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New DOL Guidance in Connection With the Fiduciary Rule

As we have previously flagged (http://www.stradley.com/insights/publications/2017/06/im-briefing-june-30-2017), service providers who became ERISA (U.S. Employee Retirement Income Security Act of 1974, as amended) fiduciaries by reason of making a "recommendation" under the U.S. Department of Labor (DOL) Fiduciary Rule would have "fiduciary status" disclosure obligations under Section 408(b)(2) of ERISA. Late last week, the DOL issued guidance that addressed these disclosure obligations, and whether communications to plan participants and IRA owners that encourage contributions or communications to plan fiduciaries on plan design changes intended to increase plan participation and contribution rates constitute investment advice under the Fiduciary Rule. We address these in turn.

408(b)(2) Disclosures

By way of context, Section 408(b)(2) of ERISA requires that service contracts and arrangements with ERISA plans be reasonable, and that service providers to ERISA plans not receive more than reasonable compensation. Moreover, various fiduciary and nonfiduciary service providers to ERISA plans must make certain disclosures to the plan regarding the services to be provided to the plan, and the compensation the service provider expects to receive. The question posed to the DOL was this: "Do service providers who are providing fiduciary investment advice as a result of the Fiduciary Rule becoming applicable on June 9, 2017, need to update their disclosures under the 408(b)(2) regulation, in particular to disclose their status as fiduciaries?"

The DOL came to the following conclusions:

1. If a service provider will continue to provide only nonfiduciary services to ERISA plans post-Fiduciary Rule, or has already effectively disclosed investment advice fiduciary status, no additional disclosure would be required under Section 408(b)(2) of ERISA.

2. In the case of a service provider who does not "reasonably and in good faith believe" that it will be providing services to an ERISA plan that would make it an investment advice fiduciary under the Fiduciary Rule, then the service provider would not be required to disclose its newfound fiduciary status under Section 408(b)(2) of ERISA. The DOL notes that this "conclusion … would not be affected by the fact that it is possible that actions of individual agents, representatives or employees involved in implementing a service contract or arrangement (e.g., call center employees) may exceed, in individual circumstances, contract limits that may result in communications that constitute investment recommendations covered by the Fiduciary Rule." We stress that a service provider can become a fiduciary under the Fiduciary Rule even without its reasonable and good faith belief that it is doing so. Practically speaking,

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this means that while a fiduciary may not have a disclosure obligation under Section 408(b)(2) of ERISA, it may nevertheless still be a fiduciary and still need to ensure it has an exemption strategy in place.

3. In the case of a service provider "who will or reasonably expects to provide fiduciary investment advice services under the Fiduciary Rule," the service provider will be subject to the Section 408(b)(2) disclosures. However, because from June 9 through Dec. 31, 2017, disclosure of fiduciary status is not a condition of relief under the Best Interest Contract Exemption or the Principal Transactions Exemption, a service provider need not identify itself as a "fiduciary" under the Section 408(b)(2) disclosures for the rest of 2017 (even though Section 408(b)(2) and its regulations technically require that "fiduciary" status be disclosed). In the place of disclosing fiduciary status, the service provider would instead need to "furnish 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 currently applicable Fiduciary Rule." Furthermore, please note that under ERISA Section 408(b)(2), a service provider generally must disclose the change in fiduciary status as soon as practicable, but not later than 60 days from the date on which the service provider is informed of such change; however, in light of all the uncertainty surrounding the Fiduciary Rule, the DOL indicated that a service provider need only update its fiduciary status (as applicable) in a disclosure "as soon as practicable after June 9, 2017, even if more than 60 days after June 9, 2017." Finally, disclosures imposed by Section 408(b)(2) of ERISA may be provided electronically, so long as they are "readily accessible to the plan fiduciary, and the fiduciary has received clear notification on how to access the information."

4. In the case of a service provider who is providing, or reasonably expects to provide, fiduciary investment advice services, within the meaning of the currently applicable Fiduciary Rule, but whose contract with, or disclosures to, an ERISA plan includes a statement that the service provider is not a fiduciary or is not providing fiduciary services, then the service provider will need to update the disclosures by removing or correcting "that affirmatively incorrect statement." Practically speaking, this means that a service provider may be put in the unenviable position of trying to explain to its ERISA plan clients that it needs to change its current disclosures that expressly address its fiduciary status (i.e., that it is not an ERISA fiduciary) to disclosures that do not specify whether or not the service provider is acting in a fiduciary capacity at all, as described above.

Communications Involving Plan Contributions

Separately, the DOL was asked whether it would constitute investment advice under the Fiduciary Rule if a service provider encouraged IRA owners or plan participants to contribute to an IRA or a plan in order to increase participants' contributions or savings to meet objective financial retirement milestones, goals or parameters based upon the participant's age, time to retirement or other similar measures, without recommending any particular investment or investment strategy. The DOL was also asked whether recommendations to a plan fiduciary to achieve the same objectives, as described immediately above, would give rise to fiduciary status under the Fiduciary Rule. The DOL responded that these communications would not by themselves constitute investment advice under the Fiduciary Rule.

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