



## The DOL's Final Fiduciary Rule: Considerations for Plan Sponsors

1412.11	-0.73	▼	0.06%
1795.63	8.49	▲	0.48%
1791.97	4.83	▲	0.27%
1795.09	-0.54	▼	0.03%
767.89	0.01	▲	0.00%
778.33	1.34	▲	0.17%
4443.87	7.63	▲	0.23%
2916.60	-4.89	▼	0.16%
1112.11	-0.73	▼	0.05%
1787.63	8.49	▲	0.38%
1791.97	4.83	▲	0.27%
1295.09	-0.54	▼	0.13%
767.89	0.01	▲	0.10%
700.33	-1.34	▲	0.17%
443.83	-5.63	▲	0.23%
416.60	-6.89	▼	0.06%
412.11	-0.73	▼	0.15%
795.63	8.49	▲	0.48%
704.07	4.83	▲	0.27%

A Presentation  
For



**SBEN**

SOUTHEAST BENEFITS EDUCATION NETWORK

Hyatt Regency Downtown  
Greenville, SC  
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# No “ducking” the Rule

If you... quack, have webbed feet and enjoy the water... you are a duck!!

If you... service retirement plans, provide investment recommendations and receive compensation...you are a fiduciary!!

Welcome to the pond!!



# Quick Disclosure

- I am biased in my views and opinions, as I am an independent Registered Investment Advisor that acknowledges my role as a plan fiduciary.
- I reserve the right to be wrong on matters presented herein pertaining to the Fiduciary Rule.
- Comments are mostly limited to considerations for Plan Sponsors



# Background

- ERISA (passed in 1974) established safeguards by imposing trust law standards of care and undivided loyalty upon plan fiduciaries, and by holding fiduciaries accountable when they breached those obligations.
- Under this regulatory structure, fiduciary status and responsibilities are central to protecting the public interest and the integrity of retirement benefits.
- The statutory definition of “fiduciary investment advice” was adopted in a different era and the regulatory structure “fit” the general plan structures of its time.
- In the era of participant-directed DC plans, the existing regulatory structure no longer “fits” as many investment advisers (“Advisers”) are under no obligation to adhere to ERISA’s fiduciary standards or prohibited transaction rules.

# Purpose of the Regulatory Action

- If Advisers are NOT fiduciaries, they are free to operate with conflicts of interest--that they need not disclose--and have limited liability under federal pension law for any damages resulting from their advice.
- Non-fiduciary advisors may give imprudent and disloyal advice; steering plan and IRA investors based upon their own financial interests rather than their clients' interests.
- This Action is aimed at providing better protections to plans, participants, IRA owners from conflicts of interest, imprudence and disloyalty.

# The Heart of the Issue

Chief areas of concern...

- Variable compensation issues, commission-based sales practices and reasonableness of fees
- Advice about **decisions** surrounding distributions and/or rollovers
- Retirement Plan “product-sold” 401(k) market used for distribution of proprietary products
- Undisclosed affiliations, financial interests and conflicts of interest

# Quick Summary of the Rule

1. The DOL Action replaces the old statutory definition of “fiduciary investment advice” with a new one that is intentionally expanded to include most advisers and service providers who will now find themselves to be fiduciaries.
2. The DOL issued a new Prohibited Transaction Exemption (“PTE”) referred to as the Best Interest Contract Exemption (“BICE”) that provides relief to fiduciary advisers receiving variable compensation and for fiduciaries receiving compensation from third parties otherwise generally known as “revenue sharing”.



# Current Advice Rule – the “Five-Part Test”

A person provides **fiduciary** investment advice if he or she:

1. Renders advice to the plan or makes recommendations as to the advisability of investing in...
2. ... on a regular basis...
3. ... pursuant to mutual understanding...
4. ... that served as the primary basis for investment decision...
5. ... that the advice was individualized to the plan

**Component factors 2, 3, 4 & 5 often resulted in the “advisor” NOT being a fiduciary to the Plan or IRA...** particularly when they sell an investment product or service.

# The New DOL Rule

A person provides ***fiduciary*** investment advice if he or she:

1. Provides “Covered Advice” *and*
2. A “Relationship Condition” is met.

This new definition is *intended to be broad enough to cover most everybody* providing investment recommendations (Covered Advice) to retirement plans and IRAs.

# “Covered Advice”

Investment advice is rendered if an adviser provides the following categories or types of advice for a fee (direct or indirect) or other compensation:

1. A recommendation as to the advisability to: buy, hold, sell, or exchange an investments,
2. A recommendation as to how to invest, roll over, transfer or distribute proceeds from the plan or IRA
3. A recommendation as to the management of an investment including
  - a. Investment policies or strategies
  - b. Portfolio compensation
  - c. Selection of other persons to provide investment advice or services
  - d. Selection of investment account arrangements (brokerage vs. advisory)
  - e. Recommendations with respect to rollovers, distributions or transfers from a plan or IRA...
  - f. Includes advice as to whether, what \$ amt., and in what form, etc.

# “Relationship Condition”

When investment advice gives rise to fiduciary duties, the advice provider must meet only one of the following requirements:

1. Represent or acknowledge that it is acting as a fiduciary,
2. Render the advice pursuant to either a written or verbal agreement, arrangement or understanding that the advice is based on the particular investment needs of the advice recipient,
3. Provides a “recommendation” directed to a specific advice recipient regarding the advisability of a particular investment or management decision with respect to investment property of a plan or IRA

“Recommendation” means a communication with a “call-to-action” that, based upon its “context, content and presentation” would reasonably be viewed as a suggestion to engage in or refrain from taking a particular course of action.

# “Recommendation” - Exceptions

Communications and activities that do NOT constitute a “recommendation”:

1. Platform Providers and Selection and Monitoring Assistance,
2. RFPs,
3. Investment education,
4. General communications,
5. Transactions with independent plan fiduciaries with financial expertise

# BEFORE - 2 Very Different Standards of Care

Fiduciaries *MUST* put their client's interest before their own!

	ERISA Fiduciary Advisor	Non-ERISA Fiduciary Advisor
Duty of Loyalty	Applies	N/A
Duty of Prudence	Applies	N/A
Avoid PTs	Applies	N/A
Personal Liability	Applies	N/A
Suitability Standard	N/A	Applies



# AFTER - 2 Slightly Different Standards of Care

Fiduciaries *MUST* put their client's interest before their own!

	ERISA Fiduciary Advisor	ERISA Fiduciary Advisor
Duty of Loyalty	Applies	Applies
Duty of Prudence	Applies	Applies
Avoid PTs	Applies	New BICE
Personal Liability	Applies	Applies
Best Interest Standard	Applies	Applies

Technically, there is actually only one Standard.

Functionally, there *remains* 2 Standards.



# The New BICE Exemption - Rationale

Compensation typically received by advisors, financial institutions and affiliates in the form of transaction-based compensation and payments from third parties would otherwise result in one of ERISA's prohibited transactions.

Without this exemption, retirement services would be disrupted due to the prevalence of all these "new" fiduciaries with existing arrangements that would otherwise be considered a prohibited transaction.

However, they must somehow abide by the new best interest standards or face threat of class action litigation.

# The New “BICE” Exemption

The BICE includes substantial compliance requirements:

- Acknowledgement of fiduciary status,
- Impartial Conduct Standards (including “best interest” standard),
- Implementation of policies and procedures designed to prevent violation of Impartial Conduct Standards,
- For IRAs, warranties that the BICE conditions will be met,
- Contract, point of sale and website disclosures about fees, conflict of interest disclosures and other aspects of the relationship,
- Prohibitions against exculpatory language and limitations on ability to participate in class action law suits in contracts.

A streamlined version of BICE is available for Level Fee Fiduciaries.

# Impact of the Action

- The DOL Action will have a significant impact upon compliance and business operations of many financial services firms
- This Action will significantly impact all of these firms (and their advisers) in the way they do business with their clients and each other.

Mostly impacted will be financial advisors and brokerage firms, wealth-management firms selling IRAs, insurance agents selling retirement products and annuities, benefits brokers selling 401(k) plans to their health insurance clients, smaller independent brokerage firms

# The Rule is a “Game Changer”

This Rule will change the nature of the relationship between the plan sponsor and most service providers and their advisors... particularly in the smaller plan market segment.

“Everyone” is now a fiduciary... so what’s the big deal?”

The DOL has emphasized that...

*The Plan Sponsor is **NOT** relieved of their duty to be prudent in the selection and retention of their existing service providers... putting the best interest of participants before that of other existing relationships.*

# Experience Suggests...

- “Disclosure alone has proven ineffective to mitigate conflicts in advice”<sup>(1)</sup>. – Department of Labor, April 8, 2016,
- Plan Sponsors must take the initiative to protect their plan participants interests and their own interests as a fiduciary,
- Use extreme caution when “outsourcing” fiduciary duty

(1) “Extensive research has demonstrated that most investors have little understanding of their adviser’s conflicts of interest, and little awareness of what they are paying via indirect channels for conflicted advice.”

# Considerations for Plan Sponsors

*In my opinion*, I think it would be prudent to re-evaluate your current arrangement(s), being particularly mindful of the following issues:

- ✓ In what capacity is my advisor currently serving us today?
  - ❑ List specific plan advisory services
  - ❑ List specific participant advisory services, financial planning, rollover decisions
- ✓ What is my advisory firm's core business and how does this Rule impact their business decision to continue in retirement services
  - ❑ What % of the firm's revenue is attributable to retirement plan services vs. wealth management services, benefits brokerage services, other individual insurance services?
  - ❑ Addressing Conflicts of interest- proprietary product issues, affiliations, and revenue sharing payments

# Considerations for Plan Sponsors

- ✓ What is their position going forward? (i.e., how do they intend to comply with the Rule?)
  - ❑ Will they serve in the fiduciary role or are they exiting the business
  - ❑ The firm's reliance upon the BICE exemption
  - ❑ Written contract or verbal understanding
  - ❑ Compensation - fixed \$ amt., level % rate fees or variable % rate fees
  - ❑ Compensation - reasonableness of fees for "Plan Services" provided; do fees vary for "Participant IRA Rollover Services"
- ✓ What about arrangements where my advisor is affiliated with my primary service provider?

# Considerations for Plan Sponsors

As a Plan Sponsor / Fiduciary, you have to evaluate the responses to these questions and factor them into your ultimate decision(s) and weigh that decision against a decision made with the “care, skill, prudence, and diligence” that hypothetical “prudent expert” would apply “in the conduct of an enterprise of a like character and with like aims.”



## “Chip’s Tip!”

Take the easy route... insist upon:

- ✓ A level fee arrangement,
- ✓ A comprehensive written contract outlining the services to be provided & the corresponding fees for each service offering and
- ✓ A written acknowledgement of fiduciary status for each service offering,
- ✓ Hire an ERISA attorney or independent prudent expert to review your arrangement (if necessary)

# Thank You!!

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# Platform Providers (Recordkeepers) Carve-Out

1. Marketing a platform of investment option, without regard to individual needs of a plan or participants, are not recommendations
2. Must provide written disclosure that it is not providing impartial investment advice in a fiduciary capacity
3. Any assistance in selecting and monitoring is without regard to the individual needs of the plan or its participants
4. Segmentation allows some customization whereby the CSP creates a limited list based on objective criteria such as plan size. However, communications by the CSP that a particular list is “appropriate” for a plan is likely to constitute a fiduciary recommendation
5. Explanation of bundled investment services i.e., Managed Accounts, QDIAs, Non-affiliated RIA services does not appear to cross the line but no practical guidance is provided in the regulations.

# Selection & Monitoring Assistance Carve-Out

1. Identifying investment alternatives that meet objective criteria
2. Criteria must be established or specified by the plan fiduciary
3. Identifying investment alternatives in a response to a request for proposal
4. Providing objective financial data and comparisons with independent benchmarks to the plan fiduciary, are not recommendations
5. This exception is conditioned on the provider's written disclosure of any financial interest it has in the alternative investments and the precise nature of this interest.
6. This provision only applies to retirement plans, not IRAs.

# “Hire Me” Carve-Out

1. Sales pitch for your advisory services is a non-fiduciary act
2. Sales pitch for an affiliate is a non-fiduciary act
3. A specific investment recommendation IS a fiduciary act
4. A specific recommendation to take a distribution, the amount, or destination of the distribution IS a fiduciary act

# Fiduciary Exemptions- Employees

1. Applies to an employee of the plan sponsor
2. Employee may not receive compensation beyond what their normal comp
3. Assumes employee is not registered or a licensed adviser
4. Service exemption includes:
  - a. Inadvertent recommendations e.g., a HR employee communicating plan information and distribution options will not be considered investment advice,
  - b. Advice, analysis, and reports provided that deal with the investments
  - c. Recommendations to buy, sell, or retain securities
  - d. Requires the employee's job responsibilities does not include giving investment advice

# Fiduciary Exemptions- Education

1. Removes IB 96-1 from the CFR and replaces it with the final rule
2. Avoids specific investment recommendations which triggers advice rule
3. Permits the following 4 broad categories of non-fiduciary education
  - a. Plan level information
  - b. General retirement, financial, and investment information
    - i. Mix of assets (e.g, stocks and bonds) based on age, income or other circumstances
  - c. Asset allocation models with reference to specific investments except for IRAs
  - d. Interactive investment materials
4. Communicating comprehensive IRA distribution options as required by tax law
  - a. Retain assets in plan
  - b. Distribution to cash
  - c. Distribution to rollover
  - d. Asset allocation models referencing specific investments is fiduciary advice

# Fiduciary Exemptions- General Communications

Communications that a reasonable person would not view as an investment recommendation, including:

1. General circulation newsletters,
2. Television,
3. Radio,
4. Public media talk show commentary,
5. Remarks in widely attended speeches and conferences,
6. Research reports prepared for general circulation,
7. General marketing materials, and
8. General market data

# Fiduciary Exemptions- Plan Investment Info.

Communications that a reasonable person would not view as an investment recommendation, including:

1. Distribution options,
2. Fee and expense information,
3. Risk and return characteristics and
4. Historical return information
5. Specific investment alternatives MAY BE used as examples in
  - a. Hypothetical asset allocation models, or
  - b. Interactive investment materials, but
  - c. Must use designated investment alternatives (“DIA”), and
  - d. DIA’s must be selected and monitored by an independent plan fiduciary
  - e. Models must identify all other investments available under the plan with similar risk and return characteristics
  - f. Model is accompanied by a statement indicating that these other investments have similar characteristics and where they can obtain more information

# Exclusions Include

1. Safe Harbor distributions
  - a. Automatic rollovers less than a certain amount
2. 403(b) Plans that are not subject to ERISA, including:
  - a. Governmental plans
  - b. Church plans,
  - c. Elective deferral-only plans qualified under 29 CFR 2510.3-2(f)
  - d. NOTE: Rollover IRAs from these plans would be subject to the new rules
3. Qualified Plans with \$50 million or more in plan assets
  - a. Based on the FINRA definition of an institutional account
  - b. Assumes there is an independent fiduciary
  - c. Assumes the large plan investor has financial expertise (sophisticated investor)
  - d. The counterparty is acting in an arm's length transaction
  - e. Applies to the fiduciary status of any sales communications or recommendations provided