Dechert LLP

Navigating the DOL's New Fiduciary Rules: A Game Plan for Broker-Dealers

A legal update from Dechert

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This *OnPoint* focuses on the new and amended fiduciary investment advice regulations issued by the U.S. Department of Labor (DOL) and accompanying prohibited transaction exemptions (Final Rules), from the perspective of broker-dealers and their registered representatives who provide investment advisory services (Financial Advisors). Dechert provided a comprehensive analysis of the Final Rules in a May *OnPoint*, and today is contemporaneously publishing an *OnPoint* focusing on the Final Rules' impact on mutual funds.

This *OnPoint* discusses: (i) the definition of "fiduciary investment advice" and the circumstances under which a broker-dealer may be considered a "fiduciary" when it provides investment advice to "Retirement Investors;" (ii) the exemptions that may be available to broker-dealers that are fiduciaries; and (iii) various compliance considerations for broker-dealers seeking to rely on one or more exemptions under the Final Rules. For purposes of the Final Rules, "Retirement Investors" are: retirement plans subject to the Employee Retirement Income Security Act of 1974 (ERISA) or Section 4975 of the Internal Revenue Code of 1986 (Code) and other plans that are not subject to ERISA (collectively, plans); plan participants and beneficiaries; individual retirement accounts (IRAs) and their beneficial owners; and fiduciaries of plans or IRAs.

Fiduciary Investment Advice

Definition of "Fiduciary Investment Advice"

A broker-dealer and its Financial Advisors will be deemed to be providing fiduciary investment advice, and thus be subject to the Final Rules, if, for compensation, they directly or indirectly provide a recommendation to a Retirement Investor regarding the investment of money or other assets. Consistent with Securities and Exchange Commission (SEC) and Financial Industry Regulatory Authority (FINRA) guidance on whether a communication is a recommendation, the DOL defined a "recommendation" generally as a "call to action" – that is, a communication which, based on its content, context and presentation, would reasonably be viewed by the communication's recipient as a suggestion to engage in or refrain from taking a particular course of action. The more a communication is individually tailored to its intended recipient(s), the more likely the communication will be considered a recommendation, although the determination of whether a particular communication is a recommendation is to be made on an objective (versus a subjective) basis.[1] A recommendation can be initiated by a person or by computer software.

Accordingly, a broker-dealer seeking to avoid designation as a fiduciary with respect to Retirement Investors will need to be confident that the firm and its Financial Advisors are not rendering fiduciary investment advice. The assessment of whether a communication is a recommendation, and therefore investment advice, cannot be made in a vacuum. Even if an individual communication is not a recommendation, when taken directly or indirectly with other

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[1] ERISA Section 2510-3.21(b)(1). The DOL noted that the definition of "recommendation" in the Final Rules is generally consistent with FINRA guidance, including the interpretation that a recommendation can be considered to be made even if there is no reference to a specific security or securities (*e.g.*, if a strategy is recommended) or no transaction results. 68 Fed. Reg. 20966 (Apr. 8, 2016). *See also* FINRA, Regulatory Notice 11-02: *Know Your Customer and Suitability* (Jan. 2011), *available here*, *citing Michael Frederick Siegel*, Release No. 34-58737(Oct. 6, 2008), *aff'd in relevant part* 592 F.3d 147 (D.C. Cir. 2010), *cert. denied* 2010 U.S. LEXIS 4340 (May 24, 2010).

communications, including communications through or together with an affiliate,[2] the communications may collectively be deemed to constitute a recommendation. Other communications that the DOL may view as recommendations include:

- Furnishing a selective list of securities as appropriate investments for the recipient, even if no recommendation is made with respect to any one security;
- Providing suggestions about the advisability of acquiring, holding, disposing of or exchanging securities or other investment property;
- Recommending how to invest securities or other investment property following a rollover, transfer or distribution from a plan or IRA; and
- Managing securities or other investment property, including making recommendations as to investment policies or strategies, portfolio composition, investment advisers or managers, or investment account arrangements (*e.g.*, brokerage versus advisory), or on all aspects of plan or IRA rollovers, transfers or distributions (*e.g.*, amount, form or destination for the rollover, transfer or distribution).

Fiduciary investment advice (*i.e.,* a recommendation) is deemed to be made directly or indirectly (*e.g.,* through or together with an affiliate) by a person who: (i) represents or acknowledges that it is acting as a fiduciary within the meaning of ERISA or the Code; (ii) renders the advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is based on the particular investment needs of the advice recipient; or (iii) directs the advice to a specific recipient regarding the advisability of a particular investment or management decision related to a plan or IRA's securities or other investment property.

Certain Express Exclusions

Certain communications or services are conditionally excluded from the definition of recommendation. A broker-dealer that seeks to rely on any of these express exclusions will need procedures for: confirming that the applicable conditions are met and periodically tested; documenting compliance with the procedures; preparing, approving and updating required disclosures; and training personnel as to compliance with applicable conditions. As discussed below, even if one of the express exclusions is not available to a broker-dealer that is deemed to make recommendations, the broker-dealer may still be able to claim an exception from the prohibited transactions restriction.

Platform Providers

The DOL included an exclusion from the definition of recommendation for the marketing or furnishing of a platform that permits plan fiduciaries to select or monitor investment alternatives, or permits plan participants or beneficiaries to direct the investment of assets or contributions. Among other things, the platform or similar mechanism cannot take

[2] For purposes of the Final Rules, an "affiliate" of a broker-dealer or its Financial Advisors is any person, directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with, such person; any officer, director, partner or employee, or relative of such person; and any corporation or partnership of which such person is an officer, director or partner.

into account the individualized investment needs of the plan, its participants or beneficiaries; the fiduciary must be independent of the person marketing or providing the platform[3] and written disclosure must be provided to the plan fiduciary that the person is not undertaking to provide impartial investment advice or to give advice in a fiduciary capacity. Existing and new platform providers will want to review the platform for compliance with the exclusion's conditions and prepare the required disclaimer. This express exclusion is not available in the case of IRAs, but the general exceptions may still be available.

Selection and Monitoring Assistance

Also expressly excluded from the definition of "recommendation" is selection and monitoring assistance in connection with a plan platform. This exclusion permits broker-dealers and their Financial Advisors to: (i) identify investment alternatives that meet objective criteria specified by the plan fiduciary, if certain conflicts of interest are disclosed in writing; and (ii) respond to requests for proposals or similar solicitations by or on behalf of a plan, which contain a sample of investment alternatives based on the size of the employee plan or the plan's current investment alternatives, if certain conflicts of interest are disclosed in writing, or which provide to the plan fiduciary objective financial data and comparisons with independent benchmarks.

General Communications

A general communication that a reasonable person would not view as an investment recommendation is not considered a recommendation, even if provided or made available to a Retirement Investor. Examples of general communications include; general circulation newsletters; commentary in publicly broadcast talk shows; remarks and presentations in widely attended speeches and conferences; research or news reports prepared for general distribution; general marketing materials; general market data (including data on market performance, market indices or trading volumes); price quotes; performance reports; and prospectuses.

Investment Education

Certain investment-related information and materials that are furnished or made available to Retirement Investors are not considered investment recommendations if, in isolation or in combination with other materials, they do not include recommendations concerning specific investment products or specific plan or IRA alternatives, or regarding investment in or management of a particular security or securities or other investment property, unless otherwise excluded from being deemed recommendations. A broker-dealer's ability to track market materials on a collective as well as an individual basis will be an important consideration for whether this express exclusion applies.

Plan Information

Certain information and materials are not considered investment recommendations if they do not discuss the appropriateness of any particular investment alternative or distribution option. The content of the information or materials must be limited to: (i) describing the terms or operation of a plan or IRA; (ii) informing Retirement Investors about the benefits of investing in or increasing investments in a plan or IRA; (iii) describing the impact of pre-retirement withdrawals on retirement income and retirement income needs, rollovers and other forms of distributions,

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[3] "Independent" is defined in the Final Rules as describing a person that: (i) is not the broker-dealer, a Financial Advisor or any affiliate relying on the exemption; (ii) does not have a relationship to or an interest in the broker-dealer, a Financial Advisor or affiliate that might affect the exercise of the person's best judgment in connection with transactions described in this exemption; and (iii) does not receive, and is not projected to receive, within the current federal income tax year, compensation or other consideration for his or her own account from the broker-dealer, Financial Advisor or any of their affiliates in excess of 2% of the person's annual revenues based upon his or her prior income tax year.

annuitization and other forms of lifetime income payment options; and (iv) the advantages, disadvantages and risks of various forms of distributions. The information or materials may also describe product features, investor rights and obligations, fees and expenses, trading restrictions, investment objectives and philosophies, risk and return characteristics, historical return information or related prospectuses of available investment alternatives.

General Financial, Investment and Retirement Information

Information and materials on financial, investment and retirement matters are not fiduciary investment advice if they do not address specific investment products, specific investment alternatives or distribution options available to Retirement Investors, or specific investment alternatives or services offered outside the plan or IRA, but that inform Retirement Investors about:

- General financial and investment concepts (*e.g.,* risk and return, diversification, dollar cost averaging, compounded return and tax-deferred investment);
- Historic differences in rates of return based on standard market indices between different asset classes (*e.g.,* equities, bonds or cash);
- Effects of fees and expenses on rates of return;
- Effects of inflation;
- Estimated future retirement income needs;
- Determination of investment time horizons;
- Assessment of risk tolerance;
- Retirement-related risks (*e.g.,* longevity, market/interest rates, inflation, health care and other expenses); and
- General methods and strategies for managing retirement assets, including those offered outside the plan or IRA (*e.g.,* systematic withdrawal payments, annuitization and guaranteed minimum withdrawal benefits).

Asset Allocation Models

Pie charts, graphs, case studies and other information and materials that provide Retirement Investors with models of asset allocation portfolios of hypothetical individuals, with different time horizons and risk profiles, are not considered recommendations if:

- The models are based on generally accepted investment theories that take into account the historic returns of different asset classes (*e.g.,* equities, bonds or cash) over defined periods of time;
- The models are accompanied by all material facts and assumptions on which such models are based (*e.g.,* retirement ages, life expectancies, income levels, financial resources, replacement income ratios, inflation rates and rates of return);
- A statement is included with the asset allocation models indicating that Retirement Investors should consider other assets, income and investments (*e.g.,* home equity, Social Security benefits, individual retirement plan

investments, savings accounts and interests in other qualified and non-qualified plans) (Other Assets, Income and Investments) in addition to their plan or IRA interests, if those items are not taken into account in the models or estimates; and

- With respect to an IRA, the models do not include or identify any specific investment product or investment alternative available under the IRA; with respect to a plan: (i) an asset allocation model is provided that identifies a specific investment alternative available under the plan; (ii) the alternative is a designated investment alternative subject to oversight by an independent plan fiduciary; and (iii) certain disclosures are made.

Interactive Investment Materials

Subject to certain conditions, interactive investment materials (*e.g.,* questionnaires, worksheets, software and similar materials) will not be considered investment recommendations if such materials: (i) allow Retirement Investors to estimate future retirement income needs; (ii) assess the impact of different asset allocations on retirement income; (iii) evaluate distribution options, products or vehicles; or (iv) estimate a retirement income stream that could be generated by an actual or hypothetical account balance.

Among other things, in order for interactive materials not to be considered investment recommendations:

- The materials must be based on generally accepted investment theories taking into account the historic returns of different asset classes over defined periods of time;

- There must be an objective correlation between the generated asset allocations and the information and data supplied by the Retirement Investor, as well as between the generated income stream and the Retirement Investor's information;

- All material facts and assumptions that may impact a Retirement Investor's assessment of the different asset allocations or income streams must accompany the materials unless they are specified by the Retirement Investor;

- The materials must either (i) take into account Other Assets, Income and Investments, or (ii) be accompanied by a statement indicating that Retirement Investors should consider their Other Assets, Income and Investments in applying particular asset allocations to their individual situations or assessing the adequacy of an estimated income stream; and

- The materials do not include or identify any specific investment alternative or distribution option available under the plan or IRA, unless such alternative or option is specified by the Retirement Investor or is a designated investment alternative under a plan subject to oversight by an Independent Fiduciary[4] In the latter case, the materials must: (i) identify all other designated investment alternatives (if any) available under the plan that have similar risks and return characteristics; and (ii) be accompanied by a statement indicating that

[4] An "Independent Fiduciary" must be: (i) a bank, as defined in section 202 of the Investment Advisers Act of 1940, or a similar state or federally examined institutions; (ii) an insurance company qualified under the laws of more than one state to manage, acquire or dispose of assets of a plan; (iii) an SEC- or state-registered investment adviser; (iv) a broker-dealer registered under the Securities Exchange Act of 1934; or (v) any independent fiduciary that holds or has under management or control total assets of at least $50 million.

such alternatives have similar risk and return characteristics and identifying where information on those investment alternatives may be obtained.

Broker-dealers seeking to distribute interactive investment models without being a fiduciary will need to implement and enforce policies and procedures to ensure that their materials meet the criteria of this express exclusion.

Exemptions and Exceptions

Absent an express exclusion or exception, broker-dealers that are fiduciaries for purposes of ERISA and the Code would be prohibited from engaging in certain transactions that would materially reduce the services that they offer to Retirement Investors. Generally, five broad exemptions or exceptions are available to broker-dealers: (i) the Best Interest Contract (BIC) exemption; (ii) the Level Fee Fiduciary exemption; (iii) product exemptions; (iv) transaction exemptions; and (v) traditional and temporary exemptions during the implementation phase of the Final Rules. Below is a summary of each of these exemptions.

Best Interest Contract Exemption

Overview

A broker-dealer provides investment advice in the "best interest" of a Retirement Investor when the broker-dealer and its Financial Advisor(s) 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 broker-dealer, a Financial Advisor, any affiliate, related entity or other party."[5] The best interest conduct standard is perhaps best described as a "quasi-ERISA" standard.

The BIC exemption permits a broker-dealer to engage in principal and riskless principal transactions with Retirement Investors, and to receive a mark-up, mark-down or similar payment in connection with the transactions. As detailed below, broker-dealers seeking to rely on the BIC exemption must:

- Satisfy the DOL's "Impartial Conduct Standards" when providing advice regarding retirement investments;
- Enter into required contracts with Retirement Investors;

[5] Section VIII(d) of the BIC exemption. A "related entity" is defined in Section VIII(m) of the BIC exemption as any entity other than an affiliate in which a broker-dealer or its Financial Advisor has an interest that may affect the exercise of its best judgment as a fiduciary.

- Provide required disclosures regarding material conflicts of interest[6] and fees and other direct or indirect compensation;[7]

- Adopt and implement policies and procedures designed to ensure that their Financial Advisors comply with the BIC exemption's Impartial Conduct Standards; and

- Retain records demonstrating compliance with the exemption.

The BIC exemption is not available to a broker-dealer that: (i) is selected by a non-Independent Fiduciary to provide investment advice to a plan; (ii) has or exercises any discretionary authority or discretionary control over the management or disposition of assets for a retirement account; or (iii) has any discretionary authority or discretionary responsibility in the administration of the account of a Retirement Investor. In the case of an ERISA plan, the BIC exemption is not available if: (a) the broker-dealer, its Financial Advisors or any affiliate is the employer of the employees covered by the plan, or the broker-dealer is a named fiduciary or plan administrator for the plan or an affiliate thereof, that was selected to provide advice to the plan by a non-Independent Fiduciary; (b) the compensation is received as a result of a principal transaction; (c) the compensations is received as a result of "robo advice" (*i.e.,* investment advice was generated solely by an interactive website in which computer software-based models or applications provide investment advice based on personal information that an investor supplies through the website without any personal interaction or advice from a Financial Advisor, unless the provider of the robo-advice complies with the Level Fee Fiduciary exemption); or (d) the Financial Advisor has or exercises discretionary authority or discretionary control with respect to the recommended transaction.

Concurrently with the adoption of the BIC exemption, DOL amended Prohibited Transaction Exemption (PTE) 86-128 and PTE 75-1.[8] Broker-dealers that provide (or whose affiliates provide) fiduciary investment advice to IRAs or plans generally must now comply with essentially the same Impartial Conduct Standard that is contained in the BIC exemption, discussed below, in order to receive compensation for effecting or executing transactions (whether as agent, principal or riskless principal). PTE 86-128, as amended, permits broker-dealers that provide (or whose affiliates provide) fiduciary investment advice to plans (or to plan fiduciaries or beneficiaries) and broker-dealers that are (or are affiliated with) fiduciaries with discretionary authority or control over plan assets, to receive a fee from a plan for effecting or executing securities transactions as an agent, if all applicable conditions are met. These broker-

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6 According to Section VIII(j) of the BIC exemption, a "material conflict of interest" exists when a broker-dealer or one of its Financial Advisors has a financial interest that a reasonable person would conclude could affect the exercise of the broker-dealer's or Financial Advisor's best judgment as a fiduciary in rendering advice to a Retirement Investor.

7 "Fee or other compensation, direct or indirect" means any explicit fee or compensation received by a broker-dealer (or any affiliate) from any source for advice provided, and any other fee or compensation received from any source in connection with or as a result of the purchase or sale of a security or the provision of investment advice services, including (without limitation): 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. If a fee or compensation would not have been paid but for the transaction or service, or if eligibility for, or amount of, the fee or compensation is based in whole or in part on the transaction or service, the fee or compensation is paid "in connection with or as a result of" the transaction or service. *See* 81 Fed. Reg. 21002, 21031, fn. 57.

8 81 Fed. Reg. 21181 (Apr. 8, 2016).

dealers may also receive commissions on agency cross transactions (*i.e.,* transactions in which they act as agent for a plan and for another party), if all applicable conditions are met.[9]

Impartial Conduct Standard

A broker-dealer relying on the BIC exemption must affirmatively state that it and its Financial Advisors will adhere to and comply with the following standard:

- Investment advice provided to a Retirement Investor must, at the time of the recommendation, be in the "best interest" of the Retirement Investor, as set forth above;
- The recommended transaction cannot cause the broker-dealer, Financial Advisor, or their affiliates or related entities, to receive, directly or indirectly, compensation for their services that is in excess of reasonable compensation under ERISA or the Code;
- Statements by the broker-dealer and its Financial Advisors to a Retirement Investor about the recommended transaction, fees and compensation, material conflicts of interest, and any other matters relevant to a Retirement Investor's investment decisions, cannot be materially misleading at the time they are made; and
- The broker-dealer must affirmatively warrant, and in fact comply with, the policies and procedures requirement set forth below.

In the case of ERISA plans, reliance on the BIC exemption requires that the broker-dealer provide the Retirement Investor with a written statement of its and its Financial Advisors' fiduciary status, compliance with requirements related to the Impartial Conduct Standard, policies and procedures, disclosures and contracts.

Contracts

In the case of an IRA or non-ERISA plan, a broker-dealer must agree that it and its Financial Advisors will adhere to the BIC exemption's standards in a written contract that is enforceable by the Retirement Investor. For Retirement Investors who have an account with the broker-dealer dated earlier than January 1, 2018, the broker-dealer may rely on negative consent to satisfy the contract requirements, as long as the broker-dealer delivers an amended contract containing the required disclosure to the Retirement Investor prior to January 1, 2018, and provides the Retirement Investor 30 days to terminate the amended contract. Negative consent may not be used to impose any new contractual obligation, restriction or liability on a Retirement Investor.

In the case of new customers, the required contract terms may be incorporated into account opening documents and similar commonly-used agreements. The DOL also provided limited relief in the case of a broker-dealer and its Financial Advisors that provide advice that comports with the conditions of the exemption, but, due to circumstances generally outside of their control, do not have the opportunity to enter into a contract with the Retirement Investor (*e.g.,* if the investor executes the transaction through a different broker-dealer). Under this scenario: (i) the broker-dealer and its Financial Advisors making the recommendation may not receive transaction-specific compensation, directly or indirectly, as a result of the recommendation or the Retirement Investor's investment transaction (including

[9] Subject to certain conditions, PTE 86-128, as amended, permits broker-dealers that are (or are affiliated with) fiduciaries to receive commissions from a plan or a mutual fund in connection with mutual fund transactions involving plans. This type of relief was previously available under certain provisions of PTE 75-1, Part II, as in effect before the issuance of the Final Rules, but this particular portion of PTE 75-1 was revoked in connection with the changes to PTE 86-128.

a commission or 12b-1 fee) that is tied to the particular Retirement Investor's investment; (ii) the broker-dealer's policies and procedures must prohibit compensating their Financial Advisors, directly or indirectly, from providing advice as part of a scheme to avoid the contract requirement with respect to Retirement Investors; and (iii) the broker-dealer and its Financial Advisors must comply with the Impartial Conduct Standards, policies and procedures requirements (except for the warranty-related requirement of a warranty with respect to those policies procedures), website disclosure requirements, and, as applicable, restrictions related to recommendations of proprietary products or investments that generate third-party payments with respect to the recommendation.[10] The broker-dealer's failure to enter into the contract must not be part of an effort, attempt, agreement, arrangement or understanding designed by the broker-dealer or its Financial Advisors to avoid compliance with the exemption or enforcement of its conditions (including the contractual requirement).

A broker-dealer need not execute a contract before making a recommendation to a Retirement Investor, but the contract must cover any advice given prior to the contract date in order for the exemption to apply. There is no contract requirement for recommendations to Retirement Investors about investments in ERISA plans, but the Impartial Conduct Standards and other requirements (including a written acknowledgment of fiduciary status) must be satisfied in order for relief to be available under the exemption.

The broker-dealer's contract must state affirmatively in writing that it and its Financial Advisors act as fiduciaries under ERISA and/or the Code with respect to any investment advice provided by the broker-dealer or its Financial Advisors pursuant to the contract or, in the case of an ERISA plan, with respect to any investment recommendations regarding the Retirement Investor's account. An electronic copy of the Retirement Investor's contract must be maintained on the broker-dealer's website so that it is accessible by the Retirement Investor.

The BIC exemption is not available if the broker-dealer's contract contains:

- Any exculpatory provisions disclaiming or otherwise limiting liability of the broker-dealer or its Financial Advisors for a violation of the contract's terms;
- Waivers or qualifications with respect to class actions or representative actions, or limitations on liquidated damages; however, waivers of punitive damages or rescission rights may be knowingly agreed to by a Retirement Investor; or
- A pre-dispute arbitration or mediation provision that specifies a remote venue or otherwise unreasonably limits the ability of a Retirement Investor to assert the claims safeguarded by the BIC exemption.

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[10] A "proprietary product" is defined in Section VIII(l) of the BIC exemption as a product that is managed, issued or sponsored by the broker-dealer or any of its affiliates.

"Third party payments" are defined in Section VIII(q) of the BIC exemption to include: sales charges that are not paid directly by a Retail Investor; gross dealer concessions; revenue sharing payments; 12b-1 fees; distribution, solicitation or referral fees; volume-based fees; fees for seminars and educational programs; and any other compensation, consideration or financial benefit provided to the broker-dealer or an affiliate or related entity by a third party as a result of a transaction involving a Retirement Investor.

Disclosures

Transaction Disclosure

In the contract or a separate single written disclosure provided to each Retirement Investor in an IRA or non-ERISA plan account, or in a single written disclosure provided to each Retirement Investor in an ERISA plan prior to or at the same time as the execution of the recommended transaction, the broker-dealer must clearly and prominently:

- State the "best interest" standard of care owed by the broker-dealer and its Financial Advisors to Retirement Investors, inform the Retirement Investors of the services provided by the broker-dealer and its Financial Advisors and describe how Retirement Investors will pay for services, directly or through third-party payments. Among other compensation-related information, the broker-dealer must provide clear disclosure if Retirement Investors will pay through commissions or other forms of transaction-based payments;

- Describe any material conflicts of interest, disclose any fees or charges the broker-dealer, its affiliates or Financial Advisors impose on the Retirement Investors or their accounts, and state the types of compensation that the broker-dealer, its affiliates and the Financial Advisors expect to receive from third parties in connection with investments recommended to Retirement Investors;

- Inform Retirement Investors of their right to obtain copies of the broker-dealer's written description of its policies and procedures, as well as the specific disclosure of costs, fees and compensation (including third-party payments) regarding recommended transactions. All transaction costs, fees and compensation must 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 Retirement Investors to make an informed judgment about the costs of the transaction and the significance and severity of any material conflicts of interest. The disclosures must also describe how Retirement Investors may obtain the information free of charge. If a Retirement Investor's request is made prior to the transaction, the information must be provided prior to the transaction; if the request is made after the transaction, the information must be provided within 30 business days after the request;

- Include a link to the broker-dealer's website, and inform Retirement Investors that model contract disclosures (which must be updated as necessary on a quarterly basis) are maintained on the website and that the broker-dealer's written description of its policies and procedures are available free of charge on the site;

- Disclose whether the broker-dealer: (i) offers proprietary products or receives third-party payments with respect to any recommended investments; (ii) limits investment recommendations, in whole or part, to proprietary products or investments that generate third-party payments; and (iii) notifies the Retirement Investors of the limitations placed on the universe of investments that the Financial Advisor may offer for purchase, sale, exchange or holding by Retirement Investors. As with other disclosure requirements, the notice is insufficient if it merely states that the broker-dealer or its Financial Advisors "may" limit investment recommendations based on whether the investments are proprietary products or generate third-party payments, without specific disclosure of the extent to which recommendations are in fact limited on that basis;

- Provide contact information (telephone and email) for a representative of the broker-dealer that Retirement Investors can use to contact the broker-dealer with any concerns about the advice or service they have received and, if applicable, a statement explaining that Retirement Investors can research the broker-dealer or its Financial Advisors using FINRA's BrokerCheck database or the Investment Adviser Registration Depository

(IARD) or other database maintained by a governmental agency or instrumentality, or self-regulatory organization; and

- Describe whether or not the broker-dealer will monitor the Retirement Investors' investments and alert the Retirement Investors to any recommended change to those investments, and, if monitoring will occur, the frequency of such monitoring and the reasons for which Retirement Investors will be alerted.

If a broker-dealer, acting in good faith and with reasonable diligence, makes an error or omission in the required disclosures, the broker-dealer will not violate the disclosure or contractual requirements solely as a result of such error or omission if, no later than 30 days after the date on which error or omission was discovered (or reasonably should have been discovered), the broker-dealer provides the correct information to the Retirement Investors. To the extent compliance with the disclosure obligations requires information to be obtained from entities that are not closely affiliated with the broker-dealer, it may rely in good faith on information and assurances from the other entities, as long as they do not know that the materials are incomplete or inaccurate. For a broker-dealer to claim good faith reliance, the entity providing the information to the broker-dealer or its Financial Advisors cannot be: (i) a person directly, or indirectly through one or more intermediaries, controlling, controlled by or under common control with the broker-dealer or any of its Financial Advisors; or (ii) any officer, director, employee, agent, registered representative, relative, family member of, or partner in, the broker-dealer or any of its Financial Advisors.

Absent material changes, disclosures need not be repeated for subsequent recommendations by a broker-dealer and its Financial Advisors of the same investment product within one year of the provision of the contract disclosure, or a previous written disclosure required under the BIC exemption.

Website Disclosure

The broker-dealer must maintain a website that is freely accessible to the public and updated at least quarterly. A website that requires a user name and password will be considered "freely accessible" as long as no other constraints or conditions on public access are imposed.[11] The website must include:

- A description of the broker-dealer's business model and any material conflicts of interest associated with that business model;
- A schedule of the broker-dealer's typical account or contract fees and service charges;
- A model contract or model notice of contractual terms (if applicable) and required disclosures. At least quarterly, broker-dealers must review the disclosures for accuracy and must make any required updates within 30 days;
- A written description or summary of the key components of the broker-dealer's policies and procedures relating to conflict-mitigation and incentive practices, which must be provided in a manner that permits Retirement Investors to make an informed judgment about the stringency of the broker-dealers' protections against conflicts of interest. Broker-dealers must provide a copy of their policies and procedures to the DOL upon request;

11 *See* 81 Fed. Reg. 61002, 61052.

- If applicable, a list of all product manufacturers and other parties with whom the broker-dealer maintains arrangements that provide third-party payments to the broker-dealer or its advisory personnel with respect to specific investment products or classes of investments recommended to Retirement Investors as well as a description of such arrangements (including whether and how the arrangements may impact Financial Advisors' compensation) and any benefits the broker-dealer provides to the product manufacturers or other parties in exchange for the third-party payments;

- Disclosure of the broker-dealer's compensation and incentive arrangements with Financial Advisors (including cash and non-cash compensation or awards to Financial Advisors for recommending to Retirement Investors particular product manufacturers, investments or categories of investments, or recruitment or retention incentives) as well as a full and fair description of any payout or compensation grids. Broker-dealers need not, however, disclose any individual's compensation or compensation arrangement.

- A fair disclosure of the scope, magnitude and nature of the compensation arrangements and material conflicts of interest in sufficient detail to permit visitors to the website to make an informed judgment about the significance of the compensation practices and material conflicts of interest with respect to transactions recommended by the broker-dealer and its Financial Advisors. Within that framework, broker-dealers may describe their arrangements with product manufacturers, advisers and others by reference to dollar amounts, percentages, formulas or other means reasonably calculated to present a materially accurate description of the arrangements. Similarly, the website may group disclosures based on reasonably defined categories of investment products or classes, product manufacturers, advisers and arrangements. If appropriate, the disclosure may be in the form of reasonable ranges of values, rather than specific values.[12]

If the broker-dealer already makes public disclosure of the BIC exemption's required website disclosures, (*e.g.,* in Form ADV, Part 2), the broker-dealer may satisfy the BIC requirements by posting the disclosures to its website with an explanation that the information can be found in the disclosures and a link to where it can be found. A broker-dealer is not required to disclose information if the disclosure is prohibited by law.

Policies and Procedures

A broker-dealer relying on the BIC exemption must adopt and comply with written policies and procedures reasonably and prudently designed to ensure that its Financial Advisors adhere to the Impartial Conduct Standards. In developing its policies and procedures, the broker-dealer must: specifically identify and document its material conflicts of interest: adopt measures reasonably and prudently designed to prevent material conflicts of interest from causing violations of the Impartial Conduct Standards; and designate a person or persons (identified by name, title or function) responsible for addressing material conflicts of interest and monitoring their Financial Advisors' compliance with the Impartial Conduct Standards.

The broker-dealer's policies and procedures must prohibit the firm or (to the best of its knowledge) any affiliate or related entity from using or relying on 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 Financial Advisors to make recommendations that are not in the best interest of the Retirement Investor. This requirement does not preclude the use of differential compensation (whether in type or amount,

[12] If a broker-dealer groups its disclosures, it must retain the data and documentation supporting the group disclosure during the time that the supporting information is applicable to the disclosure posted on the broker-dealer's website and for six years thereafter, and make the data and documentation available within 90 days of the DOL's request.

including commissions) based on investment decisions by Retirement Investors, to the extent that the broker-dealer's policies and procedures and incentive practices, when viewed as a whole, are reasonably and prudently designed to avoid a misalignment of Financial Advisors' interests with the interests of their Retirement Investor clients. For example, compensation may differ as a result of neutral factors tied to differences in the services delivered to a Retirement Investor with respect to different types of investments, as opposed to differences in the amounts of third-party payments the broker-dealer receives in connection with particular investment recommendations.

Disclosure to the DOL and Recordkeeping Requirements

Before receiving compensation in reliance on the BIC exemption, a broker-dealer must notify the DOL, by mail or email (e-BICE@dol.gov), that it intends to rely on this exemption. The notice will remain in effect until revoked in writing by the broker-dealer.

A broker-dealer relying on the BIC exemption must maintain for six years, in a manner reasonably accessible for examination, the records necessary to determine compliance with the exemption. The required records must be reasonably available at their customary location for examination during normal business hours by: any authorized employee or representative of the DOL or the Internal Revenue Service; a plan fiduciary or its authorized employee or representative; any contributing employer and any employee organization whose members are covered by a plan, and any of their authorized employees or representatives; and any Retirement Investor that engaged in an investment transaction with the broker-dealer. This right of examination does not include any recommended transaction involving another Retirement Investor, privileged trade secrets, privileged commercial or financial information of the broker-dealer, or information identifying other individuals. If a broker-dealer refuses to disclose information on the basis that the information is exempt from disclosure, the broker-dealer must provide a written notice advising the requestor of the reasons for the refusal by the close of the 30th day following the request, and the notice must state that the DOL may request such information.

A broker-dealer will lose the BIC exemption in the case of any transaction for which it fails to maintain any required records that are necessary to determine that the exemption has been met, but the firm can still rely on the BIC exemption for other transactions. In the case of supporting data and documentation for group disclosures, the good faith provisions discussed above apply. Accordingly, if such records are lost or destroyed due to circumstances beyond the control of the broker-dealer, no prohibited transaction will be considered to have occurred solely on the basis of the unavailability of those records; and no party, other than the broker-dealer responsible for complying with the disclosure or recordkeeping requirements will be subject to any civil penalties or taxes that may be assessed if the records are not maintained or provided to the DOL within the required timeframes.

Level Fee Fiduciaries – "BIC Lite"

If a broker-dealer receives only a "level fee" in connection with its advisory or investment management services, it may rely on the "Level Fee Fiduciary" exemption, colloquially referred to by many as "BIC Lite," which imposes less stringent conditions on eligible broker-dealers because fewer potential conflicts of interest are associated with the more limited services such broker-dealers provide. A Level Fee Fiduciary's compensation is limited to a level fee in connection with providing advisory or investment management services to plan or IRA assets, and the fee must be disclosed in advance to Retirement Investors. A "level fee" is defined as a fee or compensation that is 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, rather than a commission or other transaction-based fee. Level Fee Fiduciaries are subject to the Impartial Conduct Standard discussed above.[13]

When recommending the rollover of an investment in an ERISA plan to an IRA, the broker-dealer must document the specific reason or reasons why the recommendation was considered to be in the best interest of the Retirement Investor. The documentation must: (i) address the Retirement Investor's alternatives to a rollover, including leaving the money in his or her current (or former) employer's plan, if permitted; (ii) take into account the fees and expenses associated with both the plan and the IRA; (iii) reflect whether the employer pays for some or all of the plan's administrative expenses; and (iv) consider the different levels of services and investments available under each option. In the case of a recommendation to roll over from another IRA, or to switch from a commission-based account to a level fee arrangement, a Level Fee Fiduciary must also document the reasons that the arrangement is considered to be in the best interest of the Retirement Investor, specifically including the services that will be provided for the fee.

Scope of Fiduciary Duty

Even if a broker-dealer is a fiduciary with respect to a particular plan or IRA, it will not be deemed a fiduciary regarding any assets of the plan or IRA over which the broker-dealer does not: (i) have any discretionary authority, control or responsibility; (ii) exercise any authority or control; (iii) render investment advice for a fee or other compensation; and (iv) have any authority or responsibility to render such investment advice. A broker-dealer may face liability for another entity's fiduciary breach with respect to plan assets, even if the broker-dealer is not itself a fiduciary.

Product Exemptions

Exemption for Purchases and Sales, Including Insurance and Annuity Contracts

ERISA and the Code prohibit purchases from and sales to Retirement Investors of investment products, including annuities and other insurance products, by a broker-dealer that is a service provider to a plan or IRA. The Final Rules include an exemption for the purchase of an investment product by a Retirement Investor from a broker-dealer that is a party in interest or a disqualified person with respect to a plan. This exception permits a Retirement Investor to engage in a purchase or sale transaction with a broker-dealer that is a service provider to (or other party in interest or disqualified person with respect to) the plan or IRA, and was included as part of the Final Rules because investment transactions often involve prohibited purchases and sales on behalf of entities that have a pre-existing party in interest relationship with the Retirement Investor.

Conditions for relying on this exemption are: (i) the broker-dealer may only effect the transaction in the ordinary course of its business; (ii) the direct or indirect compensation received by the broker-dealer, its affiliates and related entities may not exceed reasonable compensation; and (iii) the terms of the transaction must be at least as favorable to the Retirement Investor as terms generally available in an arms'-length transaction with an unrelated party.

This exemption is not available in the case of an ERISA plan if: (i) the broker-dealer, one of its Financial Advisors or an affiliate is the employer of employees covered by the plan; or (ii) the broker-dealer or one of its Financial Advisors

[13] Section VII(h) of the BIC exemption.

is a named fiduciary or plan administrator with respect to the plan (or an affiliate of the fiduciary or plan administrator), which was selected by a non-Independent Fiduciary to provide advice to the plan.

This exception is not available if: (i) the compensation received by the broker-dealer is the result of a principal transaction; (ii) the compensation is received solely as the result of robo-advice (except for Level Fee Fiduciaries); and (iii) the broker-dealer or its Financial Advisor has or exercises any discretionary authority or discretionary control with respect to the recommended transaction.

Proprietary Products

A broker-dealer that, at the time of the transaction, restricts its Financial Advisors' investment recommendations, in whole or part, to proprietary products or to investments that generate third-party payments, may rely on the BIC exemption if all of the following conditions are satisfied:

- Prior to or contemporaneously with the execution of the recommended transaction, the Retirement Investor is furnished with a written notice that: (i) clearly and prominently indicates that the broker-dealer offers proprietary products or receives third-party payments in connection with the purchase, sale, exchange or holding of recommended investments; and (ii) informs of the limitations placed on the universe of investments that the broker-dealer or its Financial Advisors may recommend to the Retirement Investor. The requirement will not be met if the notice merely states that the broker-dealer or its Financial Advisors "may" limit investment recommendations based on whether the investments are proprietary products or generate third-party payments, without specific disclosure of the extent to which recommendations are in fact limited on that basis;

- Prior to or at the same time as the execution of the recommended transaction, the Retirement Investor receives full and fair written disclosure of any material conflict of interest that the broker-dealer or its Financial Advisors have with respect to the recommended transaction, and the broker-dealer and its Financial Advisors comply with the disclosure requirements described above under the BIC exemption;

- The broker-dealer must document, in writing: (i) its limitations on the universe of recommended investments; (ii) the material conflicts of interest associated with any contract, agreement or arrangement providing for its receipt of third-party payments or associated with the sale or promotion of proprietary products; (iii) all services it will provide to Retirement Investors in exchange for third-party payments; and (iv) any services or consideration it will furnish to any other party (including the payor) in exchange for the third-party payments. The broker-dealer also must reasonably conclude that the limitations on the universe of recommended investments and material conflicts of interest will not cause the broker-dealer or its Financial Advisors to receive compensation in excess of reasonable compensation for Retirement Investors, or to recommend imprudent investments. The broker-dealer also must document the bases for its conclusions in writing;

- The broker-dealer must adopt, monitor, implement and adhere to policies and procedures and incentive practices that meet the best interest standard of care. Further to this requirement, neither the broker-dealer, nor (to the best of its knowledge) any affiliate or related entity may 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 the Financial Advisor to make imprudent investment recommendations; subordinate the interests of the Retirement Investor to the Financial Advisor's own interests; or make recommendations based on the Financial Advisor's considerations of factors or interests other than the investment objectives, risk tolerance, financial circumstances and needs of the Retirement Investor;

- At the time of the recommendation, the amount of compensation and other consideration reasonably anticipated to be paid, directly or indirectly, to the broker-dealer, its Financial Advisors or their affiliates or related entities for their services in connection with the recommended transaction may not be in excess of reasonable compensation within the meaning of ERISA or the Code; and

- The Financial Advisor's recommendation: (i) must reflect the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances and needs of the Retirement Investor; and (ii) may not be based on the financial or other interests of the Financial Advisors, or on their consideration of any factors or interests other than the investment objectives, risk tolerance, financial circumstances and needs of the Retirement Investor.

New Exemptions Related to Rule Implementation

Pre-Existing Transactions

The DOL permits broker-dealers, Financial Advisors, and their affiliates and related entities, to receive compensation (such as 12b-1 fees) in connection with the purchase, sale, exchange or holding of securities or other investment property that was acquired for a plan or IRA account prior to April 10, 2016 (Applicability Date).

The "Pre-Existing Transactions" exception is conditioned on:

- The receipt of compensation is the result of an agreement, arrangement or understanding entered into prior to the Applicability Date and that has not expired or come up for renewal post-Applicability Date;

- The purchase, exchange, holding or sale of the securities or other investment property was not otherwise a non-exempt prohibited transaction under ERISA or the Code on the date it occurred;

- The compensation is not received in connection with Retirement Investors' investment of additional amounts in the previously acquired investment vehicle (except that the exemption does apply to a recommendation to exchange investments within a mutual fund family or variable annuity contract) pursuant to an exchange privilege or rebalancing program that was established before the Applicability Date, provided that the recommendation does not result in the broker-dealer, its Financial Advisors, or their affiliates or related entities, receiving more compensation (either as a fixed-dollar amount or a percentage of assets) than they were entitled to receive prior to the Applicability Date;

- The amount of the compensation paid, directly or indirectly, to the broker-dealer or Financial Advisors, or their affiliates or related entities, in connection with the transaction is not in excess of reasonable compensation within the meaning of ERISA and Code; and

- Any investment recommendations made after the Applicability Date by the broker-dealer or its Financial Advisors with respect to the securities or other investment property must be provided in the "best interest" of the Retirement Investor as set forth in the BIC exemption.

Transition Period

The DOL also provided a transition period from April 10, 2017 to January 1, 2018, during which certain relief is granted that allows broker-dealers and their Financial Advisors to receive otherwise prohibited compensation in connection with providing investment advice to Retirement Investors. The exclusions applicable to the Pre-Existing Transactions exemption also apply to the "Transition Period" exemption.

A broker-dealer and its Financial Advisors that seek to rely on the Transition Period exemption must:

- Provide investment advice that is in the best of interest of the Retirement Investors at the time of the recommendation;
- Receive compensation, directly or indirectly, for their services that is no more than reasonable compensation;
- Provide statements to Retirement Investors about recommended transaction fees and compensation, material conflicts of interest and any other matters relevant to a Retirement Investor's investment decisions that are not materially misleading at the time they are made;
- Prior to or concurrently with the execution of a recommended transaction, provide Retirement Investors a "one-time only" written disclosure (that may cover multiple transactions or all transactions occurring within the transition period). The written disclosure, which may be delivered in person, electronically or by mail, must: (i) clearly, prominently and affirmatively state that the broker-dealer and any of its Financial Advisors act as fiduciaries under ERISA and/or the Code with respect to the recommendation, and that the firm and its Financial Advisors adhere to the best interest standard of care when making recommendations; (ii) describe the broker-dealer's material conflicts of interest; and (iii) disclose whether the broker-dealer offers proprietary products or receives third-party payments in connection with any investment recommendation. If the broker-dealer or its Financial Advisors limit investment recommendations, in whole or part, to proprietary products or investments that generate third-party payments, the written notice must advise Retirement Investors of the limitations placed on the universe of investment recommendations.

Broker-dealers acting in good faith and with reasonable diligence have the same conditional protection from errors and omission as with the full BIC exemption's transaction disclosure requirements. To rely on the Transition Period exemption, a broker-dealer must designate a person or persons (identified by name, title or function) responsible for addressing material conflicts of interest and monitoring their Financial Advisors' adherence to the Impartial Conduct Standards. Broker-dealers are also subject to the full BIC exemption's recordkeeping requirements.

Executing Securities Transactions in the Ordinary Course of Business

The DOL retained the long-standing rule under which a broker-dealer will not be deemed to be a fiduciary solely because it executes securities transactions for the purchase or sale of securities in the ordinary course of its business on behalf of a plan or IRA at the instruction of a fiduciary for the plan or IRA. This exception from "fiduciary" status requires that neither the fiduciary providing the instructions, nor any affiliate of such fiduciary, is the broker-dealer executing the transactions. The fiduciary's instructions must include: (i) the name of the security to be bought or sold; (ii) a price range within which the security may be purchased or sold or, in the case of mutual funds, a price in compliance with Rule 22c-1 under the Investment Company Act of 1940; (iii) the time in force for the order, which

cannot exceed five business days; and (iv) the minimum or maximum quantity of the security to be bought or sold, which may be expressed as the dollar value of the security in the case of mutual fund shares.[14]

Certain Continuing Exceptions

Transactions with Independent Fiduciaries with Financial Expertise

Subject to certain conditions, a broker-dealer can provide advice to an Independent Fiduciary[15] of a plan or IRA, regarding an arms'-length sale, purchase, loan, exchange or other transaction related to the investment of securities or other investment property without being deemed to be a fiduciary.

Prior to entering into a transaction on behalf of a Retirement Investor, a broker-dealer relying on the Independent Fiduciary exemption must:

- Know or have a reasonable basis for believing that the fiduciary is an Independent Fiduciary. The broker-dealer may rely on a written representative from the plan or Independent Fiduciary as to total assets under management or control;
- Obtain a written representation to establish its knowledgeable or reasonable belief that the Independent Fiduciary is capable of independently evaluating investment risks generally and as to particular transactions and investment strategies;
- Fairly inform the Independent Fiduciary: (i) that the broker-dealer is not undertaking to provide impartial investment advice, or to give advice in a fiduciary capacity, in connection with the transaction; and (ii) of the existence and nature of the broker-dealer's financial interests in the transaction;
- Know or reasonably believe, which may be demonstrated by a written representation from the plan or Independent Fiduciary, that the Independent Fiduciary is a fiduciary under ERISA and/or the Code with respect to the transaction and is responsible for exercising independent judgment in evaluating the transaction; and
- Not receive a fee or other compensation directly from a Retirement Investor for the provision of investment advice (as opposed to other services) in connection with the transaction.

Swap and Security-Based Swap Transactions

Broker-dealers that are swap dealers, security-based swap dealers, major swap participants, major security-based swap participants or swap clearing firms are excluded from the definition of "fiduciary" when providing advice to a plan, if:

- The plan is represented by an Independent Fiduciary;

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[14] Failure to comply with the conditions related to effecting transactions at the instruction of a plan or IRA fiduciary will not cause a broker-dealer to be deemed a fiduciary with respect to any assets of a plan or IRA for which the broker-dealer does not: (i) have any discretionary authority, control or responsibility; (ii) exercise any authority or control; (iii) render investment advice for a fee or other compensation; or (iv) have any authority or responsibility to render such investment advice.

[15] *See* footnote 5, *supra*.

- The broker-dealer does not receive a fee or other compensation directly from the plan or plan fiduciary for the provision of investment advice in connection with the plan;

- Prior to making any recommendation regarding a transaction or series of transactions, the broker-dealer obtains a written representation from the Independent Fiduciary that the Independent Fiduciary understands that the person is not undertaking to provide impartial investment advice, or to give advice in a fiduciary capacity, in connection with the transaction and that the Independent Fiduciary is exercising independent judgment in evaluating the recommendation; and

- In the case of a swap dealer or security-based swap dealer, the person is not acting as an adviser to the plan in connection with the transaction.

Compliance Considerations

Listed below are one dozen compliance considerations that are among those that broker-dealers may wish to consider when assessing the Final Rules and developing their associated compliance programs:

- Products and services offered to Retirement Investors and related fees. Broker-dealers will need to determine the products and services they will offer to Retirement Investors, together with the fees that will be charged for those products and services (*e.g.,* asset-based fees, transaction-based fees, flat fees).

- Proprietary products. If a broker-dealer determines to limit its investment recommendations to proprietary products or to financial instruments that generate third-party payments, it will need to prepare disclosures regarding the limitations placed on the menu of investments that are available through the broker-dealer, as well as ensure that the disclosures have enough specificity to comply with the Final Rules (*i.e.,* disclosures should not use "may").

- Fees and charges. Broker-dealers will need to review their commissions, fees and other charges to make sure they are consistent with the best interest standard, as well as prepare required disclosures. Among other things, firms may wish to evaluate the factors used to price products. If the broker-dealer intends to claim the Level Fee Fiduciary exemption, it will also need to determine appropriate adjustments to comply with the level fee requirements.

- Identification of material conflicts of interest. A key condition of the BIC exemption is the identification and disclosure of material conflicts of interests. Broker-dealers seeking to rely on the BIC exemption may wish to consider how they will identify all material conflicts on an initial and on-going basis, prepare required disclosures, and assign supervisory responsibility for this exercise.

- Impartial standard of conduct. Broker-dealers should review their product offerings and procedures relating to recommendations, and make required adjustments so that the broker-dealer complies with the best interest standard of conduct.

- Compensation and bonuses. Broker-dealers should review their compensation models to determine that compensation is reasonable, and whether it creates conflicts of interest and is consistent with the firm's obligation to act solely in the best interest of Retirement Investors. After any required modifications are made, the broker-dealer will need to prepare the disclosures required by the Final Rules and assign responsibility for keeping the disclosures accurate. All sources of potential compensation should be evaluated, including the

use and forgiveness of retention loans. The standards used by a broker-dealer to determine compensation should be documented.

- Contracts. Broker-dealers will need to amend their customer agreements to include disclosure required by the BIC exemption and also to determine if they need to modify any pre-dispute arbitration or damages provisions to comply with the Final Rules.

- Written notices. Procedures will need to be developed to draft, and update as necessary, the written notices required by the Final Rules. Notice also will need to be provided to the DOL if the broker-dealer will rely on the BIC exemption.

- Disclosures and disclaimers. Broker-dealers will want to adopt procedures for ensuring that their disclosures are consistent (*e.g.,* in their Forms ADV, websites, marketing materials and offering memoranda). Disclosures required by the Final Rules (*e.g.,* that the broker-dealer is a fiduciary) need to be drafted and mapped to the relevant communications in which they will be used. Broker-dealers also will need to modify their websites and determine how to provide the website disclosures and information required by the Final Rules (*e.g.,* copies of Retirement Investors' written contracts).

- Exclusions from the definition of "investment recommendations". Broker-dealers that seek to claim any of the exclusions from characterization as investment recommendations will want to review their communications and services to confirm that they satisfy the exclusions.

- Policies and procedures. Broker-dealers will need to draft policies and procedures that address compliance with the conditions of any exemptions they seek to claim from fiduciary status, as well as compliance and supervisory procedures to comply with the prohibited transaction exemption(s) they claim. The firm's policies and procedures should include the definition of "materiality" that the broker-dealer will use to disclose material conflicts of interest and to ensure that it is not making any materially misleading statements.

- Training. Because the DOL's fiduciary standard of care differs from FINRA's suitability standard of care to which broker-dealers have been accustomed, it will be important to train personnel regarding the requirements under the Final Rules.

Conclusion

For broker-dealers that are fiduciaries under the Final Rules and are seeking to understand their compliance obligations, the complexity of the rules makes the exercise a bit like peeling an onion. The process will likely become even more complicated if the SEC moves forward with its own proposal for a uniform standard of conduct for broker-dealers and investment advisers next spring.

This update was authored by:

K. Susan Grafton
Partner
+1 202 261 3399 (Washington, DC)
+1 212 698 3611 (New York)
Send email

Andrew L. Oringer
Partner
New York
+1 212 698 3571
Send email