DOL RELEASES SECOND ROUND OF FAQS ON THE CONFLICT OF INTEREST RULE

Summary of the Situation

On January 13, 2017, the Department of Labor released two sets of FAQs in a second round of guidance on its Conflict of Interest rule. One set of FAQs is “Part II” of ongoing guidance on technical aspects of the rule as it affects providers and plan sponsors, and it will be the focus of this article. The other is a set of “Consumer” FAQs generally directed at plan participants and IRA owners.

Who is most impacted by this?

Sponsors of DB and DC plans.

Key takeaways for clients

- **Background – the issues that the Conflict of Interest rule presents for sponsors, generally:** Many of the new Q&As focus on when a provider communication makes the provider a fiduciary under the rule. While the new Conflict of Interest rule doesn’t change the plan fiduciary’s legal obligation under ERISA to monitor the prudence of the appointment of a (fiduciary or non-fiduciary) service provider, the new requirements applicable to the provider will be stricter and more complicated. And reviewing the provider’s compliance with those stricter and more complicated requirements will make the plan fiduciary’s job tougher.

- **Technical FAQs Part II:** Many of the new FAQs cover/repeat guidance that was explained in more detail in the original rule and its explanatory preamble. In what follows we are not going to detail Q&As that simply recite guidance that was reasonably clear in the original rule and related materials. Instead we focus on some specific Q&As that may be of significance for plan sponsors:
• **Q&A 4: Recommending non-retirement investments may trigger fiduciary status.** Q&A 4 states that an “adviser” who recommends a non-retirement investment to a person receiving a required minimum distribution from a 401(k) plan is giving “investment advice” covered by the new rule. The non-retirement investment in the example is a permanent life insurance product, but it could conceivably be anything that could be characterized as an “investment,” including, e.g., a second home. It’s fair to say that this interpretation is a surprise: it may make persons who don’t think of themselves as in the retirement investing business at all (e.g., a real estate broker recommending “investment” in a second home) ERISA fiduciaries.

• **Q5: Selecting an IRA vendor for mandatory cash-outs does not make the plan sponsor (or the vendor) a fiduciary.** ERISA allows the cash-out (without the participant’s consent) of balances under $5,000. But if the balance is valued at more than $1,000, and the participant does not make an affirmative election (e.g., of a direct rollover or a cash distribution), the benefit must be transferred to an IRA or similar vehicle designated by the plan administrator. Q&A 5 makes it clear that that sort of arrangement, by itself, does not trigger ERISA’s fiduciary rules.

• **Q7. An adviser may charge a flat fee for providing investment advice without violating ERISA prohibited transaction rules provided it nets any investment related fees against the flat fee.** Q&A 7 confirms that providers (and, implicitly, the sponsor fiduciaries who retain them) may continue to rely on Advisory Opinion 97-15A.

• **Q9/10. Recommendations to increase contributions to maximize the employer match generally do not constitute investment advice.** Thus, a call center operator “may, without giving fiduciary advice, inform the participant that, based upon her current contribution percentage, she is not taking full advantage of the employer’s matching contribution, explain the company’s matching formula and calculate how much the participant would need to contribute in order to maximize the employer match.”

• **Q20/27. Corporate officers as independent fiduciaries/non-plan assets qualify for the $50 million test.** Q&A 27 clarifies that a corporate officer such as a CFO who is also a 401(k) plan participant can qualify for the independent fiduciary exception if his job responsibilities include managing at least $50 million in assets. Q&A 20 clarifies that for purposes of the $50 million test “plan and non-plan assets and the assets of multiple plans and non-plan investors [may] be taken into account.”

• **Q28. A person may be “independent,” and thus qualify for the independent fiduciary exception, even though it is receiving, e.g., 12b-1 fees with respect to funds it selects for the plan’s fund menu if, with respect to those fees, it complies with the Best Interest Contract Exemption.** Other “independence” requirements would continue to apply.
• Briefly: The FAQs also clarify that –
  Q6. An adviser is not liable for “investment decisions made by the client against the adviser’s recommendation.”
  Q12. “Charging compensation for providing educational services does not change the nature of the communication into investment advice.”
  Q15. To qualify for the investment education “exception,” asset allocation models need only include a plan’s “designated investment alternatives” – they do not have to include options available through a brokerage window.
  Q17. Free-meal seminars are not “widely attended speeches or conferences” qualifying for the “general communications” exception to the new rule.
  Q18. A recommendation to hire a non-fiduciary recordkeeper is not fiduciary advice.
  Q24. The independent fiduciary exception applies to a meeting with an (otherwise qualified) independent fiduciary, even if members of the plan’s fiduciary committee are also at the meeting.
  Q29. Financial intermediaries may pay to/receive from each other fees with respect to investment advice without compromising eligibility for the independent fiduciary exception.
  Q32. “[T]he platform provider provision is available to persons who market or make available a platform, including a third party’s platform.”
  Q33. A platform provider (e.g., a recordkeeper) may provide a list “of all of the investment alternatives available on the platform that meet the requirements of the plan’s investment policy statement” (emphasis added) without losing the protection of the platform provider exception.

What’s next?
The critical outstanding question with respect to the Conflict of Interest rule and, by extension, this follow-on guidance remains: what will be the attitude of the Trump Administration DOL towards this policy project? It looks like (as of this writing) the hearing for President Trump’s nominee for DOL Secretary, Andy Puzder, is set for early February. That hearing may give some hints of an answer to that question.

We will continue to follow this issue.