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## **THE FIDUCIARY STANDARD: WHAT COULD CHANGE TO THE DOL STANDARD MEAN TO YOU**

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# Overview

- Current Law
  - ERISA
  - Securities Laws
- Dodd Frank Section 913
- DOL Proposal and Expected Re-proposal
- If changes occur, what it will mean
- Rollover Activity – where is that headed?

# Current Law: ERISA

- 5 part test – a person must:
  1. Render advice as to the value of or makes recommendations in investing, purchasing or selling securities or other property
  2. On a regular basis
  3. Pursuant to a mutual agreement, that
  4. The advice will serve as a primary basis for investment decisions, and that
  5. The advice will be individualized

# Current Law: Securities

- Investment Advisers: the 1940 Act contains a general antifraud provision, which in 1963 the Supreme Court interpreted as imposing a fiduciary duty on all registered investment advisers.
- Broker-dealers: federal and state common law, as well as FINRA conduct rules

# Current Law: Securities

- FINRA conduct rules:
  - Suitability Rule (FINRA Rule 2111)
  - Know Your Customer Rule (FINRA Rule 2090)
  - Duty of Best Execution (FINRA Rule 2320)
  - Product Specific Rules: Include options, OTC low-priced equity securities, direct participation programs, security futures, bonds and bond funds, hedge funds, variable life insurance, etc.

# Dodd Frank Section 913

- Became law: July 2010
  - Authorizes SEC to conduct a study
  - Authorizes SEC to write rules to establish a uniform fiduciary standard for BDs and RIAs when providing personalized investment advice
- SEC conducted staff study re: uniform fiduciary standard: January 2011
- SEC staff requested cost-benefit data (March 2013)

# DOL Proposal/Expected Re-Proposal

- 5 part test – a person must:
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  - ~~2. On a regular basis~~
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# Potential Impact of DOL Proposal

- Limits access to investor education
- Limits access to financial help for low and moderate income individuals
- Financial advisor would not be able to recommend a product that pays more compensation than another
- Prohibited transactions
- IRAs likely sold through “wrap” accounts or no service accounts
- Annuities and other products that cannot be sold in wrap accounts would not be able to be sold



# Status

- DOL re-proposal in guidance plan for August 2014
- DOL working on cost benefit analysis, PTEs and legislative language changes
- Expected expansion to cover rollovers

# Rollovers

- **DOL Proposal:** Requested comments on whether or not the fiduciary definition should be expanded to include rollover activity.
- **FINRA:** In Notice 2013-45, FINRA sought “to remind firms of their responsibilities when (1) recommending a rollover or transfer of assets in an employer-sponsored retirement plan to an Individual Retirement Account (IRA) or (2) marketing IRAs and associated services.”

FINRA notes that “Reviewing firm practices in this area will be an examination priority for FINRA in 2014.”

# Rollovers

- FINRA issued Investor Alert: January 2014
  - Top Tips to making a sound decision:
    - Minimize taxes by rolling Roth to Roth and traditional to traditional
    - Be wary of “free” or “no fee” claims
    - Realize that conflicts of interest exist
    - Understand fees and expenses
    - Compare investment options and other services

# Rollovers

- **SEC.** 2014 Examination priorities to include rollovers. The staff will undertake several initiatives, including:
  - (a) examining the sales practices of investment advisers targeting retirement-age workers to roll over their employer-sponsored 401(k) plan into higher cost investments, including whether advisers are misrepresenting their credentials or the benefits and features of individual retirement account (“IRA”) plans or other alternatives, and
  - (b) examining broker-dealers and investment advisers for possible improper or misleading marketing and advertizing, conflicts, suitability, churning, and the use of potentially misleading professional designations when recommending the movement of assets from a retirement plan to an IRA rollover account in connection with a customer’s or client’s change of employment.

# Where are things headed?

- SEC looking at fiduciary issue
- Capitol Hill engaged regarding impact to smaller investors
- DOL Secretary Perez engaged on issue
- FINRA, SEC both looking at rollovers

# Questions?

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