HUSCH BLACKWELL

DOL FIDUCIARY RULE UPDATE

Several recent updates regarding the new Department of Labor (DOL) fiduciary rule have caused confusion for our clients. On March 1, 2017, the DOL announced a proposed delay of the new fiduciary rule and prohibited transaction exemptions that were set to become applicable on April 10, 2017. The DOL requested that all comments on the proposed delay be submitted by March 17, 2017. Once the DOL reviews the comments, it will publish a final rule, which could either retain the April 10 applicability date or delay the applicability date 60 days or more.

In addition, the DOL will conduct economic and legal analysis that could change the requirements of the rule.

It is not certain when the DOL will publish its final rule. On March 10, 2017, the DOL issued Field Assistance Bulletin 2017-01, which provides that the DOL will not enforce the rule as of April 10 if a rule is issued after that date and delays the applicability date. If there is no delay in the applicability date, the DOL will not enforce the rule if affected parties comply with the requirements within a "reasonable period." Importantly, however, the guidance does not shield advisors or financial institutions from private lawsuits.

Brief Summary of the Rule

The fiduciary rule generally provides that an investment recommendation to investors in an ERISA-covered retirement plan or an IRA, including a recommendation to roll over amounts to an IRA, constitutes a fiduciary act where the advisor or institution receives a fee. Such a recommendation must be provided in the investor's best interest. In addition, if the advisor or institution receives payments from third parties for making investment recommendations, a conflict of interest arises and will constitute a prohibited transaction unless the prohibited transaction exemption is satisfied.

The most onerous requirement of the prohibited transaction exemption is the "Best Interest Contract Exemption," which requires a contract with the investor that contains certain language and disclosures. There are less burdensome requirements for "level fee" fiduciaries that do not receive third-party payments. A different set of requirements applies to advisors or institutions that are making recommendations to ERISA-covered retirement plans, who are most likely already fiduciaries.

Importantly, a transition rule that allows for fewer disclosures can be utilized until January 1, 2018, when the full requirements must be satisfied. The transition rule is a useful tool that provides protection with the fewest requirements.

Client Recommendations

Because of the uncertainty of the applicability date of the new rule, clients should be ready to comply with the requirements as of April 10 or within a "reasonable time" after the issuance of the final rule. While there may be tweaks to the rule, we anticipate that the rule will ultimately survive and that fiduciaries will have to act in the best interest of investors and satisfy the requirements of the prohibited transaction exemption to receive third-party payments. We recommend that clients act now to ensure compliance when the rule becomes applicable. Changes can then be made easily if there are changes to the law.

We find that many advisors and institutions are receiving assistance from broker-dealers or other entities that purport to ensure the advisors and institutions are in compliance. Some of these forms and disclosures are satisfactory. Others, however, may not protect the advisor or institution to the fullest extent depending on the client's circumstances, and may not meet all the requirements of the exemption. In other words, these outside parties are creating one set of documents for all advisors and institutions, but one size does not necessarily fit all. Further, the advisor or institution would be the liable party for failing to comply, and reliance on documents from outside parties will not shield them from liability unless the advisor or institution has an agreement for complete indemnification from the outside party.

In this regard, we have assisted clients with the following:

- Analyzed which acts constitute fiduciary recommendations that are subject to the new rule.
- Analyzed the prohibited transaction exemption that is best suited for the client.
- Reviewed forms and disclosures provided by outside parties.
- Revised and prepared documents as necessary to comport with the client's practices while following the requirements of the relevant exemption.
- Analyzed current practices and current conflicts of interest (i.e., third-party payments) for proper disclosure to satisfy the relevant exemption.
- Reviewed or prepared required internal policy documents, such as a recommendation and monitoring policy, document retention policy and a material conflicts of interest policy.
- Reviewed and negotiated agreements with outside parties.
- Conducted training for advisors of institutions.

Please let us know if you have any questions regarding your particular circumstances or if we can advise on compliance with the new fiduciary rule, whenever it may become effective.

Attorney Contacts

Mark Welker, Partner
Kansas City, MO
mark.welker@huschblackwell.com
816.983.8148

David Eckhardt, Associate
Milwaukee, WI
david.eckhardt@huschblackwell.com
414.978.5414