

The Department of Labor's New Fiduciary Regulation and Its Impact on the Financial Services Industry

Visual Memorandum

June 3, 2016




Davis Polk

Davis Polk & Wardwell LLP

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Appendix A: Certain Defined Terms

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I. Overview

- On April 6, 2016, the Department of Labor (**DOL**) issued final regulations expanding the definition of a **fiduciary** to Employee Plans* and IRAs* for purposes of the Employee Retirement Income Security Act (**ERISA**) and similar provisions under Section 4975 of the Internal Revenue Code (the **Code**)
- The regulatory package (collectively, the **final rule**) has three interconnected parts:

New definition of Investment Advice Fiduciary

Significantly expands the scope of communications with Employee Plans and IRAs that constitute **investment advice** and give rise to fiduciary status, triggering fiduciary conflict of interest rules

- As a fiduciary, a financial institution or other firm is subject to the prohibited transaction provisions of ERISA and the Code, and its ability to receive product revenues, commissions, fees and other compensation is limited (see [Appendix B](#))

2 New PTEs

Introduces two new DOL prohibited transaction class exemptions (**PTEs**)

- the best interest contract exemption (the **BIC Exemption**) and
- the class exemption for certain principal transactions (the **Principal Transactions Exemption**)

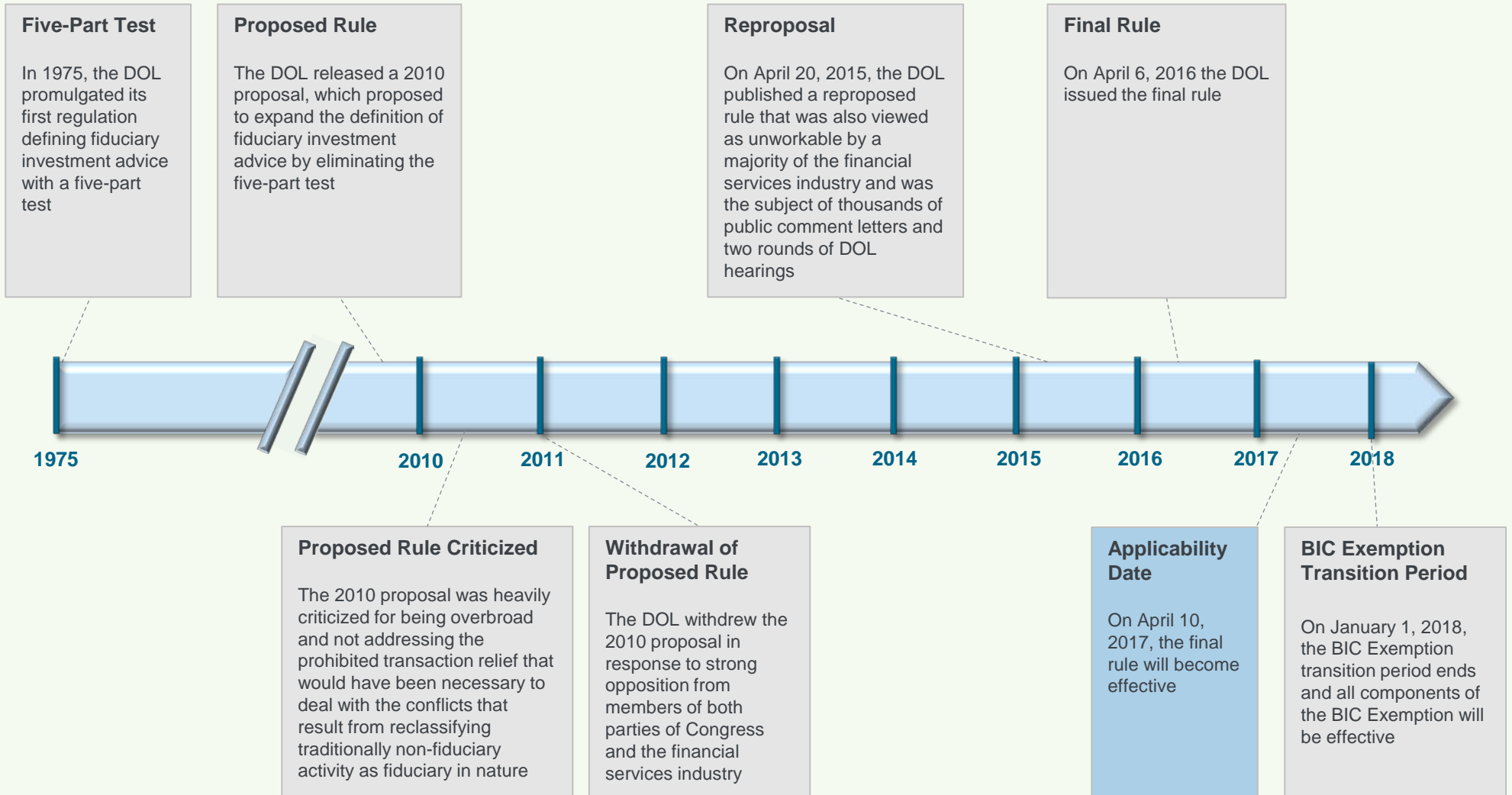
6 Narrowed PTEs (75-1; 77-4; 80-83; 83-1; 84-24; 86-128)

Limits the availability of six existing PTEs that are commonly relied on in the financial sector and imposes additional conditions on the use of these exemptions, including the **Impartial Conduct Standards**

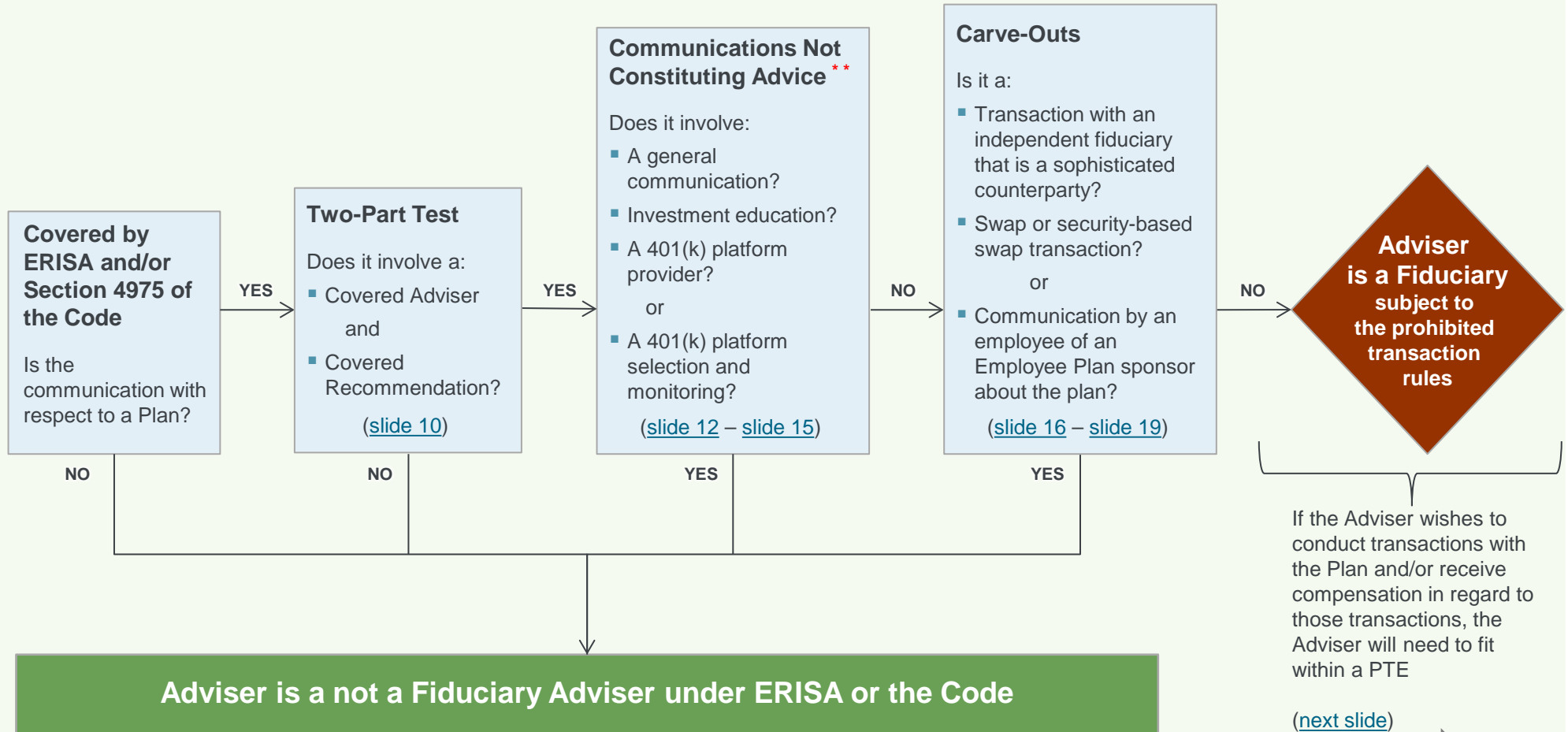
- Most of the final rule's provisions come into effect on April 10, 2017, with a transition period through January 1, 2018 for certain BIC Exemption requirements

Overview

TIMELINE OF THE RULE

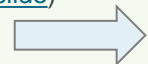


- Will a Financial Institution's* communications to a Retirement Investor* make it a Fiduciary Adviser*?



If the Adviser wishes to conduct transactions with the Plan and/or receive compensation in regard to those transactions, the Adviser will need to fit within a PTE

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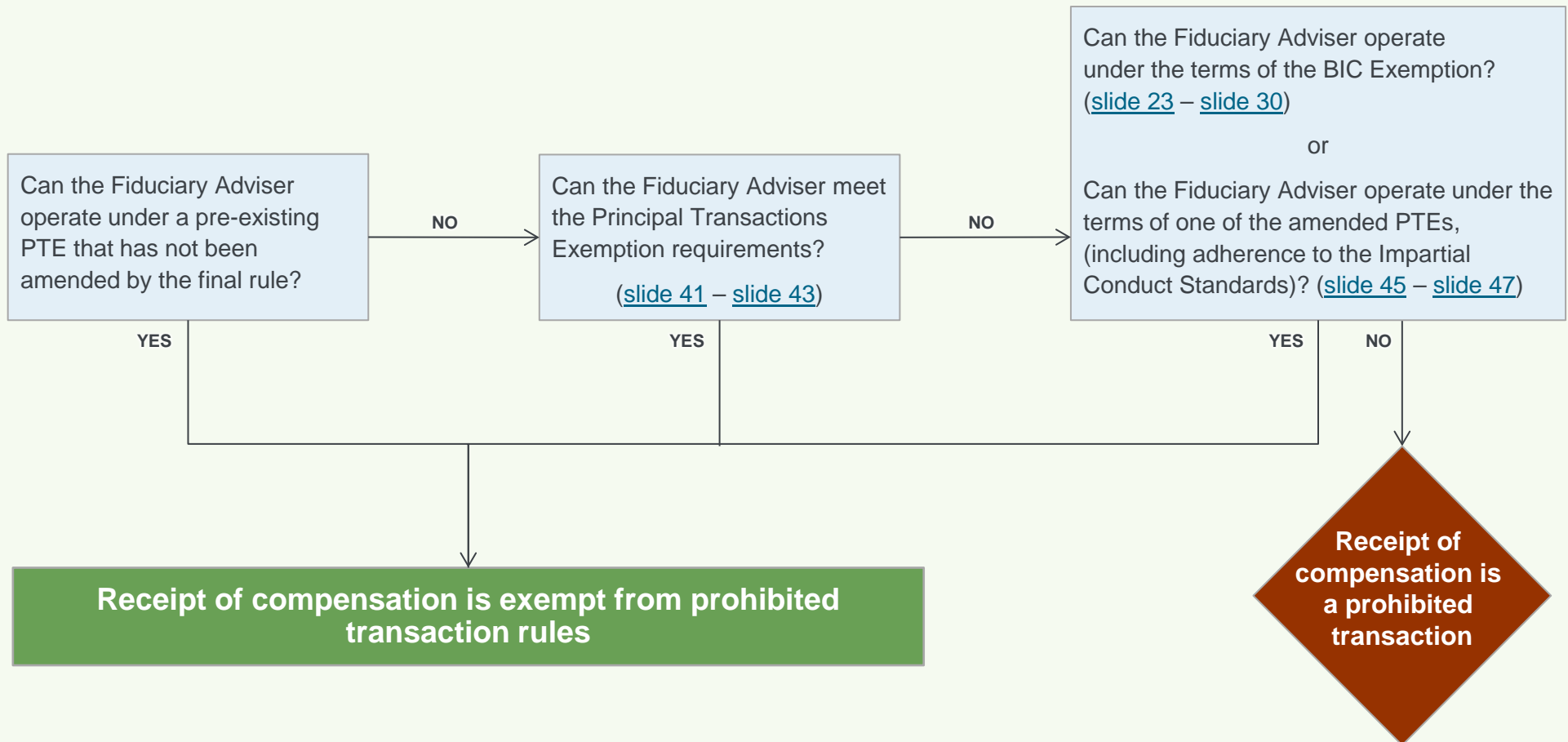


** This is technically part of the Two-Part Test since communications not constituting advice are not treated as Covered Recommendations under the final rule

* See Appendix A for certain defined terms, including Financial Institution, Adviser, Fiduciary Adviser and Retirement Investor

INVESTMENT ADVICE ANALYSIS UNDER FINAL RULE—A ROADMAP (cont.)

- If the Financial Institution is a Fiduciary Adviser, what exemptions are available?



- As described in [Appendix B](#), Title I of ERISA and Section 4975 of the Code impose various obligations on fiduciaries to retirement plans and accounts including
 - Affirmative **fiduciary duties** under Section 404 of ERISA
 - **Per se prohibited transactions** under Section 406(a) of ERISA
 - **Conflict of interest prohibited transactions** under Section 406(b) of ERISA
 - **Per se** and **conflict of interest prohibited transactions** under Section 4975 of the Code
- ERISA and the Code have similar prohibited transaction rules, but ERISA’s rules apply only to Employee Plans, while the Code’s rules apply to Employee Plans and IRAs

Source of Law	Plans Covered	Consequences for Violating Obligations
Affirmative fiduciary duties (Section 404 of ERISA)	Employee Plans Only	<ul style="list-style-type: none"> ■ Participant’s private right of action ■ Civil penalties and DOL enforcement
Per se prohibited transactions (Section 406(a) of ERISA)		
Conflict of interest prohibited transactions (Section 406(b) of ERISA)		
Per se and conflict of interest prohibited transactions (Section 4975 of the Code)	Employee Plans and IRAs	<ul style="list-style-type: none"> ■ 15% excise tax imposed on the party in interest (or disqualified person as referred to under the Code), applied annually until the prohibited transaction is corrected (i.e., rescinded to place the Plan in the place it would have been absent the transaction) ■ IRA disqualification

II. Definition of Fiduciary Investment Advice

Statute

- Under the statutory text of ERISA and Section 4975 of the Code, a person is a fiduciary with respect to a Plan if he or she
 - exercises any discretion over the management or investment of the Plan's assets
 - renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of the Plan, or has any authority or responsibility to do so** or
 - has any discretion over the administration of the Plan

Prior Rule

- When an entity without investment discretion provides **investment advice** to a Plan, it risks becoming a fiduciary and being subject to the various prohibited transaction restrictions. Prior to the final rule, to avoid being considered fiduciaries, entities relied on
 - Arguments that their conduct did not meet one of the elements of the DOL's 1975 rule (the **prior rule**), which provided a five-part test for determining whether someone was a fiduciary providing investment advice (see [slide 11](#))
 - Conclusions that their communications were not advice (e.g., educational materials)

Final Rule

- A new two-part test replaces the prior rule's five-part test, significantly expanding the types of communications that will be deemed to be **investment advice** triggering fiduciary status
- A new PTE regime will permit Financial Institutions and Fiduciary Advisers to receive compensation for transactions based on their advice, but only if they comply with strict rules to ensure that the advice is unbiased and in the customer's best interest

Fiduciary Investment Advice

COVERED ADVISERS AND COVERED RECOMMENDATIONS

Two-Part Test—fiduciary investment advice exists when

1 Covered Adviser
a person or entity that does any of the following

provides

2 Covered Recommendation
provides any of the following

Represents or acknowledges **fiduciary status**

Renders the advice pursuant to a **written or verbal agreement, arrangement or understanding** that the advice is based on the particular investment needs of the advice recipient, or

Directs the advice to a **specific** advice **recipient(s)** regarding the advisability of a particular investment or management decision

Advisability of Investing

- A recommendation as to the advisability of acquiring, holding, disposing of or exchanging investment property, or
- A recommendation as to how investment property should be invested after it is rolled over, transferred or distributed from an Employee Plan to an IRA

Management of Investment property

- A recommendation as to the management of investment property, including, among other things
- recommendations on investment policies or strategies or portfolio composition,
 - selection of other persons to provide investment advice or investment managements services, or
 - selection of investment account arrangements
- A recommendation with respect to rollovers, transfers or distributions from a Plan, including recommendations as to the amount, form or destination of such rollover

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 course of action

Under this **facts-and-circumstances test**

- the more individually tailored communications are, the more likely they are to be viewed as recommendations
- providing a selective list of investments as appropriate for an investor is a recommendation, and
- a series of actions may be considered in the aggregate as a recommendation even though no action would be considered a recommendation if viewed individually

Fiduciary Investment Advice

COMPARISON OF PRIOR RULE AND FINAL RULE

Prior Five-Part Test

A person who

1. **Renders advice** as to the purchase, sale or value of securities or other property
2. ~~On a **regular basis**~~
3. Pursuant to a ~~**mutual agreement**~~, arrangement or understanding, written or otherwise, between such person and the Plan or a Plan fiduciary
4. ~~That the advice will serve as a **primary basis** for investment decisions with respect to plan assets **and**~~
5. That the advice will be **individualized** to the particular needs of the Plan.

New Two-Part Test

1. A person who
 - represents or acknowledges fiduciary status, or
 - renders individualized advice by making a recommendation pursuant to a written agreement or verbal understanding, or
 - directs advice or recommendation to a specific recipient
2. Is **deemed to be a fiduciary** where such person makes a **recommendation** relating to
 - the **advisability** of acquiring, holding, disposing of, or exchanging, securities or other investment property, or invested after the securities or other investment property are rolled over, transferred, or distributed from the Plan, or
 - how investment property should be **invested** after it is rolled over, transferred or distributed from the Plan, or
 - the **management** of investment property, or
 - **rollovers, transfers, or distributions** from a Plan, including recommendations as to the amount, form or destination of such rollover.

Under the prior rule, **all** elements had to be met to constitute fiduciary advice, but under the final rule, the presence of **any** element in both parts of the test will trigger fiduciary status

Fiduciary Investment Advice—Exceptions

COMMUNICATIONS THAT ARE NOT COVERED RECOMMENDATIONS

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- In addition to replacing the five-part test with a new two-part test, the final rule clarifies when certain types of communications **should not be considered recommendations**
 - Note that we refer to these as **exceptions** but the DOL regards these as mere clarifications about the definition of a recommendation
- Two of these exceptions apply to mutual fund sponsors and others who provide recordkeeping platforms for Employee Plans, such as 401(k) plans

Platform Provider Exception

- For Employee Plans, it is not fiduciary investment advice to **make or market a platform** or similar mechanism from which a plan fiduciary may select or monitor investment alternatives, provided that
 - The plan fiduciary is independent of the platform provider and
 - The platform provider discloses in writing that it is not undertaking to provide impartial investment advice or give advice in a fiduciary capacity

Platform Selection and Monitoring Exception

- For Employee Plans, the following communications by a person related to **the selection of the platform and monitoring of investments** in connection with the plan platform is not fiduciary investment advice
 - Identifying investment alternatives that meet objective criteria provided by the plan, provided the person discloses any financial interest in the investments
 - Identifying a sample set of investment alternatives in response to a request for information or request for proposal, provided the person discloses any financial interest in the investments and
 - Providing objective financial data and comparisons with independent benchmarks to the plan fiduciary

Fiduciary Investment Advice—Exceptions

COMMUNICATIONS THAT ARE NOT COVERED RECOMMENDATIONS (cont.)

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- Two other exceptions apply more generally to any individuals or institutions that offer investment services to Employee Plans, Employee Plan participants and IRAs

General Communication Exception

- For both Employee Plans and IRAs, the final rule clarifies that general communications are not recommendations
- General communications** include those in general circulation newsletters, commentary in talk shows, presentations in public speeches, prospectuses, etc.

Investment Education Exception

- For both Employee Plans and IRAs, the final rule provides that the furnishing or making available of certain **educational, investment-related information, materials and software** will not be considered recommendations giving rise to fiduciary investment advice status, provided that certain requirements are met
- The final rule provides for **four types** of educational, investment-related materials
 - plan information
 - general financial, investment and retirement information
 - standard sample asset allocation models ([slide 14](#)) and
 - interactive investment materials and software allowing the design of a personal asset allocation ([slide 15](#))
- Educational information, materials and software may not include recommendations as to specific investment products or specific plan or IRA alternatives, except in very limited contexts

Asset Allocation Models

Asset allocation models include information and materials (e.g., pie charts, graphs, or case studies) that provide a plan fiduciary, plan participant or beneficiary, or IRA owner with models of asset allocation portfolios of hypothetical individuals with different time horizons (which may extend beyond an individual's retirement date) and risk profiles

General Requirements

- Must be based on generally accepted investment theories that take into account the historic returns of different asset classes over time
- Must state all material facts and assumptions on which they are based and
- Must be accompanied by a statement indicating that Retirement Investors should consider other assets, income and investments that are not accounted for by the model

Use of Specific Investments

- For IRAs, **may never** identify specific investment products
- For Employee Plans, **may only** identify specific investment products where
 - The investment product is a designated investment alternative under the Employee Plan (other than a brokerage window) (a **designated alternative**) subject to oversight by an independent plan fiduciary and
 - The model
 - Identifies all other designated investment alternatives available under the plan that have similar risk and return characteristics and
 - Is accompanied by a statement indicating that those other designated investment alternatives have similar risk and return characteristics and identifying where information on those investments may be obtained

Interactive Investment Materials and Personal Modeling Software

Interactive investment materials include questionnaires, worksheets, software, and similar materials that provide the means to

- Estimate future retirement income needs and assess the impact of different asset allocations on retirement income
- Evaluate distribution options, products or vehicles
- Estimate a retirement income stream, or
- Model a portfolio

General Requirements

- Must be based on generally accepted investment theories that take into account the historic returns of different asset classes over time
- Must establish and maintain an objective correlation between the asset allocations and the income stream generated by the materials or software on the one hand, and the information supplied by the Retirement Investor on the other
- Must state all material facts and assumptions on which they are based and
- Must either take into account the Retirement Investor's other assets and investments or provide a disclosure that the Retirement Investor should consider these other assets and investments

Use of Specific Investments

- For both Employee Plans and IRAs, materials **may only** identify specific investment products if
 - The investment product is identified by the Retirement Investor or is a designated alternative under the Employee Plan subject to oversight by an independent plan fiduciary and
 - The materials
 - Identify all other designated investment alternatives available under the Plan that have similar risk and return characteristics and
 - Are accompanied by a statement indicating that those other designated investment alternatives have similar risk and return characteristics and identifying where information on those investments may be obtained

Robo Advice vs. Education. The final rule makes an implicit distinction between offering a customer standard tools for objective allocation modeling (which is education, not advice) and offering or using modeling tools that include subjective, customized inputs or non-standard assumptions, or any bias toward particular investments within any slice of an allocation (which would be advice, not education)

Robo Advice. Unrelated to the final rule, ERISA Section 408(b)(14) provides a statutory exemption for certain robo advice programs, but the exemption is rarely used due to its cumbersome disclosure, independent certification and audit requirements

- In addition to the exceptions for communications that do not constitute investment advice, the final rule includes **three carve-outs**, which permit communications that might otherwise constitute investment advice without triggering fiduciary status

1 Communications in transactions with sophisticated counterparties

Communications with an independent fiduciary of an Employee Plan or IRA who has financial expertise in connection with an arm's-length transaction (**sophisticated counterparty carve-out**) ([slide 17](#))

2 Communications in swap and security-based swap transactions

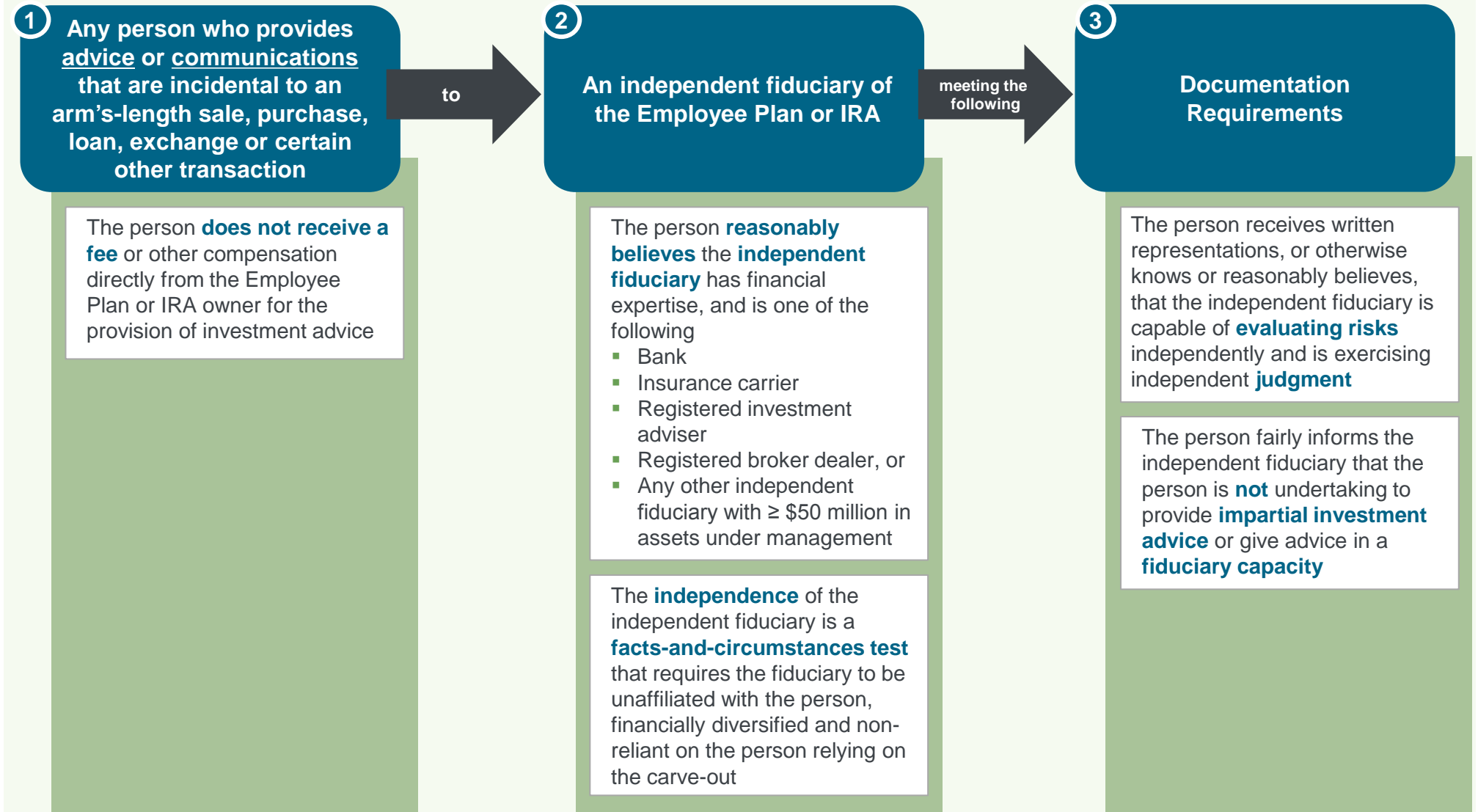
Communications with an independent fiduciary of an Employee Plan in connection with certain swaps and security-based swaps ([slide 18](#))

3 Communications by an employee of the sponsor of an Employee Plan

The communicating party is an employee of the Employee Plan sponsor communicating with a plan participant or with plan service providers or administrators and meets certain requirements ([slide 19](#))

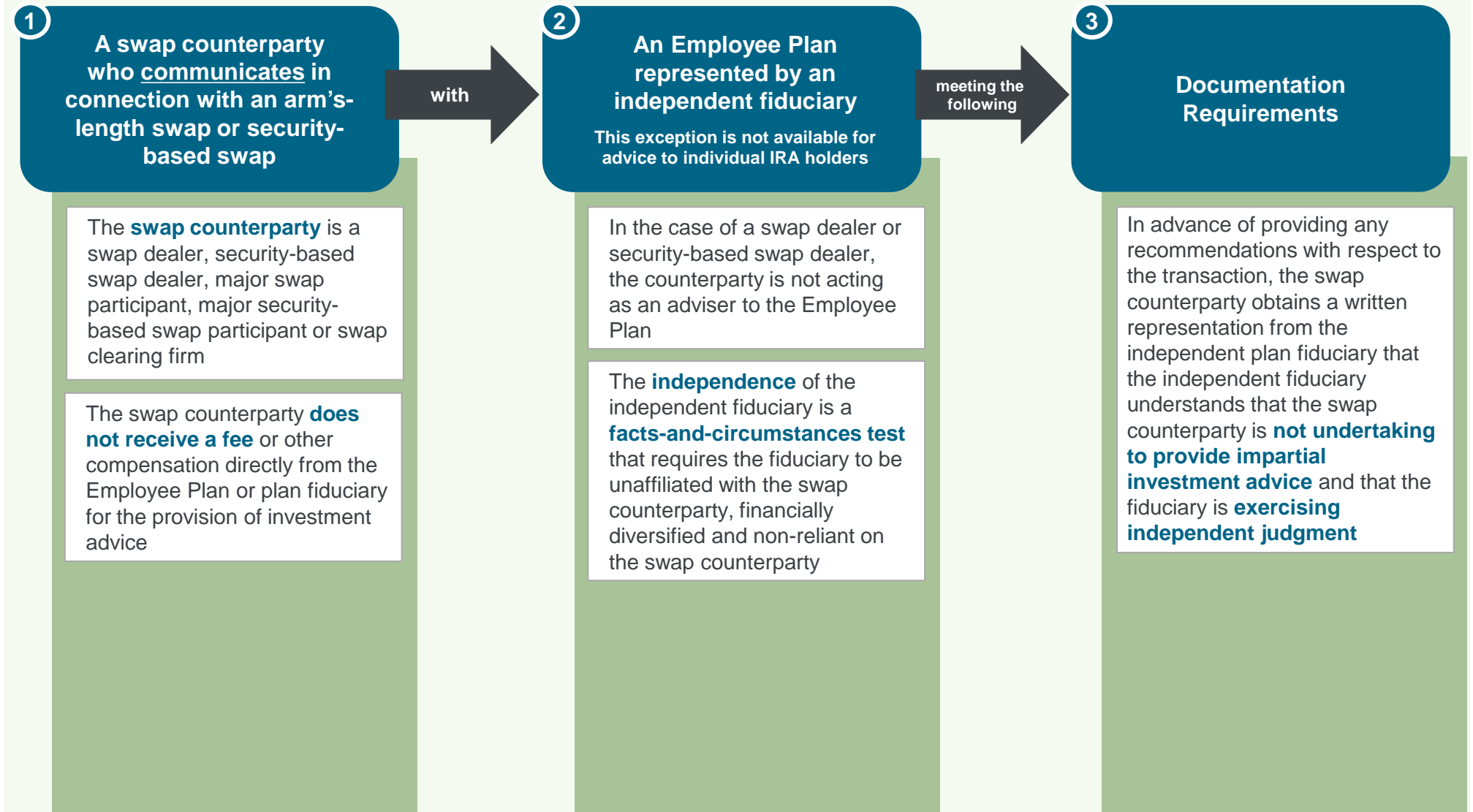
Fiduciary Investment Advice—Carve-Outs

SALES TO SOPHISTICATED COUNTERPARTIES



Fiduciary Investment Advice—Carve-Outs

SWAP AND SECURITY-BASED SWAP TRANSACTIONS



Fiduciary Investment Advice—Carve-Outs

COMMUNICATIONS BY EMPLOYEES OF THE SPONSOR OF AN EMPLOYEE PLAN

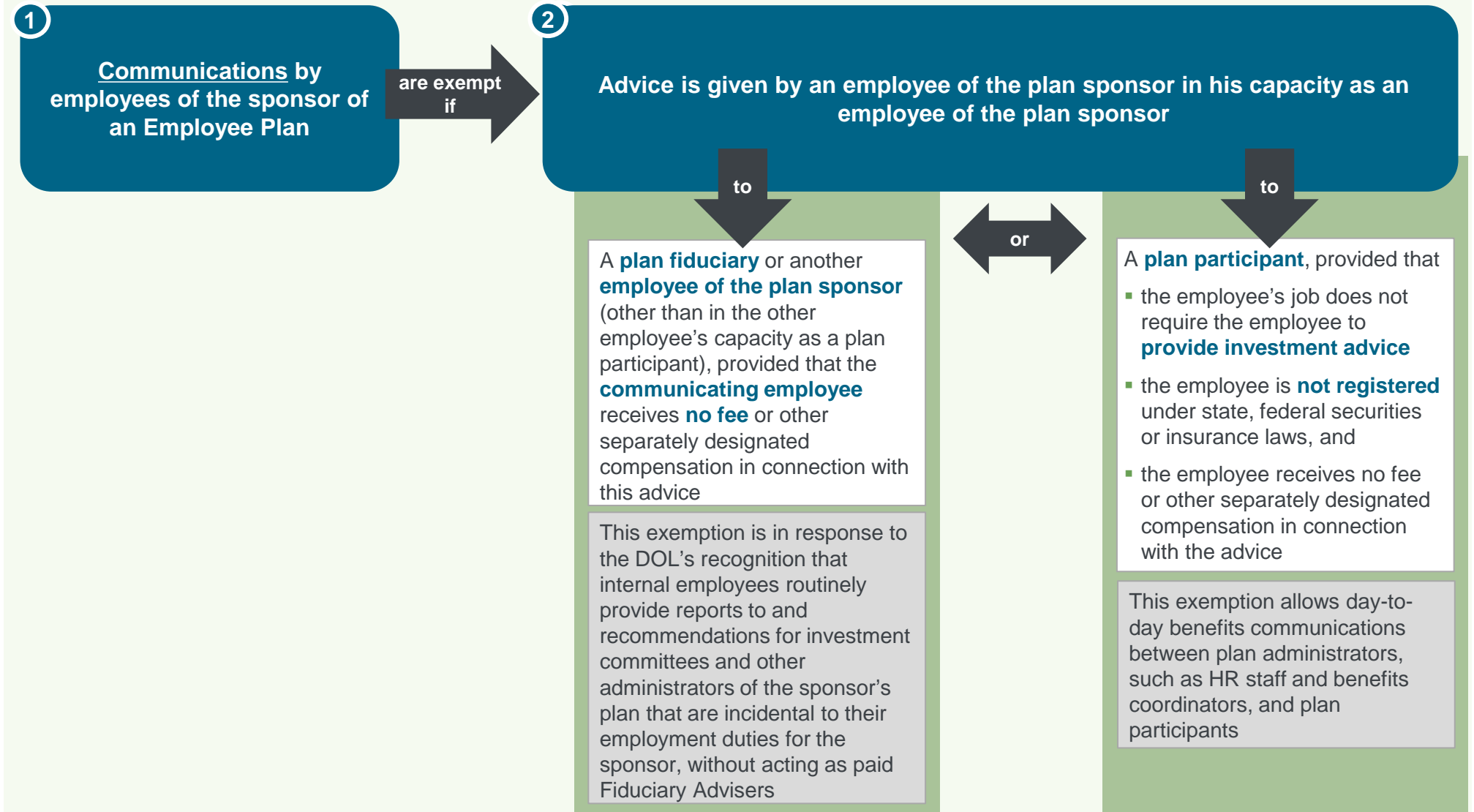
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Fiduciary Investment Advice

GENERAL IMPLICATIONS

- The final rule will bring into the fiduciary regime many **communications** that have previously been considered **ordinary course**, non-fiduciary communications, such as
 - Any broker suggestions as to specific investment alternatives, even if clearly presented in a manner that purports not to be impartial or advice
 - Any broker-provided educational or modeling materials to IRAs that include customized modeling components or specific investment alternatives as examples
 - Many marketing activities by investment product issuers to Plans, unless the sophisticated counterparty exception applies
- Touting an adviser’s services and soliciting Plans to **hire** an adviser will not be investment advice, but if such communications are coupled with a suggestion to invest in a specific product or to roll over retirement assets from another plan, then it will be investment advice
 - For example, if an investment fund or product issuer directs marketing efforts for its products at Plans, the suggestion that the Plan purchase the product is arguably fiduciary advice, even if the marketing efforts are clearly arm’s length and are not presented as impartial, since the recommendation to hire the fund or issuer is coupled with a specific product suggestion

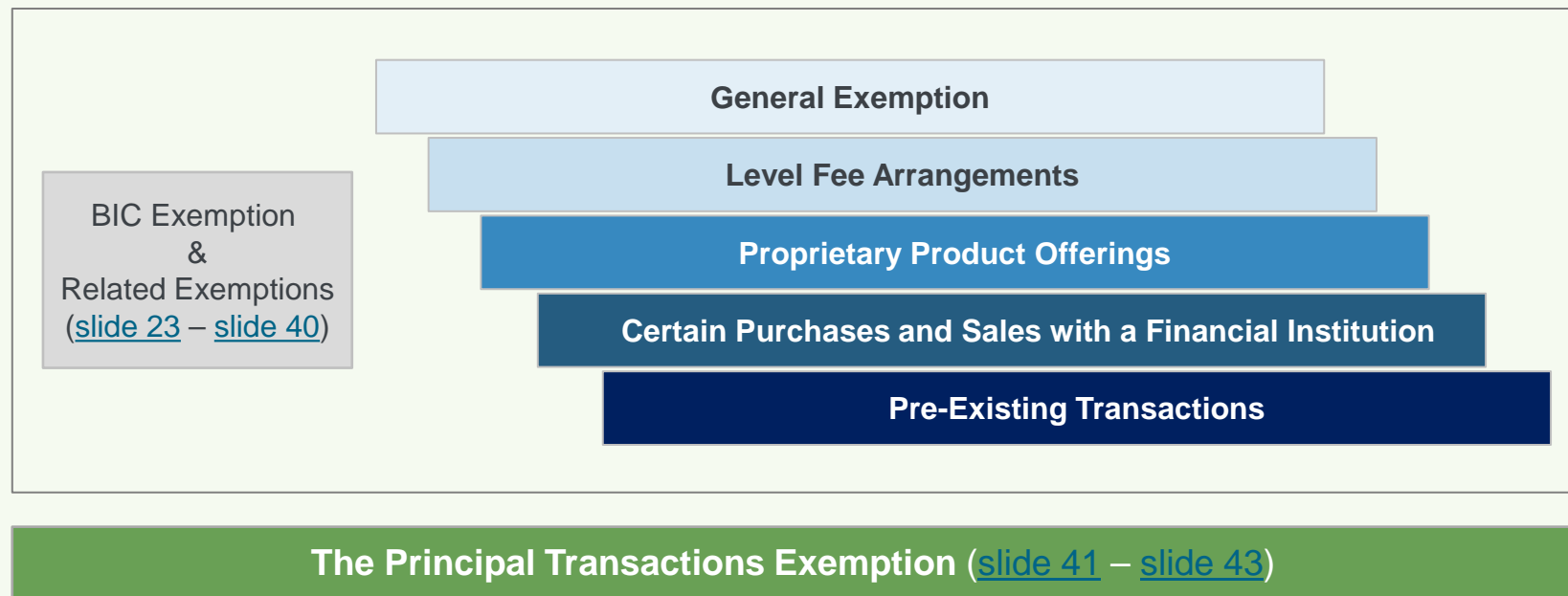
Some had criticized the breadth of the proposed rule by pointing out that even marketing an adviser’s own services to a Plan would constitute fiduciary advice—the **“hire me” conundrum**

III. New Prohibited Transaction Exemptions

New Prohibited Transactions Exemptions

OVERVIEW

- The final rule provides for two new PTEs
 - The **BIC Exemption and related exceptions** provide relief from the conflict of interest prohibited transactions associated with a Fiduciary Adviser receiving compensation as a result of the Fiduciary Adviser's advice to a Retirement Investor, so long as the Fiduciary Adviser satisfies an extensive slate of requirements intended to reduce the risk of biased advice
 - The **Principal Transactions Exemption** permits principal transactions between a Fiduciary Adviser and a Plan, with respect to purchases by the Plan of debt securities, certificates of deposits, and certain other securities, and sales by the Plan of any investments, so long as the Fiduciary Adviser satisfies certain requirements



Who may use the BIC Exemption?

- Fiduciary Advisers who receive
 - Compensation that varies based on the advice given (e.g., commissions)
 - Compensation from a third party that varies based on the advice given (e.g., revenue sharing, 12b-1 and distribution fees)
- Fiduciary Advisers engaged in a Riskless Principal Transaction ([slide 37](#))
- Fiduciary Advisers who provide advice to enter into a level advisory fee arrangement

To whom may advice be provided under the BIC Exemption?

- Retirement Investors, including, for example
 - Participants in 401(k) plans deciding how to invest their accounts
 - Participants in any Employee Plan (including a defined benefit plan) deciding whether or how to structure post-retirement payments, roll over retirement assets or take a distribution
 - Retail Fiduciaries advising IRA customers

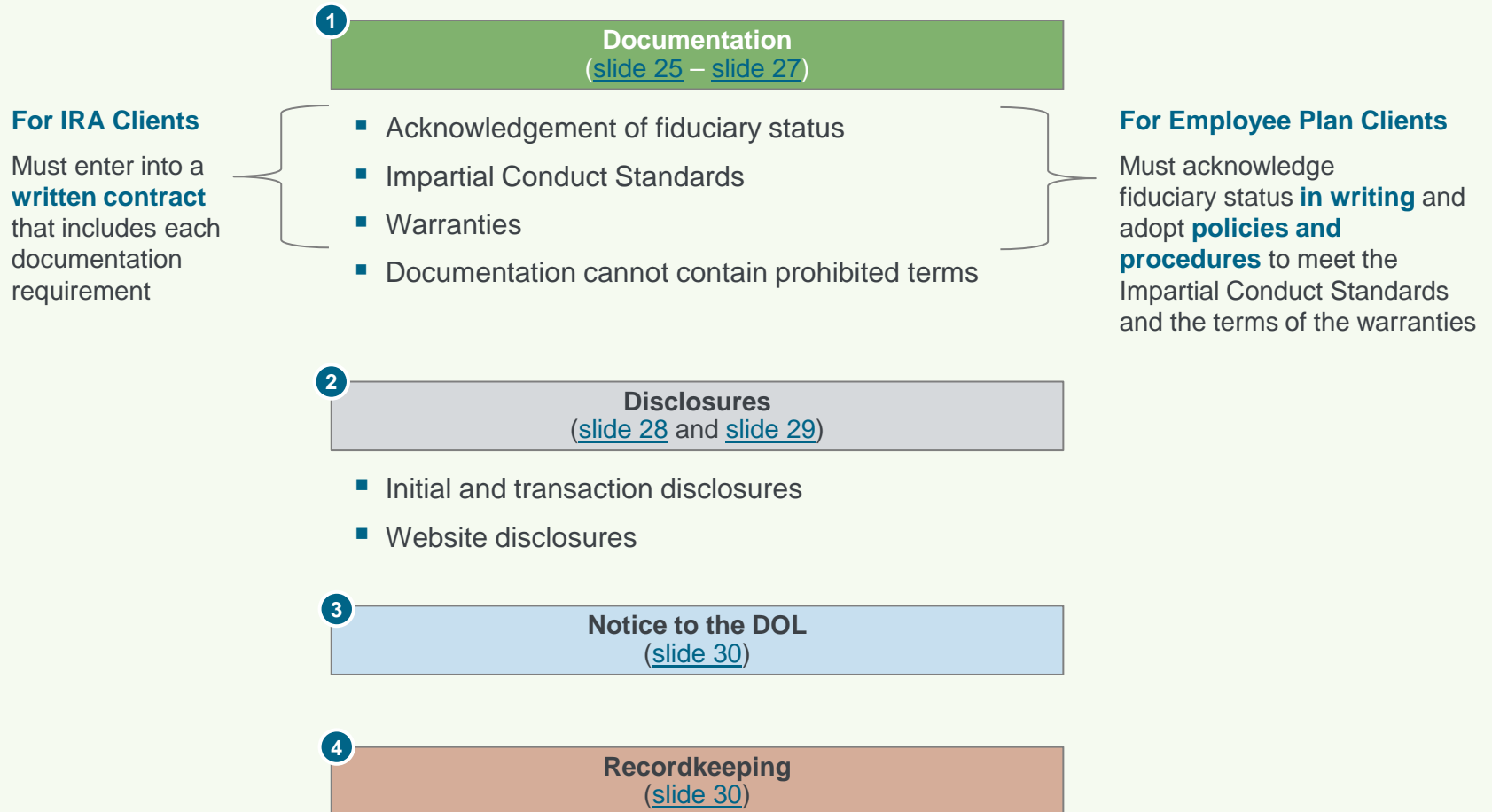
In what cases may the BIC Exemption NOT be used?

- By Fiduciary Advisers who also have discretionary authority or control with respect to the transaction
- For principal transactions between the Plan and the Fiduciary Adviser, Financial Institution or its Affiliates
 - But it can be used for sales of insurance and annuity contracts, mutual fund transactions and Riskless Principal Transactions
- For robo advice that does not qualify as objective modeling under the definition of general education ([slide 13](#) – [slide 15](#))
 - But it can be used for robo advice with respect to a level advisory fee arrangement
- For transactions with an Employee Plan where the Adviser, Financial Institution or any of their Affiliates is the employer-sponsor, a named fiduciary or plan administrator and was selected to provide advice by a fiduciary who is not independent from the Adviser, Financial Institution and their Affiliates
- For transactions with sophisticated counterparties

BIC Exemption

OVERVIEW (cont.)

- The BIC Exemption includes four general categories of requirements, which are similar for advice to IRAs and Employee Plans, with some differences for documentation requirements



BIC Exemption Requirements

DOCUMENTATION—GENERAL

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- **IRA Clients.** Unlike Employee Plans, there is no existing statutory standard of loyalty or care for IRAs
 - The BIC Exemption requires that the Fiduciary Adviser enter into a **written contract** with the client
 - The contract must be entered into prior to or at the same time as the execution of the recommended transaction
 - The terms of the contract may appear in a stand-alone document or may be incorporated into customary account opening agreements
 - Until January 1, 2018, existing IRAs may be amended by **negative consent** so that the contract requirement may be satisfied by sending the IRA customer a written notice including the contractual undertakings and requirement
 - The Adviser may treat the failure to terminate the amended contract within 30 days as assent, but the contract as delivered may not impose new contractual obligations, restrictions or liabilities on the Retirement Investor
- **Employee Plans.** Because parties who are deemed to be providing advice to Employee Plans or their participants would be subject to existing ERISA duties of loyalty and care, for fiduciary advice to Retirement Investors that are, or are advising, Employee Plans or their participants, the BIC Exemption does not require a written contract
 - In lieu of a written contract, prior to or at the same time as the recommended transaction, the Adviser must provide certain **affirmative written statements and covenants** to the client and adopt specified policies and procedures

Requirements

An affirmative, written **acknowledgement of fiduciary status**

An affirmative statement that it and its Advisers will adhere to the **Impartial Conduct Standards** ([slide 26](#))

Affirmative **warranties** that

- The Financial Institution has adopted and will comply with **written policies and procedures** reasonably and prudently designed to ensure that its Advisers will adhere to the Impartial Conduct Standards
- It has specifically **identified and documented its Material Conflicts of Interest** ([slide 26](#)) and has adopted measures to prevent such Material Conflicts of Interest from causing violations of the Impartial Conduct Standards
- Neither the Adviser nor any Related Entity uses quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation or other actions or incentives that encourage Advisers to make recommendations that are not in the **Best Interest of the Retirement Investor** ([slide 26](#))

The terms cannot include certain prohibited terms ([slide 27](#))

BIC Exemption Requirements

DOCUMENTATION—IMPARTIAL CONDUCT STANDARDS

- The BIC Exemption requires the Financial Institution to affirmatively state that it and its Advisers will adhere to three operational standards (**Impartial Conduct Standards**)
 - The Fiduciary Adviser must provide investment advice that is in the **Best Interest** of the Retirement Investor, at the time of the advice
 - All compensation received by the Fiduciary Adviser and its Affiliates for the transaction must be **reasonable** within the meaning of Section 408(b)(2) of ERISA and
 - The Fiduciary Adviser's statements about recommended investments, fees and compensation, **Material Conflicts of Interest** and any other matters relevant to the Plan's investment decisions are not misleading at the time they are made

Best Interest means the fiduciary must act with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character with like aims, based on the investment objectives, risk tolerance, financial circumstances and needs of the Plan, **without regard to the financial or other interests of the fiduciary or any other party**

Section 408(b)(2) of ERISA and the regulations thereunder require that any compensation paid by an Employee Plan for services be **reasonable** based on all the facts and circumstances and market comparators; among other requirements, such service providers are also required to provide disclosure of their compensation to the Employee Plan

A **Material Conflict of Interest** exists when the Financial Institution and its Affiliates have a financial or other interest that a reasonable person would conclude could affect the exercise of its best judgment as a fiduciary in rendering advice to the Plan

The **Impartial Conduct Standards** are also incorporated into many pre-existing PTEs that were amended as part of the final rule ([slide 45](#) – [slide 47](#))

BIC Exemption Requirements

DOCUMENTATION—PROHIBITED TERMS

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- In order to rely on the BIC Exemption, the written contract and other communications may not contain the following **prohibited terms**
 - Provisions to arbitrate or mediate individual claims in venues that are distant or that otherwise unreasonably limit the ability of Retirement Investors to assert claims
 - A waiver or qualification of a Retirement Investor's right to bring or participate in a class action or other representative action in a dispute with the Adviser or Financial Institution
 - Exculpatory provisions disclaiming or limiting liability of the Adviser or Financial Institution for a violation of the contract's terms or of the fiduciary rules under ERISA
 - Provisions that limit the Retirement Investor's recovery to an amount representing liquidated damages for a breach of contract claim
 - The agreement, however, may require an IRA customer to knowingly waive his or her right to punitive damages or rescission of recommended transactions

BIC Exemption Requirements

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Required Initial Disclosures

- State the Best Interest standard of care
 - Inform the Retirement Investor of its right to obtain copies of the Financial Institution's written policies and procedures and specific disclosures of costs, fees and compensation (including Third Party Payments) associated with the recommended transaction
 - Include a link to the Financial Institution's website and inform the Retirement Investor that the website includes model contract disclosures and copies of the Financial Institution's policies and procedures to ensure that its Advisers are meeting the Best Interest standard of care ([slide 29](#))
 - Describe Material Conflicts of Interest and disclose any fees and state the type of compensation that the Financial Institution, its Affiliates, and its Advisers expect to receive, which may be done by reference to web disclosure
 - Disclose whether the Financial Institution offers Proprietary Products or receives Third Party Payments ([slide 38](#))
 - Provide contact information for a representative of the Financial Institution
 - Describe whether or not the Adviser and Financial Institution will monitor the recommended investments
- The above disclosures must be made when an account is opened, at the same time as or prior to the execution of the first transaction

Required Transaction Disclosures

- This subset of disclosures (the **transaction disclosures**) must be repeated before any subsequent transaction is entered into under the fiduciary advice arrangement
- The transaction disclosures do not, however, need to be repeated for subsequent recommendations of the same investment product within one year unless there are material changes

All disclosures must be provided clearly and prominently

BIC Exemption Requirements

WEBSITE DISCLOSURES

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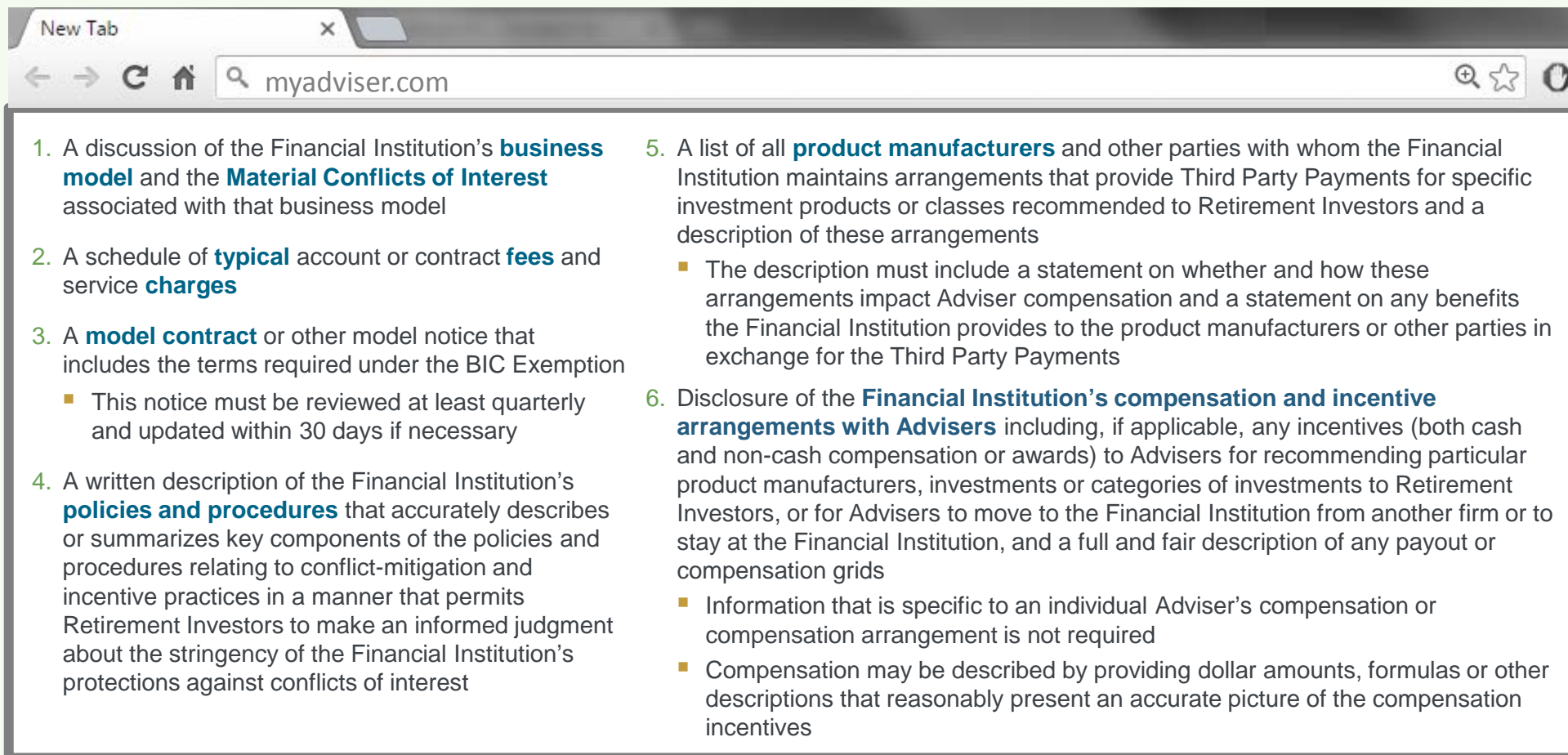
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- The Financial Institution must maintain a public website that contains the following six items



The screenshot shows a web browser window with the address bar displaying "myadviser.com". The main content area contains a numbered list of six items:

1. A discussion of the Financial Institution's **business model** and the **Material Conflicts of Interest** associated with that business model
2. A schedule of **typical** account or contract **fees** and service **charges**
3. A **model contract** or other model notice that includes the terms required under the BIC Exemption
 - This notice must be reviewed at least quarterly and updated within 30 days if necessary
4. A written description of the Financial Institution's **policies and procedures** that accurately describes or summarizes key components of the policies and procedures relating to conflict-mitigation and incentive practices in a manner that permits Retirement Investors to make an informed judgment about the stringency of the Financial Institution's protections against conflicts of interest
5. A list of all **product manufacturers** and other parties with whom the Financial Institution maintains arrangements that provide Third Party Payments for specific investment products or classes recommended to Retirement Investors and a description of these arrangements
 - The description must include a statement on whether and how these arrangements impact Adviser compensation and a statement on any benefits the Financial Institution provides to the product manufacturers or other parties in exchange for the Third Party Payments
6. Disclosure of the **Financial Institution's compensation and incentive arrangements with Advisers** including, if applicable, any incentives (both cash and non-cash compensation or awards) to Advisers for recommending particular product manufacturers, investments or categories of investments to Retirement Investors, or for Advisers to move to the Financial Institution from another firm or to stay at the Financial Institution, and a full and fair description of any payout or compensation grids
 - Information that is specific to an individual Adviser's compensation or compensation arrangement is not required
 - Compensation may be described by providing dollar amounts, formulas or other descriptions that reasonably present an accurate picture of the compensation incentives

To the extent that any of this information is otherwise disclosed in a public filing with the SEC or the DOL, the Financial Institution may post such filing on its website with an explanation of where such information can be found in the filing

BIC Exemption Requirements

NOTICE TO THE DOL AND RECORDKEEPING

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Notice to the DOL

- Before receiving any compensation in reliance on the BIC Exemption, the Financial Institution must **notify** the **Employee Benefit Security Administration of the DOL** of its intention to rely on this class exemption

Recordkeeping

- The Financial Institution must satisfy the following **recordkeeping requirements**
 - The Financial Institution must maintain for **six years** the records necessary to enable the DOL, IRS, or any fiduciary, participant, beneficiary, employer or employee organization to determine whether the conditions of the exemption have been met
- Failure to maintain the required records will result in the loss of the exemption only for the transaction(s) for which the records have not been maintained

BIC Exemption in Practice

OVERVIEW OF ALTERNATIVE FEE ARRANGEMENTS

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- Some Financial Institutions may consider alternative fee structures to minimize prohibited transaction exposure under the framework of the final rule

1

Level Advisory Fee Arrangements (e.g., AUM or wrap account arrangements)

- This arrangement charges Retirement Investors a level fee based on the account's asset value
- Adviser trades away or uses a wrap fee and does not offer Proprietary Products or products generating Third Party Payments
- Any recommendation to **enter into** the arrangement must comply with **the level fee provisions of the BIC Exemption**

([slide 32](#) and [slide 33](#))

2

Fee-leveling Arrangements under the Statutory Exemption

- This arrangement structures compensation and fees such that the Adviser and his or her employer **do not receive any compensation or revenue that varies** based on the customer's investment choices
 - Variable compensation or revenue to Affiliates of the Adviser **is not prohibited**, so any commissions or back-end revenue streams could be rerouted to a different Affiliate

([slide 34](#))

3

Alternative Fee Arrangements under the BIC Exemption

- Other arrangements could be implemented by Financial Institutions to **reduce the variable aspects** of their compensation or realign the incentives of the Fiduciary Adviser with the investor to bolster the Financial Institution's ability adhere to Impartial Conduct Standards of the BIC Exemption

([slide 35](#))

BIC Exemption in Practice

ALTERNATIVE FEE ARRANGEMENTS—LEVEL ADVISORY FEES

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1

Level Advisory Fee Arrangements

Compensation of the Adviser	Compensation of Affiliates	Product and Service Limitations	Prohibited Transaction Exemption	Key Exemption Requirements
<p>Compensation of and revenues to the Financial Institution, the Adviser and any Affiliate may not vary based on the investment choices of Retirement Investor</p> <p>Compensation must be 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 (e.g., a percentage of AUM)</p>		<p>The Fiduciary Adviser may not offer any Proprietary Products or products generating Third Party Payments</p> <p>The Fiduciary Adviser must trade away or use a wrap fee (i.e., may not charge commissions)</p>	<p>Any recommendation to enter into the level advisory fee arrangement must comply with the level fee provisions of the BIC Exemption</p> <p>Once a Retirement Investor is in a level advisory fee arrangement, no PTE is needed for the advice since compensation and revenues do not vary based on the advice and therefore there is no conflict of interest</p>	<p>The level fee provisions of the BIC Exemption are described on the next slide</p>

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ALTERNATIVE FEE ARRANGEMENTS—LEVEL ADVISORY FEES (cont.)

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- The **recommendation to enter into a level advisory fee arrangement** is itself fiduciary advice that requires an exemption
 - As a result, the DOL inserted into the BIC Exemption a more streamlined set of requirements for the discrete recommendation to enter into the arrangement (the **level fee provisions of the BIC Exemption**)
- The **conditions** of these provisions require
 - Prior to or at the same time as the execution of the recommended transaction, a written **acknowledgment of fiduciary status**
 - The Financial Institution and Adviser must comply with the **Impartial Conduct Standards**
 - If applicable, documentation of the specific reason why the recommendation is in the **Best Interest** of the Retirement Investor for
 - a recommendation to roll over from an Employee Plan to an IRA; and
 - a recommendation to roll over from another IRA or to switch from a commission-based account to a level advisory fee arrangement (AUM fee or wrap fee)

The following conditions of the general BIC Exemption are **not required** under the level fee provisions

- The written contract requirement
- Affirmative warranties
- Initial/transaction disclosures
- Website disclosures
- Notice to the DOL
- Recordkeeping requirements

This documentation condition is unique to the level fee provisions of the BIC Exemption and is only required for advice to enter into a level fee arrangement

BIC Exemption in Practice

ALTERNATIVE FEE ARRANGEMENTS—STATUTORY FEE-LEVELING EXEMPTION

2

Accounts with Fee-leveling

Compensation of the Adviser	Compensation of Affiliates	Product and Service Limitations	Prohibited Transaction Exemption	Key Exemption Requirements
Compensation to the Adviser and his or her employer may not vary based on the client's investment choices	There is no prohibition on compensation or revenue to Affiliates of the Adviser and his or her employer	The Fiduciary Adviser may offer Proprietary Products and products that generate Third Party Payments, but any compensation or revenue from these products must be rerouted to an Affiliate separate from the Adviser and his or her employer	The Fiduciary Adviser may rely on an existing statutory exemption under ERISA Section 408(b)(14) that is unrelated to the final rule	An independent fiduciary of the Plan must authorize the arrangement The arrangement must meet other requirements, including detailed disclosure on fees and compensation arrangements and an annual audit

- Advisers may be able to comply with this exemption by crediting back to their Affiliates, third-party product providers or the customer (if permitted) any distribution fees that the Adviser is eligible to receive on the distribution of Affiliate or third-party funds or products

BIC Exemption in Practice

ALTERNATIVE FEE ARRANGEMENTS—OTHER FEE STRUCTURES UNDER THE BIC EXEMPTION

3

Alternative Fee Arrangements under the BIC Exemption

Compensation of the Adviser	Compensation of Affiliates	Product and Service Limitations	Prohibited Transaction Exemption	Key Exemption Requirements
<p>Fiduciary Advisers might consider other fee structures that reduce the variable aspects of their compensation such as fee caps, rebates, and structures that compensate Fiduciary Advisers based on asset performance</p>		<p>The Fiduciary Adviser may offer Proprietary Products and products that generate Third Party Payments</p> <p>Fiduciary Advisers should consider additional implications of these offerings, discussed on slide 38</p>	<p>Fiduciary Advisers may rely on the BIC Exemption in order to exempt the compensation that they receive as a result of fiduciary investment advice</p> <p>Financial Institutions may find that alternative fee structures may provide a stronger basis for complying with the BIC Exemption requirements, including the Impartial Conduct Standards</p>	<p>All requirements of the BIC Exemption must be met, including enhanced BIC Exemption requirements if offerings are limited in whole or in part to Proprietary Products or products generating Third Party Payments</p>

As described on [slide 26](#) two of the **Impartial Conduct Standards** require

- investment advice that is in the Best Interest of the Retirement Investor
- policies to ensure that the entity and its agents act with impartiality in favor of the Retirement Investor

BIC Exemption in Practice

PROPRIETARY PRODUCTS—GENERAL RULE

- Financial Institutions may rely on the BIC Exemption and satisfy the Impartial Conduct Standards, even though they offer **Proprietary Products** or products that generate **Third Party Payments**
- Complying with the BIC Exemption with respect to the sale of these products and investments is by definition very difficult and fraught with risk since the burden is on the Fiduciary Adviser to prove that the sale was in the Best Interests of the Plan
- Financial Institutions will have to be careful not to design their platforms or software, or encourage or incentivize Advisers, to bias recommendations toward Proprietary Products or products that generate Third Party Payments
 - Without a clear and independent rationale for recommending these products, such a bias would fundamentally go against the principles behind the Impartial Conduct Standards

Proprietary Product means a product that is managed, issued or sponsored by the Financial Institution or any of its Affiliates

Third Party Payments include sales charges when not paid directly by the Employee Plan, plan participant or IRA; gross dealer concessions; revenue sharing payments; 12b-1 fees; distribution, solicitation or referral fees; volume-based fees; fees for seminars and educational programs; and any other compensation, consideration or financial benefit provided to the Financial Institution or an Affiliate or Related Entity by a third party as a result of a transaction involving a Plan

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PROPRIETARY PRODUCTS—PRINCIPAL TRANSACTIONS

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- While the preamble to the BIC Exemption discusses at length that the BIC Exemption does not preclude the sale by an Adviser of Proprietary Products, the BIC Exemption is **unavailable** for **Principal Transactions**
 - An Adviser cannot sell Proprietary Products other than insurance or annuity contracts or mutual fund shares, if the product is being issued directly from the relevant Financial Institution or one of its Affiliates (as opposed to being sold by an unrelated third-party underwriter or on a secondary market)
 - Similarly, if the Adviser's Financial Institution or Affiliate is the underwriter, then the product cannot be sold to a Plan unless it is an insurance or annuity contract or mutual fund share
- Certain types of assets may be sold under the Principal Transactions Exemption instead of the BIC Exemption, but the asset classes eligible for that exemption are limited to specified debt securities (which generally must be registered) and debt-like securities, and the exemption is not available for sales of debt securities by the issuer or underwriter
- Subject to any future guidance from the DOL, it is unclear how the DOL intended for Advisers to sell Proprietary Products under the BIC Exemption other than insurance and mutual fund products
- The Principal Transactions Exemption allows Financial Institutions to **petition the DOL** to add products to the covered assets list under that exemption; historically this has been a long and difficult process

Under the BIC Exemption, **Principal Transactions** include any purchase from or sale to a Plan of an investment product for the relevant Financial Institution's own account or that of its Affiliate, other than the sale of an insurance or annuity contract to a Plan, a mutual fund transaction or a Riskless Principal Transaction

Under the BIC Exemption, a **Riskless Principal Transaction** means a transaction in which a Financial Institution, after having received an order from a Retirement Investor to buy or sell an investment product, purchases or sells the same investment product for the Financial Institution's own account to offset the contemporaneous transaction with the Retirement Investor

BIC Exemption in Practice

PROPRIETARY PRODUCTS—LIMITING RECOMMENDATIONS

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- If a Fiduciary Adviser restricts its recommendations, either in whole or in part (e.g., with respect to a specific product category), to Proprietary Products or products generating Third Party Payments, the transaction will be exempt under the BIC Exemption only if the Fiduciary Adviser meets both the general conditions of the exemption and **specified additional requirements**
 - The additional requirements in some respects repeat the general BIC Exemption requirements but emphasize that these requirements must be met in a specific and express manner with respect to these Fiduciary Advisers
- The **additional requirements** include
 - The Financial Institution must specifically disclose
 - the limitations they place on their investment recommendations,
 - the Material Conflicts of Interest associated with Proprietary Products and products generating Third Party Payments and
 - the services that will be provided both to the Retirement Investor and third parties in exchange for payments
 - The Financial Institution must reasonably conclude that the limitations will not cause it or its Advisers to receive compensation in excess of reasonable compensation
 - After consideration of their policies and procedures, the Financial Institution must reasonably determine that the limitations and associated conflicts of interest will not cause it or its Advisers to recommend imprudent investments or allocate available investments in a self-interested manner

Financial Institutions that rely on marketing their own products for much of their revenue may consider **formally limiting investment recommendations** to Plans (either in whole or in part) to a smaller menu of products that includes (or is limited to) Proprietary Products and products generating Third Party Payments. Note that the Impartial Conduct Standards still apply

Exemption for Certain Purchases and Sales with a Financial Institution

OVERVIEW

This exemption is a separate exemption embedded in the BIC Exemption that provides relief for the **per se prohibited transactions** that occur when a Plan purchases an investment product directly from a Financial Institution that is a **party in interest**

Relief is provided for Sections 406(a)(1)(A) and (D) of ERISA (See [Appendix B](#))

Background and context

- The prohibited transaction rules include both conflict of interest prohibitions and per se prohibitions on sales to Plans by fiduciaries and other parties in interest
 - The BIC Exemption focuses on the general conflict of interest prohibitions and does not provide relief for all of the per se prohibitions that occur when a Plan purchases Proprietary Products from a Fiduciary Adviser, even if the advice otherwise complies with the BIC Exemption
 - This is particularly important for certain insurance product providers that are losing the availability of PTE 84-24 under the PTE amendments ([slide 45](#) and [slide 46](#))
- While the BIC Exemption provides prohibited transaction relief to the Fiduciary Adviser, if the Fiduciary Adviser does not comply with the terms of the BIC Exemption, the Plan's independent fiduciaries may also be implicated in a per se prohibited transaction
 - This exemption provides relief for these other parties

Conditions

- Transaction must be effected by the Financial Institution in the ordinary course of its business
- Compensation, direct or indirect, for any services rendered by the Financial Institution and its Affiliates and Related Entities is not in excess of reasonable compensation ([slide 26](#)) and
- Terms of the transaction must be at arm's length

This exemption is not available if

- The Fiduciary Adviser* is
 - the sponsoring employer or
 - a named fiduciary or plan administrator to the Employee Plan and was not selected to provide advice by an independent fiduciary
- The transaction does not involve sales of insurance or annuity contracts, mutual fund transactions or Riskless Principal Transactions
- The transaction is based on **robo advice** or
- The Adviser has or exercises discretionary authority or control with respect to the recommended transaction

* Includes the Adviser, Financial Institution, and Affiliates

Pre-Existing Transactions Exemption

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This exemption provides relief for the receipt of compensation by a Fiduciary Adviser* as a result of investment advice (including advice to hold an investment) provided to a Plan in connection with the purchase, holding, sale or exchange of investment property that was acquired prior to April 10, 2017 or pursuant to a recommendation to continue to adhere to a systematic purchase program established before April 10, 2017

Background and context

- This exemption is intended to grandfather compensation streams from transactions occurring or recommended prior to the effective date of the BIC Exemption

Conditions

- The compensation is received pursuant to an agreement, arrangement or understanding entered into prior to April 10, 2017 that has not expired or come up for renewal since April 10, 2017
- The amount of the compensation paid, directly or indirectly, to the Fiduciary Adviser* in connection with the transaction is not in excess of reasonable compensation ([slide 26](#)) and
- Any investment recommendations made after April 10, 2017 by the Financial Institution or Fiduciary Adviser with respect to the securities or other investment property meet the Impartial Conduct Standards

This exemption is not available if

- The transaction was otherwise a nonexempt prohibited transaction on the date it occurred or
- The compensation is received in connection with the Plan's investment of additional amounts in a previously acquired investment vehicle
 - However, the exemption is available for a recommendation to **exchange investments** within a **mutual fund family or variable annuity contract** pursuant to an exchange privilege or rebalancing program that was **established before April 10, 2017**, if the recommendation does not result in the Fiduciary Adviser* receiving more compensation than they were entitled to receive prior to April 10, 2017

Principal Transactions Exemption

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- This exemption provides prohibited transaction relief for
 - Principal and riskless principal purchases of **Principal Traded Assets** by a Plan from a Fiduciary Adviser or Financial Institution ([slide 43](#))
 - Principal and riskless principal sales of any **securities or other investments** by a Plan to a Fiduciary Adviser or Financial Institution

Background and context

- Since the prohibited transaction rules were enacted in 1974, the DOL has issued certain PTEs that apply only where a service provider is not a fiduciary in the subject transaction
 - These PTEs are necessary because even a non-fiduciary service provider is a party in interest to the Plan it serves, and therefore exemptions are necessary for many common transactions, such as principal transactions and sales of CDs or insurance products between service providers and Plans
- Because the final rule may cause many service providers to become fiduciaries to Plans, new exemptions were required to allow ordinary course principal and riskless principal securities transactions between these fiduciaries and Plans
- The final rule addresses this issue in three ways
 - *The existing PTE 75-1*
 - Continues to cover non-fiduciary service providers involved in principal transactions of debt and equity securities, subject to specified conditions
 - *The new BIC Exemption*
 - Covers riskless principal transactions in both debt and equity securities between a Financial Institution and a Plan
 - *The new Principal Transactions Exemption*
 - Covers principal **purchases** by a Plan from a Fiduciary Adviser of a Principal Traded Asset and principal **sales** by a Plan to a Fiduciary Adviser of any debt or equity instruments

Principal Transactions Exemption

OVERVIEW (cont.)

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Conditions

- *Transaction Requirement*
 - Purchases by a Plan from a Fiduciary Adviser or Financial Institution **must involve only** Principal Traded Assets and any other assets approved in the future by the DOL
 - The transaction must be for **cash** (no in-kind benefits or exchanges)
- *Documentation Requirement*
 - For both IRAs and Employee Plans, the documentary requirements are similar to those described on [slide 25](#) and [slide 26](#) plus a requirement that the Financial Institution have written policies and procedures addressing the credit risk and liquidity requirements
- *Prohibited Terms*
 - Written agreements may not include the provisions that are similarly excluded under the BIC Exemption ([slide 27](#))
- *Disclosure Requirements*
 - The Financial Institution must comply with disclosure requirements ([slide 28](#) and [slide 29](#))
- *Confirmation*
 - The Adviser or the Financial Institution must provide a written confirmation of the transaction, which may be provided in compliance with Rule 10b-10 under the Securities Exchange Act of 1934 or any similar requirement
- *Recordkeeping Requirements*
 - The Financial Institution must comply with recordkeeping requirements that are generally similar to those of the BIC Exemption ([slide 30](#))

This exemption is not available if

- The Adviser has or exercises discretionary authority or control with respect to the recommended transaction or
- With respect to any Employee Plan, the Fiduciary Adviser* is
 - the sponsoring employer or
 - a named fiduciary or plan administrator to the Employee Plan that was selected to provide advice by a fiduciary of the Employee Plan that is not independent of the Fiduciary Adviser

Principal Transactions Exemption

PRINCIPAL TRADED ASSETS

Principal Traded Asset means any

- **debt security**
- unit investment trust or
- certificate of deposit (**CD**)

Debt Securities must meet the following **additional requirements**

- May not be issued by the Fiduciary Adviser*,
- May not be sold in an underwriting in which the Financial Institution is a syndicate member and
- The Adviser must determine at the time of the transaction that the debt securities
 - Pose no greater than a moderate credit risk and
 - Are sufficiently liquid that they could be sold at carrying value within a short period of time

Debt Security means a debt security as defined in Rule 10b-10(d)(4) of the Securities Exchange Act of 1934 that is any of the following:

- U.S. dollar denominated, issued by a U.S. corporation and offered pursuant to a registration statement under the Securities Act of 1933
- An “Agency Debt Security” as defined in FINRA Rule 6710(l)
- An “Asset Backed Security” as defined in FINRA Rule 6710(m) that is guaranteed by an “Agency” as defined in FINRA Rule 6710(k), or a Government Sponsored Enterprise as defined in FINRA Rule 6710(n) or
- A “U.S. Treasury Security” as defined in FINRA Rule 6710(p)

These three prongs are effectively limited to debt securities that are issued or guaranteed by the government

IV. Amended Class Exemptions

- The DOL amended six existing PTEs that have been regularly relied upon by financial institution service providers

Impartial Conduct Standards

- These amendments generally **add Impartial Conduct Standards** ([slide 26](#)) (but without the warranty requirement) as a condition to reliance on the PTEs
- The Impartial Conduct Standards have only been added where the relevant PTE provided an exemption for a fiduciary to advise or use discretion to cause a Plan to engage in the subject transaction
 - Certain other PTEs which exempt specified transactions between non-advisory brokers and service providers and Plans (such as non-advisory principal transactions) remain in effect **without the Impartial Conduct Standards**
- The addition of the Impartial Conduct Standards applies not only to Fiduciary Advisers but also to advisers and discretionary asset managers for larger plans, such as pension plans

Addition of Other Conditions

- Many of these amendments include other conditions and exclusions, as described on the following slides
- These conditions and exclusions have the effect of preventing certain transactions from being covered by a PTE or requiring them to comply with the BIC Exemption and all of its requirements
- These transactions include
 - **Purchases by Plans of annuities** other than fixed-rate annuity contracts (e.g., variable annuity contracts and indexed annuity contracts) and **purchases by IRAs of mutual fund shares**, both of which were covered by PTE 84-24
 - **Agency cross transactions** involving non-discretionary advisory IRAs that are currently covered by PTE 86-128

Amended PTEs

SUMMARY OF AMENDMENTS

PTE	Relief Provided	Requires Impartial Conduct Standards	The Effect of Other Material Conditions Imposed by Final Rule
86-128	Permits a Plan's fiduciary investment manager or adviser to use itself or an affiliate to execute agency trades in securities for fees and commissions	✓	<ul style="list-style-type: none"> Extends the consent, disclosure and reporting requirements to IRAs as well as Employee Plans Limits the scope of the PTE to agency trade execution for discretionarily managed IRAs, thereby requiring advisers for non-discretionary advisory IRAs to rely on the BIC Exemption for relief for agency trades Limits the compensation covered by the PTE to commissions and excludes 12b-1 fees, revenue sharing payments, marketing fees, administrative fees, sub-TA fees and sub-accounting fees Broadens IRA definition to include tax-qualified health savings accounts, Archer MSAs and Coverdell savings accounts
	Adds a new exemption that permits a broker dealer fiduciary to use its authority to cause an Employee Plan to purchase mutual fund shares from the fiduciary and receive a commission	✓	<ul style="list-style-type: none"> Fiduciary must be a registered broker dealer acting as such and must not be a principal underwriter for, or affiliated with, the mutual fund This new exemption is not available for transactions involving IRAs
84-24	Permits insurance agents, insurance brokers and pension consultants that are parties in interest or fiduciaries to effect the purchase of insurance or annuity contracts and receive a commissions on the transaction	✓	<ul style="list-style-type: none"> Revokes relief for purchase by a Plan of annuities other than Fixed Rate Annuity Contracts (e.g., variable annuity contracts and indexed annuity contracts), thereby requiring these purchases to comply with the BIC Exemption Revokes the relief for purchase by an IRA of mutual fund shares, thereby requiring these purchases to comply with the BIC Exemption where, for example, a fiduciary is advising on the purchase of a mutual fund managed by an affiliate Limits the types of commissions that agents, brokers, pension consultants and principal underwriters can receive under the PTE by narrowly defining Insurance Commission and Mutual Fund Commission to exclude any revenue sharing payment, administrative fee or marketing fee Strengthens the recordkeeping requirement
	Permits the purchase of insurance or annuity contracts where the insurance company selling the contracts is a party in interest		
	Permits mutual fund principal underwriters that are parties in interest or fiduciaries to effect the purchase of mutual fund shares and receive a commission on the transaction		
75-1 Part III	Permits a fiduciary to cause a Plan to purchase securities from a member of an underwriting syndicate other than the fiduciary when the fiduciary is also a member of the syndicate	✓	None
75-1, Part IV	Permits a Plan to purchase securities in a principal transaction from a fiduciary that is a market marker with respect to the securities	✓	None

Amended PTEs

SUMMARY OF AMENDMENTS (cont.)

PTE	Relief Provided	Requires Impartial Conduct Standards	The Effect of Other Material Conditions Imposed by Final Rule
77-4	Permits a Plan to purchase or sell mutual fund shares where the fund's investment adviser is also a fiduciary to the Plan, subject to an offset of any advisory or management fee paid by the Plan and advisory fee paid by the fund	✓	None
80-83	Permits a fiduciary to cause a Plan to purchase a security in a public offering when the proceeds of the securities issuance may be used by the issuer to retire or reduce debt to the fiduciary or its affiliate	✓	None
83-1	Permits the sale of certificates in an initial issuance of certificates by the sponsor of a mortgage pool to a Plan when the sponsor, trustee or insurer of the pool is a fiduciary with respect to the assets of the Plan invested in the certificates	✓	None
75-1 Part V	Permits the extension of credit to a Plan by a broker dealer in connection with the purchase or sale of securities	N/A	<p>Expands the relief to permit an investment advice fiduciary that is a broker dealer to receive reasonable compensation for extending credit to a Plan to avoid a failed purchase or sale of securities if</p> <ul style="list-style-type: none"> the potential failure is not the result of action or inaction by the broker dealer or any affiliate; the terms of the extension of credit are at arm's length; the Plan receives written disclosure of certain terms prior to the extension of credit; and the broker dealer satisfies certain recordkeeping requirements
75-1, Part I (b) and (c)	Permits the effecting of securities transactions (and furnishing of advice regarding securities or other property to a Plan) by parties in interest other than fiduciaries	N/A	Revoked (intended to be covered by ERISA section 408(b)(2) and Code section 4975(d)(2))
75-1, Part II (2)	Permits the purchase or sale by a Plan of mutual fund shares, provided that no fiduciary of the Plan who makes the decision on behalf of the Plan to enter into the transaction is a principal underwriter for, or affiliated with, the mutual fund	N/A	Revoked (incorporated into PTE 86-128)

V. Practical Impacts for the Financial Services Industry

- The final rule has far-reaching implications for the financial services industry and will require changes in many firms' business models as they relate to Plans. Firm products and services will generally fall into one of two paradigms

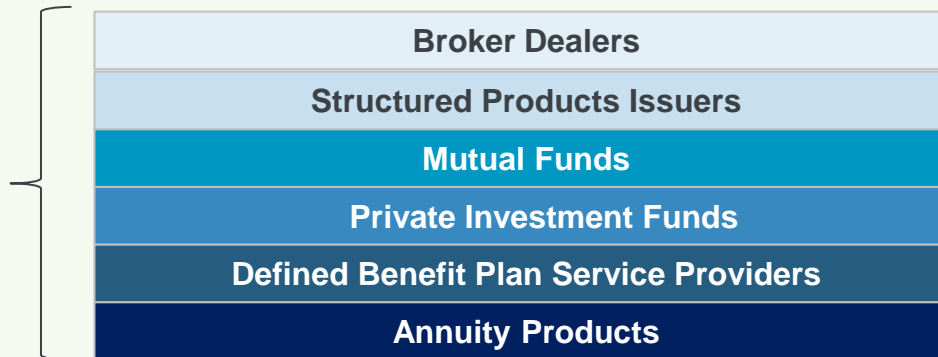
Non-Fiduciary Communications Paradigm

- **Generalize communications** so as not to provide fiduciary investment advice
 - Provide only general investment education ([slide 14](#) and [slide 15](#))
 - For product issuers, do not direct marketing materials at specific Retirement Investors—only react to unsolicited inquiries
 - Determine how to segregate communications with individuals with respect to their retirement accounts and their non-retirement accounts
- **Market to sophisticated counterparties** (e.g., large plans with independent fiduciaries)
 - Obtain all representations and provide all disclosures required by sophisticated counterparty carve-out

Fiduciary Adviser Paradigm

- Comply with the **BIC Exemption** and ensure all recommendations meet the Impartial Conduct Standards
 - Be prepared to defend any recommendations of Proprietary Products or products generating Third Party Payments in hindsight based on objective criteria
- Comply with **another PTE**
 - Most PTEs for compensation to investment advisers have been amended to add the Impartial Conduct Standards
- Structure services so as **not to receive variable compensation** based on recommendations (e.g., an alternative fee arrangement) ([slide 32](#))
 - Recommendations to enter into such an arrangement are subject to the level fee provisions of the BIC Exemption

The following slides discuss more specific implications for a few select types of financial firms and products



Practical Impacts

BROKER DEALERS OFFERING IRA PLATFORMS—SNAPSHOT

Issue

Unless full service brokers scale back their communications and services to their IRA customers, the final rule will result in a significant increase in **Brokerage IRA** accounts that are deemed **Advisory IRAs**

Impact

Brokerage services will need to be restructured to fall within one of three models

- **Brokerage IRA.** Operates under a discount brokerage model, may not provide recommendations and may only provide generic investment information
- **Advisory IRA.** Communications are considered fiduciary investment advice and must comply with the BIC Exemption
- **Discretionary/Managed IRAs.** Make investment decisions for IRAs and will continue to be fiduciaries

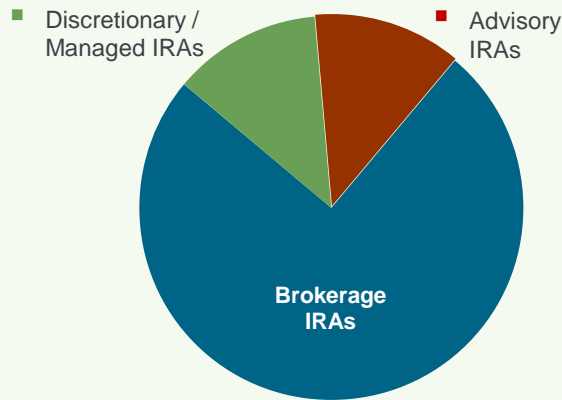
Considerations

- There are questions as to what types of services can be offered to a Brokerage IRA without triggering fiduciary status, such as: Can the firm **provide interactive tools** that limit the universe of available products in an objective way without skewing toward Proprietary Products under the investment education exception?
- Since the Brokerage IRA model will require significant **scaling back of services** offered in order to avoid providing fiduciary investment advice, brokerage firms will need to consider how to attract and retain low- and middle-net worth retail clients
- Brokerage firms may decide to seek the added revenue generated by providing advisory services beyond the Brokerage IRA model
 - Firms that decide to operate under the **Advisory IRA** model will need to determine how to comply with the Impartial Conduct Standards
 - Firms that decide to utilize a level advisory fee arrangement for their Advisory IRAs must ensure any **recommendation to enter into** such an arrangement complies with the level fee provisions of the BIC Exemption
- Brokerage firms should consider questions regarding how **services to IRAs are offered side by side with non-retirement accounts**
 - How will the new model coexist with non-retirement accounts?
 - Can investment advice related to a client's non-IRA account be distinguished from advice related to that client's IRA account if that advice is determined in hindsight to have not been in the client's best interest?

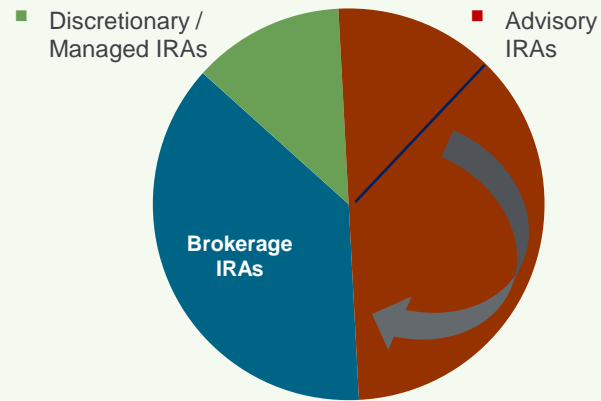
Practical Impacts

BROKER DEALERS OFFERING IRA PLATFORMS (cont.)

Prior to the final rule



After the final rule



Employee Plans	IRAs
<ul style="list-style-type: none"> Subject to prohibited transaction rules Subject to additional fiduciary duties under ERISA 	<ul style="list-style-type: none"> Subject to prohibited transaction rules
	<ul style="list-style-type: none"> Not subject to additional fiduciary duties under ERISA

Employee Plans	IRAs
<ul style="list-style-type: none"> Subject to prohibited transaction rules Subject to additional fiduciary duties under ERISA 	<ul style="list-style-type: none"> Subject to prohibited transaction rules
	<ul style="list-style-type: none"> If using the BIC Exemption, fiduciaries will have contractual fiduciary duties similar to ERISA

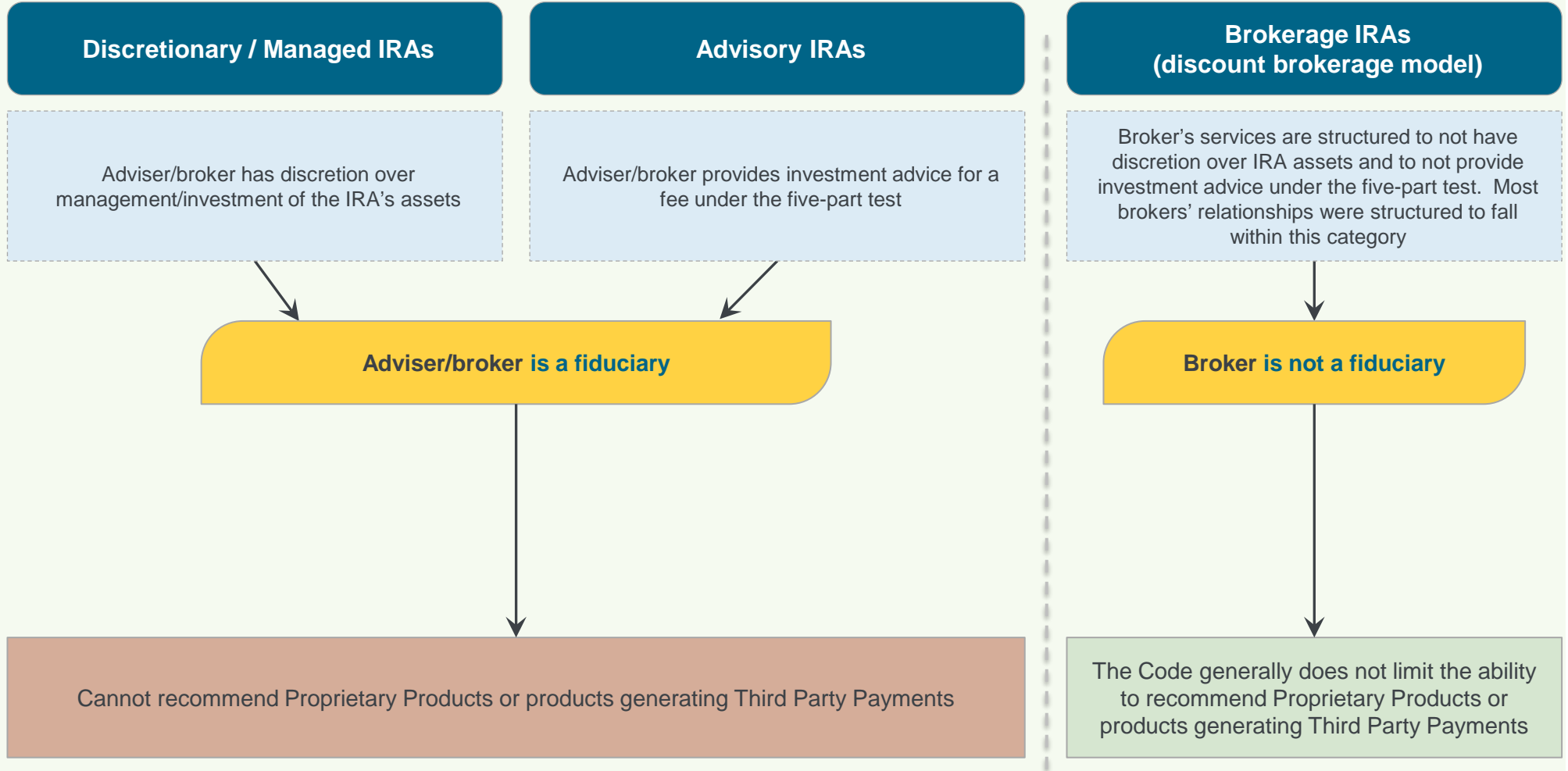
By including more communications as advice, a greater number of brokers will be considered fiduciaries to their IRA clients unless the services and communications with these IRAs are curtailed

For Fiduciary Advisers opting to operate under the BIC Exemption, there will be new requirements with respect to IRA clients

Practical Impacts

BROKER DEALERS OFFERING IRA PLATFORMS—UNDER THE PRIOR RULE

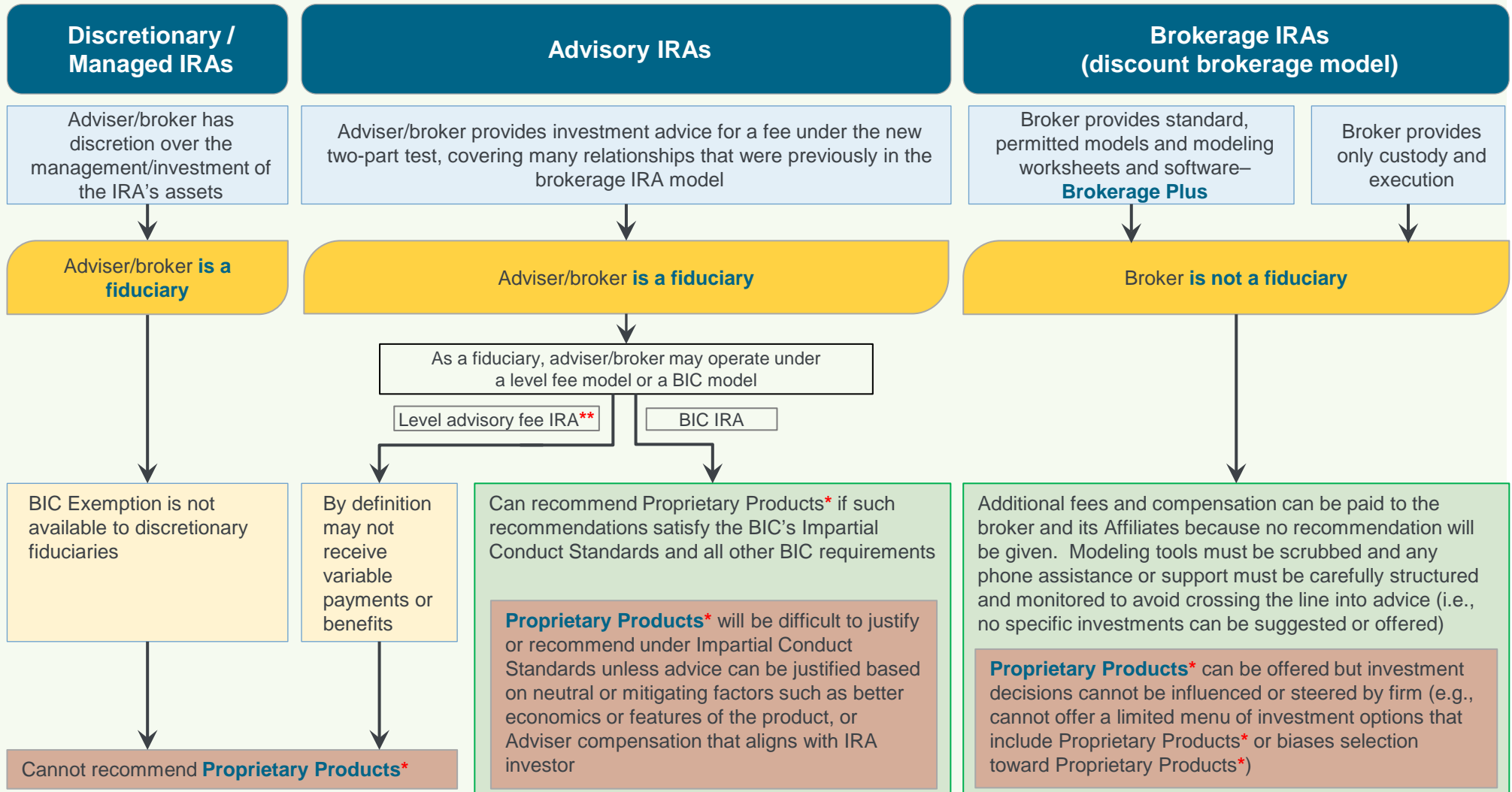
- Under the prior rule, there were three main types of IRA products for purposes of the Code's prohibited transaction rules



Practical Impacts

BROKER DEALERS OFFERING IRA PLATFORMS—UNDER THE FINAL RULE

- Under the final rule, all brokers will have to carefully navigate their fiduciary status and its implications



- Many custodial Financial Institutions offer **manager select programs** where the broker assists the customer in designing an allocation for the customer's IRA and non-IRA accounts and then allows the customer to select third-party managers from a list
- These manager select programs will present **new challenges** under the final rule since
 - anything other than very standard allocation modeling will constitute advice and
 - providing a limited list of third-party managers for an IRA customer to choose from will likely be a recommendation
- **Considerations** for Financial Institutions wishing to continue their manager select programs include
 - These programs can possibly fit into a non-advisory offering, e.g., where only standard allocation modeling is offered (education, not advice) and a broad list of third-party managers is presented
 - These programs can operate as a level advisory fee arrangement or fee-leveling arrangement ([slide 31](#) – [slide 34](#)) if the Financial Institution's retained fee, including revenue sharing from third parties, will not vary based on the customer's allocation, or
 - These programs appear to fit into the general BIC Exemption, although this may hinge on the DOL confirming that the general BIC Exemption covers fees for services as well as compensation for purchase and sale transactions

- The custodial Financial Institution may charge the customer a single wrap fee that covers all services and all trading costs, with the custodial Financial Institution compensating the third-party managers at an agreed rate and the third-party managers sending all account trades back through the custodial Financial Institution for execution and settlement into the customer's account, at no additional cost to the customer
- In many cases the custodial Financial Institution designs this wrap fee service as an advisory service, but in some cases it is designed so that the third-party managers are advisors, but the custodial Financial Institution is only assisting with allocation design and not advising on investments

Practical Impacts

STRUCTURED PRODUCTS—SNAPSHOT

Issue

- The final rule does not offer exemptive relief for the sale to a Plan by a Fiduciary Adviser of **structured notes** issued by the Fiduciary Adviser or its Affiliates
- Brokers who recommend CDs on behalf of issuers will face new challenges because they will likely be Fiduciary Advisers when recommending these products to IRAs, and the following could be prohibited transactions
 - The broker receives a distribution fee on the purchase
 - The structured product is issued or underwritten by an Affiliate of the broker who receives an economic benefit from the structured product proceeds
 - The broker or its Affiliates perform hedging and receive hedging profits

Impact

- Structured products issuers will need to review distribution channels flowing through affiliated and non-affiliated custodial brokers, with the universe of communications to Retirement Investors split into two categories
- **Non-fiduciary communications.** Communications to sophisticated counterparties (e.g., large plans and IRAs custodied at third-party brokers) or general communications in which no recommendation is provided by either the issuer or the third-party broker
 - **Fiduciary investment advice.**
 - Solicited sales by a broker to a custodied IRA, involving structured products issued whether by an Affiliate or a third party, generally must meet the BIC Exemption
 - Certain structured products may be able to use the Principal Transactions Exemption, but the exemption does not cover most structured notes
 - If no exemption is available, then affiliated brokers cannot sell the issuer's structured products, and unaffiliated brokers cannot receive any variable commissions or payments for selling the products

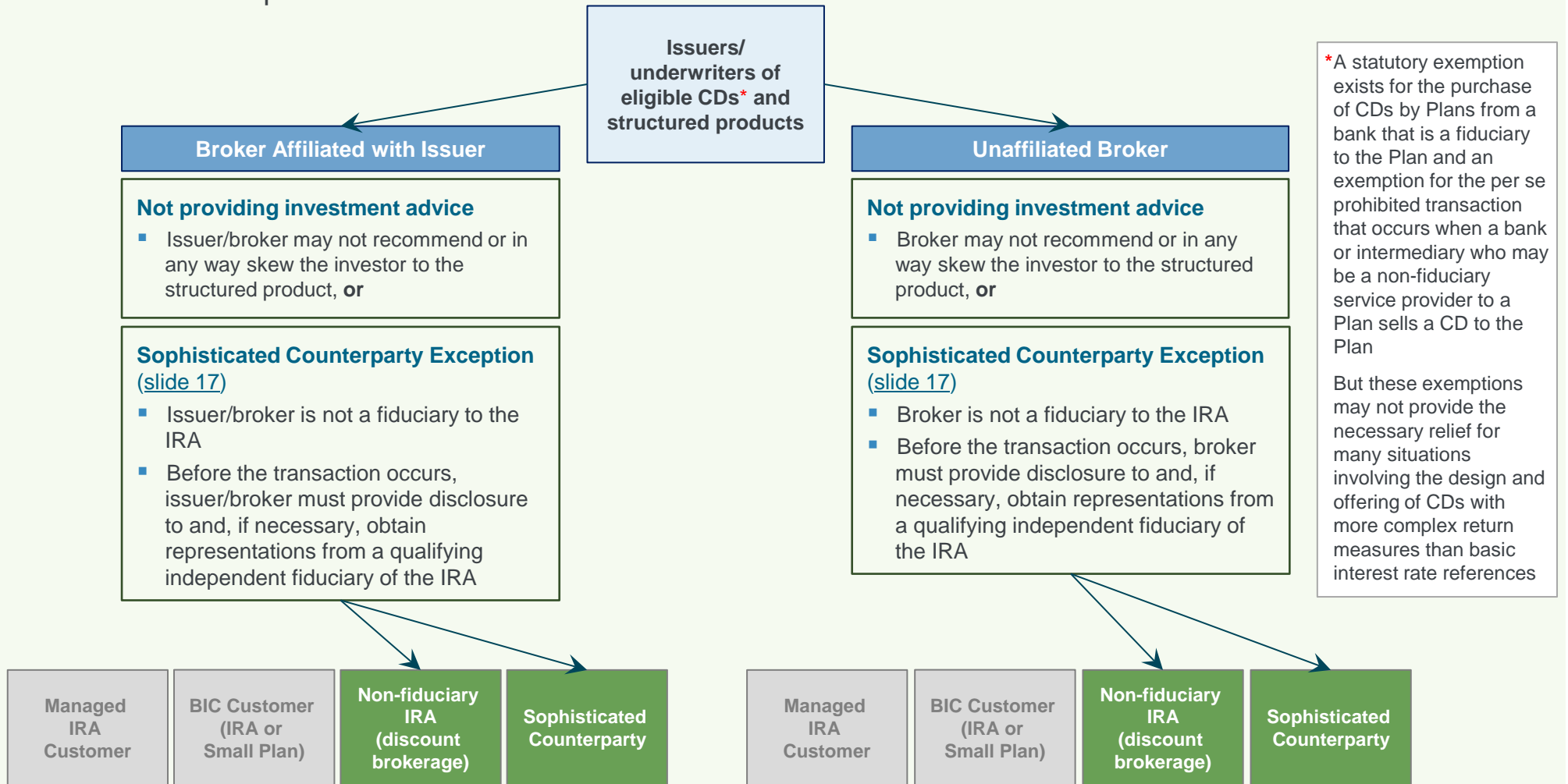
Considerations

- If relying on the sophisticated counterparty carve-out, the issuer must obtain representations from the investor's independent fiduciary and provide special disclosures. It is unclear whether deemed representations and disclosures in the prospectus would suffice or separate documentation is needed
- For sales of structured products issued by an Affiliate of the selling broker to advisory IRAs, selling Proprietary Products poses additional risks and challenges that should be considered with respect to meeting the Impartial Conduct Standards
- The BIC Exemption is difficult to satisfy (and will be subject to additional scrutiny) for any complex products, so brokers may be averse to the risks posed even where the products are issued by a third party
- As discussed on [slide 58](#), the Principal Transactions Exemption may be available for CDs, but requires the Impartial Conduct Standards
- Where the distributing broker or its Affiliates will perform hedging on structured products, consider how the Fiduciary Adviser would make the required disclosures on fees and compensation relating to the product

Practical Impacts

STRUCTURED PRODUCTS—IMPACT ON DISTRIBUTION CHANNELS

- Distributions of certain CDs and structured products to non-fiduciary IRAs and sophisticated counterparties continue to be permissible



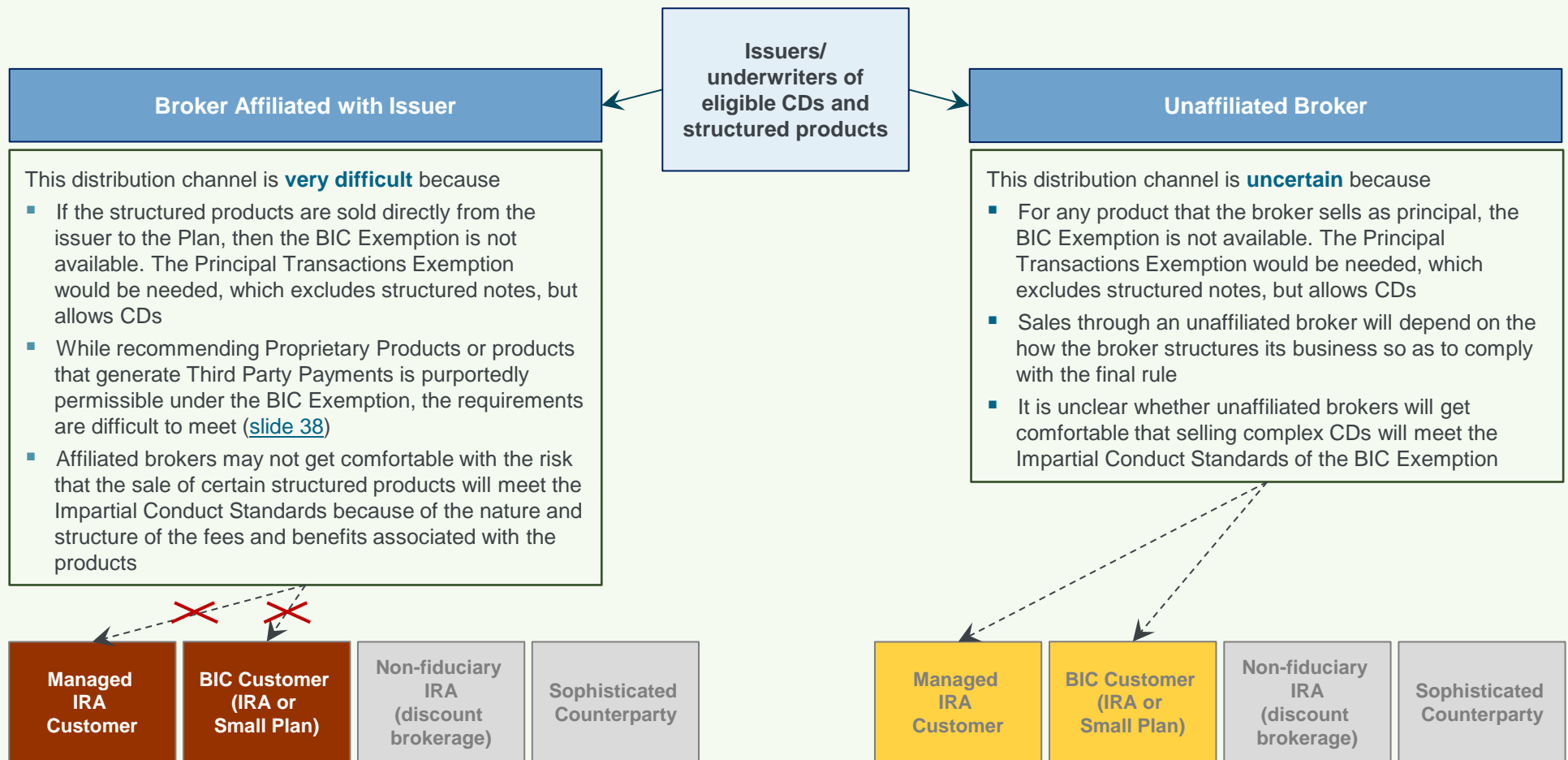
*A statutory exemption exists for the purchase of CDs by Plans from a bank that is a fiduciary to the Plan and an exemption for the per se prohibited transaction that occurs when a bank or intermediary who may be a non-fiduciary service provider to a Plan sells a CD to the Plan

But these exemptions may not provide the necessary relief for many situations involving the design and offering of CDs with more complex return measures than basic interest rate references

Practical Impacts

STRUCTURED PRODUCTS—IMPACT ON DISTRIBUTION CHANNELS (cont.)

- Distributions of structured products to Plans for which the issuer or distributor acts as a Fiduciary Adviser requires reliance on the BIC Exemption or the Principal Transactions Exemption, but the ability to satisfy the Impartial Conduct Standards will be uncertain or difficult



- Sales of **structured notes** to an IRA do not fit neatly into any exemptions under the final rule
 - Sales of a parent-issued note or a third party-issued note by a Fiduciary Adviser to an IRA custodied at an affiliated broker would likely involve **the broker selling as principal**
 - Principal transactions in structured notes are effectively excluded from the relief under both the BIC Exemption and the Principal Transactions Exemption because
 - the BIC Exemption does not cover principal transactions
 - under the Principal Transactions Exemption debt securities (other than those issued or backed by the government) are covered only if they are registered and
 - even if the structured notes were registered, the Principal Transactions Exemption does not cover debt securities when the Adviser's Financial Institution or its Affiliate is the issuer or an underwriter of the debt securities
 - Query whether it would be possible to arrange for brokers distributing notes—particularly notes issues by a third party—to act in an agency or riskless principal capacity rather than a straight principal capacity
- Sales of **CDs** to an IRA fare better
 - There is an existing statutory exemption for the sale of CDs in non-advisory settings
 - Note, it is unclear whether CDs bearing a return on rates other than fixed or floating interest rates, especially rates based on more complex indices or baskets, are intended to be covered under CD exemption
 - The Principal Transactions Exemption includes CDs as permissible products
 - Under the Principal Transactions Exemptions, CDs are debt like securities, rather than debt securities, and thus can be sold if the Adviser's Financial Institution or its Affiliate is the issuer or an underwriter of the securities
- The Principal Transactions Exemption should be available for any buy-backs from a Plan

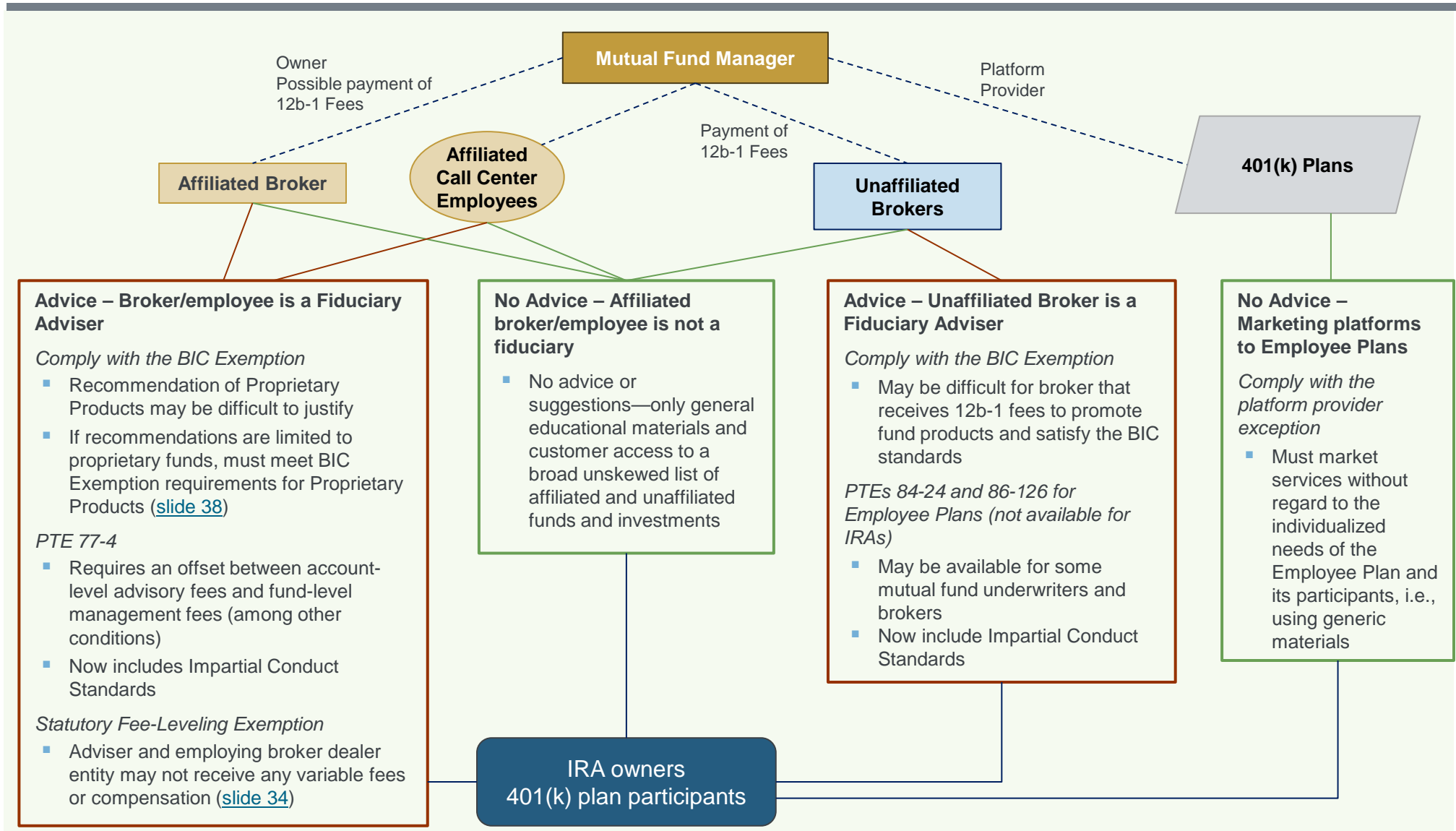
Practical Impacts

MUTUAL FUNDS—SNAPSHOT

Issue	Considerations
<p>Mutual fund sponsors (funds) will face new challenges distributing their products to Retirement Investors and Plans, both through their affiliated sales and brokerage divisions and through third-party distribution arrangements, since</p> <ul style="list-style-type: none"> these parties cannot recommend the fund's products to Retirement Investors without triggering fiduciary status payment of 12b-1 fees and similar fees will result in a prohibited transaction if the broker is a Fiduciary Adviser marketing to Employee Plans as a platform provider could trigger fiduciary status unless the platform provider requirements are met 	<ul style="list-style-type: none"> Funds relying on the investment education model for direct sales will need to determine what services may be offered without triggering fiduciary status <ul style="list-style-type: none"> Fund brokers and employees affiliated with the fund will have to exercise extreme caution when fielding calls from Retirement Investors interested in the fund's offerings, as any communications, even if initiated by the client, that suggest one fund product over another, could trigger fiduciary status Funds that rely on the BIC Exemption for direct sales must consider how the role of their affiliated broker dealers and customer-facing employees will change, and how the fund will justify sales of Proprietary Products Funds may explore using the statutory fee-leveling exemption (slide 34) <ul style="list-style-type: none"> This would require eliminating, offsetting or redirecting any 12b-1 fees or other similar fees away from the Adviser and the broker dealer employing the Adviser, and would pose some additional risks and complications in practice Some funds may create new no-fee share classes for IRAs (e.g., a share class that does not pay 12b-1 fees or other distribution fees), but the advantage of doing so is not yet clear <ul style="list-style-type: none"> This may be attractive to a fund if the benefit of paying fees to its distributors has been reduced by the final rule and the BIC Exemption (i.e., paying fees is not helpful if brokers cannot recommend the fund's products and accept the distribution fees while complying the Impartial Conduct Standards) Brokerage firms may push funds to create no-fee IRA share classes so that they can recommend the funds to IRA clients based on select criteria (performance, fees, style) or based on the IRA's objectives, without the threat of being accused of not being impartial Special share classes for IRAs could create other business issues (e.g., it arguably provides preferential treatment to IRAs and reduces broker incentives to sell shares)
Impact	
<p>Funds will need to determine</p> <ul style="list-style-type: none"> How to market and promote their products to Retirement Investors, through their direct sales, affiliated broker distribution channels, and unaffiliated broker channels, since it will be more difficult to incentivize brokers to sell fund products under the BIC Exemption Consider the implications of the final rule on their marketing efforts to 401(k) plans and similar Employee Plans 	

Practical Impacts

MUTUAL FUNDS—IMPACT ON DISTRIBUTION CHANNELS



Practical Impacts

PRIVATE INVESTMENT FUND SPONSORS—SNAPSHOT

Issue

The final rule will limit the ability of hedge funds, venture capital funds and other private funds to market and sell interests to Retirement Investors, since the definition of investment advice is broad enough to cover many marketing activities for fund offerings

Impact

Private fund sponsors will need to review their marketing activities so that marketing to Plans is limited to either

- Marketing to independent fiduciaries of large Employee Plans meeting the sophisticated counterparty carve-out, or
- General marketing that is not specifically directed at Retirement Investors

Others in the distribution chain such as financial advisers, banks, brokers, and placement agents who connect Retirement Investors with private funds could be deemed to be rendering fiduciary advice and would need to comply with an exemption, such as the BIC Exemption, in order to receive commissions or trailing fees for the placement

Considerations

- The preamble of the rule makes clear that a recommendation by a Fiduciary Adviser to **hire me** is not in itself fiduciary investment advice; however, when the solicitation is coupled with a recommendation to invest in a particular fund, that recommendation will be treated as fiduciary advice
- The final rule does not clarify the line between investment advice and general marketing of the sponsor, so any communications directed at Retirement Investors and Plans, including sales pitches, could pose risks
- Others in the distribution chain may concede fiduciary status and elect to comply with the BIC Exemption requirements
 - Selling private fund interests under the BIC Exemption may prove difficult, as the preamble notes that while the final exemption does not formally preclude recommendations to invest in illiquid, complex products, like private funds, such recommendations will be subject to additional scrutiny
- Financial Institutions that pool individuals to invest in larger private funds through private label conduit funds may face particular issues
 - The Financial Institution's activities in soliciting Retirement Investors would likely be deemed fiduciary investment advice unless the Financial Institution could show that it did not specifically direct its solicitations to specific investors (i.e., that its solicitations were generally made to all brokerage accounts as a general marketing effort), which may be difficult
- Private fund sponsors may also use the sophisticated counterparty carve-out
 - This would allow marketing to mid- to large-sized pension plans represented by independent fiduciaries, meeting the carve-out's requirements
 - Funds relying on this carve-out would need to ensure all the required representations are obtained and disclosure is provided ([slide 17](#))

Practical Impacts

PRIVATE INVESTMENT FUND SPONSORS (cont.)

- Where the requirements of the sophisticated counterparty carve-out are not met, funds will need to determine whether communications might be deemed fiduciary investment advice

Likely not fiduciary activity	May be fiduciary activity	Likely fiduciary activity
<p>Responding to unsolicited requests for fund offering materials from Retirement Investors</p> <p>Providing offering materials to pass along to individual clients at a third party's discretion—but the third party would be engaged in fiduciary activity, which would pose the same issues for the third party</p>	<p>Group sales pitches or presentations that are open to invited retail investors</p> <p>Cold calling high-net-worth individuals with offering materials</p>	<p>Marketing new funds to Retirement Investors who have participated in related funds</p> <p>One-on-one sales pitch meetings in which fund representatives or distributors discuss the benefits of a particular fund investment with Retirement Investors</p>

- The line between fiduciary and non-fiduciary communications raises several questions
 - Are solicitations to high-net-worth individuals fiduciary advice if the adviser does not know or have reason to believe that the assets the individual is considering investing are retirement assets? If so, how does a fund or financial adviser focus its recommendations to apply only to non-retirement assets?
 - In the context of pitching an investment fund to potential investors, is the fiduciary analysis impacted by whether the fund is a plan asset fund or qualifies for an exemption (e.g., satisfies the 25% test or is a venture capital operating company)?
 - It seems it should not matter because the question is whether there is a recommendation to invest in the specific fund not whether the activities of the fund itself are fiduciary activities
 - Is it possible to provide information to potential investors about a fund without providing fiduciary advice if the presentation is not tailored to the particular audience and the Retirement Investors are not singled out for the solicitation?

- Funds that intend to market their products under the **sophisticated counterparty carve-out** should consider the following
 - The independent fiduciary representing the Plan
 - must meet the definition of sophisticated counterparty and
 - would be subject to ERISA fiduciary rules, which may limit its ability to receive sales incentives
 - The final rule is not clear on whether the carve-out would allow a fund to market to an IRA owner who meets the definition of sophisticated counterparty (e.g., an IRA owner who has \$50 million or more of its own assets under management)
 - If an IRA owner independently meets the requirements for having sufficient financial expertise under the sophisticated counterparty carve-out, funds should be able to market to them, but the preamble of the final rule creates uncertainty on this point
- Funds will want to update their subscription agreement and offering document forms to include all of the disclosures and representations required for this carve-out under the final rule
 - The test is different from that under the existing Qualified Professional Asset Manager (QPAM) exemption, so additional provisions will be required
- Funds may also want to ensure that the sophisticated counterparty is a party to the applicable subscription agreement

Practical Impacts

DEFINED BENEFIT PLANS—SNAPSHOT

Issue

The final rule will have less of an impact on large defined benefit plans (**DB plans**) and the financial services firms that work with those plans, but these plans and their fiduciaries and advisers should be aware that

- The expanded definition of recommendation may impact **marketing efforts** to DB plans
- The amendments to the existing prohibited transaction rules may impose **added conditions** on exemptions previously relied on by DB plans and their advisers, including in some cases, the Impartial Conduct Standards

Impact

DB plans, their fiduciaries, registered investment advisers and financial firms marketing to these plans will need to identify whether any of their communications could be deemed recommendations and whether the sophisticated counterparty carve-out will apply

Considerations

- When a pension plan committee makes specific investment decisions on its own (e.g., authorizes a hedge fund or private equity fund commitment), the committee will want to be clear as to whether it is relying on the fund or its placement agent for advice and, if so, will want to document this and ensure that there are no prohibited conflicts
- When a registered investment adviser pitches to provide asset management services for a pension plan, it will want to be sure to consider the “hire me” exception, under which touting management services is not advice but touting a fund or other separate investment vehicle might be
- When a registered investment adviser transacts on behalf of a client pension plan, it will want to be mindful that
 - under the sophisticated counterparty carve-out, any information provided by counterparties that are broker dealer banks or insurance companies will likely not be regarded as advice, and the adviser will bear responsibility for analyzing and approving investments for the plan
 - commencing April 10, 2017, some of the PTEs will now have revised scopes and added conditions, most notably the Impartial Conduct Standards, which might arguably require closer scrubbing of proposed transactions, and documentation of any potentially influencing factors that the manager may be called on to explain later

Practical Impacts

ANNUITY PRODUCTS—SNAPSHOT

Issue

Under **the prior rule** the sale of fixed and variable (i.e., indexed) annuities could be effected without creating an advisory fiduciary relationship, and, in any case, broad relief was provided under PTE 84-24 for any related transactions and fees

Under **the final rule**

- virtually all annuity sales will likely involve fiduciary advice and
- the DOL has narrowed the scope of PTE 84-24 and added significant conditions

Impact

As shown in the following slides

- Indexed annuities may only be sold to IRAs in accordance with the BIC Exemption if the selling party is providing advice in connection with the sale, as is likely to be the case
- Fixed annuities may be sold to IRAs and Employee Plans under PTE 84-24, which has been amended to add the Impartial Conduct Standards, and specified product and fee disclosures

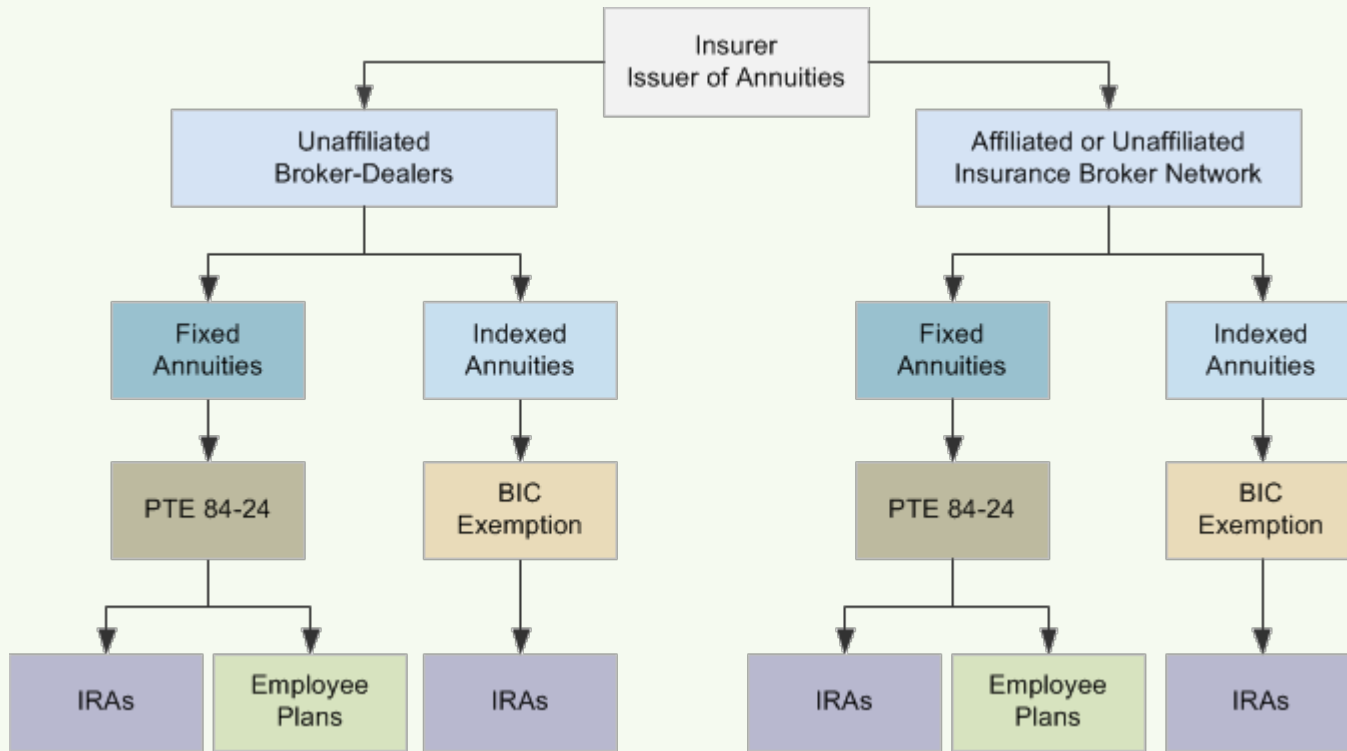
Considerations

- It remains to be seen how many of the larger brokerage firms will elect to operate under the BIC Exemption and whether those that do will continue to try to design programs for selling annuity products to Plans under fee structures that may test the Impartial Conduct Standards
- If some brokerage firms elect not to sell annuity products to Plans, it remains to be seen if they would be willing to refer Plan customers to insurance brokers who may find it easier to sell annuity products to a Plan under a paradigm where the customer is aware that the only products they offer are insurance products
- Issuers may develop products with features and benefits that are competitive enough with other investments, and sales commissions that are reasonable enough in comparison to other investments, that they create a win-win for the insurer, the distributor and the investor that stands up well under the BIC Exemption
- Specifically, for sales to IRAs of indexed annuities and other annuities categorized as securities
 - The conflict of interest prohibited transaction relating to the advice provided in connection with the sale is exempt under the BIC Exemption if the selling party complies with the BIC Exemption's requirements
 - If the annuity is being issued by an affiliate of the selling party, the Proprietary Products requirements of the BIC Exemption must be met ([slide 38](#))
 - The per se prohibited transaction of selling an investment to a Plan to which the selling party is a service provider is exempt under the limited principal transaction provisions of the BIC Exemption ([slide 39](#))

Practical Impacts

ANNUITY PRODUCTS (cont.)

- The right and left side of the graphic below are identical because whether annuity products are distributed through broker dealers unaffiliated with the issuing insurer or through an affiliated or unaffiliated insurance broker network, the same restrictions and exemptions apply
- Where the products are distributed through an insurance broker network that only sells insurance products or insurance wrappers and a limited range of other special investments, it may be easier for these insurance brokers to satisfy the impartiality requirements of PTE 84-24 and BIC Exemption if full disclosure of these limited offerings is made and the broker's impartiality is not burdened by the existence of a wide range of products and fees it could offer and receive



PTE 84-24

- **PTE 84-24** is available
 - where the selling party is not otherwise acting under the BIC Exemption for an Employee Plan or IRA and
 - the selling party is seeking to sell a fixed annuity to an Employee Plan or an IRA
- Sellers relying on PTE 84-24, as amended, must meet the conditions and documentation requirements

Where a selling party is already relying on the BIC Exemption for advising and investing the assets of a Plan customer, its sale of a fixed or indexed annuity to the customer will likely be covered by, and must comply with, the BIC Exemption

For the sale to a Plan of indexed annuities or other annuities categorized as securities, the selling party must comply with the BIC Exemption, even if the selling party had not previously complied with the BIC Exemption with respect to the Plan customer

Conditions

- Neither the issuing insurance company nor the selling party may be a trustee (other than a passive trustee), administrator, discretionary manager or sponsoring employer of the purchasing Plan
- The selling party must act in the **Best Interest** of the purchasing Plan
- The selling party must disclose any Material Conflict of Interest
- Statements by the selling party may not be materially misleading
- The combined total distribution fees must not exceed reasonable compensation ([slide 26](#))
- The terms must be at least as favorable as available in a similar arms-length sale and product offered by other parties

Documentation requirements

- Written disclosures to the independent fiduciary of the Plan before the sale
 - disclosure of any limitation on the products offered by the selling party (i.e., only a certain range of products or only products of certain insurers)
 - disclosure of the selling party's commission expressed as a dollar figure, if feasible, or, if not, as a percentage of gross annual premiums, asset accumulation or contract value, for all relevant years, and disclosure of any fees paid to any other intermediaries by the selling party or the insurer
 - disclosure of all charges, fees, discounts, penalties or adjustments applicable under the annuity
 - a written acknowledgment of the purchasing Plan, before the purchase date, of receipt of all the above items
 - the above disclosures do not need to be provided for a second annuity purchase or increase in the original annuity if executed within one year of the of the prior disclosures (unless the information has changed)
- The selling party may receive only stated and disclosed commissions and not any other revenue sharing, administrative fees or marketing payments

- DOL officials have informally indicated that the DOL will likely issue **subregulatory guidance** on the final rule in Q&A form
- The DOL did not include **appraisals, valuations** or **fairness opinions** in the definition of fiduciary activity under the final rule, stating that it would address these issues in a separate rulemaking project
 - The 2010 proposal and the 2015 Proposed Rule would have included appraisal activities in connection with a transaction as fiduciary advice, raising concerns for private funds in connection with the valuation activities by fund managers, prime brokers and other service providers
 - For now, until the new targeted regulations are released, appraisals and valuations should not raise fiduciary concerns under the final rule
- The **SEC** has **discretionary authority** under the Dodd-Frank Act to establish a **uniform federal fiduciary standard** for brokers and investment advisers, but has yet to move forward on the rulemaking
 - SEC Chair White has informally indicated that she supports a uniform fiduciary standard, but there is no guarantee that the SEC will propose its own fiduciary rule, and it is unlikely to do so any time prior to the second half of 2017
- Some members of **Congress** have expressed disagreement with the final rule, and several bills have been introduced to amend or overturn the final rule, but President Obama has vowed to veto any attempt to **derail the final rule**
 - One of the DOL's purported goals in getting the final rule out and setting an effective date of April 10, 2017 was to force the final rule and compliance preparation along to a point where a new Congress and White House would shrink from overturning the final rule
 - On June 1, 2016, Financial services industry groups also filed a lawsuit to challenge the validity of the final rule

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Appendix A

CERTAIN DEFINED TERMS

Appendix
A

Appendix
B

INVESTORS

- **IRA.** Any account or annuity described in Section 4975(e)(1)(B) through (F) of the Code, including for example, individual retirement accounts, Roth IRAs and health savings accounts, but not including Employee Plans
- **Employee Plan.** Any employee benefit plan described in section 3(3) of ERISA that is subject to Title I of ERISA, including for example, private sector employer-sponsored pension plans and 401(k) plans
- **Plan.** An Employee Plan or an IRA
- **Retirement Investor.**
 - Any
 - participant or beneficiary of an Employee Plan, with authority to direct the investment of assets in his or her Employee Plan account or to take a distribution,
 - beneficial owner of an IRA acting on behalf of the IRA, or
 - Retail Fiduciary with respect to an Employee Plan
- **Retail Fiduciary.** A fiduciary of a Plan **other than** any of the following
 - a bank or similar institution,
 - an insurance carrier qualified under the laws of more than one state to perform the services of managing, acquiring or disposing of assets of a Plan,
 - a registered investment adviser,
 - a registered broker dealer, or
 - any other fiduciary that holds or has under management or control, total assets of at least \$50 million

ADVISERS

- **Fiduciary Adviser.** Any person or entity who under the final rule is deemed to render investment advice for a fee for purposes of ERISA or the Code
- **Adviser.** An individual who
 - is a fiduciary of a Plan solely by reason of the provision of investment advice with respect to the assets of the Plan involved in the recommended transaction;
 - is an employee, independent contractor, agent or registered representative of a Financial Institution; and
 - satisfies the federal and state regulatory and licensing requirements of insurance, banking and securities laws with respect to the covered transaction, as applicable
- **Financial Institution.** An entity that employs or otherwise retains an Adviser and that is
 - a registered investment adviser,
 - a bank or similar financial institution,
 - an insurance company qualified to do business under the laws of a state meeting certain requirements,
 - a registered broker or dealer, or
 - an entity that is deemed a Financial Institution for purposes of the BIC Exemption pursuant to an individual exemption granted by the DOL after the date of the final rule
- **Affiliate** of an Adviser or Financial Institution is any
 - person directly or indirectly through one or more intermediaries, controlling, controlled by or under common control with the Adviser or Financial Institution,
 - officer, director, partner, employee or relative of the Adviser or Financial Institution or
 - corporation or partnership of which the Adviser or Financial Institution is an officer, director or partner
- **Related Entity.** Any entity other than an Affiliate in which the Adviser or Financial Institution has an interest which may affect the exercise of its best judgment as a fiduciary

OVERVIEW OF FIDUCIARY DUTIES AND PROHIBITED TRANSACTION RULES

Affirmative Fiduciary Duties for Employee Plans (Section 404 of ERISA)

- Acting solely in the interest of Employee Plan participants and beneficiaries, with the exclusive purpose of providing benefits to them (duty of loyalty)
- Carrying out duties with the care and skill of a prudent expert (or hiring an expert if necessary)
- Diversifying Employee Plan investments (unless clearly prudent not to do so)
- Following Employee Plan documents (unless inconsistent with ERISA)

Per Se Prohibited Transactions for Employee Plans (Section 406(a) of ERISA)

- 406(a)(1)(A) Selling, exchanging or leasing of any property between the Employee Plan and a party in interest
- 406(a)(1)(B) Lending or money or other extension of credit between the Employee Plan and a party in interest
- 406(a)(1)(C) Furnishing goods, services or facilities between the Employee Plan and a party in interest
- 406(a)(1)(D) Transfer to, or use by or for the benefit of, a party in interest, of any Employee Plan asset

Conflict of Interest Prohibited Transactions for Employee Plan (Section 406(b) of ERISA)

- 406(b)(1) Dealing with Employee Plan assets for the fiduciary's own interest or for his account
- 406(b)(2) Acting in any transaction involving the Employee Plan on behalf of a party whose interests are adverse to the interests of the Employee Plan or its participants or beneficiaries
- 406(b)(3) Receiving any consideration for the fiduciary's own personal account from any party dealing with the Employee Plan in connection with a transaction involving Employee Plan assets

Prohibited Transactions for both Employee Plans and IRAs (Section 4975 of the Code)

- Selling, exchanging or leasing of any property between the Plan and a disqualified person
- Lending money or other extension of credit between the Plan and a disqualified person
- Furnishing goods, services or facilities between the Plan and a disqualified person
- Transferring to, or use by or for the benefit of, a disqualified person, of any Plan assets
- Act by a disqualified person who is a fiduciary whereby he deals with the income or assets of the Plan for his own interest or for his own account
- Receiving any consideration for his own personal account by a disqualified person who is a fiduciary from any party dealing with the Plan in connection with a transaction involving the income or assets of the Plan