

DOL “Conflict-of-Interest” Fiduciary Rule Released

In April 2016, the DOL released the final ruling regarding the definition of who is a fiduciary and its role with respect to providing investment advice. The new regulation (also referred to as the “conflict-of-interest” rule) is designed to close legal loopholes permitting retirement advisers to recommend investment products that are more profitable to the adviser and not necessarily in the best interests of their clients. This is the first significant regulation addressing investment advice since 1975 and reflects the greater role played by participants in investment decisions, through participant-directed 401(k) plans, individual retirement accounts (IRA), etc.

Prior regulations required an adviser to satisfy each part of a five-part test before the provider would be treated as a fiduciary adviser. If an adviser did not satisfy one of the tests, the adviser was permitted to operate with conflicts of interest that were not required to be disclosed to the client and was granted limited liability under the federal pension law. The conflict-of-interest rule replaces the five-part test and instead provides a new broader set of principle-based rules along with exemptions to allow certain broker-dealers, insurance agents, and others to act as fiduciaries while receiving compensation as long as they ensure that the advice provided is impartial and in the best interest of their clients.

Under the new regulation, a service provider is considered to be rendering investment advice if they receive fee-based or other compensation (whether directly or indirectly) that relates to providing guidance or assistance with the purchase or sale of securities or other investment property or the management of such investment property. The regulation stipulates what constitutes a “recommendation” and indicates that classification as a recommendation is based on the content, context, and presentation of the information and whether the information would be perceived as advising the recipient to partake in or refrain from taking a certain investment strategy.

A broad exemption under the regulation permits providers to receive compensation from selling certain products that might otherwise constitute a prohibited transaction. The Best Interests Contract (BIC) exemption is available if the provider offers only non-discretionary advice and meets certain other stipulations.

The final regulation also specifies that certain communications and activities are not considered to be recommendations, which addresses concerns noted during the proposal public comment period that recipients may come across information that should not be treated as fiduciary investment advice. Communications and activities excluded from the rule include the following:

- Participant education, such as certain interactive investment materials, which seek to provide participants/beneficiaries with investment options available under the plan
- General communications, such as newsletters or other broadly-focused communication not tailored to any one specific plan or participant.

Although compliance with the new regulations begins in April 2017, the DOL has adopted a phased implementation that includes a transition period from April 2017 to January 2018 for the various exemptions covered under the new regulations. This implementation period is expected to allow service providers to prepare for the compliance requirements and to adjust their status, if needed, from non-fiduciary to fiduciary status.

For further details see webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=28806.