managers & Investment Advisors
- Anyone who assumes, advertently or inadvertently, certain discretionary responsibilities with respect to the plan

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The ERISA Fiduciary Test

- The Department of Labor and the courts apply a *functional test* to determine whether a person is an ERISA fiduciary.
- A person may be a fiduciary even if he did not know he was a fiduciary, did not intend to be a fiduciary, and signed a document stating that he is not a fiduciary.
- An ERISA fiduciary for one purpose is not necessarily a fiduciary for other purposes.

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Primary Fiduciary Responsibilities Under ERISA

- Act *solely* in interests of participants and beneficiaries, and for the *exclusive* purpose of providing benefits and defraying reasonable expenses.
- Act in accordance with plan documents (if consistent with ERISA).
- Act with care, skill, prudence and diligence of a prudent person acting in same capacity and *familiar with such matters* would use in the conduct of an enterprise *of like character and with like aims*.
- Diversify investments to minimize risk of large losses, unless clearly prudent not to do so.
- Avoid “prohibited transactions.”

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Duty to Avoid Prohibited Transactions

- Transactions between a plan and a “party in interest” with respect to the plan
- Includes:
  - Sale or exchange, or leasing, of any property between the plan and a party in interest
  - Lending of money or other extension of credit between the plan and a party in interest
  - Furnishing of goods, services or facilities between the plan and a party in interest
  - Transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan

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Title search: Overview of the Department of Labor's Proposed "Fiduciary" Regulations

Also available as part of the eCourse
Gatekeeper Duties and Liabilities

First appeared as part of the conference materials for the
38th Annual Conference on Securities and Business Law session
"The Intermediaries: Broker and Investment Adviser Duties in 2016"