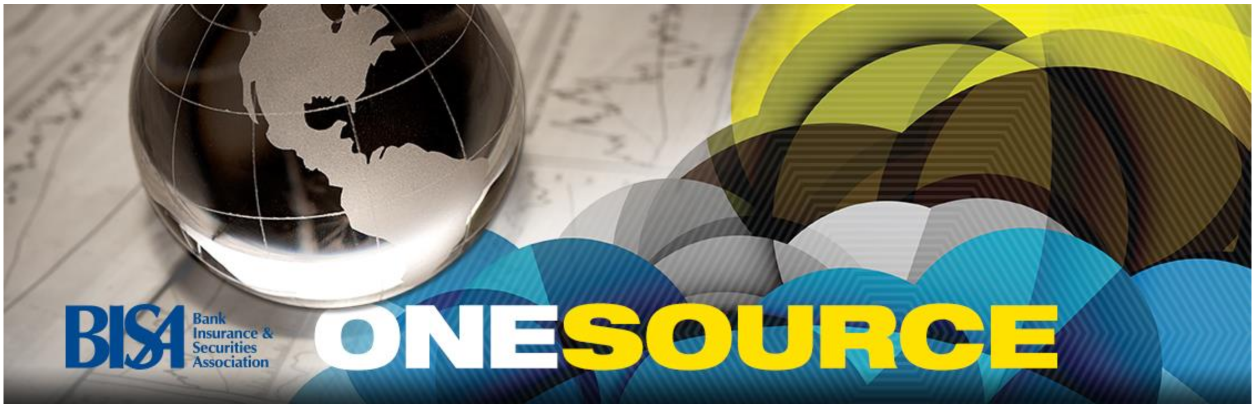


**Final DOL Investment Advice Fiduciary Rules**
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On April 6, 2016, the Department of Labor released final regulations that redefine "investment advice fiduciary" under ERISA and the Internal Revenue Code. The release comes nearly a year after proposed regulations and related prohibited transaction exemptions were reissued on April 14, 2015, and more than five years after the DOL began its rulemaking effort to subject a wider array of retirement plan and IRA advisers, brokers, consultants, and other investment providers to ERISA's exacting fiduciary standards.

As anticipated, the DOL's final regulatory package retains the basic outline of the 2015 proposal. Responding to industry comments, the DOL resolved some uncertainties in the "investment advice fiduciary" definition, relaxed several exemption requirements, and provided transition relief and an extended deadline for compliance.

**Fiduciary Status**

The centerpiece of the regulatory package is a new definition of "investment advice fiduciary" under ERISA and the Code, replacing the narrow, five-part test in prior regulations. Under the final regulation's broader definition, a person is an investment advice fiduciary if it two conditions are met:

1. The person makes a "recommendation" for a fee or other compensation, whether direct or indirect, as to:

    (i) the advisability of acquiring, holding, disposing of, or exchanging securities or other property, or a recommendation as to how securities or other property should be invested after the securities or other property are rolled over, transferred, or distributed from the plan or IRA; or

    (ii) management of plan assets, including recommendations on investment policies, portfolio composition, selection of other persons to provide investment advice, selection of investment account arrangements (e.g., brokerage versus advisory), or recommendations with respect to rollovers, transfers, or distributions from a plan or IRA regarding what form and to what destination such a rollover, transfer, or distribution should be made.

2. The person either:

   (i) acknowledges its fiduciary status;

   (ii) renders the advice under a written or verbal agreement or understanding that the advice is based on the particular investment needs of the advice recipient; or

   (iii) directs the advice to a specific advice recipient regarding the advisability of a particular investment or management decision with regard to securities or other investment property of the plan or IRA.

Unlike under the 2015 proposal, investment advice does not include the provision of appraisals, fairness opinions, or similar valuation statements, but the DOL anticipates future rulemaking to address the fiduciary implications of these services. The DOL also clarified that fiduciary advice includes recommending the selection of other persons to provide investment advice or management service, but it does not include marketing of oneself or one's services.

Exceptions to the definition are generally consistent with the 2015 proposed regulation's "carve-outs," but several important changes have been made. In particular, asset allocation models and interactive investment materials may identify specific investment options available under ERISA plans (but not IRAs), subject to certain conditions, without being considered a recommendation. And the former "seller's carve-out" has morphed into an exception to cover advice provided to an independent fiduciary of a plan or IRA that is either a licensed or regulated provider of financial services or is responsible for the management of at least $50 million in assets.

**Prohibited Transaction Exemptions**

Under these new rules, these newly-minted investment advice fiduciaries who receive variable compensation (e.g., commissions) resulting from their investment advice might otherwise be engaging in a self-dealing prohibited transaction. The prohibited transaction exemptions allow these advisers to continue to receive variable compensation if certain exemption conditions are met.

PTE 84-24 was narrowed so that it does not cover IRA transactions involving variable annuities or fixed-indexed annuities (leaving only fixed rate annuity contracts). That leaves only the Best Interest Contract Exemption (BIC Exemption) for commission arrangements for those insurance products for IRA transactions.

The BIC Exemption still requires advisors and their financial institutions to acknowledge their fiduciary status and abide by enforceable "Impartial Conduct Standards." Unlike the 2015 proposal, the final BIC Exemption is available for small plans fiduciaries of all types, including retail fiduciaries of participant-directed plans.

The final BIC Exemption does not require providers to have a written contract with ERISA plan investors, recognizing that ERISA provides a pre-existing enforcement mechanism. With respect to IRAs, however, the BIC Exemption still requires a contract with the financial institution that gives the IRA account owner enforcement rights that might otherwise not have been available. However, the DOL relaxed the contract execution requirements. For new customers, the contract may be incorporated into other account opening documents and executed at the same time as the execution of the recommended transaction. Existing customers may execute amended contracts through a “negative consent” procedure, eliminating the need to obtain a large number of signatures as the rule goes into effect.

The DOL expanded the BIC Exemption to cover all asset classes. Providers that restrict their recommendations to proprietary products may rely on the BIC Exemption, subject to specific provisions describing how proprietary products can meet the best interest standard.

Compared to the 2015 proposal, the DOL relaxed the BIC Exemption data retention and disclosure requirements. The final exemption requires contract disclosures, point-of-sale disclosures, and website disclosures; however, total cost projections over 1-, 5- and 10-year periods and annual disclosures are not mandated. The DOL also removed the requirement that financial institutions collect and retain specified data relating to inflows, outflows, holdings and returns for retirement investments; firms are only required to retain records that show they complied with the exemption.

**Applicability Date and Transition Rules**

The final regulations provide for a longer delay than had originally been proposed for the regulation applicability date: the broader definition of fiduciary will apply on April 10, 2017.

In addition, the DOL has adopted a “phased” implementation approach to the new exemptions. Firms have until January 1, 2018 to come into full compliance with the disclosure requirements, policy and procedure requirements, and contract requirements in the BIC Exemption and the Principal Transaction Exemption.

Certain existing arrangements can be grandfathered under the BIC Exemption, but generally new advice must satisfy best interest and reasonable compensation requirements on and after April 10, 2017.