

CASE OF THE WEEK
w/o 09.18.2011 Fiduciary Re-do

Our ERISA consultants on the Columbia Management Learning Center Resource Desk regularly receive calls from financial advisors on a broad array of technical topics related to IRAs and qualified retirement plans. For example, we routinely guide Columbia Management's financial advisor partners through the Employee Retirement Income Act of 1974 (ERISA) rules that define who is considered a fiduciary.

A recent call with a Morgan Stanley Smith Barney advisor in Oregon is representative of a common inquiry involving fiduciary status. The advisor asked: **"Can you confirm there is a new rule that makes nearly all financial advisors fiduciaries?"**

Highlights of Recommendations

- The Department of Labor (DOL) issued *proposed* regulations late in 2010, that *had they been finalized and put into effect*, would have caused most financial advisors who work with employers and employees regarding their retirement plans and/or investors regarding their IRAs to be fiduciaries and, consequently, personally liable for their actions. However, as of September 19, 2011, the DOL rescinded these draft regulations, with the intent to reissue revised proposed regulations sometime in early 2012.
- The DOL pulled the proposed fiduciary regulations in response to numerous comments and letters from industry and trade groups, business organizations, and members of Congress that voiced serious concerns regarding the potential negative impact the regulations would have on the industry and its ability to provide much needed investment assistance to investors in the form of guidance and diverse products.
- After reviewing the comments and considering testimony from several hearings, the DOL concluded that the rules require more time for input, review and consideration.
- The DOL anticipates harmonizing its rules with similar work being done at the Securities Exchange Commission and Commodities Futures Trading Commission. The 2012 re-proposal would 1) clarify that fiduciary advice is limited to individualized advice directed to specific parties; 2) respond to concerns about the application of the rules to routine appraisals; 3) clarify the limits of the rule's application to arm's length commercial transactions; 4) consider new exemptions addressing concerns about the impact of the new regulation on the current fee practices of brokers and advisers; and 5) clarify the continued applicability of existing exemptions that have long allow brokers to receive commissions in connection with mutual funds, stocks and insurance products.
- For the time being, the current 36-year-old definition of investment advice fiduciary stands, which follows a five-part test. Under the five-part test, a person is considered a fiduciary if he or she gives investment advice
 - ✓ About the value of or advisability of investing in securities or other property;
 - ✓ On a regular basis;
 - ✓ Pursuant to an agreement or arrangement with the plan;
 - ✓ With the understanding that the advice will serve as a primary basis for investment decisions; **AND**
 - ✓ That is individualized to suit the needs of a specific plan.

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Note that the individual must satisfy all five of the criteria to be considered a fiduciary.

Conclusion

The DOL will re-propose its investment advice fiduciary rules in 2012 after further cost/benefit analysis. Stay tuned for further developments. Financial advisors who understand the importance of any potential changes to the definition of investment advice fiduciary set themselves apart from the average advisor and, thereby, win more clients and retirement plan business. As always, the Columbia Management Learning Center is available to help.