

EMPLOYEE BENEFITS ALERT

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

DOL Withdraws Fiduciary Regulations

September 29, 2011

On September 19, 2011, the U.S. Department of Labor (“DOL”) announced that it would temporarily withdraw its October 2010 regulations proposing changes to the definition of “fiduciary” under ERISA. Practitioners had generally expected the proposed regulations to lead to an expanded class of people, including advisers who oversee individual retirement accounts (“IRAs”), being classified as fiduciaries and thereby becoming subject to ERISA’s stringent fiduciary provisions.

Section 3(21) of ERISA defines “fiduciary” to include any person who provides investment advice to a plan for a direct or indirect fee. Existing regulations, as promulgated in 1975, set forth a five-part test for determining when a person would be a “fiduciary” by reason of providing investment advice for a fee. Under those regulations, a person is deemed to provide investment advice for a fee only if he (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 plan. The existing regulations make clear that an investment adviser is not subject to ERISA unless each of these requirements is met.

When it first proposed changes to the existing fiduciary definition in October 2010, the DOL cited changes that have occurred in the financial industry since 1975. It also cited the increased complexity of investment products and enforcement challenges that have developed since that time. The proposed regulations would have eliminated the requirements that fiduciary advice be provided on a “regular basis” and with a “mutual understanding” that the advice would form the primary basis of plan investment decisions. Further, the proposed regulations would have subjected advisers to fiduciary status even if they only provided one-time appraisals or valuations of plan assets.

In deciding to re-propose the regulations sometime in 2012, the DOL cited the “more than 260 written public comments, . . . two days of open hearings and more than three dozen individual meetings” received or held by the DOL regarding the proposed amendment. The DOL anticipates that additional review and study of the proposed amendment will “clarif[y] that fiduciary advice is limited to individualized advice directed to specific parties.” The DOL also intends to respond to “concerns about the application of the regulation to routine appraisals” and to clarify “the limits of the rule’s application to arm’s length commercial transactions, such as swap transactions.”

If you have questions regarding the information in this client alert, or with respect to other provisions of recent legislation as it relates to your employee benefit plans, please contact any of the attorneys in our Employee Benefits Practice Group listed below.

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