

MEMO# 24798

December 17, 2010

Draft Letter on DOL Fiduciary Duty Proposal; Comments Due January 7

ACTION REQUESTED

[24798]

December 17, 2010

TO: PENSION COMMITTEE No. 30-10

PENSION OPERATIONS ADVISORY COMMITTEE No. 31-10 RE: DRAFT LETTER ON DOL FIDUCIARY DUTY PROPOSAL; COMMENTS DUE JANUARY 7

Attached for your review is a draft comment letter on the Department of Labor's proposal on the circumstances under which a person will be considered to be a fiduciary under ERISA by providing investment advice. [\[1\]](#) We ask that you provide comments to the undersigned (mhadley@ici.org or 202-326-5810) by Friday, January 7.

The draft points out that the current rule, by restricting application of the ERISA definition of advice and the fiduciary duties it triggers to actual advisory relationships, has provided clarity to the regulated community that allows plan fiduciaries and participants to gather a range of market input into their decision making process while also providing comfort to parties in the marketplace that they will not cross inadvertently into fiduciary acts. The letter states any revision to the rule should not impede the ability of fiduciaries and participants to interact in the marketplace and should reflect these principles:

- Persons who deal with plans and IRA investors must know whether or not they are fiduciaries.
- Simply selling an investment product cannot be a fiduciary act.
- Fiduciary status should not apply in circumstances where no reasonable person would believe a position of trust and confidence exists.
- Plan fiduciaries should be able to receive some general collateral assistance from recordkeepers engaged to administer plan accounts that help fiduciaries make prudent decisions about the plan's investment options.
- DOL should consider carefully the implications for Americans saving for retirement in IRAs before adopting amendments that affect services to IRAs.

The draft comment letter offers comments on the first, or “recommendation” test, and the second, or “status” test. It then offers comments on the exceptions and on issues related to rollovers and IRAs.

Comments on the “recommendation” part of the test

- The recommendation part of the test should apply only to advice or recommendations individualized to the plan or the participant.
- DOL should clarify that the proposal requires that advice be rendered for a fee or other compensation.

Comments on the “status” part of the test

- DOL should reconsider whether the second test should be based on the person’s “status.”
- The status test should not be deemed satisfied automatically merely because any affiliate or employee of a firm meets the definition of investment adviser in the Investment Advisers Act.
- The status test also should not sweep in incidental fiduciaries not in a position of trust and confidence with plan fiduciaries or participants.
- The fourth alternative for satisfying the status test should make clear that the parties must have a mutual agreement that the advice may be considered in making decisions and will be individualized.

Comments on the exceptions

- The exception for selling an investment product should provide more clarity.
- DOL should clarify that the exception for information related to platform investments covers certain incidental assistance recordkeepers provide to plan fiduciaries who are making decisions on plan menu investments.
- The exceptions in the proposal for individual account plans should be extended to IRAs.

Comments on rollovers and IRAs

- DOL should not alter its position that a recommendation to take a distribution does not constitute investment advice.
- DOL should take into account in its economic analysis the effect of its proposal on IRA investors.

The letter concludes by recommending that DOL repropose the rule if the weight of comments suggests significant changes are needed.

Michael L. Hadley
Associate Counsel

[Attachment](#)

endnotes

[\[1\]](#) For a description of the proposal, see Memorandum to Pension Members No. 43-10 [\[24642\]](#), dated October 22, 2010.

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