Retirement Times

NEWS AND UPDATES FOR RETIREMENT PLAN SPONSORS AND FIDUCIARIES

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"Conflict of Interest" or "Fiduciary" Rule: A Plan Sponsor's Q&A – Part II

After years of proposed regulation issuance, comment periods, drafting and anticipation, the Department of Labor (DOL) finally published final guidance regarding the definition of "fiduciary" on April 8, 2016. It is important for plan sponsors to understand the reasoning behind, and the scope of, the final rules. This Q&A is meant to assist you in understanding the regulations and how they pertain to you, your plan and your participants.

Q: The proposed rules seemed to have a heavy impact on participation education. Did that carryover to the final rules?

A: The new rules explicitly state that plan sponsors and service providers may provide general plan information, general financial, investment and retirement information, conceptual asset allocation models and interactive investment tools without becoming a fiduciary. The proposed rules prohibited use of specific investments in plans being used in models or interactive tools if the provider wished to avoid fiduciary status. The new final rules allow for identification of specific investments if the following conditions are met:

- The models/tools only identify designated investment alternatives (DIAs) in the plan that are monitored by fiduciaries that are independent from the individual/organization that developed/marketed the investment alternative;
- Other DIAs, with similar risk/return characteristics, that are not used in the model/tool are identified;
- A statement that those other DIAs are similar; and
- Identification of where participants/beneficiaries can get additional information regarding those similar DIAs.

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Q: Are my employees (employees of the plan sponsor) considered fiduciaries under these rules?

A: Typically, no. If the employees aren't receiving a fee (not considering their wages) for providing either of the below-listed recommendations, they will not be considered a fiduciary under the rules.

1. Work in Human Resources or Finance departments and provide recommendations to the plan committee; or
2. Communicate information regarding the plan and/or distribution options to participants.

Q: When will a plan's service provider be considered a fiduciary under the new rules?

A: The new rules sweep additional individuals and organizations within the definition of fiduciary due to the types of activities that will now be considered recommendations leading to "investment advice." Under the new rules, many sales and marketing actions will be considered fiduciary in nature. That said, there are a few common instances where communication between the sponsor and the service provider will not be fiduciary in nature. These include (but are not limited to):

- **Requests for Proposals (RFPs)** – Service providers may provide investment lineups if they are responding to an RFP for services. This is common with RFPs for recordkeeping services, and occasionally with RFPs for advisory services. The proposed investment lineup may be based on plan size, or the plan's current investment menu. However, for this type of communication to avoid straying into the fiduciary realm the service provider must disclose any financial interest it may have (if any) in any of the investment. This is common if the recordkeeper is also a fund company with proprietary offerings.
- **Independent Plan Fiduciaries** – Service provider recommendations that are made to plan fiduciaries, independent of the advisor, may also not give rise to fiduciary status. In this instance, the independent fiduciary must possess "financial expertise" which is considered present if they are a registered investment advisor, or holds/manages/controls (in the aggregate) at least $50 million in assets. In these instances the advisor must make certain determinations regarding the independent fiduciary, in addition to the fact that they possess financial expertise.
- **Marketing** – As long as a service provider does not market an investment platform as meeting individualized needs of a plan, and the provider states that it is not providing impartial advice/acting in a fiduciary capacity, the marketing of the platform is not a fiduciary action.

Q: Will the new rules impact my (plan sponsor) relationship with my plan's service providers?

A: The answer depends upon the service providers' current engagements with the plan and plan sponsor. For service providers presently serving in a fiduciary capacity, little may change. It is possible that they move from a broker-dealer engagement to a registered investment advisory relationship to make the engagement cleaner and more transparent. But that likely will not impact the services, compensation or fiduciary nature of the engagement.

Service providers receiving "conflicted," or uneven compensation (such as commissions, revenue sharing and 12b-1 fees) must decide if they wish to continue under that design, and meet the BIC Exemption rules, in which case you will receive a great deal more disclosure and the advisor will have to meet more arduous requirements (duties of prudence and loyalty, disclose their conflict of interest policies, etc.) than those to which they are accustomed. Or they may alter their engagement by entering into a fee-for-service RIA engagement. In such an engagement the fees (either a flat dollar fee or a flat percentage of assets based fee) will not vary depending upon the investments recommended/selected.

Q: I've heard about co-fiduciary status. Am I responsible for all these new co-fiduciaries on the plan?

A: Recently, representatives of the DOL at an industry conference made informal comments that they believed that co-fiduciary responsibilities would likely extend to individuals/organizations that become fiduciaries by way of tripping the new rules. One such statement intimated that a plan sponsor may even have to monitor service provider participant calls in order to best meet their fiduciary responsibilities. The full implementation of the new rules is still in its infancy and these were informal comments, so it bears watching to see just how far plan sponsor co-fiduciary responsibility will extend.

In Conclusion

The retirement landscape evolved greatly over past decades. Plan type, services offered, investments made available, and fiduciary concerns shifted considerably since the inception of ERISA in 1974. The new rules issued by the DOL have been expected, reviewed and debated for well over five years. In fact, in June Congress passed resolutions to nullify the rules (with Presidential veto expected) and nine organizations filed suit against the DOL and the Secretary of the DOL arguing the rules are overbroad and unconstitutional. The rules will become effective in stages (April of 2017 and January of 2018), and it bears watching to see how additional guidance from the DOL will impact the responsibilities of plan sponsors. Regardless, these rules will have a profound impact on plan fiduciaries, plans and participants. They are intended to, and should, result in a higher level of responsibility being placed on those individuals and organizations positioned to impact or influence participant ability to save for their retirement. As a result, your mission is to keep abreast of any additional guidance and developments.

ERISA Update

At a recent Western Pension Benefit Council/ASPPA Conference, the new Fiduciary Rule was reviewed. The new Fiduciary Rule (definition) has come under significant criticism by many industry groups and Congress, some of whom brought litigation to redefine and suspend the effect of this regulation. To date, the DOL shows no intent to revise their position substantially. They indicate that the new rule is structured solely to protect participants and establish a high standard of care for fiduciary behavior. Regulators felt that the former definition of fiduciary was too broad and not as protective of participants as intended. In addition, the new Fiduciary Rule has been extended to include IRA products. The DOL spokesperson put to rest rumors that this regulation has any impact on plan sponsor fiduciaries.

A new updated 5500 form may be online in 2019, but could be delayed based on comment activity. The new form will provide increased transparency on plan investments. Also, Schedule C (Form 5500) fee disclosures will be revised to be more commensurate with ERISA Section 408(b)(2) data and more "mineable" for purposes of fee comparisons. The DOL suggested plan sponsors conduct fee reasonable determinations more frequently than is currently typically practiced.

Previous guidance regarding appropriateness of socially responsible investments clarified that there is no intended prohibition on these investments, but they should not be implemented if they could negatively impact risk/return considerations or compromise economic interest of the plan/participants in any way. In essence, the DOL suggests that all else being equal (fees, risk/return metrics, etc.) social responsibility is an acceptable tie-breaker.

Lastly, the DOL appears open to expanding guidance on self-correction of late deferral contribution errors under the Voluntary Fiduciary Correction program, though such guidance is not imminent.

Establishing Your Retirement Plan Committee Charter

As retirement plan consultants we strongly encourage our clients to formally establish a retirement plan committee. The establishment of a committee may be formalized by adopting a Committee Charter. This document helps to protect the named fiduciary, typically the Board of Directors, by delegating certain identified fiduciary responsibilities to the committee. It protects committee members by defining the specific duties for which they are responsible. Furthermore, it protects the participants as it provides for orderly and prudent governance of the plan designed for the exclusive best interests of the participants and their beneficiaries, as required by ERISA Section 404(a).

When drafting your Committee Charter consider the following discussion points:

- Determine the purpose of the Committee (investment related, administrative issues, or both).
- Determine how Committee members are selected (who should/should not be members).
- Is there an ideal number of Committee members?
- What topics should the Committee cover (e.g., review investments, review IPS, identify ongoing participant needs/education, review plan design provisions, review plan/participant demographics vs. objectives, consider trends and legislation which may impact the plan, review and benchmark fees)?

The recent stock market turmoil combined with our litigious society can generate concern on the part of many fiduciaries regarding their potential exposure. Taking a casual approach to plan governance, without a formalized Committee Charter, may not help insulate the company or the plan fiduciaries from participants' complaints or lawsuits. Our team is fully prepared to assist you with any questions you may have.

Summary Plan Description Reminder

A summary plan description (SPD) describes the key provisions of an employer's retirement plan and participant rights. SPDs must be disseminated to newly eligible participants within 120 days after a new plan is established or within 90 days after a participant becomes eligible to participate in an existing plan. In addition, SPDs must be disseminated to all participants once every five years unless there have been no amendments to the plan during that period. The DOL issued final regulations on electronic delivery that indicate an SPD can be delivered through an electronic medium if certain requirements are satisfied.

COMMUNICATION CORNER: Key Dates as You Approach Retirement

This month's memo is a timeline of key dates as participants reach retirement age.

Please call or email your Lebel & Harriman Retirement Plan Team if you have questions or if we can be of further assistance.