Fiduciary Rule

- Applicable June 9, 2017
- Transitional period to 1/01/18 07/01/19
- Impartial Conduct Standards
  - Act in investors’ best interest
  - Charge reasonable compensation
  - Avoid misleading statements
- No required disclosure during transition
  - Fiduciary status
  - Potential conflicts of interest
  - Restrictions on recommendations
Death of Fiduciary Rule?

• U.S. Chamber of Commerce v DOL
  – Fifth Circuit
  – March 15, 2018
  – Vacating fiduciary rule
  – Split panel
  – Appeal to en banc?
SEC Proposed Rules

- Proposed April 18, 2018
- 90 day comment period
- Covers recommendations to ALL retail investors
- Broker-dealers (BDs) have new “best interest” standard
- Registered Investment Advisors (RIAs) to have fiduciary standard (e.g. loyalty, care)
SEC Proposed Rule

Regulation Best Interest standard for BDs:

• disclosure obligation
  – key facts about relationship

• care obligation
  – exercise reasonable diligence, care, skill, and prudence
  – reasonable basis to believe product and series in investor’s best interest

• conflict-of-interest obligation
  – reasonably designed policies and procedures to identify and disclose conflicts of interest
SEC Proposed Rule

• New SEC Form CRS
  – Customer/Client Relationship Summary
• Required for both BDs and RIAs
• Provide retail investors description of relationship
  – No longer than 4 pages
  – Can be provided digitally
• BDs cannot use “advisor” label
### DOL Penalty Increases for 2018

<table>
<thead>
<tr>
<th>Penalty</th>
<th>Rate Increase</th>
</tr>
</thead>
<tbody>
<tr>
<td>Failure to file Form 5500</td>
<td>$2,063/day to $2,140/day</td>
</tr>
<tr>
<td>Failure to furnish automatic contribution notice</td>
<td>$1,632/day to $1,693/day</td>
</tr>
<tr>
<td>Failure to furnish blackout notice</td>
<td>$131/day to $136/day</td>
</tr>
<tr>
<td>Failure to furnish 436 benefit restrictions notice</td>
<td>$1,632/day to $1,693/day</td>
</tr>
<tr>
<td>Failure to furnish statements or maintain records</td>
<td>$28/participant to $29/participant</td>
</tr>
</tbody>
</table>
Legislative Update
Tax Reform

• Tax Cuts and Jobs Act (12/22/17)
• “To provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018”
• Generally effective January 1, 2018
Tax Reform

• No changes to contribution or benefit levels
• No “Rothification”
• No changes to annual increases
Tax Reform

• No more recharacterization of IRAs
• Rollover period for loan offsets
  – Increased from 60 days to tax return due date
  – Available upon employment or plan termination
Tax Reform

- Reduction in pass-through entity income taxation
- Includes 20% qualified business income deduction
- Deduction not applied upon distribution
- Excludes reasonable compensation (W-2) for services
- Excludes professional service orgs
QBI Deduction?

Is this business a Specified Service Trade or a Business defined under §1202(a)(3)(A), 475(e)(2), or 475(e)(2)?

- YES
  - Deduction is equal to the lesser of:
    - (1) 20% of QBI; or
    - (2) 20% of taxable income less net capital gains

- NO
  - NO DEDUCTION AVAILABLE

Does Taxpayer’s taxable income exceed $315,000 for MFJ or $157,500 for single filers?

- YES
  - Deduction is equal to the lesser of:
    - (1) 20% of QBI; or
    - (2) 20% of taxable income less net capital gains

- NO
  - NO DEDUCTION AVAILABLE

Does Taxpayer’s taxable income exceed $415,000 for MFJ or $207,500 for single filers?

- YES
  - Deduction is equal to the lesser of:
    - (a) 20% of QBI; or
    - (b) The limitation amount (see FN2)

- NO
  - Deduction is equal to the lesser of:
    - (1) 20% of taxable income less net capital gains

IF the taxpayer’s taxable income exceeds $315,000 for taxpayer’s married filing jointly, or $157,500 for single filers then the deduction will be phased out by the amount that the taxpayer’s taxable income exceeds the above amounts divided by $100,000 for taxpayer’s married filing jointly or $50,000 for single filers.

The Limitation Amount is equal to the greater of (1) 30% of the W-2 wages with respect to the qualified trade or business; or (2) the sum of 25% of the W-2 wages with respect to the qualified trade or business plus 2.5% of the unadjusted basis immediately after the acquisition of all qualified property.

For example, if B, a single filer, has taxable income of $167,300, QBI of $120,000 and W-2 wages of $60,000 then the phase out will apply because 20% of B’s QBI ($24,000) is greater than the Limitation Amount ($20,000). Therefore, B’s Combined QBI Amount must be reduced by $800.
Tax Reform for Hardships

• Hardship based on casualty loss under section 165

• Previously, deduction for losses arising from fire, storm, shipwreck or other casualty
  – Regardless of exceeding 10% of AGI

• Now, deduction must be attributable to a federally declared disaster area
Tax Reform - Part 2!

- Bipartisan Budget Act of 2018 (2/9/18)
- Hardship distributions (after 2018)
  - Removed 6 month suspension
  - Deferral earnings now available
  - Safe harbor contributions, QNECs & QMACs plus earnings now available
  - No longer required to take loan first
Tax Reform - Part 2!

• California wildfires added to disaster relief measures
• Allows re-contribution of distributed amounts for wrongful tax levy as rollovers
• Established committee to recommend how to improve multiemployer plans
Qualified Hurricane Distributions

• Or Qualified Disaster Recovery Assistance Distribution
• Or Qualified 2016 Disaster Distribution
• Or Qualified Wildfire Distributions
• Participants with principal residence in declared disaster area
• Sustained economic loss due to disaster
Eligible Distributions

• Katrina, Rita & Wilma (2005)
• Kansas Tornadoes (2007)
• Midwest Storms (2008)
• Major disaster areas (2016)
  – Principal residence in area in 2016
• Harvey, Irma & Maria (2017)
  – Principal residence in area
• California wildfires (2017)
  – Principal residence in area 10/8/17-12/31/17
Qualified Hurricane Distributions

- Up to $100,000
- Avoid mandatory withholding
- Avoid early distribution penalty
- May be taxed equally over 3 years
- May return to plan as rollover without taxation within 3 year window
- Permissible, but not required - amend plan doc prior to end of 2019 yr end
Qualified Hurricane Distributions

• HIM Hurricanes
  – Disaster Tax Relief & Airport & Airway Extension Act (9/29/17)
  – Distributions between 8/23/17 to 12/31/18

• 2016 Disaster Areas
  – Tax Cuts and Jobs Act (12/22/17)
  – Distributions between 2016 to 12/31/17

• California wildfires
  – Bipartisan Budget Act of 2018 (2/9/18)
  – Distributions between 10/8/17 to 1/1/19
Qualified Hurricane Distributions

• Ability to repay hardship distribution if for principal residence which is cancelled due to disaster
  – HIM hurricanes - distributions between 2/28/17 to 9/21/17 must be repaid by 2/28/18
  – California wildfires - distributions between 3/31/17 to 1/15/18 must be repaid by 6/30/18

• NOT Available for 2016 Disaster Areas
Hardship Relief

• Ability to repay hardship distribution if for principal residence which is cancelled due to disaster
  – HIM hurricanes - distributions between 2/28/17 to 9/21/17 must be repaid by 2/28/18
  – California wildfires - distributions between 3/31/17 to 1/15/18 must be repaid by 6/30/18

• NOT Available for 2016 Disaster Areas
Loan Relief

• Increase max loan to $100,000
• No 50% of vested account req.
• Loan pmts may be delayed up to 1 yr
• Max amort up to 6 yrs
• Participants with principal residence in declared disaster area
• Permissible, but not required - amend prior to end of 2019 yr end
Loan Relief

• Permissible, but not required - amend prior to end of 2019 yr end
• Participants with principal residence in declared disaster area
  – HIM Hurricanes - loans between 9/29/17 and 1/1/19
  – California wildfires - loans between 2/9/18 and 1/1/19
• NOT available for 2016 Disaster Areas
IRS Update
## EPCRS - 2017 User Fees

<table>
<thead>
<tr>
<th>No. of Part.s</th>
<th>Fee</th>
<th>No. of Loan Fails</th>
<th>Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>20 or fewer</td>
<td>$ 500</td>
<td>13 or fewer</td>
<td>$ 300</td>
</tr>
<tr>
<td>21 to 50</td>
<td>$ 750</td>
<td>14 to 50</td>
<td>$ 600</td>
</tr>
<tr>
<td>51 to 100</td>
<td>$ 1,500</td>
<td>51 to 100</td>
<td>$ 1,000</td>
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<tr>
<td>101 to 1,000</td>
<td>$ 5,000</td>
<td>101 to 150</td>
<td>$ 2,000</td>
</tr>
<tr>
<td>1,001 to 10,000</td>
<td>$ 10,000</td>
<td>Over 150</td>
<td>$ 3,000</td>
</tr>
<tr>
<td>Over 10,000</td>
<td>$ 15,000</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
## EPCRS - 2018 User Fees

<table>
<thead>
<tr>
<th>Assets</th>
<th>Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>$500,000 or less</td>
<td>$1,500</td>
</tr>
<tr>
<td>Over $500,000 to $10 million</td>
<td>$3,000</td>
</tr>
<tr>
<td>Over $10 million</td>
<td>$3,500</td>
</tr>
</tbody>
</table>
EPCRS - 2018 User Fees

No longer reduced fees for:

- RMD failures (up to 150 = $500)
- Loan failures
- Non-amender failures ($375/$500/50% of fee)
- SEPs or SIMPLEs ($250)
DL Filing Fees

- Rev Proc 2018-8
- $2,500 - Form 5300
- $800 - Form 5307 = minor modifier
- $3,000 - Form 5310 = termination
  - Rev Proc 2018-19
  - Reduced back to $2,300
  - Retroactive to 1/2/18
RMD Notification

- IRS Memo to Examination Employees
- Dated October 19, 2017 (401(k)s)
- Challenging qualified status based on failed RMD requirements
- Dated February 23, 2018 (403(b) plans)
RMD Notification

• Will not challenge qualified status if plan sponsor has:
  – Attempted contact through USPS certified mail to last known address
  – Searched plan and publicly available public records for alternative contact info
  – Used a commercial locator service, credit reporting agency or proprietary internet search tool
RMD Notification

- Memo does not impact excise taxes for late RMDs
- Failure to timely pay RMDs results in 50% excise tax to PARTICIPANT
- May file with VCP to waive excise tax
- owners require showing of good cause
Pre-Approved Plan Documents

- Rev Proc 2017-41 (6/30/17)
- Third restatement cycle (10/2/17)
- Pre-approved plan: no longer M&P or VS
- Still standardized and non-standardized
- Option between AA & BPD or just single document
- Allow 401(k) & MPPP or 401(k) & ESOP on same document
Pre-Approved Plan Documents

- Cash balance plan with interest credits based on actual rate of return on assets
- Non-electing church plans
- Trust agreement no longer reviewed
  - Trust provisions must be separate from plan doc
- Clarifies that opinion letter has no bearing on Title I issues
- Seeking comments on retention of legacy benefits in pre-approved plans
Required Amendments List (RAL)

- Statutory & administrative changes in qualification requirements first effective during plan year in which list published
- RAL excludes:
  - Changes in which IRS expects to issue future guidance
  - Changes permitting optional provisions
  - Changes not affecting qualification
2017 RAL

• Notice 2017-72 (December 5, 2017)
• Changes in qualification requirements requiring an amendment =
• CB final regs - use of mkt rate of return
• DB benefit restrictions for cooperative or charity plans (but not CSEC plans)
• Changes in qualification requirements that may require an amendment =
• DB partial lump sum distributions
Operational Failures

- Operational Compliance List
- Identifying changes in qualification requirements
- Effective during the applicable calendar year
- Assistance, but not required, for plan sponsors
- 2016 & 2017 lists on IRS website 2/27/17
- 2018?
DL Submissions

• Eliminated RAP cycles effective 1/1/17
• Just new plans, terminations and...
• “Other” circumstances, but not in 2017 or presumably 2018
• 2019? Notice 2018-4 (4/5/18) requests comments on circumstances IRS should consider in accepting applications during 2019 calendar year
• Comments must be sent by June 4, 2018
PBGC Update
Termination Forms

• PBGC News - April 17, 2018
• Ability to e-mail termination forms
• Unsure if distress termination? Can now request pre-filing consultation to determine
• New missing participant guidelines = new forms (effective 1/1/18)
Case Law Update
Scope of Fiduciary Liability

- Rosen v Prudential - 2nd Cir - 10/11/17
- Prudential offered both mutual fund line-up and group annuity contracts
- Plaintiff alleged breach due to excessive revenue sharing for mutual funds
- Pru = directed trustee for mutual fund, so no fiduciary status
- Pru had fiduciary status over annuity contracts, but allegations of breach solely about mutual funds
SP Fiduciary Liability

- Patrico v Voya Financial (S.D.N.Y.)
- Voya offers investment advice programs
- Online, self-service advice or managed accounts
- Voya contracts with Financial Engines to provide actual investment advice to participants
- Plaintiff alleges that Voya fee excessive as it doesn’t provide any material service
SP Fiduciary Liability

• When does a service provider become a fiduciary?
  – Fees established prior to engagement as fiduciary cannot be used against fiduciary as unreasonable

• Amount of control over fees?
  – Voya fees set in service agreement
  – Voya not required to pass on fee difference due to administrative efficiency
SP Fiduciary Liability - Part 2

- Fleming v Fidelity (D. Mass) - 9/22/17
- Delta had SDBA account with Fidelity
- Also used Financial Engines
- Fidelity not liable for participant selections in SDBA (including share classes)
- Delta, not Fidelity, selected Financial Engines
- Fidelity dismissed from case
Advocate Health Care Network v. Stapleton

- US Supreme Court - June 5, 2017
- ERISA treats “established” & “maintained” interchangeably for various purposes
- Plan established & maintained by a church includes a plan maintained by an organization controlled by or associated with a church or “principal-purpose organization”
Medina v Catholic Health

- 10th Circuit - Dec. 19, 2017
- Was an internal plan admin committee an “principal-purpose organization?”
- Court rejected argument that organization must be a distinct legal entity
Medina v Catholic Health

• “Associated with” if subdivision of an org which is associated with church

• Court also relied on plan document language that plan admin committee shall be mindful of church’s teachings and tenets and shares “common religious bonds and convictions” with church
DB Fiduciary Breach

- Need a quick fix? Fund the plan!
- Thole v US Bank - 8th Cir - 10/12/17
- Participants in pay status
- Filed suit in 2013, raising issues with investments from 2007-2010
- Parts claimed breach due to investment losses resulting in 84% funding (2008) from overfunded status (2007)
• Plan reached full funding status again by 2014
• US Bank filed dismissal motion on full funding
• DB part no longer has standing for fiduciary breach when plan overfunded
• Court denied atty fees for plaintiffs based on funding being to reduce insurance premiums
Questions?

support@ftwilliam.com
800-596-0714