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DOL TO RE-PROPOSE FIDUCIARY RULE

In February, President Barack Obama announced that a long-awaited redrafting of the Department of Labor (DOL) Fiduciary Rule was being submitted to the Office of Management and Budget (OMB).

The DOL proposal would mean those advising 401(k) plan accounts, individual retirement accounts (IRAs), and other retirement accounts must act as a fiduciary – recommending a product that is in the client's "best interest."

The DOL originally proposed a fiduciary rule in 2010, but it was withdrawn a year later under pressure from the financial services industry as well as some lawmakers.

Currently, investment advisors and brokers are subject to different standards of care. Investment advisors are subject to the fiduciary standard, which requires them to have a duty of loyalty and care, to place client interests first, and to avoid conflicts of interest. These advisors can only charge a fee for their services and do not accept commissions of any kind. Brokers, on the other hand, are subject to the suitability standard, which requires them to make recommendations that are suitable for the client based on their objectives and needs.

Plan Sponsor Consideration: While it has yet to be seen what the exact shape of the final rule will look like, the changes will have a major impact on how plan sponsors interact with their advisors and other service providers.

There are groups that still oppose the DOL proposal, stating the rule would force investors to change financial advisors, would limit investment choices, and also drive up costs. Overall, though, the proposed rule is a positive for all investors.

Whatever comes of the rule, it is important for plan sponsors to understand what standard of care they are receiving from their plan providers.

IRS ISSUES WARNING TO PLAN SPONSORS ON LOANS AND HARDSHIP WITHDRAWALS

The Internal Revenue Service (IRS) issued a reminder to plan sponsors that "even if you use a third party administrator (TPA) to handle participant transactions, you're still ultimately responsible for the proper administration of your retirement plan."

In particular, the IRS highlighted the requirements of keeping up with recordkeeping of loans and hardship withdrawals, and furthermore, proving that those withdrawals comply with the law.

<u>Plan Loans</u>

According to the IRS, files should include *all* of the following documents, in paper or electronic format, for each loan:

- Loan application along with evidence that of the review and approval process
- An executed loan promissory note
- Documentation verifying if used for purchase/construction of primary home
- Evidence of loan payments
- Evidence of collection in the event of a default, and
- Form 1099-R in the event of a deemed distribution

Most important to remember as it pertains to loans is that if it is for a home purchase, the plan sponsor must obtain documentation *prior* to the loan being approved. The IRS stated they have found that plan administrators have allowed participants to self-certify, which is not allowed.

<u>Hardship Withdrawals</u>

For hardship withdrawals, the plan sponsor should retain the following records, in paper or electronic format:

- Documentation of the hardship request, along with the review and approval
- Financial information and documentation that substantiates the employee's "immediate and heavy financial need"
- Proof that the withdrawal was properly made in accordance with applicable plan provisions and the tax code, and
- Proof the actual distribution and the related 1099-R

The IRS cautioned that it is not sufficient for plan participants to keep their own records of hardship distributions. This also means that while it is okay for a participant to self-certify to show that a distribution was the only way to pay for the hardship, self-certification is not allowed to show the nature of the hardship.

The IRS also points out that failure to have these records on file for examination is itself a qualification failure that should be corrected using the Employee Plans Compliance Resolution System (EPCRS).

Plan Sponsor Consideration: It is imperative that plan sponsors understand it is their ultimate responsibility to keep all records for loans and hardship withdrawals.

It is also important to remember that self-certification is not allowed for loans for purchase of home or for proving the nature of the hardship. This guidance shows that the IRS will be reviewing these items as it expands its audit program.

If plan sponsors find that there is not complete documentation, they must remedy the issue. This could include correcting failures through the EPCRS. Plan sponsors may also consider whether the administrative burden and risk of continuing to offer these types of withdrawals is worth the perceived benefit.

DOL PROVIDES FLEXIBILITY FOR ANNUAL PARTICIPANT FEE DISCLOSURE

In March, the Department of Labor (DOL) announced that it is providing increased flexibility when it comes to the timing of the required annual participant fee disclosure notice.

The DOL will amend its definition of "at least annually" to mean a 14-month period instead of a 12-month period. This change will allow plan sponsors and administrators the flexibility to provide the disclosure around the same time each year without fear that they haven't provided it within a 12-month period.

The new regulation is effective June 17, 2015, though the DOL has stated the plan sponsors may use the new rule immediately if they believe it will benefit their plan participants.

Plan Sponsor Consideration: As stated above, the rule will allow plan sponsors to send the notice around the same time every year (i.e. last week of November) without worrying whether that day is beyond 365 days from the last notice.

IRS SIMPLIFIES CORRECTION METHOD TO ENCOURAGE AUTOMATIC ENROLLMENT

The Internal Revenue Service (IRS) and the Treasury Department issued guidance that is designed to make it easier for plans with automatic enrollment to correct administrative errors.

Historically, when plan sponsors had failed to correctly implement a participant deferral election or automatic deferral, they were required to make a qualified nonelective contribution equal to 50% of the amount the affected participant would have deferred plus 100% of the matching contributions the affected participant would have received, plus earnings.

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The new "correction safe harbor" for plans with automatic contribution features will require plan sponsors to make all employer contributions that should have been made, and to contribute an additional amount to make up for earnings on those employer contributions. The new formula removes employee deferrals from the calculation.

The new correction method is available immediately for eligible elective deferral failures occuring on or before December 31, 2020. Please note that at this time the guidance only applies to pre-tax deferrals and not after-tax deferrals.

Plan Sponsor Consideration: The guidance makes favorable changes to the correction method. An argument used by plan sponsors against automatic enrollment has been the administrative burdens that accompany the feature.

Prior to this updated guidance, if an automatic enrollment was missed, the employer would have to deposit 50% of the employee's missed deferral without having to reduce the salary of the affected employee, along with the other contributions.

Policy makers are hoping the new rules will make it easier for plan sponsors to correct errors, and also lead to more plans with automatic enrollment contribution arrangements. Overall, it does help incentivize those plan sponsors that are reluctant to adopt due to perceived administrative complexity.

SUPREME COURT ACCEPTS *TIBBLE VS. EDISON* FEE LITIGATION CASE

The Supreme Court decided to hear arguments in the well-known case, *Tibble vs. Edison*, after the appeals courts upheld the decision made by the district's court as it pertains to time-limit of the charges.

The original suit claimed that Edison failed to fulfill its fiduciary responsibility to employees participating in its 401(k) plan because it offered several funds among the plan's investment offerings that had higher fees than other nearly identical funds.

Edison, though, claimed that according to terms of the Employee Retirement Income Security Act (ERISA), the plaintiffs could only sue over funds that were among the offerings during the previous six years or less–and that several of the funds in question had been included for longer. The plaintiffs argued that fiduciary responsibility for plan choices is ongoing. This is the question that court has agreed to hear and make judgment upon.

Plan Sponsor Consideration: As we have stated before, we believe this court case could end up having wide-ranging ramifications on retirement plans across the U.S. Over the last year, there have been multiple law suits involving excessive fees and revenue sharing payments.

The Supreme Court has stated that they would focus only on timing and limitation issues stemming from the complaints, though a review of the transcripts shows they asked many questions that went beyond this limited scope.

For plan sponsors, they must remember that while plans are allowed to have revenue sharing payments in place, they must make a concerted effort to review these agreements and be able to clarify why one investment option share class was chosen over another.

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COMPLIANCE CALENDAR

April

Sun	Mon	Tue	Wed	Thu	Fri	Sat
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	**15**	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30		

May

Sun	Mon	Tue	Wed	Thu	Fri	Sat
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24/31	25	26	27	28	29	30

June

Sun	Mon	Tue	Wed	Thu	Fri	Sat
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	**30**				

COMPLIANCE CALENDAR

APRIL

April 1
Deadline for taking first required minimum distribution for those age 70½ or retiring after age 70½ in prior year.

April 15
Deadline for processing corrective distributions for excess deferrals.

Deadline for filing (or requesting extension to Oct 15) individual and/or partnership tax returns and contribution deadline for deductibility for unincorporated entities (without extension)

MAY

No deadlines

JUNE

June 30
Deadline for processing corrective distributions for failed ADP/ACP test from plan with EACA without 10% excise tax.