

THE DEPARTMENT OF LABOR'S FIDUCIARY RULE – THREE ISSUES FOR RETIREMENT PLAN SPONSORS

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The DOL's fiduciary rule re-defines when a party is acting as a "fiduciary" under ERISA as a result of providing investment advice to a retirement plan and has the effect of greatly expanding the types of services that are deemed to be fiduciary in nature. While some of the fiduciary rule's requirements are not yet applicable, the fiduciary rule's first set of requirements became applicable earlier this summer.

Service providers to retirement plans, such as recordkeepers, investment managers, and consultants are making changes to their business models and sales practices. Below are three issues that plan sponsors should consider as service providers adapt to the fiduciary rule. Please let us know if you have any questions as you work through these issues.

1. **Is your 401(k) recordkeeper making changes to the services currently provided (e.g., operating call centers, providing participant education, providing reports) in an effort to (a) avoid becoming a fiduciary or (b) comply with the fiduciary rule's requirements as a fiduciary?** *Plan sponsors should be aware of, and consider any changes to, the services that are provided and fees that are charged. A new contract with the recordkeeper may be needed. In some cases, a plan sponsor may want to perform due diligence on the recordkeeper or undertake an RFP or RFI process with the current recordkeeper and other vendors to ensure the plan sponsor has sufficient information to make a prudent decision regarding whether to retain the current recordkeeper.*
2. **Will the fiduciary rule have the effect of keeping more assets in your retirement plans (i.e., are plan participants that are separating from service more likely to leave their assets in the plan rather than roll the assets to an IRA now that advisors are required to provide advice that is in the plan participant's best interest)?** *If less rollovers are expected, plan sponsors should consider (a) converting service provider asset-based compensation structures to fixed fee arrangements (several recent class action lawsuits have questioned the prudence of asset-based recordkeeping fees), (b) whether target date funds should be constructed differently because of changing plan participant demographics, and (c) whether to provide an in-plan lifetime income distribution option for plan participants (historically, annuities are more commonly purchased in IRAs than workplace retirement plans).*
3. **For defined benefit plans, are you being asked to make representations to your investment managers about matters that pertain to your consultant, such as whether the consultant is related to the investment manager and whether the consultant is responsible for exercising independent**

judgment in evaluating whether the plan should hire the investment manager? *These representations promote the investment manager's adherence to the requirements of an exception from the definition of a fiduciary under the fiduciary rule. The representations may be found in subscription agreements (for private funds) or investment management agreements (for separate accounts). Plan sponsors should ensure that any representations they make regarding the plan's consultant are accurate. Plan sponsors may want to obtain information from their consultants to confirm any such representations.*

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