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EMPLOYEE BENEFITS LAW
MAY 2017

Update On DOL Fiduciary Rule

As is generally the case with other recent and pending federal regulations, the ultimate fate of the United States Department of Labor's revised rule on who is considered a "fiduciary" for retirement plan, IRA, HSA and other purposes is uncertain. The uncertainty stems from, among other things, controversial aspects of the revised rule and President Trump's direction to the Department of Labor (DOL) to re-evaluate the rule.

In the latest twist, although the revised rule remains under review and could be modified or even repealed, Labor Secretary Alexander Acosta announced on May 22, 2017 that the new fiduciary rule will become effective on June 9, 2017. At the same time, the DOL announced a temporary enforcement policy related to the new fiduciary rule as well as to various related prohibited transaction exemptions. The temporary enforcement policy generally provides that the DOL will not pursue claims against fiduciaries who are working in good faith to comply with the fiduciary rule and the applicable exemptions. This temporary enforcement policy is scheduled to expire on January 1, 2018.

Background

Final regulations issued by the DOL in 2016 broaden the scope of individuals and entities that will be deemed to be fiduciaries (under the Employee Retirement Income Security Act and the Internal Revenue Code) as a result of the circumstances under which the individual or entity may be providing investment advice. The final regulations were scheduled to be effective as of April 10, 2017.

Broadening the scope of fiduciary status could change the behavior of some providers who may be unwilling to accept the risks of potential liability for investment losses allegedly caused by their advice or to accept the potential for decreased future income that could result from compliance with certain conflict of interest prohibitions imposed on fiduciaries. For example, to avoid the potential negative consequences of being a fiduciary, some providers may be less willing to provide investment recommendations to retirement plan participants who are responsible for directing the investment of their individual accounts under an employer-sponsored plan. Some retirement plan participants, therefore, could be left without plan-provided counseling on plan investment strategy and plan investment selection.

To address this and other related concerns, President Trump directed the DOL to examine whether the revised fiduciary rule may adversely affect the ability of Americans to gain access to retirement information and financial advice. The DOL subsequently delayed the effective date of the new fiduciary rule from April 10, 2017 to June 9, 2017. The effective date for the full implementation of changes to related prohibited transaction exemptions is now January 1, 2018 (although parties may rely on the revised exemptions prior to that date).

Temporary Enforcement Policy

During the interim period between June 9, 2017 and January 1, 2018, the DOL will not pursue claims against fiduciaries who are working diligently and in good faith to comply with the fiduciary rule and applicable exemptions, or treat those fiduciaries as being in violation of the fiduciary rule and exemptions. During that period, advisors must provide advice that is in the "best interest" of the participant/investor, generally meaning that the advice must meet a professional standard of care and must be based on the interests of the participant/investor, rather than on the competing financial interest of the advisor. In addition, the advisor must not make any misleading statements about investment transactions, compensation or conflicts of interest,

must not charge more than reasonable compensation, and (if applicable) must seek the "best execution" for any investment transaction decisions.

Recommendations for Plan Sponsors

Assuming that the fiduciary rule and the revised prohibited transaction exemptions will survive in some form, plan sponsors (and other plan fiduciaries) that have not already done so should undertake an assessment of the investment education and investment advice services provided to the plan, to plan fiduciaries and to plan participants. To the extent service providers are providing more than general investment education, the parties should be making good faith efforts to modify the service arrangements, as necessary, to comply with the new and revised rules. For example, if the assessment reveals that participants are offered access to individualized investment advice, and if the advisor is compensated (directly or indirectly) by the plan or by participants for that advice, then the advisor should (among other things) acknowledge the advisor's fiduciary status and provide details regarding how the advisor complies or intends to comply with the new and revised conflict of interest rules.

Plan sponsors and fiduciaries should be prepared for requests initiated by some advisors to change the terms of existing arrangements between the plan and the advisor. Some advisors will want to limit their roles to providing non-specific investment education. Others may acknowledge their roles as fiduciaries, but seek higher fees and contractual limitations on liability to offset the higher risks and lower income potential associated with fiduciary status.

Regardless of the final form of the fiduciary rule and the revised prohibited transaction exemptions, plan sponsors and fiduciaries also should ensure that employees of the plan sponsor are not providing investment advice to plan participants, and should review service provider communications to participants (including communications on distributions and rollovers) to ensure the communications are consistent with each provider's status as a fiduciary or non-fiduciary. These are in addition to the on-going fiduciary responsibilities to (among other things) (i) identify and understand all sources and uses of income generated by the assets of the plan, (ii) ensure all direct and indirect fees and expenses paid by the plan or participants are reasonable, (iii) identify and eliminate situations that could present conflicts of interest, and (iv) monitor the performance of all plan service providers (making changes as appropriate).

If you have any questions about this memorandum, please contact Stephen C. Daley, any of the attorneys in our Employee Benefits and Executive Compensation Practice, or the attorney in the firm with whom you are regularly in contact.

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