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New Conflict of Interest FAQs Address 408b-2 Disclosure Transition Period and Recommendations to Increase Contributions and Plan Participation

On August 3, 2017, the Department of Labor posted a second set of Fiduciary Rule Transition Period FAQs (“Transition Period FAQ Set 2”). The FAQs address three issues about which Groom met with the DOL. The FAQs cover: (1) Implications of the Fiduciary Rule on 408b-2 disclosures made to ERISA plans; (2) Recommendations to plan participants to increase contributions; and (3) Recommendations to plan administrators regarding techniques to increase plan participation. The 408(b)(2) FAQ will allow some service providers to avoid changing previously provided 408(b)(2) notices and give others additional time to adjust the content of those notices. The contribution FAQs should ease concerns that encouraging retirement savings could lead to fiduciary status.

Importantly, the guidance could signal the Department’s willingness to take a more measured approach to the Fiduciary Rule as it reviews the rule in accordance with the February 3, 2017 Presidential Memorandum.

1. 408b-2 Disclosure Relief

ERISA section 408(b)(2) requires certain plan service providers to disclose to a plan’s fiduciary information about fees and services provided to the plan and to disclose whether the service provider acts as a fiduciary to the plan. Some service providers who were not previously fiduciaries became fiduciaries on the Fiduciary Rule’s applicability date, June 9, 2017. The FAQ clarifies what triggers the need for a disclosure, whether existing disclosures suffice, and the time period for making new disclosures.

- Service Providers Who Do Not Reasonably Expect to Provide Fiduciary Investment Advice
 - Where a service provider has acted reasonably and in good faith to structure its services as non-fiduciary, then unauthorized and irregular investment advice by an employee or agent does not trigger the need for an updated 408b-2 disclosure of fiduciary status.
- Investment Advice Service Providers
 - If a service provider has provided a 408b-2 disclosure that furnishes an “accurate and complete description of the services ... including the services that make a covered service provider an investment advice fiduciary” the fact that the word “fiduciary” is not expressly used in the disclosure will not be viewed as a failure to comply with the 408b-2 disclosure requirements.

- This relief lasts until there is a requirement under the BIC Exemption or Principal Transaction Exemption to disclose fiduciary status. Currently, this would be the end of the Transition Period (January 1, 2018).
- However, if the service provider's existing disclosure states that the service provider is *not* a fiduciary or is *not* providing fiduciary services, the disclosure must be updated to remove or correct the incorrect statement. Importantly, under this guidance, a service provider can update a previously provided disclosure by removing inaccurate statements about fiduciary status but is not required to add a statement that the provider is acting as a fiduciary, so long as the services that cause the provider to be a fiduciary are described.
 - While this correction would normally be required by August 9, 2017 (60-days following when the service provider was informed of the status change), due to the uncertainty surrounding the implementation of the Fiduciary Rule a service provider may update its disclosure "as soon as practicable after June 9, 2017, even if more than 60 days after June 9, 2017."

2. Recommendations to Contribute to a Plan or IRA

FAQ 2 builds on examples of non-fiduciary communications to plan participants included in the Department's last set of Transition Period FAQs issued in May 2017 (<https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-transition-period-1.pdf>). While the substance of the communications described in each set of FAQ examples is very similar (directed communications to plan participants by call center employees, email or other means regarding maximizing contributions, retirement readiness or matching contributions) new FAQ 2 permits explicit recommendations and suggestions that participants save more by increasing contributions. In addition:

- Consistent with the prior FAQs, FAQ 2 makes clear that no recommendation of a particular investment or investment strategy can be made.
- While the examples focus on communications with plan participants, FAQ 2 also references IRAs - presumably confirming that similar communications with IRA holders would also be non-fiduciary.
- There is no limitation on who makes the recommendation, i.e., a person who is a fiduciary for other contexts may still encourage participation in a non-fiduciary capacity.

3. Recommendations on Increasing Plan Participation and Contribution Rates

Transition Period FAQ Set 2 question 3 addresses recommendations a plan administrator or other plan fiduciary to increase employee participation and contribution levels to an ERISA plan (e.g., through an education campaign, or by adding an auto-enrollment feature or auto-escalation feature to the plan). In addition:

- The FAQ makes clear that no recommendation of a particular investment or investment strategy can be made.
- The recommendations can include communications that take into account the characteristics of the plan participants and employee population.

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The contribution related FAQs are a welcome step by the DOL towards a more common sense and practical view of the limits of fiduciary advice. Notably, the DOL's Request for Information on the Fiduciary Rule included a question about contributions suggesting the Department might create an exemption for contribution recommendations. The exclusion articulated in the FAQs is by far a more workable approach. A further improvement would be for the Department to incorporate these concepts into the definition itself as part of its on-going review of the Fiduciary Rule. The 408b-2 relief will be very useful for those providers who stayed silent regarding fiduciary status and will provide some flexibility for those who will now be required to amend prior statements on fiduciary status.

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