HICKS NOTES

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THE NEW PROPOSED FIDUCIARY RULES - WHAT YOU NEED TO KNOW

The Department of Labor (DOL) has issued proposed rules to clarify who will be held to be a Fiduciary under ERISA § 3(21)(A)(ii). The original rule was proposed in 2010, but withdrawn after September 11th because of fear of disrupting the markets. The new rule includes language from the original rule and creates nuances in defining "investment advice" for ERISA purposes. This regulation will become effective 8 months after adoption of the final rule. The 90-day comment period ends August 6th, then hearings will be held. You can expect final guidance and effective dates to be released early next year.

Under current law, a five-part test states, in order for a person to be held an ERISA Fiduciary while giving "investment advice" for a fee, such a person must: (i) make recommendations as to investing in, purchasing or selling securities or other property, or give advice as to their value, (ii) on a regular basis, (iii) pursuant to a mutual understanding of the advice, (iv) will serve as a primary basis for investment decisions with respect to plan assets, and (v) will be individualized to the particular needs of the plan.

The new rule clarifies and changes the five-part test as follows:

1. **Nature of Advice**: Old rule is valuation and investment recommendations. The new rule includes that, but also includes IRA rollovers and recommending other paid advisors. Merely educating a person about the tax consequences of plan distributions or rollover options is not enough. However an individualized recommendation of an advisor or particular investment will raise the standard for both IRA and pension distributions.
2. **Frequency of Advice**: Must be provided on a regular basis. New rule allows for a "one-time assistance instance", such as giving advice on an IRA rollover.
3. **Mutual understanding**: Under the old rule, there had to be mutual understanding that the advice is being used for investment decisions. The new rule has no primary basis of "mutual understanding". Generally, advice offered for consideration is enough Presumably, that means no 3(21) or 3(38) agreements will be needed to create the fiduciary relationship.
4. **Customization**: Old rule required the advice be on a client's particular situation and was the primary basis for investment decisions. Under the new rule, it is similar, but tailoring is not required. Referring to an investment manager is enough.
5. **Needs test**: Under the old rule, the advice was tailored to the needs. Now all you need is consideration in order to meet this test. Bottom line, you get paid a commission, you are held to the standard.

In addition to redefining the investment advice rule, there are "Sellers and Swap carve-outs" for those who offer incidental or those in an arms-length transaction to plan fiduciaries. There is a test that looks at the nature of the relationship to determine if the carve-out is appropriate. For more information on these regulations, click here.

Failure to follow these regulations can throw you into a "Prohibited Transaction" situation with penalties and liability for all fiduciaries involved.

This quick overview is to allow you to plan and act accordingly. Please realize the specifics will be flushed out as the regulations work their way through the process.

For Plan Sponsors, they need to review their contracts and disclosures to identify who they are getting advice from and who is getting paid on their plan.

For Advisors, they need to review their business practices and decide what level of liability they may be incurring. Being a fiduciary can hold you personally liable in the event of a lawsuit. Make sure you are qualified to give advice on retirement plans and are always acting in the best interest of your clients.

As always, we are here to help. We will continue keep you informed as things change throughout the year. Please click here to contact us with questions or comments.