

A Better Partnership®



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## **DoL FIDUCIARY RULE ~ *In Plain English***

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# Agenda

- **What's certain, what's not . . .**
- **“Applicable” fiduciary requirements**
- **“Transition period” compliance**
- **Questions**



# Status today

- **What's certain . . .**
  - w “Fiduciary” status is applicable (eff. 6/9/17)
  - w Transitional prohibited transaction exemptions (PTEs) do apply
  - w 18-month delay on “full” applicability
- **What's not . . .**
  - w DoL's changes to PTE's conditions
  - w Pending court challenges still on appeal
  - w Political prognosis – unlikely to block



# Status today

- **What's effective now . . .**
  - w “Fiduciary” a/k/a “**best interest**” standard
  - w “**Fiduciary advice**” definitions . . .
    - › “Recommendations” to tax-qualified accts
    - › Recommendation of service providers
    - › “Rollovers” and required distributions
    - › Status change notice under 408(b)(2)
  - w DoL and IRS **enforcement moratorium**



# Status today

- **What's being delayed 18 months . . .**
  - w “Transition period” extended to 7/1/2019
  - w “Best interest contract” (BIC) requirements
  - w “Principal” transaction requirements
  - w Changes to PTE 84-24 (annuities)
- **What's gone . . .**
  - w Prohibitions against mandatory arbitration clauses with class action waivers



# Status today

- **DoL still evaluating public comments**
  - w Pres. Trump's "Executive Memo" analysis
  - w "Fiduciary" standard is unlikely to change
  - w Burdensome conditions are likely change
- **Where to monitor DoL rulemaking**
  - w <https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2>



# More information – DoL FAQs

## **W** Part I – Exemptions

- › <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-rules-and-exemptions-part-1.pdf>

## **W** Part II – Rule

- › <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-rules-and-exemptions-part-2.pdf>

## **W** Transition Period (Set 1)

- › <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-transition-period-1.pdf>

## **W** Transition Period (Set 2)

- › <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-transition-period-2.pdf>



# DoL Rule's Highlights

- w Broadened the type of advice that constitutes “***fiduciary investment advice***”
- w Expanded scope to ERISA plans and . . .
  - › IRAs (traditional and Roth IRAs)
  - › Archer MSAs, HSAs, and
  - › Coverdell Education Savings Accounts
- w Applies changes to both ERISA and Internal Revenue Code





# Fiduciary advice includes . . .

- w Recommendations (“you should”)
- w For compensation (direct/indirect);
- w By a person who:
  - › Acknowledges fiduciary status; or
  - › Gives individualized advice; or
  - › Directs advice to specific investors



# Fiduciary advice includes . . .

## w Investment advice includes . . .

- › Acquiring, holding, disposing of securities or other investment property
- › Management of these investments -
  - Investment policies or strategies
  - Portfolio composition
- › Selection of other providers
- › Selection of account arrangements (e.g., brokerage versus advisory)



# Fiduciary advice now also includes . . .

- w “Recommendations” also cover . . .
  - › Rollovers, transfers, or distributions
    - Amount(s);
    - Form of distribution; or
    - Destination of the funds
  - › Recommending investment product
  - › Recommending investment service



# Fiduciary advice does NOT include . . .

- › Plan information
- › Investment education
  - General financial, investment, and retirement information
- › “Hire me” sales pitches
  - “What we can do for you”
  - And not “what you should do”
- › Transactions with “independent fiduciaries with financial expertise”



# Fiduciary advice does NOT include . . .

- w “Investment property” does not include
  - > Health, disability, or term life insurance
  - > Other property having no investment component



# “Independent fiduciary” exception

- w Covers industry professionals
  - › Subadvisers to “Institutional Fiduciary”
    - No meetings or advice to clients
- w Institutional Fiduciary:
  - › Bank, insurance company, RIA, BD, or
  - › Responsible for at least \$50M in AUM (plan and non-plan assets)



# Fiduciary advice requirements

- w Fiduciary status applies today (6/9/17)
- w Fiduciary requirements are:
  - > Impartial, “best interest”, prudent advice
  - > “Reasonable compensation” (all sources)
  - > No material misstatements
- w Mitigate “adviser-level” conflicts of interest
- w “Variable” compensation is permitted if fully disclosed to the client



# Fiduciary advice requirements

- w ERISA “prudent man” standard . . .
  - care, skill, prudence, and diligence
  - under the circumstances
  - a prudent man acting in a like capacity and familiar with such matters
  - in the conduct of an enterprise of a like character and with like aims . . . .”
- › Duty of loyalty - solely in client’s interest
- › Key point: document the process





# Fiduciary advice requirements

- w Rollovers, roll-ins, required distributions . . .
  - > A “prudential process” is required
  - > Gather and present current options/costs
  - > Compare available alternatives
  - > Evidence your comparison (old vs. new)
    - Costs, alternatives, features
    - Your recommendation(s)
    - Client’s decision
  - > Supervise and evidence the process



# Rollovers, roll-ins, RMDs . . .

- w Explain options to client
  - > Stay in plan, roll to new plan, roll to IRA
  - > Distribution options
- w Compare plan v. plan or IRA v. IRA
  - > Need old plan/IRA to compare
  - > Investments, expenses, and services
  - > Plan features vs. IRA features
- w Assess/apply to client's circumstances



# Leveling adviser compensation

- w Adviser-level compensation can vary by product types (e.g., mutual funds vs. variable annuities or equity vs. bonds)
- w No compensation variations among same type/class (e.g., mutual fund families and share classes)
- w No adviser-level economic incentives . . .
  - › Quotas, bonuses, contests, awards, trips
  - › Recruiting incentives



# Education versus Advice

- w Education about options (pros/cons) is OK
- w Education materials become advice if:
  - > Recommendation is a distribution (even an RMD) such as to the amount
  - > Specific product or service recommendations



# “Grandfathered” transactions

w Old standards applied to . . .

› Transactions concluded **before 6/9/17**

- Contractually committed investments
- But not “expressions of future intent”

w New standards apply to . . .

› Investments of **new money**, even into old accounts



# PTE 84-24 Annuities

- w Covers fixed rate and fixed indexed
- w Fiduciary standard of care applies
- w Reasonable compensation
- w No misstatements
- w IMO's can continue to receive sales comp
  
- w Unless changed, PTE 84-24 will only apply to fixed rate annuities



# “Best Interest Contract”

- **Unless changed (seems like) . . .**
  - w Requires a written client contract
  - w Acknowledgement of fiduciary status
  - w Contractually enforceable undertaking
  - w Disclosures (in person and on website)
  - w Policies and procedures to implement, including eliminating all adviser-level incentives



# Q & A

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Thank You

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