



ERISA Update

Considerations for Providers
and Their Clients

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Topics

- DOL Fiduciary Rule
- ERISA Litigation
- DOL Enforcement
- Other



DOL Fiduciary Rule

- Final Regulation issued April 7, 2017
 - Applicability Date – April 10 extended to June 9
- Requirements from June 9, 2017 through December 31, 2017
 - Definition of “investment advice”
 - BIC Exemption & Principal Trading Exemption – Impartial Conduct Standards only
 - “Old” PTE 84-24 plus Impartial Conduct Standards
 - Changes to PTEs 77-4, 86-128 & 75-1 effective June 9



DOL Fiduciary Rule

- January 1, 2018
 - Full BIC Exemption and Principal Transactions Exemption apply
- Presidential Memorandum
 - Additional delays?
 - Substantive changes?



DOL Fiduciary Rule - Employer Considerations

- Participant Experience
 - Distribution events & rollovers
 - Participant education (and AA models)
 - Availability of advice/management
- Sponsor Experience
 - Changing platforms
 - Investment provider interactions
 - Employees / internal fiduciaries

ERISA Litigation – 403(b)

- Target = large 403(b) plans subject to ERISA
- Common Facts:
 - One or more group variable annuity contracts or custodial accounts
 - Participants can invest employee and employer contributions in a number of investment options
 - Insurance company pooled separate accounts & mutual funds (prop. & non-prop.)
 - Option to annuitize & purchase other insured retirement benefits under contracts.
 - Multiple issuers, custodial account providers, recordkeepers



ERISA Litigation – 403(b)

- Common allegations
 - High cost investment options
 - More expensive share classes
 - Excessive revenue sharing to recordkeeper or its affiliates
 - Excessive recordkeeping fees



ERISA Litigation – 403(b)

- Unique allegations
 - No actively managed option prudent when a lower cost, passively managed option in same asset class available
 - AUM formula rather than flat dollar for allocation of recordkeeping fees to participant accounts
 - Competitive bidding process for recordkeepers at least every three years
 - Too many investment options & duplicative investment options
 - Use of multiple recordkeepers/administrators
 - Common fee structures for annuities and other insurance products
 - Critical of annuity products in general, including fixed and life annuities

ERISA Litigation – Managed Account Services

- Fleming et al. vs. Fidelity Management Trust Co.; Patrico v. Voya Financial, Inc.; Marshall v. Northrop Grumman
- Service provider advises or manages participant account assets
- Unreasonable compensation to recordkeeper
 - Fee based upon AUM of service provider, but recordkeeper level of service remains the same even as the AUM grows

ERISA Litigation – Managed Account Services

- Allegations
 - Recordkeeper acts as fiduciary in selecting service provider
 - Recordkeeper participates in a prohibited transaction
 - Plan's named fiduciary caused a prohibited transaction - allows payment of compensation in excess of reasonable comp. to the recordkeeper (recordkeeper receives spread)



Other ERISA Litigation – Common Themes Continue

- Revenue sharing & share class selection
- Active vs passive management
- SMA vs mutual funds vs CITs
- Plan's subsidy of employer's services
- Absence of competitive bidding
- Lack of IPS compliance
- Performance monitoring
- Failure to capture revenue for plans



ERISA Litigation – Future Trends?

- Alternative investment funds
- Money market funds & stable value funds
- Management of stable value funds
- Methods for allocating revenue sharing among participants
- Conflicts of interest on the part of participant advice providers, esp. rollovers



DOL Investigations & Enforcement

- DOL has always investigated plan sponsors & other “employer fiduciaries”
- DOL continues to increase focus on advisers and fiduciary services providers



DOL Investigations & Enforcement – Advisers/Providers

- ERISA sec. 408(b)(2) disclosures
- Receipt of revenue sharing/third party payments
- Prohibited transaction exemption compliance
- Compliance with IPS
- Collective investment trusts
- Coordination with SEC

Handling Provider/Adviser Investigations

- Call Investigator
 - Narrow scope of investigation/document request; extension
- SEC/FINRA Compliance vs. ERISA Compliance
 - ERISA compliance procedures
- Preparation for interview(s) with DOL Investigator
 - Operational knowledge and ERISA knowledge
- DOL will send letter describing results of investigation
 - Discuss language prior to sending
- Referral to the Solicitor's Office
 - Additional penalties involved
- DOL press releases are more common



DOL Investigations & Enforcement – Employers

- Late pretax/after-tax contributions & loan payments
- Expenses charged to plan
- Fiduciary governance
- Transactions between plan and “parties in interest”
- ESOPs – non-public stock
- Locating missing participants
- Following plan terms/IPS
- Process surrounding evaluation and understanding of plan fees



Other

- Proxy Voting
 - DOL Interp. Bul. 2016-01
- State- and Local-Government-Based Retirement/IRA Initiatives
- Multiple Employer Plans