SUTHERLAND

THE FINAL RULE:

DOL's Expanded Definition of Investment Advice Fiduciary Under ERISA and Revised Complex of Exemptions

Analysis and Critical Issues

INTRODUCTION

The Department of Labor's (DOL's) final rule expanding ERISA's definition of investment advice fiduciary (the "Final Rule") will permanently restructure long-standing business practices in the banking, insurance, securities, and financial services industries.

DID YOU KNOW?

3,134

Public comment letters filed with the DOL regarding the 2015 proposed rule.

86

Working days between the close of the DOL public comment period and the date that the final rule was delivered to the Office of Management and Budget for final review.

$18.9 TRILLION

Assets in the U.S. retirement plan system that could be impacted by the Final Rule.

SUTHERLAND'S INTERDISCIPLINARY DOL FIDUCIARY RULE COMPLIANCE TEAM

Sutherland's unique team of ERISA, insurance, securities, banking, investment management and litigation attorneys are working collaboratively to share industry knowledge and insight regarding DOL fiduciary rule compliance best practices.

For resources and commentary regarding the Final Rule, visit Sutherland's www.dolfiduciaryrule.com.

WHY SUTHERLAND?

STRENGTH in representing the country's and the world's leading organizations impacted by the Final Rule.

INSIGHT into the legal and business drivers impacting our clients' compliance decisions.

EXPERIENCE advising our clients on fiduciary compliance issues in the ERISA, FINRA, insurance, securities and investment management space for more than 35 years.

DEPTH as trial attorneys in efficiently and zealously representing our clients in individual and class actions filed in state and federal courts across the country.

WHEN IS A PERSON ACTING AS AN INVESTMENT ADVICE FIDUCIARY UNDER ERISA?

ERISA § 3(21) (A) (ii) : "... [A] person is a fiduciary with respect to a plan to the extent ... he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan..."

1975 – "5 PART TEST"	2015 – PROPOSED "4 X 2 DEFINITION"		2016 – FINAL "3 X 3 DEFINITION"	
FOR A DIRECT OR INDIRECT FEE, A PERSON:	**PERSON MEETS AT LEAST ONE IN EACH COLUMN, FOR A DIRECT/ INDIRECT FEE (INCLUDING TO AN AFFILIATE)**		**PERSON MEETS AT LEAST ONE IN EACH COLUMN, FOR A DIRECT/ INDIRECT FEE (INCLUDING TO AN AFFILIATE)**	
	SERVICE	**STATUS**	**SERVICE**	**STATUS**
1. Renders advice as to the value of securities/ property, or makes recommendations as to the advisability of investing in, purchasing or selling securities/ property 2. On a regular basis 3. Pursuant to a mutual agreement, with fiduciary, that 4. Advice will serve as a primary basis for investment of plan assets, and 5. Advice will be individualized to particular needs of the plan.	1. Investment recommendation, including to take a distribution, or as to the investment of a rollover or distribution 2. Asset or investment property management recommendation, including any recommendations regarding rollovers, transfers or distributions 3. Valuation of an asset in a specific transaction 4. Paid adviser recommendation	1. Admitted fiduciary 2. Provides advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is individualized or specifically directed to recipient for consideration in making investment or management decision	Makes a recommendation regarding: 1. Acquiring, holding, disposing of or exchanging investment in a plan /IRA 2. How investment should be invested after rollover, transfer or distribution from plan/IRA 3. Management of investment in a plan/IRA	1. Admitted fiduciary 2. Provides advice pursuant to written or verbal agreement, arrangement, or understanding that advice is based on the needs of the recipient, or 3. Directs advice to recipient regarding a particular management investment decision

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THE FINAL RULE: DOL'S EXPANDED DEFINITION OF INVESTMENT ADVICE FIDUCIARY UNDER ERISA AND REVISED COMPLEX OF EXEMPTIONS

Just less than a year since its proposal, and just more than six months after receiving thousands of pages of commentary, petitions and hearing testimony, the Department of Labor (DOL) finalized its redefinition of "investment advice fiduciary" for ERISA purposes (the "Final Rule") and its modification of the complex of exemptions corollary to that definition. This remains the most substantial and consequential regulatory undertaking by DOL since the enactment of ERISA in 1974. The DOL seeks nothing less than to reorganize many financial services companies in respect of the services they provide to ERISA plans and IRAs.

HEADLINES FOR PLAN SPONSORS

- Model asset allocations and interactive tools will not be considered fiduciary "recommendations" even if the materials identify specific plan investments.
- Communications between employees, such as human resource staff communicating information about plan distribution options, will generally be excluded from the definition of "fiduciary investment advice."
- Recommendations regarding term life, health, and disability plans will not be considered fiduciary advice.

HEADLINES FOR RETIREMENT PRODUCT AND SERVICE PROVIDERS

- The Final Rule elaborates on the definition of an investment "recommendation" in an effort to highlight DOL's standard for determining when advice communications rise to the level of being covered under the Final Rule.
- Marketing one's own services (or the services of an affiliate) will not trigger fiduciary status, so long as no investment recommendation is provided.
- The counterparty carve-out was refashioned to provide instead that a person will not be deemed to provide "fiduciary investment advice" if the advice is provided to an independent fiduciary of a plan or an IRA who is either a licensed and regulated provider of financial services or a plan fiduciary with responsibility for the management of $50M or more in plan assets. The carve-out for plans with 100 or more participants was dropped.

As it signaled during the August 2015 hearing and in subsequent public comments, DOL has also incorporated a number of revisions into the complex of related exemptions issued in connection with the Final Rule, including the Best Interest Contract Exemption ("BICE"; also "BIC Exemption").

KEY DATES

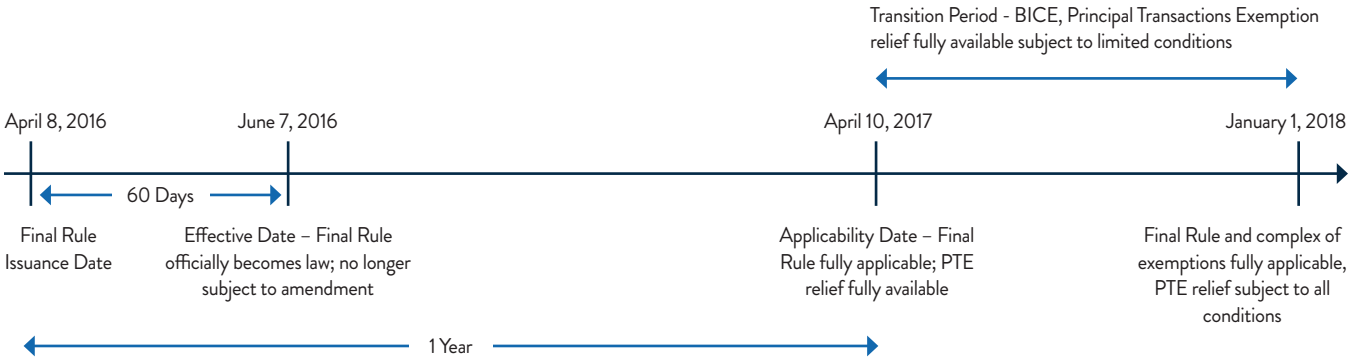
The "official" effective date of the revised definition of "fiduciary investment advice" and the date the exemptions are considered "issued" is June 7, 2016, which is 60 days after the Federal Register publication date of April 8.

As of April 10, 2017, the revised definition of "fiduciary investment advice" will apply. With noted exceptions, the prohibited transaction exemptions (PTEs) also will be available on April 10, 2017.

Exceptions—For financial institutions and advisers, implementation of the BICE and the Principal Transactions Exemption will occur in phases—

- A Transition Period runs from the April 10, 2017, applicability date to January 1, 2018.
- During the Transition Period, a reduced number of the conditions of the exemptions apply.
- Also, the BICE includes an improved grandfathering rule.

The entire package goes into full effect as of January 1, 2018. As of that time, full compliance with the exemptions will be required.



ARRANGEMENTS IN SCOPE OF THE FINAL RULE

Like the proposal, the final revised definition of investment advice fiduciary applies not only to ERISA plans (including those §403(b) programs and employer-sponsored IRAs subject to ERISA), but also, by reason of Internal Revenue Code (IRC) §4975(e)(1), to the following non-ERISA arrangements:

a. Traditional IRA accounts and annuities;

b. Roth IRAs;

c. Archer medical savings accounts;

d. Health savings accounts; and

e. Coverdell education savings accounts.

Section 403(b) and 457(b) plans generally are outside the legal scope of the Final Rule.

- Private sector 403(b) arrangements are in scope if they are subject to ERISA.
- There is the possibility of a "knock on" effect for arrangements outside the legal scope of the Final Rule, however.

Sutherland Commentary

As a conceptual matter, the Final Rule substantially follows the 2015 proposal:

- It greatly expands the circumstances in which interactions between, on the one hand, retirement product and service providers and, on the other, ERISA plans, participants and IRA owners are fiduciary activity subject to ERISA standards of prudence and loyalty; and
- It creates for IRA owners, through the BICE, a private right of action for enforcing those standards that does not exist in the statute.

And because, unlike under any other body of fiduciary law of which we are aware, conflicts of interest under ERISA standards cannot be cured by disclosure to and waiver by the party to whom those fiduciary duties are owed, DOL becomes the arbiter of those conflicts, through its prohibited transaction exemption process.

In commentary on the 2015 proposal, plan sponsors and the financial services industries generally (albeit not universally) supported the policy objective that investment intermediaries should be responsible for putting the interest of retirement investors before their own interest, as a matter of legal accountability as well as business accountability. Criticisms of the proposal were largely directed at the execution of that objective, and the consequences of that execution for investors and the retirement system.

DOL plainly made an effort to be responsive to at least some of that commentary. The circumstances in which valuation becomes fiduciary activity, which had proven difficult to articulate, were deferred to a future guidance project. More detail was provided about the types of communications that will be treated as fiduciary recommendations, although meaningful ambiguities inevitably remain. Elements of the proposal most obviously in conflict with other bodies of law to which retirement product and service providers are subject were eliminated. Operational requirements of the proposed BICE, intended by DOL as the flagship exemption for interactions with retail retirement investors, were improved in ways that make it a more viable compliance alternative.

That having been said, the most fundamental objections to this particular rulemaking are inherent in DOL's undertaking, including that:

- The investment systems DOL seeks to change are in fact the product of the governance of financial services industries by their primary regulators—Congress, state legislatures, and federal and state banking, insurance and securities regulators;
- DOL exceeds its competence when it undertakes to reorganize those financial services industries in these respects and, for example, is not entitled to the deference normally accorded an expert regulator;
- Even remedial statutes are to be interpreted in accordance with their plain meaning absent specific direction from Congress, but the Final Rule rewrites the statute in a number of respects;
- The private right of action created by the BIC Exemption exceeds the authority of a regulatory agency;
- The cost-benefit record is insufficient to and does not support a rulemaking of this magnitude. There are real costs to the Final Rule, which will be borne directly or indirectly by plan participants and IRA owners, and the piecemeal manner in which various regulators are addressing the same ultimate consumer protection objective will only maximize those costs. It is entirely speculative whether any gains that inure to retirement investors collectively will be commensurate with those costs; and
- The greater chance is that the Final Rule will be counterproductive to the most important issue facing the U.S. retirement system—the pressing need to expand retirement plan coverage among working Americans.

Accordingly, the burden now shifts to the regulated community to implement the Final Rule in a manner that protects the important interests of plan sponsors, participants, IRA owners, financial services providers and the retirement system as a whole that have been put in play.

THE FINAL REVISED FIDUCIARY DEFINITION

Under the final revised fiduciary definition, both the 1975 "five-part" investment advice fiduciary test and the 2015 proposed "4 x 2" fiduciary investment advice definition are replaced by a revised "3 x 3" definition that still focuses on services and status of the adviser, but clarifies certain key aspects of the 2015 proposal. Appraisal activity has been removed from the DOL's fiduciary interpretation entirely, and reserved for future rulemaking:

A PERSON IS A FIDUCIARY IF, FOR A FEE:

SERVICES

That person provides to a plan, plan fiduciary, plan participant or beneficiary, IRA or IRA owner:

1. A "recommendation"—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 a particular course of action—as to the advisability of acquiring, holding, disposing of, exchanging securities or other investment property; or

2. A recommendation as to how securities or other investment property should be invested; or

3. A recommendation as to the management of securities or other investment property, including recommendations regarding the selection of other persons to provide investment advice or investment management services; selection of investment account arrangements; or recommendations with respect to rollovers, transfers or distributions from a plan or IRA.

AND

STATUS

Such person directly or indirectly (e.g., through or together with any affiliate):

1. Represents or acknowledges that it is acting as a fiduciary; or

2. Renders the advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is based on the particular needs of the advice recipient, or

3. Directs the advice to a specific recipient regarding the advisability of a particular investment or management decision with respect to plan or IRA securities or other investment property.

ACCORDING TO THE PREAMBLE, NORMAL MARKETING OF ONESELF OR AN AFFILIATE AS A POTENTIAL FIDUCIARY SHOULD NOT TRIGGER FIDUCIARY STATUS (THE "HIRE ME" RULE), UP TO THE POINT THAT AN INVESTMENT RECOMMENDATION IS MADE.

INVESTMENT PROPERTY DOES NOT INCLUDE HEALTH OR DISABILITY POLICIES, TERM LIFE POLICIES, OR OTHER ASSETS THAT DO NOT INCLUDE AN INVESTMENT COMPONENT.

THE MORE INDIVIDUALLY TAILORED THE COMMUNICATION IS TO A SPECIFIC RECIPIENT ABOUT A SPECIFIC INVESTMENT, THE MORE LIKELY IT WILL BE VIEWED AS A "RECOMMENDATION."

> THE FINAL REVISED FIDUCIARY DEFINITION

Unlike the 2010 and 2015 proposals, the final definition does not include "carve-outs" from the fiduciary definition; instead, most of the previous carve-outs have been repurposed as exclusions from the definitions of "recommendation" (for purposes of 29 CFR § 2510.3-21(b)(1)) or "fiduciary investment advice" (for purposes of ERISA § 3(21)(A)(ii)) and are therefore not fiduciary activity under the Final Rule. The carve-out for appraisals made part of the 2015 proposal has been removed in light of the DOL's decision to reserve appraisals for future rulemaking. The DOL has created a new exclusion from the definition of "recommendation" for general marketing communications.

THE FOLLOWING SERVICES AND INFORMATION WILL NOT BE DEEMED A "RECOMMENDATION" (AND, THUS, NOT FIDUCIARY ADVICE)

Platform Marketing: Marketing and making available investment platforms to plans without regard to individualized plan/participant needs, with appropriate disclosures; not available in the IRA market.

Selection and Monitoring Assistance: Identifying options meeting the plan fiduciary's specifications in connection with developing an investment platform, or responding to a plan RFP on a limited basis with respect to investments available on a platform, with appropriate disclosures; not available in the IRA market.

General Marketing Communications: Furnishing information (to a plan or IRA owner) that a reasonable person would not view as an investment recommendation (i.e., general circulation newsletters, broadcast commentary, widely attended speeches, general marketing data performance reports, etc.).

Providing Investment Education: Making investment-related education available to a plan, plan fiduciary, participant, beneficiary, or IRA owner if the information **does not** include specific investment recommendations **except** as discussed below under "Investment Education vs. Fiduciary Advice."

IN ADDITION, THE FOLLOWING ACTIVITIES WILL NOT BE TREATED AS "FIDUCIARY INVESTMENT ADVICE":

"Seller" Transactions: Transactions with fiduciaries with financial expertise or who manage $50M in assets.

Swap Transactions: Specified swap or securities-based swap transactions with an ERISA plan.

Employee Communications: Advice provided by an employee of a plan sponsor to a plan fiduciary or employee advice provided the employee receives only normal compensation for the work performed.

GENERALLY, COMMUNICATIONS THAT REQUIRE THE ADVISER TO COMPLY WITH SUITABILITY REQUIREMENTS UNDER SECURITIES OR INSURANCE LAWS WILL BE TREATED AS A "RECOMMENDATION" FOR PURPOSES OF THE FINAL RULE.

Note that these definitional exceptions would not apply to an adviser of "admitted" fiduciary status.

Sutherland Commentary

- Given the concerns expressed in the public comment regarding the expansiveness of the definition of "recommendation" in the 2015 proposal, the DOL has drawn much clearer distinctions between fiduciary and non-fiduciary activities both in the preamble and in the text of the Final Rule. For instance, plan information that describes product features, investor rights and obligations, fee and expense information, and trading restrictions will not be considered fiduciary communications. A particularly welcome change relates to the treatment of RFP responses, which may now identify a limited or sample set of investment alternatives based on the size of the plan, the plan's current designated investment alternatives, or both, without triggering fiduciary duty for the responding adviser.
- In addition, the Final Rule now provides that general communications that a reasonable person would not view as an investment recommendation—such as newsletters, commentary made part of publicly broadcast talk shows, remarks made during speeches or at conferences, performance reports, or prospectuses—will not be considered "recommendations" and will therefore not trigger fiduciary status. With the elimination of the "mutual agreement" and "primary basis" prongs of the five-part test, this addition to the Final Rule was critical in order to distinguish general public communications from actual fiduciary advice.
- Furthermore, the Final Rule makes clear that even if a particular communication does not fall within any of the examples and exclusions set forth in the text of the rule, it will be treated as a fiduciary communication only if it is truly an investment "recommendation" as defined under the regulation.
- The DOL was quite eloquent in the Final Rule in describing the fees that are sufficient to make a recommendation fiduciary advice, "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," and specified a "but for" test to determine whether those fees are received in connection with the recommendation.
- The Final Rule not only treats advice as to whether to take a rollover or distribution as fiduciary advice, but also advice about any investment in which that distribution might be placed, arguably even if that investment is outside any retirement arrangement subject to the Final Rule. If that is intended, it would constitute an extraordinary assertion of jurisdiction by DOL.
- Along with all the other compliance undertakings required by the Final Rule, service providers not previously subject to the ERISA § 408(b)(2) disclosure rules will be required to develop those disclosures by April 10, 2017, if their services have been recharacterized as fiduciary activity.
- DOL declined to create a platform exception for IRAs, putting added pressure on the other compliance solutions available in that setting.

INVESTMENT EDUCATION VS. FIDUCIARY ADVICE

The 2015 proposed regulation would have upended long-standing investment education practices by superseding Interpretive Bulletin (IB) 96-1, and replacing it with a carve-out from the fiduciary definition for investment education that would have prohibited advisers from incorporating information on specific investment products in education models or materials.

In light of comments received on the 2015 proposal, the Final Rule was modified to replace the education carve-out with an exception from the definition of "recommendation" that allows asset allocation models and interactive investment materials to identify specific investment products or specific investment alternatives under certain circumstances.

CATEGORY OF INVESTMENT EDUCATION	SIGNIFICANT CHANGES IN FINAL RULE	OBSERVATIONS
PLAN INFORMATION	Definition modified slightly to include descriptions of product features; investor rights and obligations; fee and expense information; and applicable trading restrictions.	As in the 2015 proposal, may not include reference to appropriateness of individual benefit distribution options for the plan or an IRA but may include descriptions of varying forms of distributions and other forms of lifetime payment options (e.g., immediate annuity, deferred annuity, or incremental purchase of deferred annuity), advantages, disadvantages and risks of different forms of distribution.
GENERAL INVESTMENT INFORMATION	Modified slightly to include information on the effects of fees and expenses on the rate of return.	Still may not include information on specific investment products, plan alternatives, or distribution options, or specific alternatives or services outside of the plan. However, may provide information about retirement-related risks (longevity, market/interest rates, inflation, health care, etc.), and general methods and strategies for managing assets in retirement, including outside the plan.

> INVESTMENT EDUCATION VS. FIDUCIARY ADVICE

CATEGORY OF INVESTMENT EDUCATION	SIGNIFICANT CHANGES IN FINAL RULE	OBSERVATIONS
ASSET ALLOCATION MODELS	Models may identify specific investment alternatives under a plan (not an IRA) if the investment is a designated investment alterative under a plan subject to oversight by a plan fiduciary and the person who develops or markets the model: (a) identifies all of the other designated investment alternatives with similar risk/return characteristics; and (b) the model is accompanied by a statement that identifies where information on those investment alternatives can be obtained, including general plan information and participant-level fee information.	Preamble suggests an ongoing duty to monitor plan service providers and to evaluate whether information is unbiased. Asset allocation models that describe a hypothetical portfolio could fit into this category.
INTERACTIVE INVESTMENT MATERIALS	Materials may identify specific investment alternatives if the alternative is specified by the plan participant, beneficiary, or IRA owner, or if the investment is a designated investment alternative under a plan subject to oversight by a plan fiduciary and the materials: (a) identify all the other designated investment alternatives available under the plan that have similar risk/return characteristics; and (b) are accompanied by a statement identifying where information in the alternatives may be obtained, including general plan information and participant-level fee information.	Still permissible to evaluate distribution options, products or vehicles (based on plan information supplied by participant and general financial, investment, and retirement information).

Sutherland Commentary

The Final Rule retained the characterization of certain decumulation communications as education, which was largely understood under IB 96-1 but helpfully confirmed. It also clarified that information about specific investments can be provided in a neutral manner and, as noted above, reversed course to allow asset allocation models and interactive materials to reference specific designated investment alternatives in the ERISA plan setting. Both are important improvements over the 2015 proposal.

DOL did not take up the suggestion to clarify that communications related to improvident distribution elections—"you will never be able to replace that in-service distribution in your retirement savings, and you should think again about taking it"—are education rather than advice. If that communication is provided by a plan sponsor, it would not be "fiduciary investment advice" under the Final Rule. If instead it is provided by a retirement product or service provider, the "recommendation" definition would have to be parsed to determine if the line between education and advice has been crossed. In these circumstances, this difference in outcome seems a needless distinction and complication.

THE RESTRUCTURED COMPLEX OF EXEMPTIONS

The Final Rule is accompanied by the most substantial reworking of PTEs ever undertaken by DOL. Except as otherwise noted below, the changes to the PTEs take effect on April 10, 2017. There is no clear guidance with respect to the recurring consequences on or after April 10, 2017, of advice provided before that date in accordance with the existing terms of a PTE, but in principle those arrangements should still enjoy the relief provided by the existing exemption.

BEST INTEREST CONTRACT EXEMPTION (BICE)

The proposed BICE was the centerpiece of the restructured complex of exemptions. It was and is intended to be the generally applicable exemption for certain "retail" advice. The final BICE was amended in a number of substantial respects, including:

- Certain operational details of the contract and disclosure requirements have been modified, including the timing of and required parties to the contract, and the requirement of an executed contract has been eliminated for ERISA plans.
- While not providing a true "grandfather" rule, a transition rule has been added and existing contracts may become compliant through negative consent.
- The proposed BICE "approved asset" list has been dropped, meaning that the exemption will now be available regardless of the type of asset, subject to certain caveats described below.
- As a result of amendments to PTE 84-24, prohibited transactions involving variable annuities and fixed index annuities will have to rely upon BICE if no other exemption is available.

COVERED TRANSACTIONS	
THE FINAL VERSION OF THE BICE PERMITS:	
THE RECEIPT OF COMPENSATION	Permitted compensation includes "many forms of compensation that would otherwise be prohibited, including, inter alia, commissions, trailing commissions, sales loads, 12b-1 fees, and revenue-sharing payments from investment providers or other third parties." Differential compensation is permitted to the extent that the conditions of the exemption are met with respect to such compensation
BY AN "ADVISER," "FINANCIAL INSTITUTION," AFFILIATE OR RELATED ENTITY	"Adviser" is defined as an individual who is: • A fiduciary solely by reason of providing investment advice; • An employee, independent contractor, agent or registered representative of a "Financial Institution"; and • Appropriately licensed under applicable law for the advice to be given.

> THE RESTRUCTURED COMPLEX OF EXEMPTIONS

COVERED TRANSACTIONS	
THE FINAL VERSION OF THE BICE PERMITS:	
BY AN "ADVISER," "FINANCIAL INSTITUTION," AFFILIATE OR RELATED ENTITY *CONT'D*	A "Financial Institution" is an entity that "employs or otherwise retains" the Adviser and is: • An investment adviser registered under federal or state law; • A bank or similar institution supervised by the United States or a state that is subject to periodic federal or state examination and review; • An insurance company qualified to do business by a state with an active certificate of authority from its domiciliary jurisdiction (which must require annual actuarial review and reporting of reserves) and that undergoes either annual CPA examinations or a triennial financial examination by the state's insurance commissioner; • A broker or dealer registered with the SEC; or • An entity that is described in the definition of Financial Institution in an individual prohibited transaction exemption. "Affiliate" includes: • Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the Adviser or Financial Institution; • Any officer, director, partner, employee, or relative of the Adviser or Financial Institution; or • Any corporation or partnership of which the Adviser or Financial Institution is an officer, director, or partner. A "Related Entity" is any entity other than an Affiliate in which the Adviser or Financial Institution has an interest that may affect the exercise of its best judgment as a fiduciary.
FOR INVESTMENT ADVICE PROVIDED TO A "RETIREMENT INVESTOR"	A Retirement Investor includes: • An ERISA plan participant or beneficiary in a participant-directed plan; • The beneficial owner of an IRA; and • A "Retail Fiduciary" of an ERISA Plan or IRA (an independent fiduciary with financial expertise, as described in the Final Rule).
UNLESS SPECIFICALLY EXCLUDED	The exemption does not apply with regard to plans sponsored by the Adviser, Financial Institution or an Affiliate, or for which it is a named fiduciary or plan administrator, most "robo-advice," Principal Transactions other than "Riskless Principal Transactions," or situations where the Adviser has discretionary authority or control with regard to the recommended transaction.

> THE RESTRUCTURED COMPLEX OF EXEMPTIONS

BICE Conditions

While many of the more onerous conditions of the proposed exemption have been modified, the final BICE remains a highly conditioned exemption for which compliance certainty may prove difficult, if not impossible, in practice.

BICE CONDITION	TERMS
CONTRACT REQUIREMENT (IRAs AND NON-ERISA PLANS)	• New Contracts: Before or at the same time as the execution of a recommended transaction Financial Institution enters into an enforceable written contract with the Retirement Investor that includes all of the terms specified below. • Existing Contracts: Existing contracts may be amended by negative consent before January 1, 2018, subject to certain conditions. • No Contract: A narrow exception is provided for circumstances in which the Retirement Investor fails to open an account but somehow manages to generate additional income for the Financial Institution or Adviser.

CONTRACT TERMS	The Contract must contain the following terms:
	• The Financial Institution and its Adviser(s) are fiduciaries under ERISA, the IRC or both;
	• The Financial Institution and its Advisers comply with and will adhere to Impartial Conduct Standards:
	  • They will provide advice that is in the Best Interest of the Retirement Investor (discussed below) at the time of the recommendation.
	  • They will not cause the Adviser, Financial Institution, Affiliates or Related Entities to receive compensation for their services that would exceed reasonable compensation within the meaning of ERISA.
	  • Statements about the recommended transaction, fees and compensation, Material Conflicts of Interest, and any other matters related to the Retirement Investor's investment decisions will not be misleading at the time they are made.

THE FINAL RULE ELIMINATES THE EXECUTED WRITTEN CONTRACT REQUIREMENT FOR ERISA PLANS.

A MATERIAL CONFLICT OF INTEREST EXISTS WHEN AN ADVISER OR FINANCIAL INSTITUTION HAS A FINANCIAL INTEREST THAT A REASONABLE PERSON WOULD CONCLUDE COULD AFFECT THE EXERCISE OF ITS BEST JUDGMENT AS A FIDUCIARY IN PROVIDING ADVICE TO THE RETIREMENT INVESTOR.

ACCORDING TO THE PREAMBLE, "REASONABLE COMPENSATION" IS TO BE MEASURED BY REFERENCE TO THE MARKET, AS UNDER THE ERISA § 408(B)(2) SERVICE PROVIDER EXEMPTION.

> THE RESTRUCTURED COMPLEX OF EXEMPTIONS

BICE CONDITION	TERMS
CONTRACT TERMS *CONT'D*	The Financial Institution complies with and warrants: • The Financial Institution has adopted and will comply with written policies and procedures reasonably and prudently designed to ensure that Advisers adhere to Impartial Conduct Standards; • In formulating the policies and procedures, the Financial Institution identified and documented any Material Conflicts of Interest and adopted measures to prevent the Material Conflicts of Interest from causing violations of the Impartial Conduct Standards, with a designated person responsible for addressing and monitoring these issues; • The Financial Institution's policies and procedures require that neither the Financial Institution nor (to the best of its knowledge) Affiliates use or rely upon 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 Advisers to make recommendations not in the Best Interest of the Retirement Investor (although differential compensation that is not counter to the Retirement Investor's Best Interest is allowable). The contract may not contain: • Exculpatory provisions disclaiming or otherwise limiting liability for a violation of contract terms, provided that the parties may knowingly waive the right to punitive damages or rescission to the extent permissible under state or federal law; or • Any waiver or qualification of the Retirement Investor's right to bring or participate in a class action against the Adviser or Financial Institution or to agree to liquidated damages. The contract may not provide for arbitration of individual claims in distant venues or that otherwise unreasonably limit the ability of the Retirement Investor to pursue claims.
TRANSACTION DISCLOSURE	Before or at the same time as execution of the recommended investment, the Financial Institution must provide disclosure in a single written document: • Stating the Best Interest Standard and describing any Material Conflicts of Interest; • Informing the Retirement Investor of the right to obtain copies of the Financial Institution's written description of its policies and procedures, as well as specific disclosure of costs, fees and other compensation including Third Party Payments regarding recommended transactions. • Containing a link to the Financial Institution's public website disclosure and explaining that certain information can be found on the website.

> THE RESTRUCTURED COMPLEX OF EXEMPTIONS

BICE CONDITION	TERMS
WEBPAGE DISCLOSURE	The Financial Institution must maintain a webpage, open to the general public and updated at least quarterly, that contains: • A description of its business model and the Material Conflicts of Interest associated with that business model; • A schedule of typical account or contract fees and service charges; • A model contract or other model notice of the contractual terms (if applicable) and the required disclosures, which are reviewed for accuracy no less frequently than quarterly and updated within 30 days if necessary; • A written description of the Financial Institution's policies and procedures that accurately describes or summarizes key components of the policies and procedures relating to conflict-mitigation and incentive practices in a manner that permits Retirement Investors to make an informed judgment about the stringency of the Financial Institution's protections against conflicts of interest; • To the extent applicable, a list of all product manufacturers and other parties with whom the Financial Institution maintains arrangements that provide Third Party Payments to either the Adviser or the Financial Institution with respect to specific investment products or classes of investments recommended to Retirement Investors; a description of the arrangements, including a statement on whether and how these arrangements impact Adviser compensation, and a statement on any benefits the Financial Institution provides to the product manufacturers or other parties in exchange for the Third Party Payments; • Disclosure of the Financial Institution's compensation and incentive arrangements with Advisers including, if applicable, any incentives (including both cash and non-cash compensation or awards) to Advisers for recommending particular product manufacturers, investments or categories of investments to Retirement Investors, or for Advisers to move to the Financial Institution from another firm or to stay at the Financial Institution, and a full and fair description of any payout or compensation grids, but not including information that is specific to any individual Adviser's compensation or compensation arrangement.
DISCLOSURE TO DOL	Before receiving compensation in reliance on the BICE, the Financial Institution must provide a one time notification to DOL of its intent to rely on the exemption.
RECORDKEEPING AND ACCESS	The Financial Institution must maintain certain records for six years and, subject to certain limitations, provide reasonable access during normal business hours to designated persons, including: (a) DOL or IRS; and (b) participants or IRA owners (or their representatives).

> THE RESTRUCTURED COMPLEX OF EXEMPTIONS

BICE CONDITION	TERMS

BEST INTEREST STANDARD: PROPRIETARY PRODUCTS AND THIRD PARTY PAYMENTS	The Best Interest Standard will be deemed to be satisfied with respect to proprietary products and Third Party Payments if:
	• Before or at the same time as the execution of the recommended transaction, the Retirement Investor is clearly and prominently informed in writing:
	  • That the Financial Institution offers Proprietary Products or receives Third Party Payments with respect to the purchase, sale, exchange, or holding of recommended investments;
	  • Of the limitations placed on the universe of investments that the Adviser may recommend to the Retirement Investor, including specific disclosure of the extent to which recommendations are, in fact, limited on that basis and;
	  • Of any Material Conflicts of Interest that the Financial Institution or Adviser have with respect to the recommended transaction.
	• The Financial Institution documents in writing its limitations on the universe of recommended investments; the Material Conflicts of Interest; any services it will provide to Retirement Investors in exchange for Third Party Payments, as well as any services or consideration it will furnish to any other party, including the Payor, in exchange for the Third Party Payments; reasonably concludes that the limitations on the universe of recommended investments and Material Conflicts of Interest will not cause the Financial Institution or its Advisers to receive compensation in excess of reasonable compensation for Retirement Investors; reasonably determines, after consideration of the policies and procedures that these limitations and Material Conflicts of Interest will not cause the Financial Institution or its Advisers to recommend imprudent investments; and documents in writing the bases for its conclusions.
	• The Financial Institution adopts, monitors, implements, and adheres to policies and procedures and incentive practices that meet the requirements of the BICE.
	• At the time of the recommendation, the amount of compensation and other consideration reasonably anticipated to be paid, directly or indirectly, to the Adviser, Financial Institution, or their Affiliates or Related Entities for their services in connection with the recommended transaction is not in excess of reasonable compensation.
	• The Adviser's recommendation reflects 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; and the Adviser's recommendation is not based on the financial or other interests of the Adviser or on the Adviser's consideration of any factors or interests other than the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor.

> THE RESTRUCTURED COMPLEX OF EXEMPTIONS

BICE CONDITION	TERMS
LEVEL FEE FIDUCIARY	The final BIC Exemption contains streamlined conditions for "Level Fee Fiduciaries." To qualify, the only fee received by the Financial Institution, Adviser and any Affiliate in connection with advisory or investment management services to a Plan or Investment Adviser assets is a Level Fee. • "Level Fee" is a fee or compensation 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, and does not include a commission or other transaction-based fee. • Need not enter into a contract with the Retirement Investor or make BIC warranties or disclosures; provide web- and transaction-based disclosures; or comply with DOL reporting and recordkeeping requirements. • But must provide a written statement of fiduciary status no later than when a recommended transaction is effected, and must comply with impartial conduct standards. • Also, in the case of a rollover recommendation, the fiduciary must document the specific reason why the recommendation was considered to be in the Best Interest of the Retirement Investor, including consideration of the alternatives, such as leaving money in the plan, whether the employer pays for some of the plan's expenses, and the different levels of services and investments available. • And in the case of a recommendation to switch to a Level Fee arrangement, the Level Fee Fiduciary must document the reason the arrangement is considered to be in the Best Interest of the Retirement Investor, including consideration of the services to be provided for the fee.

> THE RESTRUCTURED COMPLEX OF EXEMPTIONS

BICE CONDITION	TERMS
EXEMPTION FOR PURCHASE OF INVESTMENT PRODUCT	This exemption covers the purchase of an investment product by a Plan, participant or beneficiary account, or IRA, from a Financial Institution that is a party in interest or disqualified person if: • The transaction is effected by the Financial Institution in the ordinary course of its business; • The compensation for any services rendered by the Financial Institution and its Affiliates and Related Entities is not in excess of reasonable compensation; and • The terms of the transaction are at least as favorable to the Plan, participant or beneficiary account, or IRA as in an arm's length transaction with an unrelated party. The exemption does not apply if: • The Plan is covered by ERISA, and: (a) the Adviser, Financial Institution or any Affiliate is the employer of employees covered by the Plan; or (b) the Adviser and Financial Institution is a named fiduciary or plan administrator with respect to the Plan, or an Affiliate thereof, that was selected to provide advice to the plan by a fiduciary who is not Independent. • The compensation is received as a result of a Principal Transaction; • The compensation is the result of robo-advice unless the robo-advice provider is a Level Fee Fiduciary that complies with the conditions applicable to Level Fee Fiduciaries; or • The Adviser has or exercises any discretionary authority or discretionary control with respect to the recommended transaction.

> THE RESTRUCTURED COMPLEX OF EXEMPTIONS

Transitional Rule

BICE CONDITION	TERMS
GRANDFATHER/ PRE-EXISTING ACCOUNTS	Includes a "grandfather" for retirement accounts in existence on the Applicability Date. • **Can provide limited advice.** Advisers and Financial Institutions can provide advice after the Applicability Date on investments that were acquired for a retirement account before the Applicability Date. • **Prudence Standard.** Any investment recommendations made after the Applicability Date must meet the prudence component of the Best Interest Standard—including the "without regard to" proviso. • **No new investments.** But the grandfather does not cover any advice relating to new investments for, or any additional investment in, a grandfathered account after the Applicability Date except in the case of systematic investment programs and exchanges among funds or variable annuity options pursuant to an exchange privilege or rebalancing program, but only if, in either case, the program was set up before the Applicability Date. • **Reasonable compensation condition.** A few conditions apply for a retirement account to qualify for the grandfather, including that the compensation paid to the Adviser, Financial Institution and their Affiliates or Related Entities after the Applicability Date not be in excess of reasonable compensation. • **No asset restriction.** Given that the BIC Exemption no longer restricts investments in retirement accounts to a specified list of assets, the grandfather relief is not conditioned on a pre-existing retirement account holding only assets on the list.

Sutherland Commentary

While the DOL has made broad statements about how it has carefully considered commentary and made revisions to the proposed BICE in that regard, a careful reading of the final exemption and preamble reveals a number of details and considerations that will require close attention.

Terms of Exemption

In effect, the final form of the BICE is a compendium of related exemptions for:

- Advice regarding ERISA plans;
- Advice regarding IRAs and IRA rollovers;
- Advice regarding propriety products, or nonproprietary products providing Third Party Payments;
- Advice in a "Level Fee" setting;
- Advice provided in a Bank Networking Arrangement (for which more limited conditions are specified);

- Advice during the transition period from April 10, 2017, to December 31, 2017; and
- Advice in connection with arrangements existing on April 10, 2017.

The differences in the terms and conditions applicable in each of those circumstances will need to be carefully observed in implementation.

Scope of Exemption

The operative terms of the exemption were broadened in a manner that should make the relief more generally available for recommendations treated as fiduciary activity under the Final Rule.

- For example, referrals or Investment Adviser "solicitations" are more clearly within the scope of the BICE.
- Plan-level advice is now generally within the scope of BICE. Indeed, BICE appears to be the only PTE available for plan-level advice with respect to nonproprietary mutual funds; DOL did not extend PTE 84-24 to or otherwise provide a product-specific PTE for that entirely commonplace activity.
- The circumstances in which the fiduciary definition itself was expanded in the Final Rule may necessitate reliance on the BICE in a broader range of circumstances.

The BICE remains unavailable for, e.g., discretionary advice or robo-advice arrangements.

Assets

The types of investments that can be recommended within the relief provided by the BICE are no longer expressly limited, but the preamble suggests that there may be "Tier 1" (original 13 asset classes) and "Tier 2" investments (anything not on original list), and outlines additional standards ("special care," training, etc.) and concerns (e.g., ongoing monitoring arrangements) for recommendations of Tier 2 investments to Retirement Investors.

BIC Contract

In the final exemption, the BIC contract is required only in the IRA setting, does not include the individual Adviser as a party, and can be executed along with other account-opening documentation rather than before the time a recommendation is first made.

- Because the BIC contract is the vehicle for the "ERISAfication" of IRAs and the source of a private right of action for IRA owners, it was unnecessary in the ERISA plan setting to DOL's purposes and created discontinuities with the statute that were difficult to explain.
- Nonetheless, it may be sound business practice to make use of binding contracts clarifying the scope of fiduciary responsibilities and other pertinent matters when Financial Institutions rely on BICE in their work with ERISA plans.

The warranties that must be included in the BIC contract were narrowed in constructive ways. For example, a warranty of compliance with all applicable laws, which would have had a number of pernicious effects, was eliminated. Similar language was also eliminated from a number of other PTEs that were finalized. (See "Other Revisions to the Complex of Exemptions" below.) But at the same time, DOL still noted its view that significant violations of applicable laws could amount to violations of the Impartial Conduct Standard. Also, to the extent permissible under applicable state or federal law, punitive damages and rescission may be contractually waived as remedies for breach of a BIC contract.

Best Interest Standard

Advice is in the Best Interest of the Retirement Investor if it meets a prudent investor standard "without regard" to the financial or other interest of the Adviser or Financial Institution or certain Affiliates or Related Entities or any other party. The preamble presents mixed messages regarding the extent to which this standard is the same as the ERISA § 404 standard; the PTE language itself is very close to the statute with respect to the duty of prudence but inexplicably persists with the proposed "without regard" formulation with respect to the duty of loyalty. And the preamble suggests at certain points that "conflicted" revenue is not allowable, when the weight of the preamble discussion would permit such revenue. It is entirely predictable that these aspects of the BICE will create difficulties in implementation and potentially in litigation.

Annuities

Recommendations of variable annuities and, in a change from the proposal, fixed indexed annuities to Retirement Investors will no longer qualify for reliance on PTE 84-24, as amended, and therefore will need to comply with BICE if a prohibited transaction exemption is needed. DOL relied in part on SEC and FINRA investor alerts regarding fixed index annuities (FIAs) to support its determination that FIAs are "appropriately subject to the protective conditions" of the BICE, rather than PTE 84-24, given their "risks and complexities."

FIAs face unique challenges under BICE. DOL did not directly address which entity should be considered the "Financial Institution" for Advisers recommending FIAs to Retirement Investors. But the preamble notes that, if a product manufacturer is the only entity satisfying the "Financial Institution" definition with respect to a particular transaction, the product manufacturer must acknowledge fiduciary status and exercise the required supervisory authority over the Advisers to ensure compliance with BICE, including entering into a contract in the case of IRAs and non-ERISA plans. In this regard, DOL did not address the situation where an Adviser might be authorized to act on behalf of several otherwise unrelated product manufacturers.

DOL declined to add other types of insurance distribution intermediaries to the BICE's list of Financial Institutions, as industry commenters had suggested, but made provision to consider an individual exemption for additional types of entities based on a showing of the regulatory oversight of those entities and their ability to effectively supervise individual Advisers' compliance with BICE.

DOL helpfully determined in the preamble that incremental compensation to fiduciaries in connection with annuity transactions is permissible under the Final Rule.

Level Fee Fiduciary

The Level Fee Fiduciary provisions appear to have been included in the BICE to cover conflicts arising when an Adviser recommends that a participant roll money out of a Plan into a fee-based account. It would also cover recommendations to switch from a "low activity commission-based account" to an account charging an asset-based fee.

Disclosures

While much of the detailed disclosure information has, at first glance, been dropped from the disclosure conditions, specific disclosure of costs, fees and other compensation must nevertheless be provided upon the request of the Retirement Investor. The costs, fees, and other compensation may be described in dollar amounts, percentages, formulas, or other means reasonably designed to present materially accurate disclosure of their scope, magnitude, and nature in sufficient detail to permit the Retirement Investor to make an informed judgment about the costs of the transaction and about the significance and severity of the Material Conflicts of Interest. The information required under this section must be provided to the Retirement Investor before the transaction, if requested before the transaction, and, if the request is made after the transaction, the information must be provided within 30 business days after the request. The preamble admits that the public website disclosure "is intended as much for intermediaries, consumer watchdogs, and other third parties as for plan parties or IRA owners." The extent to which the webpage disclosure can be developed and administered from existing resources will require company-by-company attention.

REVISED PTE 84-24

As granted in 1977, in its original form PTE 84-24 allowed certain parties to receive commissions when plans and IRAs purchased insurance and annuity contracts and mutual funds. In the absence of the exemption, the receipt of such payments would be treated as a prohibited transaction.

The amended exemption limits that relief to the purchase of Fixed Rate Annuity Contracts, insurance contracts (by plans and IRAs), and mutual fund shares (by plans only) and narrows the definition of permissible "commissions."

	COVERED ACTIVITY	CHANGES FROM THE 2015 PROPOSAL
PTE 84-24	Commissioned sales of insurance/annuity products and proprietary mutual funds	**Indexed Annuities.** Relief revoked for indexed annuities and similar annuities (as well as variable annuities); for both plans and IRAs, previous relief for variable annuities sold to plans under 2015 proposal revoked. **Best Interest Standard.** Consistent with other exemptions, Best Interest standard amended to align with ERISA § 404(a) language: retains "without regard" to standard but equated to "solely in the interest of" under ERISA § 404 (in the preamble). **Rollover Distributions.** Clarifies that relief applies to rollover or distribution transactions. **Group Fixed Annuities.** Group fixed annuities must guarantee return of principal net of "reasonable compensation" and provide a guaranteed declared minimum interest rate to qualify for relief. **Employee Benefits.** Expands net permissible compensation for insurance and annuities to include certain employee benefits, and would include payments made through third parties. **Insurance Company Compensation.** Clarifies that relief extends to receipt of compensation by insurance company. **Gross Dealer Concessions.** Preamble suggests that gross dealer concession and overrides will be considered "commissions." The exemption is "issued" as of June 7, 2016, and is intended to take effect on that date. The amended PTE can be relied upon as of the Final Rule's Applicability Date, April 10, 2017.

AS REVISED, PTE 84-24 IS INTENDED TO PROVIDE A MORE STREAMLINED EXEMPTION THAN THE BICE FOR LESS COMPLEX ANNUITY PRODUCTS THAT PROVIDE GUARANTEED LIFETIME INCOME.

Sutherland Commentary

As amended, the relief provided by PTE 84-24 is available for:

- Proprietary mutual funds, but only in the ERISA plan setting;
- "Fixed Rate Annuity Contracts" in either the ERISA plan or IRA setting, by which DOL means "immediate annuities, traditional annuities, declared rate annuities or fixed rate annuities (including deferred income annuities)"; that is, contracts that "provide payments that are the subject of insurance companies' contractual guarantees and that are predictable." Stable value contracts often would also seem to be within the intended scope (although the seller's exception may generally be available for stable value contracts and obviate the need for a PTE). The language used in the PTE itself to define these annuities is imperfect in certain technical respects and will need to be interpreted appropriately to effectuate DOL's stated intentions; and
- Insurance contracts in either the ERISA plan or IRA setting. Existing guidance provides that this category includes life insurance (which is unavailable in IRAs under the tax law), insurance contracts used to provide other welfare benefits, surety bonds, and recordkeeping/administrative services contracts.

DOL clarified that employee benefits provided to full-time life insurance salespersons and gross dealer concessions, along with traditional forms of insurance and mutual fund commissions including trail commissions, are forms of compensation permitted under PTE 84-24, but otherwise narrowed the exemption to exclude 12b-1 fees, revenue sharing payments, administrative fees/payments or marketing fees/payments.

- That distinction—wholly unnecessary in our judgment, since there is no qualitative difference in the nature of the conflict presented by any of these forms of payment, and the reasonable compensation condition sufficiently polices any concerns about excessive payments—will no doubt create new line-drawing complications over time.

OTHER REVISIONS TO THE COMPLEX OF EXEMPTIONS

The 2015 proposed rule would have added, revised or revoked a number of other PTEs dealing with investment activities. The final PTEs are, on balance, similar to what was proposed, with some modifications:

EXEMPTION	COVERED ACTIVITY	FINAL CHANGES
PTE 75-1, PART II(2)	Sales of nonproprietary mutual funds by broker-dealer	Revoked, and now covered in PTE 86-128.
PTE 75-1, PARTS III, IV	Underwritings and market-making	Incorporates Impartial Conduct Standards from the BICE (without the warranty).
PTE 75-1, PART V	Extension of credit to a plan/IRA in connection with a securities transaction	Revised: (1) to permit investment advice fiduciaries to receive compensation on arm's-length credit extended to avoid a failed securities transaction (other than a failure caused by the fiduciary) if Rule 10b-16 or comparable disclosure is provided in advance; and (2) recordkeeping provisions.
NEW PTE	Principal transactions in certain assets	• Available to investment advisers, broker-dealers and banks who are investment advice fiduciaries ("Financial Institutions"). • Permits Financial Institutions to effect principal transactions and riskless principal transactions in "principal traded assets." • Financial Institutions can also rely on BIC exemption for riskless principal transactions. • "Principal traded assets" include debt securities, certificates of deposit and interests in unit investment trusts under the Investment Company Act. • "Debt security" is cross-referenced to SEC Rule 10b-10, and includes certain registered debt securities issued by U.S. companies, U.S. Treasury securities, and certain agency debt securities and asset backed securities. • Financial Institution must acknowledge fiduciary status, adhere to impartial conduct standards and implement policies and procedures designed to prevent violations of impartial conduct standards. • Financial Institution must refrain from giving or using incentives for Advisers to act contrary to the Best Interest of the Retirement Investor.

EXEMPTION	COVERED ACTIVITY	FINAL CHANGES
NEW PTE *CONT'D*	Principal transactions in certain assets	• Financial Institution must seek to obtain best execution reasonably available for principal transactions. • Financial Institution must provide a written confirmation complying with SEC Rule 10b-10. • Financial Institution must provide annual list of principal transactions effected.
PTE 77-4	Allocation by discretionary asset management fiduciary to proprietary mutual funds	Incorporates Impartial Conduct Standards from the BICE (without the warranty).
PTE 80-83	Use of proceeds from sale of securities to reduce or retire indebtedness	Incorporates Impartial Conduct Standards from the BICE (without the warranty).
PTE 83-1	Mortgage pool investment trusts	Incorporates Impartial Conduct Standards from the BICE (without the warranty).
PTE 86-128	Commissions for the execution of securities transactions by a fiduciary; agency cross-transactions	• Revoked for investment advice fiduciaries to IRAs in securities and agency cross-transactions. Investment management fiduciaries meeting conditions get relief. • Clarifies that § 408(b)(2) relief, and disclosures, may be required in addition to PTE 86-128 compliance. • Revised to provide that relief is available only for compensation to the fiduciary or a Related Entity in the form of a brokerage commission or sales load paid by the plan/IRA for executing the transaction; no relief for any form of indirect compensation. • Adds relief for non-IRA principal transactions in nonproprietary mutual funds; the only compensation permitted is the commission (sales load) disclosed by the mutual fund; retains conditions from PTE 75-1 and adds the PTE 86-126 anti-churning requirement. • Incorporates Impartial Conduct Standards from the BICE (without the warranty). • Clarifies that trustees can rely on recapture of profits exception. • The fiduciary rather than the plan must satisfy recordkeeping requirements.

NEW COMPLIANCE STRATEGY?

<table>
<tr><th rowspan="2">COMMON INVESTMENTS</th><th colspan="2">401(K) PLAN-LEVEL SERVICES</th><th rowspan="2">401(K) PARTICIPANT</th><th rowspan="2">IRA OWNER</th></tr>
<tr><th>MID/LARGE/MEGA</th><th>MICRO/SMALL</th></tr>
<tr><td rowspan="2">Any</td><td colspan="4">• Not a fiduciary
  • Limit services to investment education
  • Seller's exception
• Negate any conflicted interest
  • Enterprise-wide fee neutrality
  • Return economic benefit of varying revenue to plan/IRA (Frost Bank Advisory Opinion)
  • Outsource advice to independent financial expert (Sun America Advisory Opinion)</td></tr>
<tr><td colspan="3">PTE 86-128 for execution of securities transaction
Not a fiduciary/platform exception</td><td></td></tr>
<tr><td>Non-proprietary mutual fund/agency</td><td>BICE</td><td>BICE</td><td>BICE
§ 408(g)</td><td>BICE
§ 408(g)</td></tr>
<tr><td rowspan="2">Proprietary mutual fund/agency</td><td>BICE
PTE 84-24</td><td>BICE
PTE 84-24</td><td>BICE
§ 408(g)
PTE 84-24</td><td>BICE
§ 408(g)</td></tr>
<tr><td colspan="4">PTE 77-4 (for discretionary account)</td></tr>
<tr><td>Annuity</td><td>BICE
PTE 84-24 (if fixed)
§ 408(b)(8) (if VA)</td><td>BICE
PTE 84-24 (if fixed)
§ 408(b)(8) (if VA)</td><td>BICE
§ 408(g)
PTE 84-24 (if fixed)
§ 408(b)(8) (if VA)</td><td>BICE
§ 408(g)
PTE 84-24 (if fixed)
§ 408(b)(8) (if VA)</td></tr>
<tr><td>CDs</td><td>BICE
§ 408(b)(4)</td><td>BICE
§ 408(b)(4)</td><td>BICE
§ 408(g)
§ 408(b)(4)</td><td>BICE
§ 408(g)
§ 408(b)(4)</td></tr>
<tr><td>Collective investment fund</td><td>BICE
§ 408(b)(8)</td><td>BICE
§ 408(b)(8)</td><td>BICE
§ 408(g)
§ 408(b)(8)</td><td>N/A</td></tr>
<tr><td>Alternatives</td><td>BICE</td><td>BICE</td><td>BICE
§ 408(g)</td><td>BICE
§ 408(g)</td></tr>
</table>

For retirement product and service providers working with ERISA plans and IRAs, the regulatory structure permits a three-tier compliance strategy to deal with conflicted interest and other fiduciary considerations:

- Avoid fiduciary status—the only type of provider to which these conflict of interest and other standards attach—if that status is unintended and inappropriate. The Final Rule greatly narrows the circumstances in which this will be a viable compliance strategy.

- If a fiduciary, negate any conflicted interest by, e.g., enterprise-wide fee leveling, or returning the economic benefit of any varying revenue to the plan or IRA, or by outsourcing the advice leading to that varying revenue to an independent financial expert. This remains an effective compliance strategy under the Final Rule.

- If a fiduciary and the conflicted interest cannot be negated, rely on an applicable statutory or administrative PTE. It appears that the BICE as modified may be a universally applicable compliance solution. There are, however, various other exemptions for specific investment products (PTE 77-4 or 84-24 for proprietary mutual funds, for example, or ERISA § 408(b)(4) for interest-bearing bank products) or types of advice (e.g., the § 408(g) exemption enacted in the Pension Protection Act for participant-level advice) that are also available in specific circumstances.

The chart above enumerates a number of these alternative solutions, and common circumstances in which they are available, that may properly form part of a compliance strategy after the Final Rule.

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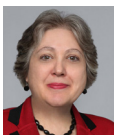

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