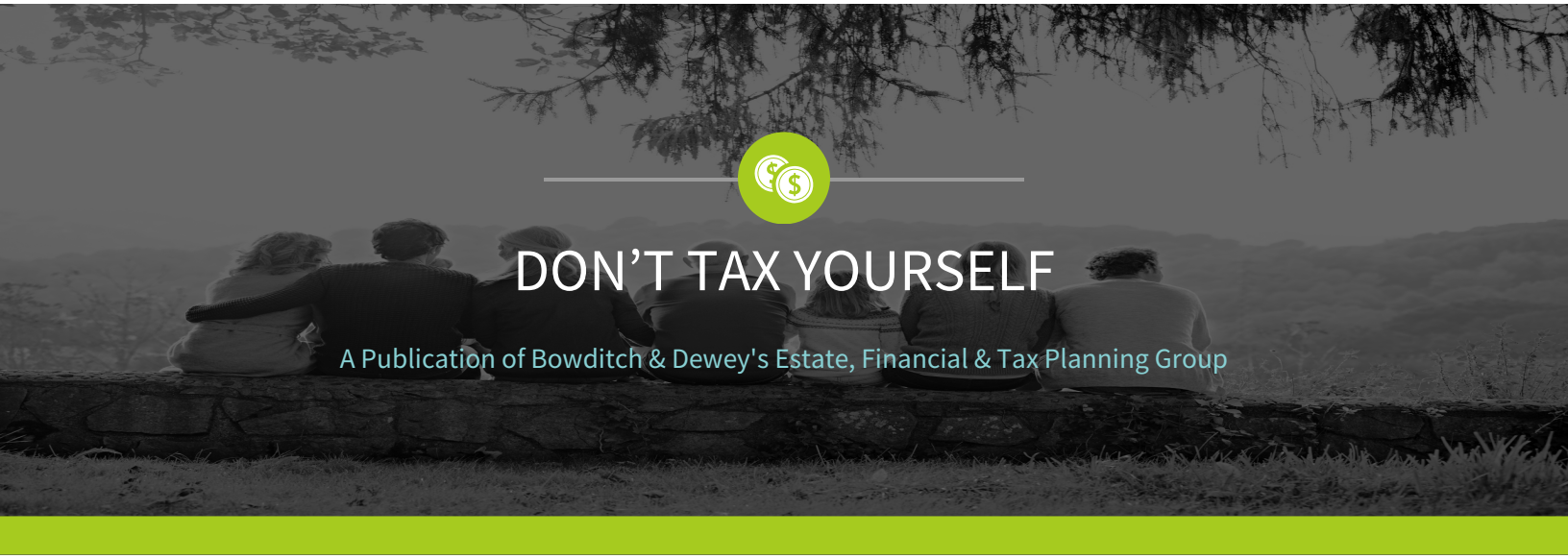

DON'T TAX YOURSELF

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DOL Fiduciary Rule: Love It or Hate It, It's Here

BY TERRENCE J. BRIGGS • JUNE 8, 2017

If you have an account in a retirement plan where you work or you own an Individual Retirement Account, you may get investment advice from an investment advisor. You might expect that advisor to give you advice that was in your best interests. But, unless you or the plan in which you participate has a contract requiring the advisor to place your interests ahead of theirs, advisors need not put your interests first. The Obama administration Council of Economic Advisors reported in 2015 that account-holders lose $17 billion every year from advice that generates excessive commissions resulting from moving money from one investment to another where fees to the advisor are higher or simply from churning, moving the money around to create trading costs.

The US Department of Labor (DOL) has struggled for years to draft and implement a rule that would require these investment advisors to accept a role as fiduciaries to the plans and IRAs for which they give investment advice. This rule, the Fiduciary Rule, would require that the advisors be guided in their recommendations by the best interests of the retirement plan or IRA account-holder.

The investment industry has generally asserted its support for revisions to the existing 40-year-old rule. It also has found reasons to lobby fiercely against every specific proposal that has emerged. It is fair to say that this regulation would not have been supported by the Trump administration, which seeks generally to free the economy from what it regards as the dead weight of excessive regulation.

Nevertheless, the Fiduciary Rule will go into effect at 11:59 p.m., local time, on June 9, 2017. As the Secretary of Labor said last week, while the Fiduciary Rule does not "align with President Trump's deregulatory goals" he could find "no principled legal basis to change the June 9 date."

He could not find a legal way to delay the implementation of the Rule, but that does not mean that it will be enforced. DOL Field Assistance Bulletin 2017-02 says, "during the phased implementation period ending on January 1, 2018, the Department will not pursue claims against fiduciaries who are working diligently and in good faith to comply with the

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fiduciary duty rule and exemptions, or treat those fiduciaries as being in violation of the fiduciary rule and exemptions." And, "[t]o the extent that circumstances surrounding the applicability date of the fiduciary duty rule and exemptions give rise to the need for other temporary relief [the DOL] will consider taking such additional steps as necessary." In other words, we should expect that the transition and phase-in period will extend beyond January 1, 2018.

What does this mean to you as an employer, a participant in your employer's retirement plan, or as the owner of an IRA?

If you are a participant in an employer-sponsored retirement plan, your plan's investment advisor should already be a fiduciary and should be acting according to this fiduciary rule. Most, but not all, retirement plan investment advisors have voluntarily agreed to these standards because it is good for them in a very competitive business environment. You also want to pay attention to your statements, which should disclose to you all of the fees that you and your plan are paying for investment advice. You can find out if your plan's advisors are fiduciaries by asking your HR department or the advisors themselves.

If you have an IRA you will need to be vigilant because most IRA advisors have not voluntarily assumed this fiduciary duty to you. You should (1) ask the advisor if he or she owes you a fiduciary duty and if not, why not, (2) ask if the advisor discloses to you all of the fees that are charged to your account, including those that are charged by the investment itself, a mutual fund for example, and funneled to the advisor as additional compensation, (3) be sensitive to lots of buying and selling in your IRA account, if you see it, ask why, and (4) once you know all of this, shop around.

It's a jungle out there.

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