CONFLICT OF INTEREST FAQS (PART I- EXEMPTIONS)

U.S. Department of Labor
Employee Benefits Security Administration
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New Exemptions and Amendments to Existing Exemptions

Under the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and the Internal Revenue Code of 1986, as amended (the "Code"), parties providing fiduciary investment advice to plan sponsors, plan participants, and IRA owners are not permitted to receive payments creating conflicts of interest without complying with protective conditions in a prohibited transaction exemption ("PTE"). In connection with the Department's rule defining who is a fiduciary as a result of providing investment advice (the "Rule"), the Department has provided two new PTEs and amended certain existing PTEs. The Rule and related PTEs will protect investors by requiring all who provide retirement investment advice to plans, plan fiduciaries and IRAs to abide by a "fiduciary" standard—putting their clients' best interest before their own profits.

The Department's new Best Interest Contract Exemption (the "BIC Exemption") ensures that retirement investors receive advice that is in their best interest while also allowing advisers and their financial institutions to continue receiving compensation that would otherwise be prohibited, such as commissions, 12b-1 fees, and revenue sharing. The Department's new Class Exemption for Principal Transactions in Certain Assets between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (the "Principal Transactions Exemption") allows advisers and financial institutions to sell or purchase certain recommended debt securities and other investments out of their own inventories to or from plans and IRAs. The Department also amended existing PTEs 75-1, 77-4, 80-83, 83-1, 84-24, and 86-128 to ensure that plan and IRA investors receiving investment advice are consistently protected by impartial conduct standards, regardless of the particular exemption upon which the adviser relies.

The preambles to the final Rule and exemptions include detailed explanations of their relevant terms and provisions, as well as descriptions of the purposes and principles that motivated this rulemaking. In addition to consulting the regulatory text and preambles, readers may also consult the FAQs below for additional guidance on application of the exemptions' terms. This guidance, like the Rule and related exemptions, is generally limited to advice concerning investments in IRAs, ERISA-covered plans, and other plans covered by section 4975(e)(1) of the Internal Revenue Code.

Applicability Dates

The new Rule defining fiduciary advice applies to investment recommendations made on or after April 10, 2017. The Department has determined that, in light of the importance of the Rule's consumer protections and the significance of the continuing monetary harm to retirement investors without the Rule's changes, the April 10, 2017 applicability date (one year after publication of the final rule in the Federal Register) is appropriate and provides adequate time for plans and financial service providers to adjust to the change from non-fiduciary to fiduciary status. The questions below address the applicability date of the new PTEs and amendments to existing PTEs 75-1, 77-4, 80-83, 83-1 84-24, and 86-128.

Compliance Dates

Q1. When do firms and their advisers have to comply with the conditions of the new BIC Exemption and Principal Transactions Exemption?

Firms and their advisers must comply with the exemptions' conditions only if they seek to give advice that would violate the prohibited transaction rules, which are designed to protect investors from conflicts of interest. Firms and advisers must either structure their compensation arrangements to avoid prohibited transactions or they must rely on an exemption such as the BIC Exemption or Principal Transactions Exemption.

The Department has adopted a phased implementation approach to both of these exemptions. The Rule's amended definition of fiduciary advice will first apply on April 10, 2017. On that same date, the BIC Exemption and Principal Transactions Exemption will become available to fiduciary advisers. At the outset, however, and for a transition period extending until January 1, 2018, fewer conditions will apply to financial institutions and advisers that seek to rely upon the exemptions. The transition period gives these fiduciaries additional time to prepare for full compliance with all of the conditions of the exemptions, while providing basic safeguards to protect the interests of retirement investors.

During the transition period, financial institutions and advisers must comply with the "impartial conduct standards" which are consumer protection standards that ensure that advisers adhere to fiduciary norms and basic standards of fair dealing. The standards specifically require advisers and financial institutions to:

- Give advice that is in the "best interest" of the retirement investor. This best interest standard has two chief components: prudence and loyalty:
    - Under the prudence standard, the advice must meet a professional standard of care as specified in the text of the exemption;
    - Under the loyalty standard, the advice must be based on the interests of the customer, rather than the competing financial interest of the adviser or firm;

- Charge no more than reasonable compensation; and
- Make no misleading statements about investment transactions, compensation, and conflicts of interest.

During the transition period, the financial institutions must also provide a notice to retirement investors that, among other things, acknowledges their fiduciary status and describes their material conflicts of interest. They must also designate a person responsible for addressing material conflicts of interest and monitoring advisers' adherence to the impartial conduct standards.

On January 1, 2018, the transition period ends and full compliance with all of the exemptions' conditions is required for firms and advisers that choose to engage in transactions that would otherwise be prohibited under ERISA and the Internal Revenue Code. These conditions importantly include, among other things, requirements to execute a contract with IRA investors with certain enforceable promises, fuller disclosures, and the implementation of specified policies and procedures to protect retirement investors from advice that is not in their best interest.

Q2. When do firms and their advisers have to comply with the new conditions in pre-existing exemptions that were amended in connection with the Rule?

The Department amended the pre-existing exemptions to require compliance with the impartial conduct standards and, in some cases, to more tightly restrict their availability for transactions subject to significant conflicts of interest. These exemptions are Prohibited Transaction Exemptions (PTEs) 75-1, 77-4, 80-83, 83-1, 84-24, and 86-128. The new restrictions on the availability of these exemptions are effective April 10, 2017. Additionally, as noted above, the impartial conduct standards simply require fiduciaries to adhere to basic fiduciary norms and standards of fair dealing (act in the best interest of customers, charge no more than reasonable compensation, and avoid misleading statements). The Department concluded that financial institutions and their advisers should be able to meet these standards within a year after publication of the Rule in the Federal Register, and accordingly requires compliance with these conditions beginning April 10, 2017.

There is, however, an additional transition period for certain transactions under PTE 86-128, which generally require a written authorization executed in advance by an independent fiduciary or IRA owner. For IRAs and non-ERISA plans that were already customers of the financial institution as of April 10, 2017, the fiduciary engaging in the transaction need not obtain affirmative written consent for such transactions as would otherwise be required, but instead may rely on negative consent, as long as the fiduciary gave the required disclosures and consent termination form to the customer by that date (See PTE 86-128, as amended, at Section III(b)(2)).

Best Interest Contract Exemption – General Questions

Q3. Is the BIC Exemption broadly available for recommendations on all categories of assets in the retail advice market, as well as advice on rolling assets into an IRA or hiring an adviser?

Yes. The BIC Exemption is broadly available for a wide variety of transactions relating to the provision of fiduciary advice in the market for retail investments. Under ERISA and the Code, parties providing fiduciary investment advice to plan sponsors, plan participants and beneficiaries, and IRA owners, are not permitted to receive payments creating conflicts of interest unless they comply with a prohibited transaction exemption. Thus, if an adviser or financial institution receives compensation that creates such a conflict of interest (e.g., transaction-based payments such as commissions, or third party payments such as 12b-1 fees or revenue sharing), the transaction generally must meet the terms of an exemption.

The BIC Exemption is intended to be broadly available for advisers and financial institutions that provide investment advice to retail investors such as plan participants and beneficiaries and IRA owners, and is intended by the Department to serve as the primary exemption for investment advice transactions involving these retail investors. As such, it broadly covers recommendations to retail investors, including recommendations with respect to all categories of assets, advice to roll over plan assets, and recommendations on persons the customer should hire to serve as investment advisers or managers.

Q4. Is compliance with the BIC Exemption required as a condition of executing a transaction, such as a rollover, at the direction of a client in the absence of an investment recommendation?

No. In the absence of an investment recommendation, the rule does not treat individuals or firms as investment advice fiduciaries merely because they execute transactions at the customer's direction. Similarly, even if a person recommends a particular investment, the person is not a fiduciary unless the person receives compensation, direct or indirect, as a result of the advice.

If, however, the firm or adviser does make a recommendation concerning a rollover or investment transaction and receives compensation in connection with or as a result of that recommendation, it would be a fiduciary and would need to rely on an exemption. Under the terms of the Rule, a "fee or other compensation, direct or indirect," includes any explicit fee or compensation for the advice received by the adviser (or by an affiliate) from any source, and any other fee or compensation received from any source in connection with or as a result of the recommended purchase or sale of a security or the provision of investment advice services, "including, though not limited to commissions, loads, finder's fees, revenue sharing payments, shareholder servicing fees, marketing or distribution fees, underwriting compensation, payments to brokerage firms in return for shelf space, recruitment compensation paid in connection with transfers of accounts to a registered representative's new broker-dealer firm, gifts and gratuities, and expense reimbursements."

Q5. If an adviser and firm are compensated solely on the basis of a fixed percentage of assets under management, do they need to rely on an exemption, such as the BIC Exemption, to avoid committing a non-exempt prohibited transaction?

As discussed in the preamble to the BIC Exemption, the ongoing receipt of a fixed percentage of the value of a customer's assets under management, where such values are determined by readily available independent sources or independent valuations, typically does not, in and of itself, raise prohibited transaction concerns or require a fiduciary to comply with a prohibited transaction exemption. However, transactions involving this kind of compensation may raise conflict of interest concerns. For example, there is a clear and substantial conflict of interest when an adviser recommends that a participant roll retirement savings out of a plan into a fee-based account that will generate ongoing fees for the adviser that he would not otherwise receive, even if the fees going-forward do not vary with the assets recommended or invested. Similarly, as noted in the BIC Exemption preamble, investment advice to switch from a commission-based account to an account that charges a fixed percentage of assets under management on an ongoing basis could be a prohibited transaction.

Because the prohibited transaction in these examples is relatively discrete and the provision of advice thereafter generally does not involve prohibited transactions, the BIC Exemption includes streamlined conditions to cover the discrete advice that requires the exemption. Discussed further below, the streamlined conditions apply to "level fee fiduciaries" who, with their affiliates, will receive only a "level fee" in connection with advisory or investment management services provided to a plan or IRA that is disclosed in advance to the retirement investor. As defined in the BIC Exemption, a "level fee" is 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. Certain other conditions, described below in Q13, also apply.

In general, after the rollover, the ongoing receipt of compensation based on a fixed percentage of the value of the assets under management, where such values are determined by readily available independent sources or independent valuations, does not, in and of itself, violate the prohibited transaction rules or require compliance with an exemption. However, certain abusive practices involving fee-based accounts can violate the prohibition on self-dealing in ERISA 406(b)(1) and Code section 4795(c)(1)(E), and fall short of meeting the conditions of any applicable exemption. For example, in its "Report on Conflicts of Interest" (Oct. 2013), p.29, the Financial Industry Regulatory Authority (FINRA) suggests a number of circumstances in which advisers may recommend inappropriate commission- or fee-based accounts as a means of promoting the adviser's compensation at the expense of the customer (e.g., recommending a fee-based account to an investor with low trading activity and little or no need for ongoing monitoring or advice; or first recommending a mutual fund with a front-end sales load, and shortly thereafter, recommending that the customer move the shares into an advisory account subject to asset-based fees). Such abusive conduct, which is designed to enhance the adviser's compensation at the retirement investor's expense, would violate the prohibition on self-dealing and would not be covered by an exemption.

Q6. Is the BIC Exemption available for advisers who act as discretionary fiduciaries to retirement plans and then provide investment advice to a participant to roll over assets to an IRA for which the adviser will provide advice?

Yes. Section I(c) of the BIC Exemption contains exclusions that describe circumstances in which the exemption is not available, including an exclusion of relief for advisers that have or exercise any discretionary authority or discretionary control with respect to the recommended transaction. However, the BIC Exemption does provide relief for investment advice to roll over a participant's account, even if the adviser serves as a discretionary fiduciary with respect to the plan or that participant's account and will provide fiduciary investment advice following the rollover, as long as the adviser does not have or exercise any discretionary authority or discretionary control with respect to the decision to roll over and the other applicable conditions of the exemption are satisfied.

Q7. Is the BIC Exemption available for recommendations to roll over assets to an IRA to be managed on a going-forward basis by a discretionary investment manager?

Yes. As noted above, the BIC Exemption does not provide relief for a recommended transaction if the adviser has or exercises any discretionary authority or discretionary control with respect to the transaction. However, it does provide relief for investment advice to roll over a plan account into an IRA, even if the adviser or financial institution will subsequently serve as a discretionary investment manager with respect to the IRA, as long as the adviser does not have or exercise any discretionary authority or discretionary control with respect to the decision to roll over assets of the plan to an IRA, and the other applicable conditions of the exemption are satisfied.

Q8. Is the BIC Exemption available for prohibited conflicts of interest arising from the actions of a discretionary manager of assets held in a plan or IRA? What exemptions are available for these prohibited transactions?

As noted above, the BIC Exemption does not provide relief for a recommended transaction if the adviser has or exercises any discretionary authority or control with respect to the transaction. Persons with such discretionary investment authority have long been treated as fiduciaries under ERISA and the Internal Revenue Code. As such, they have been and continue to be subject to a regulatory regime that specifically addresses the issues raised when a fiduciary is given the discretionary authority to manage plan assets. Including discretionary fiduciaries in the relief provided by the BIC Exemption could expose discretionary fiduciaries—and the retirement investors they serve as fiduciaries—to conflicts they are currently not exposed to. The conditions of the BIC Exemption are tailored to the conflicts that arise in the context of the provision of investment advice, not the conflicts that could arise with respect to discretionary money managers.

Some of the Department's existing exemptions would provide relief for conflicted compensation arrangements entered into by discretionary fiduciaries, if the exemptions' conditions are satisfied. For example, PTE 77-4 permits a discretionary fiduciary to invest assets of a plan or IRA in the fiduciary's -- or its affiliate's -- proprietary mutual fund. PTE 86-128 provides an exemption for discretionary fiduciaries or their affiliates to receive a commission for effecting or executing a securities transaction for a plan or IRA. In connection with the Rule, the Department amended these and several other existing exemptions primarily to incorporate the impartial conduct standards as conditions and to clarify issues of scope. With the addition of the impartial conduct standards, these exemptions now require discretionary fiduciaries to act in the best interest of retirement investors, charge no more than reasonable compensation, and avoid misleading statements. To the extent discretionary fiduciaries worked with ERISA plans, the prudence and loyalty standards in ERISA section 404 were already applicable to them.

Q9. The full BIC Exemption[1] provides that financial institutions cannot "use or rely upon quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation or other actions or incentives that are intended or would reasonably be expected to cause Advisers to make recommendations that are not in the Best Interest of the Retirement Investor." Does this provision categorically preclude financial institutions from paying higher commission rates to advisers based on volume (e.g., by using an escalating grid under which the percentage commission paid to the adviser increases at certain thresholds).

Financial institutions may use such payment structures if they are not intended or reasonably expected to cause advisers to make recommendations that are not in the best interest of retirement investors and they do not cause advisers to violate the reasonable compensation standard. Accordingly, financial institutions must take special care in developing and monitoring compensation systems to ensure that they do not run counter to the fundamental obligation to provide advice that is in the customer's best interest. Financial institutions intending to use escalating grids should consider the following factors in developing their approach:

- ***The grid.*** Financial institutions must exercise care to avoid incentivizing advisers to make investment recommendations that are not in the retirement investor's best interest. Accordingly, as firms review possible grid structures, they should carefully consider the amounts used as the basis for calculating adviser compensation to avoid transmitting firm-level conflicts to the adviser. If, for example, different mutual fund complexes pay

[1] The term "full BIC Exemption" is used in these FAQs to describe the relief that is subject to the exemption's full conditions, as distinguished from the relief provided for "level fee fiduciaries," subject to more streamlined conditions. *See* Q5 and Qs13-19.

different commission rates to the firm, the grid cannot pass along this conflict of interest to advisers by paying the adviser more for the higher commission funds and less for the lower commission funds (e.g., by giving the adviser a set percentage of the commission generated for the firm). Such an approach would incentivize the adviser to recommend investments based on their profitability to the firm, rather than their value to the investor. However, the firm could define the "compensable" revenue that goes into the grid in such a way that it is level within different broad categories of investments based on neutral factors that aren't tied to how lucrative the investments are for the firm. Of course, any such compensation structure would be subject to appropriate oversight by the firm to ensure that recommendations are based on the customer's interest, rather than the adviser's interest in earning additional compensation. The touchstone is always to avoid structures that misalign the financial interests of the adviser with the interests of the retirement investor.

- ***Neutral factors.*** As discussed in the preamble to the BIC Exemption, firms can pay different commission amounts for different broad categories of investments based on neutral factors. Under this approach, the firm eliminates variations in commissions within reasonably designed investment categories, but variation is permitted between these categories based on neutral factors, such as the time and complexity associated with recommending investments within different product categories. Thus, for example, a firm might adopt one commission structure for mutual fund investments, while providing a different structure for annuities, assuming there is a neutral basis for the distinction. For these purposes, "neutral factors" are factors that are not based on the financial interests of the firm (e.g., the profitability of the investment), but rather on significant differences in the work that justify drawing distinctions between categories and compensation. Because compensation varies between categories under this model, the financial institution should exercise special care to monitor recommendations between categories. Advisers cannot preferentially recommend particular product categories simply because they increase adviser compensation. The firm should also exercise care to ensure that any justifications for creating such categories are borne out in practice (e.g., if the rationale for paying a higher percentage for one category than another is the additional work necessary to make such recommendations, the firm should pay careful attention to whether its advisers are, in fact, performing the additional work).
- ***Size of steps.*** Grids with one or several modest or gradual increases are less likely to create impermissible incentives than grids characterized by large increases. An appropriately structured grid would not rely on compensation thresholds that enable an adviser to disproportionately increase his or her compensation as the adviser reaches the threshold. Financial institutions must exercise care to avoid dramatic increases in compensation that undermine the best interest standard and create misaligned incentives for advisers to make recommendations based on their own financial interest, rather than the customer's interest in sound advice.

- ***Retroactivity.*** **A**s the adviser reaches a threshold on the grid, any resulting increase in the adviser's compensation rate should generally be prospective – the new rate should apply only to new investments made once the threshold is reached. If the consequence of reaching a threshold is not only a higher compensation rate for new transactions, but also retroactive application of an increased rate of pay for past investments, the grid is likely to create acute conflicts of interest. Retroactivity magnifies the adviser's conflict of interest with respect to investment recommendations and increases the incentive to make the sales necessary to cross the threshold regardless of the investor's interest. Depending on the magnitude of past investments and the size of the percentage increase, the adviser can accrue compensation that is wholly disproportional to the compensation that he or she would normally receive for the sales that put the adviser over the top.
- ***Oversight.*** Financial institutions employing escalating grids should pay particular attention to the conflicts of interest such grids create in establishing a system to monitor and supervise adviser recommendations, both at or near compensation thresholds and at a greater distance. Financial institutions should increase monitoring of adviser recommendations at or near compensation thresholds to ensure that adviser recommendations are driven by the customer's best interest, rather than the desire for increased compensation. Similarly, firms should pay special attention to ensuring that the thresholds do not create undue sales incentives. Unduly aggressive or unrealistic thresholds can create incentives to make the sale without regard to whether a sale is in the investor's financial interest.

By carefully designing their compensation structures in light of such factors, firms should be able to avoid creating incentive structures that are misaligned with the interests of retirement investors. For more information on this approach, see Example 4 in the preamble to the BIC Exemption, 81 FR 21038. Under the full BIC Exemption, the overarching standard is always to ensure that the firm's compensation practices are not intended and would not reasonably be expected to cause advisers to make recommendations that violate the best interest standard. Accordingly, the firms should carefully assess their compensation practices for potential conflicts of interest, and work to avoid structures that undermine advisers' incentives to comply with the best interest standard. Additionally, upon request, the Department can provide feedback to parties on specific compensation approaches.

Q10. Is "robo-advice" covered by the BIC Exemption or other exemption?

The full BIC Exemption does not cover advice provided *solely* through an interactive Web site in which computer software-based models or applications provide recommendations based on personal information that the investor supplies without any personal interaction or advice from an individual adviser (i.e., robo-advice). The Department did not make the full BIC Exemption generally available for such robo-advice based on its view that the marketplace for robo-advice is still evolving in ways that appear to avoid conflicts of interest that would violate the prohibited transactions provisions and that minimize cost. In addition, a separate exemption set forth in ERISA sections 408(b)(14) and 408(g) and the implementing regulations at 29 C.F.R. section 2550.408g-1,[2] already provides an exemption for advice arrangements that rely upon computer models to deliver advice, provided that the arrangement meets specified conditions aimed at protecting the participant or IRA from biased advice.

However, the BIC Exemption does provide relief for robo-advice providers that are "level fee fiduciaries." As noted in Q5, there are circumstances in which even level fee fiduciaries may need an exemption. For example, there is a clear and substantial conflict of interest when an adviser recommends that a participant roll retirement savings out of a plan into a fee-based account that will generate ongoing fees for the adviser that it would not otherwise receive, even if the fees going-forward do not vary with the assets recommended or invested. Similarly, investment advice to switch from a commission-based account to an account that charges a fixed percentage of assets under management on an ongoing basis could be a prohibited transaction. The streamlined level fee provisions of the BIC Exemption cover robo-advice providers engaging in these discrete transactions. The level fee provisions and conditions are discussed in the next section.

Q11. Does the full BIC Exemption prohibit a financial institution or adviser from discounting prices paid by customers for services?

No. The Department understands that firms and advisers currently discount prices, and thereby their own compensation, based upon a variety of factors, such as the size of a client's account, the size of a particular transaction, the desire to attract a new client or begin building a practice, the level of service agreed upon between the client and the adviser, as well as to express appreciation to long-standing clients.

The full BIC Exemption requires financial institutions to adopt policies and procedures reasonably and prudently designed to ensure that individual advisers adhere to the exemption's impartial conduct standards. In addition, the full BIC Exemption requires that recommended transactions may not cause financial institutions and advisers to receive compensation in excess of reasonable compensation. If the financial institution has established a price or pricing schedule for services that satisfies the reasonable compensation standard, it is permissible for advisers to discount such prices for individual clients under the full BIC Exemption. Assuming that the discounts are not used in a manner that re-introduces conflicts of interest, neither the Rule nor the exemption prohibits such practices.

[2] *See also* Code section 4975(d)(17) and (f)(8).

Q12. Is the payment of recruitment bonuses or awards to an adviser by a financial institution permissible under the full BIC Exemption? Does it matter if the bonus or award is contingent on the achievement of one or more sales targets?

Many financial institutions maintain adviser recruitment programs. The programs are structured in a variety of ways, often including forgivable loans. The recruitment incentives may involve a "signing" or "front-end" award, which is not tied to the movement of accounts or assets to the firm or on achievement of particular asset or sales targets, but rather is paid as a fixed sum contingent on the adviser's continued service in good standing at the financial institution. Such "signing" awards and bonuses are permissible under the full BIC Exemption because the payments do not turn on the adviser's particular recommendations or create inappropriate incentives to give advice that is not in the customer's best interest.

In addition to such front-end awards, financial institutions often also provide large "back-end" awards, as part of their recruitment programs, that are expressly contingent on the adviser's achievement of sales or asset targets. Such back-end awards can create acute conflicts of interest that are inconsistent with the full BIC Exemption's requirement that financial institutions adopt policies and procedures reasonably and prudently designed to ensure that individual advisers adhere to the exemption's impartial conduct standards. In particular, under the full BIC Exemption, financial institutions may not use or rely on bonuses, special awards, differential compensation, or other actions or incentives "that are intended or would reasonably be expected to cause Advisers to make recommendations that are not in the Best Interest of the Retirement Investor." Instead, firms must structure recruitment and other incentives carefully to avoid violation of these standards or evasion of the exemption's requirement. Unlike properly structured compensation grids as described in Q9, back-end awards commonly result in large amounts of income to the adviser that are paid on an "all or nothing" basis contingent on the adviser's satisfaction of revenue or asset targets. Such disproportional amounts of compensation significantly increase conflicts of interest for advisers making recommendations to investors, particularly as the adviser approaches the target. Accordingly, financial institutions generally may not enter into such arrangements under the full BIC Exemption.

The Department recognizes, however, that some firms may have entered into such back-end recruitment award arrangements with advisers prior to the date of this guidance, and may be contractually obligated to honor their commitments for some period into the future (e.g., the firm may have committed itself to enter into a series of forgivable loans based on meeting asset or revenue targets over a five-year period, and including repayment periods potentially stretching out for a still longer period). These agreements predated the Rule, exemptions, and this guidance, and, accordingly, were not designed to evade their terms. Based on these considerations, if before the date of this guidance, a financial institution entered into such an arrangement as part of a written and binding contract, and the firm determines in good faith that it is contractually bound to continue the arrangement after the applicability date, the financial institution may continue to rely on the full BIC Exemption for transactions involving that adviser, provided that it engages in stringent oversight of the adviser during the period of the arrangement, the period of time remaining under the arrangement is reasonable and consistent with general industry practices, and the arrangement does not otherwise violate the conditions of the exemption, ERISA, or the Code. It was not the Department's intent to overturn such pre-existing binding contracts in these circumstances, and the Department would not treat the parties as having created an impermissible incentive structure under the exemption based on such a pre-existing agreement. To the extent the financial institution chooses to honor these pre-existing arrangements, however, it must adopt special policies and procedures specifically aimed at the conflicts of interest introduced by the arrangements and designed to protect investors from harm. These policies and procedures should establish an especially strict system of supervision and monitoring of conflicts of interest, particularly as the adviser approaches sales targets.

More generally, prudent financial institutions will adopt measures to protect retirement investors in connection with the recruitment of advisers, including such practices as careful screening of potential hires for past misconduct and disciplinary history; reliance on prudent supervisory policies, surveillance and technology to identify, review, and remediate improper sales practices or account transfers; training and education on the policies and procedures required to meet the impartial conduct standards; alerting investors to the potential conflicts and issues associated with recruitment practices and account transfers (see, e.g., FINRA Rule 2273); and discipline and nullification of awards where there is a conclusion of advisor wrongdoing. Firms have an obligation to avoid compensation structures that undermine advisers' incentives to comply with the best interest standard or that are designed to evade the proper application of that standard, and, accordingly, should carefully review their practices to ensure compliance.

Best Interest Contract Exemption – Level Fee Fiduciaries

Q13. Under the BIC Exemption, who are "level fee fiduciaries" and what prohibited transaction relief is available to them?

The BIC Exemption provides streamlined relief for "level fee fiduciaries" to receive compensation as a result of their provision of investment advice to retirement investors. In general, level fee fiduciaries do not have the sorts of conflicts of interest that give rise to prohibited transactions or require reliance on an exemption. However, there is a clear and substantial conflict of interest when an adviser recommends that a participant roll money out of a plan into a fee-based account that will generate ongoing fees for the adviser that he would not otherwise receive, even if those fees do not vary with the assets recommended or invested. Similarly, investment advice to switch from a commission-based account to an account that charges a fixed percentage of assets under management on an ongoing basis could be a prohibited transaction. The streamlined level fee provisions of the BIC Exemption are designed to provide relief for these discrete transactions.

Under these streamlined provisions of the, level fee fiduciaries, with their affiliates, may receive only a "level fee" in connection with advisory or investment management services provided to a plan or IRA, and the fee must be disclosed in advance to the retirement investor. As defined in the exemption, a "level fee" is 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. Level fees do not include commissions or other transaction-based fees.

The streamlined conditions applicable to level fee fiduciaries require the financial institution to provide a written acknowledgment of its and its advisers' fiduciary status to the retirement investor. The financial institution and its advisers must satisfy the impartial conduct standards (requiring fiduciaries to act in the best interest of their clients, charge no more than reasonable compensation, and make no misleading statements) and document the reasons why the advice was considered to be in the best interest of the retirement investor. In the case of investment advice to roll over assets from an ERISA plan to an IRA, this documentation must include consideration of the retirement investor's alternatives to a rollover, including leaving the money in his or her current employer's plan, if permitted, and must take into account the fees and expenses associated with both the plan and the IRA; whether the employer pays for some or all of the plan's administrative expenses; and the different levels of services and investments available under each option.[3] See BIC Exemption, Section II(h).

It should be emphasized that compliance with the streamlined conditions generally is not the only way for level fee fiduciaries to obtain relief under the BIC Exemption. In most cases, they can also avoid prohibited transactions simply by executing the Best Interest Contract with their customer and complying with the applicable conditions of the full BIC Exemption.[4] Thus, if firms or individual advisers are in doubt about their status as level fee fiduciaries, they have an alternative means of compliance that protects investors' interests in unbiased investment advice and provides relief from application of the prohibited transaction provisions.

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[3] As further described in Q14, the documented factors and considerations are integral to a prudent analysis of whether a rollover is appropriate, regardless of whether the fiduciary is a "level fee" fiduciary or a fiduciary complying with the full BIC Exemption.

[4] Robo-advice providers, however, may rely on the BIC Exemption only if they are level fee fiduciaries; relief is not available under the full BIC Exemption. *See* Q10.

Q14. Can an adviser and financial institution rely on the level fee provisions of the BIC Exemption for investment advice to roll over from an existing plan to an IRA if the adviser does not have reliable information about the existing plan's expenses and features?

As described in Q13, in the case of investment advice to roll over assets from an ERISA plan to an IRA, the streamlined level fee provisions of the BIC Exemption require advisers and financial institutions to document the reasons why the advice was considered to be in the best interest of the retirement investor. The documentation must take into account the fees and expenses associated with both the existing plan and the IRA; whether the employer pays for some or all of the existing plan's administrative expenses; and the different levels of services and investments available under each option.

To satisfy this requirement, the adviser and financial institution must make diligent and prudent efforts to obtain information on the existing plan. In general, such information should be readily available as a result of DOL regulations mandating plan disclosure of salient information to the plan's participants (see 29 CFR 2550.404a-5). If, despite prudent efforts, the financial institution is unable to obtain the necessary information or if the investor is unwilling to provide the information, even after fair disclosure of its significance, the financial institution could rely on alternative data sources, such as the most recent Form 5500 or reliable benchmarks on typical fees and expenses for the type and size of plan at issue. If the financial institution relies on such alternative data, it should explain the data's limitations and the written documentation should also include an explanation of how the financial institution determined that the benchmark or other data were reasonable.

Although the documentation requirement is only specifically recited in the level fee provisions of the BIC Exemption, the documented factors and considerations are integral to a prudent analysis of whether a rollover is appropriate. Accordingly, any fiduciary seeking to meet the best interest standard as set out in the exemption would engage in a prudent analysis of these factors and considerations before recommending that an investor roll over plan assets to an IRA or other investment, regardless of whether the fiduciary was a "level fee" fiduciary or a fiduciary complying with the full BIC Exemption.

Q15. In order for a financial institution to rely upon the streamlined provisions for "level fee fiduciaries" must the financial institution and its affiliates offer only "level fee" accounts?

No. An adviser, financial institution, and their affiliates may offer both "level fee" advisory services for which they can rely on the streamlined provisions, as well as commission-based brokerage accounts for which they have to rely on the full BIC Exemption. Retirement investors could invest in both types of accounts, but the institution and adviser should take care to ensure that any recommendations as to account type adhere to the impartial conduct standards and are not intended to evade the requirements of the exemption. *See also* Q5 (noting that certain abusive practices involving fee-based accounts can violate the prohibition on self-dealing in ERISA 406(b)(1) and Code section 4795(c)(1)(E), and fall short of meeting the conditions of any applicable exemption).

Q16. Can a financial institution and adviser rely on the level fee provisions in the BIC Exemption to recommend a rollover from an employee benefit plan to an IRA if the adviser will become a discretionary manager with respect to the IRA assets after the rollover?

Yes. The BIC Exemption is available for investment advice to roll over a plan account to an IRA, even if the adviser will subsequently serve as a discretionary investment manager with respect to the IRA, as long as the adviser does not have or exercise any discretionary authority or discretionary control with respect to the decision to roll over assets of the plan to an IRA. The level fee provisions are available when the only fee or compensation received by the financial institution, adviser and any affiliate in connection with the advisory or investment management services is a "level fee" and is fully disclosed in advance to the Retirement Investor. If the discretionary manager, its financial institution and their affiliates satisfy this limitation and the other applicable conditions of the BIC Exemption for level fee fiduciaries, the exemption would provide relief for the rollover investment advice. As discussed in Q8, however, the BIC Exemption is not available for any prohibited conflicts of interest arising from the discretionary manager's conduct after the assets are rolled over to the discretionary account.

Q17. Can an adviser and financial institution rely on the level fee provisions in the BIC Exemption if they recommend that investors transfer from commission-based accounts to accounts paying only a "level fee"?

Yes. Under the Rule, fiduciary investment advice includes a recommendation regarding the selection of investment accounts (e.g., brokerage or advisory). The BIC Exemption's relief for level fee fiduciaries includes relief for a recommendation to transfer from a commission-based account to a fee-based account. In addition to receiving only a "level fee" for themselves and their affiliates, the exemption requires the financial institution to provide a written acknowledgment of its and its advisers' fiduciary status to the retirement investor. The financial institution and its advisers must also satisfy the impartial conduct standards and document the reasons why the recommendation was in the best interest of the retirement investor. Additionally, the documentation must address the services that will be provided for the level fee. As noted above, even if the adviser is a "level fee fiduciary," it still must adhere to the impartial conduct standards. As a result, certain abusive practices involving fee-based accounts can violate the prohibition on self-dealing in ERISA 406(b)(1) and Code section 4795(c)(1)(E), and fall short of meeting the conditions of any applicable exemption. For example, in its "Report on Conflicts of Interest" (Oct. 2013), p.29, the Financial Industry Regulatory Authority (FINRA) suggests a number of circumstances in which advisers may recommend inappropriate commission- or fee-based accounts as a means of promoting the adviser's compensation at the expense of the customer (e.g., recommending a fee-based account to an investor with low trading activity and no need for ongoing monitoring or advice; or first recommending a mutual fund with a front-end sales load, and shortly later, recommending that the customer move the shares into an advisory account subject to asset-based fees). Such abusive conduct, which is designed to enhance the adviser's compensation at the retirement investor's expense, would violate the prohibition on self-dealing and would not be covered by an exemption. In making these recommendations, financial institutions and advisers should consider whether the type of account is appropriate in light of the services provided, the projected cost to the customer, alternative fee structures that are available, and the customer's fee structure preferences, in addition to non-price factors.

Q18. Can advisers and financial institutions rely on the "level fee" provisions in the BIC Exemption if they receive third party payments (e.g., 12b-1 fees or revenue sharing payments) in connection with the assets recommended? What if they only recommend assets that generate the same level of third party compensation?

For purposes of the exemption, a "level fee" is 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. Third party payments such as 12b-1 fees and revenue sharing payments, even if they provide the same amount or percentage for each investment offered, are transaction-based fees and vary on the basis of a particular investment because they are paid only for the particular investments that are included in the arrangement. If the adviser or financial institution is going to recommend products that generate third party payments, they need to comply with the more stringent provisions of the full BIC Exemption to safeguard the investor from biased advice. The BIC Exemption includes a section specifically describing how such financial institutions and advisers can adhere to the best interest standard, even when they restrict the investments recommended based in whole or part on the receipt of third party compensation. *See* BIC Exemption, Section IV.

Q19. Can a financial institution and adviser rely on the "level fee" provisions in the BIC Exemption if they sell only proprietary investments for which the financial institution pays the same commission to its advisers regardless of the investment selected?

No. The "level fee" provisions are not available for commission or transaction-based compensation arrangements, or for compensation structures that are limited to the sale of proprietary products. The availability of the compensation depends on the recommendation of a product (and acceptance of that recommendation by the advice recipient) and therefore is not level. If the adviser and financial institution are only going to recommend proprietary products, they need to comply with the more stringent provisions of the full BIC Exemption to safeguard the investor from biased advice. Section IV of the BIC Exemption specifically describes how such financial institutions and advisers can adhere to the best interest standard, even when they restrict investment recommendations to proprietary products.

Best Interest Contract Exemption – Bank Networking Arrangements

Section II(i) of the BIC Exemption provides conditions applicable to advisers who are bank employees, and financial institutions that are banks or similar financial institutions or savings associations, who receive compensation pursuant to a "bank networking arrangement." As defined in the BIC Exemption, bank networking arrangements involve the referral by banks and their employees to non-affiliates who are providers of retail non-deposit investment products, in accordance with applicable banking, securities and insurance regulations.

Q20. The BIC Exemption provisions regarding Bank Networking Arrangements address referrals by banks and bank employees only to non-affiliated financial institutions such as registered investment advisers, insurance companies or broker dealers. Why isn't relief provided for referrals to affiliates?

Under the Rule, a recommendation of *other* persons to provide investment advice or investment management services constitutes fiduciary investment advice, and receipt of compensation as a result of such advice is a prohibited transaction requiring compliance with an exemption. In contrast, marketing oneself or an affiliate (when it is disclosed as such), without otherwise making an investment recommendation covered by the Rule, does not constitute investment advice that may result in a prohibited transaction. Referrals to affiliates who are providers of retail non-deposit investment products therefore generally would not be considered fiduciary investment advice giving rise to a prohibited transaction for which an exemption is required.

Best Interest Contract Exemption and PTE 84-24 – Annuities

The Department has granted two exemptions that permit insurance agents and other advisers to receive compensation when they provide investment advice regarding the sale of annuities. PTE 84-24 (available for fixed rate annuity contracts) and the BIC Exemption (available for fixed rate, fixed indexed, and variable annuity contracts) are available if the applicable conditions are satisfied.

Q21. Can "insurance-only" agents continue to sell fixed rate and fixed indexed annuities to retirement investors after the applicability date of the Rule?

Yes. Both the BIC Exemption and PTE 84-24 provide relief for agents, including insurance-only agents, who sell fixed rate and fixed indexed annuities to retirement investors, as described below.

Under PTE 84-24, an insurance agent can receive an insurance commission on the sale of a recommended "fixed rate annuity contract." For purposes of the exemption, an insurance commission is a sales commission paid by the insurance company, but not revenue sharing payments, administrative fees, or marketing payments. The term "fixed rate annuity contract" is intended to describe the types of annuities commonly referred to as immediate annuities, traditional annuities, declared rate annuities and fixed rate annuities. Fixed indexed annuities and variable annuities are not covered by PTE 84-24, but relief is available for such annuities under the full BIC Exemption, which also covers a broader range of compensation.

PTE 84-24, like the BIC Exemption, requires insurance agents to comply with "impartial conduct standards," which are consumer protection standards that ensure that advisers adhere to fiduciary norms and basic standards of fair dealing. The standards specifically require advisers and financial institutions to:

- Give advice that is in the "best interest" of the retirement investor. This best interest standard has two chief components: prudence and loyalty:
    - Under the prudence standard, the advice must meet a professional standard of care as specified in the text of the exemption;
    - Under the loyalty standard, the advice must be based on the interests of the customer, rather than the competing financial interest of the adviser or firm;
- Charge no more than reasonable compensation; and
- Make no misleading statements about investment transactions, compensation, and conflicts of interest.

Additionally, the exemption includes other conditions, including disclosure and consent requirements, and some restrictions on the parties that may rely on the exemption.

The chief differences between the full BIC Exemption and PTE 84-24 are that the full BIC Exemption: provides broader relief for compensation received on annuity sales (not just insurance commissions); requires the execution of the Best Interest Contract in transactions with IRA owners; requires that financial institutions put in place anti-conflict policies and procedures[5]; and imposes different disclosure obligations than PTE 84-24. Both exemptions require adherence to the impartial conduct standards, and neither exemption requires execution of a contract for advice given to ERISA-covered plans or their participants.

Nothing in these exemptions, the impartial conduct standards, or ERISA prohibits investment advice by "insurance-only" agents, or requires such insurance specialists to render advice with respect to other categories of assets outside their specialty or expertise. A prudent adviser should be careful, however, in accordance with the exemptions, to disclose any limitations on the types

[5] Although PTE 84-24 does not condition relief on a specific policies and procedures requirement, the impartial conduct standards equally apply under both exemptions. As a result, financial institutions should implement prudent anti-conflict policies and procedures, regardless of which exemption they rely upon. In the absence of such policies and procedures, the financial institution is unlikely to be able to ensure adherence to the best interest standard.

of products he or she recommends, and would refrain from recommending an annuity if it were not a prudent choice for the retirement investor. If, for example, it would be imprudent for the investor to purchase an annuity in light of the investor's liquidity needs, existing assets, lack of diversification, financial resources, or other considerations, the adviser should not recommend the annuity purchase, even if that means the agent cannot make a sale.

Q22. Can insurance companies rely on independent insurance agents to sell fixed rate and fixed indexed annuities to retirement investors after the applicability date of the Rule?

Yes. The Department's exemptions for annuity sales (PTE 84-24 and the BIC Exemption) do not require insurance companies to use any particular distribution channel. While insurance companies may rely on a captive sales force to distribute their proprietary products, they may also distribute annuities through independent insurance agents or other channels.

PTE 84-24 provides relief for the insurance agent's receipt of an insurance commission and related employee benefits and for an insurance company's receipt of compensation and other consideration in connection with the sale of a recommended fixed rate annuity contract, provided the conditions of the exemption are satisfied. The full BIC Exemption provides broader relief under expanded conditions for transactions involving annuities of all kinds and for all forms of compensation. PTE 84-24, like the BIC Exemption, requires the independent insurance agent to satisfy the best interest standard and other impartial conduct standards when providing investment advice. Additionally, the exemption includes other conditions limiting the parties that may rely on the exemption and mandating specific disclosures.

Under the full BIC Exemption, advice recommendations must be overseen by an appropriate financial institution, which may be the insurance company that issues the annuity. As under the "suitability" rules that apply to insurance companies under many states' laws, the insurer or financial institution responsible for overseeing the agent's recommendations is responsible for adopting appropriate supervisory mechanisms to ensure the agent's (including independent agent's) compliance with its legal obligations to customers. Under the full BIC Exemption, the responsible financial institution must acknowledge its fiduciary status and the fiduciary status of the agent in connection with the covered annuity recommendations. Advice recommendations must adhere to the impartial conduct standards, including the best interest standard, and the financial institution must have policies and procedures in place that are reasonably and prudently designed to ensure adherence to these standards. In the case of IRA customers, these commitments must be expressed in a written contract with the annuity investor (i.e., the Best Interest Contract). There is no requirement of a written contract for advice to ERISA plans and plan participants, but the standards of conduct are the same as for IRAs.

When an independent insurance agent recommends an annuity under the full BIC Exemption, the agent *and* the insurance company acting as the financial institution must satisfy the exemption's conditions, including the fiduciary acknowledgment and the impartial conduct standards, with respect to that transaction. In such cases, the insurance company effectively stands behind the agent's recommendation to purchase the insurance product, and makes a commitment to the retirement investor that it has policies and procedures in place that have been prudently designed to ensure that the agent's recommendations will be prudent and based upon the investor's financial interests, rather than, for example, sales incentives created by the insurer that run contrary to the investor's interests. Thus, as the full BIC Exemption states, the insurer, its affiliates, and related parties may not use or rely upon incentives, quotas, or other actions or incentives that are intended or would reasonably be expected to cause an adviser to give advice that violates the impartial conduct standards, including the obligation to make recommendations that are prudent and loyal.

While the independent agent may recommend products issued by a variety of insurers, the full BIC Exemption does not require insurance companies to exercise supervisory responsibility with respect to the practices of unrelated and unaffiliated insurance companies. If an insurer chooses to act as the supervisory financial institution for purposes of the exemption, its obligation is simply to ensure that the insurer, its affiliates, and related parties meet the exemption's terms with respect to the insurer's annuity which is the subject of the transaction. Under the exemption, the insurer must adopt and implement prudent supervisory and review mechanisms to safeguard the agent's compliance with the impartial conduct standards when recommending the insurer's products; avoid improper incentives to preferentially push the products, riders, and annuity features that are most lucrative for the insurer at the customer's expense; ensure that the agent receives no more than reasonable compensation for its services in connection with the transaction; and adhere to the disclosure and other conditions set forth in the exemptions. In other words, its responsibility is to oversee the recommendation and sale of its products, not recommendations and transactions involving other insurers.

If the insurance company adheres to these principles, it should be able to comply with the full BIC Exemption, regardless of whether it chooses to market its products through a captive sales force, independent agents, or other channels. The insurer could also bolster its oversight by contractually requiring an intermediary such as an independent marketing organization (IMO) to implement policies and procedures designed to ensure that all of the agents associated with the IMO adhere to the impartial conduct standards. Thus, for example, the IMO could eliminate potentially troubling compensation incentives across all the insurance companies that work with the IMO. While the insurance company remains responsible for compliance with the full BIC Exemption, nothing in the exemption precludes insurers from contracting with other parties, such as IMOs, for compliance work.

Q23. What is the role of insurance intermediaries, such as independent marketing organizations (IMOs), in the sale of annuity contracts to retirement investors after the applicability date of the Rule? Can they receive compensation such as commissions and override payments?

Insurance intermediaries such as IMOs can continue to distribute the products of an insurance company through independent insurance agents after the applicability date of the Rule. An IMO can receive compensation as a result of an annuity purchase recommended by an insurance agent pursuant to either PTE 84-24 or the full BIC Exemption.

The full BIC Exemption requires that a "financial institution" execute the best interest contract and exercise supervisory authority over advisers. Under the exemption, marketing organizations like IMOs are not treated as financial institutions that can execute the Best Interest Contract. Instead, the exemption contemplates that the insurance company (or other enumerated financial institution) will take responsibility for ensuring that the exemption's conditions are met and that investment advice to buy the insurer's products are in the best interest of retirement investors. This does not mean, however, that insurance companies and independent agents are prohibited from working with IMOs, assuming that the IMOs do not promote imprudent or disloyal advice or advice that otherwise violates the basic standards of fair dealing set forth in the BIC Exemption. Accordingly, the exemption specifically provides relief for compensation paid to "affiliates" and "related entities" of an adviser and financial institution, which would typically include IMOs.[6] Under the exemption, therefore, an IMO can continue to work with an insurance company and receive compensation if the insurance agent and the insurance company comply with the conditions of the exemption applicable to advisers and financial institutions, respectively.

Additionally, the BIC Exemption provides a process for IMOs to seek to be added to the definition of financial institution. Under this process, an IMO can apply to be treated as the financial institution with the responsibility to execute the best interest contract and ensure compliance with the exemption's terms. The Department presently has several such applications under consideration. If the Department grants an individual exemption to an IMO under this process, any other IMO that satisfies the definition and the conditions of the new exemption could also act as a financial institution under the BIC Exemption. Alternatively, the Department may propose a class exemption for IMOs. Before the Department grants such an exemption, it would have to find that the exemption is administratively feasible, in the interests of plans and their participants and beneficiaries and IRA owners, and protective of the rights of participants and beneficiaries of plans and IRA owners.

Disclosures under the Best Interest Contract Exemption

Q24. After January 1, 2018, the full BIC Exemption requires the financial institution to maintain an electronic copy of the required best interest contract with its clients on its web

[6] If an IMO is not an affiliate or related entity, or otherwise a party in interest or disqualified person with respect to the plan or IRA, the IMO's receipt of payments as a result of an adviser's advice would not be a prohibited transaction requiring compliance with an exemption.

site, which must be accessible to the retirement investor. Does the financial institution's website have to maintain an executed copy of each retirement investor's contract or is a model contract acceptable?

Section II of the BIC Exemption requires that financial institutions agree to certain standards and make specified warranties in a written contract with their IRA and non-ERISA plan customers. Section II(a)(2) of the BIC Exemption requires financial institutions to maintain an electronic copy of the retirement investors' contracts on its website that is accessible by the investor.

The best practice is for a financial institution to maintain an executed copy of the retirement investor's individual contract on its website that is accessible by the retirement investor. This ensures that the retirement investor will have ready access to a statement of his or her rights and potentially eliminates many needless disputes about the existence of the contract and the scope of the financial institution's obligations under that contract. To the extent the insurer uses a model contract that does not vary for a class of customers, it may nevertheless choose to post the model on its website along with an acknowledgment that it is bound by the terms of the model contract in its dealings with the specified customers. However, the financial institution should exercise care in this regard. The contract is a condition of the full BIC Exemption for IRA and non-ERISA plan investors. If, in fact, the model contract does not include all of the mandatory terms with respect to the particular customer, does not express the terms of the contract that was executed at the time of the transaction, or if the firm subsequently disclaims the contract posted on the website as the governing document, the exemption is not satisfied.

Q25. How does a financial institution relying on a retirement investor's negative consent to amend an existing contract satisfy Section II(a)(2) of the full BIC Exemption, requiring the financial institution to maintain an electronic copy of the retirement investor's best interest contract on its web site that is accessible by the retirement investor?

Section II(a)(1)(ii) of the BIC Exemption provides that a financial institution can amend existing contracts with investors to add the best interest contract provisions required by the exemption by using a negative consent procedure. Financial institutions may deliver the proposed contract amendment prior to January 1, 2018, and consider the investor's failure to terminate the amended contract within 30 days as assent. An "existing contract" is defined in the exemption as an investment advisory agreement, investment program agreement, account opening agreement, insurance contract, annuity contract, or similar agreement or contract that was executed before January 1, 2018, and remains in effect. If the financial institution elects to use the negative consent procedure to establish the best interest contract, it may deliver the proposed amendment by mail or electronically, but it may not impose any new contractual obligations, restrictions, or liabilities on the retirement investor by negative consent.

As a best practice, financial institutions can post the contract amendment in each retirement investor's account with information on the date and means of delivery. As in the preceding answer, however, financial institutions may post the model contract amendment provisions on their websites with a statement that the provisions are applicable to specified IRA and non-ERISA plan investors with existing contracts as of the relevant date.

Q26. Must the transaction disclosure required by Section III(a) of the full BIC Exemption be provided in connection with a recommendation to hold or to sell an investment product?

No. Section III(a) of the BIC Exemption requires financial institutions to provide certain disclosures "prior to or at the same time as the execution of the recommended investment in an investment product." This disclosure is required to be made only for purchase recommendations and does not have to be provided for recommendations to hold or to sell any investment products.

Q27. If a retirement investor requests specific disclosure of costs, fees or other compensation regarding recommended transactions under Section II(e) or III(a) of the full BIC Exemption, does this require the financial institution to disclose costs, fees or other compensation as of *the date of the recommendation* or as of *the date of the request*?

Section II(e) and III(a) of the BIC Exemption each require the financial institution to disclose that the retirement investor has the right to obtain specific disclosure of costs, fees, and compensation, including third party payments, regarding recommended transactions. The costs, fees, and compensation may be described in dollar amounts, percentages, formulas, or other means reasonably designed to present materially accurate disclosure of their scope, magnitude, and nature in sufficient detail to permit the retirement investor to make an informed judgment about the costs of the transaction and about the significance and severity of the material conflicts of interest. If the retirement investor's request is made prior to the transaction, the information must be provided prior to the transaction, and if the request is made after the transaction, the information must be provided within 30 business days after the request.

The information provided to retirement investors pursuant to Section II(e) and III(a) of the BIC Exemption should generally be provided as of *the date of the recommendation*. However, nothing in the exemption is intended to preclude the financial institution from providing the information as of a subsequent date if the retirement investor requests such subsequent information.

Grandfathering in the Best Interest Contract Exemption

Section VII of the BIC Exemption provides an exemption for specified compensation received in connection with investments that were made before the April 10, 2017 applicability date of the Rule, as well as compensation for recommendations to continue to adhere to a systematic purchase program established before the applicability date. Among other conditions, any new advice with respect to the grandfathered investments must meet the best interest standard.

Q28. Are dividend reinvestment programs "systematic purchase programs" eligible for grandfathering relief under Section VII of the BIC Exemption?

Yes. As contemplated by the exemption, a systematic purchase program operates automatically after the applicability date. For example, a dividend reinvestment program in which dividends paid with respect to specific shares of stock are solely used to purchase additional shares of the stock would constitute a systematic purchase program. Thus, if an investor enters into a dividend reinvestment program prior to the applicability date, Section VII would apply if, after the applicability date, an adviser recommended that the investor continue to adhere to the dividend reinvestment program and received compensation as a result, provided the other applicable conditions of Section VII are satisfied. As noted in the text, the exemption is available for advice to continue to adhere to the program; the exemption does not extend to investment advice to make any changes to the program.

Q29. Under Section VII(b)(3) of the BIC Exemption, grandfathering relief is not available for compensation received in connection with the investment of additional amounts in a previously acquired investment vehicle. If an adviser provides investment advice that a retirement investor invest an additional $100,000 in an annuity contract acquired prior to the applicability date, does that new deposit cause the "old money" in the annuity contract to cease to be eligible for grandfathering relief?

No. Investment advice to deposit the additional $100,000 is not eligible for grandfathering under Section VII; instead, the adviser and financial institution must comply with the applicable terms of Sections I through V of the BIC Exemption, or another exemption, for that advice. The additional deposit, however, does not cause compensation attributable to the annuity purchase that predated the applicability date to become ineligible for relief under Section VII.

Q30. Does investment advice to sell an investment product qualify for grandfathering under Section VII of the BIC Exemption?

Yes. Section VII specifically provides that the exemption applies to compensation received in connection with the "purchase, holding, sale, or exchange" of securities or other investment property acquired before the applicability date. Accordingly, compensation received as a result of investment advice to sell a grandfathered investment is covered by Section VII of the BIC Exemption. Advice regarding investment of the proceeds of the sale, however, must be made in accordance with the applicable terms of Sections I through V of the BIC Exemption, or another exemption, rather than the grandfathering provisions of Section VII.

Principal Transactions Exemption

The Department's new Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Principal Transactions Exemption) allows an adviser and financial institution to engage in principal transactions and riskless principal transactions involving certain investments, with plans, participant and beneficiary accounts, and IRAs. To safeguard the interests of plans, participants and beneficiaries, and IRA owners, the exemption requires financial institutions and advisers to satisfy certain conditions, including adhering to impartial conduct standards. The exemption limits the type of investments that may be purchased by the plans and IRAs, and contains certain other conditions which the adviser and financial institution must satisfy in order to rely on the exemption.

Q31. Is there a way to get an exemption for advice to engage in principal transactions involving assets that are not specifically covered by the Principal Transactions Exemption?

Yes. Parties interested in such an exemption can apply for an individual or class exemption to expand the scope of assets covered by the Principal Transactions Exemption. The Principal Transactions Exemption specifically contemplates a process by which the definition of "Principal Traded Asset[s]" can be expanded through individual exemptions. Thus, the definition of a Principal Traded Asset includes "an investment that is permitted to be purchased under an individual exemption granted by the Department . . . that provides relief for investment advice fiduciaries to engage in the purchase of the investment in a Principal Transaction or a Riskless Principal Transaction with a Plan or IRA under the same conditions as this exemption." This means that the Department may grant an individual exemption for a product to be sold on a principal basis in compliance with the terms of the Principal Transactions exemption, and that product will be added to the definition of Principal Traded Asset in the class exemption. At present, the Principal Transactions Exemption is expressly available for recommended sales to a plan or IRA of CDs, interests in UITs, and securities within the exemption's definition of "debt security." Debt securities are generally defined as corporate debt securities offered pursuant to a registration statement under the Securities Act of 1933; treasury securities; agency securities; and asset-backed securities that are guaranteed by an agency or government sponsored enterprise.

PTE 84-24

As amended, PTE 84-24, allows fiduciaries and other service providers to receive compensation in connection with plans' and IRAs' purchases of insurance contracts and "Fixed Rate Annuity Contracts," as defined in the exemption. It also provides relief for the receipt of compensation in connection with ERISA plans purchasing securities of investment companies registered under the Investment Company Act of 1940.

Q32. Does PTE 84-24 cover rollovers into an annuity?

Yes. Section I(b)(1) provides that the exemption permits "[t]he receipt, directly or indirectly, by an insurance agent or broker or a pension consultant of an Insurance Commission and related employee benefits, from an insurance company in connection with the purchase, with assets of a Plan or Individual Retirement Account (IRA), *including through a rollover or distribution*, of an insurance contract or Fixed Rate Annuity Contract." (Emphasis added.) Likewise, as amended, Section I(b)(4) of the exemption permits "[t]he purchase, with assets of a Plan or IRA, *including through a rollover or distribution*, of a Fixed Rate Annuity Contract or insurance contract from an insurance company, and the receipt of compensation or other consideration by the insurance company." (Emphasis added.)

Q33. The wording of PTE 84-24's reasonable compensation standard differs from the reasonable compensation standard used in the BIC Exemption. Does the Department intend to interpret them differently?

Section III(c) of PTE 84-24 provides that "[t]he combined total of all fees and compensation received by the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter for their services does not exceed reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2)[.]" Section II(c)(2) of the BIC Exemption requires that "[t]he recommended transaction will not cause the Financial Institution, Adviser or their Affiliates or Related Entities to receive, directly or indirectly, compensation for their services that is in excess of reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2)."

The two standards do not differ substantively and the Department intends to interpret these provisions the same way. In this regard, the reasonable compensation standard used in each exemption incorporates the well-established reasonable compensation standard, as set out in ERISA section 408(b)(2) and Code section 4975(d)(2), and the regulations thereunder. The reasonableness of the fees depends on the particular facts and circumstances at the time of the investment advice. The essential question is whether the charges are reasonable in relation to what the investor stands to receive for his or her money. See 81 FR 21167 (PTE 84-24); 81 FR 21030 (BIC Exemption). In general, firms can ensure compliance with the standard by being attentive to market prices and benchmarks for the services; providing the investor proper disclosure of relevant costs, charges, and conflicts of interest; prudently evaluating the customer's need for the services, and avoiding fraudulent or abusive practices with respect to the service arrangement.

Compliance

Q34. How will the Department approach implementation of the new rule and exemptions during the period when financial institutions and advisers are coming into compliance?

The Department has been and will continue working together with fiduciaries, financial institutions, recordkeepers, insurance companies, advisers, and other stakeholders to help them come into compliance with the new rule and related prohibited transaction exemptions. This first set of FAQs is the product of those collaborations. We are also working on outreach to workers, retirees and their families to help them understand the new rule and benefits they will get from it.

Although the Department has broad authority to investigate or audit employee benefit plans and plan fiduciaries, compliance assistance is a high priority for the Department. The Department's general approach to implementation will be marked by an emphasis on assisting (rather than citing violations and imposing penalties on) plans, plan fiduciaries, financial institutions and others who are working diligently and in good faith to understand and come into compliance with the new rule and exemptions.

CONFLICT OF INTEREST FAQS (PART II - RULE)

U.S. Department of Labor
Employee Benefits Security Administration
January 2017

Set out below are a number of Frequently Asked Questions (FAQs) regarding implementation of the conflict of interest (COI) final rule (Rule) on fiduciary investment advice. Since the publication of the Rule last April, the Department has held many meetings with stakeholders to assist in their compliance efforts. Many of the questions they raised related to the various Rule provisions that draw lines between fiduciary and non-fiduciary communications. Like the FAQs the Department issued on October 27, 2016, on the Prohibited Transaction Exemptions, these FAQs focus particularly on specific technical questions raised by financial service providers. These FAQs are generally limited to investment advice concerning ERISA-covered plans, IRAs, and other plans covered by section 4975(e)(1) of the Internal Revenue Code (Code).

Investment Recommendations Covered Under the Rule

Under the Rule, fiduciary investment advice status depends on whether the advising person makes a "recommendation" regarding an investment or investment management and receives direct or indirect fees or other compensation.

Q1. Is every communication with a financial adviser about retirement accounts a fiduciary recommendation?

No. Covered investment advice is defined as a recommendation to a plan, plan fiduciary, plan participant and beneficiary, IRA, or IRA owner for a fee or other compensation, direct or indirect.

As a threshold issue, the communications must be a "recommendation" to be fiduciary investment advice. A "recommendation" is a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular investment-related course of action. In general, a recommendation is a "call to action" -- a communication that a reasonable person would view as recommending that he or she actually buy, hold, or sell a particular investment, or as a recommendation on managing investments or investment accounts. Providing a selective list of securities to a particular advice recipient as appropriate for that investor would be a recommendation as to the advisability of acquiring securities even if no recommendation is made with respect to any one security. The more individually tailored the communication is to a specific advice recipient or recipients, the more likely the communication will be viewed as a recommendation.

The Rule provides for clarifications of communications that do not constitute recommendations and for communications that are excluded from the operation of the Rule even though they may technically rise to the level of recommendations. As an example, as mentioned later in these FAQs, merely furnishing information and materials that describe the terms or operation of a plan or IRA or product features of investment alternatives available under a plan or IRA, general financial, investment, and retirement information, certain asset allocation models and interactive investment materials, all would be investment education under the Rule and not advice. As a result, merely describing to a potential customer the attributes and features of an investment product without a specific recommendation would not be investment advice.

In order for a recommendation to constitute fiduciary investment advice, it must be a recommendation as to the advisability of buying, holding, selling, or exchanging securities or other investment property, including recommendations as to the investment of securities or other property after the securities or other property are rolled over, transferred or distributed from a plan or IRA. Covered investment advice also includes recommendations as to the management of securities or other investment property, including, among other things, recommendations on investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, selection of investment account arrangements (e.g., brokerage versus advisory); or recommendations with respect to rollovers, transfers, or distributions from a plan or IRA, including whether, in what amount, in what form, and to what destination such a rollover, transfer, or distribution should be made.

The adviser must also receive a "fee or other compensation" for a communication to be investment advice covered under the Rule. This includes both any explicit fee or compensation for the advice which is received by the adviser (or by an affiliate) from any source, as well as any other fee or compensation received from any source in connection with or as a result of the recommended transaction or service, including such things as commissions, loads, finder's fees, revenue sharing payments, shareholder servicing fees, marketing or distribution fees, underwriting compensation, payments to firms in return for shelf space, recruitment compensation, gifts and gratuities, and expense reimbursements. The Rule provides that "[a] fee or compensation is paid 'in connection with or as a result of' such transaction or service if the fee or compensation would not have been paid but for the transaction or service or if eligibility for or the amount of the fee or compensation is based in whole or in part on the transaction or service."

Q2. Do fiduciary investment recommendations include the communications a financial services company has with its own employees in their capacity as employees regarding their job responsibilities merely because the employees may in the ordinary course of their employment provide fiduciary investment advice to plans or IRAs?

No. A firm's internal communications with its employees regarding their job responsibilities, including training materials prepared for internal use, would not be treated as investment recommendations to a plan fiduciary in such circumstances. If, on the other hand, such internal communications are forwarded or made available to any retirement investor, the facts and circumstances would need to be evaluated to determine whether an objective person would view the communication as a recommendation or part of a recommendation to engage in a transaction.

Q3. An employee works for a financial adviser who provides investment advice to 401(k) participants and IRA owners. The employee's normal job responsibilities include development of models and materials for the adviser to use when presenting recommendations. Is the employee providing fiduciary investment advice under the Rule when he or she develops these materials for his or her employer?

No. The Rule includes an exception for employees of a plan sponsor or an affiliate of the sponsor, employees of an employee benefit plan, employees of an employee organization, and employees of a plan fiduciary. When such employees develop reports, recommendations, and products for their employer, that activity is not fiduciary investment advice.

Q4. An investment adviser who is also a licensed insurance agent approaches a client who will soon begin receiving minimum required distributions from the client's 401(k) plan accounts and IRAs. The adviser recommends that once the client receives these required minimum distributions they should be used to fund a permanent life insurance product. The investment adviser in his or her capacity as insurance agent will receive a commission on the sale of the permanent life insurance product. Is the recommendation of the permanent life insurance product investment advice covered by the Rule?

Yes. Because the minimum required distributions are compelled by the Code, the adviser has not recommended a distribution from a plan or IRA simply by explaining the tax requirements and telling the plan participant that the law requires those distributions. However, the adviser has made a recommendation as to how securities or other investment property of a plan or IRA should be invested after the funds are distributed from the plan or IRA within the meaning of paragraph (a)(1)(i) of the Rule.

Q5. The governing documents of an individual account defined contribution plan require that the account balances of terminated vested plan participants of less than $5,000 be cashed out and automatically rolled over to an IRA in accordance with applicable rules and regulations. The plan sponsor has contracted with a vendor to serve as custodian of the rollover IRAs. Communications sent to participants upon termination explain that, in the absence of participant election, accounts under $5,000 will be automatically rolled over to an IRA. The arrangement between the plan and the vendor is intended to satisfy the Department's automatic rollover safe harbor at 29 CFR § 2550.404a-2. Does the plan sponsor or vendor provide a recommendation, as defined under the Rule, to a participant subject to the plan's automatic rollover provision by explaining that the rollover will occur absent participant action?

No. Paragraph (b)(1) of the Rule defines a "recommendation" as a "communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action." The plan sponsor's or vendor's actions to implement the plan's cash out and automatic rollover provisions, including disclosures required by the Code and ERISA, do not involve a communication that suggests a particular course of action.

Q6. Is an adviser liable as an investment advice fiduciary for investment decisions made by the client against the adviser's recommendation, e.g., the adviser recommends selling a security that it at one time recommended for purchase, but the client instead holds or adds to the investment? Likewise, is a financial institution relying on the Best Interest Contract Exemption liable for such investment decisions because, for example, the exemption requires it to acknowledge fiduciary status with respect to investment advice and, in some cases, enter into a contract with its clients with certain enforceable promises regarding the advice?

No. Neither the Rule nor the Best Interest Contract Exemption requires an adviser or financial institution to take responsibility for a client's investment decisions made against the adviser's recommendation. Of course, depending on the nature of the relationship between the parties under their contract or arrangement, the adviser or financial institution may have ongoing duties to monitor and advise the client regarding investment decisions. Also, in the plan context, if the adviser or financial institution is a trustee, it may have other fiduciary obligations under ERISA with respect to implementing the client's investment decision. See, e.g., FAB 2004-03 and 29 CFR § 2550.404c-1(b)(2)(ii)(B) and (d)(2)

Q7. A financial institution with an existing relationship with an ERISA plan charges the ERISA plan a mutually agreed upon asset-based fee of 35 basis points to provide ongoing investment advice regarding mutual funds that are available on the plan's platform. The firm may receive revenue sharing or other payments as a result of plan investments in the mutual funds recommended by the adviser. The fees paid to the firm are generally 12b-1 fees, sub-transfer agency fees, or other third-party compensation.

The firm will disclose to the plan the extent to which it may receive such fees, and will expressly provide that any fees received as a result of the plan's investment in such mutual funds will be used to pay all or a portion of the compensation that the plan is obligated to pay to the adviser, and that the plan will be entitled to any such fees that exceed the plan's liability. May the firm rely on the analysis in Advisory Opinion 97-15A (May 21, 1997) as providing that its receipt of these payments does not result in a non-exempt prohibited transaction under ERISA?

Yes. As described in the preamble to the Rule and the Best Interest Contract Exemption, nothing in the Rule or the Exemption alters the analysis of Advisory Opinion 97-15A. Although, the receipt of any of these fees in connection with, or as a result of, the purchase or sale of a security or the provision of advice would cause the adviser to be a fiduciary under the Rule, a prohibited transaction would not arise as a result of the adviser affecting the amount or timing of its compensation to the extent that the adviser appropriately offsets against its 35 basis point advisory fee any fully disclosed 12b-1 fees, sub-transfer agency fees, or other third-party payments.

Investment Education

The Rule draws an important distinction between *non-fiduciary investment education* and *fiduciary recommendations* (as discussed above). The Rule in paragraph (b)(2)(iv) defines non-fiduciary education as covering four categories of information and materials:

- ***Plan and investment information* (information and materials that describe investments or plan alternatives without specifically recommending particular investments or strategies). Thus, for example, an adviser would not act as a fiduciary merely by describing the investment objectives and philosophies of plan investment options, mutual funds, or other investments; their risk and return characteristics; historical returns; the fees associated with the investment; distribution options; contract features; or similar information about the investment.**
- ***General financial, investment, and retirement information.* Similarly, one does not become a fiduciary merely by providing information on standard financial and investment concepts, such as diversification, risk and return, tax deferred investments; historic differences in rates of return between different asset classes**

(e.g., equities, bonds, cash); effects of inflation; estimating future retirement needs and investment time horizons; assessing risk tolerance; or general strategies for managing assets in retirement. All of this is non-fiduciary education as long as the adviser does not cross the line to recommending a specific investment or investment strategy.

- ***Asset allocation models.*** **Here too, firms and advisers can provide non-fiduciary information and materials on hypothetical asset allocations as long as they are based on generally accepted investment theories, explain the assumptions on which they are based, and do not cross the line to making specific investment recommendations. In the case of ERISA-covered plans, the models may reference specific designated investment alternatives on the plan's menu as hypothetical examples to aid participant understanding, as long as the examples meet the Rule's protective conditions.**
- ***Interactive investment materials.*** **Again, firms and advisers can provide a variety of questionnaires, worksheets, software, and similar materials that enable workers to estimate future retirement needs and to assess the impact of different investment allocations on retirement income, as long as the adviser meets conditions similar to those described for asset allocation models.**

Q8. A 401(k) plan purchases a group annuity product with a menu of available investment alternatives selected by the plan fiduciary. The menu includes a target retirement date series of funds with an optional guaranteed lifetime income feature. Would the provision of a factual explanation of the guaranteed lifetime income feature by the annuity provider's call center representative constitute the provision of non-fiduciary "plan information" as described in paragraph (b)(2)(iv)(A) of the Rule?

Yes. "Plan information" includes communications that "describe product features, investor rights and obligations, fee and expense information, applicable trading restrictions, investment objectives and philosophies, risk and return characteristics, historical return information, or related prospectuses of investment alternatives available under the plan or IRA." The call center representative's description of the product feature, without addressing the appropriateness of the guaranteed lifetime income feature for that particular plan participant would be "plan information" within the meaning of the Rule.

Q9. Does the investment education provision cover information that a call center employee provides to a plan participant about the benefits of increasing plan contributions in order to maximize the employer match?

Yes. Non-fiduciary plan information and education includes information and materials that, without reference to the appropriateness of any individual investment alternative or any individual benefit distribution option for the plan participant, inform the plan participant "about the benefits of plan or IRA participation [and] the benefits of increasing plan or IRA contributions . . . ." If a plan participant contacts a call center and the call center employee notices in reviewing the participant's plan participation status that the participant is not taking full advantage of the employer's matching contribution, the call center employee may, without giving fiduciary advice, inform the participant that, based upon her current contribution percentage, she is not taking full advantage of the employer's matching contribution, explain the company's matching formula and calculate how much the participant would need to contribute in order to maximize the employer match. The call center employee can also describe the plan procedure or form used to increase contributions.

Q10. Can an employer recommend that a plan participant increase plan contributions to a suggested percentage of compensation to maximize the employer match without the communication being treated as fiduciary investment advice?

Yes. To constitute fiduciary investment advice under the Rule, the person making the recommendation must receive a fee or other compensation in connection with or as a result of the recommended transaction or service. Employers generally do not receive fees or other compensation in connection with or as a result of such communications. Accordingly, such a recommendation from an employer would not be investment advice covered under the Rule so long as the employer does not receive a fee or other compensation for the recommendation.

Q11. Could a defined contribution plan service provider's interactive investment tool be treated as investment education and not fiduciary investment advice under the Rule if the tool asks plan participants to input data (such as age, expected retirement date, current retirement savings, annual retirement contributions, current tax rate, estimated retirement tax rate, etc.) and then the tool generates the estimated future retirement income needs of the participant?

Yes. The investment education provision in the Rule includes specific conditions for non-fiduciary interactive tools that help the participant estimate future retirement income needs and assess the impact of different asset allocations on retirement income, or estimate a retirement income stream that could be generated by an actual or hypothetical account balance. A service provider who uses such interactive tools in her communications with clients should ensure that the tools satisfy the conditions within paragraph (b)(2)(iv)(D) of the Rule.

Q12. If a person provides general educational information to a plan participant about rollover options, in marketing materials, in person, or on the phone, such as options to leave assets in the plan account, cash out or roll over the assets to a new plan or IRA, would that person be considered an investment advice fiduciary if the person received a fee for providing that general educational information?

Charging compensation for providing educational services does not change the nature of the communication into investment advice. Rather, whether a communication is an investment recommendation is governed by the definition of investment recommendation in the Rule (described above). Accordingly, a person can charge a fee for providing educational materials without the mere receipt of the fee changing the communication into a fiduciary investment recommendation.

Q13. Assume the same facts as in Q12 above but, after providing the participant with the information about rollovers, the person then refers the plan participant to a recommended third party who provides investment advice and the person receives a referral fee from the third party. Would that person be considered an investment advice fiduciary?

Yes. Recommending a third party who provides investment advice and receiving a referral fee as a result of that recommendation would be investment advice covered by the Rule, and the receipt of a referral fee for such a recommendation would also be a prohibited transaction unless the person complied with an applicable exemption.

Q14. Can an adviser give educational information and materials on rollover options to a plan participant who is an existing client, without being deemed to be providing fiduciary investment advice on the rollover options?

Yes. Whether a communication is an investment recommendation is governed by the definition of investment recommendation in the Rule (described above).

Q15. Assume a plan offers a core menu of 15 investment options and makes available 2000 other investment options through a brokerage window. Can an asset allocation model limited to the 15 core designated investment alternatives be treated as education under the education provision in the Rule even if the model does not reference any of the other 2000 options available through the brokerage window?

Yes. The education provision in the Rule permits asset allocation models to include designated investment alternatives in the plan if conditions in the Rule are satisfied, including the provision of certain information about all the other designated investment alternatives available under the plan that have similar risk and return characteristics, if any. Investment options available through a brokerage window would not be designated investment alternatives for purposes of the asset allocation model provision in the Rule. See paragraph (b)(2)(iv)(C)(4) of the Rule.

General Communications

Under the Rule, certain general communications are not considered fiduciary investment advice if a reasonable person would not view the communication as an investment recommendation. General communications for this purpose include, for example, general circulation newsletters; television, radio, and public media talk show commentary, remarks in widely attended speeches and conferences, research or news reports prepared for general distribution, general marketing materials, and general market data.

Q16. A broker-dealer holds a conference on trends in the retirement industry. The conference is generally open to professionals in the retirement industry, including financial advisers, other service providers, consultants, and fiduciaries of ERISA-covered plans, but is not open to individual retirement investors. The broker-dealer invites a representative of a life insurance company – a "wholesaler" – to make a presentation about the new features of the life insurance company recordkeeping services and a group annuity product available to 401(k) plans. Approximately 300 people are present at the conference, including consultants, other service providers, plan sponsors and plan fiduciaries of ERISA-covered plans. Over the course of her presentation, the wholesaler describes the group annuity contract, including its flexible pricing features, and describes how the contract can accommodate a variety of broker-dealer compensation structures. The wholesaler's remarks include statements about the quality of the contract and the value that it would provide for "many" 401(k) plans, but do not purport to make specific or individualized plan-based recommendations. Are the wholesaler's statements about the group annuity product "general communications" under paragraph (b)(2)(iii) of the Rule?

Yes. The Rule defines a recommendation, in relevant part, as a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action. The wholesaler's remarks were made at a speech or conference widely attended by retirement professionals (but not individual retirement investors) and concerned the attributes of the annuity contract with respect to 401(k) plans in general, rather than with respect to any particular plan. Under the circumstances described, the attendees could not reasonably conclude that the remarks were investment recommendations under the Rule.

Q17. Would a free dinner seminar offered by an investment adviser as a means of marketing services or investments to a group of retirees or individuals approaching retirement be a widely attended speech or conference within the meaning of the general communications provision of the Rule?

The Department does not consider such free-meal seminars to be widely attended speeches or conferences within the meaning of the general communications provision. Moreover, in the Department's view, a reasonable person attending such a seminar could view statements by the investment adviser as investment recommendations even if the statements were made to all the attendees. Whether the particular communications at the seminar could reasonably be viewed as a suggestion that the advice recipients engage in or refrain from taking a particular course of action (i.e., a recommendation) would be a matter of facts and circumstances.

Q18. A third-party administrator (TPA) is asked by the plan fiduciaries of a defined contribution plan to recommend a recordkeeper for the plan. The TPA recommends that the plan fiduciaries consider two recordkeepers. Both recordkeepers would provide revenue sharing payments to the TPA to compensate the TPA for various shareholder services that the TPA will provide to the plan and its participants. The revenue sharing payments do not vary based upon the investment options that are included on the recordkeeper's platform or those selected as designated investment alternatives for the plan. In recommending the recordkeepers, the TPA generally describes differences between the services offered by the two respective recordkeepers (e.g., open architecture versus a limitation to proprietary funds) but makes no representations regarding the investment options available on such platforms. Is the TPA's recommendation of the two recordkeepers "investment advice" under the Rule?

No. The Rule does not treat a recommendation to hire a non-fiduciary recordkeeper as fiduciary advice, although a recommendation to invest in a particular investment alternative or to hire a third party to serve as an asset manager or adviser would constitute fiduciary advice. Based on the facts presented, the recommendation of a recordkeeper to perform recordkeeping and related administrative services is not necessarily a recommendation regarding the investment alternatives available on the recordkeeper's platform. Whether the TPA made a recommendation regarding available investment alternatives would depend on the facts and circumstances.

Q19. A financial institution offers a self-directed brokerage program, an investment advice program, a discretionary investment management program, and an on-line model portfolio program (e.g., robo-advice). A prospective customer approaches the financial institution and says she wants to roll over her money from her qualified plan into an IRA with the financial institution. A representative of the financial institution explains the services provided in each of the programs and tells the customer that the financial institution is a recognized leader in the industry for providing high-quality services with fees that are lower than many of its competitors. Does this constitute an investment recommendation under the Rule?

No. The Rule covers the recommendations of others to provide investment advice or investment management services and recommendations on the selection of investment account arrangements (e.g., brokerage versus advisory). Here, the financial institution, through the representative, only recommended itself, not another person to provide investment advice and investment management services, and the description of the range of services that the financial institution can provide does not constitute a recommendation of any particular account type as appropriate for the prospective customer merely because the financial institution represented that it provides high-quality services for competitive fees. However, if the financial institution actually recommends a particular account type or service, that would be a fiduciary investment advice recommendation under the Rule.

Transactions with Independent Fiduciaries with Financial Expertise

A party transacting business with an independent fiduciary of a plan or IRA in an arm's length transaction is excepted from the Rule if certain disclosure requirements are met and the party reasonably believes that the independent fiduciary of the plan or IRA is a bank, insurance carrier, or registered broker-dealer or investment adviser, or any other independent fiduciary who manages or controls at least $50 million.

Q20. Does the independent fiduciary exception require that the $50 million be attributable to only one plan or involve only plan assets?

No. The exception allows plan and non-plan assets and the assets of multiple plans and non-plan investors to be taken into account. For example, the $50 million requirement would be met by a plan's fiduciary committee that has under its management or control $42 million in a defined contribution plan and $10 million in a defined benefit plan. The same conclusion would apply in the case of chief financial officer of a company that is a plan fiduciary with management or control of a company plan that has $42 million in total assets and who also is responsible for management of $10 million in cash and securities held in the company's treasury department.

Q21. Can a party's reasonable belief be based on representations from the independent plan fiduciary?

Yes. The representations must be in place at the time the transaction takes place and must cover the period over which the communications are to take place. For example, in the case of an ongoing commercial relationship, a party could reasonably rely on written disclosures (for example, in a contract or account opening agreement) that include a representation by the independent plan fiduciary that it manages at least $50 million as of the date of the contract, and that requires the plan fiduciary to notify the service provider in writing if the amount drops below $50 million.

Q22. Does the exception apply to communications (including recommendations) with respect to entering into investment advisory or investment management arrangements as well as with respect to transactions that involve investments in securities or other investment property?

Yes. The exception applies to communications with respect to *any* "transaction related to" the investment of securities or other investment property. Advice regarding entering into investment advisory and investment management arrangements relates to the investment of securities or other investment property for purposes of the Rule.

Q23. Does the exception apply to communications a party has with an independent fiduciary of a plan or IRA who is a representative of a registered investment adviser?

Yes, provided the representative is acting under the control and supervision of the registered investment adviser in accordance with applicable securities laws.

Q24. If a recordkeeper has a meeting with a registered investment adviser who is acting as a plan fiduciary with the responsibility to evaluate and make a recommendation to the plan's fiduciary committee regarding a potential transaction between the plan and the recordkeeper, would the presence of the members of the plan's fiduciary committee in the meeting preclude the recordkeeper from relying on the independent fiduciary exception for recommendations to an independent fiduciary with financial expertise?

No, provided the recordkeeper knows or reasonably believes that the registered investment adviser is acting as a plan fiduciary with responsibility for exercising independent judgment in making a fiduciary recommendation to the plan's fiduciary committee with respect to the transaction at issue and the other conditions of the exception are satisfied. Ongoing communications between the recordkeeper and the members of the plan's fiduciary committee would not fall within the exception, however, unless the registered investment adviser participated in the particular subsequent communication and it was clear that the registered investment adviser continued to have responsibility to exercise independent judgment in making fiduciary recommendations with respect to the transaction that is the subject of the subsequent communication.

Q25. Is the exception available for transactions involving an IRA if the IRA is represented by a registered investment adviser acting as an independent fiduciary of the IRA?

Yes. The exception applies to parties in transactions involving IRAs provided the conditions of the exception are met, including the requirement that the party know or reasonably believe that the registered investment adviser is responsible for exercising independent judgment in evaluating the transaction. The party may rely on written representations from the IRA or independent fiduciary to satisfy this requirement, but the mere fact that the registered investment adviser is a fiduciary under the Code would not be sufficient to establish that the condition of the exception requiring that the party have a reasonable belief that the registered investment adviser was responsible for exercising independent judgment with respect to the transaction at issue was met.

Q26. Can an IRA owner who has assets of more than $50 million dollars in personal and IRA assets be an independent fiduciary with respect to his or her IRA for purposes of the exception?

No. The exception concerns advice provided to a fiduciary of a plan or IRA who is independent of the advice provider and meets certain conditions. Paragraph (g)(7) of the Rule defines the term "plan fiduciary" and states that, for purposes of the Rule, an IRA owner or relative is not a "plan fiduciary" with respect to the IRA. If a person cannot be a "plan fiduciary" with respect to an IRA for purposes of the Rule, the person by definition cannot be an "independent fiduciary" with respect to the IRA for purposes of the Rule. The Department explained this limitation in the preamble where we noted that we would not expand the exception to retail retirement investors through the application of an accredited or sophisticated investor test that uses wealth as a proxy for investor sophistication. The Department noted that merely concluding someone may be wealthy enough to be able to afford to lose money by reason of bad advice should not be a reason for treating advice given to that person as non-fiduciary.

Q27. Can a corporate officer, such as the chief financial officer, who is a participant in the company's 401(k) plan and a member of the plan's fiduciary investment committee, be an independent plan fiduciary for purposes of the exception in paragraph (c)(1) of the Rule if his or her job responsibilities include managing at least $50 million in assets?

Yes. If the corporate officer is receiving advice in his or her capacity as a fiduciary for the plan, and not merely with respect to his or her own individual participant account, the fact that the corporate officer is also a participant in the plan would not preclude the officer from being the independent fiduciary for purposes of the exception.

Q28. Assume a recordkeeper is working with a broker-dealer hired by a 401(k) plan to act as a fiduciary in evaluating whether to select the recordkeeper's platform for the plan, including the selection of mutual funds on the platform as investment alternatives for the plan. Can the broker-dealer represent that it is independent for purposes of the independent fiduciary exception if the broker-dealer, or an affiliate, receives indirect compensation as a result of plan investments in the selected mutual funds, such as revenue sharing or 12b-1 fees?

The Rule does not specifically define “independent.” However, the preamble to the Rule states that “[w]hether a party is ‘independent’ for purposes of the [Rule] will generally involve a determination as to whether there exists a financial interest (*e.g.*, compensation, fees, etc.), ownership interest, or other relationship, agreement or understanding that would limit the ability of the party to carry out its fiduciary responsibility to the plan or IRA beyond the control, direction or influence of other persons involved in the transaction.” Further, the preamble provides that parties would likely not be independent in any of the following circumstances: (i) the parties belong to a group of corporations under common control or are members of an affiliated service group, (ii) the transaction includes an agreement designed to relieve the fiduciary from any responsibility to the plan or IRA, (iii) the fiduciary is under substantial control and close supervision by a common parent, or (iv) a fiduciary receives compensation in violation of ERISA sections 406(b)(1), (2) or (3). Where the broker-dealer provides fiduciary advice as to the purchase of the mutual funds and receives compensation, direct or indirect, as a result of that recommendation, a prohibited transaction under section 406(b)(1) of ERISA occurs. However, if the broker-dealer complies with the Best Interest Contract Exemption, the receipt of the compensation would be exempted from a violation under ERISA section 406(b)(1). Thus, solely for the purposes of this exception to the Rule, in the absence of any common ownership or control affiliation, the broker-dealer can still represent that it is independent of the recordkeeper for purposes of the exception if the conditions of the BIC Exemption are satisfied (including full disclosure of the revenue sharing or 12b-1 fees to plan), and there is no agreement or understanding between the broker-dealer and the recordkeeper that would limit the broker-dealer’s ability to carry out its fiduciary duty to the plan. Accordingly, under the circumstances described and assuming the other conditions of the exception are satisfied, the recordkeeper can rely on the independent fiduciary exception.

Q29. A financial institution recommends that independent investment advisers use the financial institution’s model portfolio services to assist the investment advisers in developing asset allocation recommendations for plan and IRA clients using the financial institution’s investment products. If the financial institution charges the investment adviser a fee for access to the model portfolio services, would that be treated as payment of a direct fee for investment advice for purposes of the independent fiduciary exception?

The person relying on the exception cannot receive a fee or other compensation directly from the plan, plan fiduciary, plan participant or beneficiary, IRA or IRA owner, for the provision of investment advice (as opposed to fees or compensation for other services) in connection with the transaction. The Department would not treat a fee paid between financial intermediaries as a direct fee for investment advice for purposes of the exception unless the fee is directly paid by the plan or IRA or with plan or IRA assets. A fee paid by the plan or IRA or with plan or IRA assets would include a situation in which the investment adviser pays the fee out of its own general assets but then is separately reimbursed by the plan, plan participant or IRA (e.g., the investment adviser's invoice to the plan, participant or IRA includes a separate line item for model portfolio service fee).

Marketing Platforms for Individual Account Plans and Providing Assistance in Selection and Monitoring Investment Alternatives

A person can market or make available to an independent plan fiduciary a platform or similar mechanism from which the fiduciary may select or monitor plan investment alternatives for an individual account plan without making a fiduciary recommendation under the Rule as long as the marketing is done without regard to the individualized needs of the plan and the other conditions of the provision of the Rule are met. Similarly, a person who identifies investment alternatives for such a platform based on objective criteria (e.g., expense ratios, types of assets) specified by the plan fiduciary also does not make a fiduciary recommendation as long as the person sets forth in writing certain disclosures to the fiduciary.

Q30. Can a group annuity contract constitute a "platform or similar mechanism" within the meaning of the Rule?

Yes. The fact that investment alternatives are made available under a group annuity contract does not, in and of itself, affect the availability of the platform provider provision in the Rule. For example, a life insurance company could rely on the platform provider provision in offering a range of investment alternatives to a 401(k) plan sponsor as part of a group annuity product that included recordkeeping services.

Q31. Assuming a group annuity contract offers a range of investment alternatives, would the platform provider provision still be available if the only investment alternative available in the capital preservation asset class on the platform is the life insurance company's proprietary fixed income separate account?

Yes, the group annuity would still be a "platform or similar mechanism." Inclusion of proprietary investment options on the platform does not make the platform provider exception unavailable. Similarly, the fact that only one investment option is available in certain asset classes does not make the platform provider exception unavailable.

Q32. Can a recordkeeper rely on the platform provider provision to make available to plans a third party's platform of investment options for which it provides recordkeeping services?

Yes. Subject to the conditions in the exception, the platform provider provision is available to persons who market or make available a platform, including a third party's platform as part of a broader set of recordkeeping, participant communication, or other administrative services.

Q33. The plan sponsor provides the plan's investment policy statement to a recordkeeper and requests that the recordkeeper provide a list of investment alternatives available on its platform that would meet the statement's requirements. The plan's investment policy statement lists the asset classes, investment strategy, expense ratio range, risk and return characteristics, and type of investment vehicle for investment alternatives that may be included in the plan. The investment policy statement also provides that at least one investment alternative should constitute a "qualified default investment alternative," as defined under the Department's regulations at 29 CFR § 2550.404c-5. Would the recordkeeper provide fiduciary investment advice by providing a complete list of the investment alternatives available on the platform that meet these requirements?

No. The recordkeeper would not be treated as making a recommendation for purposes of the Rule if it provided a list of all of the investment alternatives available on the platform that meet the requirements of the plan's investment policy statement. However, if the recordkeeper exercises discretion in narrowing the response to a selective list of investment alternatives, in the Department's view, the communication could constitute an investment recommendation for purposes of the Rule if a reasonable person would view the communication as a recommendation that the fiduciary choose investments from the selective menu screened by the recordkeeper.

Q34. Is it fiduciary investment advice under the Rule if a financial institution offers an automated daily cash sweep service to its clients, including IRA account owners and small plans that will, pursuant to a client's standing directions, automatically sweep uninvested cash from the client's account into a short-term investment vehicle of the client's choice on a daily basis? The client electing to use the service may select from a limited list of short-term investment vehicles available as part of the automated cash sweep service, from which the financial institution receives fully-disclosed shareholder servicing fees. If the client does not select the sweep service, the service will not be used.

No, the communication would not constitute an investment recommendation if the financial institution merely offers the cash sweep service and describes the features of the service. Further, the fact that the financial institution's cash sweep service offers a limited list of short-term investment vehicles would not by itself mean that the financial institution is recommending all of the investment vehicles as appropriate for the plan or IRA. The financial institution could rely on the investment education provision to describe the product features, investor rights and obligations, fee and expense information, applicable trading restrictions, investment objectives and philosophies, risk and return characteristics, historical return information, or related prospectuses for the short term investment vehicles. If the communication recommended using a particular cash sweep service, such a communication, however, may constitute a recommendation subject to the Rule.

Q35. Is the platform provider provision available to a recordkeeper who includes recordkeeping and other services as part of a platform of investment alternatives?

Yes. The concept of a platform for a 401(k) plan generally includes available investment alternatives along with a bundle of recordkeeping and other services. For example, a recordkeeper could rely on the platform provider provision for a platform that includes access to one or more investment advisory firms that a plan sponsor or plan participant may use to assist in selecting specific investment alternatives from the available alternatives. Merely offering connectivity services to investment advisory firms as an elective option within a bundle of services would not necessarily constitute a "recommendation" that the plan sponsor or participant use the investment advisory firm for investment advice. Rather, whether such a recommendation was made would depend on the content, context, and presentation of the available services.