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What Plan Sponsors Need to Know About the New Fiduciary Regulation and Related PT Exemptions

04.08.16

What Plan Sponsors Need to Know Now

On Tuesday the U.S. Department of Labor released a new definition of what constitutes a fiduciary to a retirement plan. While the new guidance clarified that certain activities meeting the requirements of investment education and actions by employees on behalf of a plan sponsor within the scope of their role as an employee, are not providing fiduciary advice, but there are many changes for retirement plans and the entities that provide services to those plans. Welfare benefit plans purchasing insurance contracts do not come within this regulatory package as fiduciary acts, but many other service providers to plans will still be potentially caught if they are involved in investment advice as defined in the package, annuity purchases, or insurance contracts for plans.

What Employers Need to Think About Now:

At this time employers need to think about the following items.

- The rule is generally applicable April 10, 2017. There are some transition rules on some aspects of the package, but it generally applies to transactions on and after April 10, 2017.
- Between now and April 10, 2017 employers may be receiving a number of additional disclosures related to their retirement plans from the retirement plan service providers and advisors. The plan fiduciaries need to review these and include such review documentation in their fiduciary procedures. In the past when other service providers were required to make disclosures to plan fiduciaries, the U.S. Department of Labor's audits followed up when auditing plan sponsors to ensure not only that the fiduciaries received the disclosure but that they documented their review.
- Plan fiduciaries should review all of the service provider relationships for each plan and determine from which entities it should expect disclosures and then monitor to ensure that they receive any disclosures so that they are ready for any potential future audits.
- Some of the disclosures plan sponsors will receive on their plans will include changes to their service agreements that will be required by the new exemptions. The new exemptions generally require or permit these to be agreed to via negative consent which means if you receive them and you do not object within 30 days, the changes will automatically go into effect. When those items are received they should be reviewed by the plan fiduciaries and the review documented. While some agreement changes are mandated by the regulation, plan sponsors and plan fiduciaries will need to monitor these negative amendments for additional changes because the changes from this package are likely to drive economic changes in the arrangements.
- Plan fiduciaries should retain documentation of all of their review and all of the disclosures they receive because we learned with one of the last new disclosure mandates that it was not just a mandate a disclosure by the service provider, but to the Department of Labor on audit expected to see these when they reviewed or audited plans for compliance with ERISA.
- Plans sponsors are likely to see more stratification with respect to what services are provided to what size plans and what platforms may be available to different size plans.
- Plan sponsors may want to consider plan design changes to facilitate former employees keeping their funds in a retirement vehicle when they retire if the market evolves and will not accept rollovers below a fixed dollar fee as a business matter as suggested in some early articles on the market impact.
- Plan sponsors should review their fiduciary training for additional considerations they should be considering and documenting as part of their fiduciary obligations to the ERISA plan.

These are a few of the first initial considerations an employer should be thinking about now with respect to their retirement plans as the new fiduciary rule goes into effect. More will be coming on this topic as it impacts many service providers in the employee benefit plan market as well as plans.