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DOL Issues Additional Fiduciary Rule Transition FAQs

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The Department of Labor ties up a few loose ends with FAQS regarding the fiduciary rule.

The US Department of Labor (DOL) has released an additional set of three frequently asked questions (FAQs) to address further inquiries in light of the applicability of the fiduciary rule on June 9. This guidance is in addition to several prior sets of FAQs issued by the DOL to clarify the DOL's fiduciary rule and related exemptions.

Analysis of the FAQs

The new set of FAQs, issued August 4, 2017, addresses the fiduciary rule's impact on other required disclosures of covered service providers to ERISA plans (as opposed to non-ERISA plans, such as IRAs) under ERISA Section 408(b)(2) ("service provider fee disclosures") during the transition period that began on June 9, 2017, and whether certain recommendations constitute fiduciary investment advice. Specifically, the FAQs address:

- whether updates to service provider fee disclosures are required during the transition period in light of the new definition of an investment advice fiduciary;
- whether a recommendation to a plan participant or an IRA owner to increase his or her contributions constitutes fiduciary investment advice; and
- whether a recommendation to an employer or plan fiduciary regarding plan design changes that are intended to increase participation and contributions constitutes fiduciary investment advice.

In FAQ 1, the DOL states that an update to the service provider fee disclosures may be required if a

service provider reasonably expects to provide fiduciary investment advice under the fiduciary rule. The DOL states that it would treat a service provider as satisfying the fiduciary status disclosure requirement if the service provider "furnishes an accurate and complete description of the services that will be performed under the contract or arrangement with the plan, including the services that would make the covered service provider an investment advice fiduciary" under the new fiduciary rule, though the service provider need not specifically use the word "fiduciary." But, the DOL noted that if a service provider reasonably expects to provide fiduciary services, any disclosures that expressly state the service provider will not act as a fiduciary would be viewed as violating the service provider fee disclosure requirements.

Further, the DOL provides relief on the deadline for providing updated service provider fee disclosures—stating that service providers will still be in compliance with the rules if they disclose the change in fiduciary status as soon as practicable, even if the disclosure is made beyond the 60-day deadline for change notices under the ERISA Section 408(b)(2) regulations. The DOL notes that the regulations allow the use of electronic means to deliver disclosures.

In FAQ 2, the DOL reiterates that absent a "recommendation," as defined in the fiduciary rule, general communications regarding participation and increasing contributions to a plan or IRA are not fiduciary investment advice, so long as the recommendations are not with respect to a specific investment product or recommendations with respect to investment management of a particular security or other investment property. The DOL provides four examples of communications that would not constitute fiduciary investment advice:

1. A plan enrollment brochure furnished to individuals at or near their date of eligibility to participate in the plan that discusses generally how people should save for retirement—including a recommended contribution rate and a recommendation to increase contributions each year to eventually reach the recommended contribution rate.

2. A targeted email sent on a participant's enrollment anniversary date suggesting that the participant increase his or her contribution rate for the current year or over the next several years because the participant's contribution rate is below a particular savings goal.

3. A targeted email sent on a participant's birthday that provides a retirement savings goal based on the individual's age and account balance, and recommends that the participant increase his or her contribution rate for the current year or over the next several years to reach the retirement goal.

4. A telephone call with an ERISA plan participant in which the call center employee suggests a specific contribution rate and also recommends that the participant increase his or her contribution rate by a specific percentage to take full advantage of an employer's matching contribution.

Likewise, in FAQ 3, the DOL states that plan design recommendations provided to an ERISA plan administrator and/or fiduciaries that are intended to increase the participation or contribution rate of plan participants are generally not fiduciary investment advice, so long as the recommendations are not with respect to a specific investment product or recommendations with respect to investment management of a particular security or other investment property. This holds even if the recommendations are tailored to specific plan demographics.

Takeaways

Service providers that reasonably expect to provide fiduciary investment advice under the new fiduciary rule should consider evaluating whether revisions to their 408(b)(2) service provider disclosures are required. Service providers may want to consider updating their agreements, communications, and other documents to provide that any disclaimers of fiduciary status are no longer valid.

FAQs 2 and 3 provide additional clarity with specific examples of communications and actions that would not be viewed as investment advice recommendations. However, there is continued uncertainty as to the extent to which service providers may discuss specific investment products in conjunction with contribution discussions.

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