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ALERTS

The New Fiduciary Rule: What Does Possible DOL Delay Mean For Plan Sponsors?

August 21, 2017 | Atlanta | Chicago | Columbus | Dallas | Delaware | Elkhart | Fort Wayne | Grand Rapids | Indianapolis | Los Angeles | Minneapolis | New York | South Bend

The Department of Labor's (DOL) new fiduciary rule became effective in part on June 9, 2017. The definition of fiduciary was expanded by broadening the term "investment advice," and the impartial conduct standards became effective. The remaining provisions of the fiduciary rule are currently scheduled to be effective as of Jan. 1, 2018. However, this month, in a notice of administrative action filed in an ongoing lawsuit, the DOL indicated it has proposed to the Office of Management and Budget postponing the effective date for further implementation to July 1, 2019. The period of time between the June 9, 2017, effective date and the date when full implementation of the new fiduciary rule is required is referred to as the "Transition Period."

The fiduciary rule applies to qualified retirement plans and private 403(b) plans, IRAs, health savings accounts and certain other savings vehicles. Plan sponsors must recognize when a service provider is a fiduciary under the new fiduciary rule because they now have a heightened obligation to monitor service providers to ensure compliance. Agreements with service providers should reflect: (1) whether the service provider is intended to act as a fiduciary and, if so, include provisions requiring compliance with fiduciary status or (2) whether a carve-out is intended to apply.

What Does This Mean for Plan Sponsors?

Advisers tend to be supportive of extending the Transition Period, as it gives them more time to comply with provisions that require them to acknowledge fiduciary status and commit to adherence to fiduciary requirements in writing, and to satisfy specified disclosure requirements. Additionally, the revised prohibited transaction exemption rules with which advisers must comply will not be effective until the Transition Period has expired.

However, a delay in full implementation of the new fiduciary rule is not generally helpful to plan sponsors. In fact, it may be more challenging for plan sponsors to monitor advisers for compliance with the impartial conduct standards described below during the Transition Period when the advisers are not yet required to comply with certain disclosure requirements.

How Has the Definition of Fiduciary Expanded?

Under the new fiduciary rule, the definition of a fiduciary has been broadened; a person renders fiduciary investment advice with respect to assets in a covered plan if the person provides recommendations regarding investment advice for a fee or other direct or indirect

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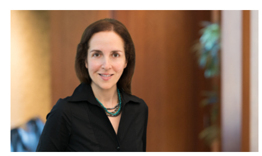

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compensation. A recommendation includes providing advice on investments, as well as advising a participant to take a distribution or make a rollover contribution to an IRA.

Most retirement plan advisers are now held to a fiduciary standard under the new fiduciary rule. Advisers who provide investment advice and recommendations for investors with respect to covered plans are fiduciaries and are required to comply with the “impartial conduct standards.” This means that advisers must: (1) make recommendations that are in an investor’s best interest (i.e., advice that is “prudent and loyal”), (2) avoid misleading statements; and (3) charge no more than reasonable compensation for services, which is already an obligation under the Employee Retirement Income Security Act (ERISA).

What Isn’t Investment Advice Under the New Fiduciary Rule?

Certain guidance is “carved-out” of the definition of investment advice, including:

- Educational information and materials including plan information, general financial, investment, and retirement information, asset allocation models and interactive investment materials
- A platform of investment alternatives not individualized to the needs of the plan, its participants, or beneficiaries (if the service provider represents in writing that it is not undertaking to provide impartial investment advice or to give advice in a fiduciary capacity) and selection and monitoring assistance
- Responses to requests for proposal and other self-marketing
- Communications that a reasonable person would not view as investment recommendations (e.g., general circulation newsletters, commentary in publicly broadcast talk shows, remarks in widely attended conferences or seminars, etc.)
- Advice of employees of the plan sponsor, provided they do not receive any additional compensation for such advice.

What Are Best Practices for Plan Sponsors?

The following are some best practices for plan sponsors to consider both during and after the Transition Period:

- Identify which service providers are fiduciaries with respect to certain plan assets or services under the new fiduciary rule. Consider whether service providers are providing participant level advice, including advice related to self-directed brokerage accounts and rollovers
- Identify where increased fees have resulted in connection with fiduciary acknowledgement
- Adopt policies and procedures reasonably expected to comply with the impartial conducts standard
- Review educational materials to ensure that a carve-out is

applicable, if intended to apply

- Spot check recorded call center calls to ensure investment advice is not provided if a carve-out is intended to apply
- Work with service providers to review current compensation structures, identify conflicts of interest, and implement conflict mitigation strategies
- Develop a system for ongoing monitoring of service providers
- Review service agreements and disclosures and revise, if necessary, to ensure compliance not only with currently effective provisions of the new fiduciary rule, but also those provisions effective after the Transition Period. A revised ERISA Section 408(b)(2) disclosure may be required if the adviser previously disclaimed fiduciary status.

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