

Applicability Date for DOL Conflict of Interest Rule is Looming

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As you may be aware, the Department of Labor's (DOL's) Conflict of Interest rule expands the scope of the definition of "fiduciary" under ERISA and the Code to cover more classes of financial advisers. While the final rule became effective on June 7, 2016, it will become applicable to persons who provide investment advice, for a fee, with respect to employee benefit plans and other tax-advantaged accounts, such as individual retirement accounts and health savings accounts (collectively, IRAs), as of June 9, 2017. This means that such advisers will be considered to be fiduciaries (under DOL regulations and jurisdiction) and, therefore, could implicate (and be liable for the violation of) the prohibited transaction rules under ERISA and the Code as of such date. Absent an exemption from the prohibited transaction rules, an adviser can be subject to significant penalties for violations of these rules.

While many of the conditions of the new prohibited transaction exemptions issued in connection with the rule are not required to be satisfied until January 1, 2018, the adviser must still act in accordance with the impartial conduct standards as of June 9, 2017. That is, the adviser must act in the best interest of the client, not receive excessive compensation, and not make misleading statements. To defend against a claim of wrongdoing and, further, to support the adviser's good faith compliance, we recommend that advisers document their compliance with these standards - even before the January 1, 2018 compliance date for the prohibited transaction exemptions.

Such documentation may be accomplished through a client setup process, an addendum to an existing client services agreement, or a new client services agreement, in which each of the impartial conduct standards are addressed. For advisers who charge a level fee (either as a percentage of assets under management or a flat dollar amount), we believe such advisers should also be documenting their review of applicable fee information and their rationale for recommendations made on and after June 9, 2017. Finally, in order to qualify for the level fee requirement of the two primary exemptions, advisers should review their fee, expense sharing and other compensation arrangements with custodians and other service providers.

Please ensure that you document your compliance with these requirements as of June 9, 2017. Even if your client services agreements have already been updated to address the Conflict of Interest rule, additional changes may be necessary to address more recent DOL guidance.

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