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The Delayed Fiduciary Rule May Have Already Changed the Landscape

By Sheila Ninneman

In April 2016, the Department of Labor (DOL) finalized extensive changes to the definition of a "fiduciary" applicable to both individual retirement accounts (IRAs) and ERISA-governed plans, to be effective as of April 10, 2017. The broader definition affects a much larger group of institutions and advisors who could now be considered fiduciaries, because it expands the scope of actions that are considered fiduciary acts. The newly minted fiduciaries who do not follow the basic standards of fiduciary conduct may suddenly find themselves personally liable to restore any losses to a plan or IRA or to restore any profits made through improper use of a plan's or IRA's assets resulting from their actions. Exemptions from the self-dealing prohibited transactions in ERISA and the Internal Revenue Code issued with the final regulations include requiring individuals and institutions affected by the expanded definition to enter into a "Best Interest Contract" with their customers and to disclose their business structure and compensation policies in connection with conflicts of interest posed by any of their fees or compensation practices.

Implementation of the fiduciary rule change, however, was knocked off its course when on February 3, 2017, President Trump issued a memorandum directing the DOL to:

- Examine the new fiduciary rule to determine whether it adversely affects access to retirement and financial advice;
- Prepare an economic and legal analysis concerning the impact of the fiduciary rule; and
- Rescind or revise the fiduciary rule following the appropriate review procedures.

On March 1, 2017, in response to the President's memorandum, the DOL proposed to delay the April 10, 2017 applicability date for the new fiduciary rule for 60 days. Eight days later, the DOL issued Field Assistance Bulletin (FAB) No. 2017-01 regarding a temporary enforcement policy.

The FAB provides that the DOL will not take enforcement action for noncompliance with the fiduciary rule from April 10, 2017 to the date that a final rule extending the applicability date is published. In addition, if the DOL does not issue a final rule regarding an extended applicability date, the DOL will not take any enforcement action for noncompliance, provided the rule's requirements are met within a "reasonable" period after the publication of the decision not to delay.

Four weeks later, the IRS announced a nonenforcement policy with regard to the assessment of excise taxes in connection with prohibited transactions impacted by the DOL's temporary enforcement policy. On April 4, 2017, the DOL extended the applicability date for the fiduciary rule to June 9, 2017. The deadline for comments for consideration by the DOL in its study of the rule (as required by President Trump's February 3rd memorandum) is April 17, 2017. Depending on the result of the study, the DOL will either allow the rule to take effect on June 9, 2017, issue a further delay of its applicability date, propose to modify the fiduciary rule, or withdraw it completely.

In a 2016 article entitled "DOL New Fiduciary Regulation: Seven Action Items for the Next Year", we recommended that plan sponsors consider preparing for the rule's April 2017 applicability date. Given that many plans sponsors and investment advisors have already reviewed and made changes to their contracts and communications in light of the new fiduciary rule, it appears that the spirit and principles of the rule may have already become best practices in the world of ERISA-governed plans and IRAs. Moreover, it is still possible that the new rule will become effective June 9, 2017, or some other future date.

In that regard, our recommendations have changed little since April 2016:

1. Review fiduciary "best practices" in general, including the duty to monitor the plan's service providers;

2. Understand when service providers are and are not acting as fiduciaries – just because an advisor is a fiduciary for these assets or those services, doesn't mean they are fiduciaries as to the plan or its assets on a global basis;

3. Review any agreements or correspondence from service providers, particularly investment advisors, for statements regarding their fiduciary status, and note if changes (in response to the impending new rule) were made by providers, including potentially higher fees;

4. Review any educational materials provided by investment advisors to ensure that no inadvertent recommendations are being made;

5. Review any communications to plan participants regarding rollovers and distributions to ensure that no particular recommendations are inadvertently being made; and

6. Review who the employees are (and how they are compensated) who regularly communicate with plan participants and beneficiaries, and educate them about avoiding any situation that would suggest that they were giving investment advice.

Until we learn otherwise from the DOL in the coming two months, the fiduciary rule's requirements around the expanded fiduciary definition and impartial conduct, including prohibited transaction exemptions, will be fully applicable on June 9, 2017. Compliance with many of the disclosures and supervision policies, as well as executing a Best Interest Contract, will continue to have an effective date of January 1, 2018.