




ERISA Update

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DOL Regulatory Action – Target Date Funds

DOL “Tips” for Plan Fiduciaries

- Review performance and fees, asset class allocation, glidepath.
- Consider how allocation and glidepath align with participants’ ages and retirement dates.
- Consider fees of TDF and “underlying funds.”
- Ask about non-proprietary or custom TDF options.
www.dol.gov/ebsa/newsroom/fsTDF.html

DOL Regulatory Action – Investment Advice

- Under current DOL regulations, "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 Regulatory Action – Investment Advice

- Under a 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.*
- Regulation includes "limitations" on scope for sellers, investment platform providers, asset reporting.
 - 75 FR 65263 (Oct. 22, 2010)

DOL Regulatory Action – Investment Advice

- In 2011, DOL announced it would re-propose the “investment advice” rule to –
 - Update economic analysis,
 - Clarify that advice must be individualized,
 - Clarify application to arm’s length commercial transactions, such as swaps.
- New or amended class exemptions may be issued, to facilitate transactions by service providers who could be fiduciaries under an amended rule.

DOL Regulatory Action – IRA Rollovers

- In connection with proposed rulemaking to amend ERISA's investment advice definition, DOL requested comment on whether advice on plan distributions (*i.e.*, rollover advice) should be treated as "investment advice."
 - See 75 FR 65263, 65266 (Oct. 22, 2010).
- 2011 GAO Report identified cross-selling to participants, especially IRA rollovers, as problematic.
 - GAO-11-119, *401(k) Plans: Improved Regulation Could Better Protect Participants from Conflicts of Interest*, (Jan. 28, 2011).

DOL Regulatory Action – IRA Rollovers

2013 GAO Report suggests DOL and IRS could improve rollover process for plan participants.

- Current process favors distribution to IRAs; IRAs are an easier and faster choice.
- Participants receive guidance and marketing favoring IRAs; participants do not understand financial institutions' financial interest.
- DOL and IRS could make plan to plan rollovers more efficient; require better participant disclosure.

DOL Regulatory Action – IRA Rollovers

DOL Advisory Opinion 2005-23A - A “rollover” recommendation is not “investment advice” under ERISA.

“Where, however, ... someone who is already a plan fiduciary responds to participant questions concerning the advisability of taking a distribution or the investment of amounts withdrawn from the plan, that fiduciary is exercising discretionary authority respecting management of the plan ... if, for example, a fiduciary exercises control over plan assets to cause the participant to take a distribution and then to invest the proceeds in an IRA account managed by the fiduciary, the fiduciary may be using plan assets in his or her own interest, in violation of ERISA section 406(b)(1).”

DOL Regulatory Action – IRA Rollovers

Advisory Opinion 2005-23A – Outcome

- Plan fiduciaries – including advisers/brokers – generally may not advise participants on rollover options.
- An adviser or broker with no plan relationship may seek to capture participant IRA rollovers, and recommend a rollover.
- An adviser or broker who does not provide “fiduciary” services to the plan or participant may seek to capture IRA rollovers.
 - Non-fiduciary services include, e.g., sales; investment education and fund research services for sponsor and participants; vendor search and monitoring; plan governance and compliance.

DOL Regulatory Action - Swaps

DOL Advisory Opinion 2013-01A – When a plan and a dealer enter a swap subject to clearing:

- neither the central counterparty (CCP) nor clearing member (CM) are fiduciaries;
- margin held by CM is not “plan assets;”
- CM, as a service provider to plan, may be a “party in interest” – therefore, each swap must be covered by an exemption, *e.g.*, QPAM (PTE 84-14).

DOL Regulatory Action – New Rulemaking

- **Abandoned Plans** – proposed regulations would expand program to trustees in Chapter 7 bankruptcy; simplify QTA qualification; provide safe harbor for distribution of accounts of deceased participant's with balance over \$1,000.
 - 77 FR 74063 (Dec. 12, 2012)
- **Delinquent Filer Voluntary Compliance** – restatement of program incorporates technical changes; penalties may now be paid online.
 - 78 FR 6135 (Jan. 29, 2013)

DOL Regulatory Action – Other Pending Projects

- Standard format for guide to 408(b)(2) Disclosures; 408(b)(2) FAQs (?)
- Target Date Participant Disclosure (Proposed)
 - 75 FR 73987 (Nov. 30, 2010)
- Pension Benefit Statements
- Annual Funding Notice
- Lifetime Income Options

DOL Enforcement – Error Correction

DOL Settlement – Trading Error Correction

ING paid \$5.2 million settlement relating to undisclosed error correction practices in its 401(k) recordkeeping business.

- ING retained gains when transactions did not process on contract date and were reprocessed, and when reprocessing erroneous transactions.
- DOL alleged ING violated ERISA by receiving undisclosed compensation from correcting errors.
- ING agreed to disclose its correction policy to all clients in writing, and track the effect of corrections to each plan and disclose annually.
- See dol.gov/ebsa News Releases 02/04/2013

DOL Enforcement – Error Correction

ING Settlement – Outstanding Issues

- Treatment of “gains” as plan assets and compensation.
- Disclosure of “gains” as compensation?
 - tracking of “net” vs. “gross” gains; impact of omnibus-level trading.
 - 408(b)(2) disclosure; Schedule C disclosure.



EBSA – National Enforcement Projects

- Delinquent Contributions
- Plans in Bankruptcy/Abandoned Plans
- Employee Stock Ownership Plans
- Consultant/Adviser Project
- Participant and Beneficiary Complaints
- 5500 Desk Reviews/Non-Filer Enforcement
- Health Fraud/Multiple Welfare Arrangements
 - See http://www.dol.gov/ebsa/erisa_enforcement.html

EBSA – National Enforcement Projects

Employee Stock Ownership Plans

- DOL alleges ESOP trustee, Great Bank Trust Co., permitted plan to make imprudent and/or prohibited purchases employer stock purchases.
 - See dol.gov/ebsa News Releases: 2/21/13 (Sherwin-Williams); 10/2/2012 (Sierra Aluminum Co.); 2/23/12 (Tribune Co.).
- DOL alleges independent fiduciary, First Bankers Trust Service approved employer stock purchases exceeding FMV.
 - See dol.gov/ebsa News Releases: 12/7/12 (Rembar, Inc.); 11/29/12 (Maran, Inc.); 7/24/12 (SJP Group).

EBSA – National Enforcement Projects

Consultant/Adviser Project - Settlements

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

ERISA Fiduciary Litigation

401(k) Investments - Fees, Selection, Disclosure

- *Tibble v. Edison Int'l*, 711 F.3d 1061 (9th Cir. 2013) (failure to investigate availability of lower fee institutional class shares was imprudent).
- *Fuller v. SunTrust Banks, Inc.*, 2012 WL 1432306 (N.D. Ga. Mar. 20, 2012) (allows claims alleging bank acted imprudently in offering bank affiliated mutual funds as investment options).
- *Tussey v. ABB, Inc.*, 2012 WL 1113291 (W.D. Mo. Mar. 31, 2012) (plan committee violated duty of prudence by failing to follow IPS and engage in “deliberative assessment of the merits”).

ERISA Fiduciary Litigation

401(k) Plan – Cross Selling

- In *Tussey v. ABB, Inc.*, court found evidence that company received service discounts in consideration of excess fees paid from 401(k) plan.
 - Plan committee breached fiduciary duties by causing plan to pay excess fees.
 - Service provider (Fidelity) not liable.

ERISA Fiduciary Litigation

Float Disclosure Claims

- In *Tussey v. ABB, Inc.*, court held plan trustee (Fidelity) liable for failure to credit “float” to plan or disclose as compensation.
- Class actions filed on behalf of other plans seek to recover float income from Fidelity.
 - *E.g., Kelly et al. v. Fidelity Management and Trust Co. et al.*, CV No. 13-10222 (D. Mass) (filed Feb. 5, 2013).

ERISA Fiduciary Litigation

Custodian/Trustee Liability

- *McLemore v. Regions Bank*, 682 F.3d 414 (6th Cir. 2012) (depository bank not a fiduciary and not liable for TPA fraud; notwithstanding structural “irregularities”; non-ERISA claims preempted).
- *Mandelbaum v. Fiserv, Inc.*, 787 F. Supp. 2d 1226 (D. Colo. 2011) (IRA custodian/trustee not liable for losses caused by Madoff investments).
- *Tullis v. UMB Bank, N.A.*, 423 F. App'x 567 (6th Cir. 2011) (no breach by directed trustee who did not tell participants about investment adviser's fraud).

ERISA Fiduciary Litigation

Fiduciary Status – Service Provider

- *Danza v. Fidelity Mgmt. Trust Co.*, 2012 WL 3599362 (D.N.J. 2012)
 - Fidelity hired to provide trustee and QDRO services pursuant to a trust agreement.
 - Fidelity had no duty to negotiate a “reasonable” fee for QDRO services prior to the trust agreement being signed.
 - Fidelity did not act as a plan fiduciary in the negotiation.
 - Fidelity may continue to receive the negotiated fees.



Questions?

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