

The DOL Fiduciary Rule and Its Impact upon Current and Future Compliance Strategies

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Purposes of the New Rule

- Make an agent (or advisor) into a fiduciary, called an “***Investment Advice Fiduciary***,”
- Create a conflict of interest in the agent's advice and compensation;
- Make the agent liable for excise taxes (and sometimes damages);
- Make the supervisory broker (and further upstream) liable, too; and
- Create a distance between investment advisors and their retirement clients.

By so doing, the central aim is to transform the way investment advisors to IRAs (and some small ERISA plans) are paid.

The Problem: Exposure

- Exposure (from making no changes) depends upon the retirement vehicle involved in the transaction.
- *If it is an IRA -*
 - (1) The agent (and maybe his affiliated broker and financial institution) will be liable for a two-tiered, annual excise tax to the IRS for engaging in a prohibited transaction. There is also a risk of disqualifying the IRA. *Code § § 4975, 408(e)(2)*
 - (2) The excise tax grows geometrically over time, and after only a few years can be very expensive. Because it renews itself annually, it can go on for years without a normal limitations defense.
 - (3) The excise tax can be stopped only by correcting the prohibited transaction, which involves undoing the transaction. It is a self-assessing tax.
 - (4) The cost and necessity of correction can make the agent and others into guarantors of investments.
 - (5) But, ERISA will not complicate the risk. This new regulation applies but only under the Internal Revenue Code. *§ 2510.3-21(f)*

Exposure

- *If it is an ERISA plan -*
 - (1) The described excise tax exposure to the IRS is there, plus
 - (2) ERISA will also apply, making the agent (and more easily, his affiliated broker and financial institution) personally liable for (i) damages arising from either breaching applicable fiduciary duties or engaging in transactions prohibited by ERISA and (sometimes) (ii) restoring profits realized from the breach or prohibited transaction.
 - (3) Correction under ERISA also involves reversing the prohibited transaction. Correction under ERISA and correction under the Internal Revenue Code are not necessarily the same thing.

Delays

A Presidential Memorandum was directed to the Secretary of Labor on February 3, 2017. (82 Fed. Reg. 9675)

The Presidential Memorandum told the Secretary of Labor

- To determine whether the restated investment advice fiduciary rule might adversely affect how Americans gained access to retirement savings and financial advice; and
- To prepare an updated economic and legal analysis concerning the impact of the restated fiduciary rule, considering three specifically enumerated criteria.

Then, if the Secretary of Labor concluded at least one enumerated detriment existed or that the fiduciary rule was inconsistent with the Administration's stated priorities, the Secretary was required to publish "a proposed rule rescinding or revising" the fiduciary rule.

On February 3, the Secretary of Labor committed to "consider[ing] its legal options to delay the applicability date...".

Delays

After publishing proposed changes on March 2, 2017 (82 Fed. Reg. 12319) that would amend both the final regulation and the related PTEs released with the final regulation on April 8, 2016, amendments were published on April 7, 2017 (82 Fed. Reg. 16902). The changes to the 2016 package of regulatory and PTE guidance (the “final rule”)

- amended Labor Regulations section 2510.3-21 to remove “April 10, 2017” and to substitute “June 9, 2017” as the regulatory applicability date in the three places the date appeared in the regulation.
- amended Best Interest Contract Exemption (the “BICE”) to (i) change the applicability date of the BICE to June 9, 2017; (ii) relax the applicability of the Level Fee Fiduciary exception in the BICE during transition; and (iii) allow enhanced access as a Level Fee Fiduciary for robo-advice providers.
- amended the “Transition Period” requirements in BICE Section IX to (i) run from June 9, 2017 to January 1, 2018, (ii) apply the transitional Impartial Conduct Standards beginning June 9, 2017; and (iii) prevent the application of the remaining Transition Period BICE standards during 2017.

Delays

The changes to the 2016 final rule package of regulatory and PTE guidance also

- amended CPTe 84-24 (i) to change its applicability date to January 1, 2018; (ii) to apply the unique 84-24 Impartial Conduct Standards beginning June 9, 2017; and (iii) to apply needed definitions by June 9, 2017.
- amended a laundry list of other PTEs (that were amended on April 8, 2016) to extend their applicability dates to June 9, 2017).

Delays

On March 10, 2017, the Department of Labor adopted a temporary nonenforcement policy, promising not to initiate an enforcement action based on a failure to satisfy the regulation or a related PTE “during the ‘gap period’.” *Field Assistance Bulletin No. 2017-01 (March 10, 2017)*

- This enforcement relief was conditioned on the Department’s issuing “a final rule after April 10 implementing a delay in the applicability date.” The delay was issued before April 10.
- The only other circumstance where this policy would apply literally is if “the Department decides not to issue a delay...”. It did issue a delay.
- Did this nonenforcement policy ever apply?

At roughly the same time, the Treasury Department and the IRS adopted “a temporary excise tax non-applicability policy that conforms with the DoL’s temporary nonenforcement policy described in FAB 2017-01.” The IRS announced it “will not apply § 4975 and related reporting obligations [to] any transaction or agreement to which the DoL’s temporary nonenforcement policy, or other subsequent related enforcement guidance, would apply.”

Announcement 2017-4

Delays

On May 22, 2017, the Department of Labor adopted another temporary nonenforcement policy, promising (i) not to pursue claims during 2017 against newly-minted investment advice fiduciaries who were working diligently and in good faith to comply with their new fiduciary duties and chosen PTEs and (ii) not to treat those investment advice fiduciaries during 2017 as being in violation of the regulation or noncompliant with exemptions. This is limited relief.

Field Assistance Bulletin No. 2017-02 (May 22, 2017)

- The Treasury Department and the IRS agreed with this approach in footnote 1 of the Field Assistance Bulletin.
- On the same day, the Department of Labor published on its website fifteen new FAQs intended to address transition period compliance from June 9, 2017 through December 31, 2017. *Conflict of Interest FAQs (May 22, 2017)*
- On June 29, 2017, the Department of Labor published another Request for Information, asking for public input that could be the basis for new exemptions or the basis for changes to the regulation, the existing exemptions or both.
- On August 31, 2017, the Department of Labor published proposed amendments to two existing exemptions (the BICE and the Principal Transactions Exemption) and a proposed change to delay amendments to CPTe 84-24. These changes would extend the transition period for all three exemptions from January 1, 2018 to July 1, 2019. *82 Fed. Reg. 41365 (Aug. 31, 2017)*

What to do now?

If -

- there is no delay to the January 1, 2018 applicability date;
- there are no significant amendments to the investment advice fiduciary regulation or the related PTEs; and
- neither the investment advice fiduciary regulation nor the BICE (or related PTEs) are repealed; then

...in the meantime,

- one set of rules will apply until June 9, 2017;
- a markedly different set of rules will apply from June 9, 2017 through December 31, 2017; and
- another markedly different set of rules will apply beginning January 1, 2018.

The last set of rules beginning January 1, 2018 (and some about the later in 2017 rules) are explained in the rest of these slides.

Exception to Exposure for Welfare Plans

When applying the new regulation, “investment property” will **not** include -

- health insurance policies;
- disability insurance policies;
- term life insurance policies; and
- other property

to the extent they do **not** have an investment component. *§ 2510.3-21(g)(4)**

* All citations are to final guidance published in the Federal Register on April 8, 2016.

Exception for Executing Securities Transactions

A person who is (i) a broker or dealer registered under the Securities Exchange Act of 1933, (ii) a reporting dealer who makes primary markets in certain U.S. government securities or (iii) a bank supervised by the U.S. or a state will **not** be a fiduciary of any sort under ERISA or the Internal Revenue Code solely because the person executes purchase or sale transactions for securities of a plan or IRA as directed by a fiduciary of that plan or IRA, if -

- The fiduciary and its affiliates are not the executing broker, dealer or bank.
- The fiduciary's transaction execution instructions generally state (i) the security, (ii) a price range, (iii) a time span (not greater than five business days) and (iv) a quantity. *§2510.3-21(e)(1)*

More Exceptions

- A broker-dealer (registered under the Securities Exchange Act of 1933?), a reporting dealer (who makes primary markets in U.S. government or agency securities?), and a bank (supervised by the U.S. or a state?) which is a fiduciary of an ERISA plan or an IRA as a result solely of executing purchases and sales of securities for the plan or IRA will **not** be deemed to be an ERISA fiduciary with regard to any assets of the plan or IRA over which it has no discretionary authority, control or responsibility and is not otherwise an ERISA fiduciary. *§ 2510.3-21(e)(2)*
- If a “person” is an investment advice fiduciary for an ERISA plan or IRA, that person will **not** be deemed to be an ERISA fiduciary with regard to any assets of the plan or IRA over which it has no discretionary authority, control or responsibility and is not otherwise an ERISA fiduciary. *§ 2510.3-21(d)*
- Limits to these exceptions
 - (1) ERISA's co-fiduciary liability is not affected by these limits.
 - (2) These limits do not affect whether the person is otherwise a “party in interest” under ERISA or a “disqualified person” under the Code.

“Employee” Exception

An individual will not be an investment advice fiduciary if she -

- acts in her capacity as an employee of the sponsor (or its affiliate) of an ERISA plan (which does not include an IRA) and gives advice to another employee who is a participant or beneficiary, so long as (i) her job does not require giving such advice, (ii) she is not registered or licensed to give such advice (and does not have to be), and (iii) she does not receive direct or indirect compensation (above her normal compensation) for the advice.

§ 2510.3-21(c)(3)(ii)

- acts in her capacity as an employee of the sponsor (or its affiliate) of an ERISA plan, as an employee of the ERISA plan, as an employee of the plan's fiduciary or as an employee of an employee organization and gives advice to a fiduciary, another employee (not as a participant or beneficiary) or an independent contractor if she does not receive direct or indirect compensation (above her normal compensation) for such advice. *§ 2510.3-21(c)(3)(i)*

“Independent Fiduciary” Exception

- This “independent fiduciary on steroids” exception is limited to “true arm’s length transactions between...professionals or...managers who do not have a legitimate expectation that they are in a relationship of trust and loyalty...”. *Supplementary Information, 81 Fed. Reg. 20946, 20983 (April 8, 2016) (“Preamble”).* It is “...designed to ensure that the parties...understand the nature of their relationships.” *Id.* The burden of proof is on the advisor. *Preamble, at pg. 20984.* The Department of Labor has commented on this exception in its Conflict of Interest FAQs (Part II - Rule), released on January 16, 2017 (“FAQs II”) and in its Conflict of Interest FAQs (Transition Period), released on May 22, 2017 (“FAQs III”).
- Any advice given “to a fiduciary” about any investment-related transaction (*FAQs II, Q&A-22*) involving a plan or an IRA (*FAQs II, Q&A-25*) by an advisor -
 - (1) Who knows the recipient is a fiduciary of an ERISA plan or IRA;
 - (2) Who knows the recipient is “independent” (*FAQs II, Q&A-28*);
 - (3) Which is about a sale, purchase, loan, exchange or other transaction related to an investment; and
 - (4) Which is about an “arm's length” transaction;

“Independent Fiduciary” Exception

- will **not** make the advisor an investment advice fiduciary if, *before* the transaction, the advisor -
 - (5) Knows (or reasonably believes) the independent fiduciary is (i) a regulated bank, (ii) a qualified insurance carrier, (iii) an investment advisor registered under the Investment Advisor Act of 1940 (or a state's equivalent), (iv) a broker-dealer registered under the Securities Exchange Act of 1934, or (v) the manager (or holder) of at least \$50,000,000;
 - (6) Knows (or reasonably believes) the independent fiduciary is capable of making individual evaluations of investment risks;
 - (7) Knows (or reasonably believes) the independent fiduciary is the fiduciary for this transaction;
 - (8) Knows (or reasonably believes) the independent fiduciary is responsible for exercising independent judgment about the transaction;

“Independent Fiduciary” Exception

- (9) Informs the independent fiduciary the advice is **not** impartial and the advice is **not** fiduciary advice;
 - (10) Informs the independent fiduciary about the advisor's financial interests in the transaction;
 - (11) Does **not** receive a fee or other compensation directly from the plan, its fiduciary, participant or beneficiary, or from an IRA or an IRA owner in connection with the investment “(as opposed to other services);” and
 - (12) Has **not** admitted to fiduciary status. *§ 2510.3-21(c)(1)*
- The advisor may rely on appropriate written representations from the independent fiduciary for #5-#8 above. *§ 2510.3-21(c)(1)(i),(ii),(iv)*. The representations must be in place at the time the transaction takes place and must cover the period during which the advice is given.
(FAQs II, Q&A-21)

“Independent Fiduciary” Exception

- The \$50,000,000 may be any combination of plan and non-plan assets and the combined assets of several plans and non-plan investors. *(FAQs II, Q&A-20)*
- The independent fiduciary can be a representative of a registered investment advisor. *(FAQs II, Q&A-23)*
- An IRA owner cannot be his own independent fiduciary. *(FAQs II, Q&A-26)*
- A fee between financial intermediaries is not a disqualifying fee under #11 above, unless it is paid by a plan or an IRA or by using their assets. *(FAQs II, Q&A-29)*
- An employee of the plan sponsor who is a participant, an officer or a fiduciary committee member can also be this independent fiduciary if he receives the advice in his independent fiduciary status. *(FAQs II, Q&A-27)*
- “Reasonable belief” can be satisfied through negative consent to a written representation. *(FAQs III, Q&A-13)*

Participant/Owner Exception

A participant or beneficiary (or their relatives) of an ERISA-covered plan and an IRA owner (or a relative) cannot be a fiduciary for this purposes of this rule. *§2510.3-21(g)(7)*

Investment Advice Fiduciary

- An “***Investment Advice Fiduciary***” is a person -
 - (1) Who gives certain, enumerated kinds of investment advice;
 - (2) Directly (or indirectly) to either (i) an ERISA plan, its fiduciary or its participant or beneficiary, or (ii) to an IRA or its owner;
 - (3) In exchange for compensation, received directly or indirectly; and
 - (4) Who admits to being a fiduciary of the ERISA plan or IRA for investments; or
 - (5) Who gives the advice under an agreement or understanding to make the advice individualized to the recipient for investments; or
 - (6) Who gives the advice under an agreement or understanding to provide advice specifically directed to the recipient's investment property. §2510.3-21(a)

Affected Investment Advice

“*Investment Advice*” is only -

- A recommendation (which means: a *suggestion*) to buy, hold, sell, or exchange securities or other investment property
- A recommendation to take a distribution, including its form and amount
- A recommendation to do a rollover or transfer, including its amount and destination.
- A recommendation about how to invest the proceeds after taking a distribution
- A recommendation about how to invest the proceeds after doing a rollover or transfer
- A recommendation about managing investments in securities or other property
- A recommendation of a person to give these kinds of investment advice
§ 2510.3-21(a)(1)(i)-(ii), (b)(1)

Giving appraisals and other valuations is not investment advice, for now.

“Recommendation”

A “communication that, based on its content, context and presentation, would reasonably be viewed as a suggestion” about a course of action. *§ 2510.3-21(b)(1)*

- Objective inquiry.
- A suggestion that is more individually tailored is more likely to be viewed as a recommendation.
- Recommendations can originate from a person or a computer.
- A selective list of securities for a particular recipient is a recommendation, even if no single security is recommended.
- A series of actions may be viewed as a recommendation, even if none of the single actions would be. *§ 2510.3-21(b)(1)*
- Use these criteria to determine if an action is a recommendation, subject only to a list of activities that are expressly not recommendations. *§ 2510.3-21(b)(2)*

Carve-outs

These situations do not generate a recommendation. They were called “carve-outs” in the proposed regulation, but that reference was abandoned.

- “Platform providers”
- Assistance with only investment selection or monitoring
- General communications
- Investment “education” that does not include recommendations of specific products or alternatives and does not provide recommendations about how to manage a particular investment.

§ 2510.3-21(b)(2)

“Platform Provider” Carve-out

A person can avoid being an investment advice fiduciary (by avoiding giving regulated recommendations) if its relationship with an ERISA plan (**not** an IRA) stays within these parameters:

- (1) It markets or merely provides a menu of securities or other property to an ERISA plan.
- (2) It uses a platform (or similar mechanism) to do so.
- (3) The platform's offered choices do not take any individualized needs into account.
- (4) The plan's fiduciary is independent of the platform provider.
- (5) The plan's fiduciary makes any investment selections chosen from the platform's menu.
- (6) The fiduciary's choice becomes an option that the plan's participants or beneficiaries may use to select a direct investment.
- (7) The plan's fiduciary is told in writing that the platform provider is not attempting to give impartial investment advice and is not giving advice as a fiduciary. § 2510.3-21(b)(2)(i)

“Selection/Monitoring” Carve-out

A person can also avoid giving regulated recommendations by limiting what it gives as a platform provider to an ERISA plan (**not** an IRA) to materials that -

- Identify investment alternatives that meet objective criteria selected by the ERISA plan's fiduciary, but only if the provider discloses any financial interest it has in any provided alternative. *§ 2510.3-21(b)(2)(ii)(A)*
- In response to a RFI, RFP or something similar, identifies a limited set of investment alternatives based on only (i) the size of the plan sponsor, (ii) the size of the plan, (iii) the plan's current investment alternatives, or (iv) a combination of those three, but only if the provider discloses any financial interest it has in any provided alternative. *§ 2510.3-21(b)(2)(ii)(B)*
- Provides the ERISA plan's fiduciary with objective financial data, comparisons with independent benchmarks, or both. *§ 2510.3-21(b)(2)(ii)(C)*

This carve-out does not extend to IRAs.

“General Communications” Carve-out

A person does not give regulated recommendations by furnishing general communications that a reasonable person would not view as an investment recommendation, such as -

- general circulation newsletters
- commentary in publicly broadcast talk shows
- comments in widely attended speeches and conferences
- research or news reports intended for general distribution
- general marketing materials; and
- general market data *§ 2510.3-21(b)(2)(iii)*

“Investment Education” Carve-out

A person does not give regulated recommendations just because it provides any of four kinds of educational information or materials, if the information or materials do -

- **Not** include recommendations, solely or in combination, about specific investment products or specific plan or IRA alternatives; and
- **Not** include recommendations on investment or management of a particular security or securities or other property.

If this investment education carve-out would otherwise apply, it does not matter to whom the information or materials were given, who provided the information or materials, how often they were provided, the form in which they were communicated or whether the education materials or information were provided alone or in combination with other information or materials. *§ 2510.3-21(b)(2)(iv)*

The final guidance revoked Interpretative Bulletin 96-1 (§ 2509.96-1) and its guidance about investment-related education.

Four Allowed Kinds of Educational Materials

#1: Information and materials that (without referring to the appropriateness of an individual item) only -

- Describe the terms or operation of the ERISA plan or IRA; or
- Inform the recipient about
 - (1) the benefits of participation
 - (2) the benefits of “increasing” contributions
 - (3) the impact of pre-retirement withdrawals
 - (4) retirement income needs
 - (5) available forms of distribution
 - (6) advantages or disadvantages and risks of available forms of distribution; or
- Describe for available investment alternatives (under the ERISA plan or IRA) (i) investment objectives and philosophies, (ii) risk and return characteristics, (iii) historical return information, (iv) product features, (v) investor rights and obligations, (vi) trading restrictions, (vii) fees and expenses, or (viii) prospectuses. *§ 2510.3-21(b)(2)(iv)(A)*

Four Allowed Kinds of Educational Materials

#2: Information or materials on financial, investment or retirement matters that -

- Do **not** address specific investment products
- Do **not** address specific ERISA plan or IRA alternatives
- Do **not** address available distribution options
- Do **not** address specific alternatives or services offered outside the ERISA plan or IRA; or

§ 2510.3-21(b)(2)(iv)(B)

Four Allowed Kinds of Educational Materials

#2: (cont.): Information or materials on financial, investment or retirement matters that -

- Inform the ERISA fiduciary, participant or beneficiary, or IRA owner about
 - (1) General financial concepts
 - (2) General investment concepts
 - (3) Historical differences in rates of return among asset classes (using standard market indices)
 - (4) Effects of fees and expenses
 - (5) Effects of inflation
 - (6) Estimating retirement income needs
 - (7) Choosing investment time horizons
 - (8) Assessing risk tolerance
 - (9) Retirement-related risks; and
 - (10) General methods and strategies for managing assets in retirement in and outside of the plan or IRA.

Four Allowed Kinds of Educational Materials

#3: Information or materials that provide “models of asset allocation portfolios of hypothetical individuals with different time horizons... and risk profiles,” if the models -

- Are based on “generally accepted investments theories that take into account the historic returns of different asset classes...over defined periods of time;”
- Disclose all material facts and assumptions on which they are based;
- Do **not** include or identify any specific investment product or available specific alternative (other than in limited circumstances, a DIA under an ERISA plan); and
- Include a statement to the effect that users of the model should appropriately include and consider their other assets, income and investments outside the plan or IRA when using the model.

§ 2510.3-21(b)(2)(iv)(C)

Four Allowed Kinds of Educational Materials

#4: Information and materials which allow an ERISA plan fiduciary, participant or beneficiary or an IRA owner a way to “[e]stimate future retirement income needs and assess the impact of...asset allocations on retirement income... to evaluate distribution options, products or vehicles (using allowed educational information) [or]... to estimate a retirement income stream” so long as -

- The materials are based on “generally accepted investment theories that take into account the historic returns of different asset classes... over defined periods of time;”
- There is an objective correlation between suggested asset allocations or income streams generated by the materials and data from the user;
- Material facts and assumptions are disclosed or provided by the user;
- Other assets and income are considered, or reference is made to them;
- No specific investment alternatives available in the ERISA plan or IRA are included or identified (unless provided or (in limited circumstances), is an ERISA plan's DIA); and
- Assets outside the ERISA plan or IRA are taken into account or there is a disclosure that they should be. § 2510.3-21(b)(2)(iv)(D)

The Solution: An Exemption for Investment Advice Fiduciaries

It is a lot easier now to become an investment advice fiduciary. It is tough to find relief. The **Best Interest Contract Exemption** (“BICE”) lets investment advice fiduciaries - who (i) want to cause an ERISA plan or IRA to pay them additional compensation as a result of their investment advice, or (ii) want to receive additional compensation from third parties as a result of their investment advice - to receive that otherwise prohibited compensation.

- The BICE is a bear (but a smaller one than before).
- Its relief is optional, but its conditions and requirements for that relief are mandatory. It is changing the industry.
- It is intended to be the new normal, the default relief.
- Its relief is layered, and access is limited.
- Its details can feel endless, and its fondness for specific disclosures (in particular) is daunting.

The BICE - Protected Transactions

- The BICE allows certain protected persons to be paid variable compensation from services provided
 - (1) in connection with the purchase, sale or holding of an asset
 - (2) to an ERISA plan or IRAeven if the transaction and compensation were the result of investment advice by the protected person to a retirement investor.
- It provides relief from ERISA sections 406(a)(1)(D) and 406(b) and from sections 4975(c)(1)(D), (E) and (F) of the Internal Revenue Code. § 1(b)
- It does **not** provide relief if -
 - (1) *All* of the BICE's applicable conditions are not met.
 - (2) The plan is an ERISA plan, and
 - (a) the protected person is the plan's sponsor, or
 - (b) the protected person is a named fiduciary of the plan or its administrator who was selected for this purpose by a fiduciary who is not independent.

The BICE - Protected Transactions

- It does **not** provide relief if -
 - (3) The compensation is from a transaction where the advisor was acting for its own account or that of an affiliate in a principal transaction.
 - (4) The compensation is from advice generated solely by an interactive web site without personal interaction or personal advice from an advisor (“robo-advice”), unless the provider is a level fee fiduciary.
 - (5) The advisor has discretion with respect to the recommendation. *1(c)*
 - (6) The general relief of the BICE does not apply when the recommendation is about investments in ERISA-covered plans. An exception could apply. *§ 11(g)*

The BICE - Protected Persons

“**Advisors**” can use the BICE. An advisor is an individual who -

- Is an investment advice fiduciary with respect to the assets involved in the recommended transaction;
- Is an “employee, independent contractor, agent or registered representative” of certain financial institutions; and
- Satisfies applicable governmental regulatory and licensing requirements with respect to the advice. § VIII(a)

“**Financial Institutions**” can use the BICE. A financial institution is an entity with a relationship to the advisor that is (i) registered as an investment advisor (under the Investment Advisors Act of 1940, as amended, or the state where it is located), (ii) certain banks or savings associations, (iii) certain insurance companies, (iv) a broker or dealer registered under the Securities Exchange Act of 1934, or (v) an entity described as such in later individual exemptions. § VIII(e)

The BICE - Retirement Investors

“**Retirement Investors**” are those who can get potentially conflicted advice from a protected person and can be only:

- A participant or beneficiary in an ERISA plan with the right to direct the investment of her account or take a distribution.
- The beneficial owner of an IRA (who is acting for the IRA).
- A fiduciary of an ERISA plan or an IRA who is not an investment advice fiduciary. *§ VIII(o),(n)*

If the investment advice is directed to any other entity or individual, the BICE cannot protect the transaction. The restriction limiting the BICE's relief available for ERISA plans to ERISA plans covering fewer than 100 participants has been removed from this definition.

The Layers of the BICE - The Conditions

To use the relief promised by the BICE for only *purchases* of an investment product (including an insurance policy or annuity contract) from some financial institutions -

- The transaction must be in the ordinary course of the financial institution's business.
- Only reasonable compensation can be paid to the financial institution (or its affiliates) out of the purchase.
- The terms must be at least as good as those generally available in an arm's length purchase with an unrelated party.

This relief is not available if (i) an ERISA plan is involved and the plan's sponsor or its tainted administrator is the advisor or financial institution, (ii) the compensation is from a principal transaction, (iii) the advice is robo-advice, or (iv) the advisor has discretion over the purchase. § VI

The Layers of the BICE - The Conditions

To use the relief promised by the BICE for compensation from certain *pre-existing* investment transactions occurring before April 10, 2017 (or later as part of a systematic purchase program in effect before April 10, 2017) -

- The agreement to pay the compensation must have been in effect before April 10, 2017.
- The transaction must not have been prohibited at the time.
- The compensation now was not due to additional purchases (with an exception).
- The compensation received has been reasonable.
- Investment advice given after April 10, 2017 in this situation adhered to the best interest standard. § VII

The Layers of the BICE - The Conditions

To use the relief promised by the BICE for recommendations about investments in *ERISA-covered plans* -

- Before or at the time of the transaction, the financial institution and advisor must affirmatively acknowledge fiduciary status with respect to investment advice about the recommended transaction. § 11(g)(1), § 11(b)
- The financial institution and advisor must comply with the “Impartial Conduct Standards.” § 11(g)(2), § 11(c)
- The financial institution must adopt policies and procedures that implement three required warranties, and it and the advisor must comply. § 11(g)(3), § 11(d)(1)-(3)
- The financial institution must disclose mandated information early and often. § 11(g)(4), § 11(e)
- The financial institution and advisor may not disclaim liability beyond what is allowed under ERISA, not try to waive the investor's right to be in a class action in a dispute with them, and not try to require unreasonable arbitration or mediation of individual investor claims against them. § 11(g)(5)

The Layers of the BICE - The Conditions

To use the relief promised by the BICE for *level fee fiduciaries* -

- Before or at the time of the transaction, the financial institution and advisor must affirmatively acknowledge fiduciary status with respect to investment advice about the recommended transactions. § II(h)(1), § II(b)
- The financial institution and advisor must comply with the “Impartial Conduct Standards.” § II(h)(2), § II(c)
- In the case of a recommendation to rollover to an IRA (or switch to a level fee arrangement), the financial institution must document why the recommendation was in the investor's best interest. § II(h)(3), § VIII(d)

A level fee fiduciary (i) can receive only compensation that is a fixed percentage of asset value or a set dollar amount that does not vary based on an investment recommendation and (ii) must disclose that fee in

advance. § VIII(h) For further commentary, consult the Department of Labor’s Conflict of Interest (Part I-Exemptions) FAQs issued on October 27, 2016, Q&As-13 through -19.

The BICE - The Conditions

To use the relief promised by the BICE for a *new BICE contract* for an IRA (or a plan not covered by ERISA) -

- There must be a contract, signed before or at the time of the transaction. No longer is it required before any recommendation is made, but a later contract must cover prior related advice.
- The contract must acknowledge the protected person's fiduciary status.
- The contract must contain an agreement to adhere to the “Impartial Conduct Standards.”
- The contract must warrant the protected person has adopted policies and procedures designed to mitigate the unsavory effects of conflicted advice.
- The protected person must disclose mandated information early and often.
- The protected person must generate and keep specific data about the investment recommendations it wants protected.
- The signed BICE contract must be accessible to the investor on the protected person's website. § 1(b), § 11(a)

The BICE - The Contract

Exception: Existing investment-related contracts or agreements executed before January 1, 2018 and in effect on that date can be amended to include BICE requirements, instead of requiring a new BICE contract. § 11(a)(1)(ii)

- Amendment would be accomplished by delivering the proposed amendment, plus a full set of BICE-required disclosures to the investor before January 1, 2018. § 11(a)(1)(ii), § 11(e)
- A failure to terminate the existing contract within thirty days after delivery can be treated as negative consent. § 11(a)(1)(ii)

The BICE - The Contract

Exception: If a financial institution does **not** get a BICE contract with an IRA (or plan not covered by ERISA), the BICE can still provide relief, if -

- The advisor giving a recommendation does not get paid compensation from the recommendation.
- There are policies and procedures designed to stop paying that compensation to the advisor.
- The protected persons comply with the “Impartial Conduct Standards,” implement certain required policies and procedures, and implement the BICE-required website.
- The failure to get the BICE contract was not an effort or arrangement designed to avoid compliance. § 11(a)(1)(iii)

The BICE - Contract Terms

The following are general details about the required BICE contract:

- The protected persons and the retirement investor are required parties who must sign. *§ II(a)(1)(i)*
- The required signatures are needed before the conflicted recommended transaction is complete. *§ II(a)(1)(i)*
- The advisor (and his financial institution) must both admit to investment advice fiduciary status. *§ II(b)*
- The advisor (and his financial institution) must warrant to four specified protections. *§ II(d)*
- The contract must include required disclosures. *§ II(e)*
- The contract must **not** contain (i) exculpatory clauses disclaiming or limiting a protected person's liability for breaching the contract, or (ii) a waiver or qualifier of the investor's right to bring or join an action in court against a protected person. *§ II(f)* On August 30, 2017, the Department of Labor published a temporary nonenforcement policy, promising not to pursue failures to comply with parts of this waiver requirement. *Field Assistance Bulletin No. 2017-03 (Aug. 30, 2017)*

The BICE - Impartial Conduct Standards

These are at the core of the new exemption. In the BICE contract, the advisor (and his related financial institution) must commit to the following “***Impartial Conduct Standards***”:

- The investment advice given must be in the “Best Interest” of the investor.
- An investment will **not** be recommended if the total compensation expected from that investment to the advisor, financial institution and their affiliates will be more than reasonable compensation.
- **No** statements by the advisor (or his financial institution) to the retirement investor (about the investment, fees, conflicts or other relevant details) will be misleading at the time they are made. § II(c)

The BICE - Best Interest Conduct

- “**Best Interest**” conduct says the investment advice fiduciary will
 - “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 without regard to the financial or other interests of... [any] other party.” § II(c)(1), § VIII(d)
- The BICE's best interest standard sounds very familiar to those knowledgeable about ERISA's fiduciary standard in ERISA section 404(a)(1)(B). But, ERISA section 404(a)(1)(B) does not apply to the usual IRA, and the standard has been tweaked for the BICE.

The BICE - Required Contract Warranties

The BICE contract must include the following -

- The financial institution warrants it has written policies and procedures reasonably and prudently designed to make its advisors follow the Impartial Conduct Standards.
- The financial institution warrants it has found its material conflicts of interest, imposed measures to limit their effects, and picked a monitor to oversee this.
- Subject to an exception, the policies and procedures forbid using quotas, performance appraisals, bonuses, differentiated compensation or other such incentives that might result in recommendations that are not best interest advice. *§ 11(d)*

The BICE - Unwelcome Contract Terms

There will be no BICE relief if the BICE contract has any of these terms -

- Exculpatory language disclaiming or limiting liability in the event of a breach.
- Conditions, waivers or limits on (i) being a part of a class action, (ii) being part of a class settlement, or (iii) being part of an individual settlement, although limits on punitive damages and rescission can be okay.
- Arbitration or mediation of individual claims in difficult places or limited in other unreasonable ways. *§ 11(f)*

The BICE - Required Contract Disclosures

The BICE contract must include these disclosures clearly and prominently (in its terms or with the contract) -

- (1) State the best interest standard of care owed
- (2) Tell the investor what services are offered and how they will be paid
- (3) Describe material conflicts of interest
- (4) Disclose fees to be paid by the investor and by third parties
- (5) Describe policies, procedures and disclosures available upon request
- (6) Provide a link to the BICE-required website.

The BICE - Required Contract Disclosures

The BICE contract must include these disclosures clearly and prominently (in its terms or with the contract) (con't.) -

- (7) Describe the model contract and policies available on the website.
- (8) Disclose whether the proprietary products are being offered and any limits those products put on the recommendations.
- (9) Discuss whether offered products generate third party payments and whether the chance of getting those payments limited offered products.
- (10) Provide contact information for complaints.
- (11) Discuss whether the investor's investments will be monitored and how often, and whether alerts will be sent. *§ II(e)(1)-(7)*

The BICE - Required Separate Disclosures

- Independently of the BICE contract, the retirement investor must get two more kinds of disclosure to get BICE relief.
 - (1) *Transaction Disclosure.* Before executing a purchase, the financial institution must provide a single document that (i) recites the best interest standard of care owed, (ii) describes material conflicts of interest, (iii) tells the investor about policies, procedures and disclosures it can get, (iv) includes a link to the institution's website, and (v) tells the investor about content on the website.
 - (1) *Website.* The financial institution must create and maintain a public, freely accessible website that shows (i) the institution's business model and associated material conflicts of interest, (ii) typical fees and charges, (iii) a model BICE contract or its BICE-related terms, (iv) a summary of its BICE-required policies and procedures, (v) products offered in the recommendation that can result in third party payments to the institution, and (vi) summaries of payout and compensation grids for advisors from recommended products. *§ III(a)-(b)*

The BICE - Proprietary Products

A financial institution can restrict advisors' investment recommendations, partially or completely, made to ERISA plans and to IRAs and use the BICE.

Allowed Restrictions

Proprietary products

- can use this exception.
- are products managed, issued or sponsored by the institution.
§ IV(a), § VIII(l)

Products that generate ***third party payments*** to the financial institution or advisor (or affiliates)

- can use this exception.
- are charges not directly paid by the plan or IRA, which include revenue sharing payments, 12b-1 fees, distribution, solicitation or referral fees (and other examples) *§ IV(a), § VIII(q)*

The BICE - Proprietary Products

Additional Requirements (which apply equally to both exceptions)

Transactions under these circumstances will be deemed to satisfy only the best interest standard, if the following are completed by the time of the transaction.

- Inform the investor “clearly and prominently” about which of the two restrictions is involved and the limits the involved restrictions put on the universe of possible recommendations. Using “may” is not allowed.
- Inform the investor “fully and fairly” about material conflicts of interest.
- Satisfy the BICE's separate disclosures requirements.
- Document the financial institution's imposed limits on restrictions, material conflicts of interest and services to be provided in exchange for third party payments.

The BICE - Proprietary Products

Additional Requirements (which apply equally to both exceptions)
(con't.)

- The institution must reasonably conclude the limits and conflicts will not result in excessive compensation or recommending imprudent investments and document the reasons why.
- Adopt and monitor policies, procedures and incentive compensation practices that meet the BICE's standards.
- Ensure the compensation received from these conflicted transactions is no more than reasonable compensation.
- Ensure the recommendations are in the investor's best interest. *§ IV(b)*

84-24

Prohibited Transaction Exemption 84-24 (“84-24”) was amended and restated in the guidance released with the BICE.

- 84-24 can protect insurance agents, brokers, insurance companies, pension consultants, investment companies, certain principal underwriters and investment advisors. *84-24, § 1(b)(1)-(6)*
- It provides relief from all of the Internal Revenue Code's and ERISA's prohibited transactions. *84-24, § 1(b)* In this respect alone, it is better than the BICE.
- It allows payments of insurance commissions, mutual fund commissions and other consideration that would be, or would arise from, otherwise prohibited transactions, and it allows certain purchases and one kind of sale that would otherwise be prohibited transactions. *84-24, § 1(b)(1)-(6)*

84-24

After it is fully effective, it will no longer apply to -

- A purchase of “investment company securities” by an IRA.
- A purchase of a “variable annuity contract, indexed annuity contract or similar contract” by an IRA or by an ERISA plan. It does not define these terms. *84-24, §1(c)*

84-24 Conditions

When acting as an investment advice fiduciary,

- (1) the fiduciary must act in the best interests of the ERISA plan or IRA; and
- (2) the fiduciary's statements must not be materially misleading when made. *84-24, § II*

When generally using 84-24,

- (1) the transaction must be effected in the ordinary course of business;
- (2) the transaction must be on terms at least as favorable as an unrelated, arm's length transaction; and
- (3) the total of all fees and compensation received cannot exceed reasonable compensation. *84-24, § III(a)-(c)*

When using 84-24 to protect against the first 4 of the transactions it allows, additional conditions must be satisfied. *84-24, § IV* Those using 84-24 also have recordkeeping requirements to meet. *84-24, § V*

84-24 Covered Transactions

Only these transactions can be protected under 84-24:

#1: Receiving an insurance commission when an IRA or ERISA plan buys an insurance contract or fixed rate annuity contract.

- An insurance commission is a sales commission paid by the insurer for services related to causing the purchase and includes renewal fees and trailers, but excludes revenue sharing payments, administrative fees and marketing payments. *84-24, § 1(b)(1), VI(f)*
- Only insurance agents, brokers and pension consultants can use.

#2: Receiving a mutual fund commission when an ERISA plan buys investment company securities.

- A mutual fund commission is a “commission or sales load” paid for services related to causing or executing the purchase, but excludes 12b-1 fees, revenue sharing payments, administrative fees and marketing fees. *84-24, § 1(b)(2), VI(i)*
- Only a principal underwriter can use. *84-24, § 1(b)(2), VI(m)*
- An investment company must be registered under the Investment Company Act of 1940.

84-24 Covered Transactions

Only these transactions can be protected under 84-24 (con't.):

#3: Causing the purchase of an insurance contract or fixed rate annuity contract with assets of an IRA or an ERISA plan or the purchase of investment company securities with assets of an ERISA plan. *84-24, §1(b)(3)*

- Only an insurance agent, broker or pension consultant can use this relief as part of buying insurance or an annuity.
- Only a principal underwriter can use this relief as part of buying investment company securities.

#4: Buying an insurance contract or fixed rate annuity contract from an insurance company with assets of an IRA or an ERISA plan.

84-24, §1(b)(4)

- Includes consideration paid to the insurance company.

84-24 Covered Transactions

Only these transactions can be protected under 84-24 (con't.):

#5: Buying an insurance contract or a fixed rate annuity contract from an insurance company using ERISA plan assets. *84-24, § 1(b)(5)*

- The insurance company must be a fiduciary or service provider for the plan only because it sponsors a master or prototype plan. *84-24, § 1(b)(5), VI(g)*

#6A: Buying investment securities from an investment company or principal underwriter using ERISA plan assets. *84-24, § 1(b)(6), VI(j)*

- The investment company, principal underwriter or an investment advisor must be a fiduciary or service provider for the plan only because it sponsors a master or prototype plan or is a nondiscretionary trustee.

84-24 Covered Transactions

Only these transactions can be protected under 84-24 (con't.):

#6B: Selling investment securities owned by an ERISA plan to an investment company or principal underwriter. *84-24, §1(b)(6)*

- The investment company, principal underwriter or an investment advisor must be a fiduciary or service provider for the plan only because it sponsors a master or prototype plan or is a nondiscretionary trustee.

84-24 Controversy

Unexpectedly, amended and restated 84-24 limited the annuity products that can be within the exemption's relief.

- 84-24 has been the standard exemption for 21 years for sales and purchases of annuity contracts and related commission payments that would be prohibited by the ERISA or the Internal Revenue Code.
- New 84-24 provides relief only for annuity contract transactions involving a “Fixed Rate Annuity Contract.” 84-24, § 1(b)(1)
- “**Fixed Rate Annuity Contract**” is a fixed annuity contract (immediate or deferred) issued by an insurance company (i) that “satisfies applicable state standard nonforfeiture laws” at issue date, or in the case of only group fixed annuities, “guarantees return of principal net of reasonable compensation and provides a guaranteed declared minimum interest rate in accordance with the rates specified in the standard nonforfeiture laws in [the] state,” and (ii) the benefits of which do not vary based on investment experience of the insurer's separate account or accounts or investment experience of an index or investment model. 84-24, § 1(b)(1), VI(k)

84-24 Controversy

- A variable annuity, an indexed annuity and a “similar annuity” is not a fixed rate annuity. These terms are not defined in 84-24.
- “[T]raditional annuities, declared rate annuities, [and] fixed rate annuities (including deferred income annuities)” are fixed rate annuities eligible for 84-24, according to the preamble to 84-24. The Department believes each provides payments that are predictable.

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