DOL Re-Proposes Rule on Definition of a Fiduciary for IRAs and Pension Plans

On April 20, 2015 the DOL finally issued its long awaited revised definition of who is a fiduciary. The DOL in 1975 issued a regulation defining a fiduciary. The current DOL does not like this definition and wants to change it.

The DOL's proposal is very complicated and time will tell to what extent this proposal will be implemented. There is going to be substantial negative response to this proposal. One would hope Congress will take an active role in this matter because the DOL is essentially making new law without instruction from Congress to do so.

In October of 2010 the DOL proposed a new definition of who is a fiduciary for pension and IRA purposes. In September of 2011 after receiving substantial negative comments from powerful politicians from both parties the DOL stated it would be withdrawing the 2010 proposal.

The 2015 proposal would treat persons who provide investment advice or various recommendations to an IRA, the IRA owner, pension plan, plan fiduciary, the plan participant or a beneficiary as a fiduciary. The proposal contains certain exceptions when a person would not be considered to be a fiduciary,. but these exception rules are murky at best.

One of the primary goals of the DOL is to make any one serving an IRA or pension plan a fiduciary and then require such person to act in the best interest of the IRA owner or the pension plan participants. In theory this may seem very desirable, but it is unworkable in the real world. The DOL is well aware of the large amount of wealth being directly rolled over into IRAs from 401(k) plans and other retirement plans ($2 trillion over the next 5 years). The DOL believes that individuals who are non-fiduciaries may give imprudent and disloyal advice and then direct IRA owners to invest their IRA funds in investments based on their own interests rather than the best interest of the IRA owners (i.e. their clients). The DOL also believes most individuals are incapable of managing their own IRAs. The powers that be within the DOL do not really like that fact that most 401(k) plans are written to allow for participants to invest their own account balances. The DOL believes that professional money managers would do a better job.

In October of 2010, the EBSA had published a proposed rule revising a 1975 regulation defining when a person is a "fiduciary" with respect to an IRA or pension plan by reason of giving investment advice for a fee. The 1975 regulation provided for a five-part test to determine if a person was a fiduciary. Under this rule, a person is a fiduciary only if he or she: (1)makes recommendations on investing in, purchasing or selling securities or other property, or gives advice as to their value;(2) on a regular basis; (3) pursuant to a mutual understanding that the advice; (4)will serve as a primary basis for investment decisions; and (5) will be individualized to the particular needs of the IRA or plan.

A person who did not meet all five conditions was and is not a fiduciary. The current EBSA believes there are situations where a person should be a fiduciary even though they are not one under existing law. One example, an investment representative selling an investment product to an IRA owner making a rollover contribution is not a fiduciary since he or she most likely is not performing services on a "regular basis". So, the new rule has been proposed with the goal to make many more individuals fiduciaries.

The DOL's proposal, if adopted, will radically change the definition of whom would be a fiduciary for IRA and pension purposes. We will keep you informed. We expect Congress will furnish a response to the DOL's proposal within the next 2-6 weeks.

We would suggest a bank serving as an IRA custodian/trustee will wish to inform its congressional representatives that this proposed regulation is too complicated and the DOL should be informed it should not be adopted and implemented.