

THIS MONTH IN COMPLIANCE

DOL Fiduciary Rule – effective February 16, 2021

MONTHLY COMPLIANCE TASKS

Please be sure to check your SmartRIA CCO portal to keep up with your monthly Compliance tasks or utilize the CCO Scorecard included in our This Month in Compliance email. Please contact the following for:

- **Login and Portal Requests:** Sara Sparks: ssparks@thecomplianceresource.com
- **Task Related Questions:** Nancy Harry: nharry@thecomplianceresource.com
Stacie Craddock: scraddock@thecomplianceresource.com
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REMINDER. Please complete and return the Annual ADV Amendment Checklist if you would like CRP to assist with your annual filing. Checklists are due back to CRP by March 15th to guarantee the filing be completed before the March 31st deadline.

Task this Month – *Review of States: Note New York – Registration Requirements*

The State of New York’s new investment adviser representative (“IAR”) registration requirements are now effective. Prior February 1, 2021, New York remained the final state that did not require investment adviser representatives to be licensed with the state securities regulator by filing the Form U4. Adopted in December 2020, the rule changes now require the registration of investment adviser representatives – including principals, supervisors and solicitors for registered investment adviser firms – by filing the Form U4 via the WebCRD/IARD system. Registration is required for investment adviser representatives of New York state registered investment adviser firms, as well as for investment adviser representatives of SEC-registered investment adviser firms, ***if the investment adviser representative conducts advisory activities from a place of business in New York.***

DOL FIDUCIARY RULE EXEMPTION – Effective February 16, 2021

The Fiduciary Rule Exemption became effective on February 16, 2021. While the Fiduciary Rule Exemption does not technically change the regulatory definition of what it means to be a fiduciary under ERISA or the Internal Revenue Code (Code), the preamble to the Fiduciary Rule Exemption includes an interpretation (Final Interpretation) that alters longstanding guidance on how DOL will determine whether a person is a fiduciary by reason of providing non-discretionary investment advice to a plan subject to ERISA or the Code (including an individual retirement account (IRA)). ***Under the Final Interpretation, advice to rollover assets from an ERISA-covered plan to an IRA is more likely to be deemed to be fiduciary investment advice.*** With respect to the Final Interpretation:

- *There must be ongoing advice to a “plan” (whether subject to ERISA or the Code) to attain fiduciary status. Recommendations made only with respect to non-plan assets are disregarded for this purpose; and*
- *There is a specific statement that introductory “hire me” discussions should generally not be viewed as fiduciary advice (although any investment recommendation that accompanies such discussion is separately evaluated to determine whether it would be considered fiduciary advice).*

For Registered Investment Advisers, the takeaway is the same as discussed last year when implementing Regulation Best Interest. Advisors will have to show they have gone through a process when advising on rollover options and be able to document that analysis. Advisors can get paid but they must show they reviewed the benefits and drawbacks of each potential option and came up with recommendations that were in the client's best interest. Advisors need to be better educated on all facets of rollover options. It can't just be 'roll it over to an IRA with us' without going through all the available options to see which is best. But they can get paid for this valuable service when they put in the time. We will see this point addressed on exams this year! "Document everything! That's clear in these recent rules."

CCO TIPS:

- **UPDATE:** policies and procedures on rollover rationale – refer to attached sample language
- **DOCUMENT:** the review using the rollover rationale form – refer to the attached with language added on options and risks
- **TRAIN:** your IARs to use rollover rationale form – make sure your IARs are aware of the requirements, and document the training
- **TESTING:** conduct random sampling of the completed rollover rationale forms

Let's take a look at a recent SEC Exam Request – Is your Firm prepared?

Retirement Account Disclosures. Copies of written disclosures made to clients during the Examination Period regarding:

- a. distribution options regarding clients' retirement plans (e.g., maintaining assets in a former employer's plan, transferring assets to a new employer's retirement plan, rolling assets over to an IRA or similar account type, or taking a lump sum distribution), the tax implications of those options, and other considerations (e.g., required minimum distribution requirements and availability of penalty-free withdrawals).
- b. conflicts of interest or financial interests that the Adviser has in recommending any specific product or investment related to retirement accounts;
- c. types of account options available to clients (e.g., IRA Rollover), including account-level fees and expenses and services provided under those account options;
- d. retirement account investment options available to clients (e.g., variable annuities and/or mutual funds), including information regarding (i) account-level fees and services, and (ii) investment-specific fees, expenses, revenue sharing, loads, commissions and other charges.