

The top half of the slide features a dark background with a glowing blue and purple digital aesthetic. A red square in the upper left corner contains the text 'K&L GATES' in white. The background is filled with a grid of binary code (0s and 1s) and a series of vertical bars of varying heights, some of which are highlighted in a bright cyan color. A pink line graph is overlaid on the bars, showing a fluctuating trend that peaks in the middle and then declines towards the right.

K&L GATES

2017 BOSTON INVESTMENT MANAGEMENT CONFERENCE

## ERISA Developments

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## TOPICS

- Regulatory Environment
- DOL Fiduciary Rule
  - Practical Implications
  - Case Studies / Tips to Avoid Traps in Practice
- Class Action Litigation



# Regulatory Environment



# SERVICING RETIREMENT CLIENTS

- Multiple regulators: SEC, DOL, IRS
- Different regulatory schemes:
  - Investment advisers vs. broker-dealers
  - Retail vs. institutional
  - Retirement vs. non-retirement accounts
- Current administration has different priorities than the prior administration

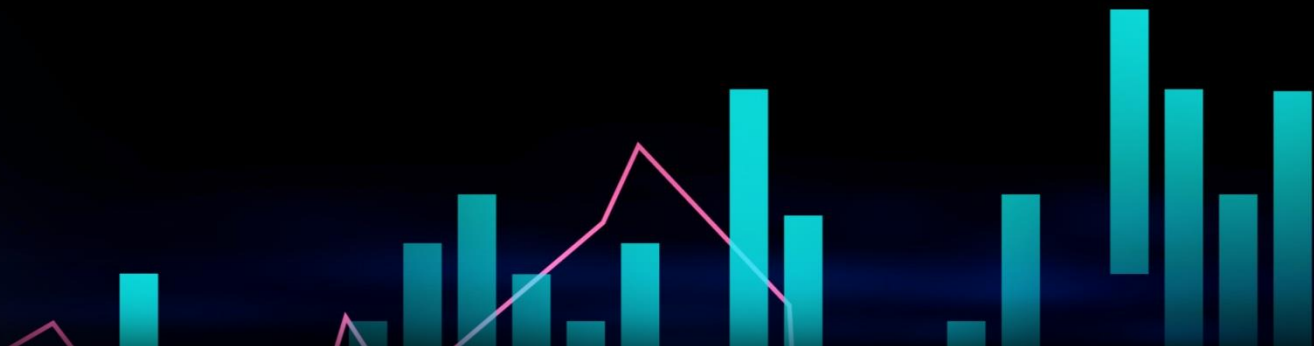
# FIDUCIARY RULE(S)

## SEC

- In 2011, a cross-divisional task force recommended establishing a uniform fiduciary standard for investment advisers and broker-dealers
- In June of 2017, SEC published a request for public comment on standards of conduct applicable to investment advisers and broker-dealers when they provide investment advice to retail and retirement investors

## DOL

- Crafted a comprehensive fiduciary rule
- In June of 2017, some aspects of the rule became applicable
- Tomorrow, DOL is scheduled to officially delay other aspects of the rule until July of 2019; could be rescinded or revised before becoming applicable
- Enforcement relief?



# DOL Fiduciary Rule



## IN-SCOPE CLIENTS

Over \$18T in  
assets

- Defined contribution plans
- Defined benefit plans
- IRAs
- HSAs
- Some 403(b)s
- Taft-Hartleys

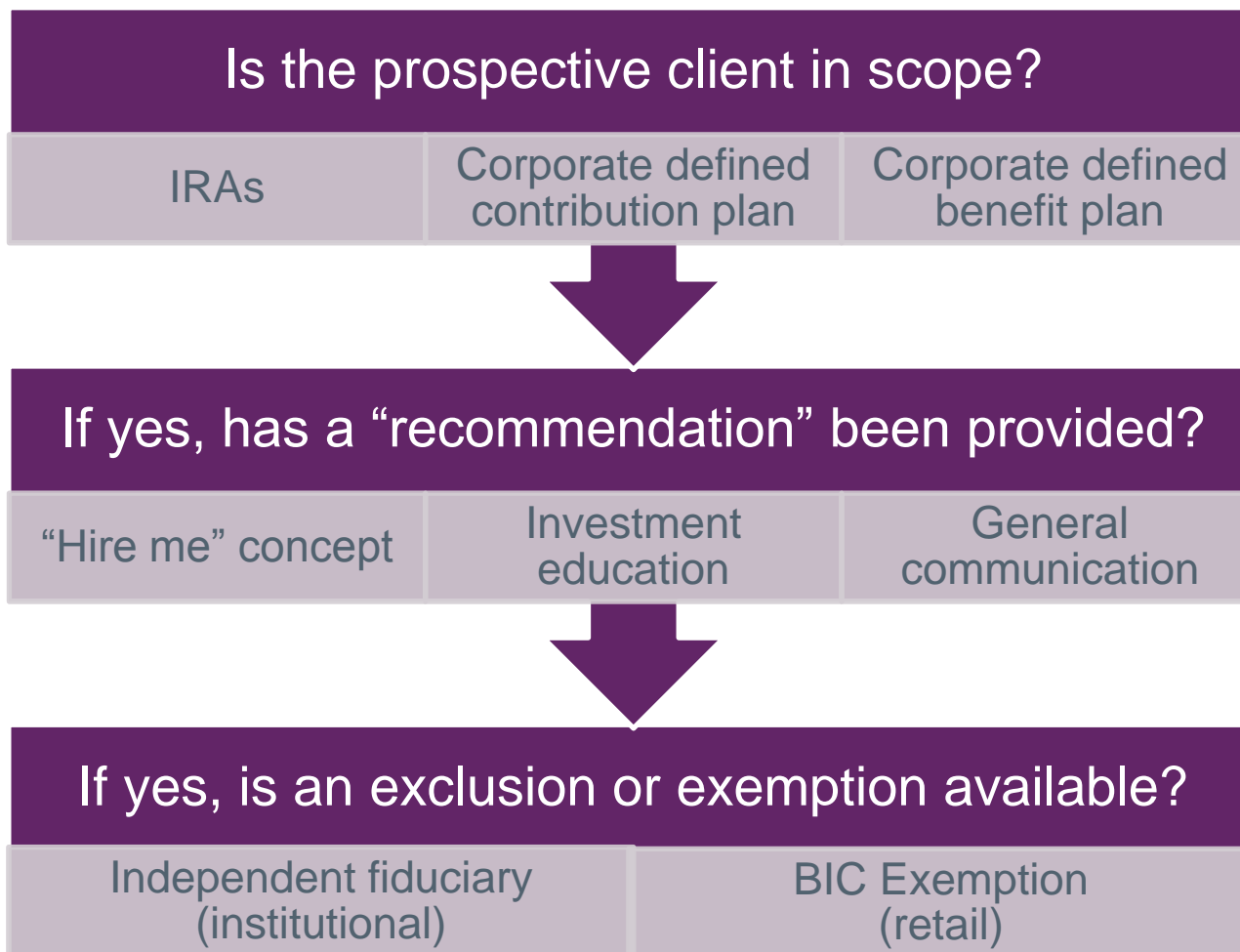


## MAY CHANGE THE TIMING OF WHEN FIDUCIARY STATUS ATTACHES

- Previously, firms avoided ERISA fiduciary status when selling and promoting products and services by making sure there was no “mutual understanding” between the client and the firm that the firm was providing investment advice
  - Disclaimers on marketing materials
  - Representations in client agreements
- Now, the fiduciary rule may cause a firm to become an ERISA fiduciary when selling and promoting products and services



# MARKETING & SALES ACTIVITY OVERVIEW



## IRA ROLLOVERS

- Previously, advice to rollover assets from a workplace retirement plan to an IRA was not fiduciary advice
- Now, under the fiduciary rule, rollover advice is fiduciary advice
- Impacts more than those seeking rollover business:
  - Plan recordkeepers
  - Product manufacturers
  - Plan sponsors

## ACTION ITEMS – FIDUCIARY RULE

- Identify in-scope clients/prospective clients
  - Separate accounts
  - Commingled funds
- Analyze marketing efforts
  - Distribution partners and relationships
  - Initial and post hire marketing
- Develop “best interest” procedures
  - Consider compensation
  - Consider process for obtaining client information
- Monitor status of the fiduciary rule 2018/2019

## CASE STUDY #1 – IRA ROLLOVER

- Situation: Prospective client recently retired and has accumulated \$500k in a workplace retirement plan
- Tips:
  - Obtain information on client’s current account to be able to engage in a “best interest” determination; “diligent and prudent efforts”
    - Account statement; summary plan description; 404(a) notice
    - Alternative data sources (document the data’s limitations and include an explanation as to why the data source is reasonable)
    - Consider vendors
  - Document basis for recommendation

## CASE STUDY #2 – RESPONDING TO AN RFP

- Situation: Firm responds to a plan's RFP for investment management services
- Tips:
  - RFP responses may constitute fiduciary investment advice
  - Consider whether a consultant is running the process
  - If the internal plan fiduciary (e.g., an investment committee) is responsible for at least \$50M, consider the independent fiduciary exception
  - Smaller plans, consider the BIC exemption

## CASE STUDY #3 – INTERMEDIARIES

- Situation: Firm's services are made available to retirement clients through an intermediary, such as a platform provider
- Tips:
  - The intermediary may be an ERISA fiduciary
  - Consider relying on the independent fiduciary exception by amending the contract with the platform provider to include certain representations and disclosures or sending a negative consent letter



# Class Action Litigation





# LITIGATION AGAINST PLAN SPONSORS

- Allegations have come in waves:
  - 1<sup>st</sup> Wave - Employer stock
  - 2<sup>nd</sup> Wave - Large corporate plans for excessive fees
  - 3<sup>rd</sup> Wave -
    - Hospitals and universities (403(b) plans)
    - Investment management firms for offering proprietary funds as the plan's investment options

## ACTION ITEMS - LITIGATION

- Review governance
  - Committee structure
  - Charters
  - Meeting minutes
- Review investment policy statement, if any
- Refine written process
  - Timing for running RFPs and RFIs on service providers
  - Oversight and benchmarking
- Consider plan design changes



# Questions

