

LEGAL UPDATE

What the DOL's Final Fiduciary Rule Means for Plan Committees

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As most readers are aware, on April 6, 2016, the U.S. Department of Labor (DOL) released its final rule on fiduciary investment advice and its related exemptions (Fiduciary Rule) that greatly expands the list of activities that make one a fiduciary and the entities that will be treated as fiduciaries under ERISA. The Fiduciary Rule is a significant regulatory initiative, and thus it is important to understand how it impacts retirement plan committees' fiduciary responsibilities and committee relationships with plan service providers. This article will focus on some of the implications the new Fiduciary Rule will have on retirement plan committee responsibilities.

Immediate Effect. At its narrowest scope, the new Fiduciary Rule will have no effect on plans that already have strong retirement plan committees comprised of qualified internal representatives aided by independent fiduciaries. That is, the Fiduciary Rule generally does not expand upon the activities that will result in fiduciary status for retirement plan committee's members, since retirement plan committee's members are currently ERISA fiduciaries because of their responsibilities for the management of the plan and its assets. The new Fiduciary Rule does not alter the fiduciary duties that ERISA currently imposes on plan fiduciaries: the duties of loyalty, prudence, diversification of plan assets, acting for the exclusive benefit of plan participants and beneficiaries, and administering plans in accordance with their terms.

Retirement Plan Committees and Service Providers. Where the new Fiduciary Rule will have an effect on retirement plan committees will be in dealing with service providers who in the past may not have regarded themselves as fiduciaries. For example, in the past, a consultant who was making recommendations that might be perceived as advice could avoid fiduciary responsibility by saying he or she did not render advice "on a regular basis," or that a recommendation was not intended to serve as the "primary basis" for investment decisions. The Fiduciary Rule takes a broader approach and characterizes any

investment-related communication that "would reasonably be viewed as a suggestion [to] engage in or refrain from taking a particular course of action" as fiduciary in nature even if the communicator does not intend to give definitive advice (whether on a primary basis, or otherwise). As these consultants will no longer be able to take the position that they are not ERISA fiduciaries, the change in status has a number of possible implications for retirement plan committees.

First, because there is a concept under ERISA known as co-fiduciary liability, retirement plan committees' potential fiduciary liability under ERISA is increased. In part for that reason, although more so for the uptick in fiduciary litigation in the past few years, retirement plan committees members might wish to review and possibly increase their fiduciary liability insurance. This fiduciary liability insurance is entirely separate and apart from the ERISA fidelity bond, which only deals with losses due to fraud or dishonesty.

Second, the level of disclosure that a fiduciary makes to retirement plan committees is different from the disclosure by a nonfiduciary. For example, a fiduciary must furnish information with respect to its direct and indirect compensation as well as the conflicts of interest of interest arising from its business model.

Third, because of a perceived higher risk of liability as a fiduciary, the fees charged by a service provider that is now being treated as a fiduciary may be higher. That could be relevant from a retirement plan committee's perspective, because it needs to sign off on the compensation being paid to the service provider as reasonable. Payment of unreasonable compensation to a service provider is a prohibited transaction under both the Internal Revenue Code and ERISA.

Finally, to the extent that a service provider is acting as a fiduciary, retirement plan committees will want to confirm the manner in which the service provider is dealing with potential conflicts of interest.

Investment Education and Distribution. Another area in which the new rules will have an effect, although operationally more upon human resources rather than retirement plan committees, is with respect to investment education and distribution options. The DOL recognized the importance of being able to provide investment education and distribution information to plan participants. It also recognized that the Fiduciary Rule could cause those responsible for providing this information at the plan level to be treated as fiduciaries. Therefore, the DOL created specific conditions that allow for those responsible to not be subject to the Fiduciary Rule. Communications in both of these areas will need to be monitored by retirement plan committees to ensure that a line is not inadvertently crossed converting a permissible nonfiduciary communication into a fiduciary one.

IRA Rollovers. The new Fiduciary Rule also extends ERISA investment fiduciary coverage to IRAs. Transactions

involving rollovers can have fiduciary implications, and as a result, there may be fewer rollovers from the various plans that are maintained by the plan sponsor, that is, there will be more terminated vested participants with account balances in these plans. Although this will most likely not directly affect plans in 2016 or 2017, retirement plan committees will need to start considering how to address the implications this will have on plans in the near future.

Big Picture. Retirement plan committees will need to make sure that they have a firm understanding of the Fiduciary Rule and put the proper policies and procedures in place to address the increased responsibilities they have in monitoring the interactions of individual and entities that will be deemed fiduciaries under the new Fiduciary Rule.

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