




ERISA Update

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FIRMA

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- DOL 408(b)(2) “Guide” Proposal
 - Investment Advice Rule Proposal
 - DOL Enforcement Activity
 - Other Guidance/Pending Rules
 - ERISA Fiduciary Litigation
 - IRA Rollovers and Other Developments
 - MyRA; Tax Reform

DOL Rulemaking – 408(b)(2) Disclosure Guide

- Proposed amendment to service provider disclosure rule would require “covered service providers” to furnish a “guide” if disclosure documents exceed a page count.
- Guide would –
 - provide page #'s or section references to key information;
 - be a stand-alone document;
 - updated annually for changes; and
 - provide a contact person for questions.
- 79 FR 13949 (March 12, 2014)

DOL Rulemaking – Investment Advice

- In 2010, DOL proposed to amend the definition of “investment advice” under a regulation defining who is a “fiduciary” subject to ERISA.
 - 75 FR 65263 (Oct. 22, 2010)
 - DOL expressed concerns that limitations of definition allowed advisers to avoid liability for dealing with plans when they had undisclosed compensation/conflicts.
- Responding to significant objections, DOL announced it would re-propose; after delay, proposal is now scheduled for August 2014.
 - HR 2374 would block DOL from issuing a rule until at least 60 days after the SEC issues final fiduciary standard of conduct rules.

DOL Rulemaking – Investment Advice

- Current regulations provide that "fiduciary" investment advice requires –
 - (1) recommendations,
 - (2) which are (a) individualized, (b) provided on a regular basis, (c) with mutual understanding that advice will be a "primary basis" for decisions, and
 - (3) for a fee.
- Sales presentations, fund menu offerings, and participant education (IB 96-1) generally are not "fiduciary advice" under this definition.
 - 29 CFR § 2510.3-21

DOL Rulemaking – Investment Advice

- Under 2010 proposed amendment, a person provides "fiduciary" advice if the person –
 - *provides "advice"* – including (i) recommending securities/property, (ii) appraisals, and (iii) proxy voting and manager recommendations;
 - *has a "relationship" to the plan* - (i) agrees to be fiduciary, (ii) any RIA, or (iii) mutual agreement that *advice will be considered* and individualized (eliminating "regular basis" and "primary basis" elements of current test); and
 - *receives a fee.*
- Proposal includes "limitations" on scope for sellers, investment platform providers, asset reporting.
 - 75 FR 65263 (Oct. 22, 2010)

DOL Enforcement – Fiduciary Status

- In *Santomenno v. John Hancock Life Insurance Co.*, 2013 WL 3864395 (D.N.J. 2013), court dismissed claims that John Hancock was a fiduciary when it retained authority to substitute and delete investment options selected by Plan.
- DOL Amicus Brief to 3rd Circuit –
 - John Hancock acted as a fiduciary by retaining authority to unilaterally substitute and delete mutual funds, change share classes, and change fees.

DOL Enforcement – Error Correction

DOL ING Settlement – Trading Error Correction

- DOL alleged ING violated ERISA by receiving undisclosed compensation from correcting recordkeeping errors.
- In addition to a money settlement, ING agreed to disclose its correction policy and to disclose annually the effect of corrections to each plan.
 - <http://www.dol.gov/opa/media/press/ebsa/EBSA20130071.htm>
- Informally, DOL suggests its “float” disclosure policy (FAB 2002-03) is a guideline; scope of required disclosure and policy on enforcement for past conduct are open issues.

DOL Enforcement – Paying Plan Expenses

Sunkist Growers, Inc.

- Enforcement action against sponsor/fiduciary of plans maintained for Sunkist Growers, Inc.
- DOL spells out guidelines for determining “direct expenses” that may be charged to plans by a sponsor or other fiduciary.
 - DOL requires a “written agreement” between plan and sponsor describing services and expenses charged.
- www.dol.gov/opa/media/press/ebsa/EBSA20132073.htm



DOL Enforcement – Priorities

- Delinquent Contributions/
Contributory Plans Criminal Project
- Fiduciary Service Provider Compensation Project
- Health Benefits Security Project
- Rapid ERISA Action Team (REACT)
- Employee Stock Ownership Plans
 - http://www.dol.gov/ebsa/erisa_enforcement.html

DOL Enforcement - Employee Stock Ownership Plans

- DOL enforcement actions against fiduciaries and trustees allege imprudent and/or prohibited employer stock purchases; purchases for amounts exceeding FMV.
- See EBSA News Releases at www.dol.gov/ebsa/newsroom/:
 - 12/26/13 (PBI Bank, Inc. and Miller's Health Systems)
 - 11/18/13 (Omni Resources and Alpha Investment Consulting)
 - 2/21/13 (Great Bank Trust Co. and Sherwin-Williams); 10/2/2012 (Great Bank Trust Co. and Sierra Aluminum Co.); 2/23/12 (Great Bank Trust Co. and Tribune Co.)
 - 12/7/12 (First Bankers Trust Service and Rembar, Inc.); 11/29/12 (First Bankers Trust Service and Maran, Inc.); 7/24/12 (First Bankers Trust Service and SJP Group).

DOL Enforcement – Consultants/Advisers

- Austin Capital Management (2/27/13) \$43 million settlement for losses by plans invested in Madoff scheme.
- Ivy Asset Management and Affiliates (11/13/12) \$220 million settlement for losses by plans invested in Madoff scheme.
- USI Consulting (8/23/12) \$1.27 million settlement for failure to disclose 12b-1 fees.
- Morgan Keegan (4/16/12) \$630,000 settlement in connection with fees received by advisor from hedge funds.
- Available at <http://www.dol.gov/ebsa/newsroom/main.html>

DOL – Other Guidance

Revenue Sharing (Advisory Opinion 2013-03A)

- Addresses “plan asset” status of revenue sharing payments received in connection with investments of 401(k) and similar plans.
- Definition of “plan asset” – DOL applies “ordinary notions of property rights” - a plan’s *contractual right* to credits may be a “plan asset” – this means that dollars generated by revenue sharing are not necessarily a “plan asset” unless deposited to the plan.
- All service provider compensation (including revenue sharing) must comply with 408(b)(2) and be prudent.
- DOL does not address allocation of revenue sharing to pay plan expenses, or among participants.



DOL – Pending Rules

- Timing of 404a-5 Participant Disclosures
 - FAB 2013-02 (transition relief).
- Pension Benefit Statements
 - 78 FR 26727 (May 8, 2013) (Advance notice of proposed rulemaking, requests comment on providing lifetime income illustrations on participant statements).
- Target Date Participant Disclosure
 - 75 FR 73987 (Nov. 30, 2010) (proposed rule).

ERISA Fiduciary Litigation

401(k) Fees Litigation - *Tussey v. ABB, Inc.*, 2012 WL 1113291 (W.D. Mo. Mar. 31, 2012)

- *District Court held* –
 - In light of evidence that company received service discounts in consideration of excess fees paid from 401(k) plan, plan committee liable for causing plan to pay excess fees.
 - Investment replacement was imprudent based on inadequate process/failure to follow IPS.
 - Trustee (Fidelity) was liable for failure to credit “float” to plan or disclose as compensation, but not liable for excess plan recordkeeping fees.

ERISA Fiduciary Litigation

401(k) Fees Litigation - *Tussey v. ABB, Inc.*,
2014 WL 1044831 (8th Cir. Mar. 19, 2014)

- *8th Court of Appeals* –
 - Affirmed holding and award of \$13.4 million in damages for excess plan recordkeeping fees.
 - Vacated decision on investment replacement, requiring district court to grant deference to plan committee determinations on remand.
 - Reversed decision against Fidelity, because “float” was not a plan asset (under Fidelity procedures, float is retained by mutual funds).

ERISA Fiduciary Litigation

401(k) Plans – Fiduciary Process

- *Gordon v. Massachusetts Mutual Life Insur. Co.* (D.Mass, filed Nov. 5, 2013) (participants allege failure to follow IPS in investment selection).
- *Tibble v. Edison Int'l*, 729 F.3d 1110 (9th Cir. 2013) (failure to investigate availability of lower fee institutional class shares was imprudent).
- *Dudenhoeffer v. Fifth Third Bancorp*, 692 F.3d 410 (6th Cir. 2012), cert. granted No. 12-751 (U.S. Dec. 13, 2013) (Supreme Court to review “presumption of prudence” standard in employer stock drop cases).

ERISA Fiduciary Litigation

401(k) Plans – More Fee Cases

- *Skin Pathology Assoc. v. Morgan Stanley & Co.*, 13 Civ. 3299 (S.D. N.Y. Feb. 4, 2014) (complaint alleging that revenue sharing paid between two service providers violated ERISA dismissed).
- *McCaffree Financial Corp., v. Principal Life Insur. Co.* (S.D. Iowa, filed Mar. 18, 2014) (alleges service provider charged excessive fees to plan and participants).

ERISA Fiduciary Litigation

401(k) Plans – More Fee Cases

- *Kruger v. Novant Health, Inc.*, (N.D. Ca., filed Mar. 12, 2014) (alleges participants pay excessive fees for investments and recordkeeping services).
- *Gordon v. Massachusetts Mutual Life Insur. Co.* (D.Mass., filed Nov. 5, 2013) (plaintiff class members are employees of MassMutual participating in MassMutual Thrift Plan).
- Ayres and Quinn, “Beyond Diversification: The Pervasive Problem of Excessive Fees and ‘Dominated Funds’ in 401(k) Plans.”

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2399531



IRAs – Rollovers

- **DOL Advisory Opinion 2005-23A** - Advising participants on plan distributions including whether to take a “rollover” distribution is not fiduciary “investment advice.”
 - Plan advisers may breach fiduciary duties by recommending a rollover if adviser could benefit.
- In connection with “investment advice” rulemaking, DOL asked whether advice on plan distributions is “investment advice.”
- **2013 GAO Report 13-30** concluded that current processes favor rollovers; identified misleading sales practices in connection with IRA rollovers.

IRAs – Rollovers

FINRA Notice 13-45 – Advises broker-dealers on responsibilities concerning IRA Rollovers.

- A rollover recommendation to an IRA *typically* involves securities recommendations.
- FINRA suitability rule, and rules requiring fair and balanced communications to the public, apply.
- Recommendations should reflect considerations such as investment options and fees associated with the plan versus IRA, tax consequences and other legal consequences of plan versus IRA.
- Specific supervisory controls required.



IRAs – Indemnities

- DOL Advisory Opinion 2011-09A – indemnity relating to a futures brokerage account involved a prohibited “extension of credit” between IRA and IRA owner.
- IRS Announcement 2011-81 provides temporary relief, provided that there is no attempt by a financial institution to enforce contractual provisions.
- DOL Proposed Amendment to PTE 80-26
 - 78 FR 31584 (May 24, 2013).

IRAs – Custodians

- *Gist v. Commissioner*, TC Summ. Op. 2014-1 (tax court relies on IRA custodian's report of value for "worthless" promissory notes).
- *Mandelbaum v. Fiserv, Inc.*, 787 F. Supp. 2d 1226 (D. Colo. 2011) (IRA custodian/trustee not liable for losses caused by Madoff investments).

IRAs – Other Litigation

- *Ellis v. Commissioner*, T.C. Memo 2013-245 (disqualification in connection with use of rollover for a business start-up);
- *Daniels v. Agin*, 736 F.3d 70 (1st Cir. 2013)(assets of disqualified plan and two IRAs not exempt from bankruptcy estate);
- *In re Clark*, 714 F.3d 559 (7th Cir. 2013)(cert granted 11/26/13) (Supreme Court to review whether inherited IRA is exempt from a debtors' bankruptcy estate).



MyRA Program

- Designed to assist individuals to save for retirement – no Congressional action required.
- Roth-IRA structure – after-tax contributions to accounts invested in specially-designed Treasury securities.
 - Treasury securities provide principal protection and backed by U.S. government
- Once balance is \$15,000, must transfer to private sector Roth IRA.
- Initially, limited to a select group of employers.

Tax Reform Proposals

Tax Reform (Camp Proposal) - Generally would reduce tax rates and simplify tax filings, but includes significant retirement system reforms.

- Require 401(k) plans to offer Roth; employee contributions over certain limits after-tax.
- Freeze inflation adjusted plan contribution limits; conform 403(b)/457 limits to 401(k).
- Limit value of tax preferences for taxpayers in highest tax bracket.
- Essentially eliminate non-qualified deferred compensation under Code 409A after 2013.
- No new contributions to traditional IRAs.



Questions?

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