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New Developments Reinforce Plan Fiduciary Obligations

Plan fiduciaries must be diligent in monitoring service provider fees and investment options, and, when necessary, removing underperforming investments and service providers. Two recent developments highlight these obligations.

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Department of Labor Re-Proposes Fiduciary Rule

In April, the Department of Labor ("DOL") reissued proposed regulations that, if finalized, would significantly expand the definition of "fiduciary" under ERISA by changing the rules for providing investment advice.

Implications for Plan Sponsors

Plan sponsors do not need to take action in response to the proposed regulations.

The proposed regulations most significantly impact individuals who provide investment advice or services to employee benefit plans or IRA owners and have previously denied fiduciary responsibility. Investment advisors who are already fiduciaries who receive direct compensation and plan fiduciaries (e.g., the named fiduciary, the plan sponsor and the plan administrator) will likely not be significantly impacted even if the proposed regulations are finalized. Plan fiduciaries should continue to monitor and periodically review the performance of service providers and service providers' fees.

The proposed regulations, if finalized, may change plan sponsors' relationships with certain advisors. Some providers may request changes to service contracts or the scope of their services. If contract changes are requested, a plan sponsor may want to seek legal review of the contract to ensure ongoing compliance with these rules.

Proposed Regulations

Under the proposed regulations, an individual is a fiduciary if providing investment advice for compensation to: (1) a plan; (2) a plan fiduciary; (3) a plan participant or beneficiary; (4) an individual retirement account ("IRA"); or (5) an IRA

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owner, and either: (a) directly or indirectly represents or acknowledges that the individual acts as a fiduciary; or (b) provides the advice under an agreement, arrangement or understanding that the advice is individualized to or specifically directed to the recipient for consideration in making investment or management decisions. "Investment advice" has a specific definition that includes recommendations regarding buying, selling, holding or exchanging securities or other property, and certain appraisals or fairness opinions.

The proposed regulations also provide six "carve-outs" from the general definition of "fiduciary." These carve-outs include providers of appraisals and opinions for ESOPs, plan sponsor employees who provide investment advice and providers of certain investment education.

In addition to the "carve-outs," the DOL proposed new prohibited transaction exemptions, including one allowing individuals to continue operating under certain fee arrangements (e.g., commissions and revenue sharing) if the individual complies with certain requirements.

Supreme Court Confirms Duty to Monitor

The Supreme Court of the United States recently decided *Tibble v. Edison*, confirming plan fiduciaries have a continuing duty to monitor investment options and take action when an investment is no longer prudent. The Supreme Court found plaintiffs' breach of fiduciary duty claim was not barred by the six-year statute of limitations based on the initial selection of the investments; rather, the duty to monitor and review investments is ongoing.

Lessons for plan sponsors and plan fiduciaries are:

- Duty to Monitor. Fiduciaries cannot rely on the due diligence conducted at the time of the initial investment decision to satisfy their fiduciary duties. Instead, fiduciaries must monitor investments and investment fees on a periodic basis. Investments should be reviewed at reasonable intervals (e.g., annually or biannually), but more frequent review may be appropriate under the circumstances.
- Consider Investment Policy. Plan sponsors and fiduciaries should create and adopt an investment policy to assist with reviewing and monitoring investment service providers. Such a policy provides fiduciaries with a roadmap for reviewing and monitoring investments, and criteria for measuring performance. Once a policy is adopted, the plan fiduciaries should follow the policy,

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document compliance with the policy and update the policy as appropriate.

- Prudent Expert. A plan fiduciary should have sufficient knowledge (or engage an expert) to identify, monitor and replace underperforming investments. This is especially true for plan fiduciaries that consider high risk investments.
- Document, Document, Document. A fiduciary's actions to monitor an investment as well as any action taken in response to monitoring should be clearly documented in writing. One option is to periodically review plan operations against a checklist that describes actions taken by the plan fiduciaries and dates those actions are taken. Contact your Reinhart attorney to learn more about available checklists or request a checklist tailored to your plans' needs.

The primary lesson from *Tibble* and the DOL's re-proposed fiduciary regulations is that plan sponsors and plan fiduciaries need to ensure that they have adequate procedures in place to prudently select, monitor and, if necessary, terminate investment options and service providers.

If you have questions about the topics discussed in this e-alert, please contact your Reinhart attorney or any member of our Employee Benefits Practice.

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