DEPARTMENT OF LABOR FOCUS ON FIDUCIARY RESPONSIBILITIES

Introduction

As many of our readers know, on April 6, 2016, the U.S. Department of Labor ("DOL") issued a final regulation concerning fiduciary responsibilities. (Our May 2016 Newsletter discussed this new rule and its applicability to individuals/entities who provide investment advice to employer sponsored retirement plans.) These rules, both old and new, have their foundation in the Employee Retirement Income Security Act of 1974 ("ERISA").

While this new DOL rule is sweeping for investment professionals as either Section 3(21) or 3(38), financial advisers or discretionary asset managers respectively, the new federal rule does not change the fundamental "fiduciary" status of the plan sponsor. The plan sponsor has been, and continues to be, a fiduciary.

This article is primarily concerned with the plan sponsor's/employer's ongoing and unchanged managerial responsibilities for the operation of the qualified retirement plan, as opposed to hiring an ERISA section 3(16) fiduciary to manage the retirement plan.

Retirement Plan Partners

The plan sponsor of a typical 401(k) employee retirement plan uses (1) a **Third Party Administrator** ("TPA") to provide plan level compliance and administrative services, including required plan documents, the preparation of nondiscrimination tests, and federally required annual reports, (2) a **Financial Advisor** to assist the employer in selecting suitable plan investments and/or investment opportunities for participants, and (3) a **Financial Institution** that provides an investment platform whereby plan assets may be entrusted to various investments, such as mutual funds. Generally, plans with 100 participants or more at the beginning of the plan year must also select an auditing firm to conduct annual plan audits.

The employer sponsoring the plan must select these parties and must do so with the best interests of plan participants in mind. Experts on ERISA emphasize the need to document the steps taken in the process of selecting and retaining each of these entities that assist in the investment of plan assets and plan operations. Many ERISA lawyers will advise that when it comes to discharging an employer's fiduciary duties to the plan, the **process** followed in making the selection decisions mentioned above is far more important than the actual resulting decision.

Continued on Page 2

ERISA Section 3(16)

Although some plans may retain experts to guide them through the process, many plans adopt more of a "do it yourself" approach to the decision making process. There is nothing in ERISA or the DOL rules that require hiring an ERISA Section 3(16) fiduciary to determine eligibility, file government reports, or process participant distribution requests.

While it may be appropriate for a plan sponsor to consider hiring a Section 3(16) fiduciary to handle the retirement plan, this step is rarely taken. There may be other alternatives since (1) an expenditure for a 3(16) fiduciary does *not* change the fact that the plan sponsor is still the **primary fiduciary**, and still liable for perceived managerial misjudgments on the part of others administering the plan, (2) hiring a 3(16) fiduciary as a plan administrator, could involve paying two times the normal TPA fee with no reduction in employer liability for any alleged errors, and (3) hiring a Section 3(16) fiduciary means that the plan sponsor is not only responsible for vetting the technical expertise of the 3(16) fiduciary, but also whether that 3(16) fiduciary has the financial resources to settle any fiduciary breaches.

In fact, there is no reason why the plan sponsor cannot do the general oversight itself, better and cheaper, provided it hires a reputable TPA, financial advisor, and investment platform provider and takes a few important basic steps.

Create a Responsibility List

One of **the** most important steps for the plan sponsor is to prepare a responsibility list that states what has to "**be done**" annually regarding the administration of its qualified retirement plan, and more importantly "**who is responsible**" for getting it done, by a certain date. A third party administrator can provide a preliminary "responsibility grid" to get the process started, while other service providers can make sure it is complete.

The annual task that plan sponsors may be familiar with is the compilation of the plan sponsor's "**census",** listing all the employees working for the plan sponsor during the past year, their name, social security number, date of birth, date of hire, compensation amount, number of hours worked that year, and date of termination (where applicable). This data is needed to prepare nondiscrimination testing and provide other administrative functions. Depending on the type of retirement plan, other data may be required. Please note, the plan sponsor, does not have to do everything; it merely has to verify that everyone on the responsibility list above is doing their job, on time. In other words, the plan sponsor's responsibilities under

Continued on Page 3

the new "fiduciary" rule are pretty much the same as before. What has **changed** is the responsibility of certain investment providers described above.

If the plan sponsor wants additional protection regarding its fiduciary responsibilities, purchasing fiduciary liability insurance is the most direct, and cost effective route to take.

In summary**,** hiring a Section (3)(16) fiduciary may be an increased expenditure, with *no decrease* in the plan sponsor's personal fiduciary liability. Alternatively, careful management of reputable service providers, including a TPA and recordkeeper, and documenting their responsibilities, can satisfy the plan sponsor's fiduciary obligations.

REMINDERS FOR NOVEMBER

November 15 – Minimum funding requirements for Defined Benefit, Money Purchase, and Target Benefit plan years ended 2/29/16 must be met by November 15, in order to avoid excise taxes. An electronic transfer must be completed or a check mailed by this date.

November 15 – Retirement plan employer contributions are due in order to be deducted on employer tax returns due to be filed November 15, 2016.

November 15 – Forms 5500 Series/8955-SSA – Forms that are on extension are due for the Plan Year ended 1/31/16.

November 30 – Forms 5500 Series/8955-SSA – Forms are due for the Plan Year ended April 30, 2016 for plans that are not on extension.

December 1 – Safe harbor notices for calendar 2017 401(k) and 403(b) safe harbor plans with safe harbor provisions and automatic enrollment notices for auto enrollment plans are required to be distributed to plan participants in order to satisfy the timing requirement in federal regulations.

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