DOL Fiduciary Rule – Still Very Much Alive

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On November 29, 2017, the Department of Labor (the DOL) released a final rule (the "final rule") extending the transition period for compliance with certain requirements of the Conflict of Interest Rulemaking package (commonly known as the "Fiduciary Rule") by 18 months to July 1, 2019.[1] While certain requirements of the Fiduciary Rule have been delayed, the expanded definition of a fiduciary (with respect to those who render investment advice for a fee or other compensation) and the standards to which such fiduciaries are to be held ***are in effect***. The DOL is using the extended transition period to further review compliance burdens and, potentially, introduce modifications to the Fiduciary Rule. During the transition period, the DOL is requiring providers to exercise good faith compliance with the Fiduciary Rule.

When the Fiduciary Rule was first published by the DOL on April 8, 2016, it significantly broadened the definition of who is a fiduciary based on rendering investment advice for a fee or other compensation. Importantly, under the Fiduciary Rule, in order for an advice provider to be held to a fiduciary standard, investment advice does not need to be on a regular basis — it only has to be one factor in the decision-making (rather than the primary basis for an investment decision, as was required under the 1975 rules). The Fiduciary Rule also now covers advice provided directly to individual investors, including advice with respect to IRA rollovers and IRA investments. This broadened definition of an investment advice fiduciary has the impact of subjecting many advisors who were not previously considered to be investment advice fiduciaries to a fiduciary standard of conduct. Perhaps the most visible result of the new definition is that many retirement plan recordkeepers have been forced to review their practices to determine whether the services they provide are now fiduciary in nature, and advisors to IRAs now find themselves subject to ERISA's fiduciary standards.

Under ERISA, fiduciaries are prohibited from using retirement assets for their own account (self-dealing) and from receiving any consideration from third parties in connection with a transaction involving plan assets (kickbacks). In order to allow fiduciaries to continue existing compensation practices, especially those fiduciaries receiving variable rate compensation (compensation that changes based on the investment advice rendered), the DOL introduced the Best Interest Contract (BIC) Exemption, under which advisors must:

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- acknowledge fiduciary status;
- adhere to impartial conduct standards (act in the best interest of the retirement account holder, receive only reasonable compensation, and avoid any materially misleading statements);
- adopt policies and procedures to meet the impartial conduct standards, disclose fees and other compensation, and;
- in the case of investment advice to IRA account holders, enter into a contract with the account holder agreeing to adhere to impartial conduct standards.[2]

A prohibited transaction exemption with substantially similar requirements for fiduciaries entering into transactions with retirement account holders involving the advisor's proprietary investments (the "Principal Transactions Exemption") was introduced alongside the BIC Exemption to allow fiduciaries to continue to engage in such transactions.

The Fiduciary Rule was originally to become applicable on April 10, 2017, with a transition period for compliance with the written requirements of the BIC Exemption and Principal Transactions Exemption (virtually all substantive requirements other than adherence to impartial conduct standards) until January 1, 2018. These written requirements generate significant documentation requirements for advisors and, through the written contract requirement, provide IRA account holders a previously unavailable mechanism for filing a lawsuit against advisors who breach their fiduciary duties by failing to adhere to impartial conduct standards.[3] When the Fiduciary Rule was published, voices in the industry expressed substantial concern regarding the financial costs and labor burdens of compliance with the rule. These concerns were brought to the attention of the new administration and culminated in a memorandum issued by President Trump on February 3, 2017. The memorandum directed the DOL to re-examine the Fiduciary Rule to determine whether it may adversely affect the ability of Americans to gain access to retirement information and financial advice, and if such adverse conclusions were reached, consider revising or rescinding the new Fiduciary Rule.

The analysis of the Fiduciary Rule is an ongoing process for the DOL. A primary focus has been on the burdens associated with compliance with the written requirements for the BIC Exemption, especially as those requirements relate to IRA advisors who previously were not subject to ERISA's fiduciary standards. In an effort to provide additional time for review, the DOL delayed the applicability date of the new Fiduciary Rule by 60 days, resulting in the rule becoming applicable on June 9, 2017. Near the end of the 60-day delay, the DOL published a Field Assistance Bulletin (2017-02) providing that, through the transition period ending on January 1, 2018, the DOL would not pursue claims against fiduciaries working diligently and in good faith to comply with the fiduciary duty rule and exemptions.

With January 1, 2018 rapidly approaching, and an analysis of the impacts of the new Fiduciary Rule not yet complete, the DOL published the final rule extending the transition period for 18 months (until July 1, 2019). Although the final rule has been commonly referred to as a "delay" of the new Fiduciary Rule, the scope and impact of the delay is limited. The primary impacts of the delay are as follows:

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- Compliance with the written provisions of the BIC Exemption (including entering into a contract with IRA holders) are delayed until July 1, 2019.
- Compliance with the written provisions of the Principal Transactions Exemption are delayed until July 1, 2019.
- Amendments to Prohibited Transaction 84-24 (which will, in effect, require advisors who sell variable annuities and indexed annuities to satisfy the conditions of the BIC Exemption) are delayed until July 1, 2019.
- The DOL will continue to apply a "good faith" standard to compliance through July 1, 2019.

The 18-month delay has garnered significant attention because the delayed provisions provide a reprieve for advisors to IRAs from having to finalize contracts with IRA account holders by July 1, 2019 (and simultaneously provide a reprieve from the potential of a breach of fiduciary lawsuit by an IRA holder until July 1, 2019). Notably, however, the final rule does ***not*** delay the expanded definition of a fiduciary as anyone who renders investment advice for a fee or other compensation. This means that many service providers, including IRA advisors, are now subject to a fiduciary standard of conduct and must undertake good faith efforts to comply with the new Fiduciary Rule, including adherence to impartial conduct standards when rendering investment advice.

For sponsors and service providers to qualified plans in particular, the new Fiduciary Rule is very much alive, and its impacts are visible now. Many plan sponsors have already participated in discussions with plan recordkeepers to determine whether the recordkeeper's communications with participants constitute investment advice under the new Fiduciary Rule. These discussions have resulted in amendments to recordkeeping agreements to either avoid communications giving rise to fiduciary investment advice or, in the alternative, acknowledge fiduciary status. In any event, as of the applicability date of June 9, 2017, service providers (including recordkeepers) who engage in conduct constituting fiduciary investment advice under the Fiduciary Rule are considered fiduciaries. As such, service providers must now:

- understand the scope of the new definition of fiduciary investment advice;
- determine whether any services being provided constitute fiduciary investment advice; and
- to the extent any services constitute fiduciary investment advice, undertake good faith efforts to comply with fiduciary standards of conduct and impartial conduct standards.

Finally, while IRA advisors will not be required to meet the BIC Exemption's contract requirements prior to July 1, 2019, they must still undertake good faith efforts to comply with the impartial conduct standards of the BIC Exemption. Thus, while IRA advisors will not have a written contract with IRA account holders, the IRA advisor must still undertake good faith efforts to act in the best interest of the retirement account holder, receive only reasonable compensation, and avoid any materially misleading statements.

For more information on the new Fiduciary Rule, please contact the Trucker Huss attorney with whom you normally work. We will continue to provide you with updates as the DOL analysis of the new Fiduciary Rule continues.

Footnotes follow on next page

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[1] On November 29, 2017, the DOL released a final rule extending the transition period for compliance with certain requirements of the Best Interest Contract (BIC Exemption) and the Principal Transactions Exemption to the Fiduciary Rule. The final rule also delays the applicability date of amendments to Prohibited Transaction Exemption 84-24.

[2] For certain IRA investment advisors who receive "level" compensation, no such contract is required. See more information here. Please note that such fiduciaries are still subject to the impartial conduct standards.

[3] As originally drafted, the Best Interest Contract Exemption prohibited the use of arbitration provisions in written contracts with retirement investors. In Field Assistance Bulletin 2017-3, the DOL announced that it will no longer enforce the anti-arbitration requirement of the Best Interest Contract Exemption. We anticipate this will result in arbitration requirements in most contracts.

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