Flashpoint: June 9th Is the Due Date For Fiduciary Rule Applicability….For Now

As you may remember from a prior FlashPoint (see "DOL Delays Fiduciary Rules," Flashpoint 4/5/17), the Department of Labor (DOL) delayed the applicability date of the new Fiduciary Rule ("Rule") from April 10, 2017, to June 9, 2017. This delay was in response to a memorandum issued by President Trump, directing the DOL to do a further study of the Rule to find out, in short, if it would harm people more than it helped. (See "Fiduciary Rules and 401(k) Hardship Distributions: The Latest," FlashPoint 3/13/17.) With the April 10 applicability date pending, the DOL issued a regulation to delay the date for 60 days while it did its preliminary looksee at the Rule and figured out what, at least in the longer run, would occur.

Since the delay began, Alexander Acosta was sworn in as Secretary of Labor. On May 10, 2017, Insurancenewsnet.com reported that Mr. Acosta told a Republican senator that he (Acosta) wanted to "freeze the fiduciary rule in a way that will 'stick.'" With the extended applicability date getting closer on the horizon, we all waited with bated breath to see what would happen.

On May 22, 2017, the DOL issued Field Assistance Bulletin 2017-02, as well as a new set of Frequently Asked Questions ("FAQs"). The short story: the Rule is going forward on June 9. While Secretary Acosta acknowledged that the Rule may not be aligned with President Trump's "deregulatory goals," he said that there was "no principled legal basis to change the June 9 date."

What Does This Really Mean?

There are actually two major parts to the new Rule. First, there is the actual **final regulation** that redefines when someone is an investment-related fiduciary. That was intended to be applicable on April 10. That regulation now will go into effect on June 9. This means that anyone who gives investment advice (as defined in the regulation) for a fee or other compensation will be a fiduciary as of that date. This is particularly important for those individuals who, under the old rules, did not provide advice regularly or did not serve as the primary basis of investment decisions made by their clients. Those advisors are not fiduciaries under the old rules, but will be under the new. Therefore, they need to get ready to comply with their fiduciary duties under ERISA.

Another group of people whose lives will change in less than two weeks are those who give investment advice in relation to IRAs. Again, those advisors were not fiduciaries under the old rules, but will be under the new.

Finally, anyone who gives advice to someone regarding distributions and rollovers or about who to hire as an investment advisor (and who gets paid for it) will be a fiduciary under the new Rule.

The second part of the Rule is the group of **prohibited transaction exemptions**, including the Best Interest Contract Exemption or BICE. These exemptions were never applicable on April 10, so will not be applicable on June 9. However, there are advisors who will become fiduciaries on June 9 who need one or more of these exemptions to carry on their business. Therefore, the Rule contains a transition period, during which fiduciaries can rely on these exemptions, and do not need to do everything the exemptions require to get the reliance. During this transition period, which runs from June 9 through December 31, 2017, fiduciaries relying on these exemptions need only act according to the exemptions' impartial conduct standards, which require that the fiduciary: (a) act in his or her clients' best interest and comply with ERISA's prudence requirements; (b) accept only reasonable compensation; and (c) not make any misleading statements.

Probably most important to those who deal with qualified plans: the new level-to-level part of the BICE, which permits plan fiduciaries to give distribution and rollover advice to plan participants, will provide two significant advantages over the old rules. First, it will not be a prohibited transaction for you to give this advice and capture the rollover funds for your advisory practice (which it was before), so long as you provide your plan-related services for a level fee (i.e., either a flat dollar amount or a percentage of assets) and you also provide your IRA-related services for a level fee (even if the two fees are different). Second, it will consider your competition—i.e., those advisors who were not fiduciaries to the plan and so, under the old rules, were not considered to engage in a prohibited transaction when they worked to capture rollover funds—to be fiduciaries now, as well. This levels the playing field for everyone.

There are formalities that must be followed to take advantage of the level-to-level exemption. If you need help to follow those, we are here for you.

Concrete Suggestions From Us While Things Are Shaking Out

- If you are a TPA or other non-investment person, do not advise your plan clients regarding who to use as an investment fiduciary unless you are *absolutely sure* that there is no argument to be made that you are compensated for that advice.
- If you are an investment advisor who was not a fiduciary under the old rules, get educated on what you need to do to comply with the new Rule. Again, we can help.
- If you are giving advice to participants about distributions and rollovers, make sure you do this under the auspices of the level-to-level exemption and that you maintain the proper documentation.

Enforcement During the Transition Period

The DOL again emphasizes in its publications that it knows that the Rule is not ready for prime time. As a result, it will be concentrating on assisting practitioners, and not on penalizing those who are doing their best to comply. In particular, the DOL says:

Although the Department has broad authority to investigate or audit employee benefit plans and plan fiduciaries, compliance assistance is a high priority for the Department. The Department's general approach to the June 9 implementation will be marked by an emphasis on compliance assistance (rather than citing violations and imposing penalties). This includes issuing a new temporary enforcement policy for the transition period, under which the Department will not pursue claims against fiduciaries who are *working diligently and in good faith to comply with the fiduciary duty rule and its exemptions*.

The italicized section is our emphasis: you cannot just sit on your haunches and wait for more information. You must do your best to comply in the transition period.

Furthermore, the DOL notes that it checked with the IRS and received confirmation that the IRS will not apply the penalties for prohibited transactions relating to the Rule during the transition period.

While it has been derided by those in the media who favor the Rule, this transition period is critical for those who have been trying to figure out how to fully comply with the Rule, while lacking needed guidance and being worried that all the time and money spent on compliance could end up being wasted if the Rule was revoked. It is truly a good thing for the industry that the DOL and IRS are taking a reasonable enforcement stance.

More to Come …

The DOL's releases make it clear that it is not through with its review nor has it finalized any findings pursuant to the President's directive. Therefore, the January 1, 2018, applicability date for full compliance with the prohibited transactions may be delayed, as well (extending the transition period during which only partial compliance is needed). The DOL also is going to issue a Request for Information (RFI) to solicit public input about specific ideas for additional prohibited transaction exemptions or other regulatory changes.

A Few Thoughts

As we have noted in other FlashPoints, we believe that a lot of the thinking behind the Rule already has become part of the way financial institutions and advisors are now doing business. It will be very difficult for someone to go back to selling investment advisory services without putting participants' interests first, even if the Rule were to be revoked. Additionally, many investment and financial institutions have instituted changes to their procedures and compensation practices to reflect the importance of keeping advisors on the participants' side and eliminating conflicts of interest.

The level-to-level exemption discussed earlier in this FlashPoint resolves the difficulties with which plan fiduciaries have struggled for years to provide participants with access to good distribution and rollover advice, while avoiding engaging in impermissible behavior. And it has the added benefit of holding all advisors to the same standard, whether they work with the plan or not.

Finally, the part of the Rule that makes someone who responds to a client's request for the name of a reliable investment advisor a potential fiduciary needs to be removed or modified so that it does not disrupt the good relationship between financial advisors and TPAs. For example, the revised rule could state that the recommending person is a fiduciary *solely in relation to that advice*, without any residual liability for anything else going on in the plan. That would ensure that people who give referrals do so prudently, for only reasonable compensation, without turning everyone into an ongoing ERISA fiduciary, with all the responsibility and liability and co-fiduciary liability that accompanies that role.

P.S. For a thorough discussion of the regulation and the prohibited transaction exemptions, please see our three-part FlashPoint series, "The New Fiduciary Regs: A Practical Review," available on our website.

FERENCZY
BENEFITS LAW CENTER
We are your ERISA solution™

Ilene Ferenczy • ilene@ferenczylaw.com | Alison Cohen • acohen@ferenczylaw.com
Adrienne Moore • amoore@ferenczylaw.com | Adriana Starr • astarr@ferenczylaw.com
Tia Thornton • tthornton@ferenczylaw.com | Leah Dean • ldean@ferenczylaw.com

2635 Century Parkway Suite 200, Atlanta, GA 30345
T 404.320.1100 | F 404.320.1105 | www.ferenczylaw.com