Fiduciary Rule's Impact on IRAs Should be no Surprise

During the course of the Department of Labor's (DOL's) development of its recently released final fiduciary rule, a common industry challenge has been whether individual retirement accounts (IRAs) should be covered by the rule. Challengers have claimed:

- that the DOL doesn't have oversight of IRAs since IRAs are generally subject to tax, not labor law; and
- a lack of regulatory history of IRAs being subject to the fiduciary investment advice standards that have applied to ERISA-governed plans since 1975.

DOL Answers to Objections

The first point - appropriateness of DOL oversight of IRAs – has been answered by citing 1978 presidential Executive Order 12108, which transferred from the Treasury Department to DOL regulatory oversight of IRAs in the context of prohibited transactions. Because providing investment advice for a fee is a prohibited transaction (absent an exemption), DOL has rulemaking authority over not only IRAs, but also Health Savings Accounts (HSAs), Archer Medical Savings Accounts (MSAs), and Coverdell Education Savings Accounts (ESAs) and other non-ERISA plans.

The second point – lack of history of DOL fiduciary advice standards applying to IRAs - has been answered by citing a 1975 Treasury regulation. This second point, including how the DOL addressed it in its final fiduciary rule, is described more fully below.

No History of Fiduciary Investment Advice for IRAs?

Apart from the fact that the DOL now has general oversight over IRAs for prohibited transactions, is there *really* no regulatory history linking IRAs with fiduciary investment advice? The DOL issued fiduciary investment advice guidance for ERISA plans in 1975, which was three years before Executive Order 12108 gave DOL oversight of IRAs for prohibited transactions. Therefore, in that year – 1975 – DOL *did not* have regulatory authority. However, there's more to the story.

The final fiduciary rule includes a transition period during which certain requirements for providing fiduciary investment advice must be met. That period is June 7, 2016 to April 10, 2017.

A clause in the final fiduciary rule transition requirements – Section 2510.3-21(j)(1)(i) – states

that the transition period conditions described above will apply to employee benefit plans within the meaning of ERISA *and Internal Revenue Code (Code) section 4975*. Since the term "employee benefit plan" suggests an employer plan to many practitioners, this italicized text has caused confusion among IRA practitioners.

However, in Footnote 15 of the Preamble to the final fiduciary rule, the DOL reminds IRA practitioners that on October 31, 1975, the Department of the Treasury issued a virtually identical regulation, at 26 CFR 54.4975-9(c), which interprets Code section 4975. Then, as now, Code section 4975 covered IRAs (since modified to include MSAs, ESAs and HSAs).

Essentially, the transition period conditions reflect the 1975 Treasury Department and the 1975 DOL regulations that for more than four decades have defined what constitutes fiduciary investment advice. Key elements of the requirements during this period include:

- an advising relationship based on mutual agreement; and
- an understanding that individualized investment advice that is given regularly will be the primary basis for a saver's investing decisions.

The upshot is that during the transition period ERISA-governed retirement plans and non-ERISA retirement plans such as IRAs, HSAs, MSAs and ESAs will be under essentially the same standard for fiduciary investment advice and it's the same standard that has applied since 1975.

Conclusion

Both ERISA-governed plans and IRAs have been governed by the same fiduciary investment advice for decades. Considering the DOL has since been given rule making authority over Code section 4975, it should come as no surprise that IRAs are subject to the same recently issued final rule that also applies to ERISA governed employer retirement plans. The more things change, the more they stay the same.