DOL's Re-Proposal of the Definition of "Fiduciary"

- In October 2010, the DOL proposed to amend regulation defining who is an ERISA fiduciary by reason of providing investment advice.

- The DOL’s proposal would have significantly broadened the scope of persons who could be deemed ERISA fiduciaries. The proposed regulation would have eliminated requirements that the advice must be provided on a "regular basis" and with a "mutual understanding" that the advice would be the primary basis for plan investment decisions.

- We expect the DOL to re-issue its definition of fiduciary in 2013 alongside numerous exemptions in an attempt to harmonize the re-proposal with longstanding DOL exemptions.
408(b)(2) Service Provider Disclosure Update

- On February 3, 2012, the DOL published its Final Rule under ERISA section 408(b)(2) requiring “covered service providers” to ERISA-covered retirement plans to provide information about their services, direct and indirect compensation.

- Despite numerous questions relating to the interpretation of the Rule, the DOL has indicated that it would prefer not to issue any immediate guidance in this area regarding how the Final Rule should be interpreted.

- DOL has suggested that “best practice” tips may be issued in the future to the extent that the DOL deems further guidance is necessary.
Lifetime Income Illustrations

- The DOL has suggested that it will propose guidance relating to “lifetime income illustrations” that would be provided to participants in individual account plans.

- The DOL wants plan participants to understand how their plan account balance in terms of a lifetime annuity that could be purchased upon retirement.

- The lifetime income illustrations would be provided as part of the annual "pension benefit statement" that must be provided to participants under ERISA section 105.
DOL Swaps Opinion

- On February 7, 2013, the DOL issued Advisory Opinion 2013-01A that provides some clarification as to the fiduciary status of certain parties involved in the swap-clearing process required by Dodd Frank.

- The DOL concluded that a Clearing Member, but not a Central Clearing Party, is a “party in interest” to plans engaging in swaps on the basis that the Clearing Member acts as a plan service provider.

- Plan fiduciaries wishing to engage in swaps ensure a statutory or class exemption is available to prevent a non-exempt prohibited transaction from arising.
DOL Settlement Regarding Trading Error Correction Gains

- Recordkeeping errors may occur when purchase or sale orders are placed for an erroneous amount or when such orders are not completed at the correct time. Most service providers undertake to make their clients whole by placing corrective orders. The price of the investments often changes during the interim between the erroneous trade and the corrective trade. As a result, a gain or a loss may be generated due to the correction.

- The DOL alleged that ING’s failure to disclose its error correction policy and its retention of gains resulted in receiving compensation in violation of ERISA.

- As part of the settlement, ING must make full disclosure of its investment transaction policy to current and prospective ERISA-covered clients.
Pension De-Risking – What is it?

- Employers want to remove defined benefit plan liabilities from their books
  - Reduce/eliminate effect on earnings
  - Get out of the pension business
- From an ERISA perspective, plan administrator is terminating the plan or purchasing annuities with respect to the affected participants
  - Requires purchase of an annuity from an insurance company
  - Insurer takes over as guarantor of payment of benefit
  - PBGC coverage ceases
  - Plan may actually terminate (GM) or annuitize/liftout the plan’s benefit payment obligation with respect to a subset of participants
IRAs – Rollovers

Pending New Guidance?

- In connection with proposed rulemaking to amend ERISA’s fiduciary advice definition, DOL requested comment on whether advice on plan distributions should be treated as “investment advice”
- 2011 GAO Report identified cross-selling to participants, especially IRA rollovers, as problematic
- 2013 GAO Report identified “steering” issues by 401(k) providers – recommends IRS and DOL draft new rules including standardized disclosure rules
  - GAO-13-30 401(k) Plans: Labor and IRS could improve the Rollover Process for Participants
ERISA Accounts – Excess Revenue Sharing Allocation

Plan assets status of “ERISA Accounts”

- Reporting and accounting issues
- Duty to invest
- Allocating excess revenue sharing
  - Proportionality question