



DOL Update

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

\$1,100

\$2,063/day to \$2,140/day

- Failure to file Form 5500

\$1,000

\$1,632/day to \$1,693/day

- Failure to furnish automatic contribution notice

\$100

\$131/day to \$136/day

- Failure to furnish blackout notice

\$1,000

\$1,632/day to \$1,693/day

- Failure to furnish 436 benefit restrictions notice

\$11

\$28/participant to \$29/participant

- Failure to furnish statements or maintain records



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

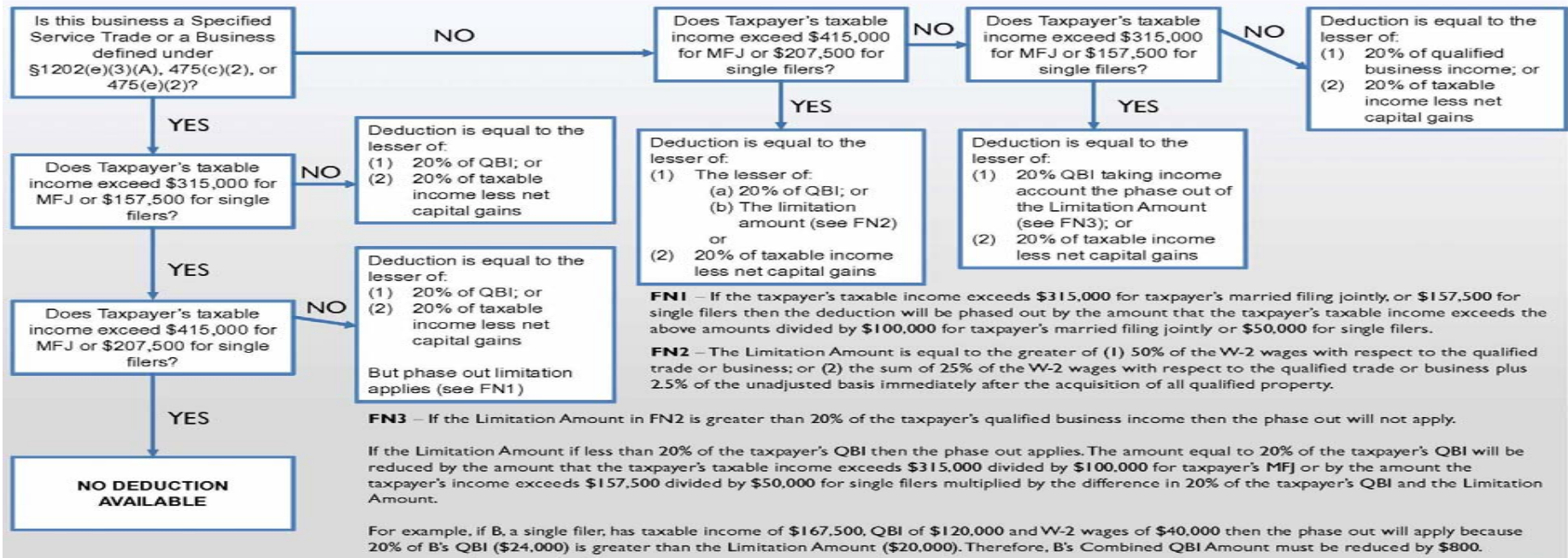
Tax Reform

- 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?



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Planning with an \$11,200,000 Per Person Estate Tax Exemption

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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

| No. of Part.s | Fee | | No. of Loan Fails | Fee |
|-----------------|-----------|--|-------------------|----------|
| 20 or fewer | \$ 500 | | 13 or fewer | \$ 300 |
| 21 to 50 | \$ 750 | | 14 to 50 | \$ 600 |
| 51 to 100 | \$ 1,500 | | 51 to 100 | \$ 1,000 |
| 101 to 1,000 | \$ 5,000 | | 101 to 150 | \$ 2,000 |
| 1,001 to 10,000 | \$ 10,000 | | Over 150 | \$ 3,000 |
| Over 10,000 | \$ 15,000 | | | |

EPCRS - 2018 User Fees

| Assets | Fee |
|--------------------------------|----------|
| \$500,000 or less | \$ 1,500 |
| Over \$500,000 to \$10 million | \$ 3,000 |
| Over \$10 million | \$ 3,500 |

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)

DB Fiduciary Breach

- 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?

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