



ERISA GROUP BENEFITS NEWSLETTER

May 2016

Department of Labor Final Fiduciary Rule: How Does The Fiduciary Rule Affect Plan Sponsors

On April 8, 2016, the Department of Labor (DOL) issued the long-anticipated final fiduciary regulations (Fiduciary Rule). The Fiduciary Rule significantly broadens the definition of who is an investment fiduciary under the Employee Retirement Income Security Act of 1974, as amended (ERISA) and the Internal Revenue Code (Code). While the Fiduciary Rule is primarily targeted at investment advisors and other providers of retirement plan products and services, it will also affect plan sponsors.

Plan sponsors, employers, retirement plan committees and other fiduciaries should understand how the Fiduciary Rule will affect them and the plan service provider relationships they have. This article focuses on some key issues and matters under the Fiduciary Rule that are of importance to plan sponsors, employers, retirement plan committee members and other internal fiduciaries.

When is the Fiduciary Rule Effective?

The Fiduciary Rule is effective June 7, 2016. However, the requirements of the Fiduciary Rule do not apply until April 10, 2017, and January 1, 2018, with respect to some requirements. These delayed applicability dates should provide investment advisors and other services providers with ample time to review their business models and make necessary changes.

Who is a Fiduciary?

ERISA and the Code define fiduciary to include any person who (1) exercises any discretionary control with respect to the management of the plan or exercises any authority or control with respect to the management or disposition of the plan's assets or (2) has any discretionary authority or discretionary responsibility in the administration of the plan. The Fiduciary Rule does not change this part of the definition of fiduciary.

In addition, ERISA and the Code define fiduciary to include any person who renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of the plan, or has any authority or responsibility to do so. This part of the definition of fiduciary was further limited by a multifactor test imposed by DOL regulations issued in 1975. The Fiduciary Rule changes the DOL regulations issued in 1975.

Under the Fiduciary Rule a person is a fiduciary on account of rendering investment advice with an ERISA plan or an IRA if the person provides to a plan, plan fiduciary, plan participant or beneficiary, IRA or IRA owner the following types of advice for a fee or other compensation, direct or indirect:

- a recommendation as to the advisability of acquiring, holding, disposing of or exchanging, securities or other investment property, or a recommendation as to how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA; or
- a recommendation as to the management of securities or other investment property, including, among other things, recommendations on investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, selection of investment account arrangements (e.g., brokerage versus investment advisory); or recommendations with respect to rollovers, transfers or distributions from a plan or IRA, including whether, in what amount, in what form and to what destination such a rollover, transfer or distribution should be made.

In order to be an investment fiduciary, the recommendation must be made either directly or indirectly (through or together with an affiliate) by a person who:

- represents or acknowledges that it is acting as a fiduciary within the meaning of ERISA or the Code;
- renders the advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is based on the particular investment needs of the advice recipient; or
- directs the advice to a specific advice recipient or recipients regarding the advisability of a particular investment or management decision with respect to securities or other investment property of the plan or IRA.

What is a Recommendation?

For purposes of the Fiduciary Rule, a "recommendation" means a communication that, based on its content, context and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action. The determination of whether a "recommendation" has been made is an objective rather than a subjective inquiry. The definition of a "recommendation" is very broad and is intended to make more service providers investment fiduciaries, unless one or more exceptions apply.

The Fiduciary Rule helpfully identifies a number of different types of communications that do not constitute a "recommendation" if the communications otherwise satisfy the requirements of the Fiduciary Rule. These communications include participant investment education and providing general plan information.

Action Items for Plan Sponsors

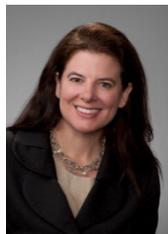
The following is a list of action items that plan sponsors and other internal fiduciaries should take to help ensure that service provider agreements and arrangements, participant communications and fiduciary governance structure do not run afoul of the Fiduciary Rule:

- Conduct fiduciary training for retirement plan committee members and other internal investment fiduciaries, with a focus on fiduciary duties and responsibilities affected by the Fiduciary Rule.
- Review all plan education materials, investment education materials, required plan disclosures and plan information that is provided or will be provided to participants.
- Review investment advice programs offered to participants, if any.
- Ask current and prospective plan service providers if they will be making changes to the services they provide as a result of the Fiduciary Rule.
- Review investment advisory agreements and other service agreements with current investment advisors, paying particular attention to fiduciary status provisions, indemnification provisions, limitations of liability and insurance provisions.
- Be prepared for requests from service providers for amended contracts.
- Review plan governance structure.

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