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April 17, 2017

Via Federal eRulemaking Portal

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Fiduciary Rule
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: RIN 1210-AB79 – Proposed Rule; Extension of Applicability Date

Dear Sir or Madam:

McGuireWoods LLP ("McGuireWoods") appreciates the opportunity to comment on the regulations finalized in the "Definition of the Term 'Fiduciary'; Conflict of Interest Rule – Retirement Investment Advice," 81 Fed. Reg. 20,946 et seq. (April 8, 2016) (the "Rule"). We are responding to the Department's invitation for comments on questions raised by the Presidential Memorandum on Fiduciary Duty Rule for the Secretary of Labor (February 3, 2017) (the "Presidential Memorandum") and on general questions of law and policy concerning the Rule.

McGuireWoods is a leading U.S. law firm with more than 1,000 attorneys in 23 offices across the United States and Europe. We counsel a diverse range of clients on employee benefits matters, including publicly held corporations, small and large privately held companies, tax-exempt organizations and educational institutions.

On behalf of our retirement plan sponsor clients and their affiliated employers, we wish to provide comments on a specific issue relating to the Rule's exemption for "investment education" (the "Education Exemption") in light of the compliance FAQs recently issued by the Department.[1]

Recent FAQs Introduce Uncertainty as to the Education Exemption

Since the Rule was finalized, plan sponsors have been actively analyzing the Rule and evaluating its impact on their participant communications practices. One particular area of focus

[1] Conflict of Interest FAQs (Part II – Rule) (Jan. 13, 2017).

has been on the Education Exemption. Our plan sponsor clients have spent considerable time confirming that the materials and resources they provide to plan participants, both directly and through their recordkeepers and other service providers, meet the Education Exemption and thus do not constitute fiduciary investment advice for purposes of the Rule.

Unfortunately, the compliance FAQs recently issued by the Department have introduced uncertainty regarding the availability of the Education Exemption for certain types of communications. Specifically, Question 10 of the FAQs suggests that an employer communication recommending that a participant increase his or her own contributions to a higher percentage of compensation in order to maximize the employer matching contribution they would receive under a 401(k) plan could be investment advice not covered by the Education Exemption. The FAQ observes that despite this potential result, it may be possible for such a retirement savings communication to not constitute investment advice so long as the employer does not receive a fee or other compensation in connection with that communication.

Following are some of the concerns raised by our plan sponsor clients as to Question 10 of the recent FAQ guidance.

Question 10 is inconsistent with how plan sponsors have interpreted communications covered by the Education Exemption

Question 10 is at odds with how our clients have been interpreting the Rule, specifically in their view of the types of communications covered by the Education Exemption. Plan sponsors do not understand why the Department would consider an individualized recommendation to increase retirement savings as potentially constituting an investment recommendation rather than investment education, and the FAQs provide no explanation for such an interpretation.

In our clients' view, a communication to a 401(k) plan participant recommending that the participant consider increasing their contributions to accumulate greater retirement savings, without any recommendation of an investment product, alternative, property or of a specific security in which such contribution should be invested, is educational information about how the plan works. In other words, the communication is designed to educate the participant on how to better utilize the plan to achieve his or her retirement savings goals. Retirement savings recommendations should be treated as non-fiduciary education within the scope of the Education Exemption.

Tailored participant communications are jeopardized by the guidance

Another problem with Question 10 and its underlying reasoning is that it hinders the use of individualized communications (often referred to as "targeted communications") for participants who are not contributing at a level to qualify for the full level of employer contributions available under a 401(k) plan. Many plan sponsors find that participants are more responsive to and willing to consider communications that are individualized to them. Such communications frequently include targeted mailers, social networking and creative marketing channels.[2] Absent clarification from the Department, Question 10 poses a risk of chilling useful forms of targeted communications to participants that have proven effective in increasing participation levels and retirement savings.[3]

How to Address these Concerns

We suggest that the Department reconsider Question 10 of the FAQs, and clarify that retirement savings recommendations are not fiduciary investment advice for purposes of the Rule. We believe the Department could accomplish this by revising the Rule to state that a communication recommending a participant to consider increasing the amount of their contributions under the plan, including in order to receive additional employer contributions, be listed as a type of information that constitutes either "plan information" or "general financial, investment and retirement information," as those terms are defined in the Rule for purposes of the Education Exemption. This would merely clarify what plan sponsors already believe is a proper interpretation of the Education Exemption. Furthermore, it should not create any risk of abuse because the Education Exemption already contains safeguards to protect against the use of educational materials to provide fiduciary investment advice. Specifically, the Rule makes clear that the information and materials listed in the Education Exemption are covered by the Education Exemption only if they "do not include (standing alone or in combination with other materials) recommendations with respect to specific investment products or specific plan or IRA alternatives, or recommendations with respect to investment or management of a particular security or securities or other investment property . . . ."

Conclusion

We thank you for the opportunity to comment on this issue and for any consideration you may provide to the concerns discussed in this letter. Please contact us if you have any questions or if we may be of further assistance. Mr. Capwell can be reached at 704-353-6256 and Mr. Wynne at 804-775-1868.

Respectfully submitted,

Jeffrey R. Capwell

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[2] *See* ERISA Advisory Council Report, Successful Plan Communications for Various Population Segments (Nov. 2013) ("The Council found that communications used by plan sponsors to specifically target participants based upon their interests, background, and/or economic status were more successful than providing general communications intended for every participant/employee in the retirement plan.").
[3] *Id.* ("Personalizing the approach and understanding the unique characteristics of the particular workforce garnered effective results when compared to a simple mass communication").

Robert B. Wynne