

Chapman Client Alert

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Current Issues Relevant to Our Clients

DOL Issues FAQs for 401(k) Plan Advisors

The Department of Labor (the “DOL”) recently issued another set of FAQs, focusing on advisors to 401(k) plans. The FAQs generally address two issues. The first issue deals with the interaction of the fiduciary rule with the already existing service provider disclosure rules under the DOL’s 2012 Section 408(b)(2) regulations. The second issue deals with whether recommendations to increase participant contributions and participation in retirement plans constitutes fiduciary investment advice.

Section 408(b)(2) Disclosure Update

The Section 408(b)(2) regulations require covered service providers to provide plan fiduciaries with certain information about the services they provide to the plans and the compensation they receive for such services. Among the information such service providers must disclose is whether they intend to provide fiduciary services to a plan. The DOL indicated that questions have been raised regarding the interplay between the new fiduciary rule and the required fiduciary disclosures under the Section 408(b)(2) regulations. In response, the DOL provided in the FAQs the following:

- Service providers who are not currently fiduciaries and who reasonably believe that they will not become investment advice fiduciaries under the fiduciary rule will not be required to disclose fiduciary status under Section 408(b)(2) regulation. This is the case even if possible actions of agents, representatives or employees of the service provider, in individual circumstances, undertake actions that result in communications that constitute investment recommendations under the fiduciary rule.
- During the transition period, service providers who will, or expect to become, investment advice fiduciaries may provide service provider disclosures to a plan without using the word “fiduciary,” provided they accurately and completely describe their services. This DOL guideline is in response to certain concerns, including a concern about making an express disclosure during the transition period even though there is uncertainty about possible changes that the DOL may make to the fiduciary rule and associated exemptions.
- Service providers who will, or reasonably expect to become, investment advice fiduciaries, but whose Section 408(b)(2) disclosure currently provides that they are not fiduciaries must as soon as practical (even after the 60-day period, as required by the Section 408(b)(2) regulations) amend their disclosures to accurately and completely describe the services they provide.

Recommendations to Increase Contributions to 401(k) Plans or IRAs or Participation in 401(k) Plans

Provided that plans and their service providers do not recommend a particular investment or investment strategy, communications “about the benefits of plan or IRA participation, [and] the benefits of increasing plan or IRA contributions” will not be treated as fiduciary investment advice. Similarly, provided that information and materials do not include recommendations with respect to specific investment products or investment strategy, recommendations or suggestions

to plan administrators or other plan fiduciaries related to methods to increase plan participation or the level of plan contributions will not be treated as fiduciary investment advice.

For More Information

If you would like to discuss any topic covered in this Client Alert, please contact a member of the Investment Management Group or visit us online at chapman.com.

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