

Comparison of the DOL's Proposed and Final Conflict of Interest or "Fiduciary" Rule and Best Interest Contract Exemption

	Proposed Rule – April 2015	Final Rule – April 2016
I. Rule Governing Investment Advice		
Definition of Investment Advice	<p>Includes any of the following types of advice for a fee or other compensation:</p> <ul style="list-style-type: none"> ■ recommendation to acquire, hold, dispose, or exchange plan or IRA assets, including to take a distribution of benefits or to roll over amounts from a plan or IRA; ■ recommendation as to the management of plan or IRA assets; ■ appraisal concerning the value of assets acquired, disposed of, or exchanged by a plan or IRA; or ■ any recommendation of a person who will also receive a fee or compensation for providing any recommendation or advice covered under this definition; and <p>Such advice is pursuant to any agreement or understanding that the advice is individualized or specifically directed to the recipient.</p>	<p>Includes any of the following types of advice for a fee or other compensation:</p> <ul style="list-style-type: none"> ■ recommendation to acquire, hold, dispose, or exchange plan or IRA assets, or a recommendation as to how plan assets should be invested after they are rolled over, transferred, or distributed from a plan or IRA; ■ recommendation as to the management of plan or IRA assets, including recommendations on investment policies/strategies, portfolio composition, the hiring of other investment advisers, selection of investment account arrangements, or recommendations with respect to rollovers, transfers, or distributions from a plan or IRA; and <p>Such advice is pursuant to any agreement or understanding that the advice is based on the particular investment needs of the recipient or directed to a specific recipient or recipients.</p>
Definition of Recommendation	<p>A communication that would reasonably be viewed as a suggestion to take, or not take, a particular action.</p>	<p>A communication that would reasonably be viewed as a suggestion to take, or not take, a particular action.</p> <ul style="list-style-type: none"> ■ A determination of whether a "recommendation" has been made is objective and based on the facts and circumstances. ■ Providing a list of appropriate securities is a <i>per se</i> recommendation. ■ A series of actions that may not constitute recommendations when viewed individually may amount to a recommendation in the aggregate. <p>The final regulation includes an expanded discussion of when a communication constitutes a recommendation.</p>

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Applicability Date	Eight months after publication of the final rule.	One year after publication (April 10, 2017). Parts of the BIC Exemption are applicable on January 1, 2018 (see below).
II. Proposed Carve-outs and Final Exclusions¹		
Platform Providers; Selection Monitoring and Assistance	<p>A party that makes securities available to an ERISA plan through a platform will not be covered under the definition of investment advice, if:</p> <ul style="list-style-type: none"> the platform is made available without regard to the individualized needs of the plan and the party discloses to the fiduciary in writing that the party is not undertaking to provide impartial investment advice, or the platform provider merely identifies investment alternatives that meet objective criteria or provides objective financial data and comparisons with independent benchmarks. 	<p>A party that makes securities available to an ERISA plan through a platform will not be covered under the definition of investment advice, if:</p> <ul style="list-style-type: none"> the platform is made available without regard to the individualized needs of the plan and the party discloses to an independent fiduciary in writing that it is not undertaking to provide impartial investment advice, or the platform provider identifies investment alternatives that meet objective criteria or provides objective financial data and comparisons with independent benchmarks, as long as the provider discloses in writing any financial interests it may have in the investment alternatives. <ul style="list-style-type: none"> This includes identifying a sample set of investment alternatives in response to a request for information or proposal from the plan.
Appraisals and Fairness Opinions	The carve-out applies to a person who provides appraisals or valuations for ESOPs, investment funds with more than one unaffiliated plan investor, benefits plans, or IRAs for the purpose of reporting and disclosure under applicable laws and regulations.	Not addressed in the final regulation. The DOL reserved on this issue for a separate rulemaking project.
General Communications	Not addressed in the proposed regulation.	Exclusion covers mass communications that a reasonable person would not view as a recommendation, including general circulation newsletters, public talk shows, remarks in widely attended speeches and conferences, general marketing materials and prospectuses.

¹The proposed rule "carved-out" the activities identified in this Section II from the definition of "investment advice." In the final rule, the DOL acknowledged that these activities do not generally constitute recommendations in the first instance and therefore excluded these activities from the definition of "recommendation," as long as certain conditions are met.

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Investment Education	<p>The carve-out applies to anyone who furnishes to a plan, plan fiduciary, or plan or IRA participant or beneficiary, the following information:</p> <ul style="list-style-type: none"> ■ generalized plan information; ■ general financial, investment and retirement information; ■ asset allocation models (note, does not include the mention of specific investments in asset allocations models as provided for in IB-96-1); or ■ interactive investment materials. 	<p>The exclusion applies to anyone who furnishes to a plan, plan fiduciary, or plan or IRA participant or beneficiary, the following information:</p> <ul style="list-style-type: none"> ■ generalized plan information; ■ general financial, investment and retirement information; ■ asset allocation models (with respect to ERISA plans, but not IRAs, may mention specific designated investment alternatives under the plan if certain requirements are met); or ■ interactive investment materials.
III. Proposed Carve-outs and Final Exceptions²		
Counterparties or "Seller" Transactions	<p>A counterparty to an ERISA plan will not be covered under the definition of investment advice if the advice is provided to an independent fiduciary in an arms length proposal or transaction, and</p> <ul style="list-style-type: none"> ■ the plan has at least 100 participants, or the independent fiduciary manages at least \$100 million in assets; ■ certain disclosure or independence requirements are met; and ■ the counterparty is not directly compensated by the plan for the investment advice. 	<p>A counterparty to an ERISA plan will not be covered under the definition of investment advice if a recommendation is provided to an independent fiduciary³ in an arms length proposal or transaction, and</p> <ul style="list-style-type: none"> ■ the counterparty reasonably believes that the independent fiduciary of the plan or IRA (a) is (i) a bank, (ii) an insurance carrier, (iii) a registered investment adviser or, (iv) a registered broker-dealer, or (b) holds or manages total assets of least \$50 million in assets; ■ certain disclosure and independence requirements are met; and ■ the counterparty is not directly compensated by the plan or IRA owner for the advice.

²The proposed rule "carved-out" the activities identified in this Section III from the definition of "investment advice." In the final rule, the DOL acknowledged that these activities generally constitute recommendations, but treated them as not being investment advice, as long as certain conditions are met.

³While the text of the rule is not entirely clear, it appears that an independent fiduciary would exclude an IRA owner.

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<p>Swap Transactions</p>	<p>Certain swap dealers or swap participants who transact with an ERISA plan will not be covered under the definition of investment advice provided the ERISA plan is represented by an independent fiduciary and certain independence requirements are met.</p>	<p>Certain swap dealers or swap participants that provide advice while transacting with an ERISA plan will not be covered under the definition of investment advice if the ERISA plan is represented by an independent fiduciary, certain independence requirements are met, and the swap party does not receive a fee or compensation directly from the plan or plan fiduciary for the provision of investment advice in connection with the transaction.</p>
<p>Employee Communications</p>	<p>If an employee of the employer or benefit plan sponsor provides advice to the plan fiduciary and does not receive a fee or other compensation in connection with the advice, the employee will not be covered under the definition of investment advice.</p>	<p>If an employee of an employer, plan sponsor, or its affiliates, or an employee of a benefit plan, employee organization, or plan fiduciary, provides advice to a plan fiduciary or to an employee (not in a participant capacity) or independent contractor and does not receive any fee or other compensation in connection with the advice (beyond normal compensation), the advising employee is not covered under the definition of investment advice.</p> <p>In addition, if an employee of the plan sponsor or its affiliates provides advice to another plan sponsor employee (in a participant capacity) and the advising employee does not normally provide investment advice, is not a registered adviser, and does not receive compensation in connection with the advice (beyond normal compensation), the advising employee is not covered under the definition of investment advice.</p>

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IV. Best Interest Contract ("BIC") Exemption		
<p>Application</p>	<p>Applies to advisers and financial institutions who receive commission based fees in connection with providing investment advice to plan fiduciaries, IRAs, and plan sponsors of non-participant directed plans with fewer than 100 participants.</p> <p>The requirements of the BIC Exemption apply uniformly to transactions involving ERISA plans as well as to IRAs and non-ERISA plans.</p>	<p>Applies to advisers and financial institutions who receive commission-based fees in connection with investment advice to retail plan fiduciaries, IRA owners, and plan participants and beneficiaries, but does not include advice to institutional fiduciaries or fiduciaries that hold, manage, or control \$50 million or more in assets.</p> <p>Distinguishes between transactions with ERISA plans and transactions with IRAs and non-ERISA plans, and creates a category of "Level-Fee Fiduciaries" when applying the requirements of the BIC Exemption.⁴</p>
<p>Covered Assets</p>	<p>BIC Exemption is available only for transactions involving specified investments, including bank deposits, certificates of deposits, exchange-traded funds, public equities, and certain corporate bonds</p>	<p>BIC Exemption is available for transactions involving all types of assets, as long as the requirements of the BIC Exemption are met.</p>

⁴Each requirement in this Section IV applies to IRAs and non-ERISA plans. For a comparison table of the requirements applicable to ERISA plans and Level-Fee Fiduciaries, and advice given pursuant to Bank Networking Arrangements, see the Ropes & Gray LLP client alert, *DOL Issues "Investment Advice" Fiduciary Rule: Fiduciary Net Will Widen on April 10, 2017*.

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<p>Contract Requirement</p>	<ul style="list-style-type: none"> ■ Written contract affirming the adviser is a fiduciary must be agreed upon prior to any recommendation; ■ Contract must be signed by each party to the transaction, including the adviser, financial institution and the retirement investor; ■ Adviser must affirmatively agree to the Impartial Conduct Standards; and ■ The contract may not include provisions barring investor participation in class action law suits, and may not include provisions limiting the liability of the adviser. 	<ul style="list-style-type: none"> ■ Written contract affirming the adviser is a fiduciary must be agreed upon, but may be entered into at the time an account is opened (must cover advice given prior to the execution of the contract) or incorporated into existing contracts through negative consent; ■ Only required parties to the contract are the financial institution and the retirement investor; ■ Financial institution must affirmatively agree to Impartial Conduct Standards; and ■ The contract may not include provisions barring investor participation in class action law suits, limiting the liability of the adviser or financial institution, unreasonably limiting the ability of investors to assert claims otherwise safeguarded by the BIC Exemption, or mandating arbitration or mediation for individual claims in distant venues.
<p>Written Fiduciary Acknowledgment</p>	<p>The adviser and financial institution must affirmatively state that they are fiduciaries under ERISA or the Code, or both, with respect to investments recommended to the investor.</p>	<p>The financial institution must affirmatively state that it is a fiduciary under ERISA or the Code, or both, with respect to advice provided by the adviser or financial institution that is subject to the contract, or in the case of an ERISA plan, with respect to any investment recommendations regarding the plan.</p>
<p>Commitment to Standards of Impartial Conduct</p>	<p>Advisers must commit to Impartial Conduct Standards, including:</p> <ul style="list-style-type: none"> ■ investment advice will be in the Best Interest of the investor (similar to the ERISA fiduciary standard); ■ anticipated compensation related to the advice will not exceed reasonable compensation; and ■ statements will not be materially misleading at the time they are made. 	<p>The financial institution must commit to Impartial Conduct Standards, including:</p> <ul style="list-style-type: none"> ■ investment advice will be in the Best Interest of the investor (similar to the ERISA fiduciary standard); ■ anticipated compensation related to the advice will not exceed reasonable compensation; and ■ statements will not be materially misleading at the time they are made.

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<p>Specific Warranties</p>	<p>Advisers must warrant:</p> <ul style="list-style-type: none"> ■ that they will comply with all applicable laws in rendering the advice; ■ that they maintain written policies and procedures reasonably designed to mitigate conflicts of interest and ensure compliance with the Impartial Conduct Standards; and ■ that the financial institution does not use incentive based awards or programs to encourage advisers to make interests not in the best interest of the retirement investor. 	<p>The financial institution must warrant:</p> <ul style="list-style-type: none"> ■ that the financial institution maintains written policies and procedures reasonably and prudently designed to ensure compliance with the Impartial Conduct Standards, and ■ that the financial institution's policies and procedures require that the financial institution not use incentive based awards or programs to encourage advisers to make interests not in the best interest of the retirement investor.
<p>Disclosure of Conflict of Interest and Cost of Advice</p>	<p>The written contract must state:</p> <ul style="list-style-type: none"> ■ any material conflicts of interest; ■ the right to obtain all fees associated with the investment; and ■ whether the adviser offers proprietary products or receives third party payments with respect to the purchase, sale, or holding of any asset. 	<p>The written contract, or another written disclosure, must:</p> <ul style="list-style-type: none"> ■ state the Best Interest Standard of care owed by the adviser and financial institution; ■ describe all material conflicts of interest; disclose any fees or charges, and state the compensation expected to be generated in connection with the recommended transaction; ■ inform the retirement investor of the right to obtain copies of the financial institution's policies and procedures and specific disclosure of costs, fees, and compensation regarding recommended transactions; ■ include a link to the financial institution's website and informs the retirement investor of certain information on the website; ■ disclose whether the adviser limits advice to proprietary products or receives third party payments with respect to any recommended investments, and to the extent such products are offered, notifies the investor of any limitations placed on the universe of investments offered; and ■ provide contact and certain other information for the financial institution and state the extent to which the financial institution will monitor the recommended investments.

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<p>Required Webpage</p>	<p>The financial institution must maintain a website, the address which is disclosed in the written contract, that discloses the adviser's direct or indirect material compensation arrangements in connection with each investment available through the adviser that was purchased, held or sold by a plan, participant, or IRA in the last 365 days (amount can be expressed as a dollar amount, formula or percentage of assets).</p>	<p>The financial institution must maintain a website, updated no less frequently than quarterly, that contains:</p> <ul style="list-style-type: none"> ■ A copy of the investor's executed BIC; ■ A discussion of the financial institution's business model and material conflicts of interest associated with that model; ■ A written description of the financial institution's policies and procedures; ■ A list of all parties with whom the financial institution maintains third party payment arrangements; and ■ Compensation and incentive arrangements with the institution's advisers.
<p>Initial Cost Disclosure</p>	<p>Prior to the sale of any investment, the adviser must furnish the investor with a chart providing the total cost of investing in the asset over a 1, 5, and 10 year period, all expressed as a dollar amount (where total cost includes acquisition costs, ongoing costs, disposition costs, and any other costs).</p>	<p>This provision was eliminated from the final BIC Exemption.</p>
<p>Annual/Transaction Disclosure</p>	<p>Within 45 days of the end of the year, advisers must provide investors with a written disclosure identifying:</p> <ul style="list-style-type: none"> ■ each asset an investor purchased or sold, ■ the total dollar amount paid by the investor with respect to each asset purchased, held, or sold during the year, and ■ all compensation received by the adviser from any party resulting from each asset sold, purchased, or held by the investor. 	<p>By the time a transaction is executed, a financial institution must provide:</p> <ul style="list-style-type: none"> ■ a statement of any material conflicts of interest and a statement of the Best Interest standard of care owed to the investor; ■ the right to obtain copies of the financial institution's written description of its policies and procedures and the costs and fees and compensation paid with respect to the transaction; ■ a link to the financial institution's website and a statement that certain model contract disclosures or notices and the institution's policies and procedures are maintained on the institution's website.

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Range of Investment Options to Rely on the BIC Exemption	<p>Absent certain exceptions, before relying on the BIC Exemption, a financial institution must offer a range of assets that is broad enough to serve the Best Interest of the investor in light of the investor's investment objectives, risk tolerance and financial circumstances.</p>	<p>A financial institution may restrict an adviser's investment recommendations to proprietary products or to investments that generate third party payments, as long as certain disclosure conditions are satisfied.</p>
Exemptions from Best Interest Contract	<ul style="list-style-type: none"> ■ Where the adviser to an ERISA plan is the employer of employees covered by the plan; ■ Principal Transactions; ■ Robo-advisers or web-based generated models providing investment advice; or ■ Where the adviser exercises any discretionary authority or control over plan or IRA assets in the transaction. 	<ul style="list-style-type: none"> ■ Where the adviser to an ERISA plan is the employer of employees covered by the plan; ■ Principal Transactions; ■ Robo-advisers or web based generated models providing investment advice (except if the provider is a compliant Level-Fee fiduciary); or ■ Where the adviser exercises any discretionary authority with respect to the recommended transaction.
Applicability Date	<p>Eight months after publication of the final rule.</p>	<p>With the exception of the written fiduciary acknowledgment and the adherence to the Impartial Conduct Standards, both of which are applicable on April 10, 2017, the applicability date for the BIC Exemption is January 1, 2018. During the transition period between April 10, 2017 and January 1, 2018, certain transition period disclosure requirements will also apply.</p>