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Via Electronic Mail (e-ORI@dol.gov)

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Conflict of Interest Rule, Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: RIN 1210-AB32, Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice

Dear Sir or Madam:

I am an attorney, an instructor and author of IRA compliance guides for the American Bar Association and the American Institute of Certified Public Accountants. I have been involved in conducting continuing education outreach programs with the Internal Revenue Service on the retirement distribution rules. I submitted a number of comments regarding the 2002 proposed regulations involving §1.401(a)(9) regarding many technical issues and clarification issues, many of which were adopted in the final regulations. I also submitted an amicus (friend of the court) brief in the inherited IRA Supreme Court case, Clark v. Rameker.

Further, in 2013 I submitted a letter to the IRS regarding issues involving IRA accounts together with a series of recommendations regarding the need to explain to the public and professionals about certain areas of the IRA distribution rules and IRA penalty issues that needed to be clarified by the IRS in Publication 590.

Some of the suggestions made included the need to explain and clarify the post-death required minimum distribution rules that apply to beneficiaries of traditional IRAs and Roth IRAs, the need to clarify the IRS post-death IRS trust compliance rules and a number of other areas that needed clarification and further explanation.

Congressman Steve Israel was supportive of my recommendations regarding the need to educate the public and professionals about the complex IRA distribution rules and penalty issues. The Congressman sent my letter to the IRS.

The IRS responded and agreed that there was a need to further explain certain technical items by means of additional examples and add clarifying comments in IRS Publications.

I would like to commend the Employee Benefits Security Administration of the Department of Labor for its efforts in attempting to curtail abuses of IRA advisors who place their interest first and their client's interests second. While I am sure that most IRA advisors adhere to the highest standards possible, there may be a number of IRA advisors that are conflicted and need to be more transparent with their clients' retirement account transactions.

It is helpful that the proposals use the carrot and the stick approach in order to encourage those IRA advisors who may be conflicted to be more transparent with their clients who are IRA account holders. Whenever the words "conflict of interest" is used in these comments, it shall include Fiduciary, Conflict of Interest Rule – Retirement Investment Advice.

There are a number of issues that I would like to address in my comments.

The first issue is the use of estate planning techniques by an IRA advisor that is given with respect to handling IRA distributions some of which may be discreet product sales related transactions and some of which are not product related transactions.

The following examples will help explain these points:

Example 1

An IRA advisor recommends to the IRA owner that he withdraw $100,000 from his/her IRA to make annual gifts to his grandchildren and children to reduce the IRA owner's estate tax liabilities.

This should be fine and should not be a problem regarding the pending proposed conflict of interest rules.

Example 2

An IRA advisor recommends to the IRA owner that $100,000 be withdrawn from his/her IRA and given to his/her children as gifts and with the recommendation that the children consider buying a life insurance policy on the IRA owner. The IRA advisor sells life insurance.

This can be a problem regarding the proposed conflict of interest rules. One can argue that the recommendation is an estate planning recommendation or in the alternative that it is a recommendation regarding a product sale.

Example 3

An IRA advisor tells the IRA holder that the IRA rules may change and eliminate the stretch payment rules and that the IRA holder should withdraw $100,000 from his/her IRA and purchase a life insurance policy. The IRA advisor sells insurance and fails to tell the IRA owner that he/she will earn a 55% insurance commission or more on the first year premiums plus lower renewal commissions thereafter.

This can be a conflict of interest issue if the IRA advisor fails, for whatever reason, to indicate his/her direct and indirect compensation base initially, up front and in writing to the IRA owner.

According to proposed regulation §2510.3-(a)(1) if an IRA advisor receives direct or indirect compensation "as a result of making a recommendation as to the advisability of acquiring, holding, disposing or exchanging securities or other property, including a recommendation to take a distribution of benefits or a recommendation as to the investment of securities or other property to be rolled over or otherwise distributed from the plan or IRA", then he/she is considered to be a fiduciary since investment advice is involved. See Proposed Regulation §2510.3-21(a)(1)(i). Also see Proposed Regulation §2510.3-21(a)(1)(ii).

It would appear that an IRA advisor who recommends to the IRA owner that he or she should take a distribution from his or her IRA, pay income taxes on the IRA distribution and use the net amount or a portion of the net amount to buy a life insurance product may fall within the proposed conflict of interest rules.

Under the definition of "recommendation" under the proposed rules, "a [r]ecommendation means a communication that, based on its content, context and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action." See Proposed Regulation §2510.3-21(f))(1).

The issue for the Employee Benefits Security Administration of the U.S. Department of Labor is whether or not EBSA Advisory Opinion 2005-23A or any statute precludes the Department from promulgating rules that governs the handling of post-distribution product sales transactions that are triggered as a result of a recommendation by an IRA advisor to the IRA owner prior to the distribution event.

It seems to me that transparency should be necessary regardless of whether or not the IRA advisor is a fiduciary or not a fiduciary if the IRA advisor makes a recommendation to the IRA owner that results in a product sale. The advice may be sound from an estate planning point of view but should be subject to transparency even if the IRA advisor is not considered to be a fiduciary with respect to a post-distribution transaction. In my opinion, the IRA advisor should disclose alternatives to a life insurance product sale to the IRA owner. The pro and con of a life insurance product sale should be provided to the IRA owner as well. If the IRA advisor is involved in estate planning, he or she should suggest alternative estate planning approaches to the IRA owner of which there are many.

Further, the investment education rule should be tightened up to cover recommendations regarding distributions from an IRA that result in a post-distribution product sale. It should cover call centers and information and materials that, in essence, recommends a post-distribution insurance product sale.

An additional significant point involving self-dealing and conflict of interest is discussed below.

As a result of the Clark v. Rameker case, many IRA advisors are aware of the fact that most inherited IRA are not protected against creditors in a bankruptcy proceeding or in a non-bankruptcy proceeding.

As a result the IRA advisor may recommend that the IRA owner establish an IRA trust as the beneficiary of an IRA owner's account.

In the event that an accountant or attorney is selected as a trustee of any IRA trust, then he or she is automatically considered to be a fiduciary with respect to an IRA trust. See Advisory

Opinion 2009-02A dated September 28 2009. In my opinion, under no circumstances, should a trustee of an IRA trust engage in transactions that involve additional direct or indirect compensation of any kind to the trustee or to any related or affiliated entity that the trustee is directly or indirectly connected with regarding any trust transaction in the absence of a prohibited transaction exemption or a favorable Advisory Opinion from the U.S. Department of Labor. Also see Advisory Opinion 97-15A dated May 22, 1997 and Advisory Opinion 2005-10A dated May 11, 2005 regarding banking institutions trustee commission issues.

This is especially important since many accountants have affiliations with Wealth Advisory units either directly or indirectly. In that case it is best for the accountant to not serve as trustee of an IRA trust in the event that he/she receives commissions of any type either directly or indirectly as a result of any trust transactions. It is also applicable with respect to accountants regarding any trust transactions that are in violation of the above referred to Advisory Opinions. The above statements apply to attorneys that act as trustees of IRA trusts and that have affiliations with Wealth Advisory units either directly or indirectly. It is also applicable with respect to attorneys regarding any trust transactions that are in violation of the above referred to Advisory Opinions. Trust assets may include non IRA assets as well as IRA assets that are payable to the trust. In that event the above statements would apply in part to those trusts as well.

Ignoring breach of trust issues, there is a significant excise tax issue that can involve an IRA trust, or a combined trust as described above regarding prohibited transactions. The excise tax liability with respect to a prohibited transaction involving retirement accounts is IRC Section 4975. This excise tax is generally equal to 15% of the amount involved and is a pyramiding excise tax. According to the U.S. Department of Labor "the parties that have participated in a prohibited transaction for which an exemption is not available must pay the excise tax and file the Form 5330 with the Internal Revenue Service." See page 48 of the Proposed Best Interest Contract Exemption, ZRIN 1210-ZA25. There is no statute of limitations that is triggered if the Form 5330 is not filed.

As a final point an IRA trust must be a compliant IRA trust from an IRS point of view and follow the IRS Regulations and IRS letter rulings of which there are many. Failure to comply can result in significant IRS penalties and tax liabilities to the trust. IRS penalties under IRC Section 4974 may be applicable to an IRA trust. This last paragraph is not within the purview of the proposed rules but is made for information purposes only.

I hope these comments are helpful and hope that the Department will consider them when issuing their final recommendations.

Sincerely yours,

GOLDBERG & GOLDBERG, P.C.

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