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Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice

Comment On: EBSA-2010-0050-3491

Definition of Term Fiduciary; Conflict of Interest Rule-Retirement Investment

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General Comment

See attached file(s)

Attachments

EBSA Fiduciary Rule Examination – RIN 1210-AB79

Dear Sirs:

I support your intent to delay the application of the Fiduciary Rule and subject it to further review for a minimum of 60 days. However, I believe this delay is insufficient and that the review period should be extended even further.

I have been involved in the provision of advice with respect to retirement plans for the past 43 years, initially in the Employee Plans Division of the Internal Revenue Service at the inception

of ERISA in 1974, and since 1978 in private practice. Our firm primarily provides advice with respect to qualified retirement plans for small businesses whose typical workforce ranges from a handful to several hundred employees.

Many of these plans were start-ups when we were first engaged. Our investment advice has here-to-fore been rendered under the broker-of-record model through an unaffiliated independent broker dealer. Our compensation for these investment services was primarily received in the form of mutual fund 12b-1 fees, which in the early years was minimal based on the low level of plan assets.

Conceptually, I do not have reservations about an acknowledgement of fiduciary status. However, the rule as drafted is an invitation for retirement investors to sue their investment providers. As such, our broker-dealer is contemplating a requirement for significantly greater documentation and monitoring of advice given to all plans. To fulfill this heightened documentation, our firm has determined that we will need to receive minimum annual revenue of \$5,000 to provide our investment services. This minimum fee level will be a detriment to the creation of potential plans for many small businesses and likely will result in the termination of plans by existing clients.

Over the years, we have also established an investment relationship with a number IRA clients, many of whom were rollovers from the employer plans we serviced. These rollovers were transacted at net asset value with no additional compensation other than the ongoing 12b-1 fees from the same mutual funds in which the plan was invested, typically 25 bps. Again, given the enhanced documentation for any advice given to the recipient, either as to a decision to rollover or any advice subsequent to the rollover, our existing model is not economical. Consequently, these clients will need to be placed into fee based accounts with such fees ranging anywhere from 1-2% of assets.

In its justification for the current rule, the DOL estimated that investors would gain \$33-36 billion dollars over the first ten years of the rule's existence. I believe this to be a gross overestimation and does take into consideration the additional cost of providing advice that is going to be charged to the recipient investors. Additionally, in its analysis under the Regulatory Flexibility Act, the DOL indicated it would impact 2,438 Broker Dealers. Registered representatives of independent BD's operate as independent contractors, and as such, virtually all representatives are small businesses – sole proprietors, partnerships, LLC's, S-corps, etc. Our BD alone has at least 3,000 individual reps who will be impacted by the rule. No consideration was given to this fact in the DOL's analysis. Had it done so, the number of impacted small businesses would be in the tens of thousands.

For the above reasons, there is no question in my mind that small employer plans and IRA investors will have more difficulty in obtaining qualified investment advice. Secretary Perez' answer to this argument is that these smaller investors can be serviced by enhanced technology, i.e., "robo advisors". While computers are probably capable of constructing a good investment allocation, this presumes the novice investor will know how to provide well thought out input on which the recommendation is based. My experience is that small investors typically cannot do this without the guidance that can be given in a face to face meeting. The robo will also not be

able to stop the investor from his own worst enemy, the tendency to be overwhelmed by his emotions during times of stress and to be influenced by the financial headline of the day. I believe my greatest service to a number of investors over the years was to get them to “stay the course” during difficult periods such as 1987, 2000-2002, and 2007-2009. Those investors who stuck to their plan now understand and appreciate that advice.

To be clear, there are some bad actors in the retirement advice arena. However, rather than imposing increased regulation on all advisors which will only limit access or increase costs on small investors, the public would be better served by the Department focusing its efforts on increased educational initiatives which would alert them of practices that are unacceptable or questionable.

Thank you for your consideration.