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US

Volume 40 | Issue 95 | August 7, 2017

Easing Into the DOL Fiduciary Rule

As promised, the DOL is providing ongoing updates about compliance with the revised definition of investment advice fiduciary during the transition and re-evaluation period it previously announced. The latest set of FAQs affirms that participant communications specifically encouraging larger plan contributions – at specific individualized levels – are not fiduciary in nature as long as investment recommendations are not specified. In addition, the FAQs provide helpful advice to new plan fiduciaries about fee disclosure responsibilities.

Background

DOL in 2016 finalized the "fiduciary rule" that expanded the scope of the definition of fiduciary and impermissible conflicts of interests for employer-sponsored plans as well as non-ERISA investment vehicles like IRAs and health savings accounts. The rule was generally scheduled to take effect in April 2017, with certain exemptions effective in 2018. DOL announced a delay in the April applicability date and temporarily modified the disclosures needed under the associated prohibited transaction exemptions, as noted in our April 5, 2017 *FYI Alert*.

Our May 24, 2017 *FYI Alert* on Field Assistance Bulletin 2017-2 explained how DOL would focus on providing compliance assistance during the phased implementation period between June 9 and the end of 2018. In the FAB, DOL instructed its enforcement personnel not to pursue claims against fiduciaries who are working "diligently and in good faith" to comply with the rule and exemptions, or to treat those fiduciaries as violating the rule and its exemptions during the phased implementation period. The guidance also confirmed that, for fiduciaries making this diligent effort, IRS will not apply IRC Section 4975 prohibited transaction excise taxes for any transactions and reporting obligations that DOL's enforcement policy affects. DOL said it will consider additional temporary relief to the extent circumstances merit it.

Many questions have surfaced about how to apply the new rule and how to specifically deal with transition issues and associated requirements under DOL's ERISA 408(b)(2) disclosure regulation.

Recommendations to Contribute

Some plan sponsors and advisors expressed concerns about recommending to individuals that they make specific contributions changes. DOL attempted to address these concerns in their initial

set of FAQs (see Q12 as reported in our May 24 *FYI Alert*) but stopped short of stating it would be acceptable to tell the participant that they should increase plan contributions by specified amounts – for example, “Joe, you need to contribute 3% more of your salary each year to close in on your goal of $1.5 million in your account at age 62.”

In FAQs released this month, DOL clarified that a fair amount of specificity is permitted when providing financial education that stops short of fiduciary investment advice. Communications about the benefits of the plan and increasing contributions are non-fiduciary in nature as long as they do not include recommendations about specific investment products or investment management of a particular security or other investment property. The FAQs step through four examples of communication scenarios that will not trigger fiduciary status for the messenger. In this second shot at explaining what is acceptable, DOL has made it clear that plans can advise participants to increase contributions in a very specific way – such as telling Joe about the 3% increase recommendation – without the communications being fiduciary investment advice.

The same approach goes for providing recommendations to the plan administrator or other plan fiduciary about how to increase employee participation and contribution levels to the plan. For example, a vendor does not become a fiduciary merely by suggesting auto-enrollment or that an employer change the level or structure of matching contributions to encourage higher employee contributions. Again, the advice would need to steer clear of recommendations about specific investment products.

Service Provider Disclosures

An arrangement to furnish goods or services between a plan and a plan service provider is specifically prohibited under ERISA absent the applicable service provider exemption under ERISA Section 408(b)(2). To qualify for the exemption, the plan fiduciary must ensure the contract or arrangement is reasonable, confirm that the services are necessary for the establishment and operation of the plan, and pay no more than reasonable compensation for the services. In addition, plan fiduciaries must receive and evaluate disclosures from covered service providers, and periodically re-evaluate such arrangements. (See our February 23, 2012 *For Your Information.*) DOL Section 408(b)(2) regulations require a service provider to state that services will be provided as a fiduciary, if applicable.

DOL’s FAQs provided the following guidelines as a response to uncertainty about the need to update fiduciary disclosures under the 408(b)(2) regulation:

- If the service provider does not believe it is an investment advice fiduciary, the possibility that individual agents, representatives or employees might step over the line and provide investment recommendations would not trigger the need for fiduciary status disclosure.
- If the service provider will become a fiduciary under the conflict of interest rules (but was not a fiduciary under the old rules), it is not necessary to affirmatively state that services will be provided as a fiduciary for 408(b)(2) compliance as long as services are accurately disclosed – including a description of the services that would make the covered service provider an investment advice fiduciary.
- If the service provider will become a fiduciary under the conflict of interest rules and current contracts or disclosures specifically state that the service provider is NOT a fiduciary, the service provider must provide a revised contract or disclosure to correct that statement. Ordinarily, there’s a 60-day period for revising disclosures, but DOL says “as soon as practicable” is acceptable for this requirement.

Plan fiduciaries may receive these revised disclosures via mail or by electronic notification, provided the covered service provider's disclosures on a website or other electronic medium are readily accessible to the plan fiduciary, and the fiduciary has received clear notification on how to access the information.

In Closing

The current set of DOL examples should assuage some concerns over the obligations of the plan fiduciary under the conflict of interest rule that plan sponsors may have in connection with efforts to enhance participant retirement savings. Plan fiduciaries should be aware that some service providers may need to revise 408(b)(2) disclosures, and take note of any changes in the responsibilities of their vendors.

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