THE
NATIONAL LAW REVIEW

New Rule, Old Rule - What Should Advisers Do Now?: Interesting Angles on the DOL's Fiduciary Rule #40

Wednesday, March 15, 2017

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Labor & Employment
All Federal

This is my 40th article about interesting observations concerning the ***Department of Labor's fiduciary rule*** and exemptions. These articles also cover the DOL's FAQs interpreting the regulation and exemptions and related developments in the securities laws.

Now that it seems clear that the applicability date of the new fiduciary regulation will be delayed, many advisers (including broker-dealers and RIA firms) may heave a sigh of relief. However, while some relief is justified, that does not mean that their services are not governed, in many cases, by the "old" fiduciary regulation. (By "old" rule, I refer to the DOL regulation that defines fiduciary advice and that has been in effect for decades.) With all the attention that has been devoted to fiduciary status and prohibited transactions, it is possible, perhaps even probable, that the old rule will be applied more vigorously. As a result, advisers need to understand its provisions and need to review their practices to determine whether they are currently acting as fiduciaries under the old rule. To properly discuss that issue, advisory services need to be divided into four categories: advice to plans; advice to participants; advice to IRAs; and recommendations of plan distributions and rollovers. This article will discuss the first of those categories . . . advice to retirement plans.

Briefly stated, the old—and current–fiduciary rule has a five-part test:

- A recommendation of an investment, insurance product, investment manager, and/or investment strategy or policy.
- The advice must be given on a regular basis, that is, on an ongoing basis.
- There must be a mutual understanding between the adviser and the plan fiduciaries.
- The understanding is that the advice will be a primary basis for decision-making.
- The advice is individualized and based on the particular needs of the plan.

With regard to qualified retirement plans (for example, 401(k) plans), those conditions will likely be satisfied in many cases. For example, it is common, perhaps even typical, for an adviser to meet with plan fiduciaries quarterly or annually. As a result, the advice is given on a regular basis. Similarly, when an adviser provides a list of investments, it is difficult to say that they are not individualized to the plan, because of the suitability requirements that apply to broker-dealers, RIAs, and insurance agents. In any event, there is a significant risk that an adviser who provides a list of investments to plan fiduciaries will be considered to have made fiduciary recommendations.

As a result, and with likely heightened scrutiny of advisers' recommendations and fiduciary status, broker-dealers and insurance agents should consider whether they are willing to run the risk of being a fiduciary. (As this suggests, RIA's probably are fiduciaries for ERISA plans.) And, if they are willing to be fiduciaries, there should be a formal program in place for that purpose. For example, a broker-dealer might establish a fiduciary advisory program under its corporate RIA and allow its most experienced retirement plan advisers to participate in that

program. For those advisers who won't be allowed to be fiduciaries under the RIA program, those broker-dealers should consider requiring that the advisers only recommend 401(k) providers who have platform fiduciaries. For example, a recordkeeping platform might offer a 3(21) non-discretionary fiduciary investment adviser and/or a 3(38) discretionary fiduciary investment manager. In that case, the platform fiduciary would recommend or select the investments, while the adviser would provide other services to the plan, for example, assistance with plan design, coordination with the recordkeeper, participant education meetings, and so on.

My point is that, now that we are more aware of the fiduciary definitions and the impact of fiduciary status, advisers need to be more attentive to their services and to whether those services result in fiduciary status. Correspondingly, their supervisory entities (for example, broker-dealers) need to make decisions about how those services will be offered, including whether some of the registered representatives can be 401(k) fiduciaries under the corporate RIA.

The views expressed in this article are the views of Fred Reish, and do not necessarily reflect the views of Drinker Biddle & Reath.

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