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Banking Insights:

DOL Fiduciary Rule Summary

Impact of the Rule

The Department of Labor Fiduciary Rule (the Rule) has changed the relationship between financial institutions (banks, broker/dealers and investment advisers) their personnel (advisors) and retirement investors (defined below). In regards to the Employee Retirement Income Security Act of 1974 (ERISA), as amended, plans and participants or the beneficiaries of such plans, the Rule has revised the criteria for activities that constitute fiduciary investment advice, as well as revised and adopted prohibited transaction exemptions. More importantly, the Rule applies ERISA fiduciary and prohibited transaction exemption requirements to the interactions between financial institutions and current or prospective IRA owners. These fiduciary and prohibited transaction exemption requirements did not apply to IRA owners prior to the adoption of the Rule.

Application of the Rule

The Rule applies to any advisor and the advisor's financial institution that provide investment advice directly (or indirectly) to either (i) an ERISA plan, its fiduciary or its participant or beneficiary, or (ii) to an IRA or its owner (Retirement Investors) in exchange for compensation, received directly or indirectly.

Investment advice is any recommendation (e.g. a suggestion) to buy, hold, sell or exchange securities or other investment property, including:

- A recommendation to take a distribution, including its form and amount;
- A recommendation to do a rollover or transfer, including its amount and destination;
- A recommendation about how to invest the proceeds after taking a distribution;
- A recommendation about how to invest the proceeds after doing a rollover or transfer;
- A recommendation about managing investments in securities or other property; or
- A recommendation of a person to give these kinds of investment advice.

A recommendation is "communication" that, based on its content, context and presentation, would reasonably be viewed as a "suggestion" about a course of action. A suggestion that is more individually tailored is more likely to be viewed as a recommendation. A selective list of securities or investment products for a particular recipient is a recommendation, even if no single security is recommended.

General communications and investment education are exempt from the definition of recommendation and, therefore, do not constitute investment advice. A person does not give regulated recommendations by furnishing general communications that a reasonable person would not view as a recommendation, such as general circulation newsletters, general marketing materials or general market data.

Financial institutions and advisors do not give regulated recommendations just because they provide certain educational information or materials, if the information or materials:

- **DO NOT** include recommendations, solely or in combination, about specific investment products or specific plan or IRA alternatives; and
- **DO NOT** include recommendations on investment or management of a particular security or securities or other property.

Any financial institution that provides investment advice to a retirement investor must do so in accordance with the fiduciary requirements of the Rule. The fiduciary requirements are referred to as the Impartial Conduct Standards. The requirements of the Impartial Conduct Standards are as follows:

- The investment advice given must be in the best interest of the retirement investor;
- The financial institution and advisor must receive no more than reasonable compensation; and
- No statements by the advisor or his/her financial institution to the retirement investor (about the investment, fees, conflicts or other relevant details) will be misleading at the time they are made.

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The Prohibited Transaction Exemptions

When subject to a conflict of interest in providing investment advice to a retirement investor, a financial institution may only provide that investment advice in accordance with a "prohibited transaction exemption." A financial institution is subject to a conflict of interest when it limits recommendations to proprietary products or products from which the financial institution receives payments. In addition, a financial institution is subject to a conflict of interest when the compensation paid to an advisor is transaction based or otherwise varies depending upon the type of product sold to a retirement investor.

In addressing these conflicts a financial institution will generally rely upon the Best Interest Contract Prohibited Transaction Exemption (BICE). The requirements of BICE are extensive. These requirements include, but are not limited to: required contractual terms with the retirement investor; website and contract disclosures; maintenance of required policies and procedures; and designation of a conflicts officer.

Applicability Dates of the Rule

- **The Rule is applicable beginning June 9, 2017, and beginning on that date a financial institution is a fiduciary when providing investment advice to a retirement investor.**
- **However, from June 9, 2017, until January 1, 2018, all that is generally required for compliance with the various prohibited transaction exemptions (e.g. BICE) is compliance by the Financial Institution with the Impartial Conduct Standards.**
- **Starting January 1, 2018, a financial institution, subject to any conflicts of interest, must begin compliance with the requirements of the applicable prohibited transaction exemption.**

Bank Analysis for Compliance with the Rule

In ensuring compliance with the Rule, banks should generally engage in the following analysis and process:

- **Determine what bank departments service or interact with retirement investors.**
  - → For each department determine whether interaction will be changed to (i) ensure the interaction does not constitute investment advice; or (ii) ensure that the investment advice is provided in accordance with the Rule.
  - → After this determination, launch revised policies and procedures, with required training, for bank personnel. As an example, will retail branch personnel be limited in their interactions with IRA owners so retail branch personnel are not providing investment advice?
- **Review bank products and services to determine whether the bank is subject to any conflicts of interest in its interactions with retirement investors.**
  - → Does the bank limit offerings to proprietary products?
  - → Does the bank offer products for which it receives third party payments?
  - → Does the bank pay transaction or product based compensation to advisors?
- **Are the bank's compensation schedules compliant with the fiduciary requirements of the Rule? If not, the bank must make revisions to its compensation schedules.**
- **If the bank is subject to a conflict of interest determine whether will make revisions to eliminate the conflict or if the bank will utilize a prohibited transaction exemption, e.g. BICE.**
- **For those bank departments that will continue to provide investment advice, launch revised policies and procedures, with required training, to address the Rule and any relied upon prohibited transaction exemption.**

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