

The Final Conflicted Advice Regulation

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What We Will Cover

- Background
- 2015 proposal
- Final regulation
- Communications that are not recommendations
- Carve-outs
- Prohibited transaction exemptions
- Effective dates and transitional relief

Background

Investment Advice

- In enacting ERISA, Congress was concerned that certain persons who could influence plan transactions might have conflicts of interest. Hence the concept of an ERISA fiduciary was born based on trust law principles.
- ERISA fiduciaries must act exclusively for benefit of plan participants.
- Under ERISA, fiduciary status applies to a person who renders “investment advice” for a fee or other compensation.
- ERISA §3(21)(A)(ii) and Reg. §2510.3-21(c) define the rendering of investment advice for this purpose.

Definition of Fiduciary Advisor

- Provision of investment advice triggers ERISA fiduciary status.
- Fiduciary status could then lead to possible prohibited transactions (PTs).
- The definition of what constitutes the giving of “investment advice” (and therefore fiduciary status) has been based on a 40-year old regulation that contains a rather infamous “five-part test.”

“Prohibited Transactions”

- A fiduciary must not cause the plan to engage in a non-exempt prohibited transaction.
- These are transactions between the plan and persons/entities that under ERISA or the Internal Revenue Code are considered to have a relationship to the plan (related party), such as a plan fiduciary.
- Fiduciaries are prohibited from engaging in **self-dealing transactions or receiving third-party payments in connection with plan transactions.**

Self-Dealing/Third-Party Payments

- Example: Joe is hired to provide investment advice to participants in a 401(k) plan.
 - Joe is a fiduciary because he gives investment advice.
 - An investment provider of an investment product that Joe recommends to participants pays him a higher commission than the providers of comparable products.
 - Because Joe is a fiduciary, he has engaged in an act of self-dealing when he recommends the higher commission investment product and has impermissibly received third-party payments if he receives a commission from the provider (unless he otherwise fits within an exemption).
 - If Joe wasn't a fiduciary, there would be nothing illegal in what he did.

ERISA Jurisdiction

- SANCTIONS under ERISA and the IRC for committing a prohibited transaction include:
 - 15 percent excise tax on the “amount involved,” and
 - Offending fiduciary must restore plan earnings, disgorge “ill-gotten” profits, excise tax, fiduciary removal, attorney fees, civil penalty
- Fiduciaries are personally liable for breaches
- DOL has stepped up enforcement efforts
- Not much IRS enforcement of the excise tax rules

Existing Definition of Fiduciary Advisor

- Current “five-part test” provides that a person is an investment advice fiduciary if he/she:
 - (1) Makes ***recommendations on investing in, purchasing, or selling*** securities or other property, or gives advice as to their value
 - (2) On a ***regular basis***
 - (3) Pursuant to a ***mutual understanding*** that the advice
 - (4) Will serve as a ***primary basis*** for investment decisions, and
 - (5) Will be ***individualized*** to the particular needs of the plan

Definition of Fiduciary Advisor

- Key components of the five-part test:
 - Advice must be given on a “**regular basis**” and
 - Must be the “**primary basis**” for investment decisions
- Many advisors have maintained over the years that their recommendations did not meet all five parts of the test and therefore they were not fiduciaries
- DOL has indicated that applying this test in enforcement actions has been problematic and one of the underlying justifications for the new regulation

2015 Proposed Regulation

Fiduciary Rule

- Proposed “Definition of the Term “Fiduciary,” Conflict of Interest Rule – Retirement Investment Advice” was issued April 20, 2015
- Initial comments were due July 21, 2015
- Hearing was held August 10-13, 2015
- Additional comments were due September 24, 2015
- Over 3,000 comments were filed with DOL with respect to the proposal

Proposed Definition of Fiduciary

- You are a fiduciary if you provide certain types of *advice for a fee* to a plan, plan fiduciary, plan participant or beneficiary, IRA or IRA holder, including:
 - Recommendations on buying, selling, holding, exchanging securities or other property
 - Recommendations on the management of securities or other property
 - ***Recommendations on distributions, including rollovers, and***
 - Appraisal, fairness opinion, or similar statement regarding the value of securities or property in connection with a specific transaction (other than ESOP appraisals)

Best Interest Contract Exemption (BIC)

- Exemption for variable compensation and third-party payments
- Applies to advisors and their associated financial institutions, affiliates, and other related entities
- Applies to advice to “retirement investors”:
 - Participant or beneficiary in a self-directed plan *or* entitled to distribution
 - IRA-owner acting on behalf of the IRA, and
 - Plan sponsor of a *non-participant directed plan with less than 100 participants*

Fiduciary Rule Comment Letters

- Major “asks” of ASPPA/ARA comment letters:
 - Special “level-to-level” rollover exemption
 - Clarify that the platform provider carve-out is available to TPAs and others who market the platform (but are not otherwise being compensated for providing investment advice)
 - Make a simplified BIC Exemption available to small self-directed 401(k) plans
 - Permit specific funds to be mentioned within the education carve-out, and
 - Extend the eight-month delay in enforcement to two years.

2016 Final Regulation

The Final Rule: An Improved 2015 Proposed Rule

- Published on April 8, 2016
- The DOL has reacted to the extensive feedback received on the 2015 proposed regulations
- The final rule largely adopts the general structure of the 2015 Proposal but with modifications in response to comments
 - The “five-part test” is being replaced
- The impact of the ARA’s comments and testimony is evident throughout the final rule and the BIC

General Definition of Investment Advice

- Categories and types of fiduciary investment advice
- Meaning of “recommendation”
- Meaning of “for a fee or other compensation, direct or indirect”
- Scope or types of recommendations to which the regulation applies
- Types of plans to which the regulation does or does not apply

Reminder: Who is a Fiduciary?

- A person is a fiduciary with respect to a plan or IRA to the extent he or she:
 - (i) Exercises any discretionary authority or discretionary control with respect to management of such plan or IRA, or exercises any authority or control with respect to management or disposition of its assets
 - (ii) **Renders investment advice for a fee or other compensation, direct or indirect, with respect to any monies or other property of such plan or IRA**, or has any authority or responsibility to do so, or
 - (iii) Has any discretionary authority or discretionary responsibility in the administration of such plan or IRA
- **What is “investment advice?”**

Types of Fiduciary Investment Advice

- **A person provides investment advice if, for a fee or other compensation, they provide:**
 - (i) A recommendation as to the advisability buying, selling, or holding a plan asset OR a recommendation as to how plan assets should be invested after the assets are rolled, transferred, or distributed from the plan or IRA or

Types of Fiduciary Investment Advice

- A person provides investment advice if, for a fee or other compensation, they provide (continued):
 - (ii) A recommendation as to the management of plan assets, including recommendations related to:
 - Investment policies or strategies or portfolio composition
 - Selection of other persons to provide investment advice or management services
 - Selection of investment account arrangements (e.g., brokerage versus advisory), or
 - Rollovers, transfers, or distributions from a plan or IRA, including whether, in what amount, in what form, and to what destination such a rollover, transfer, or distribution should be made
 - **NOTE:** Recommending a specific investment for the rolled assets is NOT required

Recommendations on Rollovers, Benefit Distributions, or Transfers from Plan or IRA

- Final rule specifically includes recommendations regarding the investment of plan assets to be rolled, transferred, or distributed from a plan or IRA
- A recommendation regarding whether, how much, in what form, and to what destination the funds should be distributed is also investment advice
 - Not necessary to include a specific investment product recommendation; the recommendation to move the assets is itself a fiduciary act under the final rule
 - Supersedes a prior, contrary DOL advisory opinion (2005-23A)

Recommendations on Rollovers, Benefit Distributions, or Transfers from Plan or IRA

- Includes recommendations to NOT take a distribution or to keep assets in a plan or IRA
- Distinguishes between recommendations (fiduciary advice) and educational or informational materials (not fiduciary advice)
 - “Accidental” advice is still advice – no exemption
 - DOL maintains that the provision of advice by a service provider does not make the employer/sponsor an investment advice fiduciary (still have a fiduciary obligation with respect to service provider selection)

Investment Management Recommendations

- A recommendation as to the “management” of securities or other investment property is fiduciary investment advice.
Examples:
 - A recommendation to move from a commission-based account to a fee-based account is fiduciary investment advice
 - Recommendations on investment strategy are subject to the “suitability” requirements *regardless of whether the recommendation results in a securities transaction or even references a specific security or securities* – such as:
 - Purchasing securities on margin
 - Engaging in day-trading
 - Includes a specific recommendation to hold an investment
 - Includes recommendations regarding the exercise of proxy/ownership rights

Investment Manager/Advisor Recommendations

- Recommendations regarding the selection of investment advisors, for a fee, is fiduciary investment advice
- Recommendations of managers are a critical part of an investment strategy
 - Rule requires recommendations of “other persons” to provide advice – **may tout oneself or an affiliate without triggering fiduciary obligations**
- Recommendations of specific investments or to transfer assets is a fiduciary act, even if part of a marketing/sales presentation
- Referral recommendations of investment advisors or managers may be fiduciary advice if they rise to the level of a recommendation **and is for a fee** (no specific exception for providing a list)
- A general recommendation to simply “hire an advisor” is likely not a fiduciary act – but facts and circumstances will determine

Appraisals and Valuations

- Appraisals and valuations are NOT covered by this regulation
 - Not considered fiduciary investment advice
 - Unlike the 2015 proposed regulations
- The DOL wants to address appraisal and valuation issues in a separate regulatory initiative
 - ESOP appraisals, in particular
 - Such opinions have unique issues that warrant more detailed guidance

The Circumstances

- A person is considered a fiduciary investment advisor in connection with a recommendation of a type previously described, if the recommendation is made either directly or indirectly by a person who:
 - (i) **Represents or acknowledges that it is acting as a fiduciary**
 - (ii) Renders the advice pursuant to a **written or verbal agreement, arrangement, or understanding** that the advice is based on the **particular investment needs of the advice recipient**, or
 - (iii) **Directs the advice to a specific advice recipient** or recipients regarding the advisability of a particular investment or management decision with respect to securities or other investment property of the plan or IRA

The Circumstances

- The question is whether the person was reasonably understood to hold itself out as a fiduciary with respect to communications with the plan or IRA investor
 - “If a person or entity does not want investment-related communications to be treated as fiduciary in nature, it should exercise care not to suggest otherwise.”
- The circumstances surrounding the relationship must be such that a reasonable person would understand that the nature of the relationship is one in which the advisor is to consider the particular needs of the advice recipient
 - As opposed to “recommendations made to the general public, or no one in particular”

What is a “Recommendation?”



Preamble

- The preamble to the regulation “provides that “recommendation” means a 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 determination of whether a “recommendation” has been made is an objective rather than subjective inquiry.”**

No More “Carve-Outs” But Certain Communications Still Not Fiduciary Advice

- Threshold issue: whether a person makes a recommendation as to the various previously described activities
- **A recommendation is** “a 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”
- Factors to consider:
 - Communications that require the advisor to comply with suitability requirements
 - How individually tailored is the communication is to a particular customer
 - Providing a list of securities considered appropriate for an investor, even without a recommendation
 - A series of actions, that may amount to a recommendation when considered in the aggregate
- It makes no difference in determining the existence of a recommendation whether the communication was initiated by a person or a computer software program

Meaning of “For a Fee or Other Compensation, Direct or Indirect”

- In order to be fiduciary advice, the advice must be in exchange for a fee or other compensation, whether direct or indirect
 - **Any fee or compensation for the advice received** by the person (or by an affiliate) **from any source** or
 - **Any fee or compensation incident to the transaction** in which the investment advice has been or will be rendered
 - **Including**, but not limited to:
 - Commissions
 - Loads
 - Finder's fees
 - Revenue-sharing payments
 - Shareholder-servicing fees
 - Marketing or distribution fees (12b-1)
 - Underwriting compensation
 - Payments to brokerage firms in return for shelf space
 - Recruitment compensation (in connection with transfers of accounts to a rep's new broker-dealer firm)
 - Gifts and gratuities
 - Expense reimbursements

Fee or Compensation “But For”

- A fee or compensation is paid “in connection with or as a result of” advice if it would not have been paid but for the recommended transaction or advisory service or if eligibility for or the amount of the fee or compensation is based on the transaction or service

Scope of Fiduciary Duty

- An investment advice fiduciary is only a fiduciary with respect to the assets over which the fiduciary has discretionary authority, control, or responsibility, or the authority to render investment advice
 - Does not impact co-fiduciary liability under ERISA
- Cannot by contract or disclaimer specify whether fiduciary investment advice has occurred or will occur during the course of a relationship
- Whether someone is a fiduciary for a particular activity is a functional test based on facts and circumstances

Scope of Fiduciary Duty (Continued)

- The final rule does not impose an automatic ongoing fiduciary duty to monitor the investment to ensure the recommendations remain prudent and appropriate for the plan or IRA
 - The obligation to monitor the investment on an ongoing basis would be a function of the reasonable expectations, understandings, arrangements, or agreements of the parties
- Execution of trades by a broker/dealer does not give rise to fiduciary status (in and of itself)

Plans to Which the Regulation Applies

- **The regulation covers:**
 - Qualified plans
 - IRAs
 - SIMPLE-IRAs
 - SEPs
 - Keogh plans
 - 403(b) plans covered by ERISA
 - Welfare benefit plans
 - Health Savings Accounts
 - Archer Medical Savings Accounts
 - Coverdell Education Savings Accounts
- **The regulation does not cover:**
 - Governmental plans
 - Church plans (non-electing)
 - 403(b) plans “not established or maintained” by an employer

Communications That Are Not “Recommendations”

Non-Recommendations

- The final regulation changes the structure from the 2015 proposal by doing away with the concept of “carve-outs.”
- Instead, examples are provided of the types of communications and activities that would not rise to the level of being a “recommendation” and therefore would not be considered to be the giving of investment advice. They include:
 - Marketing or making available a “platform” or menu of investment alternatives without recommending any particular alternative on the platform
 - General communications, and
 - Investment education

Platforms

- Many TPAs and recordkeepers offer a “platform” that consists of a selection of investment alternatives
- The platform is marketed to 401(k) and similar plans that allows participants to self-direct the investment of their accounts
- The independent fiduciary of the plan selects various investment alternatives from the menu that will then become the designated investment alternatives offered to the participants
- Like a waiter in a restaurant, the platform provider simply makes available the menu without recommending any particular entrée

Platforms

- The final regulation provides that marketing or making available to a plan fiduciary a platform or similar mechanism is not a “recommendation” if certain requirements are met:
 - The plan must have an **independent** fiduciary who selects the investments
 - The menu of investments can not be individualized specifically for a particular plan sponsor (although it is okay to provide “segmented” menus based on objective criteria, such as plan size), and
 - The platform provider must disclose in writing that the provider is not giving impartial investment advice or advice as a fiduciary

Platforms

- In connection with marketing or making available a platform (or similar mechanism) a provider may:
 - **Identify investment alternatives** on the menu that meet certain objective criteria (e.g., size of fund, expense ratios, asset class, etc.), however, the provider must disclose any financial interest it has in any identified investments
 - **Limit the menu** based on **non-individualized** market segments
 - **Respond to RFPs** and in doing so identify a limited number (or sample) of investment alternative from the menu, provided the sample is chosen based on the size of the employer (or plan) and/or the existing investment alternatives and the provider discloses any financial interest it has in any of the listed alternatives, and
 - **Provide objective financial data** and comparisons with benchmark's fiduciary

General Communications

- Furnishing or making available “general communications” that a “reasonable person” would not view as an investment recommendation will not cause the provider to be considered to be an investment advice fiduciary
- Examples provided by the regulation include:
 - General circulation newsletters and research or news reports for general distribution
 - Commentary on publicly broadcast talk shows or remarks and presentations at widely attended speeches or conferences
 - General marketing materials
 - General market data including data on market performance, market indices, trading volumes, performance reports, or prospectuses

Education

- Investment education is a very broad category of communications that do not rise to the level of being considered recommendations
- The four broad categories include:
 - Plan information
 - General financial, investment and retirement information
 - Asset allocation models, and
 - Interactive investment materials
- The investment education examples are very similar to Interpretive Bulletin 96-1, which is now superseded by the regulation

Education: Plan or IRA Information

- General information about the plan (or IRA), without reference to the appropriateness of any particular investment alternative or benefit distribution option, is not a “recommendation”
- This exclusion is very expansive and includes a broad range of information such as:
 - The terms or operations of the plan (or IRA)
 - The benefits of plan (or IRA) participation
 - The benefits of increasing contributions and the impact of pre-retirement withdrawals

Education: Plan Information

- Additional examples of plan (or IRA) information include:
 - Information on the forms of distribution available under the plan (or IRA) including rollovers, annuitization and other forms of lifetime income and their respective advantages, disadvantages and risks
 - Investment product features including investment objectives, fee and expense information, trading restrictions, risk and return characteristics, historical returns, and prospectuses
 - A description of investor rights and obligations

Education: Financial Information

- Excluded from being a recommendation are information and material that **generally** provides education on financial, investment, and retirement matters
- This category of information must not address specific investment products or alternatives available under the plan or IRA, specific distribution options, or specific services offered outside the plan or IRA

Education: Financial Information

- Examples of general financial, investment, and retirement information include:
 - General financial and investment concepts, such as risk and return, diversification, dollar cost averaging, compounded return, and tax deferred investment
 - Historic differences in rates of return between different asset classes (e.g., equities, bonds, or cash) based on standard market indices
 - Effects of fees and expenses on rates of return
 - Effects of inflation

Education: Financial Information

- Examples of general financial, investment, and retirement information (continued):
 - Estimating future retirement income needs
 - Determining investment time horizons
 - Assessing risk tolerance
 - Retirement-related risks (e.g., longevity risks, market/interest rates, inflation, health care, and other expenses), and
 - General methods and strategies for managing assets in retirement (e.g., systematic withdrawal payments, annuitization, guaranteed minimum withdrawal benefits), including those offered outside the plan or IRA

Education: Asset Allocation Models

- The ability to use asset allocation models within the investment education exclusion was the subject of many comments made with respect to the proposed regulation
- In particular, unlike IB 96-1, the proposal would have precluded the naming of any specifically designated investment alternatives that fit within the parameters of an allocation model
- The final regulation will now allow identification of specifically designated investment alternatives available under the plan (but not for IRAs) if certain requirements are met

Education: Asset Allocation Models

- Information provided through an asset allocation model will be considered education if:
 - The model must be based on generally accepted investment theory that takes into account historic returns of different asset classes
 - Material facts and assumptions accompany the model, and
 - An accompanying statement must advise the recipient to consider other assets, income, and investments in addition to those considered by the model

Education: Asset Allocation Models

- An asset allocation model used in conjunction with a plan (but not an IRA) may identify specific investment products or alternatives if:
 - The investment is a plan designated investment alternative (DIA) (as defined under the ERISA section 404(a)(5) disclosure rules) that is subject to oversight by an independent plan fiduciary
 - The model identifies all other DIAs under the plan that have similar risk and return characteristics, and
 - An accompanying statement informs the recipient of those additional DIAs and where additional information on those alternatives may be obtained

Education: Interactive Materials

- Questionnaires, worksheets, software, and similar materials that provide a participant or IRA owner the means to estimate retirement income needs, retirement income streams, the impact of different asset classes, and different distribution options, will qualify as education if certain requirements are met:
 - The materials are based on generally accepted investment theories that take into account historic returns of different asset classes, and
 - There is an “objective correlation” between the asset allocation and income stream generated by the materials and the data supplied by the participant or IRA owner

Education: Interactive Materials

- Interactive materials requirements:
 - The materials are based on generally accepted investment theories that take into account historic returns of different asset classes
 - There is an “objective correlation” between the asset allocation and income stream generated by the materials and the data supplied by the participant or IRA owner
 - All material facts and assumptions are specified by the participant or IRA owner or accompany the materials
 - If the materials identify specific investments or distribution options, a disclosure is provided similar to what is made for asset allocation models

Education: Interactive Materials

- Interactive materials requirements (continued):
 - The materials do not identify specific investment alternatives or distribution options available under the plan or IRA unless the participant or IRA owner specified the investment option or distribution alternative
 - For plans, and not IRAs, if not specified by the participant, the investment option must be a designated investment alternative overseen by an independent plan fiduciary and:
 - The materials identify all other DIAs under the plan that have similar risk and return characteristics, and
 - An accompanying statement informs the recipient of those additional DIAs and where additional information on those alternative may be obtained

Carve-Outs

Carve-Outs

- The final regulation exempts from being classified as fiduciary investment advice certain activities and communications that might otherwise be considered to meet the definition
- Although no longer referred to as carve-outs, the three listed exemptions have essentially the same effect and fall into three categories:
 - A “seller’s” exemption
 - Swap transactions, and
 - Certain activities by employees of the plan sponsor

Seller's Exemption

- The seller's exemption applies to recommendations made to an independent plan (or IRA) fiduciary deemed to have financial expertise in conjunction with an arm's-length sale of an investment product to a plan or IRA
- The independent fiduciary must be an institutional fiduciary (such as a bank, insurance carrier, or similar institution), a regulated advisor, a broker-dealer, or a fiduciary that manages at least \$50 million
- The proposed regulation would have required any type of independent fiduciary to have at least \$100 million under management

Seller's Exemption (Continued)

- The sellers must know or reasonably believe that the independent fiduciary is capable of evaluating investment risks and may rely on a written representation from the plan or fiduciary
- The seller must “fairly inform” the independent fiduciary:
 - That the seller is not undertaking to provide impartial investment advice
 - Of the existence and nature of the seller’s financial interest in the transaction, and
 - That the seller is not giving advice in a fiduciary capacity

Seller's Exemption (Continued)

- The seller may not receive a fee from the plan, independent fiduciary, plan participant, beneficiary, IRA or IRA holder for the provision of investment advice in connection with the transaction
- The foregoing requirements generally have to be met before entering into the transaction

Swap Transactions

- The provision of any advice to an ERISA plan (and not an IRA) by a person who is a swap dealer or swap participant in connection with a swap transaction will be exempt if:
 - The plan is represented by an independent fiduciary
 - The swap dealer is not acting as an advisor to the plan
 - The swap dealer ahead of the transaction obtains from the independent fiduciary a representation that the fiduciary understands the dealer is not undertaking to provide impartial investment advice or give advice in a fiduciary capacity, and
 - No additional fee for investment advice is received

Employees of Plan Sponsor

- Investment advice is exempted to the extent an employee of the plan sponsor, acting in their capacity as an employee, gives advice to a plan fiduciary or to another employee or independent contractor.
- The employee must not receive any fee or other compensation in connection with the advice other than their normal compensation for work performed for the employer.
- Advice given to a fellow employee in that employee's capacity as a plan participant or beneficiary is also exempted as long as the advice giver's job responsibilities do not involve giving investment advice and they are not otherwise registered under securities or insurance laws.

The Best Interest Contract Exemption

Best Interest Contract Exemption “The BIC”

- The prohibited transaction rules generally prohibit fiduciaries to plans or IRAs from engaging in self-dealing and receiving third-party compensation for transactions involving plan or IRA assets
- **Problem:** This restriction would generally prohibit financial professionals from receiving transaction or product-based compensation on investments they recommend and could have impact on some level-fee arrangements as well
- **The BIC Exemption allows RIAs, broker-dealers, and insurance companies, and their agents and representatives, that are fiduciaries by reason of giving investment advice, to receive compensation that may otherwise give rise to a prohibited transaction**
 - A number of requirements must be satisfied for the exemption to apply

The BIC Exemption

- Available for advisors and financial institutions (FIs) that make investment recommendations to retail “retirement investors,” including:
 - Plan participants and beneficiaries, IRA owners, and non-institutional (or “retail”) fiduciaries
- Must acknowledge fiduciary status, in writing
- Must adhere to a best-interest standard of conduct and fair dealing
- Financial institutions must adopt policies and procedures designed to mitigate COIs

The BIC Exemption

- For IRAs and non-ERISA plans, must have an enforceable contract with investor
- For ERISA plans, no contract necessary for recommendations to retirement investors
 - But same standards still apply
- “Level-fee” fiduciaries who receive only a level fee for service do not have to enter into a contract, but written acknowledgment of fiduciary status, adherence to fiduciary standards, and written documentation for the reasons for the recommendation are required
- Disclosures: about COIs and the cost of advice

The BIC Exemption

To rely on the exemption, financial institutions generally must:

- **Acknowledge fiduciary status** with respect to investment advice to the retirement investor
- **Adhere to Impartial Conduct Standards** requiring them to:
 - Give advice that is in the retirement investor's best interest (*i.e., prudent advice that is based on the investment objectives, risk tolerance, financial circumstances, and needs of the retirement investor, without regard to financial or other interests of the advisor, financial institution, or their affiliates, related entities or other parties*)
 - Charge no more than reasonable compensation, and
 - Make no misleading statements about investment transactions, compensation, and conflicts of interest

The BIC Exemption

- **Implement policies and procedures** reasonably and prudently designed to prevent violations of the Impartial Conduct Standards
- **Refrain from giving or using incentives** for advisors to act contrary to the customer's best interest, and
- **Fairly disclose the fees, compensation, and material conflicts of interest**, associated with their recommendations
- Advisors relying on the exemption must adhere to the Impartial Conduct Standards when making investment recommendations

Proprietary Products

- Financial institutions and advisors that restrict their recommendations, in whole or in part, to proprietary products or to investments that generate third-party payments may rely on the BIC exemption if:
 - The recommendation is prudent
 - The fees reasonable
 - The conflicts disclosed (so that the customer can fairly be said to have knowingly assented to the compensation arrangement), and
 - The conflicts are managed through stringent policies and procedures that keep the advisor's focus on the customer's best interest, rather than any competing financial interest of the advisor or others

Proprietary Products (Continued)

- Proprietary products are products that are managed, issued, or sponsored by the financial institution or any of its affiliates
- Third-party payments are sales charges that are not paid directly by the plan, participant, or beneficiary account, or IRA:
 - Gross dealer concessions
 - Revenue-sharing payments
 - 12b-1 fees
 - Distribution, solicitation, or referral fees
 - Volume-based fees
 - Fees for seminars and educational programs
 - Any other compensation

Level-Fee Fiduciary



- Level-fee fiduciary: Applies if the only fee received by the FI, the advisor, or affiliate in connection with advice or management of Plan or IRA assets is a pre-disclosed level fee, i.e., **a fee that is a fixed percentage of plan assets or a set fee that does not vary based on the investments that are made.**
- Level-fee arrangements are generally considered less prone to COIs, accordingly for level-fee only arrangements, the FI does not have to enter into a contract with retirement investors or make the other required disclosures.

Level-Fee Fiduciary

- For level-fee only arrangements, to satisfy the BIC exemption, the FI does not have to enter into a contract with the retirement investor or make the other required disclosures. The level-fee fiduciary, however, must provide:
 - A written statement of fiduciary status
 - Adhere to the Impartial Conduct Standards, and
 - Prepare a written documentation of the reasons for the recommendation(s) to roll from an ERISA Plan to an IRA, rollover from an IRA, or switch from commission to a level-fee arrangement

Key Changes from 2015 BICE Proposal

- The DOL revised the exemption in response to commenters' concerns about its workability. The final exemption:
 - Eliminates the contract requirement for ERISA plans
 - Eliminates the requirement that a contract be entered into in advance of any recommendation
 - Lessens the requirements of the BIC for level-fee fiduciaries
 - Provides that required terms can be incorporated in the account documents
 - Allows for negative consent for existing contract holders

Key Changes from 2015 BICE Proposal

- The final exemption changes continued:
 - Does not require the individual advisor to be a party to the contract
 - Applies to all assets, not those on the restricted list
 - Expands availability to small businesses sponsoring participant-directed plans
 - Allows for the sale of proprietary products
 - Clarifies that relief is provided for all categories of fiduciary recommendations (rollovers, etc.)
 - Eliminates annual disclosures and the one-, five-, and ten-year expense projections
 - Drops the data collection requirement
 - Provides a mechanism for correcting good faith errors

Amendment and Partial Revocation of PTE 84-24

- PTE 84-24 was originally granted in 1977 and has been amended several times
 - Permitted insurance agents/brokers and pension consultants to receive a commission for selling insurance or annuity contracts to plans and IRAs
 - Permitted the purchase by plans and IRAs of insurance and annuity contracts from insurance companies that are parties in interest or disqualified persons
 - Permitted the investment company's principal underwriter to receive commissions in connection with a plan's or IRA's purchase of investment company securities (mutual funds)

Amendment and Partial Revocation of PTE 84-24

- As amended, the exemption generally permits investment advice fiduciaries and other service providers to receive commissions in connection with the purchase of insurance and Fixed Rate Annuity Contracts by plans and IRAs, as well as the purchase of mutual funds by plans
 - **Fixed Rate Annuity Contract:** An annuity that is non-forfeitable at the time of issue, or guarantees return of principal less expenses for a group fixed annuity, and has benefits that don't vary based on investment experience of a separate account or index (**not: a variable, indexed, or similar annuity**)
 - **Non-Fixed Rate Annuity Contract:** Relief revoked for Plans and IRAs (see BIC)
 - **Investment Company Securities (mutual funds):** Relief revoked for IRAs (see BIC)

Amended PTE 84-24 Requirements

- Commissions for the purpose of sales of Fixed Rate Annuity Contracts to Plans and IRAs and mutual fund shares are narrowly defined
 - Excludes, for example, revenue sharing and similar payments
- Recommendations under PTE 84-24 must meet the Impartial Conduct Standard created under the BIC

Effective Dates and Transitional Relief

Effective Date

- The Final Regulation is officially effective on June 8, 2016.
- With that said, however, the date on which the new rules actually are applied (the "Applicability Date") is April 10, 2017.
- The BIC Exemption becomes effective when the regulation becomes applicable on April 10 2017.
 - A BIC exemption transition will run from April 10, 2017 until January 1, 2018.
 - During the transition period, the exemption is available under slimmed-down conditions that should make compliance easier.

What to Expect in the Future

What to Expect

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- The final rule remains contentious in Congress.
- The Congressional Review Act gives Congress 60 legislative days to pass a resolution of disapproval. It is expected that the President would veto the resolution and there would be insufficient support in the Senate to override the veto.
- It is also possible that Congress could pass substantive legislation to override the regulation but that is unlikely in 2016.

QUESTIONS?