



Making Sense of the Final DOL Fiduciary Rule

An easy guide that compares the proposed rule to the final rule.

Red Paper



CHART ILLUSTRATING CHANGES FROM DEPARTMENT OF LABOR'S 2015 CONFLICT OF INTEREST PROPOSAL TO FINAL



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The changes in the retirement landscape over the last 40 years have increased the importance of sound investment advice for workers and their families. The Department's conflict of interest final rule and related exemptions will protect investors by requiring all who provide retirement investment advice to plans and IRAs to abide by a "fiduciary" standard—putting their clients' best interest before their own profits.

Following its proposal in April 2015, the Department received extensive feedback from industry, advocates, Congress, federal and state regulators, and others. The Department of Labor carefully evaluated the full range of public comments as well as the extensive record developed on the conflict of interest proposal. Many changes were made to clarify, streamline, and simplify the proposed rule and proposed exemptions while still adhering to the 'North Star' of an enforceable best interest standard for people receiving advice about their retirement savings.

Some of the changes made from the proposed regulatory package to the final rule and exemptions include:

RULE:

- Clarifying the standard for determining whether a person has made a "recommendation" covered by the final rule.
- Clarifying that marketing oneself or one's services without making an investment recommendation is not fiduciary investment advice.



- Removing appraisals from the rule and reserving them for a separate rulemaking project.
- Allowing asset allocation models and interactive materials to identify specific investment products or alternatives for ERISA and other plans (but not IRAs) without being considered fiduciary investment advice, subject to conditions.
- Providing an expanded seller's exception for recommendations to independent fiduciaries of plans and IRAs with financial expertise and plan fiduciaries with at least \$50 million in assets under management is not fiduciary advice.

BEST INTEREST CONTRACT EXEMPTION (BICE):

- Eliminating the limited asset list from the Best Interest Contract Exemption.
- Expanding the coverage of the Best Interest Contract Exemption to include advice provided to sponsors of small 401(k) plans.
- Eliminating the contract requirement for ERISA plans and participants.
- Not requiring contract execution prior to advisers' recommendations.
- Specifically allowing for the required contract terms to be incorporated in account-opening documents.
- Providing a negative consent process for existing clients to avoid having to get new signatures from those clients.
- Simplifying execution of the contract by requiring the financial institution to execute the contract rather than also requiring each individual adviser to sign.
- Clarifying how a financial institution that limits its offerings to proprietary products can satisfy the best interest standard.
- Streamlining compliance for fiduciaries that recommend a rollover from a plan to an IRA or moving from a commission-based account or moving from one IRA to another and will receive only level fees.
- Eliminating most of the proposed data collection requirements and some of the more detailed proposed disclosure requirements.
- Requiring the most detailed disclosures envisioned by the Best Interest Contract Exemption to be made available only upon request.



- Providing a mechanism to correct good faith violations of the disclosure conditions without losing the benefit of the exemption.

The following chart shows some of the most frequently raised issues and how the Department addressed them:

ISSUE	WHAT CRITICS SAID ABOUT THE PROPOSAL	WHAT THE DEPARTMENT DID IN THE FINAL
Education	The Department should establish a clear line between education and investment advice and avoid a result in which service providers refrain from providing essential information and education to participants and investors due to concerns about triggering fiduciary status. In addition, when using asset allocation models to educate participants and investors, service providers should be able to identify specific investment options.	The final rule clearly describes the types of information and activities that constitute non-fiduciary investment education-including plan information and general financial, investment, and retirement information. The Department also revised the final rule to allow asset allocation models and interactive investment materials to identify specific investment alternatives under ERISA-covered and other plans if certain conditions are met. However, in the IRA context there is no independent plan fiduciary to review and select investment options so references to specific investment alternatives are not treated as education under the education provision in the final rule.



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Coverage of health and welfare arrangements	The proposal could be read to apply to group health, dental, and disability insurance policies. The Department should explicitly exclude these policies, which do not raise the concerns the Department appears to be addressing with respect to advice regarding investment property.	The Department clarified that advice regarding “investment property” does not include health, disability, and term life insurance policies and other assets that do contain an investment component.
Appraisals	All appraisals and valuations, not just for ESOPs, should be excluded from the rule and addressed separately.	The Department has reserved all appraisal issues, not just those involving ESOPs, for a separate future rulemaking.
“Hire me”	An adviser should be able to recommend that the customer hire the adviser for a reasonable fee without that recommendation to “hire me” being treated as a fiduciary recommendation.	The Department has made clear in the final rule that a person or firm can recommend that the customer hire the adviser (or its affiliate) for advisory or asset management services without the recommendation counting as a fiduciary recommendation. However, the adviser’s investment recommendations, such as the recommendation to roll money out of a plan or invest in a particular investment, are fiduciary recommendations.
Small Businesses	By excluding small plans from the proposed “seller’s carve-out,” the Department will deprive small	The Department has made the BICE available to small plans of all types.



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	businesses of essential advice, because the Best Interest Contract Exemption (BICE) did not provide relief to sponsors of participant-directed plans.	Further, the proposed “seller’s carve-out” has been substantially revised and is now available to any plan that is represented by an independent fiduciary with financial expertise that satisfies specified criteria or has \$50M in assets.
Asset list in BICE	By listing only certain asset classes to be covered by the BICE, the proposal limits investor choice.	The Department has eliminated the list so that advice to invest in all asset classes is covered by the BICE.
Timing of the contract	The contract requirement is unwieldy, calls for the signatures of too many parties, and must be executed too early in the process—before the customer even knows he or she will make an investment.	The contract requirement was eliminated for ERISA plans; it only applies to IRAs and other non-ERISA plans. The Department also adjusted the contract requirement to make it clear that it can be incorporated into other account opening documents and can be entered into before or at the same time the recommended transaction is executed. Any advice given before the contract was signed must be covered by the contract. The exemption provides a special “negative consent” procedure for existing clients to obtain the new



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		<p>protections. In other words, the firm can send out a notification to its client informing them of proposed contract amendments. If the client does not terminate the amended contract within 30 days, the amended contract is effective.</p> <p>There is also a provision for advisers who provide advice in accordance with the conditions of the exemption but due to circumstances beyond their control, the contract was not executed.</p>
Call centers and required contract parties	There's a lot of uncertainty about the role and ability of call centers to interact with customers under the new regime. In particular, since the contract requirement requires signatures of the firm, the adviser, and the client, will a new contract need to be signed every time the client speaks to another employee of the same firm (such as a different call center representative)?	The Department modified the contract requirement so that the contract is between the firm and the client, and a new contract will not be required for each interaction with a different employee of the same firm.
Disclosure	The disclosure requirements of the Best Interest Contract Exemption are	The Department significantly streamlined the disclosure



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	overly cumbersome. In particular, the 1, 5, and 10 year projections are nearly impossible to execute.	requirements in the final BICE. In particular, requirements to include projections, as well as the annual disclosure requirement, have been entirely eliminated.
Web Disclosure	The web disclosure requirements are too burdensome for firms and could be read to require disclosure of individual adviser compensation and salaries.	The Department has streamlined this provision and clarified that individualized information about advisers is not required.
Data Retention	The data retention requirements which called for the retention of detailed information on inflows and outflows are too burdensome.	The Department has removed those requirements. Just as they would in other situations, firms only have to retain the records that show they complied with the law (in this case, the BICE or other exemption).
Proprietary Products	The requirement to recommend the product that is in the client's best interest will force advisers to recommend another company's products instead of their own (because their financial interest in their own products means they could never say it was solely in the client's best interest).	The Department has included language in BICE to make clear that advisers may continue to sell proprietary products and has provided specific guidance on how proprietary product providers can satisfy the best interest standard.
Lifetime Income Products	The focus on fee transparency in the proposal disadvantages lifetime income options and other insurance products, whose value – particularly the guaranteed lifetime income – may	The Department has included language in the BICE to make clear that advisers may recommend insurance products and revised the disclosure provisions to better reflect how insurance products are sold.



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	not be as easily understandable by consumers.	In addition, the final amendment to PTE 84-24 provides a streamlined exemption for recommendations of “fixed rate annuity contracts.” which are less complex lifetime income products.
Recommendations to move into a level fee arrangement	Advisers would be discouraged from making recommendations to plan participants to move into an investment advisory arrangement with a level fee, i.e. rollover recommendations. Plan advisers who receive level compensation from a retirement plan, and would receive level compensation for advice provided to an IRA rollover from a retirement plan, would be discouraged from working with plan participants on rollovers. The Department should address this so that advisers are treated the same regardless of whether they have a relationship to the plan, and regardless of the fee structure they use.	The Department added a special provision for level fee fiduciaries in the final BICE. Essentially, it requires that documentation is kept to show why a recommendation to roll over from a plan or IRA to a level fee arrangement or to switch from a commission to a level fee arrangement was in the customer’s best interest.
Conversions to fee-based accounts	The proposal will effectively prohibit commissions.	The Department clarified this issue by, among other changes, providing examples of policies and procedures that are compatible with commission-based models. In addition, the Department notes that if moving a



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		customer into a fee-based model is not in that customer's best interest, the firm/adviser would have engaged in a non-exempt prohibited transaction.
Inappropriate bias towards low fee products	The proposal favors low-fee and low-cost products over all else, ignoring returns, quality, and other factors that may be important to consumers.	The Department did not adopt the low-fee streamlined option considered in the proposal, and clarified in the preamble that the adviser is not required to recommend the lowest fee option if another product is better for the client.
Grandfather relief	The Department should treat existing arrangements and investments differently than new transactions.	The Department included a grandfathering provision that allows for additional compensation based on investments that were made prior to the Applicability Date. It includes compensation from recommendations to hold, as well as systematic purchase agreements, but requires that post-Applicability Date, additional advice must satisfy basic best interest and reasonable compensation requirements.
Implementation concerns	Eight months is far too short a time period to implement such an expansive overhaul. The Department should	The Department extended the first phase of implementation to one year after publication of the final rule. In



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	consider phased implementation and/or an implementation safe-harbor.	In addition, the Department adopted a “phased” implementation approach for the Best Interest Contract Exemption and the Principal Transaction Exemption so that firms will have more time to come into full compliance. In particular, the full disclosure provisions, the policies and procedures requirements, and the contract requirement only go into full effect on January 1, 2018. Finally, the Department made it clear that it intends to provide compliance assistance to firms that have implementation questions to the greatest extent possible.

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