



GAME CHANGER, REVISITED

THE FINAL CONFLICT OF INTEREST RULES

It's finally here, and the financial industry may never be the same. The final rules contain significant changes from the 2015 version, but the overarching theme remains the same: in the brave new world of retirement plan and IRA investment advice, everyone is a fiduciary and must follow ERISA-like rules.

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INTRODUCTION

In April of 2015, the White House and the Department of Labor (DOL) dropped a bomb on the financial industry with the Conflict of Interest proposal ("2015 Proposal" or "Proposal"). The Proposal set forth a regulatory scheme whereby IRAs would become subject to ERISA-like fiduciary rules, and business models based on non-level or indirect compensation (i.e., commissions and revenue sharing) in retirement plans and Individual Retirement Accounts (IRAs) would grow difficult—if not impossible—to support. It was a frontal assault on non-fiduciary product sales and, in particular, an assault on compensation that is variable or indirect.

Since then, there have been thousands of comment letters both in favor of and opposed to the rules, intense lobbying, hearings, testimony, letters from Congress to the DOL, and a welter of activity among the nation's financial services providers, seeking the way forward. The DOL studied the feedback, rewrote the Proposal to create the draft final rules, sent them to the Office of Management and Budget (OMB) for review, and—midday on April 6, 2016—published the final rules. The rules go into effect in sixty days (first week of May, 2016) but the effective date for most of the major provisions is April 10, 2017. We get a year to prepare. There is also a transition period whereby implementation for certain provisions is phased, with the final deadline being January 1, 2018.

The new conflict of interest rules ("Final Rules") represent a sea change for the financial services industry. Make no mistake: this is, in fact, game changing stuff. Any advisor or service provider whose business model depends on variable or indirect compensation, or on the premise that one's investment recommendations don't cross the threshold into fiduciary status, should assume that **their business model must change**.

Advisors whose business models are predominantly fee-based will see less of a tectonic shift, but the reality is that most advisors, including fee-based advisors, are affected by these rules. None can afford to ignore the necessity of studying the new rules and reimagining the business model in light of the new realities. And, therefore, the service providers who rely on advisors will need to reexamine their offerings as well.

BASIC STRUCTURE OF THE FINAL RULES

There are many parts to the Final Rules, which make changes to at least eight separate pieces of existing DOL guidance (regulations and prohibited transaction exemptions, or PTEs) and create some new ones:

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- A final DOL Regulation Section 2510.3-21¹ (“3-21 regulation”), the definition of “fiduciary” regulation, which substantially broadens the net that catches brokers and advisors in fiduciary status in both retirement plans and IRAs
- The Best Interest Contract Exemption (BICE), a PTE allowing advisors to provide fiduciary advice and receive compensation if certain conditions are met.
- The old education safe harbor, Interpretive Bulletin 96-1 (IB 96-1) is repealed and replaced by a new (but similar) safe harbor contained in the BICE.
- Changes to PTCE 86-128, which allows certain securities transactions by broker/dealers who serve as advice fiduciaries to retirement plans, and also provides for the receipt by broker/dealers of mutual fund commissions in retirement plans if certain conditions (which are less onerous than those of the BICE, if still substantial) are met.
- Changes to various other PTEs to incorporate “best interest” standards of care into the requirements. The gist of these changes is that, when advisors are fiduciaries, any available PTEs will require adherence to a modified fiduciary standard of care as one of the requirements for the exemptions.
- A new PTCE for principal transactions.

IMPACT SUMMARY

At this writing, the Final Rules are only a day old, and time for reflection will doubtless give rise to many insights about the Rules' impact. But certain key ramifications suggest themselves.

Forced Conversion to Fiduciary Status

Many advisors are already fiduciaries, but many are not. Also, many advisors act as fiduciaries some of the time, but not all of the time. The reality is that, for decades, the paradigm of the investment industry has been a powerful aversion to fiduciary status. This has been changing, gradually, for over a decade, but the new 3-21 regulation forces the great mass of putatively non-fiduciary advisors who work with both retirement plans and IRAs into fiduciary status. This was the DOL's stated intent going back to the original 2010 proposal regarding the definition of “fiduciary” regulation, though at that time it was limited to ERISA retirement plans. The Final Rules solidify it: avoiding fiduciary status will be difficult in the future, and IRAs are included.

The “ERISA-fication” of IRAs

In the 2010 proposed definition of “fiduciary,” the original version of the proposal that led, ultimately, to the Final rules, one little section in the preamble mentioned IRAs:

“...the proposed amendments to the definition of the term ‘fiduciary’ in 29 CFR 2510.3-21 (c) also apply for purposes of the application of Code section 4975 with

¹ 29 CFR 2510.3-21

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respect to any plan described in Code section 4975(e)(1), regardless of whether such plan is an employee benefit plan.”

This alarmed some, but no one suspected a play by the DOL to take over IRA regulation, ERISA-style, and treat IRAs as mini-retirement plans. This reference in the preamble was consistent with long-standing rules dating back to 1975 and 1978.

The 2015 Proposal was therefore quite a shock to many. Retirement plans are a significant, but still relatively small part of the business of most broker/dealers and Registered Investment Advisers (RIAs), whereas IRAs are huge. An alteration to the 1975 definition of fiduciary, as applied to IRAs, didn't impinge on the collective consciousness in 2010 because the DOL has no enforcement authority over IRAs. But the 2015 Proposal and Final Rules created an enforcement mechanism, via the courts, and suddenly IRAs were the new focus.

The resulting “ERISA-fication” of IRAs means:

- Advisors are fiduciaries under a definition identical to that under ERISA
- An ERISA-style “exclusive purpose” fiduciary standard applies (though it’s called a “best interest” standard)
- ERISA-style prohibited transaction rules apply, including a prohibition against non-level compensation (and, under the Final Rules, indirect compensation such as commissions)
- Receipt of non-level or indirect compensation is therefore conditioned upon satisfying the conditions of one or more prohibited transaction exemptions
- Even level compensation will require satisfaction of some new compliance conditions
- Failure to qualify for those now-needed exemptions means being subject to 15-20% civil penalties and other consequences, likely to include disgorgement of all fees, with interest, on top of those penalties.

A New Paradigm for Rollovers

Rollovers from retirement plans to IRAs, and from one IRA to another, have been a mainstay of the investment business since ERISA created the IRA in 1974. Rollovers are big business, and the industry's preference for broker non-fiduciary status has given rise to some non-intuitive practices in which people who call themselves “advisors” go to great lengths not to be viewed as giving advice for regulatory purposes. That will now probably change.

OLD ROLLOVER RULES AND STRATEGIES	THE NEW ROLLOVER PARADIGM
Many compliance departments forbid brokers from serving as retirement plan fiduciaries and claim non-fiduciary status for their brokers.	No choice: nearly everyone will be an ERISA fiduciary under the Final Rules.

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<p>Those compliance departments allowing brokers to serve as retirement plan fiduciaries usually draw the line at the participant level, claiming that brokers and adviser representatives provide education only, under the IB 96-1 education safe harbor, to participants.</p>	<p>This could still work if advisors adhere faithfully to the strictures of the new education safe harbor. But have they ever, truly, been non-fiduciaries when face-to-face with a participant asking, "What should I do?"</p>
<p>The only DOL guidance on rollovers was AO 2005-23A², which said a non-fiduciary to the plan could do rollovers without becoming a fiduciary.</p>	<p>The Final Rules make recommendations concerning investment in an IRA after a rollover a fiduciary act. Being a non-fiduciary to the plan doesn't avoid fiduciary status with respect to a rollover from that plan.</p>
<p>Common interpretations of AO 2005-23A held that a fiduciary advisor to a retirement plan can help participants with rollovers if certain steps are taken, including avoiding recommending the rollover, giving proper information on options per FINRA guidance, and having the participant sign a document saying the choice to roll out of the plan was solely the participant's.</p>	<p>The Final Rules scrap all of that and make it a prohibited transaction to make more money in the IRA than in the plan, triggering the need to comply with the BICE in most cases. But simplified compliance with the BICE is available so long as the advisor is a "Level Fee" advisor both inside the plan and in the IRA. Regardless, AO 2005-23A is repealed and replaced by an entirely new regime.</p>
<p>Broker/dealers and RIAs both believed that they had incentives under the prevailing rules to avoid acknowledging fiduciary status with respect to advice to participants, even if serving as a fiduciary at the plan level, because of how compliance attorneys interpreted 2005-23A.</p>	<p>Those incentives are gone. Advisors might as well embrace fiduciary status not only at the plan level, but at the individual participant level, so long as they are prepared to do so properly and it makes good business sense. And since they have no choice but to learn to do so properly in IRAs, doing so in a retirement plan becomes less of a big deal.</p>
<p>There are no ERISA-like rules in IRAs and generally no fiduciary status for brokers, or such is the consensus.</p>	<p>IRAs are subject to ERISA-like rules and brokers and RIAs are fiduciaries with respect to them.</p>
<p>Old Paradigm: don't be a fiduciary to retirement plan participants, if at all, and craft rollover compliance procedures around 2005-23A, based on a desire to avoid having</p>	<p>New Paradigm: you are a fiduciary and can't escape it, so embrace it - even at the participant level. You have to comply with the BICE in the IRA anyway, so build your rollover</p>

² Advisory Opinion 2005-23A, to Desert Mutual Benefit Administrators

transactions subject to ERISA fiduciary rules.	procedures around the BICE.
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Migration to Fee-Based Service

In the wake of the 2015 Proposal, many attorneys were offering the opinion that compliance with the terms of the BICE was so difficult as to be impossible unless one converted to a fee-based compensation model. In other words, while the Proposal (and the Final Rules) come under the guise of openness to a variety of compensation models, some would argue that the rules effectively ban commissions and variable compensation in a large percentage of transactions. In other words, the rules pretend to support commissions, but do not actually do so.

Maybe this is true, and maybe not. The fact is that there has been a shift toward fee-based business models for decades now, and there is every reason to believe that the Final Rules will accelerate this trend.

New Compliance Infrastructure

For many members of the financial community, compliance will be a massive undertaking. And because so many members of the community are drawn into the need to comply with the BICE, virtually all of us will have some need for—and expense in creating—new compliance infrastructure.

A LOOK BACK AT THE 2015 PROPOSAL; CHANGES

The Final Rules vary quite a bit from the 2015 Proposal, and most of the changes are spelled out by the DOL on their website at <http://www.dol.gov/ebsa/pdf/conflict-of-interest-chart.pdf>. Some of the key provisions and changes include:

- Under the fiduciary definition:
 - **“Recommendation” is very broad.** Almost everything is a “recommendation” that can trigger fiduciary status.
 - **Education safe harbor allows some mention of specific funds.** In the 2015 Proposal, there was an updated education safe harbor replacing IB 96-1; this is still the case in the Final Rules. But many industry commentators expressed concern that the inability to name specific funds available in a retirement plan, as part of educating a participant about model portfolios, represented an unreasonable handicap. The DOL responded by allowing the naming of specific funds, subject to certain conditions.
 - **As expected, the old five-part test gives way to a much broader test.** It will be quite difficult to successfully defend a claim of non-fiduciary status. The wording

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in the Final Rules differs greatly from the Proposal.

- Under the BICE:
 - **No list of covered assets.** All assets are eligible so long as the compliance requirements are met.
 - **Small plans are covered.** This was a major concern over the 2015 Proposal; the BICE was not available to small plans; the Final Rules open BICE usage to smaller plans than the 2015 proposal.
 - **Negative consent process for existing clients.** Just send them a notice; no need to get new signatures for every client.
 - **Level-to-Level exemption.** Advisors who receive level fee compensation within a retirement plan and roll a participant over to an IRA that pays them more must still comply with some rules, but the rules are much simplified over the BICE as a whole so long as the advisor remains level fee in the IRA.
- Under the PT Exemptions:
 - **PTE 84-24** formerly provided a means for selling insurance³, annuities, and mutual funds to plans and IRAs; its scope has now been limited. The new PTE only allows insurance and “fixed rate annuity” (which does NOT include fixed indexed annuities, under the final PTE) sales, not mutual fund sales, which are covered elsewhere.
 - **PTE 86-128** is revised to allow certain types of securities transaction between a broker/dealer and its clients when the broker/dealer is a fiduciary (agency cross transactions, for example). More importantly, 86-128 contains a revised mutual fund exemption that appears to allow brokers to sell mutual fund shares under conditions less burdensome than the BICE.

THE DEFINITION OF “FIDUCIARY” REGULATION

The 2016 Regulation replaces the 1975 Regulation at 29 CFR 2510.3-21. Its key provisions are summarized below.

The Fiduciary Net: Who is and is not a Fiduciary?

Instead of the five-part test of the 1975 regulation, we have a more broadly applicable and more complicated test under the Final Rule.

The 1975 Five Part Investment Advice Test

Remember that the focus of industry questions—and DOL response—in 1975 was around how NOT to be a fiduciary. The five-part test created a blueprint, therefore, for service providers and advisors to avoid fiduciary advisor status. The Final Rule reverses the intent—the focus now is on

³ Note that IRA rules prohibit life insurance in IRAs, so the insurance exemption only applies to retirement plans.

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ensuring that “fiduciary” is construed as broadly as possible, and that most forms of advisor interaction with a client or prospect will constitute advice with respect to retirement plan or IRA assets.

The five-part test can be summarized as follows:

1. A person **renders advice** to the plan as to the value of or advisability of buying, selling, investing in securities or other property
2. On a **regular basis**
3. Pursuant to a **mutual agreement**, arrangement, or understanding, written or otherwise, between the plan or a plan fiduciary...
4. ...that the services will serve as a **primary basis** for investment decisions
5. The advice will be **individualized** to the plan based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification.

The 2016 Final Definition of “Fiduciary”

You are a fiduciary by virtue of rendering investment advice for a fee or other compensation (whether direct or indirect) as described in ERISA Section 3(21)(A)(ii) if:

1. You give one of two types of advice...
 - a. **How to invest assets.** A “recommendation” as to the “advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property, or a recommendation as to how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA”;
 - b. **Strategy recommendations, including as to the choice of advisor or manager:** “...A recommendation as to the management of securities or other investment property, including, among other things, 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 versus 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...”
2. ...You give that advice to any of six types of people...
 - a. Plan
 - b. Plan fiduciary
 - c. Participant
 - d. Beneficiary
 - e. IRA

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- f. IRA owner.
3. ...directly or indirectly...(i.e., either you do it yourself or you work in conjunction with affiliates or related persons)
4. ...and meet one of the following conditions:
 - a. You **acknowledge fiduciary status** or represent yourself as a fiduciary;
 - b. You render the advice “pursuant to a **written or verbal agreement**, arrangement, or understanding that the advice is based on the **particular investment needs** of the advice recipient”; or
 - c. You **direct the advice “to a specific advice recipient** or recipients regarding the advisability of a particular investment or management decision with respect to securities or other investment property of the plan or IRA.”

What’s a “Recommendation”?

The definition is very broad and derives from securities law: “...a communication that would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action.” The Rule states that the determination of whether something is a recommendation or not is an objective inquiry, not subjective, and gives additional detail. The idea is that, under the final regulation, nearly any communication with a prospect or client about investments can probably be construed to be a “recommendation.”

The Rule provides an exception, however, for providing information about oneself and one’s services for purposes of attempting to get hired. Saying “hire me” does not make one a fiduciary.

The “Information and Materials” Exemption

Several types of information and materials can be provided without being considered “recommendations” and therefore triggering fiduciary status. The term “carve-out” was used to describe these sorts of exceptions in the 2015 Proposal, but the DOL has moved away from that term due to the confusion it generated. The following are not recommendations:

1. Information can be provided with respect to platform providers’ offering of services and products to a plan.
2. Also in connection with the offering of services, it is not a considered a “recommendation” to include information about investments available on the platform.
3. General communications such as widely circulated newsletters or commentary from public talk shows.
4. Investment education. The Final Rule replaces IB 96-1, but maintains much of the core language of the so-called “education safe harbor.”

Other Exemptions from Fiduciary Status

Transactions with regulated financial institutions and sophisticated plan fiduciaries with \$50 million or more do not, by themselves, trigger fiduciary status. There are also exemptions for swap⁴ dealers and transactions, and for employees who are tasked with assisting plan fiduciaries who provide certain information or assistance to other employees.

Clarity on Rollovers

The DOL's previous guidance on when activity in connection with rollovers gave rise to fiduciary status is found in DOL Advisory Opinion 2005-23A to Deseret Mutual Benefit Administrators, the "Deseret Letter." The Final Rule supersedes Deseret and makes clear that, "...recommendations how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA and recommendations with respect whether, in what amount, in what form, and to what destination such a rollover, transfer or distribution should be made"⁵ give rise to fiduciary status.

The implication is that having anything to do with rollovers, more or less, makes one a fiduciary—either under ERISA, in the case of advice while the employee is still in the plan, or under the Code in the case of assets in an IRA—and triggers the need for the BICE if the advisor hopes to be compensated. Note that "non-level" includes the compensation being higher in the IRA than it is in the plan, even if the compensation is level in both places. But the BICE includes a streamlined exemption for such circumstances, the "level-to-level" exemption whereby compliance procedures are less burdensome.

The implication, as discussed in some detail above, is a reasonable expectation that a new paradigm will soon emerge for both the compliance infrastructure and the business planning around rollovers. In short, the reality of unavoidable fiduciary status changes everything and points toward a compliance regime centered on the BICE, and tending to favor level fee approaches.

Effecting Securities Transactions and Scope of Fiduciary Duty

The Final Rule clarifies certain long-standing DOL positions: first, broker/dealers can engage in securities transactions, under specific conditions, without triggering fiduciary status. Second, a fiduciary is only responsible to the extent he or she is a fiduciary with respect to a specific task under ERISA. Thus, an advisor is only responsible for those aspects of a plan over which he or she renders advice or has the authority or responsibility to do so; there is no responsibility and liability, outside of possible co-fiduciary liability under ERISA Section 405(a), for responsibilities of others. One way to think of that is that a fiduciary is only responsible for what he or she is responsible for.

⁴ A "swap" is a complex derivative that can be thought of as a type of insurance policy or hedge.

⁵ From the preamble.

TREATMENT OF IRAs

The Final Rules make clear that IRAs are subject to the DOL's jurisdiction with respect to interpreting both ERISA and the Internal Revenue Code (IRC or Code) when it comes to fiduciary issues, including the prohibited transaction (PT) rules. The path the DOL follows to effectively extend ERISA-style fiduciary rules to IRAs is via IRC §4975, a mirror image (almost but not quite identical) to the prohibited transaction rules of ERISA §§406(a) and (b). Here is the basic logic:

- IRAs are not subject to ERISA except in very unusual circumstances.
- The DOL's authority is limited to ERISA plans.
- However, under a Presidential order from 1978, the DOL does have authority over the interpretation of the Code for purposes of the fiduciary definition and PT rules. The IRS retains control of enforcement.
- The DOL therefore gets to write the rules on PTs for IRAs, though they have no power to enforce them.
- In the Final Rules, the DOL uses its rule-making authority to:
 - Paint nearly all advisors as fiduciaries so that the PT rules apply as broadly as possible
 - Use the PT rules to prohibit advisors from serving IRAs unless they adopt a "best interest" standard of care that is distinct from both ERISA and common law fiduciary standards, but which is patterned after ERISA's loyalty, prudence, and conflict of interest rules.

The old line of thinking was that the DOL could not regulate IRAs because they are not ERISA plans, but the DOL has found a way.

KEY PROVISIONS OF THE BEST INTEREST CONTRACT PTE

The Best Interest Contract PTE ("BICE") is the mechanism whereby advisors are held to ERISA-like loyalty, prudence, and conflict of interest standards in IRAs.

One key conclusion of an initial review of the BICE is that DOL is taking the position that ALL fiduciary advisors must adhere to the BICE, not just those who receive variable or indirect compensation. The procedures for compliance are streamlined for "level fee" advisors, but compliance is still required. This is consistent with ERISA fiduciary rules, under which the mere provision of services or receipt of compensation is prohibited unless one qualifies for an exemption, regardless of whether the compensation is level.

Key BICE Provisions

- Requirements include:
 - Commit to adhere to Impartial Conduct Standards:
 - An ERISA-like Best Interest Standard

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- Compensation must be “reasonable” within the meaning of ERISA
- Statements about compensation, conflicts of interest, and anything relevant to the transaction cannot be “materially misleading” at the time they are made
- Adopt anti-conflict policies and procedures that are reasonably designed to ensure that advisors adhere to the Impartial Conduct Standards
- For non-ERISA plans and IRAs, agree to abide by the exemption’s terms in a written contract (no contract required for ERISA plans since different rules apply)
 - The contract must be delivered on or before the time of execution of the transaction
 - Negative consent applies to existing contracts—send a notice and if the client does not object, it is construed as consent
 - The contract has to be available to the investor on the firm’s website
- Warranties
 - The advisor has adopted policies and procedures reasonably designed to ensure compliance with the Impartial Conduct Standards
 - The advisor has disclosed material conflicts and adopted measures in its policies to mitigate the harmful effects of conflicts
 - The firm and its affiliates do not rely on incentive programs for advisors such as quotas, awards, or financial incentives for sale of one product over another that might impair impartiality
- Disclosures:
 - The duty of care that is owed (Best Interest)
 - Fees and compensation and how they will be paid
 - Material conflicts of interest
 - Right to obtain a “written description” of the policies and procedures
 - A public website disclosing your fees and even the compensation grid for the firm’s brokers or adviser reps
 - A detailed point of sale disclosure at time of transaction
 - A point of contact for investors
 - Whether or not the advisor will monitor the investments
- As in ERISA Section 410, exculpatory provisions are not permitted, though FINRA-style arbitration clauses are permitted so long as a client’s right to join a class action is not infringed
- Firms relying on this exemption must notify DOL that they are doing so and agree to make information on the services available for inspection by the DOL.

Circumstances in which the BICE is Not Available

1. The advisor is the employer, administrator, or named fiduciary of the plan, or was chosen by a fiduciary who does not qualify as “independent.”

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2. The compensation is part of a principal transaction (for which a separate PTE is available).
3. The compensation is for robo-advice⁶ in which no human was involved (as opposed to “cyborg advice,” perhaps, where a human uses a robo-tool to help advise a participant personally), unless the robo-advisor meets the conditions applicable to being a level fee fiduciary.
4. The advisor has discretion over the recommended transaction.

Streamlined Rules for Level Fee Fiduciaries

In keeping with the core purpose of the conflict of interest rules—curtailing the perceived harmful effects of variable and indirect compensation—the compliance burden is much reduced for advisors whose compensation is level. This is similar to the rules under ERISA, whereby advisors do not require compliance with PTEs other than 29 CFR 2550.408b-2 (“408b-2”) if their compensation is level.

The reduced compliance requirements are:

1. Fiduciary status is disclosed
2. Comply with the Impartial Conduct Standards (Best Interest, reasonable compensation, no material misstatements)
3. Document why a rollover transaction was in the best interest of the investor, including:
 - a. Consideration of alternatives, including staying in the plan
 - b. Fees and expenses, and whether paid by the employer in the plan
 - c. Different levels of service and investment options available under each arrangement.
4. Document why a movement from a commission-based to a level fee account is in the investor’s best interest.

Rules for Sellers of Proprietary Products and Products with Third Party Payments

The basic rule is that special requirements apply if a firm restricts what its advisors can sell to proprietary products or those that generate third party payments. Requirements include:

- Clearly and prominently disclose that the firm offers proprietary products or receives third party payments
- Disclose limitations placed on the investment universe made available
- Take extra pains to document material conflicts of interest
- Document in writing the basis for its conclusion that the limiting of the investment universe and the offering of proprietary products and third party payment products does not cause advisors to make imprudent recommendations

⁶ A term of art that has come to be used to describe an asset allocation tool that is computer-based.

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- Otherwise meet all other requirements such as Best Interest standard and various disclosures.

The BICE's Insurance and Annuity Exemption

This exemption makes possible insurance and annuity sales by a party in interest to a plan or IRA, but does not provide exemption from the conflict of interest requirements applicable to fiduciaries—the exemption only applies to the prohibited transaction provisions of ERISA Section 406(a) (covering the ability to do the transactions at all), not 406(b) (which covers self-dealing and conflicts of interest).

The Exemption for Pre-Existing Transactions

There is a grandfathering provision but it does not appear to help for many accounts for very much time. Transactions entered into before the effective date and for which ongoing compensation is received must ultimately meet the requirements of the Final Rules, so any grandfathering will be, at best, a temporary respite for an advisor who wishes the Final Rules would go away.

WHO WILL ENFORCE THESE RULES?

The DOL has the power to write these rules, but has no enforcement authority over IRAs—enforcement is up to the IRS, who has very few people nationally focused on IRA compliance. This has always been a concern to industry commentators, who observe that regulation without enforcement simply results in the worst offenders continuing to offend. The DOL addressed this concern via the BICE, in which the courts are established as the primary enforcement mechanism. It seems likely, as well, that the DOL will find ways of asking questions about IRAs in audit activity surrounding qualified plans.

PARTING THOUGHTS

The true impact of this suite of rules will not be known for years. Will the Final Rules cure the ills they set out to cure—the conflicts of interest inherent to variable and indirect compensation and the 1% and \$17 billion per year that the Administration estimates that they cost investors?⁷ Or will the impact be actively bad for investors via the added costs of compliance and litigation, and decreased access to choices and advice, as some in the industry suggest will happen? Or will the new rules simply redirect the industry's energy in different, but not necessarily better, directions via a frenzy of compliance effort but without any measurable gains to investors--full of sound and fury, signifying nothing?

⁷ From the studies and press releases released in conjunction with the 2015 Proposal.

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Regardless of the answer, this is going to be a lot of work, and the April 2017 deadline will be upon us before we know it. The team at the Department of Labor who did the incredible amount of work necessary to make these rules happen deserves heartfelt thanks and congratulations for a thorough, professional job, and it seems likely that their work, like ours, is just beginning.

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