June 5, 2017 | Employment & Employee Benefits, Insights

DOL Delays Enforcement of Fiduciary Rule

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The Department of Labor fiduciary rule (the "Fiduciary Rule") will come into effect June 9, 2017. The Fiduciary Rule will apply fiduciary standards and impose certain requirements upon advisers to ERISA plans and individual retirement accounts, defined contribution plans and defined benefit plans.

However on May 22, 2017, the DOL issued Field Assistance Bulletin 2017-02 ("FAB 2017-2"), announcing that during a transition period from June 9, 2017 until 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 related exemptions or treat those fiduciaries as being in violation of the Fiduciary Rule and related exemptions. The DOL explained that its general approach to implementation will emphasize assisting plans, plan fiduciaries, and financial institutions with compliance, rather than citing violations and imposing penalties.

In conjunction with FAB 2017-2, the DOL also issued a FAQ addressing its approach to specific compliance questions and Fiduciary Rule requirements during the transition period, including the following:

- Only limited conditions will apply to financial institutions and advisers seeking to rely upon the Best Interest Contract Exemption and Principal Transactions Exemption during the transition period. Specifically, such financial institutions and advisors will only be required to comply with the DOL's impartial conduct standards in dealing with retirement plans and consumers. These standards require that the adviser act in the "best interest" of its customer, which includes defined duties of prudence and loyalty; charge no more than reasonable compensation; and make no misleading statements about investment transactions, compensation, and conflicts of interest.

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- Upon the full effectiveness and enforcement of the Fiduciary Rule, advisors who use an affiliated broker-dealer would be required to comply with Prohibited Transaction Exemption 86-128, which generally requires a written authorization executed in advance. However, if the authorization and reporting package is sent to existing clients before June 9th, negative consent is permitted. The use of the affiliated broker-dealer must also meet the impartial conduct standards.
- Robo-advice providers that receive only a "level fee" may rely on the Best Interest Contract Exemption during the transition period, subject only to the impartial conduct standards. Under that exemption, "level fee" refers to a fixed percentage of the value of the assets or a set fee that does not vary with the particular investment recommended, as opposed to a commission or other transaction-based fee.
- An adviser that only develops and provides non-client specific model portfolios to unaffiliated advisers or broker-dealers, and does not receive any compensation directly from end clients for use of the model, will not generally be subject to the Fiduciary Rule. The DOL would not consider such a model developer as making recommendations to the end-client retirement plan or investor. Assuming the model developer does not control how the adviser charges fees to end clients, that conclusion would be the same even if the investment adviser implementing the model pays a fee to the model developer and then is separately reimbursed by a plan, plan participant or IRA (e.g., the investment adviser's invoice to the plan, participant or IRA includes a separate line item for model portfolio service fee).

Compliance with other conditions of the Fiduciary Rule and related exemptions, such as requirements to make specific disclosures and representations of fiduciary compliance in written communications with investors, will not be enforced until January 1, 2018. The full FAQ is available here: https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-transition-period.pdf.

The DOL further stated in FAB 2017-2 that it may make additional changes to the Fiduciary Rule in response to a February 3, 2017 memorandum from President Trump to the Secretary of Labor, relating to the impact of the Fiduciary Rule on the ability of Americans to gain access to retirement information and financial advice. The DOL also stated that it intends to issue a Request for Information seeking additional public input on specific ideas for possible new exemptions or regulatory changes based on recent public comments and market developments.

While the scope of the Fiduciary Rule and related exemptions remains in flux pending the

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DOL's review, advisors to retirement plans and investors should still review their compliance policies and procedures to ensure that they are in compliance with the impartial conduct standards and are otherwise working "diligently and in good faith" to comply with the Fiduciary Rule during the transition period.

Please contact a member of Rich May's investment management practice group regarding any questions you may have relating to the implementation of the Fiduciary Rule during this transition period or otherwise.

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