

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

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February 11, 2016

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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.

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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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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"