FINAL DOL FIDUCIARY RULE: SUMMARY

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On April 6, 2016, the Department of Labor completed the rulemaking process it officially launched on April 20, 2015, by releasing (i) a new final regulation redefining "investment advice fiduciary" for purposes of ERISA and tax rules applicable to retirement plans and IRAs, and (ii) final modifications to the complex of exemptions, providing relief from the "conflict of interest" prohibitions under those rules, for selling and other investment-related activities. As with the proposal, the final rules are expressly intended to restructure legal obligations in respect of the manner in which FSI member firms and advisers interact with retirement investors.

In its response to the DOL proposal through comment letters, hearing testimony, meetings with policymakers in the Administration and on Capitol Hill, and other commentary, FSI strongly advocated for enhancing investor protection while ensuring access by all to affordable retirement advice, products, and services. More specifically, FSI supported:

- *Uniform Fiduciary Standard:* A fiduciary standard of care that can be adopted uniformly across all types of investment accounts and can apply to all investment professionals.
- *Compensation Governance:* Policies and procedures reasonably designed to manage material conflicts of interest.
- *Robust Disclosures:* A comprehensive two-tiered disclosure regime – a short form disclosure provided as part of account-opening documentation, supplemented by a disclosure of detailed compensation and material conflicts information provided free of cost through the firm's website or brochures – plus other point-of-sale and annual disclosures.
- *Interagency Coordination:* Coordination between the Department, SEC, FINRA and state securities regulators.[1]

While the final rules are responsive to FSI's comments in a number of respects, they continue to raise concerns. The final rule substantially follows the structure and concept of the proposal, with improvements primarily made in its operational elements. We remain concerned that the meaningful compliance conditions, costs and liabilities DOL retained in the final rule will (i) increase the cost of and limit access to investment services for retirement investors, and (ii) challenge firms and advisers with more constrained resources in very difficult ways. We are also concerned that DOL has functionally become an additional regulator for all retail accounts, because of the potential "knock on" effect from these rules for retirement accounts.

Summaries of both FSI's comments and the final rules are provided below.

Important 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, 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 also will be available on April 10, 2017.

Exceptions—For Financial Institutions and Advisers, implementation of the BIC Exemption 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, there is an improved grandfathering rule under the BIC Exemption.

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

[1] Senator Johnson's report of February 24, 2016, documents that such coordination remained lacking, although the preambles to the final rule dispute that conclusion.

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COMMENT TOPIC: PUBLIC POLICY CONTEXT AND ADVERSE IMPACTS OF DOL'S PROPOSAL		
Barrier to Uniform Fiduciary Standard: The proposal would be a barrier to a uniform fiduciary standard of care that could apply to all investment advice professionals for all retail accounts.	FSI's concerns were acknowledged, but no action was taken. The DOL does not believe that a uniform fiduciary standard can apply to all retail accounts.	*...the governing statutes [relating to FINRA and SEC regulations] do not permit the DOL to make the obligations of fiduciary investment advisers under ERISA and the Code identical to the duties of advice providers under the securities laws. ERISA and the Code establish consumer protections for some investment advice that does not fall within the ambit of federal securities laws, and vice versa. Even if each of the relevant agencies were to adopt an identical definition of "fiduciary," the legal consequences of the fiduciary designation would vary between agencies because of differences in the specific duties and remedies established by the different federal laws at issue.*
Adds Regulatory Complexity: The proposal would add complexity to an already complicated regulatory environment for broker-dealers, investment advisers, financial advisors, and investors. It overlays the existing regime with an intricate regulatory framework that would raise new barriers to the availability of professional investment services for millions of Americans.	No action taken. Final rule still overlays current regime with a complex regulatory framework, and does little to align standards.	Not addressed.
Exponential Increase in Number of Standards: The proposal would require investors to transition from understanding two standards of care to understanding six different standards of care.	FSI's concerns were acknowledged, but no action was taken. The DOL does not believe that a uniform fiduciary standard can apply to all retail accounts.	See above.
Reduces Access: The proposal would reduce access to retirement advice and services for low and middle-income investors by favoring passive investment "robo-advice" over professional and personalized investment guidance. The Proposal would also establish road blocks that prevent or deter Financial Advisors from offering their services to small businesses seeking to create retirement accounts for their employees.	**Action taken.** "Hire Me" discussions no longer considered fiduciary advice. Education exemption modified to allow asset allocation models and interactive models to identify specific investments in certain circumstances.	*The DOL acknowledges commenters' concerns that some employers and service providers could restrict the type of investment education they provide regarding rollovers and plan distributions based on concerns about fiduciary liability. Accordingly, the final rule (like the 2015 Proposal) includes provisions that describe in detail the distinction between recommendations that are fiduciary investment advice and educational and informational materials.*

FSI COMMENT	TREATMENT IN FINAL RULE	DOL COMMENTARY
COMMENT TOPIC: PUBLIC POLICY CONTEXT AND ADVERSE IMPACTS OF DOL'S PROPOSAL *CONT'D*		
U.K. RDR: The United Kingdom's experience with Retail Distribution Review foreshadows the negative impact that the proposal will have on small accounts in the U.S.	FSI's concerns were acknowledged; however the DOL dismissed the direct impact of RDR on small accounts in the U.K.	*...recent experience in the United Kingdom suggests that potential gaps in markets for financial advice are driven mostly by factors independent of reforms to mitigate adviser conflicts. Commenters' conclusions that stem from an assumption that advice will be unavailable therefore are of limited relevance to this analysis. Nonetheless, the DOL notes that these commenters' claims about the consequences of the rule would still be overstated even if the availability of advice were to decrease.*
COMMENT TOPIC: INVESTMENT ADVICE DEFINITION REQUIRES REFINEMENT		
Intent: Absent a representation or acknowledgement of fiduciary status, the determination of whether a trusted "fiduciary" relationship has arisen between the retirement investor and adviser must take account of the parties' contemplation, and cannot be wholly objective.	**Action taken.** Reasonable person standard now added to the Final Rule in two important respects: • The definition of a "recommendation" that will trigger fiduciary status has been amended. Going forward, the determination of whether a "recommendation" has been made is an objective rather than subjective inquiry. The more individually tailored the communication is to a specific advice recipient or recipients about, for example, a security, investment property, or investment strategy, the more likely the communication will be viewed as a recommendation. • In addition, any 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 respect to the comments that emphasized the breadth of the term "suggestion," the DOL notes that the same term is used in the FINRA guidance and securities laws and related regulations to define and establish standards related to investment recommendations.* *...the final rule includes new text to emphasize that there must be an investment "recommendation" as a threshold issue and initial step in determining whether investment advice has occurred, and clarifies that a recommendation requires that there be a call to action that a reasonable person would believe was a suggestion to make or hold a particular investment or pursue a particular investment strategy.*

FSI COMMENT	TREATMENT IN FINAL RULE	DOL COMMENTARY
COMMENT TOPIC: INVESTMENT ADVICE DEFINITION REQUIRES REFINEMENT *CONT'D*		
	Final Rule also now clarifies 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.	
Mutuality: That contemplation cannot be one-sided, but must be shared between the investor and the Adviser.	Action not taken. DOL specifically rejected a mutuality or "meeting of the minds" standard, citing compliance concerns.	*As explained in the preamble to the 2015 Proposal, the parties need not have a subjective meeting of the minds on the extent to which the advice recipient will actually rely on the advice, but the circumstances surrounding the relationship must be such that areasonable person would understand that the nature of the relationship is one in which the adviser is to consider the particular needs of the advice recipient.*
COMMENT TOPIC: CARVE-OUTS FROM THE DEFINITION OF FIDUCIARY INVESTMENT ADVICE NEED EXPANSION		
Counterparty Carve-Out: The Counterparty Carve-out should be expanded to cover advice paid for through plan assets, and should cover plans of any size. All plan fiduciaries are required to have or obtain the type of financial expertise that the DOL uses to justify the "large-plan" carve out.	FSI's concerns were acknowledged; however the carve-out was not expanded to cover advice paid through plan assets; 100 participant requirement was dropped in favor of a carve-out for fiduciaries who have financial expertise or manage at least $50M in plan assets.	*The DOL does not believe it would be consistent with the language or purposes of ERISA... to extend this exclusion to advice given to small retail employee benefit plan investors or IRA owners.* *"...the DOL agrees with the commenters that criticized the proposal with arguments that the criteria in the proposal were not good proxies for appropriately distinguishing non-fiduciary communications taking place in an arm's length transaction from instances where customers should reasonably be able to expect investment recommendations to be unbiased advice that is in their best interest." "Thus, after carefully evaluating the comments, the DOL has concluded that the exclusion is better tailored to the DOL's stated objective by requiring the communications to take place with plan or IRA fiduciaries who are independent from the person providing the advice and are either licensed and regulated providers of financial services or plan fiduciaries with responsibility for the management of $50 million in assets."*

FSI COMMENT	TREATMENT IN FINAL RULE	DOL COMMENTARY
COMMENT TOPIC: CARVE-OUTS FROM THE DEFINITION OF FIDUCIARY INVESTMENT ADVICE NEED EXPANSION *CONT'D*		
Education Carve-Out: The Education Carve-out must preserve investor access to meaningful investment education. The Proposal's changes precluding identification of specific investment alternatives will deny investors access to helpful information that greatly benefits their investing experience.	**Action taken.** DOL reversed course on these changes. The final rule provides that plan investment education materials (asset allocation models and interactive tools) that meet certain requirements may identify specific investment alternatives.	*Although the DOL is open to continuing a dialog on possible approaches for additional regulatory or other guidance in this area, when advisers use such tools and models to effectively recommend particular investments, they should be prepared to adhere to fiduciary norms and to make sure their investment recommendations are in the investors' best interest.*
Platform Carve-Outs: The Platform Provider/Selection and Monitoring Assistance Carve-outs should be expanded to cover IRA platforms. IRA owners are fully capable of understanding that a provider's standardized IRA platform is not individualized to the needs of the IRA owner.	FSI's concerns were acknowledged; however the DOL elected not to expand these carve outs to IRAs.	*Without an independent plan fiduciary overseeing the investment lineup and signing off on any disclaimers of reliance on the advice, there is too great a danger that the exclusion would effectively shield fiduciary recommendations from treatment as such, even though the IRA owner reasonably understood the communications as constituting individualized recommendations on how to manage assets for retirement....* *Consequently, the final rule declines to extend application of the platform provider provisions to plan participants and beneficiaries, and IRAs.*
COMMENT TOPIC: BEST INTEREST CONTRACT EXEMPTION (BICE) REQUIRES SIGNIFICANT CHANGES TO ENSURE INVESTORS HAVE ACCESS TO PERSONALIZED RETIREMENT ADVICE		
The BICE Should be Available for Discretionary Accounts. The best interest standard, coupled with appropriate conflicts policies and disclosures, provides an equally effective solution in these circumstances as in the case where the financial Adviser is only providing advice and receiving commission-based compensation.	FSI's concerns were acknowledged; however the DOL elected not to expand BICE protection to discretionary accounts.	*The DOL has considered these comments but has determined not to broaden the exemption to include relief for fiduciaries with investment discretion over the recommended transactions....* *Including discretionary fiduciaries in the relief provided by the exemption would expose discretionary fiduciaries – and the Retirement Investors they serve as fiduciaries -- to conflicts that they are currently not exposed to.*

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COMMENT TOPIC: BEST INTEREST CONTRACT EXEMPTION (BICE) REQUIRES SIGNIFICANT CHANGES TO ENSURE INVESTORS HAVE ACCESS TO PERSONALIZED RETIREMENT ADVICE *CONT'D*		
Written Contract Requirement: The BICE written contract requirement is inconsistent with customary practices in the financial services industry and reasonable investor expectations. FSI encourages the DOL to reconsider the BICE pre-advice, pre-transaction contract requirement.	**Action taken.** In the final exemption, the BICE 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 prior to the time a recommendation is first made	*Based upon these objections [from commenters], the DOL has deleted the requirement that individual Advisers be parties to the contract.* *The DOL eliminated the proposed contract requirement with respect to ERISA plans in this final exemption in response to public comment on this issue.* *The DOL did not intend to chill developing advice relationships or limit investors' ability to shop around. Therefore, the DOL adjusted the exemption on this point by deleting the proposed requirement that the contract be entered into prior to the advice recommendation.*
The Best Interest Standard Should Incorporate the ERISA Duty of Loyalty. This well-developed statutory standard does not bar all competing interests on the part of a fiduciary, so long as the retirement investor's interests are put first.	**Action taken.** ERISA's duty of loyalty standard under section 404 incorporated into the best interest standard.	*The final exemption retains the Best Interest definition as proposed, with minor adjustments. The first prong of the standard was revised to more closely track the statutory language of ERISA section 404(a), and, is consistent with the DOL's intent to hold investment advice fiduciaries to a prudent investment professional standard.*
The Best Interest Standard Should Rely on the Adviser and the Firm Together to Manage Potential Conflicts. A process that leverages existing suitability and other regulatory processes can be incorporated into the BICE without the costs and uncertainties of a new compliance model.	The DOL did not address this directly with regard to conflicts, but made clear that the FINRA suitability standard was inadequate for BICE purposes.	*The DOL has not specifically incorporated the suitability obligation as an element of the Best Interest standard, as suggested by FINRA but many aspects of suitability are also elements of the Best Interest standard…The [FINRA suitability standard], however, does not do any of the following: reference a best interest standard, clearly require brokers to put their client's interests ahead of their own, expressly prohibit the selection of the least suitable (but more remunerative) of available investments, or require them to take the kind of measures to avoid or mitigate conflicts of interests that are required as conditions of this exemption.*

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COMMENT TOPIC: BEST INTEREST CONTRACT EXEMPTION (BICE) REQUIRES SIGNIFICANT CHANGES TO ENSURE INVESTORS HAVE ACCESS TO PERSONALIZED RETIREMENT ADVICE *CONT'D*		
Definition of Asset: The BICE definition of "Asset" hinders best interest advice by impeding diversification in retirement accounts and exposing investors to greater risk. FSI proposes a broader definition of "Asset" to ensure financial advisors can recommend the best investments for a client's specific needs	**Action taken.** BICE definition of Asset eliminated; however, anything not on original list of asset classes would be subject to additional fiduciary advice standards	*After careful consideration of these comments, the DOL eliminated the definition of Asset in the final exemption. In this regard, the DOL ultimately determined that the other safeguards adopted in the final exemption…were sufficiently protective to allow the exemption to apply more broadly to all securities and other investment property.*
IRA Rollovers: The unclear application of the many BICE requirements to IRA rollover advice creates uncertainty that will jeopardize retirement savings. FSI urges the DOL to clearly state that rollover advice is eligible for protection under BICE, requiring advisers to meet a best interest standard.	**Action taken.** BICE amended to expressly provide rollover relief.	*In response to commenters' concerns, the exemption expressly provides relief for all categories of fiduciary recommendations set forth in the Regulation. In addition to covering asset recommendations, for example, an Adviser and Financial Institution can provide investment advice regarding the rollover or distribution of assets of a plan or IRA…*
Levelized Compensation: The BICE restrictions on compensation are duplicative and do not serve investor interests. Levelized fee arrangements would make access to financial advice cost-prohibitive for small investors.	**Action taken.** Levelized fee arrangements subject to a streamlined version of the BICE.	*The provisions for Level Fee Fiduciaries in this exemption respond to [commenters] by streamlining the conditions applicable to fiduciaries that provide advice on a Level Fee basis.*
Compliance Costs: The BICE exposes financial institutions to a myriad of compliance costs and added liability risks that render the exemption unusable in its current form.	**Action taken.** The DOL attempted to make the BICE more workable by eliminating the contract requirements for ERISA plans, streamlining compliance for level fee fiduciaries, etc.	*See above.*
Operational Difficulties: The BICE disclosure requirements will require access to third-party information and massive overhauls of administrative systems thereby increasing costs substantially. Streamlined disclosures should be required, instead.	**Action taken.** The DOL created a two-tier approach to disclosure. However, while much of the detailed disclosure information has been dropped from the disclosure condition, much of it must nevertheless be provided upon the request of the Retirement Investor.	*The DOL significantly revised the disclosures from the proposed exemption…. The DOL carefully considered the comments in order to formulate an approach in the final exemption that responded to commenters' legitimate concerns, while ensuring fair disclosure of important information to Retirement Investors.*

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COMMENT TOPIC: BEST INTEREST CONTRACT EXEMPTION (BICE) REQUIRES SIGNIFICANT CHANGES TO ENSURE INVESTORS HAVE ACCESS TO PERSONALIZED RETIREMENT ADVICE *CONT'D*		
Remedies: The best interest standard should be enforced through existing statutory structures. In particular, the creation of a new private right of action under BICE appears to be beyond the scope of DOL's delegated authority. That private right of action displaces SEC and FINRA authority over industry enforcement and investor disputes, and conflicts with ERISA in the case of investment advice to ERISA plans. Both arbitration as a forum for "best interest" complaints and mandatory arbitration provisions should be allowed.	Action taken. The contract may provide for binding arbitration of individual claims, and may waive contractual rights to punitive damages or rescission.	*....a number of features of this final exemption, discussed more fully below, should temper concerns about the risk of excessive litigation. In particular, the exemption permits Advisers and Financial Institutions to require mandatory arbitration of individual claims, so that claims that do not involve systemic abuse or entire classes of participants can be resolved outside of court. Similarly, the exemption permits waivers of the right to obtain punitive damages or rescission based on violation of the contract. In the DOL's view, make-whole compensatory relief is sufficient to incentivize compliance and redress injury caused by fiduciary misconduct.*
Grandfathering Provision: The BICE grandfathering provision is ineffective and should be expanded to account for customary client maintenance procedures.	**Action taken.** BICE grandfathering expanded to provide for limited advice, but no new investments.	*The DOL concurs with commenters that it is appropriate to provide broader grandfathering relief as a means of affording the industry time to transition to the new regulatory structure, and to minimize disruption of existing arrangements.*
THE PROPOSAL'S PROHIBITED TRANSACTION CLASS EXEMPTION FOR DEBT SECURITIES TRANSACTIONS EFFECTED ON A PRINCIPAL BASIS IS INADEQUATE		
Riskless Principal Trades: Riskless principal trades are the functional equivalent of agency transactions and should be excluded from the PTE.	**Action taken.** Riskless principal transactions excluded.	*The DOL also clarified that this exemption is available for riskless principal transactions involving principal traded assets. The definition of a principal transaction now explicitly excludes riskless principal transactions, and the exemption's scope specifically encompasses both principal transactions and separately-defined riskless principal transactions. In this manner, the exemption now clearly draws a distinction between principal transactions and riskless principal transactions and provides relief for both with respect to principal traded assets.*

FSI COMMENT	TREATMENT IN FINAL RULE	DOL COMMENTARY
THE PROPOSAL'S PROHIBITED TRANSACTION CLASS EXEMPTION FOR DEBT SECURITIES TRANSACTIONS EFFECTED ON A PRINCIPAL BASIS IS INADEQUATE *CONT'D*		
Operational Difficulties: The separate contract requirements, confirmation mark-up disclosure requirements and pricing requirements are all costly and very challenging to implement.	**Action taken.** Mark-up disclosure eliminated.	*The DOL was persuaded by the commenters that required disclosure of the mark-up or mark-down might introduce significant complexity to compliance with the exemption…*
Investor Confusion: The multiple disclosures will not provide sufficient context and education to be useful for investors.	FSI's concerns were acknowledged, but no action was taken.	*The DOL adopted the annual disclosure for the principal basis PTE, despite comments indicating it was unnecessary and duplicative of other disclosures.*
THE PROPOSAL'S PROHIBITED TRANSACTION CLASS EXEMPTION 84-24 WILL REDUCE ACCESS		
Restricts Access: The amendments to PTE 84-24 will require many firms to discontinue relationships that have traditionally relied on the protections of PTE 84-24, thereby reducing access to professional advice.	Not addressed.	Not addressed.
Lack of Clarity: Uncertainty regarding the definition of "insurance commission" clouds the compliance landscape and exposes the industry to liability risks many financial advisors will be unwilling or unable to assume.	**Action taken.** Definition of insurance commission was clarified in several respects.	*To provide certainty with respect to the payments permitted by the exemption, however, the amended exemption now provides a specific definition of Insurance Commission and Mutual Fund Commission.*
THE PROPOSAL REQUIRES A LONGER IMPLEMENTATION PERIOD		
Applicability Date: Our members will need, at minimum, 36 months to put the Proposal into place, assuming that DOL eliminates many of the BICE disclosures, adopts a conventional grandfathering rule, and that many of the existing prohibited transaction class exemptions are preserved in current form. If DOL does not make these changes to BICE, our members require additional time to achieve compliance.	Action taken. Members will have 18, rather than 8, months to fully comply with the BICE and Principal Transactions Exemption.	*The DOL has also determined that, in light of the importance of the final rule's consumer protections and the significance of the continuing monetary harm to retirement investors without the rule's changes, that an applicability date of one year after publication of the final rule in the Federal Register is adequate time for plans and their affected financial services and other service providers to adjust to the basic change from non-fiduciary to fiduciary status.*

OVERVIEW: FINAL DOL FIDUCIARY RULE

FIDUCIARY DEFINITION:

- Clarifies 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
- Scope of services that qualify as a recommendation regarding the management of investment property clarified
- Appraisals reserved for future rulemaking
- Clarifies when advice is considered "directed to" the advice recipient
- Makes clear that marketing one's own services (or the services of an affiliate) without an investment recommendation does not trigger fiduciary status
- Carve-Outs:
  - Although eliminated in name, carve-outs retained in the form of exceptions to the definitions of "recommendation" (platform providers, selection and monitoring assistance, general communications, and investment education) and "fiduciary investment advice" (counterparty transactions, swaps, employee communications).
  - Model allocations will not be considered "recommendations" even if the materials identify specific plan investments (this does not apply to IRAs)
  - Counterparty carve-out refashioned to provide instead that a person will not be deemed a 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. Carve-out for plans with 100 or more participants was dropped.
  - 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"

BIC EXEMPTION:

- Contracts: Contract requirements are somewhat liberalized:
  - Executed contract will generally be required only for IRA and will be a two-party contract between the retirement investor and the financial institution (not the Advisor)
  - Financial Institution, however, will be required to acknowledge that both it and the Advisor are fiduciaries.
  - Impartial conduct standard tweaked a bit to be closer to ERISA §404 standard, but still includes "without regard to" language.
  - Warranties: "Compliance with all applicable laws" dropped; standards for variable compensation and policies/procedures loosened.
  - Exculpatory Provisions. Prohibition against exculpatory provisions expanded to prohibit liquidated damages clause; relaxed to permit waiver of punitive damages and rescission rights to extent permitted under applicable law.
- Streamlined Conditions: "Level Fee Fiduciaries" and "Bank Networking Arrangements" are exempt from most of the conditions of the exemption.

- Disclosure: While some of the more onerous disclosure requirements have been dropped (e.g., those that would have violated Securities or other laws), an extensive disclosure scheme will still be required:
  - The annual disclosure requirement has been dropped. However, transactional disclosure will have to be updated for repeat recommendations unless it has been less than a year since last provided.
  - Public website is still required, but with streamlined information requirements.
  - More detailed disclosure must still be provided upon request (meaning that system build costs must still be incurred?)
- Proprietary Products and Third-Party Payment Arrangements: A safe harbor is provided for proprietary products and third-party payment arrangements.
- Minor Errors and Omissions: In specified limited circumstances and subject to conditions, minor errors and omissions will not cause a potential prohibited transaction to lose reliance on the exemption.
- List of Permitted Assets: The types of investments that can be recommended are no longer expressly limited but the preamble effectively creates "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.

PTE 84-24:

- Provides that the amended exemption will be limited to "Fixed Rate Annuity Contracts", and will not cover transactions involving variable annuity contracts, indexed annuities, or similar annuities. Instead, such transactions will be subject to the Best Interest Contract Exemption or another exemption.
- Revocation of PTE 84-24 relief with regard to variable and indexed annuities applies with regard to both plans and IRAs.
- Definition of "Insurance Commissions" was amended to eliminate the prohibition on payments from third party sources, such as independent marketing organizations. In addition to Insurance Commissions, the payment of related employee benefits is covered under the exemption.
- Revised disclosure requirements.

EFFECTIVE DATE/IMPLEMENTATION DATE:

- The "official" effective date of the revised definition of "fiduciary investment advice" and the date the exemptions are considered "issued" is June 7, 2016.
- As of April 10, 2017, the revised definition of "fiduciary investment advice" will apply.
- With noted exceptions, the prohibited transaction exemptions also will be available on April 10, 2017.
  - Exceptions—For Financial Institutions and Advisers, implementation of the BIC Exemption and the Principal Transactions Exemption will occur in phases—
  - A Transition Period runs from the April 10, 2017, issuance date to January 1, 2018.
  - During the Transition Period, a reduced number of the conditions of the exemptions apply.

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

GRANDFATHER RULE IN THE BIC EXEMPTION:

- The final BIC Exemption includes a "grandfather" for retirement accounts in existence on the applicability date for the final rule (April 10, 2017).
- Can provide limited advice. The grandfather has been conditionally broadened to permit advisers and financial institutions to provide advice after the applicability date on investments that were acquired for a retirement account prior to the applicability date. 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.

PRINCIPAL TRANSACTIONS PTE:

- Includes a PTE for principal transactions, similar to what was proposed last year.
- Riskless principal transactions recognized. In response to comments, the final principal transactions PTE differentiates riskless principal transactions from principal transactions effected from the principal's own account.
- BIC Exemption Alternative. While advisers and financial institutions can rely on the principal transactions PTE for riskless principal transactions, they also will be able rely on the BIC exemption so long as they comply with the BIC exemption conditions.
- Best execution requirement. The final principal transactions PTE eliminated the proposed requirement that the purchase or sale price for the transaction could not be "unreasonable under the circumstances," and instead requires advisers and financial institutions relying on the PTE to seek to obtain best execution reasonably available for the principal transaction; this requirement would be satisfied if they comply with FINRA rules for fair prices and commissions and best execution.
- Other investments added. The final PTE was expanded to cover not only debt securities, but also certificates of deposit and interests in registered unit investment trusts.
- Confirmation disclosure. The final PTE eliminated the explicit requirement to provide mark-up and mark-down information on confirmations of principal transactions.
- The cost-benefit analysis in the final rule does not marshal materially different support for this rulemaking.

FINAL RULE – THE REVISED "INVESTMENT ADVICE FIDUCIARY" DEFINITION

PLANS AND IRAS IN SCOPE

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 IRC §4975(e)(1), to the following non-ERISA arrangements:

- Traditional IRA accounts and annuities,
- Roth IRAs,
- Archer medical savings accounts,
- Health savings accounts, and
- Coverdell education savings accounts.

There is, of course, the risk of a "knock on" effect for accounts outside the scope of ERISA and IRC §4975 – e.g., governmental plans, non-ERISA 403(b)'s, and even non-retirement retail accounts -- effectively making the DOL an additional regulator for all these accounts.

CORE DEFINITION

1975 "5-PART" DEFINITION
For a direct or indirect fee, a person:
1. Renders advice as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing or selling securities or other property
2. On a regular basis
3. Pursuant to a mutual agreement, arrangement or understanding, with the plan or a plan fiduciary, that
4. The advice will serve as a primary basis for investment decisions with respect to plan assets, and that
5. The advice will be individualized based on the particular needs of the plan.

2016 "3X3" DEFINITION	
Person provides at least one service in Column A directly to an ERISA plan, ERISA plan fiduciary/ participant/ beneficiary, IRA or IRA owner, for a direct/indirect fee received (including by affiliate) in connection with that service, and has a status in Column B	
A. Service	**B. Status**
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 3. Directs advice to recipient regarding a particular investment management decision

Under the final revised fiduciary definition, the five-part investment advice fiduciary test adopted in 1975 is replaced by the expanded definition introduced in the proposed rule, with limited modifications from the 2015 proposal, and subject to several exceptions (replacing the "carve-outs" in the proposal). The final definition operates as follows:

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, or 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.

UNLESS ONE OF THE FOLLOWING EXCEPTIONS APPLIES

EXCEPTIONS TO "RECOMMENDATION"

- 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.

UNLESS ONE OF THE FOLLOWING EXCEPTIONS APPLIES

EXCEPTIONS TO "FIDUCIARY INVESTMENT ADVICE"

- "Seller" Transactions: Transactions with fiduciaries (financial institutions) with financial expertise or who manage at least $50M in assets, as discussed below.
- 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, provided the employee receives only normal compensation for the work performed.

For this purpose, a "fee" includes any direct or indirect fee or other compensation for the advice received by the person (or an affiliate) from any source including "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." The final rule specifies a "but for" test to determine whether those fees are received in connection with the recommendation.

OBSERVATIONS ABOUT THE CORE DEFINITION

- The more individually tailored a communication is to a specific recipient about a specific investment, the more likely it will be viewed as a "recommendation."
- Generally, communications that require the adviser to comply with suitability requirements under insurance or securities laws will be treated as a "recommendation" under the final rule.
- According to the preamble, normal marketing of one's own services (or those of an affiliate) as a potential fiduciary should not itself trigger fiduciary status, up to the point that an investment recommendation is made.

SELLER'S EXCEPTION

The "seller's exception" was substantially restructured, in an effort to more directly identify transactions with independent fiduciaries with financial expertise. The two plan-based "carve-outs" were replaced with a single, simpler exception for fiduciaries managing $50 million or more in assets. In particular, the carve-out for plans with 100 or more participants was dropped. The exception was also broadened to include independent fiduciaries that are specified types of financial institutions. DOL declined to expand the exception to smaller plans or to individuals treated as sophisticated investors under securities laws.

PLAN PARTY	CONDITIONS
Advice with respect to an arm's length sale, purchase, loan, exchange or other transaction related to the investment of securities or other investment property to an independent fiduciary who is: • A bank • An insurance company • A registered investment adviser under federal or state law • A broker-dealer • Any independent fiduciary that holds or has under management total assets of at least $50 million (which may be established through representations). Basic regulatory qualifications are prescribed for each type of financial institution.	Providing to providing the advice, the counterparty/adviser: 1. Knows or reasonably believes that the independent fiduciary meets such criteria; 2. Knows or reasonably believes that the independent fiduciary is capable of evaluating investment risks independently, both in general and with respect to the specific transactions (which may be established through representations); 3. Fairly informs the independent fiduciary that the counterparty/adviser is not undertaking to provide impartial advice or to give advice in a fiduciary capacity, and of the existence and nature of its financial interests in the transaction; 4. Knows or reasonably believes that the independent fiduciary is a fiduciary under ERISA or the Internal Revenue Code with respect to the transaction and is responsible for exercising independent judgment with respect to the transaction (which may be established by representations); and The counterparty/adviser does not receive an investment advice fee or other compensation directly from the plan or fiduciary in connection with the transaction (other fees for other services are permissible).

INVESTMENT EDUCATION EXCEPTION

The 2015 proposed regulation would have upended longstanding 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
PLAN INFORMATION	Definition modified slightly to include descriptions of product features; investor rights and obligations; fee and expense information; and applicable trading restrictions.
GENERAL INVESTMENT INFORMATION	Modified slightly to include information on the effects of fees and expenses on the rate of return.
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: • Identifies all of the other designated investment alternatives with similar risk/return characteristics; and • 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.
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: • Identify all the other designated investment alternatives available under the plan that have similar risk/return characteristics; and • Are accompanied by a statement identifying where information in the alternatives may be obtained, including general plan information and participant-level fee information.

OBSERVATIONS ABOUT INVESTMENT EDUCATION EXCEPTION

As in the 2015 proposal, plan information 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 still may not include information on specific investment products, plan alternatives, or distribution options, or specific alternatives or services outside of the plan. It may, however, 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.

With respect to asset allocation models, the 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.

It remains permissible for interactive investment materials to evaluate distribution options, products or vehicles (based on plan information supplied by participant and general financial, investment, and retirement information).

FINAL RULE – EXEMPTIONS

The Final Rule is accompanied by the most substantial reworking of prohibited transaction exemptions (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.

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.

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 FINAL VERSION OF THE BICE PERMITS:	
BY AN "ADVISER," "FINANCIAL INSTITUTION," "AFFILIATE" OR "RELATED ENTITY"	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.

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, the Financial Institution enters into an enforceable written contract with the Retirement Investor that includes all of the terms specified below. The individual Adviser is not required to be a party to the contract. **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 Financial Institution warrants: (a) 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; (b) 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

BICE CONDITION	TERMS
CONTRACT TERMS	causing violations of the Impartial Conduct Standards, with a designated person responsible for addressing and monitoring these issues; (c) 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: (a) 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 (b) 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.
BEST INTEREST STANDARD	Investment advice is in the "Best Interest" of the Retirement Investor when "the Adviser and Financial Institution providing the advice act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party."
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 specific information can be found on the website.

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 required disclosures [described in § II(b)-(e)], 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 unconditional access during normal business hours to designated persons, including: (a) DOL or IRS; and (b) participants or IRA owners (or their representatives).

SPECIAL RULES	
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: o That the Financial Institution offers Proprietary Products or receives Third Party Payments with respect to the purchase, sale, exchange, or holding of recommended investments; o 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; o 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

BEST INTEREST STANDARD: PROPRIETARY PRODUCTS AND THIRD PARTY PAYMENTS	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.
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.
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

BICE CONDITION	TERMS
EXEMPTION FOR PURCHASE OF INVESTMENT PRODUCT	• 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.
GRANDFATHER/ PRE-EXISTING ACCOUNTS	The final BICE 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 BICE 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.

OBSERVATIONS ABOUT BICE CONDITIONS

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 resorting to 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. 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.

While the warranty with respect to compliance with other applicable laws was deleted, DOL suggested in a footnote that serious violations may still be deemed violations of the Best Interest Standard.

Annuities Recommendations of variable annuities and, in a change from the proposal, fixed indexed annuities (FIAs) 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 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 had been suggested by commenters, 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 BIC 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 it is for plan fiduciaries, participants and IRA owners. The extent to which the webpage disclosure can be developed and administered from existing resources will require company-by-company attention.

PTE 84-24

Originally 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 and insurance contracts (by plans and IRAs) and proprietary mutual fund shares (by plans only) and narrows the definition of permissible "commissions."

COVERED ACTIVITY	CHANGES FROM THE 2015 PROPOSAL
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.

OBSERVATIONS ABOUT PTE 84-24

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.

PRINCIPAL TRANSACTIONS IN DEBT SECURITIES

The final rule includes the new exemption for principal transactions in debt securities that DOL proposed in 2015.

COVERED ACTIVITY	CHANGES FROM THE 2015 PROPOSAL
PRINCIPAL TRANSACTIONS IN DEBT SECURITIES	• 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 BICE 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. • 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.

OBSERVATIONS ABOUT THE PRINCIPAL TRANSACTION PTE

The final exemption for principal bond transactions covers a few more types of securities than was originally proposed. More importantly, it permits riskless principal transactions to rely on BICE, in the alternative, and does not require explicit mark-up and mark-down information on transaction confirmations.

The 2015 proposed rule would have added, revised or revoked a number of other prohibited transaction class exemptions (PTEs) dealing with investment activities. The final PTEs are, on balance, similar to the proposal, 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 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 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's action or inaction) if Rule 10b-16 or comparable disclosure is provided in advance. • Revised recordkeeping provisions
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	
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.

EXEMPTION	COVERED ACTIVITY	FINAL CHANGES
PTE 86-128	Commissions for the execution of securities transactions by a fiduciary; agency cross-transactions	• 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.

CONCLUSION

While the final rules are somewhat responsive to FSI's comments, they continue to raise serious concerns. We remain concerned that the meaningful compliance conditions, costs and liabilities DOL retained in the final rule (i) increase the cost of and limit access to investment services for retirement investors, and (ii) challenge firms and advisers in very difficult ways. We are also concerned that DOL has functionally become an additional regulator for all retail accounts. As an organization whose mission is to ensure that all individuals have access to competent and affordable financial advice, products and services delivered by a growing network of independent financial advisors and independent financial services firms, we will continue to pursue all available advocacy options.