



IRAs in the Crosshairs: Washington's Growing, Multi- Agency Interest in Fees, Conflicts and Disclosure

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- Mr. Campbell concentrates his practice in Employee Benefits advice and ERISA litigation, specializing in ERISA Title I issues, including fiduciary conduct and prohibited transactions. He also serves as an expert witness in ERISA litigation. The former Assistant Secretary of Labor for Employee Benefits, head of the Employee Benefits Security Administration, Mr. Campbell was ERISA's primary Federal regulator and law enforcement official. He played a key role in ERISA retirement and health reform initiatives of the prior decade, and his regulatory and policy decisions had a fundamental impact on the structure and operation of ERISA plans, including:
 - Proposing the initial 408b-2 service provider and 404a-5 participant disclosure regulations
 - Issuing final regulations establishing Qualified Default Investment Alternatives (QDIAs), electronic fee disclosure, and participant access to investment advice
 - Administering an enforcement program reporting more than \$2.6 billion in monetary results and more than 200 criminal indictments

Suddenly Everyone in Washington Is Interested in IRAs, But Are They All on the Same Page?

- **IRA Asset Growth and “Boomers:”** IRA assets to exceed ERISA assets, and more rollovers are coming. GAO, DOL, SEC, FINRA, and Treasury noticed.
- **DOL Fiduciary Regulation, Part I: Prohibited Transaction Issues**—The PT “bootstrap” for DOL regulation and what it means.
- **DOL Fiduciary Regulation Part II: Rollover Issues**—AO 2005-23A, rollover solicitation and what may come.
- **FINRA and SEC**—FINRA suitability standard, and FINRA and SEC enforcement priorities

IRA's Keep Growing, Fueled by Rollovers

- IRAs now hold \$5.7 trillion in assets.
- 4 out of 10 US households own an IRA.
- About half of traditional IRAs contain rollover assets from employer-sponsored retirement plans.
- Of those rollovers, 85% rolled over all of the assets in their employer-sponsored retirement plan.
- Of those rollovers, the median percentage of total account value due to employer-sponsored plan assets was 70%.
- Rollover amounts are about 13 times direct contribution amounts.

Regulators Become Concerned

- GAO March 2013 report identified several problems with IRA rollovers and called on DOL and Treasury to address them:
 - Process biased towards rollovers due to procedural hurdles in plan-to-plan transfers
 - Participants given marketing material touting rollovers by service providers to the plan
 - Call centers recommend rollover without know financial situation of the participant
- FINRA issued new guidance on the suitability requirements of recommending a rollover.
- FINRA and SEC are placing an enforcement priority on rollovers.
- DOL's fiduciary regulation addresses IRAs.

DOL Proposed Fiduciary Regulation

- DOL proposed regulation in 2010 redefining the standards for fiduciary advice. Due to controversy, it was withdrawn, and is scheduled to be repropose this August (likely will slip until after November election)
- Though IRAs are not generally ERISA plans, DOL has interpretive authority over the prohibited transaction rules in both ERISA and the Code. IRAs are subject to the PT rules in the Code.
- DOL's proposed regulation took the position that redefining "fiduciary" under ERISA would also redefine that term under the PT rules.
- Consequently, if IRA provider gave IRA holder investment advice, the IRA provider would have to be paid as if a fiduciary in order to avoid a prohibited transaction.

DOL on Rollovers, and How Policy May Change in Reproposed Fiduciary Regulation

- AO 2005-23A—DOL holds that if the person soliciting a rollover from a participant is not a fiduciary to the plan or participant, then ERISA does not apply. However, if the person soliciting the rollover is a fiduciary to the plan or participant, then it “may” be a prohibited transaction.
- 2010 proposed rule asked for comment on whether this standard was sufficiently protective of participants.
- Likely that the new regulation will change the standard from the AO to expand the agency’s reach. Not clear how, but one possibility is to propose that any solicitation is fiduciary advice about the disposition of assets currently held in a plan.

Current ERISA Regulation on Fiduciary Advice

Investment advice is fiduciary investment advice only if it is regarding:

- Valuation, or
- Buy/sell/hold recommendations

AND meets all five of these criteria:

- Regularly provided (not just one-time advice),
- For a fee,
- Individualized to plan,
- Pursuant to a mutual understanding,
- That the advice will be a primary basis for plan decision-making.

2010 Proposal Expands Definition

Investment advice is fiduciary investment advice if it is regarding:

- Valuation,
- Buy/sell/hold recommendations, or
- Management recommendations (not defined, but “includes, for instance,” advice regarding proxy voting and asset manager selection)

AND is provided by one of these entities:

- Someone holding themselves out as a fiduciary investment advisor
- An RIA
- An ERISA fiduciary for another purpose, or
- Anyone else giving individualized advice, for a fee (direct or indirect), pursuant to an understanding that the advice “may be considered” in plan decision-making

Enforcement—Fee Scrutiny

- DOL's EBSA is a regulatory and enforcement agency. In FY 2013, 3,766 civil investigations closed, 73% with violations, reporting \$1.7 billion. 320 criminal cases, 88 indictments.
- Participant Inquiries—237,000 participants called DOL, informal resolution yielded \$231 million in benefits, but also 775 cases referred for investigation (21% of total cases).
- Fiduciary Service Provider Compensation Project — “EBSA will continue to investigate the receipt of improper or undisclosed compensation...This project complements the Department's regulatory and reporting initiatives intended to ensure...comprehensive disclosure about service provider compensation and conflicts of interest.”
- Major Case Enforcement Priority — “EBSA is strategically focusing...on professional fiduciaries and service providers with responsibility for large amounts of plan assets”

