EMPLOYEE BENEFITS

THE DEPARTMENT OF LABOR CONFIRMS JUNE 9TH AS THE EFFECTIVE DATE OF THE FIDUCIARY RULE: WHAT EMPLOYERS NEED TO KNOW NOW

By Eric Gregory

On May 22, 2017, Secretary of Labor Jim Acosta announced that, after having been delayed 60 days, the Department of Labor's ("DOL") Conflict of Interest Rule ("Fiduciary Rule") will largely apply on June 9, 2017. At that time, an expanded definition of "fiduciary" will go into effect and "Impartial Conduct Standards" will be a requirement of certain prohibited transaction exemptions. As a consequence, some service providers, such as brokers and recordkeepers, may find that they are now fiduciaries. Employers, in their role as plan fiduciaries, have an increased obligation to monitor the activities of these additional fiduciaries so to ensure that the activity is exempt from the prohibited transaction rules.

This Client Alert provides a brief overview of the Fiduciary Rule and outlines some practical steps that employers can follow to ensure compliance in light of its implementation.

What Becomes Effective on June 9?

Under the new Fiduciary Rule, the previous five-part test for defining who is a fiduciary that provides investment advice is replaced with a new objective inquiry test. Under the new test, any communication that meets the following requirements constitutes fiduciary investment advice:

1. A "recommendation" regarding specific investment transactions or investment management, including advice related to roll-overs;
2. Directed at a plan, plan participant, beneficiary, IRA or IRA owner;
3. For a fee or other compensation, direct or indirect; and
4. Made directly or indirectly by a person who acknowledges fiduciary status, has an agreement or understanding with a recipient that the advice is tailored to him/her, or otherwise tailors specific advice to a specific recipient or recipients.

A "recommendation" is 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." The more individually-tailored a communication is, the more likely it would be a recommendation.

Fiduciaries who receive commissions or other variable compensation (as broadly defined in the new Fiduciary Rule) must comply with the Impartial Conduct Standards on June 9, 2017. These standards generally require that the fiduciary:

1. Give advice that is in the retirement investor's best interest;
2. Charge no more than "reasonable compensation;" and
3. Make no misleading statements about investment transactions, compensation, and conflicts of interest.

Fiduciaries impacted by these regulations temporarily benefit from a "good faith" compliance transition period until January 1, 2018, when additional disclosure and contractual obligations will go into effect. During the transition period, the DOL intends to focus on compliance assistance rather than penalty enforcement, as long as fiduciaries act in good faith.

How Does the Fiduciary Rule Impact Employers Sponsoring Retirement Plans?

The Fiduciary Rule's main impact on employers will involve interactions between recordkeepers and investment advisors regarding investment lineups, distributions and rollovers.

During the next few weeks, there are a number of steps that plan sponsors can take to proactively prepare for the implementation of the Fiduciary Rule.

- **Ensure you have prudent processes and procedures**. Document all evaluation and monitoring of plan service providers, ensuring that fees are reasonable and all services are necessary; establish effective internal controls to evaluate plan operations; review, maintain, and update any investment policy statement; and ensure that formal fiduciary training is regularly provided.
- **Evaluate whether employees are acting as fiduciaries**. Ensure that human resources and finance employees are not providing fiduciary advice to participants. Generally speaking, employees may discuss plan rules, investment options, and distribution options without becoming fiduciaries, so long as the employees are not giving particularized advice. Employees may also provide reports to retirement fiduciaries (e.g., regarding enrollment or investment performance) without becoming fiduciaries, so long as those employees are not receiving additional compensation for those services beyond their normal pay.
- **Review agreements with your recordkeeper**. Determine whether your recordkeeper is acknowledging fiduciary status for either investment lineup choices or call center advice to participants. Some recordkeepers are assuming "point-in-time" fiduciary status for making investment lineup suggestions under which they accept fiduciary status only at the time of the specific investment communication with participants, but are disclaiming an ongoing fiduciary duty to monitor the propriety of those investments. Other recordkeepers are acknowledging fiduciary status with respect to participant call-center investment and rollover advice. On the other end of the spectrum, some

recordkeepers maintain that all of their interactions with plan fiduciaries and participants are non-fiduciary in nature. Some recordkeepers are making changes to agreements via negative consent (i.e., unless the plan sponsor responds, it will assume the plan sponsor consents to the change). It is critical that plan sponsors understand the position that their recordkeeper is taking and ensure that their recordkeeper acknowledge its fiduciary status if it is acting as a fiduciary. Plan sponsors should review investment education materials, rollover and distribution forms, call center scripts as they relate to rollovers, and other recordkeeping related processes to be sure they reflect the requirements of the Fiduciary Rule.

- **Review agreements with your investment advisor**. Plan fiduciaries must understand the services that are being provided by the plan's investment advisor. Plan sponsors should have a clear understanding whether their advisor is acting either as a broker or as a registered investment advisor ("RIA"). If the advisor is acting as a broker, and the advisor is directly or indirectly receiving commissions, 12b-1 fees, trailing payments, asset-based revenue sharing, solicitor's fees, or payments from custodians, as a result of investment or insurance recommendations, the payments would be prohibited transactions, unless an exemption applies. If the advisor is an RIA, ensure that it has acknowledged its fiduciary status in writing.

- **Continue to monitor fiduciaries**. If a service provider has assumed fiduciary status or expanded the scope of its services so that they are fiduciary in nature, the plan sponsor has an increased burden to monitor its performance, because of the duty to monitor imposed by ERISA. Any subsequent notification from that service provider that purports to limit or disclaim future fiduciary responsibility should be reviewed carefully. If a service provider determines it will not be a fiduciary and is not going to continue to provide certain services such as distribution or rollover guidance, a plan sponsor should consider the impact of the loss of these services on participants, and should consider other options for assisting participants when these events arise.

Conclusion

Even though the Fiduciary Rule is being implemented on June 9, the DOL's review is ongoing. The DOL plans to request information from the public as a part of its continued examination of the Fiduciary Rule, and may consider further delays or revisions based on the responses it receives. We continue to monitor these developments.

Please contact the author of this Alert or any member of the Dickinson Wright employee benefits practice team if you have any questions about the Fiduciary Rule, need assistance in developing appropriate policies and procedures, or in reviewing service provider agreements.

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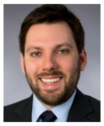

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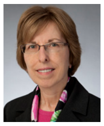

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