

# Compliance

Provided by BB&T Insurance Services, Inc., McGriff, Seibels & Williams, Inc., BB&T Insurance Services of California, Inc., and Precept Insurance Solutions, LLC

## Trump Directs DOL to Reconsider Fiduciary Rule

Legislative Alert 04-2017 February 8, 2017

### Highlights:

- In its current form, the final rule will require investment advisors to comply with strict fiduciary standards.
- The President's memorandum instructs the DOL to carry out an "economic and legal analysis" of the final rule's potential impact.
- Based on its analysis, the DOL may revise or rescind the final rule.

### Important Dates:

- April 10, 2017  
The final rule's expanded definition of "fiduciary" is scheduled to take effect. However, the DOL is evaluating its legal options for delaying this effective date while it reconsiders the impact of the final rule.

In April 2016, the Department of Labor (DOL) released a [final rule](#) that expands who is considered a "fiduciary" when providing investment advice to retirement plans and their participants. According to the DOL, the final rule will protect investors by compelling advisors to put their clients' best interest first. However, critics of the final rule have argued that its burdensome requirements will raise the cost of financial advice for consumers.

On Feb. 3, 2017, President Donald Trump issued a [memorandum](#) that directs the DOL to re-examine the final rule and consider whether it should be revised or rescinded in order to be consistent with the Trump administration's priorities. The DOL is also considering its legal options for delaying the effective date of the final rule as it complies with the President's directive.

### Action Steps

The DOL may delay, revise or even rescind the final rule based on the President's directive. However, because the final rule's effective date is looming, many financial advisors have already changed their business practices to comply with the rule's requirements. Employers may want to contact their retirement plan providers to determine what standards of conduct will apply to their investment advice services.

The President's memorandum directs the DOL to examine the final rule to determine whether it may adversely affect the ability of Americans to gain access to retirement information and financial advice. As part of this review, the DOL must prepare an updated economic and legal analysis that considers whether the final rule will:

- Harm investors by reducing access to certain retirement savings offerings, products, information or related financial advice;
- Disrupt the retirement services industry so that investors are adversely affected; or
- Cause an increase in litigation, and an increase in the prices that investors and retirees must pay to gain access to retirement advice.

President Trump's memorandum directs the DOL to revise or rescind the final rule if the DOL determines that it will adversely affect

The DOL is instructed to rescind or revise the rule if it makes an affirmative determination with respect to any of the factors listed above or if it concludes that the final rule is inconsistent with the Trump administration's goals to "empower Americans to make their own financial decisions, to facilitate their ability to save for retirement and build the individual wealth necessary to afford typical lifetime expenses, such as buying a home and paying for college, and to withstand unexpected financial emergencies."

### Final Fiduciary Rule

The Employee Retirement Income Security Act (ERISA) and the federal Internal Revenue Code (Code) impose standards of conduct on individuals who manage an employee benefit plan and its assets, who are called fiduciaries. For example, fiduciaries are required to act prudently and solely in the interest of plan participants and beneficiaries. Fiduciaries can be held personally liable for losses when there is a fiduciary breach of duty. In addition, certain transactions are prohibited in order to prevent dealings with parties who may be in a position to exercise improper influence over the plan.

Under ERISA and the Code, people who give investment advice for a fee are considered fiduciaries, regardless of whether that fee is paid directly by the customer or by a third party. **The final rule revises guidance that has been in place for 40 years to broaden the definition of fiduciary to include a wider scope of investment advice relationships.** In addition to ERISA retirement plans, the final rule covers individual retirement accounts (IRAs), health savings accounts (HSAs), Archer medical savings accounts (MSAs), Coverdell Education Savings Accounts and ERISA-covered 403(b) plans.

### Investment Advice

Under the final rule, a person is a fiduciary if the person receives compensation for providing investment advice with the understanding that it is based on the particular needs of the person being advised or that it is directed to a specific plan sponsor, plan participant or account owner. Investment advice includes:

- **Investment recommendations**, which means advice on buying, holding, selling, or exchanging securities or other investment property, or advice on investing securities or other property after a rollover or distribution from a plan.
- **Investment management recommendations**, which means advice on investment policies or strategies, portfolio compensation, selection of others to provide investment advice or investment management services, selection of investment account arrangements (for example, brokerage versus advisory) or recommendations with respect to rollovers, transfers or distributions from a plan or IRA.

Under the final rule, a recommendation means "communication that, based on its content, context and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action." The more tailored the communication is to a specific recipient, the more likely that the DOL is to view it as a recommendation.

Also, to become a fiduciary, the person providing the investment advice must:

- Represent or acknowledge that he or she is acting as a fiduciary under ERISA or the Code;
- Provide investment advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is based on the particular needs of the advice recipient; or
- Direct investment advice regarding the advisability of a particular investment or management decision to a specific recipient(s).

### Exceptions

In the final rule, the DOL clarifies that some common communications do not meet the definition of "recommendation," and, thus, do not constitute fiduciary investment advice.

- **Investment education:** A plan sponsor, service provider or others can provide investment educational information without becoming a fiduciary.
- **General communications:** General communications that a reasonable person would not view as an investment recommendation, such as general circulation newsletters, remarks or presentations in widely attended speeches and conferences, or general marketing materials, are not investment advice.
- **Platform providers:** Service providers or third-party administrators (TPAs) that offer a "platform" or selection of investment alternatives for a defined contribution retirement plan—for example, a 401(k) plan—without regard to the individualized needs of the plan, its participants or beneficiaries are not providing investment advice.

---

This Compliance Bulletin is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice. Readers should contact legal counsel for legal advice. Design ©2016-2017 Zywave, Inc. All rights reserved.

The information provided should not be considered tax or legal advice. Please consult with your individual tax advisor and/or attorney regarding your individual circumstances. Insurance products are offered by BB&T Insurance Services, Inc., BB&T Insurance Services of California, Inc., F.B.P. Insurance Services, LLC, DBA Precept Insurance Solutions, LLC, and DBA as Provview Advanced Administrators, LLC, and McGriff, Seibels & Williams, Inc., all subsidiaries of BB&T Insurance Holdings, Inc. BB&T Insurance Services, Inc., CA Lic #0C64544; BB&T Insurance Services of California, Inc., CA Lic #0619252; F.B.P. Insurance Services, LLC, CA Lic #0747466; McGriff, Seibels & Williams, Inc., CA Lic #0E83682.

© 2017, Branch Banking and Trust Company. All rights reserved.

Insurance.BBT.com

Page 2

The DOL's final rule also includes some broad exemptions that are intended to provide fiduciary advisors with flexibility to continue many common fee and compensation practices, as long as certain protections are in place to ensure that their advice is in their clients' best interest.

### [More Information](#)

The DOL's [webpage](#) on the final rule includes links to the final rule and related prohibited transaction exemptions. It also includes links to frequently asked questions ([FAQs](#)) on the final rule and fact sheets that describe the final rule's requirements.