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GORDIAN SOLUTIONS

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SEC REGULATORY UPDATES

The DOL's Fiduciary Rule: Compliance Guidance

Gordian Compliance Solutions is offering this outline as a quick guide to compliance with the Department of Labor's ("DOL") new fiduciary rule ("Fiduciary Rule").

Gordian anticipates expanding this outline to a full compliance guide as the final legal arguments and political turmoil surrounding the rule are resolved. For now, the purpose of this guide is to familiarize advisers with some of the specifics of the DOL's proposed rule.

Compliance Date:

Gordian staff has followed developments surrounding the DOL's initially proposed implementation date of April 10, 2017,[1] which has become a moving target for advisers. The DOL has proposed a 15-day comment period to institute a 60-day delay in implementation of the fiduciary rule—potentially pushing the compliance date to June 9, 2017.[2] The proposal for the 60-day delay would also open a 45-day comment period regarding the findings from President Donald Trump's February order directing the DOL to re-examine the fiduciary rule.[3]

Due to the changes in the overall direction of the current administration, we anticipate further delays in compliance date(s), as well as potential substantive changes to the rule.[4] This guide describes the DOL rule in its current iteration, absent additional changes from future comment periods.

Rule Purpose and Summary:

The DOL's proposed rule updates the 1975 regulations outlining the fiduciary definition for advisers under the Employee Retirement Income Security Act of 1974 ("ERISA" or "the Act"), and establishes a new set of exemptions from ERISA's prohibited transaction rules to permit firms to continue to receive compensation for retirement account business—provided that certain standards are met to ensure that the advice is given in the best interest of the investor and impartial.[5] The DOL's rule would apply to financial advisers who receive compensation for providing advice to individual retirement investors as well as retirement plans as defined by ERISA. Advisers that manage retirement accounts or ERISA plans will have to make a determination as to which exemption scheme is appropriate given their client compensation arrangements and the nature of the investment recommendations.

DOL Fiduciary Rule Exemptions:

DOL's Fiduciary Rule provides the following exemptions so advisers may continue receive compensation for retirement account recommendations, without running afoul of ERISA's prohibited transaction rules.

- **Best Interest Contract Exemption (the "BIC Exemption")**
  BIC Exemption allows fiduciary advisers to receive otherwise prohibited compensation while providing impartial advice that is in best interest of the investors. BIC Exemption is further defined as "Full BIC Exemption" and "BIC Level Fee Exemption" based on the types of compensation received by the fiduciary, with "BIC Level Fee Exemption" being less onerous.[6]
- **Principal Transaction Exemption**
  Principal Transaction Exemption allows advisers to transact in certain recommended debt securities and other investments out of their own inventories to or from retirement accounts.[7]
- **Transitional BIC**
  Transitional BIC is optional for all fiduciary advisers and provides for a transition period between the implementation date on April 10, 2017 and full compliance date on January 1, 2018.[8]

Summary:

In summary, the DOL's Fiduciary Rule applies to financial advisers who receive compensation for providing advice to individual retirement investors as well as retirement plans. Due to current political and legal arguments[9] surrounding the final rule and implementation date, Gordian recommends that all advisers who conduct retirement business comply with Transitional BIC, which would require fiduciary advisers to implement the following by April 10, 2017:[10]

- Compliance with the following impartial conduct standards;
  - Give advice that is in the "best interest" of the retirement investor. This best interest standard has two chief components, prudence and loyalty
    - Prudence: The advice must meet a professional standard of care as specified in the text of the exemption;
    - Loyalty: The advice must be based on the interests of the customer, rather than the competing financial interest of the adviser or firm
  - Charge no more than reasonable compensation; and

- Make no misleading statements about investment transactions, compensation, and conflicts of interest

- Appointment of BIC officer (a person responsible for addressing material conflicts of interest and monitoring advisers' adherence to the impartial conduct standards);

- Written general disclosure of compensation and conflicts.

Gordian staff will continue to monitor developments in the Fiduciary Rule implementation and will be issuing further updates as needed. In the meantime, please contact your Gordian Consultant or email us (compliance@gordiancompliance.com) to discuss specific DOL Fiduciary Rule applications for your advisory business.

[1]*Definition of the Term ''Fiduciary''; Conflict of Interest Rule—Retirement Investment Advice*, 81 Fed. Reg. 68 (April 8, 2016) (to be codified at 29 CFR pts. 2509, 2510, and 2550)
[2]*DOL Proposes 60-day Delay to Fiduciary Rule,* InvestmentNews.com (March 1, 2017)
[3]*Id.*
[4]*Delay of Fiduciary Rule Likely to Extend Beyond 60 Days*, InvestmentNews.com (March 1, 2017): "I think many commenters will urge the final delay regulation to be for a longer period of time, perhaps 12 months," Bradford Campbell, a partner at Drinker Biddle & Reath and a former DOL assistant secretary, wrote in an email. "If the result of the review is a new notice and comment rulemaking amending the rule, a delay of a year will likely be necessary."
[5]*Definition of the Term ''Fiduciary''; Conflict of Interest Rule—Retirement Investment Advice*, 81 Fed. Reg. 68 (April 8, 2016) (to be codified at 29 CFR pts. 2509, 2510, and 2550)
[6]*Definition of the Term ''Fiduciary''; Conflict of Interest Rule—Retirement Investment Advice*, 81 Fed. Reg. 68 (April 8, 2016) (to be codified at 29 CFR pts. 2509, 2510, and 2550); see also *Conflict of Interest FAQs (Part I - Exemptions)*, United States Department of Labor (October 27, 2016)
[7]*Id.*
[8]*Id.*
[9]*Industry Plaintiffs Appeal Dallas Court's Decision to Uphold DOL Fiduciary Rule*, InvestmentNews.com (February 28, 2017): "The Securities Industry and Financial Markets Association, the Financial Services Institute, the Insured Retirement Institute, the Financial Services Roundtable and the U.S. Chamber of Commerce filed the appeal on Friday in the Fifth Circuit Court of Appeals in New Orleans."
[10]*Definition of the Term ''Fiduciary''; Conflict of Interest Rule—Retirement Investment Advice*, 81 Fed. Reg. 68 (April 8, 2016) (to be codified at 29 CFR pts. 2509, 2510, and 2550); see also *Conflict of Interest FAQs (Part I - Exemptions)*, United States Department of Labor (October 27, 2016)

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