U.S. Department of Labor

Advisory Opinion

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December 7, 2005
Michael 'J' Stapley
President
Deseret Mutual Benefit Administrators
Eagle Gate Plaza
60 East South Temple
P.O. Box 45530
Salt Lake City, UT 84145

2005-23A
ERISA Sec. 3(21)

Dear Mr. Stapley:

This is in response to your request for guidance concerning the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974, as amended (ERISA). You have requested guidance concerning the responsibilities of plan fiduciaries regarding the advice and other services provided directly to plan participants by financial planners or advisers. For purposes of this letter, we assume that the planner or adviser is neither chosen nor promoted by plan fiduciaries and is not otherwise a fiduciary with respect to the plan. In that context, you ask a number of questions.

The relevant statutory provisions are as follows. Section 3(21)(A) of ERISA provides that a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

Sections 403(c)(1) and 404(a) of ERISA require, among other things, that the assets of a plan be held for the exclusive purpose of providing benefits to participants and beneficiaries of the plan and defraying reasonable administrative expenses of administering the plan, and that a fiduciary with respect to the plan carry out his duties for the exclusive purpose of providing benefits to participants and beneficiaries.

Where an individual account pension plan permits a participant or beneficiary to exercise control over the assets in his or her account and a participant or beneficiary exercises such control, section 404(c) provides that no other person who is otherwise a fiduciary shall be liable for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

Section 405(a) of ERISA provides that a fiduciary of a plan may be liable for a breach of fiduciary responsibility committed by another fiduciary of the plan: (1) if he knowingly participates in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach; (2) if, by his failure to comply with section 404(a)(1) of ERISA in the exercise of his fiduciary obligations, he has enabled such other fiduciary to commit a breach; or (3) if he has

knowledge of the breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

Section 406(a) of ERISA prohibits various types of transactions between a plan and persons who are parties in interest with respect to the plan. In particular, section 406(a)(1)(D) prohibits a fiduciary from engaging in a transaction if the fiduciary knows or should know that the transaction is a direct or indirect transfer to, or use by or for the benefit of any party in interest, of the assets of the plan. Section 406(b) of ERISA prohibits a fiduciary with respect to a plan from dealing with assets of the plan in his own interest or for his own account, acting on behalf of or representing a party dealing with the plan in a transaction involving the assets of the plan, or receiving any consideration for his own personal account from any party dealing with the plan in connection with a transaction involving the assets of the plan.

The following is a summary of the questions presented in your letter and our responses thereto.

Question 1: Is an individual who advises a participant, in exchange for a fee, on how to invest the assets in the participant's account, or who manages the investment of the participant's account, a fiduciary with respect to the plan within the meaning of section 3(21)(A) of ERISA?

Answer: The Department has stated on numerous occasions that directing the investment of a plan constitutes the exercise of authority and control over the management or disposition of plan assets and that the person directing the investments would be a fiduciary, even if the person is chosen by the participant and has no other connection to the plan. In addition, regulation 29 CFR § 2510-3.21(c) further clarifies the meaning of the term "investment advice." Under that regulation, a person will be deemed to be rendering investment advice if such person renders advice to the plan as to the value of securities or other property, or makes a recommendation as to the advisability of investing in, purchasing, or selling securities or other property and such person either directly or indirectly has discretionary authority or control, whether or not pursuant to an agreement, arrangement or understanding, with respect to purchasing or selling securities or other property for the plan; or renders any such advice on a regular basis to the plan pursuant to a mutual agreement, arrangement or understanding, written or otherwise, between such person and the plan or a fiduciary with respect to the plan, that such services will serve as a primary basis for investment decisions with respect to plan assets, and that such person will render individualized investment advice to the plan based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments. The Department has taken the position that this definition of fiduciary also applies to investment advice provided to a participant or beneficiary in an individual account plan that allows participants or beneficiaries to direct the investment of their accounts. 29 CFR § 2509.96-1(c).

In the context of a participant-directed individual account plan meeting the requirements of ERISA section 404(c), a person, such as a financial planner or investment manager or adviser, who is selected by a participant to manage the participant's investments would be liable for imprudent investment decisions because those decisions would not have been the direct and necessary result of the participant's exercise of control, even though the participant selected the person to manage the assets in his or her individual account.[1] The other fiduciaries of the plan would not be liable as fiduciaries for either the selection of the investment manager or investment adviser or the results of the investment manager's decisions or investment adviser's recommendations.[2] Nor would the plan fiduciaries have any obligation to advise the participant about the investment manager or investment adviser or their investment decisions or recommendations. See 29 CFR § 2550.404c-1(f) – Example (9).

Question 2: Does a recommendation that a participant roll over his or her account balance to an individual retirement account (IRA) to take advantage of investment options not available under the plan constitute investment advice with respect to plan assets?

Answer: It is the view of the Department that merely advising a plan participant to take an otherwise permissible plan distribution, even when that advice is combined with a recommendation as to how the distribution should be invested, does not constitute "investment advice" within the meaning of the regulation (29 CFR § 2510-3.21(c)).[3] The investment advice regulation defines when a person is a fiduciary by virtue of providing investment advice with respect to the assets of an employee benefit plan. The Department does not view a recommendation to take a distribution as advice or a recommendation concerning a particular investment (*i.e.*, purchasing or selling securities or other property) as contemplated by regulation § 2510.3-21(c)(1)(i). Any investment recommendation regarding the proceeds of a distribution would be advice with respect to funds that are no longer assets of the plan.[4]

Where, however, a plan officer or someone who is already a plan fiduciary responds to participant questions concerning the advisability of taking a distribution or the investment of amounts withdrawn from the plan, that fiduciary is exercising discretionary authority respecting management of the plan and must act prudently and solely in the interest of the participant.[5] Moreover, if, for example, a fiduciary exercises control over plan assets to cause the participant to take a distribution and then to invest the proceeds in an IRA account managed by the fiduciary, the fiduciary may be using plan assets in his or her own interest, in violation of ERISA section 406(b)(1).

Question 3: Would an advisor who is not otherwise a plan fiduciary and who recommends that a participant withdraw funds from the plan and invest the funds in an IRA engage in a prohibited transaction if the advisor will earn management or other investment fees related to the IRA?

Answer: No. For the same reasons explained above, a recommendation by someone who is not connected with the plan, that a participant take an otherwise permissible distribution, even when combined with a recommendation as to how to invest distributed funds, is not investment advice within the meaning of the 29 CFR § 2510-3.21(c), nor is such a recommendation, in and of itself, an exercise of authority or control over plan assets that would make a person a fiduciary within the meaning of section 3(21)(A) of ERISA. Accordingly, a person making such recommendations would not be a fiduciary solely on the basis of making such recommendations, and would not engage in an act of self-dealing if he or she advises the participant to roll over his account balance from the plan to an IRA that will pay management or other investment fees to such person.

However, as indicated above with respect to question 2, this position applies only to advice provided by a person who is not a plan fiduciary on some other basis. Advice of this nature given by someone who is already a fiduciary of the plan would be subject to ERISA's fiduciary duties. Moreover, if the person exercised control over the participant's account in making the distribution and reinvestment outside the plan, the person would be a fiduciary and would be subject to the ERISA's fiduciary obligations.

This letter constitutes an advisory opinion under ERISA Procedure 76-1 (41 Fed. Reg. 36281, August 27, 1976). Accordingly, this letter is issued subject to the provisions of the procedure, including section 10 relating to the effect of advisory opinions.

Sincerely,
Louis Campagna
Chief, Division of Fiduciary Interpretations
Office of Regulations and Interpretations

Footnotes

1. *See* Advisory Opinion 84-04A, January 4, 1984 (AO 84-04A). In particular, AO 84-04A stated that if a person is deemed to be giving investment advice within the meaning of regulation §

2510.3-21(c)(1)(ii)(B), the presence of an unrelated second fiduciary acting on the investment advisor's recommendations on behalf of the plan is not sufficient to insulate the investment advisor from fiduciary liability under section 406(b) of ERISA. Regulation § 2510.3-21(c)(1)(B) presupposes the existence of a second fiduciary who by agreement or conduct manifests a mutual understanding to rely on the investment advisor's recommendations as a primary basis for the investment of plan assets. In the presence of such an agreement or understanding, the rendering of investment advice involving self-dealing will subject the investment advisor to liability under section 406(b) of ERISA. We believe that the same principles enunciated in AO 84-04A apply in the context of a financial planner or investment advisor rendering investment advice to a participant in a participant-directed plan.

2. Other fiduciaries of the plan may have co-fiduciary liability of the plan if, for example, they knowingly participate in a breach committed by the participant's fiduciary. ERISA section 405 (a).
3. We note that a person recommending that a participant take a distribution may be subject to Federal or state securities, banking or insurance regulation.
4. In the view of the Department, the situation described herein is distinguishable from those situations where a plan fiduciary exercises control over the timing of the distribution, the selection of the individual retirement plan provider and the products in which the distributions will be invested. For example, situations such as those involving automatic rollovers of mandatory distributions. See 29 CFR § 2550.404a-2 (69 FR 58018, September 28, 2004). *See also*, AO 93-24A (September 13, 1993) and the letter from Robert J. Doyle to Judith McCormick, August 11, 1994.
5. *See* Varity Corp. v. Howe, 516 U.S. 489, 502-03 (1996).

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