Presenter

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  - Drilling down: interactions with plan participants
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Why is this important to plan sponsors?

- For ERISA plans: the rule and related guidance can apply to a wide range of interactions that plan sponsors and participants have with individuals and firms providing investments and services to the plan. The rule and related guidance also can apply to rollovers out of both ERISA and non-ERISA plans, however they do not impose duties on non-ERISA plans.

- On or before the applicability date: the plan sponsor and the investment/service provider should have a shared understanding of how the rule and related guidance apply to those interactions; or, if the investment/service provider intends to:
  - Accept fiduciary status for the promised services that are not considered fiduciary advice; or,
  - Adjust services as necessary, to fit within the exceptions to fiduciary status.
Timeline

- Final regulation and exemptions were released by DOL on April 6, 2016; and published in the Federal Register on Friday, April 8, 2016

- Original applicability date: April 10, 2017
  - With full applicability of all of the guidance on January 1, 2018

- Further guidance from DOL delayed the initial applicability date to June 9
  - With full applicability still at January 1, 2018

- Could there be further changes to the timeline? Yes
  - DOL not likely to complete its review by June 9
  - They are being encouraged from many directions to delay the regulation further until they can complete their review
  - If there are delays: the ability of many service providers to assume additional fiduciary responsibilities also will be delayed
General overview

- A DOL guidance package with many parts:
  - Re-defines investment advice fiduciary
  - Modifies the existing investment education exception and
  - Modifies and narrows a number of existing prohibited transaction exemptions (PTEs), and adds a new one -- Best Interest Contract Exemption (BICE)
    - What is an exemption? A DOL balancing of protections and market needs

- Focus is on recommendations
  - To buy, sell, or hold investments
  - Of an unaffiliated investment advice fiduciary

- Applicable to ERISA plans, Keogh plans (and also, IRAs)
  - Not applicable to non-ERISA plans (other than Keogh plans)

- Significant expansion of scope of fiduciary advice
  - Before final rule: exclusionary rule; many interactions excluded unless fiduciary status agreed or acknowledged.
  - Under final rule: inclusionary rule; many interactions would be fiduciary unless an exception applies
Interactions with plan sponsors and participants

- Fiduciary rule can apply to both, either, neither – depending upon the nature of the interactions

- Important to review and assess at both levels
  - Does the interaction involve a recommendation?
  - If so, does an exception apply?
  - If it involves a recommendation, and no exception applies, then
    - Are there any prohibited conflicts of interest?
    - If there are, is there an applicable exemption?
Drilling down: Interactions with plan sponsors

- Fiduciary investment consultant to the plan: covered under both old and new rule
- Many service provider interactions are plan-related and not investment-related: not covered by the regulation and related guidance
- Product and platform offerings: also generally not covered unless they fall outside of available exceptions
  - Education exception
  - Platform exception: offering (without recommendation) of plan investment platform, with related services
    - Related services can include connectivity to other service providers, including fiduciaries
    - Platform also can include certain investment selection and monitoring support
- Independent fiduciary with financial expertise: sometimes shortened to “independent plan fiduciary”, or IPF
  - Can be plan sponsor, if fiduciary responsibility for $50M+ in fiduciary assets
  - Also can be plan consultant, such as an investment advisor or broker dealer
- Example: VALIC Financial Advisors, Inc (VFA): will provide non-fiduciary plan sponsor support under these exceptions
Drilling down: Interactions with plan sponsors (cont’d)

- **Additional drill down: platform exception**
  - Marketing and making available to an ERISA plan sponsor/fiduciary
    - securities or other property through a platform or similar mechanism
    - from which a plan fiduciary may select or monitor investment alternatives, including qualified default investment alternatives
    - into which plan participants or beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts
    - without regard to the individualized needs of the plan, its participants, or beneficiaries
  - Platforms can include fixed and variable plan investments, a designated investment for forfeitures or other unallocated amounts, a self-directed brokerage window, IRAs for automatic rollovers, QLACs, etc.
  - Platform can include assistance with investment identification and monitoring, *if the plan fiduciary selects the identification and monitoring criteria.*
  - Service and investment providers can respond to RFPs, including sample investment line-ups with certain disclosures to the plan fiduciary.
Additional drill down: education exception (applicable at both plan sponsor and plan participant levels). The exception includes 4 general categories of information and materials:

- plan information – for example, terms or operation of the plan or IRA; benefits of plan or IRA participation; benefits of increasing contributions; distribution options; product features; risk and return information.
- general financial, investment and retirement education – for example, general financial and investment concepts; effects of fees and expenses on rates of return; assessing risk tolerance; estimating future income needs
- asset allocation models and
- interactive investment materials.

Education exception also allows identification of specific investments in allocation models, interactive investment materials: *but only for plans, not IRAs*

- For IRA interactive investment materials: can show specific investment *if* selected by the client
Drilling down: Interactions with plan participants

- Existing investment advice programs could be covered under both old and new regulation: where advisor acknowledged fiduciary status, or otherwise fell within the scope of the rule
  – Example: VFA’s Guided Portfolio Services®, investment advisory programs

- Other interactions: can (prospectively) include both fiduciary and non-fiduciary interactions
  – Non-fiduciary: often include certain enrollment services, customer support, education services
  – Fiduciary: product and/or investment recommendations, investment allocation recommendations, distribution and/or rollover recommendations
  – Service provider alternatives:
    • Provide only non-fiduciary services: avoiding any covered fiduciary recommendations; or,
    • Provide both, and follow the applicable guidance
      – Example: VFA will provide both, and follow the applicable guidance
Platforms and affiliated products

- Many plan recordkeeping platforms include one or more investment alternatives or products of the platform provider or an affiliate

- Under ERISA: fiduciary advising regarding an affiliated product is inherently conflicted
  - Other inherent conflicts include receipt of third party compensation

- In the case of such a conflict: fiduciary must comply with one or more exemptions
  - New exemption created by DOL: best interest contract exemption (BICE)
    • Available at plan participant level, and at plan sponsor level for smaller plans
  - Other existing exemptions also may be available
Best Interest Contract Exemption (BICE): Core requirements and standards

- **Core requirements**
  - Qualifying financial institution
  - Acceptance of fiduciary status: within defined scope
  - Compliance policies and procedures

- **Impartial Conduct Standards** for Fiduciary Recommendations, under BICE and certain other exemptions
  - **Best interest** standard
    - Incorporates elements of suitability: “suitability+”
    - Focus: objective standards of care and undivided loyalty
    - Not hindsight standard
    - Ongoing relationship optional but must disclose
  - **Reasonable compensation**
  - **Avoid misleading statements** (failure to disclose material conflict generally considered misleading communication)
BICE: required initial disclosures

- **Required in-plan BICE disclosures**: content requirements, *beginning 1/1/18* (disclosures not required prior to that date)
  - State fiduciary status
  - State best interest standard of care
  - Adhere to impartial conduct standards: best interest, reasonable compensation, statements not materially misleading
  - Describe material conflicts of interest
  - Inform of right to obtain copies of written description of policies and procedures and specific disclosure of costs, fees and compensation, including third party payments
  - Include link to Financial Institution’s web site
  - Disclose proprietary products/third party payments and any limitations
  - Contact information for Financial Institution representative
  - Describe ongoing monitoring and frequency
BICE: Additional transaction/periodic disclosures

- **Transaction/periodic disclosures: beginning after 1/1/18**
  - Identify best interest standard of care
  - Right to obtain policies and procedures, other disclosures free of charge
    - If requested before transaction: must provide before transaction
    - If requested after transaction: must provide within 30 business days of request
  - Identify/link to website: where policies and procedures, and model disclosures, notices (updated quarterly) can be found
  - Disclosures do not have to be repeated for same investment product for one year, unless material change
BICE: Additional website disclosure

- **Website disclosures**: starting 1/1/18
  - Freely accessible to public, updated at least quarterly
  - Discussion of business model, material conflicts of interest
  - Schedule of typical account or contract fees, charges
  - Model contract/notice: reviewed at least quarterly for accuracy, updated within 30 days when needed
  - Written description of Financial Institution’s policies and procedures
  - List of product manufacturers, other parties with which Financial Institution has arrangements for third party payments: description of arrangements, services or benefits provided for those payments
  - Disclosure of compensation and incentive arrangements with advisers
  - Flexibility in form, manner to describe above arrangements – as long as they present a materially accurate description
  - If requirements are met in other documents, such as Form ADV, Part II, can post those and link to relevant portion
Pulling it all together: expectations for plan service providers?

- At the plan sponsor level: disclosures and requests for confirmation, for
  - Platform exception
  - IPF confirmation

- At the participant level: decisions to either
  - Limit interactions to non-fiduciary ones, including client service and education; or,
  - Accept fiduciary status and comply with rule or exemption, and provide any required disclosures
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“The Latest on the DOL Fiduciary Regulation”

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