TODAY’S SPEAKERS

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NEW FIDUCIARY ADVICE RULE
LONG-AWAITED “INVESTMENT ADVICE FIDUCIARY” RULE

- Significantly expands the fiduciary umbrella
- Replaces five-part test dating back to 1975
- Key provisions effective April 10, 2017
- Certain other provisions phased-in through January 1, 2018

OBJECTIVES:

- Address the many changes in benefit structures, industry practices, and technology
- Protect plans, participants, IRA owners, and HSA owners from conflicts of interest

Over $14 trillion in DC plans and IRAs (est.)

PLAN SPONSORS ARE ALREADY FIDUCIARIES
--- SO WHAT’S THE BIG DEAL?

ERISA FIDUCIARIES ARE REQUIRED TO:

• Prudently discharge their duties solely in participants’ best interests
• Communicate plan information accurately and objectively
• Prudently select and monitor plan vendors
• Oversee plan administration

Enhanced scrutiny and scope under new rules may increase co-fiduciary exposure
WHAT IS FIDUCIARY INVESTMENT ADVICE?

<table>
<thead>
<tr>
<th>Aspect</th>
<th>Current rule</th>
<th>New rule</th>
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<tbody>
<tr>
<td>Plans and accounts impacted</td>
<td>• ERISA retirement plans</td>
<td>• ERISA retirement plans</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• IRAs, HSAs, Coverdell education savings accounts (collectively “IRAs”)</td>
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<tr>
<td>Topics</td>
<td>• Investments</td>
<td>• Investments</td>
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<td></td>
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<td>• Investment management</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Distributions</td>
</tr>
<tr>
<td>Frequency</td>
<td>• On a regular basis</td>
<td>• Any frequency, including one-time</td>
</tr>
<tr>
<td>Relationship</td>
<td>• Mutual agreement advice will be both</td>
<td>• Fiduciary status acknowledged, <strong>or</strong></td>
</tr>
<tr>
<td></td>
<td>– Primary basis for decisions</td>
<td>• Agreement that advice will be individualized, <strong>or</strong></td>
</tr>
<tr>
<td></td>
<td>– Individualized</td>
<td>• Directed to specific recipient about a particular investment or decision</td>
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WHAT IS FIDUCIARY INVESTMENT ADVICE?

- Advice provided for direct or indirect fee or other compensation
- Advice recipient is plan, fiduciary, participant/IRA owner
- Advice includes a “recommendation”

If a communication is tailored to a specific recipient, it may be viewed as a “recommendation”
NEXT STEPS FOR PLAN SPONSORS
PARTICIPANT COMMUNICATIONS

• Potential fiduciary exposure
  – Broader range of communications = fiduciary investment advice
  – Enhanced scrutiny may increase risk of participant claims/litigation

• Sponsors have a duty to monitor communications provided by recordkeeper, managed account provider and all third parties
  – Call center scripts
  – Websites and mobile apps
  – Enrollment kits
  – Distribution kits
  – Investment information
**EDUCATION EXCEPTION**

General communications for a broad audience and some forms of investment education are not considered investment advice, if conditions are met.

<table>
<thead>
<tr>
<th>Examples</th>
<th>Exempt?</th>
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<tbody>
<tr>
<td>Broadcasts, newsletters, conference speeches</td>
<td>Yes</td>
</tr>
<tr>
<td>Information on retirement spend-down or annuitization</td>
<td>Yes</td>
</tr>
<tr>
<td>References to recordkeeper’s proprietary IRA as distribution option</td>
<td>No</td>
</tr>
<tr>
<td>Examples of conservative, moderate and aggressive allocations using plan’s core investment options</td>
<td>Yes</td>
</tr>
</tbody>
</table>
STRATEGY FOR TERMINATED PARTICIPANTS

- Impartial distribution counseling that avoids conflicts of interest
- Facilitate asset retention
  - Special web site/communication materials for terminated participants
  - Plan features that accommodate post-employment flexibility
  - Education and assistance with spend down strategies
- Implications of retaining terminated accounts
  - Reduced investment and recordkeeping expenses
  - Additional administration
  - Tracking participants

Formulate strategic and tactical approaches for engaging with terminated participants
EVALUATING DISTRIBUTION MATERIALS

• Address advice related to distributions, rollovers, and annuity products
• Identify distribution programs and related touch points – oral or written – that could be considered advice under the new rule
• Examples:
  – Counseling an employee whether to start benefit payments now versus deferring to retirement age
  – Terminated vested lump sum materials for defined benefit plans
  – Recordkeeper interactions
• Review/revise all materials to confirm consistent messaging and compliance at each touch point
IRA ROLLOVERS

• New rules target distribution counselling, especially as it relates to IRAs

• Recordkeepers often facilitate rollovers to proprietary IRAs
  – Over $6.7 TN in US DC plans (as of December 31, 2015)

• DC plans may offer advantages over IRAs:
  – Institutional investment pricing
  – Diversified fund options appropriate for retirement accounts
  – Professional oversight and ongoing monitoring of fund options

FOCUS ON MANAGED ACCOUNTS

- New rule targets counselling that names specific investment options or products
- Recordkeepers often involved in marketing and communicating managed account option
  - Fee credits to recordkeeper typically tied to number of participants enrolled
  - Marketing aimed at
    - Plan sponsors
    - Participants
- Not yet clear how new rule will impact
  - Compensation related to managed accounts
  - Marketing and communication practices
IMPACT ON RECORDKEEPERS

• Potential for significant conflict of interest related to:
  – Distribution counseling
  – Counseling and marketing related to managed accounts

• Many recordkeepers offset low margins with downstream income from:
  – Non-retirement financial services and banking relationships
  – Managed accounts
  – Rollovers to proprietary IRAs

• New rule could change recordkeeping economics
  – Decrease income from alternate sources
  – Add initial and ongoing compliance costs
IMPACT ON OTHER PROVIDERS

- **Investment consultants** (traditional consulting and delegated advisors)
  - Generally, already under the fiduciary umbrella
  - Review and negotiate favorable contract terms
    - Independence representation
    - Compensation/revenue representation
    - Unlimited fiduciary liability

- **Consultants, legal counsel, accountants, directed trustees**
  - No impact since these parties do not provide investment advice

- **Rollover and annuity placement services**
  - Subject to increased scrutiny and liability
  - Variable annuity products may need to change pricing structures
    - Could curtail use of variable products
### Why Are Brokers Concerned?

<table>
<thead>
<tr>
<th>Current rule: not a fiduciary</th>
<th>New rule: a fiduciary</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Suitability” standard (low bar)</td>
<td>“Best interests” standard (high bar)</td>
</tr>
<tr>
<td>Charge whatever you can get away with</td>
<td>Charges must be reasonable</td>
</tr>
<tr>
<td>Minimal fee disclosure</td>
<td>Clear fee disclosure</td>
</tr>
</tbody>
</table>
| Conflicted advice OK  
  - Bonuses, commissions, trips, prizes, etc. for selling certain products  
  - No disclosure to buyer required  
  - No contract required | Any conflicted advice must be in “best interest” of participant or IRA owner  
  - Variable compensation must be disclosed in detail  
  - Enforceable contract required |
| Enforcement very difficult | Best-interest contract terms enforceable |
| Rollover counseling not “investment advice” | Rollover counseling is “investment advice” |
NEXT STEPS FOR PLAN SPONSORS

- Participant Communications
- Distribution Counseling
- Vendor Management
- Fiduciary Training
QUESTIONS

Please type your questions in the Q&A section of the toolbar and we will do our best to answer as many questions as we have time for.

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CLICK HERE TO ASK A QUESTION TO “ALL PANELISTS”

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