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FINAL FIDUCIARY RULE: WHAT YOU NEED TO KNOW

The Department of Labor (DOL) released on April 6, 2016 the final rule regarding investment advice and conflicts of interest in retirement plans, known as the FIDUCIARY RULE. I wrote about the pending rule last year in our May 2015 newsletter and changes are reflected in the final rule.

These rules answer the basic conundrum of how an investment advisor can be held as a fiduciary and still benefit from working with a retirement plan. This conflict of interest has plagued our industry for many years and this rule tries to clarify how advisors can work with these plans and still get paid. The DOL has issued a Fact Sheet that I've summarized and quoted below. Here's a basic primer on what you need to know:

> **Implementation Date**: There is a one year open period, so firms only will be required to comply by April 10, 2017. In addition, the Best Interest Contract Exemption provides for a transition period from the April 2017 applicable date to January 1, 2018. Advisors working on 401(k) plans with less than 100 participants and under $50 million in assets will have to operate under the BIC exemption.
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> **What constitutes Investment Advice**: In order to be held as a fiduciary, the advice given must be considered a "recommendation" based on the entirety of the communication. "A recommendation is a communication that, based on its content, context and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action".
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> Covered Investment Advice includes "a recommendation to a plan, plan fiduciary, plan participant and beneficiary and IRA owner for a fee or other compensation, direct or indirect, as to the advisability of buying, holding, selling or exchanging securities or other investment property." This includes existing plan assets as well as rollovers into IRAs. It also included recommendations as to the management of securities investment policies or strategies, selection of account managers and methods as well as rollover advice. Mere education, "hire me" newsletter, marketing material and other communications that cannot be construed as investment advice are exempt under this rule.
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> **Best Interest Contract Exemption**: "In order to ensure retirement investors receive advice that is in their best interest while also allowing advisers to continue receiving commission-based compensation, the Department is issuing the Best Interest Contract Exemption (which some refer to as BIC or BICE)." In order for the exemption to exist, it "requires the financial institution to acknowledge fiduciary status for itself and its advisors. The financial institution and advisers must adhere to basic standards of impartial conduct, including giving prudent advice that is in the customer's best interest, avoiding making misleading statements, and receiving no more than reasonable compensation". The preamble of the regulation clarifies the advisor does not have to recommend the lowest cost product if another is more appropriate. "Best interest does not mean lowest priced product," Secretary Perez told reporters.

In addition the institution must make the appropriate disclosures about the conflicts of interest and the cost of such advice. They must commit to these costs via a written contract enforceable under other jurisdictions and ERISA. This will make it easier to sue in State court and lower the standards of proof, should an investor so decide.

There is language as to only requiring one contract with the client, not every participant. New contracts don't necessarily need to be re-executed and disclosure on account forms is fine as well as other technicalities towards the implementation of these rules. For a link to the DOL conflict of interest chart click here.

In conclusion, these rules will affect every investment firm and advisor that works with retirement plans and IRAs including rollovers. Knowing these rules and exercising prudence when dealing with retirement plans will be required or you will be held accountable. There will be more to come as these rules are flushed out and tested. Stay tuned…