ERISA lawyers explain latest DOL moves

By Editorial Staff *Thu, Aug 17, 2017*

'The most interesting change is that... the adviser can avoid calling itself a fiduciary during the transition period, even if it is providing fiduciary advice,' said the Client Alert from the Drinker Biddle law firm.

The law firm of Drinker Biddle issued a Client Alert on August 10 explaining the significance of a new set of answers to frequently-asked-questions (FAQs) recently issued by Department of Labor with respect to the fiduciary rule.

“In light of possible changes to the rule, these FAQs give transition relief for providing a 408(b)(2) change notice of fiduciary status,” attorneys Bruce L. Ashton, Bradford P. Campbell and Joan M. Neri wrote. “The FAQs also clarify the scope of fiduciary advice for recommendations to increase plan participation and contribution rates.”

The biggest effect, they wrote, “is an extension of the 60-day deadline that otherwise would have expired on August 8. For those who need to make a change, there is now more time to do so.

“The most interesting change is that as long as the service agreement accurately describes the adviser’s services, and as long as the agreement or other writings do not disclaim fiduciary status, the adviser can avoid calling itself a fiduciary during the transition period, even if it is providing fiduciary advice.”

408(b)(2) disclosure and the fiduciary rule

Some retirement plan service providers have been confused, the attorneys wrote, about whether they need to provide a change notice related to their fiduciary status under the fiduciary rule, and if so, when.

Under the existing 408(b)(2) regulation, the Drinker Biddle *Client Alert* said, a service provider that expects to be a fiduciary to an ERISA plan must disclose to the responsible plan fiduciary its status as a fiduciary, along with a description of its services and fees, reasonably in advance of entering into a relationship with the plan.

But, according to DOL’s latest statement on the topic, service providers that *expect* to provide fiduciary advice to plans do not have to use the word “fiduciary” during the transition period, so long as they *accurately and completely* describe the services they are providing that would make them fiduciaries.

Service providers that believe they won’t be providing fiduciary advice to plans after June 9 do not need to disclose fiduciary status.

“Service providers should tread carefully here,” the Client Alert warned. “This relief may be somewhat of a trap, since disclosures are often general and lack the specificity that the FAQs seem to require.”

Somewhat ironically, service providers that are not fiduciaries or are not providing fiduciary services can’t

avoid using the word “fiduciary” under this DOL relief. “The transition period relief allows service providers to avoid using the word ‘fiduciary’ to affirmatively describe their services, but it does not allow them to deny fiduciary status directly,” the attorneys pointed out.

No disclosure required for unauthorized actions

In the FAQs, the DOL formally endorsed the view, already held by ERISA practitioners, that “unauthorized and irregular” actions by employees or representatives of a service provider that is not a fiduciary and that are beyond the service provider’s contract terms (e.g., recommendation of a rollover by a call center representative who is only authorized to provide educational information) do not necessitate a disclosure of fiduciary status under 408(b)(2) even though that unauthorized action was fiduciary advice.”

The Client Alert also said:

■ The new relief only applies during the transition period. Once the fiduciary rules become fully applicable, service providers who are fiduciaries under the new version of the rule will need to make a complete 408(b)(2) disclosure of their status as such.

■ If the service provider was already a fiduciary but failed to disclose that status in a 408(b)(2) notice, the FAQs don’t provide any relief and the service provider may have engaged in a prohibited transaction.

■ Communications to plan or IRA participants encouraging plan contributions to meet “objective financial retirement milestones, goals or parameters” are not fiduciary advice, so long as no specific investment product or investment strategy is recommended. Such communications may include, for example:

- Plan enrollment brochures recommending that a participant contribute a certain percentage of pay
- Targeted emails that suggest that a participant increase his contributions by a certain percentage each year
- Targeted emails that suggest an amount to contribute based upon the individual’s current plan savings
- Call center assistance that suggests a specific overall retirement savings goal
- Recommendations to a plan fiduciary on how to increase plan participation are not fiduciary advice, even if the recommendations are based on specific attributes of the plan or its demographics

“A safe course would seem to be to tie the recommendation to specific goals, parameters or milestones rather than a general encouragement to defer more,” the Alert recommended.