

**MEMO# 29837**

April 13, 2016

# Department of Labor Finalizes Rule and Related Exemptions Defining Investment Advice Fiduciary

[29837]

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TO:

PENSION MEMBERS No. 10-16  
SEC RULES COMMITTEE No. 17-16  
OPERATIONS MEMBERS No. 10-16  
SMALL FUNDS MEMBERS No. 14-16  
BANK, TRUST AND RETIREMENT ADVISORY COMMITTEE No. 12-16  
BROKER/DEALER ADVISORY COMMITTEE No. 12-16  
TRANSFER AGENT ADVISORY COMMITTEE No. 16-16  
SALES AND MARKETING COMMITTEE No. 3-16

RE:

DEPARTMENT OF LABOR FINALIZES RULE AND RELATED EXEMPTIONS DEFINING  
INVESTMENT ADVICE FIDUCIARY

On April 6, 2016, the Department of Labor (“Department” or “DOL”) issued a final regulation (“Final Rule”) defining who is a “fiduciary” under section 3(21) of the Employee Retirement Income Security Act of 1974 (“ERISA”) and section 4975(e)(3) of the Internal Revenue Code (“Code”) as a result of giving investment advice to an employee benefit plan, plan fiduciary, plan participant or beneficiary, IRA or IRA owner. [\[1\]](#) As the Department notes, the Final Rule treats persons who provide investment advice or recommendations for a fee or other compensation with respect to assets of a plan or IRA as fiduciaries in a wider array of advice relationships. [\[2\]](#) In addition to the Final Rule, the Department issued a package of materials including two new prohibited transaction class exemptions (“PTEs”)—the “Best Interest Contract” (“BIC”) exemption [\[3\]](#) and “Principal Transactions” exemption [\[4\]](#)—and amendments to several other existing PTEs. [\[5\]](#) The action finalizes the proposed regulation and proposed PTEs published by DOL in 2015 (“2015 proposal”) [\[6\]](#) with various changes.

The Final Rule is effective June 7, 2016, but the general applicability date is April 10, 2017. Full compliance with the new BIC and Principal Transactions exemptions will be required by January 1, 2018, and until then (during the period between the rule's applicability date and January 1, 2018) there will be a transition period in which fewer conditions of the exemptions will apply. [7]

While the Final Rule and exemptions incorporate welcome changes from some of the many burdensome aspects of the 2015 proposal, the structure and key elements remain. The consequence is that a complex new framework for serving retirement investors has been created that in many cases will require changes to business models. Moreover, many important interpretive issues remain and will require careful analysis and guidance from DOL as the financial services industry attempts to implement the new fiduciary regime in a manner that allows it to serve retirement investors. In regard to interpretive issues, please forward any questions you have to David Abbey at [david.abbey@ici.org](mailto:david.abbey@ici.org) or 202-326-5920, Elena Chism at [elena.chism@ici.org](mailto:elena.chism@ici.org) or 202-326-5821, or Shannon Salinas at [shannon.salinas@ici.org](mailto:shannon.salinas@ici.org) or 202-326-5809. The Institute is also holding a forum of members, distributors, DOL staff and others to talk over the rule's implications – that forum will be held on May 10 in Washington, DC. We hope to use the forum to explore and analyze many of these interpretive issues. More information about the forum is available here: [https://www.ici.org/events/upcoming/conf\\_16\\_dol\\_fiduciary\\_rule](https://www.ici.org/events/upcoming/conf_16_dol_fiduciary_rule).

Set forth below is an overview of the most consequential changes to the 2015 proposal, followed by a more detailed description of the Final Rule and Best Interest Contract Exemption.

## I. Overview of Key Changes in Final Rule

The Final Rule preserves the structure and key elements of the 2015 proposal, but DOL did make several important modifications that reflect many of the concerns expressed in advocacy efforts by the financial services industry.

### A. Final Rule. Following is a summary of the most consequential changes to the Final Rule for the fund industry:

- Scope of “Recommendation” – The Final Rule more closely aligns the definition of a “recommendation” with FINRA guidance, adding new language indicating that communications need to be more tailored to the particular recipient to constitute a recommendation. The definition still includes a “suggestion” of a specific call to action—a seemingly very broad standard—but other specific examples of general communications excluded from the definition of “recommendation” (e.g., general marketing materials and other widely circulated communications) are also provided and help to narrow the application of the definition somewhat.
- “Hire me” Issue – The Final Rule clarifies that recommending oneself is not, by itself, the type of recommendation that necessarily leads to fiduciary status. If the “hire me” recommendation is coupled with a rollover recommendation, however, or effectively includes a recommendation as to how to invest or manage plan or IRA assets (i.e., an investment strategy), the adviser will not be shielded from fiduciary status. In the latter case, the adviser would likely need to use the BIC exemption. This could substantially limit the utility of an otherwise favorable change.
- Populating Asset Allocation Models – The Final Rule excludes from the description of a “recommendation,” the provision of asset allocation models and interactive materials

that reference specific investments or products available under ERISA-covered plans (provided that certain conditions are met). Importantly, this change does not extend to populating asset allocation models with potential investments for IRA holders.

- **Selling Exception** – Under the Final Rule, advice provided to a fiduciary independent of the adviser in the context of an arm's length sale, loan, exchange or other investment-related transaction will not result in fiduciary status for the adviser if the independent fiduciary:

-- is a bank, insurance company, registered investment adviser, or registered broker dealer; or

-- manages or controls total assets of at least \$50 million (aggregated across clients, and not limited to plan or IRA clients) and certain other conditions are met.

This change should help address the "wholesaler" or "daisy chain" issue, but the relief is conditioned on making disclosures to the otherwise sophisticated financial intermediaries and in certain instances effectively will require representations from such firms. Moreover, DOL did not retain the language treating plans with more than 100 participants as "sophisticated" for purpose of the exception. This will serve as a significant limitation on the ability to advise many medium size plans as well.

- **Platform Exception** – The Final Rule affirms that offering a platform of investment alternatives to a fiduciary of a participant-directed defined contribution plan will not be viewed as a fiduciary recommendation, and there is language in the Preamble suggesting that the "segmenting" of platforms based on general categories is permitted. DOL also clarified that platform providers may provide RFP responses or objective financial data regarding alternatives meeting objective criteria established by a plan sponsor without triggering fiduciary status.

## **B. BIC Exemption**

While DOL made important changes to the BIC exemption that arguably improve the workability of the exemption, one cannot conclude that the changes result in a "principles-based approach." Moreover, one might argue that very little has been done to resolve concerns about litigation risk—particularly through class actions—although marginal improvements (elimination of affirmative warranty regarding compliance with applicable federal and state law and clarification of ability to avoid punitive and rescission damages) have been made. Significant concerns about the BIC continue to include webpage and written policies and procedures requirements, which have only marginally been remedied by the final BIC exemption. In this regard, the following key changes were made:

- **Written Contract Not Required For Plans** – DOL eliminated the requirement that a separate written contract be entered into for recommendations to ERISA Title I plans and participants, noting that those plans and participants have recourse through ERISA's civil enforcement provisions. In lieu of the contract, the financial institution of the adviser making such recommendations is generally required, among other things, to provide a unilateral writing acknowledging fiduciary status and affirmatively provide warranties and disclosures.
- **Written Contract Required For IRAs** – DOL retained the written contract requirement for advisers seeking to use the BIC exemption when providing advice to IRA holders in order to provide a contract-based private right of action. The requirements for establishing a written contract have been eased somewhat in that the contract document may be incorporated into other account opening documentation and may

be signed either electronically or manually by the client. The contract must be entered into not later than the time the recommended transaction is executed. In the case of existing accounts (contracts in place before January 1, 2018), a “negative consent” process is available for forming the contract (during a transition period.)

- **No Three-Way Contracts** – DOL eliminated the requirement that the individual adviser be a party to the BIC exemption contract, now requiring a contract only between the customer and the financial institution employing or retaining the individual adviser.
- **No Covered Asset List** – The BIC exemption was amended to apply to recommendations of any asset as opposed to the restricted list of assets included in the proposed exemption.
- **Small Plans Included** – DOL expanded the availability of the BIC exemption to small businesses that sponsor participant directed plans. The BIC is now available for recommendations to small plans (under \$50 million) of all types, participants in self-directed brokerage windows, and Keoghs.
- **Use of Proprietary Products** – The proposed requirement that any financial institution limiting its products must offer a “broad range of investments” was eliminated. Instead, the BIC exemption provides new provisions intended to clarify how it can be used for recommendations of proprietary products, including a requirement that financial institutions determine that the limitations are not so severe that the adviser will generally be unable to satisfy the exemption’s best interest standard and other requirements.
- **Disclosures Modified** – DOL eliminated the annual disclosure and disclosures requiring 1-, 5- and 10-year projections, as well as the proposed exemption’s data retention requirements. However, DOL retained the conflict of interest disclosure requirement and website disclosure requirement. The final exemption also requires certain disclosures in the contract and, in certain circumstances, prior to or at the time of a transaction (and no less frequently than annually). Much of the information required to be disclosed is to be made available on a website, linked to in the initial notice. Moreover, those subject to the BIC exemption can request more detailed disclosures on fees and costs.
- **New Streamlined “Level Fee” Exemption** – The BIC exemption contains a streamlined “level fee” provision, which enables advisers and financial institutions that will receive only a level fee in connection with the advice they provide to rely on the exemption without entering into a contract so long as special attention is paid and documentation is kept to show that certain specific recommendations, including a recommendation to rollover assets from an employer plan to an IRA, are in the customer’s best interest. Importantly, no contract is required. However, the level fee condition extends to all affiliates, so, for example, it may not provide a basis to recommend a rollover into an arrangement otherwise covered by an exemption that only requires level fees for the adviser (e.g., ERISA section 408(b)(14)).
- **Improved Grandfathering** – The BIC exemption expands the applicability of a grandfathering provision that allows for receipt of compensation from previously acquired assets. The grandfather provision includes recommendations to hold, as well as systematic purchase agreements, but requires that any additional advice satisfy the best interest and reasonable compensation requirements.
- **Data Retention** – DOL eliminated the data request provisions that required financial institutions to maintain specified data and provide it to customers upon request. Financial institutions are still required to maintain for six years, records necessary to show that the conditions of the BIC have been met.
- **Transition Period.** DOL provides relief during a transition period from April 10, 2017 to January 1, 2018. During the transition period, advisers generally may continue to

receive compensation for investment advice, as long as the advice is in the best interest of the investor, the amount of compensation received is reasonable (within the meaning of ERISA 408(b)(2)), and the adviser does not make materially misleading statements.

### **C. Principal Transactions Exemption and Changes to Existing Exemptions**

The final exemption for Principal Transactions between an adviser (or financial institution) and a plan or IRA is broader than the proposal and covers transactions involving not just certain debt securities, but also unit investment trusts (UITs) (as requested by the Institute) and certificates of deposit. DOL also makes a number of changes to existing prohibited transaction exemptions, including: PTE 75-1, PTE 84-24, PTE 86-128, PTE 77-4, PTE 80-83, and PTE 83-1. All of these PTEs are amended to require all fiduciaries relying on the exemptions to adhere to the same impartial conduct standards required in the BIC exemption. Changes to the final Principal Transaction exemption and existing exemptions are described more fully below.

## **II. Detailed Description of Final Rule - Definition of Fiduciary**

The Final Rule represents the culmination of a six year quest by the Department to revise regulations defining an investment advice fiduciary. In October 2010, the Department proposed a regulation ("2010 proposal") that would have replaced the existing five-part test [\[8\]](#) in the Department's regulation under ERISA section 3(21) with a new definition of what constitutes fiduciary investment advice. [\[9\]](#) In September 2011, the Department announced that it would withdraw and re-propose the rule.

In April 2015, the Department re-proposed the rule and proposed two new PTEs and amendments to various existing PTEs. [\[10\]](#) The 2015 proposal differed significantly from the 2010 proposal. The Institute submitted numerous comment letters [\[11\]](#) on the 2015 proposal and testified at DOL's August 2015 hearings. [\[12\]](#) The Final Rule is based largely on the 2015 proposal, but with various changes "to address comments seeking clarification of certain provisions in the proposal and delineating the differences between the final rule's operation in the plan and IRA markets." [\[13\]](#) In addition, many of the conditions of the final BIC exemption are streamlined, as described below.

### **A. Functional Definition**

The Final Rule eliminates the existing regulation's five-part test (as did the 2015 proposal) and treats a person as a fiduciary under ERISA if:

- for a fee or other compensation (direct or indirect); [\[14\]](#)
- the person provides certain types of advice (explained below) to a plan, plan fiduciary, plan participant or beneficiary, IRA or IRA owner; [\[15\]](#) and
- the person either (1) represents or acknowledges that it is acting as a fiduciary (within the meaning of ERISA or the Internal Revenue Code), (2) renders the advice pursuant to an understanding or agreement that the advice is based on the particular investment needs of the advice recipient, or (3) directs the advice to a specific advice recipient or recipients.

Therefore, like the proposal, the Final Rule eliminates the regular basis, primary basis, and mutuality conditions of the existing five-part test.

## B. Covered Advice

The types of advice that will result in fiduciary status under the Final Rule are as follows:

1. A recommendation as to the advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property, [\[16\]](#) or a recommendation as to how securities or other investment property should be invested after being rolled over, transferred, or distributed from the plan or IRA;
2. A recommendation as to the management of securities or other investment property, including recommendations on investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, selection of investment account arrangements (e.g., brokerage vs. advisory); or recommendations with respect to 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.

As proposed in 2015, the Final Rule covers recommendations concerning the investment of securities to be rolled over or otherwise distributed from a plan or IRA. Thus, the Final Rule supersedes DOL Advisory Opinion 2005-23A, in which the Department stated that it is not fiduciary advice to make a recommendation as to distribution options even if that advice is accompanied by a recommendation as to how the distribution should be invested. [\[17\]](#)

Under the second category of covered advice described above, the specific reference to “other” persons in the context of recommending someone to provide investment advice or investment management services, appears to be an attempt to clarify that advisers can sell their own advice or management services (i.e., the “hire me” situation) without it being considered fiduciary advice. In the Preamble to the Final Rule, DOL explains that “a person or firm can tout the quality of his, her, or its own advisory or investment management services or those of any other person known by the investor to be, or fairly identified by the adviser as, an affiliate, without triggering fiduciary obligations.” [\[18\]](#) But the Preamble also explains that a recommendation to “hire me” could cross the line into fiduciary advice if coupled with a recommendation of how to invest or otherwise manage retirement assets. In this regard, DOL states that “when a recommendation to ‘hire me’ effectively includes a recommendation on how to invest or manage plan or IRA assets (e.g., whether to roll assets into an IRA or plan or how to invest assets if rolled over), that recommendation would need to be evaluated separately under the provisions in the final rule.” [\[19\]](#)

Unlike the 2015 proposal, the Department did not include appraisals, fairness opinions, or similar statements as to the value of securities or other property in the categories of covered advice under the Final Rule, specifying that valuations will be considered in a future separate regulatory initiative.

## C. Definition of Recommendation

Like the 2015 proposal, the Final Rule defines “recommendation” as “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 Final Rule includes the following additional clarifying language (some requested by the Institute) in the definition of “recommendation,” based on existing FINRA and SEC guidance:

- Whether a “recommendation” has been made is an objective rather than subjective

inquiry.

- The more individually tailored the communication is to a specific advice recipient or recipients, the more likely the communication will be viewed as a recommendation.
- Providing a selective list of securities to a particular advice recipient as appropriate for that investor would be a recommendation even if no recommendation is made with respect to any one security.
- A series of actions that individually may not constitute a recommendation, may amount to a recommendation when considered in the aggregate.
- It makes no difference whether the communication was initiated by a person or a computer software program.

#### **D. Exclusions from Recommendation Status**

After defining what constitutes a “recommendation” for purposes of the rule, the Final Rule outlines four different types of activity that will not be considered a “recommendation.” Some of these activities were identified in the 2015 proposal as “carve-outs,” or circumstances under which the rendering of advice or communications will not cause the person providing the advice or communication to be treated as a fiduciary. Unlike the 2015 proposal, the Final Rule does not use the term “carve-out” to describe these exclusions or exceptions. The Final Rule’s exclusions from “recommendation” are as follows:

1. Platform providers. The Final Rule contains generally the same exception for platform providers as the 2015 proposal: marketing or making available to a plan fiduciary, without regard to the individualized needs of the plan, a platform or similar mechanism from which a plan fiduciary may select or monitor investment alternatives, including qualified default investment alternatives, into which plan participants may direct the investment of their accounts. The Final Rule specifies that the plan fiduciary must be independent of the platform provider and the platform provider must provide a written disclosure. The platform provider exclusion does not apply with respect to IRAs.

The Institute asked DOL to clarify that the exception for platform providers covers segmenting the overall investment platform into separate platform offerings for different market segments (but not for individual plans). The Preamble explains that segmenting based on objective criteria is permitted (and provides an example based on plan size categories), provided that no plan-specific customization takes place. [\[20\]](#) It further explains, however, that promoting segmented platforms as “appropriate for” a particular plan would trigger fiduciary status.

2. Selection and monitoring assistance. As in the 2015 proposal, platform providers may assist plan fiduciaries by identifying investment alternatives that meet objective criteria specified by the plan fiduciary (such as stated parameters concerning expense ratios, size of fund, type of asset, or credit quality), but, under the Final Rule, must disclose in writing whether the platform provider has a financial interest in any of the identified investment alternatives, and if so, the precise nature of such interest. The Final Rule includes a clarification that platform providers may also respond to a request for information (“RFI”) or request for proposal (“RFP”) by identifying a limited or sample set of investment alternatives based on only the size of the employer or plan, the current investment alternatives of the plan, or both, and must provide the same written financial interest disclosure described earlier. Like the 2015 proposal, platform providers may also provide objective financial data and comparisons with independent benchmarks under the exclusion. This exclusion likewise does not apply with respect to IRAs.



3. General communications. The Final Rule includes a new clarification explaining that certain general communications that a reasonable person would not view as an investment recommendation—including general circulation newsletters, commentary in publicly broadcast talk shows, remarks and presentations in widely attended speeches and conferences, research or news reports prepared for general distribution, general marketing materials, general market data, including data on market performance, market indices, or trading volumes, price quotes, performance reports, or prospectuses—are excluded. This clarification is intended to address concerns expressed that the “specifically directed to” language of the 2015 proposal would pick up many communications not individualized to the particular recipient and not intended to be advice.
4. Investment education. The exclusion for investment education in the Final Rule is largely the same as the 2015 proposal’s carve-out, with a key change described below. Like the proposal, the investment education exclusion incorporates much of the Department’s Interpretive Bulletin (“IB”) 96-1, which provided guidance on the circumstances under which the provision of investment-related information to participants and beneficiaries of an individual account plan will not constitute the rendering of fiduciary investment advice. Similar to IB 96-1 and the 2015 proposal, the exclusion covers the furnishing of (1) plan information, (2) general financial, investment and retirement information, (3) asset allocation models, and (4) interactive investment materials.

Also like the 2015 proposal, the Final Rule clarifies that the distinction between non-fiduciary education and fiduciary advice applies equally to information provided to plan fiduciaries, as well as to information provided to plan participants and beneficiaries and IRA holders, and that it also applies equally with respect to participant-directed plans and other plans. In addition, the Final Rule retains the clarification that the provision of certain general information that helps an individual assess and understand retirement income needs (such as longevity and inflation risk) or explains general methods for the individual to manage those risks, both within and outside the plan, would not result in fiduciary status.

In contrast with the proposal, however, the Final Rule provides that asset allocation models and interactive investment materials may identify a specific investment alternative available under a plan if it is a designated investment alternative (within the meaning of 29 C.F.R. 2550.404a-5(h)(4)) (a “DIA”) subject to oversight by a plan fiduciary, and the model or materials identify all of the plan’s other DIAs with similar risk and return characteristics, if any, and are accompanied by a statement that those other DIAs have similar risk and return characteristics and indicating where to obtain information on those DIAs. Importantly, the investment education exclusion in the Final Rule does not permit the identification of specific investment alternatives within an asset allocation model or interactive investment materials with respect to IRAs. The Department explained that it did not extend the exclusion in this regard to IRAs because of the lack of involvement by an independent plan fiduciary who selects and monitors the investment options presented to the investor.

Although the Institute asked DOL to clarify that call center employees and their employers are not fiduciaries if they simply receive their normal compensation and do not receive additional compensation that is based on the choices that participants make or for referring participants to an investment product or service, DOL did not grant a blanket exclusion for call centers. Instead, the Preamble points to the investment education exclusion as covering call center assistance and expresses the view that any actual recommendations



provided by a call center representative should be treated as fiduciary advice. [\[21\]](#)

The 2015 proposal had included a carve-out for certain financial reports and valuations (such as those provided to employee stock ownership plans or to plans, participants, and IRA owners for purposes of complying with reporting and disclosure requirements). Because the Final Rule reserves appraisals and valuations for a separate regulatory project, an exclusion for specific types of valuations and appraisals was not included in the Final Rule.

## **E. Exclusions from Fiduciary Advice Status**

The Final Rule describes other activities that, by themselves, will not be considered fiduciary advice, except in cases where the advice provider represents or acknowledges fiduciary status. Like the exclusions from recommendation status described above, these exclusions (or variants of them) were described as “carve-outs” under the 2015 proposal. The activities excluded under the Final Rule are as follows:

1. Transactions with independent fiduciaries with financial expertise. The Final Rule includes a significantly modified version of the “counterparty” carve-out from the 2015 proposal. The new exclusion covers advice to a fiduciary to a plan or an IRA who is independent from the advice provider, with respect to an arm’s length sale, purchase, loan, exchange, or other transaction related to the investment of securities or other property, if prior to the transaction, certain requirements are satisfied:
  - a. The advice provider must know or reasonably believe that the fiduciary either is a licensed and regulated financial services provider (i.e., bank, insurance carrier, registered investment adviser, or broker-dealer) or is responsible for managing total assets of at least \$50 million (not specific to employee benefit plan assets). [\[22\]](#)
  - b. The advice provider also must know or reasonably believe that the fiduciary is capable of evaluating investment risks independently, is a fiduciary under ERISA or the Code, or both, with respect to the transaction, and is responsible for exercising independent judgment in evaluating the transaction. [\[23\]](#)
  - c. The advice provider must fairly inform the fiduciary that the provider is not undertaking to provide impartial investment advice, or to give advice in a fiduciary capacity, in connection with the transaction and must fairly inform the fiduciary of the existence and nature of the provider’s financial interests in the transaction.
  - d. The advice provider must not receive a fee or other compensation directly from the plan, plan fiduciary, plan participant or beneficiary, IRA, or IRA owner for the provision of investment advice (as opposed to other services) in connection with the transaction.

The 2015 proposed counterparty carve-out applied only to advice to fiduciaries of plans with 100 or more participants or plan fiduciaries that manage at least \$100 million in employee benefit plan assets. The new exclusion applies to advice to fiduciaries of plans and IRAs alike, with no participant size requirement and generally no asset size requirement, unless the independent fiduciary is not a bank, insurance carrier, registered investment adviser or broker-dealer (in which case a \$50 million threshold applies).

In a helpful change, the Final Rule does not require consent by the independent plan fiduciary to rely on the exclusion, but the person relying on the exclusion must make certain other findings (described above) and may need to rely on representations of

the independent plan fiduciary, which could limit the utility of the exclusion.

The exclusion is extended to advice to financial professionals, which addresses the wholesaler or “daisy chain” issue. But the exclusion is conditioned on disclosure and other conditions that may require representations from the financial professional, again possibly limiting its utility.

Like the counterparty carve-out in the 2015 proposal, it is not clear that the exclusion covers the sale of investment related services that otherwise would fit within the definition of investment advice.

2. Swap and security-based swap transactions. The Final Rule includes an exclusion for swap dealers, security-based swap dealers, major swap participants, security-based major swap participants, and swap clearing firms who make recommendations to plans, based largely on the 2015 proposal. First, the plan must be represented by a fiduciary independent of the swap dealer, swap participant, or swap clearing firm. Second, the swap dealer or security-based swap dealer may not act as an advisor to the plan (within the meaning of Section 4s(h) of the Commodity Exchange Act or section 15F(h) of the Securities Exchange Act of 1934) in connection with the transaction. Third, in a new requirement, the swap dealer, swap participant, or swap clearing firm must not receive a fee or other compensation directly from the plan or plan fiduciary for the provision of investment advice (as opposed to other services) in connection with the transaction. Finally, prior to making any recommendations, the swap dealer, swap participant, or swap clearing firm must obtain a written representation that the plan fiduciary understands that the swap dealer, swap participant, or swap clearing firm is not providing impartial investment advice or giving advice in a fiduciary capacity and that the plan fiduciary is exercising independent judgment.
3. Employees. The Final Rule includes generally the same exclusion as the 2015 proposal for the rendering of advice by an employee of a plan or plan sponsor to a plan fiduciary, another employee, or an independent contractor of the plan or plan sponsor, provided that the employee receives no fee or other compensation in connection with the advice beyond the employee’s normal compensation for work performed for the employer. In addition, if the advice is to another employee of the plan sponsor in his or her capacity as a plan participant, to be eligible for the exclusion, the job responsibilities of the person providing advice must not involve the provision of investment advice or investment recommendations, that person must not be registered or licensed under federal or state securities or insurance law, and the advice he or she provides must not require the person to be registered or licensed under federal or state securities or insurance laws.

## **F. Other Provisions**

The Final Rule includes provisions from the existing regulation and 2015 proposal regarding the scope of fiduciary duty and the execution of securities transactions. The scope provision confirms that being an investment advice fiduciary with respect to certain assets of a plan or IRA does not make the person an investment advice fiduciary for all of the assets of the plan or IRA. The securities transactions provision specifies that the execution of certain securities transactions by broker-dealers at the direction of plan clients or unrelated parties is not fiduciary advice.

### **III. Detailed Description of “Best Interest Contract” Exemption**

As in the case of the 2015 proposal, the BIC exemption remains a significant component of the rulemaking’s intended purpose of (1) promoting the provision of investment advice that is untainted by conflicts of interest and is in the best interest of retail investors such as plan participants and beneficiaries, IRA holders, and small plans; and (2) facilitating the continued provision of advice to such retail investors by permitting advisers to receive brokerage or insurance commissions, 12b-1 fees and revenue sharing payments.

While many changes were made to the BIC exemption that make it more workable, the overall structure is retained in the final exemption. In general, as was the case of the 2015 proposal, service providers wishing to rely on the BIC exemption must agree to adhere to impartial conduct standards in rendering advice, warrant that they have adopted policies and procedures designed to mitigate the dangers posed by material conflicts of interest, disclose important information relating to fees, compensation, and those conflicts, and retain documents and data relating to investment recommendations.

#### **A. Covered Transactions**

The asset list from the 2015 proposed exemption was eliminated. [\[24\]](#) The final exemption now applies to transactions involving any security or investment product.

#### **B. Covered Compensation**

The exemption covers commissions paid directly by the plan, plan participant or beneficiary, or IRA, as well as commissions, trailing commissions, sales loads, 12b-1 fees, and revenue sharing payments paid by the investment providers or other third parties to advisers and financial institutions. It also covers other compensation received by the fiduciary as a result of the retirement investor’s investment, such as investment management fees or administrative services fees from an investment vehicle in which the retirement investor invests. [\[25\]](#)

#### **C. Covered Recipient of Advice**

Only advice provided to “Retirement Investors” is covered by the BIC exemption. This provision has been expanded from the 2015 proposal to include small plans. As provided by the final exemption, the term Retirement Investor [\[26\]](#) includes:

- A participant or beneficiary of a plan (including an ERISA plan, or a non-ERISA 401(a) or 403(a) plan) with the authority to direct the investment of assets in his or her plan account or to take a distribution;
- In the case of an IRA, the beneficial owner of an IRA; or
- A Retail Fiduciary with respect to a plan or IRA. A Retail Fiduciary includes a fiduciary of a plan (an ERISA plan, or a non-ERISA 401(a) or 403(a) plan) that is not a bank, registered investment adviser, registered broker-dealer, insurance company, or plan fiduciary that holds, manages, or controls \$50 million or more of assets. [\[27\]](#) Note that this includes all types of plan fiduciaries, not just the plan sponsor as in the 2015 proposal.
- Owners of Archer MSAs, health savings accounts, and Coverdell education savings accounts can also be Retirement Investors.

## D. Exclusions

While other exemptions may be available, the BIC exemption does not cover the receipt of prohibited compensation in the following circumstances: [\[28\]](#)

- If the service provider is the employer of employees covered by the ERISA plan;
- If the service provider is a named fiduciary or plan administrator with respect to an ERISA plan;
- If the compensation is received as a result of a principal transaction engaged in by the service provider with the plan, participant or beneficiary account, or IRA (this does not include sales of an insurance or annuity contract, a mutual fund transaction, or a “Riskless Principal Transaction” [\[29\]](#));
- If the compensation is received by a service provider as a result of investment advice that is generated solely by an interactive website in which the computer software-based models or applications provide investment advice to retirement investors based on personal information each investor supplies through the website without any personal interaction or advice from the service provider (i.e., so-called “robo investment services”), unless the robo investment service meets the requirements for level fee fiduciaries; or
- If the compensation is received by service providers who have or exercise any discretionary authority or discretionary control with respect to the recommended transaction.

## E. Conditions of Relief

To rely on the BIC exemption, a service provider must meet the conditions described below. As described under (1) below, there are three levels of compliance requirements: full compliance requirements for IRAs and non-ERISA plans, full compliance except for the written contract requirement for ERISA plans, and streamlined requirements for level fee arrangements.

1. Contract requirements. The written contract requirement applies only to IRAs and non-ERISA plans. A written contract is not required for ERISA plans and where a recommendation is being made pursuant to a level fee arrangement. More specifically:
  - IRAs and non-ERISA plans. For recommendations regarding IRAs and non-ERISA plans, an enforceable written contract between the investor and the financial institution is required. The execution requirements are significantly improved from the 2015 proposal: the required contract terms may be incorporated into account opening documents and similar commonly-used agreements; the investor may sign the contract by handwritten or electronic signature; the contract must be entered into not later than the time the recommended transaction is executed (rather than before a conversation takes place); and existing contracts in place before January 1, 2018 may be amended by negative consent. [\[30\]](#)
  - ERISA plans. Although a written contract is not required for ERISA plans, [\[31\]](#) advisers to ERISA plans are required to meet the requirements described below (specifically, the requirements described below in (2), (3), (5), (7), (8), (10), (11) and if applicable, (9)), either in separate documents or, as applicable, by complying with the requirement. [\[32\]](#) The Preamble confirms that service providers to ERISA plans “must simply satisfy the provisions in Section II(b)-(e) when transacting with such Retirement Investors.” [\[33\]](#)

- Level fee arrangements. The final exemption includes streamlined requirements for recommendations by “Level Fee Fiduciaries.” [\[34\]](#) For these recommendations, a written contract is not required, but these arrangements must comply with the requirements described in (2) and (3) below. [\[35\]](#) Additional documentation is required when there is a recommendation to roll over an amount from an ERISA plan to an IRA or to roll over from an IRA or to switch from a commission-based account to a level fee arrangement. In these cases, service providers must document why the recommendation was considered to be in the investor’s best interest. In the case of a rollover from an ERISA plan to an IRA, alternatives to the rollover must be considered (for example, the plan’s and IRA’s fees and expenses and whether the employer pays for plan expenses). [\[36\]](#)
2. Acknowledge “fiduciary” status. Service providers must acknowledge fiduciary status in writing with respect to any investment advice provided under the contract, or in the case of an ERISA plan, recommendations regarding the plan or participant account. [\[37\]](#)
  3. Impartial conduct standards. Service providers must contractually commit to adhere to “Impartial Conduct Standards” [\[38\]](#) when providing investment advice (advisers to ERISA plans must simply comply with the standards, rather than include them in a contract), including:
    - The service provider must provide advice in the “Best Interest” of the retirement investor.
      - “Best Interest” is defined to require the service provider to “act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor.”
      - Under the standard, the service provider must make recommendations without regard to the financial or other interests of the service provider or any affiliate, related entity, or other party.
    - The recommended transaction must not cause the service provider or its affiliates and related entities to receive, directly or indirectly, compensation for services that is in excess of reasonable compensation as described in ERISA section 408(b)(2).
    - The service provider may not make statements that are “materially misleading at the time they are made.”
  4. Required warranties. The contract must contain specific warranties, which, if broken, could result in contractual liability for breach of warranty, but that would not result in loss of the exemption, as long as the breach did not involve violation of one of the exemption’s other conditions. Service providers must warrant that they have adopted and will comply with written policies and procedures that are reasonably and prudently designed to prevent material conflicts of interest from causing violation of the Best Interest standard. [\[39\]](#) The warranty that the service provider will “comply with all applicable federal and state laws” is no longer required. The warranties do not apply with respect to ERISA plans, but advisers to ERISA plans must adopt the policies and procedures described below. [\[40\]](#) The requirement of contractual warranties would appear to allow retirement investors to bring state law claims that would otherwise be preempted by ERISA, which serves

as the primary enforcement mechanism for IRA holders.

5. Policies and procedures related to conflicts. In formulating its policies and procedures, the service provider must specifically identify and document material conflicts of interest and adopt measures reasonably and prudently designed to prevent those material conflicts from causing violations of the impartial conduct standards; must designate a person responsible for addressing material conflicts and monitoring advisers' adherence to the impartial conduct standards (effectively a BIC compliance officer); and must prohibit use of quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation or other actions or incentives that are intended or would reasonably be expected to cause employees of the service provider to make recommendations that are not in the best interest of retirement investors. [\[41\]](#) DOL has softened this section somewhat in the final exemption and removed the implication that the procedures must ensure perfect compliance. [\[42\]](#) The adopted policies and procedures must be provided to DOL upon request. [\[43\]](#)

DOL notes that a "level-fee" structure is not required, as long as the policies, when viewed as a whole, are designed to avoid a misalignment of interest. "Neutral factors tied to the differences in the services delivered" (as opposed to the difference in the amounts the service provider receives in connection with a particular investment) appear to be required for differential compensation at the adviser level. [\[44\]](#) This may present significant compliance challenges. In the Preamble, DOL provides five examples of broad approaches to compensation structures that could help satisfy the contractual warranty regarding the policies and procedures. [\[45\]](#) DOL includes one example, Example 4 (Commissions and stringent supervisory structure), that describes acceptable policies that would permit a service provider to receive compensation that varies based on the recommended investment.

The Financial Institution establishes a commission-based compensation schedule for Advisers in which all variation in commissions is eliminated for recommendations of investments within reasonably designed categories. The Financial Institution establishes supervisory mechanisms to protect against conflicts of interest created by the transaction-based model and takes special care to ensure that any differentials that are retained are based on neutral factors, such as the time or complexity of the work involved, and that the differentials do not incentivize Advisers to violate the Impartial Conduct Standards or operate to transmit firm-level conflicts of interest to the Adviser (e.g., by increasing compensation based on how much revenue or profits the investment products generate for the Financial Institution). [\[46\]](#)

The example illustrates components that a prudent supervisory structure may have in order "to ensure that Advisers' recommendations are based on the customer's financial interest and not the additional compensation the Adviser stands to make." These include, for example, the use of metrics or "red flags," penalizing advisors and supervisors who fail to comply, and a periodic review of the policies to ensure that they are appropriately safeguarding proper conduct.

6. No exculpatory provisions. Service providers may not include contractual provisions that would exculpate, disclaim or otherwise limit the service provider's liability or that would waive or qualify a retirement investor's right to bring or participate in a class action or other representative action or would agree to an amount representing



liquidated damages in a contract dispute with the service provider. Agreements to arbitrate or mediate individual claims in venues that are distant or unreasonably restrictive are also prohibited. [47] The rule does not prohibit a disclaimer of third party acts or omissions or a waiver of rescission or punitive damages (provided that parties “knowingly agree” to the provision). This provision does not apply with respect to ERISA plans because a contract is not required; however, section II(g)(5) of the BIC exemption lists similar provisions that cannot be used by the service provider in any contract, instrument or communication related to the ERISA plan. [48] The prohibition on exculpatory provisions does not mean that service providers cannot contractually limit the scope of their responsibilities. For example, the service provider may limit its duty to monitor investments. According to the Preamble, the BIC exemption “does not in and of itself, impose an ongoing duty to monitor on the Adviser or Financial Institution.” This language suggests that the adviser could specify that it has no duty to monitor. The Preamble goes on to say “[h]owever, there may be some investments which cannot be prudently recommended to the individual Retirement Investor, in the first place, without a mechanism in place for the ongoing monitoring of the investment.” [49]

7. Contractual disclosures. The service provider must provide certain written disclosures either in the contract or in a separate single written disclosure (in a single written disclosure in the case of an ERISA plan), provided before or at the same time as the execution of the recommended transaction. The disclosure must include: [50]

- A statement of the Best Interest standard, the services that the service provider will provide, and a description of how the investor will pay for the services.
- A description of material conflicts of interest, any fees or charges that will be imposed on the investor, and any compensation that the service provider or its affiliates expect to receive in connection with the recommended investments.
- A description of the investor’s right to obtain a description of the policies and procedures and the specific disclosure of costs, fees and compensation, including third party payments. These amounts can be described in dollar amounts, percentages, formulas or other means reasonably designed to present materially accurate disclosure of their scope, magnitude and nature. If requested, these materials must be provided within 30 business days of the request; if requested before the transaction, they must be provided before the transaction.
- A link to the service provider’s website.
- A disclosure of whether the service provider offers proprietary products or receives third party payments related to any recommended investment, including any limitation on the investments offered by the service provider.
- Contact information for a representative the investor can contact with concerns.
- A statement describing FINRA’s BrokerCheck database, the Investment Adviser Registration Depository, or a similar database.
- A statement of whether or not the service provider will monitor the investor’s investments. Note that, according to the Preamble, the BIC “does not in and of itself, impose an ongoing duty to monitor on the Adviser or Financial Institution.” This language suggests that the adviser could specify that it has no duty to monitor. The Preamble goes on to say “[h]owever, there may be some investments which cannot be prudently recommended to the individual Retirement Investor, in the first place, without a mechanism in place for the ongoing monitoring of the investment.”

8. Additional disclosures. In addition to the contractual disclosures described above, the



exemption requires additional disclosures. These disclosures were substantially streamlined compared to the 2015 proposed exemption. An annual disclosure is not required; nor is a disclosure of future costs at 1-, 5-, and 10-year periods.

- Website. The service provider must maintain a public webpage, which provides the following information, updated not less frequently than quarterly, and written in a manner easily accessible to a retirement investor and the general public.

[\[51\]](#)

-- A discussion of the service provider's business model and the material conflicts of interest associated with that model.

-- A schedule of typical account or contract fees and service charges.

-- A model contract or model notice of the contractual terms, including the disclosures required under the contractual requirements.

-- A description of the policies and procedures.

-- A list of all product manufacturers and other parties with whom the service provider maintains arrangements that provide third party payments to the service provider relating to the specific investment product or classes of investments recommended, and a description of the arrangements.

-- A description of the service provider's compensation and incentive arrangements.

- Transaction disclosure. A point of sale disclosure must be provided to the retirement investor prior to the execution of an investment transaction. Subsequent recommendations do not require a new notice unless there are material changes to the information or if it has been more than one year since the prior disclosure was given. The information required is similar to information required in the contractual disclosure, including: [\[52\]](#)

-- A statement of the best interest standard and description of any material conflicts of interest.

-- A statement of the investor's right to obtain a description of the policies and procedures and a specific disclosure of costs, fees, and other compensation, as described in the contract disclosure.

-- A link to the website, noting some of the materials that can be found on the website.

- Good faith provision. A good faith compliance provision was added to cover errors, omissions or website unavailability. [\[53\]](#) Any errors or omissions on the website must be corrected within 7 days after the error is discovered (or reasonably should have been discovered). Errors or omissions on the transaction disclosure must be corrected as soon as practicable, but no later than 30 days after the error is discovered (or reasonably should have been discovered). A similar good faith provision applies to the contractual disclosure requirements. [\[54\]](#) The good faith provision also allows advisers to rely on information from other entities not closely affiliated if certain conditions are met.

9. Proprietary Products and Third Party Payments. This section from the 2015 proposal was effectively re-written. This section now explains how the best interest standard is

met in the case of service providers who limit their recommendations, “in whole or in part,” to proprietary products or investments that generate third party payments.

[\[55\]](#) To meet the conditions, the service provider must provide the retirement investor with a written description of the limitation. The service provider must also document the limitations in place, the material conflicts of interest, the services that will be provided in exchange for third party payments, and the bases for concluding that the arrangement will not cause the service provider to recommend imprudent investments or to receive compensation in excess of reasonable compensation.

10. DOL Disclosure. Before receiving prohibited compensation in reliance on the exemption, the service provider must notify DOL by email of its intention to rely on the exemption. [\[56\]](#)
11. Recordkeeping and data requests compliance. The service provider is required to maintain for six years records to demonstrate that the conditions of the BIC exemption have been met. The service provider must provide DOL and others with access to these records. [\[57\]](#) The 2015 proposal’s requirement to maintain data related to “inflows,” “outflows,” “holdings,” and “returns” was not included in the final exemption.

## **F. Effective Date/Transition Period**

The final BIC exemption is generally applicable as of April 10, 2017. DOL applies a phased implementation schedule to the BIC exemption, however, to allow service providers more time to come into full compliance with the BIC requirements. During the transition period (from April 10, 2017 to January 1, 2018), advisers generally may continue to receive compensation for investment advice, as long as the advice is in the best interest of the investor, the amount of compensation received is reasonable (within the meaning of ERISA section 408(b)(2)), and the adviser does not make materially misleading statements. [\[58\]](#) The adviser also must meet certain disclosure, compliance monitoring, and recordkeeping requirements.

## **G. Grandfathering**

The Pre-Existing Transactions exemption, which allows advisers to continue receiving compensation that relates to assets that were invested before April 10, 2017, is retained and expanded from the 2015 proposal. The service provider may make recommendations regarding grandfathered investments after April 10, 2017, but recommendations will be subject to the best interest standard. Generally, additional amounts that are invested on or after April 10, 2017 will not be treated as grandfathered. However, certain exchanges within mutual fund families will be covered (as long as they do not result in more compensation to the service provider or an affiliate than they were entitled to before the April 10, 2017), as well as systematic purchase programs that were in place before April 10, 2017. To be treated as grandfathered, the amount of compensation must be reasonable, within the meaning of ERISA section 408(b)(2). [\[59\]](#)

# **IV. Principal Transactions Exemption**

The final exemption for Principal Transactions between an adviser (or financial institution) and a plan or IRA is broader than the proposal and covers transactions involving not just certain debt securities, but also unit investment trusts (UITs) (as requested by the Institute) and certificates of deposit. The final exemption still requires acknowledgement of fiduciary status, adherence to Impartial Conduct Standards, implementation of policies and

procedures designed to prevent violations of the Impartial Conduct Standards, consent of the plan or IRA, and certain disclosures. For principal transactions with IRAs, an enforceable written contract is required. The proposed requirement that the adviser disclose the “mark-up” or “mark-down” was eliminated, as was the two-quote pricing requirement, which was replaced with a requirement to seek to obtain the best execution reasonably available under the circumstances.

## **V. Changes to Existing Exemptions**

DOL also makes a number of changes to existing prohibited transaction exemptions, including: PTE 75-1, PTE 84-24, PTE 86-128, PTE 77-4, PTE 80-83, and PTE 83-1. These amendments are effective as of June 7, 2016; the terms of the amended PTEs will be applicable as of April 10, 2017. All of these PTEs are amended to require all fiduciaries relying on the exemptions to adhere to the same impartial conduct standards required in the BIC exemption.

- PTE 84-24 – PTE 84-24, which generally permits commissions related to the sale of mutual funds and insurance products sold to plans and IRAs, was significantly limited. Regarding insurance products, only fixed rate annuities may use the amended PTE 84-24. The PTE may be used for the purchase of mutual fund shares with plan assets, but not with IRA assets. Mutual funds purchased with IRA assets and variable and indexed annuities must now use the BIC exemption. Like in the proposal, the final PTE 84-24 narrows the types of payments covered and does not include mutual fund 12b-1 fees, revenue sharing, administrative or marketing fees.
- PTE 86-128 – Similar changes were made to PTE 86-128, which relates to a fiduciary’s use of affiliated brokerage. PTE 86-128 may not be used for fiduciaries providing advice to IRAs. The PTE does not cover 12b-1 fees, revenue sharing, administrative fees, marketing fees, or sub-TA fees or sub accounting fees.

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### **endnotes**

[1] The Final Rule is available here:  
<http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=28806>.

[2] Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20946 (April 8, 2016).

[3] The Best Interest Contract exemption is available here:  
<http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=28807>.

[4] The Principal Transactions exemption is available here:

<http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=28808>.

[5] The amendment to PTE 75-1 (Part V) is available here:

<http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=28809>. The amendment to and partial revocation of PTE 84-24 is available here:

<http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=28810>. The amendments to and partial revocations of PTEs 86-128 and PTE 75-1 (Part II) are available here:

<http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=28811>. The amendments to PTEs 75-1 (Parts III and IV), 77-4, 80-83, and 83-1 are available here:

<http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=28812>.

[6] See Memorandum to Pension Members No. 15-15, Operations Members No. 15-15, Small Funds Members No. 19-15, Bank, Trust and Retirement Advisory Committee No. 11-15, Broker/Dealer Advisory Committee No. 16-15, and Transfer Agent Advisory Committee No. 18-15 [28939], dated April 29, 2015. The 2015 proposal and proposed PTEs are available here: <http://www.dol.gov/ebsa/regs/conflictsofinterest-proposed.html>.

[7] A more detailed breakdown of this phased compliance period is discussed below.

[8] Under current guidance, the DOL provides a 5-part test to determine whether a person will be acting as a fiduciary adviser (29 CFR § 2510.3-21(c)). Specifically, a person may provide investment advice if the person: (1) renders advice to a plan as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing, or selling securities or other property; (2) on a regular basis; (3) pursuant to a mutual understanding; (4) that such advice will be a primary basis for investment decisions; and that (5) the advice will be individualized to the plan.

[9] The Department's 2010 proposed rule is available here:

<http://www.gpo.gov/fdsys/pkg/FR-2010-10-22/pdf/2010-26236.pdf>. For the Institute's summary of the 2010 proposed rule, see Memorandum to Pension Members No. 43-10 [24642], dated October 22, 2010. The Institute submitted a comment letter in response to the 2010 proposal and testified during the Department's March 2011 hearing. For the Institute's comment letter, see Memorandum to Pension Members No. 8-11[24941], dated February 3, 2011. For a copy of the Institute's testimony at the March 1, 2011 hearing, see Memorandum to Pension Members No. 17-11 [25000], dated March 2, 2011.

[10] See Memorandum to Pension Members No. 15-15, Operations Members No. 15-15, Small Funds Members No. 19-15, Bank, Trust and Retirement Advisory Committee No. 11-15, Broker/Dealer Advisory Committee No. 16-15, and Transfer Agent Advisory Committee No. 18-15 [28939], dated April 29, 2015. The 2015 proposal and proposed PTEs are available here: <http://www.dol.gov/ebsa/regs/conflictsofinterest-proposed.html>.

[11] The Institute's comment letters are available here:

[https://www.ici.org/pdf/15\\_ici\\_dol\\_fiduciary\\_overview\\_ltr.pdf](https://www.ici.org/pdf/15_ici_dol_fiduciary_overview_ltr.pdf);

[https://www.ici.org/pdf/15\\_ici\\_dol\\_fiduciary\\_def\\_ltr.pdf](https://www.ici.org/pdf/15_ici_dol_fiduciary_def_ltr.pdf);

[https://www.ici.org/pdf/15\\_ici\\_dol\\_fiduciary\\_best\\_interest\\_ltr.pdf](https://www.ici.org/pdf/15_ici_dol_fiduciary_best_interest_ltr.pdf);

[https://www.ici.org/pdf/15\\_ici\\_dol\\_fiduciary\\_reg\\_impact\\_ltr.pdf](https://www.ici.org/pdf/15_ici_dol_fiduciary_reg_impact_ltr.pdf);

[https://www.ici.org/pdf/15\\_ici\\_dol\\_rule\\_comment.pdf](https://www.ici.org/pdf/15_ici_dol_rule_comment.pdf);

[https://www.ici.org/pdf/15\\_ici\\_dol\\_ria\\_comment.pdf](https://www.ici.org/pdf/15_ici_dol_ria_comment.pdf).

[12] Video and statements from the Institute's testimony at the August 2015 hearings is available here:

[https://www.ici.org/policy/retirement/reg/labor/15\\_video\\_blass\\_collins\\_dol\\_fiduciary](https://www.ici.org/policy/retirement/reg/labor/15_video_blass_collins_dol_fiduciary).

[13] 81 Fed. Reg. 20947-20948.

[14] The definition of “fee or other compensation, direct or indirect” is expanded in the Final Rule to mean: any explicit fee or compensation for the advice received by the person (or by an affiliate) from any source, and any other fee or compensation received from any source in connection with or as a result of the purchase or sale of a security or the provision of investment advice services, including, though not limited to, commissions, loads, finder’s fees, revenue sharing payments, shareholder servicing fees, marketing or distribution fees, underwriting compensation, payments to brokerage firms in return for shelf space, recruitment compensation paid in connection with transfers of accounts to a registered representative’s new broker-dealer firm, gifts and gratuities, and expense reimbursements.

[15] Pursuant to Reorganization Plan No. 4 of 1978, the Department has interpretive authority over the Code’s prohibited transaction provisions in section 4975, which parallel ERISA’s prohibited transaction rules and apply to IRAs.

[16] The Final Rule clarifies that “investment property” does not include health insurance policies, disability insurance policies, term life insurance policies, or other property to the extent the policies or property do not contain an investment component.

[17] Advisory Opinion 2005-23A is available here:  
<http://www.dol.gov/ebsa/regs/aos/ao2005-23a.html>.

[18] 81 Fed. Reg. 20968.

[19] *Id.*

[20] 81 Fed. Reg. 20973.

[21] 81 Fed. Reg. 20976.

[22] The provider may rely on written representations from the plan or independent fiduciary in this regard.

[23] Again, the provider may rely on written representations from the plan or independent fiduciary in this regard.

[24] See 81 Fed. Reg. 21015. DOL notes in the Preamble that the fact that the asset list was removed “does not mean the Department is no longer concerned about some of the attributes of the investments that were not initially included in the proposed definition of Asset, such as unusual complexity, illiquidity, risk, lack of transparency, high fees or commissions, or tax benefits that are generally unnecessary in these tax preferred accounts. This broadening of the exemption for products with these attributes must be accompanied by particular care and vigilance on the part of Financial Institutions responsible for overseeing Advisers’ recommendations of such products.” *Id.* The definition of Asset in the 2015 proposal did not include Unit Investment Trusts. Also excluded from the definition was any equity security future or a put, call, straddle, or any other option or privilege of buying an equity security from or selling an equity security to another without being bound to do so.

[25] 81 Fed. Reg. 21019.

[26] BIC exemption section VIII(g), (n) and (o).

[27] Note that under this definition, only plan fiduciaries who are not covered by the revised counter-party exclusion are provided coverage under the BIC exemption.

[28] These exclusions are more fully described in BIC exemption section II(c)(1)-(4).

[29] A Riskless Principal Transaction, defined in BIC exemption section VIII(p), is “a transaction in which a Financial Institution, after having received an order from a Retirement Investor to buy or sell an investment product, purchases or sells the same investment product for the Financial Institution’s own account to offset the contemporaneous transaction with the Retirement Investor.”

[30] BIC exemption section II(a). Note that under subsection (2), the service provider must maintain an electronic copy of the Retirement Investor’s contract on its website. This could be a daunting compliance hurdle, as it is not clear if this requirement refers to each individual’s own contract or a model one.

[31] In describing this change in the Preamble, DOL notes that a written contract is not necessary because ERISA plans have an existing statutory framework that provides a pre-existing enforcement mechanism. In the case of a service provider’s failure to comply with the BIC exemption, the ERISA plan investor would generally be able to sue under ERISA section 502(a)(2) or (3). 81 Fed. Reg. 21021.

[32] BIC exemption section II(g).

[33] 81 Fed. Reg. 21021.

[34] As defined in BIC exemption section VIII(h), “[a] Financial Institution and Adviser are ‘Level Fee Fiduciaries’ if the only fee received by the Financial Institution, the Adviser and any Affiliate in connection with advisory or investment management services to the Plan or IRA assets is a Level Fee that is disclosed in advance to the Retirement Investor. A ‘Level Fee’ is a fee or compensation that is provided on the basis of a fixed percentage of the value of the assets or a set fee that does not vary with the particular investment recommended, rather than a commission or other transaction-based fee.”

[35] BIC exemption section II(h). In the Preamble, DOL notes that, by itself, ongoing receipt of a level fee would not raise prohibited transaction concerns. “However, there is a clear and substantial conflict of interest when an Adviser recommends” that a participant roll money out of plan into a fee-based account or recommends a switch from a “low activity commission-based account to an account that charges a fixed percentage of assets under management on an ongoing basis.” This provision “focuses on the discrete recommendation that requires an exemption.” 81 Fed. Reg. 21011-2.

[36] See BIC exemption section II(h)(3)(i). In the Preamble, DOL notes that service providers should consider the investor’s needs and circumstances as described in FINRA Regulatory Notice 13-45. 81 Fed. Reg. 21012.

[37] BIC exemption section II(b).

[38] BIC exemption section II(c).

[39] BIC exemption section II(d).

[\[40\]](#) BIC exemption section II(g)(3).

[\[41\]](#) BIC exemption section II(d)(1)-(3).

[\[42\]](#) Section II(d)(2) now uses the phrasing “measures reasonably and prudently designed to prevent Material Conflicts of Interest from causing violations of the Impartial Conduct Standards” rather than the proposal’s phrasing “ designed to mitigate the impact of Material Conflicts of Interest and ensure that its individual Advisers adhere to the Impartial Conduct Standards.”

[\[43\]](#) BIC exemption section III(b)((4)

[\[44\]](#) BIC exemption section II(d)(3).

[\[45\]](#) 81 Fed. Reg. 21038-9.

[\[46\]](#) 81 Fed. Reg. 21039.

[\[47\]](#) BIC exemption section II(f).

[\[48\]](#) The prohibited provisions include those that “purport to disclaim any responsibility or liability for any responsibility, obligation, or duty under Title I of ERISA to the extent the disclaimer would be prohibited by ERISA section 410; purport to waive or qualify the right of the Retirement Investor to bring or participate in a class action or other representative action in court in a dispute with the Adviser or Financial Institution, or require arbitration or mediation of individual claims in locations that are distant or that otherwise unreasonably limit the ability of the Retirement Investors to assert the claims safeguarded by this exemption.”

[\[49\]](#) 81 Fed. Reg. 21026.

[\[50\]](#) BIC exemption section II(e)(1)-(7).

[\[51\]](#) BIC exemption section III(b)(1)(i)-(vii).

[\[52\]](#) BIC exemption section III(a)(1)-(3).

[\[53\]](#) BIC exemption section III(c).

[\[54\]](#) BIC exemption section II(e)(8).

[\[55\]](#) BIC exemption section IV. Note that there is some ambiguity regarding what is meant by limiting recommendations “in whole or in part.”

[\[56\]](#) BIC exemption section V(a).

[\[57\]](#) BIC exemption section V(b) and (c).

[\[58\]](#) BIC exemption section IX.

[\[59\]](#) BIC exemption section VII.

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