MAY 24, 2017

DOL Signals the Fiduciary Rule Will Become Final

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The Department of Labor (DOL) has now made clear that it intends for its controversial "Fiduciary Rule" to become effective on June 9, 2017. The Fiduciary Rule expands the definition of "fiduciary investment advice" under ERISA and the tax code to cover many additional service providers to ERISA plans and IRAs. As we noted in an earlier post, the DOL had delayed the Fiduciary Rule for 60 days while it considered the burdens that the Fiduciary Rule would impose on the investment industry as directed by President Trump. In a column in the Wall Street Journal published on May 22nd, Secretary of Labor Alexander Acosta reported that the DOL had "found no principled legal basis" to delay the applicability date beyond June 9th.

This makes it almost a certainty that the Fiduciary Rule will "go live" on June 9th. However, the DOL has tried to soften the landing for plan service providers. The Fiduciary Rule expands the reach of the "fiduciary" definition for ERISA plans and IRAs, but most of the compliance implications for plan service providers result from the related Best Interest Contract (BIC) Exemption, an exemption necessary in light of the prohibited transaction rules of ERISA and the Code that govern how a fiduciary's compensation can be determined. The BIC Exemption exempts compensation received by fiduciaries that are financial institutions (including banks, insurance companies and registered investment advisers) as the result of investment advice from the prohibited transaction rules of ERISA and the Code as long as the financial institutions meet a number of conditions, including policies and procedures, contract requirements and record retention requirements. When the DOL delayed the rule, it also relaxed the conditions that would apply under the BIC Exemption until January 1, 2018. As a result, during the transition period from June 9th until January 1st, the only conditions for BIC Exemption are:

- Investment advice is in the "best interest" of the retirement investor, meaning that it is both prudent and the advice is based on the interest of the investor rather than the adviser.
- No more than reasonable compensation is charged.
- No misleading statements are made about the transaction, compensation or conflicts of interest.

Further, on May 22nd, the DOL issued a temporary enforcement policy (FAB 2017-02) announcing that until January 1, 2018, it will not take any enforcement action against "fiduciaries who are working diligently and in good faith to comply with the fiduciary and exemptions." Note, however, that this enforcement policy applies only to the DOL and would not affect any private rights of action by retirement investors on the basis of the Fiduciary Rule and a service provider's compliance with the BIC

Exemption's transition rules.

In addition, the DOL issued a set of Frequently Asked Questions (FAQs), which address how service providers may comply with the BIC Exemption during the transition period. These FAQs note that the DOL is considering whether an extension of the transition period is necessary to afford service providers more time for the long-term planning necessary to comply with the conditions of the BIC Exemption before it is fully implemented. The DOL is also considering whether any other changes are needed to the BIC Exemption before it is implemented, and Secretary Acosta suggested that he would welcome any coordination with the SEC.

As a result, the DOL has now gone on record that it intends to implement the Fiduciary Rule, although there are still some questions about implementation requirements following the transition period. Additionally, in both FAB 2017-02 and the FAQs, the DOL noted that further changes to the Fiduciary Rule could be proposed. Nevertheless, plans and plan service providers should be prepared for the application of the Fiduciary Rule on June 9th. Further, now is the time for plan service providers to assess what they will need to do to comply with the BIC Exemption on January 1, 2018.