Will ERISA's Fiduciary Exemption "Rollover" to the New Administration?

DOL Issues Year-End Package Relating to "Investment Advice."

Authored by
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Overview

The U.S. Department of Labor (the "DOL") on December 15, 2020 issued a release (the "Release") finalizing Prohibited Transaction Class Exemption ("PTCE") 2020-2 (the "Final Exemption") for retirement accounts ("Plans") that are subject to the Employee Retirement Income Security Act of 1974 ("ERISA") or Section 4975 of the Internal Revenue Code of 1986 (the "Code"). The Final Exemption provides relief from ERISA's and the Code's prohibited transaction rules for individuals and institutions that wish to assert they are, or otherwise are at risk of being, fiduciaries by virtue of providing "investment advice" as defined under ERISA or Section 4975 of the Code ("Investment Advice") to Plans and that also intend to offer them financial products and services. The Release is also important because it sets forth in the preamble to the Final Exemption (the "Final Preamble") the DOL's most recent published views regarding significant aspects of what makes one an Investment Advice fiduciary. We previously noted the issuance of the Release in a prior NewsFlash, and our OnPoint on the proposed version of PTCE 2020-2 (the "Proposed Exemption") can be found here.

Introduction

In General

The 1975 regulation regarding the definition of Investment Advice (the "1975 Rule"), which had stood for approximately 40 years, had been substantially amended in 2016. The 1975 Rule set forth a five-part test (the "Five-Part Test") under which one may be considered to be providing Investment Advice and therefore be a Plan fiduciary.

The path to finalization of the 2016 amendment of the 1975 Rule (the "2016 Rule") was extremely circuitous, and the 2016 Rule was ultimately vacated in 2018 by the U.S. Court of Appeals for the Fifth Circuit.[1] In connection with the release of the Proposed Exemption, the DOL expressly reinstated the 1975 Rule, and also reinstated Interpretative Bulletin ("IB") 96-1, which relates to what is considered investment education (as opposed to Investment Advice) and

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[1] *Chamber of Commerce v. US Dep't of Labor*, 885 F.3d 360 (5th Cir. 2018).

which had been superseded when the 2016 Rule was finalized[2]. The DOL also continued in effect certain transition relief (discussed below) that had been contained in Field Assistance Bulletin ("FAB") 2018-02.[3] In FAB 2018-02, the DOL generally stated it would not pursue prohibited transactions claims against Investment Advice fiduciaries who work to comply with the "impartial conduct standards" that had been set forth in the now-vacated exemptive relief issued in connection with the 2016 Rule.

The Release is the latest chapter in the saga of the amended fiduciary rule, although, especially in light of the upcoming change from a Republican administration to a Democratic one, likely not the last. The Release does not establish a new fiduciary rule. Rather, it is essentially a package that (along with the release relating to the Proposed Exemption) includes (i) a reinstatement of the 1975 Rule, (ii) additional color from the DOL on a variety of elements of the 1975 Rule and (iii) a new exemption that can be used by financial institutions to the extent they affirmatively wish to be, or otherwise conclude that they are or may be, regarded as Investment Advice fiduciaries. The Final Exemption may be relevant in many circumstances, including where an institution and/or its personnel seek to rollover assets from employer-sponsored Plans to individual retirement accounts ("IRAs").

There are at least three broad areas of interest surrounding the Release:

- **The Conditions of the Final Exemption.** The Final Exemption is substantially similar to the Proposed Exemption with some exceptions, including changes regarding the required compliance report and regarding who may provide the necessary certification. The DOL also clarifies that, while the consequence of showing deficiencies in the compliance report could result in the possibility of a prohibited transaction, there is now a new limited self-correction provision.

- **DOL's Interpretation of Five-Part Test, Including as to Rollover Solicitations.** The preamble to the Proposed Exemption (the "Proposed Preamble") contained some arguably unexpected color on the DOL's thinking about key elements of the Five-Part Test, particularly as regarding the solicitation of rollovers. The Release generally stands by that additional color, and believes it has given "a clear roadmap for determining when they are and are not [investment advice] fiduciaries." There may, however, be some additional flexibility indicated by the Release, and the Final Preamble expressly notes that "parties can make clear in

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[2] IB 96-1 sets out the DOL's view of what constitutes investment education as opposed to Investment Advice. IB 96-1 was substantially modified under the 2016 Rule, and the Release proposes officially to reinstate it as it was. The fact that IB 96-1 permits models to include a given individual's entire financial picture (i.e., not just assets in a Plan) has been helpful not only for individual Plan participants, but also for Financial Institutions, in developing materials that allow Plan participants and fiduciaries to choose among a suite of possible investment options and other products and services.

IB 96-1 provides guidance on Plan related information that informs "a participant or beneficiary about the benefits of plan participation, the benefits of increasing plan contributions, the impact of preretirement withdrawals on retirement income, the terms of the plan, or the operation of the plan" and "investment alternatives under the plan (e.g., descriptions of investment objectives and philosophies, risk and return characteristics, historical return information, or related prospectuses." IB 96-1 characterizes as investment education, among other things, the use of certain asset allocation models and the use of certain "questionnaires, worksheets, software, and similar materials which provide a participant or beneficiary the means to estimate future retirement income needs and assess the impact of different asset allocations on retirement income."

[3] The Proposed Exemption also had the effect of reinstating several important prohibited transaction class exemptions in the form that they were in immediately prior to their 2016 Rule form. These include widely used exemptions such as PTCE 75-1, PTCE 77-4, PTCE 84-24 and PTCE 86-128, as well as PTCE 80-83 and PTCE 83-1.

their communications that they do not intend to enter into an ongoing relationship to provide investment advice" if they act "in conformity with that communication" and that "parties who do not wish to enter into an ongoing relationship can make that fact consistently clear in their communications and act accordingly."

- **Change in Administration.** The Final Exemption is the product of the outgoing Trump Administration, but it is scheduled to become effective on February 16, 2021, which is after the upcoming inauguration of President-elect Biden. President-elect Biden has already indicated that, like at least the last two incoming presidents before him, he will have his administration freeze those regulations that have been finalized but that are not yet effective on the inauguration date.[4] In addition, the Release provides that FAB 2018-02 will no longer be available beginning December 20, 2021. It is uncertain whether the new administration will proceed with the Final Exemption as is, delay its effectiveness or withdraw it. Similar uncertainty surrounds FAB 2018-02 and its ultimate fate.

The Release affects many different individuals, entities and groups, including:

Financial Institutions Seeking Rollover Assets. Rollovers from Plans to IRAs (and from IRAs held at one institution and rolled over to another institution) receive significant attention in the Release. The Release may make it more challenging for a number of institutions to take the position that they are not providing Investment Advice in connection with rollover solicitations. If institutions are or become Investment Advice fiduciaries, the Release indicates that they will need an exemption—such as the Final Exemption—from ERISA's (and the Code's) self-dealing prohibited transaction rules, including with respect to the making of the rollover itself.

- **Service Providers to the Non-Institutional Retirement Market.** Banks, broker-dealers, insurance companies, mutual fund complexes,[5] recordkeepers and other intermediaries servicing the retirement marketplace outside of the institutional market may need to consider the implications of the DOL's color on the Five-Part Test and the other aspects of the Release. The ability to make use of the Final Exemption will generally be dependent on the type of products and services offered. Brokerage businesses conducted by an Investment Advice fiduciary may raise issues under ERISA (and the Code) because they potentially involve the receipt of a wide variety of payments that could otherwise implicate the prohibited transaction rules (e.g., commissions in general, 12b-1 fees, sales loads, trailing commissions and revenue-sharing payments). By contrast, these considerations would not generally apply to broker-dealers and banks that do not expect to be Investment Advice fiduciaries (including on any rollover of assets).

- **Those Offering Products Through Intermediaries in the Non-Institutional Retirement Market.** Many investment managers, insurance companies (and some investment banks) that offer their products to Plans through intermediaries may be affected by demands and requests of intermediaries that seek to comply with Final Exemption as they adjust their retirement platforms to conform to the conditions in the Final Exemption.

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[4] See, Memorandum for the Heads of Executive Departments and Agencies issued on January 20, 2017 by Reince Priebus, Assistant to President Trump and Chief of Staff; Memorandum for the Heads of Executive Departments and Agencies issued on January 20, 2009 by Rahm Emanuel, Assistant to President Obama and Chief of Staff; Memorandum for the Heads of Executive Departments and Agencies issued on January 20, 2001 by Andrew H. Card, Jr., Assistant to President George W. Bush and Chief of Staff.

[5] Mutual funds may be implicated, for example, where the sale to the Plan is directly from the mutual fund sponsor and not through an intermediary such as a bank, broker-dealer or recordkeeper.

- **Plan Fiduciaries and Plan Participants.** The manner in which institutions and other providers approach and interact with Plans, sponsors, fiduciaries and participants could be affected in a variety of different contexts, and providers may seek to conform their businesses and approaches to new conditions and requirements.

Regulation Best Interest

The Proposed Exemption came out the day before the June 30, 2020 effective date of Regulation Best Interest ("Reg BI") of the Securities Exchange Act of 1934 (the "Exchange Act"), which was adopted last year by the Securities and Exchange Commission (the "SEC"). Reg BI is generally intended to apply a "best interest" standard of conduct for all broker-dealers making recommendations to retail customers (extending both to retirement accounts and to other accounts), and incorporates some (but intentionally not all) of the features of the now-defunct 2016 Rule.[6]

On December 15, 2020, in connection with the issuance of the Release, Labor Secretary Eugene Scalia and SEC Chair Jay Clayton authored a *Wall Street Journal* op-ed, in which they argue that the Final Exemption "will help ensure American workers and retirees have access to high-quality investment advice at a fair price" and that the "new rule [the 1975 Rule as reinstated] affirms the longstanding definition of fiduciary, while also clarifying it *for the benefit of investors [*emphasis added]."[7] Previously, there had been discussion among the regulators regarding the benefits of harmonizing Reg BI, ERISA and the Code's investment advice fiduciary rules, and other standards of conduct, including Rule 2111 (the "Suitability Rule") of the Financial Industry Regulatory Authority, Inc. ("FINRA").[8]

The possibility of changes to Reg BI or its accompanying guidance may have future impact on how the Final Exemption and the Five-Part Test may be interpreted and implemented. Although Messrs. Scalia and Clayton believe that the Release "complete[s] the task of replacing a flawed, stand-alone rule promulgated by the Obama Labor Department . . . [that] would have made it more difficult both for financial professionals to provide meaningful advice and for investors to find the combination of products and services that worked best for them [i.e., the 2016 Rule],"[9] it is by no means certain that changes to the 1975 Rule and the Final Exemption will not be sought by the incoming Biden Administration.

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[6] We discussed Reg BI in our June 11, 2019 OnPoint, SEC Adopts Enhanced Standard of Conduct for Broker-Dealers and Clarifies Fiduciary Duties of Investment Advisers. See also Grafton, Oringer, Perlow and Sherman, Simply the Best (Interest) - SEC Proposes New Broker-Dealer Standard and Additional Related Guidance, 46 *Tax Management Compensation Planning Journal* (Bloomberg Tax) 127 (Aug. 14, 2018).

[7] Available at: https://www.wsj.com/articles/a-simple-framework-for-financial-advice-11608064648?st=f6jt7saqutrgu3a&reflink=article_email_share.

SEC Chair Jay Clayton issued a contemporaneous notice of support of the Proposed Exemption in his Statement on the Department of Labor's Investment Advice Proposal.

[8] FINRA is the primary self-regulatory organization for broker-dealers who conduct business with public customers.

[9] The op-ed by Messrs. Scalia and Clayton states:

For the first time, our agencies are aligned on a coherent framework centered on ensuring that American workers and retirees receive advice in their best interest. In the interim, certain states, most notably Massachusetts, have proposed and finalized their own standard of conduct rules. The addition of state sponsored consumer protection rules complicates matters both from an analytic and operational basis for many firms. Many find that states' rules may help to create an inconsistent and confusing patchwork of regulations not only as amongst themselves, but also with ERISA or Reg BI.

Outline of the Conditions of the Final Exemption

The Final Exemption that Financial Institutions and Investment Professionals (each as defined below) meet the conditions relating to:

- **Impartial Conduct Standards, which include:**
  - a duty to comply with Section 404(a) of ERISA's prudence standards;
  - a duty not to place the interests of the Financial Institution, Investment Professional, affiliates, related entities or other parties ahead of the interests of the Plan, or to subordinate the interests of the Plan to their own;
  - a duty of "best execution";
  - a requirement that the Plan pay no more than "reasonable compensation";
  - a requirement to acknowledge in writing the Financial Institution's and its Investment Professionals' fiduciary status under ERISA and Section 4975 of the Code, as applicable, when providing Investment Advice to Plan participants and beneficiaries, IRA owners, and Plan and IRA fiduciaries;
- **Disclosure:** which includes a description in writing of the services to be provided and the Financial Institution's and Investment Professionals' material conflicts of interest;
- **Policies and Procedures:** which involve the adoption of policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards—with special considerations for rollovers, commission-based compensation arrangements and limited or proprietary platforms; and
- **Retrospective Review:** which requires an annual retrospective review of compliance, with certain certifications by senior officials.

SUMMARY

In 2016, the DOL finalized the now-defunct 2016 Rule, which, prior to being vacated by the Fifth Circuit, was essentially a new regulation that replaced the 1975 Rule. After the U.S. Court of Appeals for the Fifth Circuit vacated the 2016 Rule in 2018, the DOL issued FAB 2018-02, a temporary enforcement policy providing prohibited transaction relief to Investment Advice fiduciaries. FAB 2018-02 is slated to expire in December of 2021. The Final Exemption will likely be of interest not only to Plans, but also to financial intermediaries that sell products and services to Plans outside of purely institutional channels and those that accept or seek rollovers. Firms that offers these intermediaries products and services will also likely wish to pay attention to these developments.

Some financial institutions (e.g., broker-dealers, banks, insurance companies and some mutual fund complexes offering products directly to the retail Plan market) created and implemented compliance structures designed to ensure satisfaction of the then-applicable impartial conduct standards and have been permitted to rely on those structures pending further guidance. The Final Exemption would permit financial institutions to continue relying on those compliance structures on a permanent basis, subject to the additional conditions of the Final Exemption, rather

than requiring them to change course to begin complying with the DOL's other existing exemptions for Investment Advice fiduciaries.

The Final Exemption

The 2016 Rule substantially broadened the types of ordinary course interactions that would be regarded as resulting in Investment Advice fiduciary status. Some financial institutions sought to preserve their traditional commission-based platform by using exemptions issued in connection with the issuance of the 2016 Rule. Financial institutions that utilized an exemption or set of exemptions designed to work under the 2016 Rule sometimes accepted or even embraced fiduciary status. However, with the demise of the 2016 Rule, the related exemptions no longer applied. Without the exemptions, the elimination of the 2016 Rule would seem in some cases to have the perverse result of actually discouraging providers from proceeding as fiduciaries.

The DOL's new interpretation of the Five-Part Test (discussed below) may cause some providers that had been operating prior to the 2016 Rule under the conclusion that they were not Investment Advice fiduciaries to reconsider that determination. The Final Exemption may thus be used not only by those firms that transitioned to an exemption under the 2016 Rule and wish to continue to provide services on a fiduciary basis and by others that affirmatively wish to provide services on a fiduciary basis, but also by other institutions that may now be concerned that they are at risk for being considered Investment Advice fiduciaries, whether or not they wish to be.

Conditions

Each Financial Institution and Investment Professional relying on the Final Exemption would need to satisfy all of the following:

- Impartial Conduct Standards;
- Disclosure Requirements;
- Policies and Procedures; and
- Retrospective Review.

A significant area for consideration is rollovers. There are also a number of important exclusions, including for "pure" (machine-only) robo-advice and for advice provided to a Financial Institution's own employees. In addition, the exemption only applies to Investment Advice: not discretionary management. There are also key limitations on the Final Exemption's coverage of certain fixed income securities and other principal transactions. And policies and procedures require significant attention, among other things, with respect to a Financial Institution and its Investment Professionals' compensatory practices and ongoing oversight to avoid violations of the impartial conduct standards. Some of the disclosure requirements (including with respect to rollovers) require substantial detail and documentation, including reasons why the rollover is recommended.

The Five-Part Test

The Release provides important color on the DOL's current thinking about key elements of the Five-Part Test. The Final Preamble highlights its discussion of each of the prongs of the Five-Part Test as a "Facts and Circumstances Analysis." It also indicates that this is the DOL's "Final Interpretation" with respect to the aspects of the Five-Part

Test it seeks to cover. Rollovers are again a major focus, but many institutions will find it worthwhile to consider the DOL's insights with respect to the "regular basis," "a primary basis" and "mutual agreement" prongs.

Change in Administration

It is anticipated that once in office, Joe Biden will issue a "first-day" order to freeze all final regulations not yet effective. While the Final Exemption is scheduled to become effective in February, it is unclear whether any such freeze will be a mere pause, or rather result in withdrawal, or modification, of the Final Exemption. Because FAB 2018-02 is slated for expiration in December of 2021, it will be important to see how any such delay may impact the timetable for that widely-used temporary enforcement guidance.

DISCUSSION

In 2016, the DOL finalized the now-defunct 2016 Rule, which, prior to being vacated by the Fifth Circuit, was essentially a new regulation that replaced the 1975 Rule. The DOL also issued a number of new and amended related PTCEs, notably including the Best Interest Contract Exemption (the "BIC Exemption") and the Principal Transactions Exemption (the "PrTE").

After the U.S. Court of Appeals for the Fifth Circuit vacated the 2016 Rule in 2018, the DOL issued FAB 2018-02, a temporary enforcement policy providing prohibited transaction relief to Investment Advice fiduciaries. In FAB 2018-02, the DOL stated that it would not pursue prohibited transactions claims against Investment Advice fiduciaries who worked diligently and in good faith to comply with "impartial conduct standards" for transactions that would have been exempted by the BIC Exemption or the other new PTCEs, or treat the fiduciaries as violating the applicable prohibited transaction rules. As discussed below, impartial conduct standards are now a centerpiece of the Final Exemption.

Some financial institutions created and implemented compliance structures designed to ensure satisfaction of the then-applicable impartial conduct standards and have been permitted to rely on those structures pending further guidance. The Final Exemption permits financial institutions to continue relying on those compliance structures on a permanent basis, subject to the additional conditions of the Final Exemption, rather than requiring them to change course to begin complying with the DOL's other existing exemptions for Investment Advice fiduciaries. In addition, while FAB 2018-02 is limited by its nature to DOL enforcement actions, the effect of satisfying an actual exemption such as the Final Exemption extends to potential claims by Plan participants and beneficiaries, in that satisfaction of the exemption would result in there being no violation of the applicable ERISA (and Code) rules.

We will discuss below the Final Exemption and its conditions, in some cases noting the manner in which the Final Exemption departs from the Proposed Exemption. We will then discuss the DOL's important commentary regarding the Five-Part Test and certain other aspects of the Release.

I. The Final Exemption

A. Background

The 2016 Rule substantially broadened the types of ordinary course interactions that would be regarded as resulting in Investment Advice fiduciary status. The manner in which financial institutions responded to the 2016 Rule was not

uniform across market participants.[10] Some sought to preserve their traditional commission-based platform by using, among other avenues, the now-vacated BIC Exemption and PrTE.

Financial institutions that utilized an exemption or set of exemptions designed to work under the 2016 Rule sometimes accepted or even embraced fiduciary status. However, with the demise of the 2016 Rule, the BIC Exemption and the PrTE no longer applied. Thus, this aspect of the vacatur of the 2016 Rule had what may be a counterintuitive impact: while the elimination of the amended fiduciary regulation itself relieved a wide range of institutions from additional regulatory responsibilities as ERISA fiduciaries, the removal of the corresponding exemptions removed relief for those who were now proceeding as fiduciaries. In this regard, with the removal of the 2016 Rule and the resulting elimination of the related exemptions, the receipt of the types of fees and compensation arrangements mentioned above, and various principal transactions, could involve non-exempt self-dealing or related-party prohibited transactions for those proceeding as fiduciaries. Indeed, without the exemptions, the elimination of the 2016 Rule would seem in some cases to have the perverse result of actually discouraging providers from proceeding as fiduciaries.

FAB 2018-02 was issued after the 2016 Rule was vacated as “a temporary enforcement policy providing prohibited transaction relief to investment advice fiduciaries.” In it, the DOL announced that it would “not pursue prohibited transactions claims against investment advice fiduciaries who worked diligently and in good faith to comply with certain impartial conduct standards for transactions that would have been exempted in the new exemptions, or treat the fiduciaries as violating the applicable prohibited transaction rules.” These impartial conduct standards contain three components: a best interest standard, a reasonable compensation standard, and a requirement to make no misleading statements about investment transactions and other relevant matters.

The DOL noted that it was issuing the Proposed Exemption so that “financial institutions could continue relying on those compliance structures on a permanent basis, subject to the additional conditions of the exemption, rather than changing course to begin complying with the DOL’s other existing exemptions for investment advice fiduciaries.” In addition, the Proposed Exemption “would provide a defense to private litigation as well as enforcement action by the DOL, while the FAB is limited to the latter.” The same is true under the Final Exemption as it would apply to those Financial Institutions (as defined below) that seek to make use of this relief.

The DOL’s new interpretation of the Five-Part Test (discussed below) may cause some providers that had been operating prior to the 2016 Rule under the conclusion that they were not Investment Advice fiduciaries to reconsider that determination. The Final Exemption may thus be used not only by those firms that transitioned to the BIC Exemption under the 2016 Rule and wish to continue to provide services on a fiduciary basis and by others that affirmatively wish to provide services on a fiduciary basis, but also by other institutions that may now be concerned that they are at risk for being considered Investment Advice fiduciaries, whether or not they wish to be.

B. Overview

The Final Exemption maintains the overall structure of the Proposed Exemption with a few changes noted below. It utilizes many of the concepts and features of FAB 2018-02, and in some important contexts, the now-vacated BIC Exemption and PrTE. While the Final Exemption may seem facially easier to satisfy than the BIC Exemption and the PrTE, it is not clear the extent to which that actually will be the case for all affected institutions. Significantly, the Final Exemption’s Impartial Conduct Standards (the “Impartial Conduct Standards”) tends to incorporate many Reg BI

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[10] For statistics showing how market participants responded to the 2016 Rule, see 84 Fed. Reg. 33,322, 33,421 & nn. 33-34, 1005-1007 (July 12, 2019).

concepts that were absent from the 2016 Rule, thereby continuing an effort by various regulators to harmonize standards of conduct across agencies.[11] Conversely, there are some instances where the requirements of the Final Exemption extend beyond Reg BI.[12]

In general, and as discussed in greater detail below, the Final Exemption is available for SEC-registered investment advisers, broker-dealers, banks, and insurance companies ("Financial Institutions") and their individual employees, agents, and representatives ("Investment Professionals") that provide fiduciary Investment Advice to Plan participants and beneficiaries, IRA owners, and Plan and IRA fiduciaries (also referred to as "Retirement Investors"). The Final Exemption applies only to Investment Advice fiduciary relationships, and not to discretionary or investment management relationships.

The Final Exemption maintains much of the Proposed Exemption's structure and substance. Examples of areas of departure include the permitting of a range of senior executive officers to provide the report contemplated by the condition of the Final Exemption relating to retrospective compliance reviews, and new provisions permitting corrections of certain errors.

C. Conditions – in General

The Final Exemption applies to a variety of services. However, it applies only to a limited number of principal and riskless principal transactions. In addition, even where some financial transactions may be permitted—for example, municipal securities and "complex" investments—the Release sounds a cautionary note.

As in the Proposed Exemption, the Final Exemption requires as a condition to its use that the Financial Institution provide (and the Investment Professional would also have to provide) advice in accordance with the Impartial Conduct Standards and meet several other important conditions. Specifically, each Financial Institution and Investment Professional relying on the Final Exemption would need to satisfy conditions with respect to:

- **Impartial Conduct Standards,** which include:
  - a duty to comply with Section 404(a) of ERISA's prudence standards;
  - a duty not to place the interests of the Financial Institution, Investment Professionals, affiliates, related entities or other parties ahead of the interests of the Plan, or to subordinate the interests of the Plan to their own;

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[11] For example, the SEC expressly rejected using (and the Proposed Exemption does not use) the BIC Exemption's "without regard to" test, which many found cumbersome at best. The BIC Exemption had required that recommendations be made "without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party." Many expressed concern that this standard was too broad and set an institution up for a failure of the exemption any time a plaintiff could prove that the Financial Institution did not recommend the investment that paid it the least. The Reg BI release noted that the SEC decided to reject this standard because the "language could alter the way in which conflicts are viewed and cause a substantial portion of conduct that is currently permitted, and reasonably accepted and desired by retail customers, to be limited or eliminated."

[12] The BIC Exemption applied only to Investment Advice fiduciaries. Thus, the BIC Exemption was not available for prohibited transactions resulting from discretionary investment management. As a result, most prohibited transactions resulting from discretionary investment management decisions were absolutely prohibited. Arguably, under the Final Exemption, those same issues remain.

  - a duty of "best execution";
  - a requirement that the Plan pay no more than "reasonable compensation";
  - a requirement to acknowledge in writing the Financial Institution's and its Investment Professionals' fiduciary status under ERISA and Section 4975 of the Code, as applicable, when providing Investment Advice to Plan participants and beneficiaries, IRA owners, and Plan and IRA fiduciaries;

- **Disclosure:** which includes the description in writing of the services to be provided and the Financial Institution's and Investment Professionals' material conflicts of interest;
- **Policies and Procedures:** which involve the adoption of policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards—with special considerations for rollovers, commission-based compensation arrangements, and limited or proprietary platforms; and
- **Retrospective Review**: which requires an annual retrospective review of compliance, with certain certifications by senior officials.

D. Coverage – in General

The Final Exemption is available to Financial Institutions and their Investment Professionals that provide fiduciary Investment Advice to Retirement Investors. The DOL noted in the Proposed Preamble and stated again in the Release that the "definition [of Financial Institution] is based on the entities identified in the statutory exemption for investment advice under [certain provisions of ERISA], which are subject to well-established regulatory conditions and oversight." The DOL concluded that "Congress included broker-dealers and registered investment advisers in the statutory advice exemption . . . , according to the same set of conditions [but not others]." In addition, the Financial Institution and Investment Professional (as applicable) must not have been disqualified or barred from making investment recommendations by any insurance, banking, or securities law or regulatory authority (including any SRO). Institutions and persons convicted of certain crimes, or that have been notified as having been engaged in behavior the DOL believes inappropriate, are not permitted to rely on the Final Exemption.

The DOL largely rejected calls by commenters to include independent marketing organizations ("IMOs"), field marketing organizations and brokerage general agencies as "Financial Institutions." Commenters had noted that "insurance companies are not set up in such a manner as to be able to act as Financial Institutions with respect to independent insurance agents, which they said would ultimately put insurance companies and insurance products at a competitive disadvantage."[13] In response to commenters, the Final Preamble clarifies that "foreign affiliates of banks, broker-dealers, insurance companies, and registered investment advisers to the entities [are] covered by the exemption" as it "did not exclude foreign affiliates in the proposal, and confirms that they are not excluded in the exemption, as finalized."

[13] The Impact Analysis states "Insurers and non-retail [broker-dealers ("BDs")] currently operating under a suitability standard in most states and largely relying on transaction-based forms of compensation, such as commissions, will be required to establish written policies and procedures that comply with the Impartial Conduct Standards if they choose to use this exemption. These activities will likely involve higher cost increases than those experienced by IAs and retail BDs."

E. Specific Covered Transactions, Products and Services

1. Rollovers and Recommendations to Move Accounts

One of the main focuses of the Proposed Release and the Final Release is the solicitation of rollovers. The Final Exemption specifically covers compensation received as a result of Investment Advice to roll over assets from a Plan to an IRA, as well as "from an IRA account at another Financial Institution, or even between different account types." The reference to "different account types" here refers to an account that is fee-based as opposed to an account that is commission-based. The DOL stated its belief that it is important that the Investment Professional "take the time to form a prudent recommendation, and that a record is available for later review" and that "[t]he written record serves an important role in protecting Retirement Investors during this significant decision." Hence there are both diligence and documentary aspects associated with rollovers under the Final Exemption.

Echoing a concern expressed in connection with the issuance of the 2016 Rule, the DOL in the Proposed Release "caution[ed] [against] certain practices [with respect to switching account types] such as 'reverse churning' (i.e. recommending a fee-based account to an investor with low trading activity and no need for ongoing monitoring or advice)." For those Financial Institutions that embrace a fiduciary model or otherwise are at risk for being considered a fiduciary (possible fiduciary status in connection with the solicitation of rollovers is discussed in Section II), there may be challenges under the Final Exemption that are similar to those involved with migrating accounts to comply with the now-defunct BIC Exemption.[14]

In considering a recommendation to rollover assets from an ERISA Plan to an IRA, the Final Preamble indicates that the Investment Professional must consider and document:

> The Retirement Investor's alternatives to a rollover, including leaving the money in his or her current employer's Plan, if permitted, and selecting different investment options; the fees and expenses associated with both the Plan and the IRA; whether the employer pays for some or all of the Plan's administrative expenses; and the different levels of services and investments available under the Plan and the IRA. For rollovers from another IRA or changes from a commission-based account to a fee-based arrangement, a prudent recommendation would include consideration and documentation of the services that would be provided under the new arrangement.

When the DOL discussed rollovers from another IRA or changes from a commission-based account to a fee-based arrangement, "documentation of the specific reasons that the recommendation to roll over assets is in the best interest of the Retirement Investor" is required.

In this regard, the Final Preamble notes that:

> a prudent recommendation would include consideration and documentation of the services that would be provided under the new arrangement. The Department agrees with commenters that the long-term impact of any increased costs and the reason(s) why the added benefits justify those added costs, as well as the

[14] As the SEC noted in its Reg BI release, "fee-based compensation could result in so-called 'reverse churning' and a disincentive to reduce assets under management, even if that would be in the investor's best interest, while flat-fee models can lead to shirking and overbilling." 84 Fed. Reg. 33,426 (July 12, 2019).

impact of features such as surrender schedules and index annuity cap and participation rates, should be considered as part of any rollover recommendation, as relevant.

The Final Preamble also states that, to be in compliance, Financial Institutions would "identify and carefully focus on the particular aspects of their business model that may create incentives that are misaligned with the interests of Retirement Investors." The Proposed Preamble stated that, if a "Financial Institution anticipates that conflicts of interest in its business model will center on advice to roll over Plan assets, and after the rollover, the Financial Institution and Investment Professional will be compensated on a level-fee basis, the Financial Institution's policies and procedures should focus on the rollover or distribution recommendation."[15]

The specific documentation-related requirements of the Final Exemption would go beyond what is expressly required under Section 404(a) of ERISA, which generally governs a fiduciary's prudence obligations,[16] and goes beyond what Reg BI requires. In this regard, the Final Preamble acknowledged that "[t]he SEC already encourages firms to record the basis for significant investment decisions such as rollovers, although doing so is not required under Reg BI." Thus, the Final Exemption would seem to envisage documentation that neither general prudence principles of ERISA nor Reg BI require.

With respect to rollovers from ERISA Plans, the Final Preamble indicates that "the Department expects that Investment Professionals and Financial Institutions evaluating this type of potential rollover will make diligent and prudent efforts to obtain information about the existing Title I Plan and the participant's interests in it." It also notes that "[i]f the Retirement Investor is unwilling to provide the information, even after a full explanation of its significance, and the information is not otherwise readily available, the Investment Professional should make a reasonable estimation of expenses, asset values, risk, and returns based on publicly available information and explain the assumptions used and their limitations to the Retirement Investor." It also notes that "[i]n such cases, the Investment Professional could rely on alternative data sources, such as the most recent Form 5500 or reliable benchmarks on typical fees and expenses for the type and size of Plan at issue."[17] The DOL in the Final Exemption estimates that "documenting each rollover recommendation will require 30 minutes for a personal financial advisor whose firms

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[15] Beyond satisfying a best interest standard, it is unclear what the DOL is suggesting, since a Financial Institution and Investment Professional would have an incentive to accrete more assets.

[16] See 29 C.F.R. § 2550.404a-1(b)(1) (A fiduciary satisfies the prudence requirements of that section if it "has given appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role the investment or investment course of action plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties.").

[17] This affirmative action was not required under the BIC Exemption and may suggest that the Financial Institution (and Investment Professional) must actively engage in meaningful and proactive research to satisfy its substantive prudence requirements.

currently do not require rollover documentations and five minutes for financial advisors whose firms already require them to do."[18]

2. Certain Services and Monitoring

Echoing the now-defunct BIC Exemption, the Final Exemption covers "reasonable compensation as a result of a Financial Institution's or Investment Professional's investment advice to Retirement Investors." Thus, sales commissions, 12b-1 fees, trailing commissions, sales loads and other compensation associated with the provision of services or the sale of products would be eligible for relief, to the extent they constitute reasonable compensation.

As under the BIC Exemption, the fact that compensation varies from product to product or service to service would not be a per se bar to using the Final Exemption. A provider would be able to receive different trailing payments or commissions, for example, depending on the specifics of the product and would not otherwise be regarded as violating the self-dealing prohibited transaction rule in which fiduciaries are not permitted to give advice that affects the amount of their compensation. The Final Exemption allows for variable compensation if the other applicable conditions are satisfied.

However, the Final Preamble expressly cautions that:

- "[I]nvestments that possess unusual complexity and risk," for example, may require ongoing monitoring to protect the investor's interests.
- An Investment Professional may be unable prudently to recommend to an "individual Retirement Investor" certain investments in the first place "without ongoing monitoring of the investment."
- The Department notes that Financial Institutions and Investment Professionals will need to make decisions on the products that require monitoring or what constitutes a product of unusual complexity on a case-by-case basis. The Proposed Preamble also indicated that in considering such "complex" products, "the cost of monitoring . . . should also be considered."
- Some "complex products or recommendations" should not be made if they "might, on their face, appear inconsistent" with the best interest of the Plan.

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[18] This computation is "based on the assumption that most financial services professionals already incorporate documenting the basis for rollover recommendations in their regular business practices and another assumption that 67.4 percent of rollovers are handled by financial services professionals who act in a fiduciary capacity." The DOL noted in the Final Preamble that it disagreed with those who thought it underestimated the costs involved with determining whether a rollover was in the client's best interest. The DOL stated: "As explained in the proposal, the Department did not expect this requirement to create an undue burden for the following reasons: (1) Financial services professionals generally seek and gather information on investor profiles in accordance with other regulators' rules; and (2) as a best practice, financial professionals often discuss the basis for their recommendations and associated risks with their clients. Because financial professionals already collect relevant information and discuss the basis for certain recommendations with clients, the Department believes that it would be relatively easy for them to document such information with respect to rollover recommendations." The DOL also cited to *Regulation Best Interest: How Wealth Management Firms are Implementing the Rule Package,* Deloitte (Mar. 6, 2020). The participating firms in this study included dual-registrants, BDs and RIAs that were owned by or affiliated with banks, holding companies, insurance companies, and trust companies, as well as independent dually-registered BDs and RIAs. 90% of participating firms were dual registrants in which almost eight in ten firms "require their financial service professionals to document rollover recommendations in response to Regulation Best Interest."

- "Recommending holding an asset solely to generate more fees" can run afoul of the Impartial Conduct Standards.

The BIC Exemption had similar language about "complex" products. Some commenters were concerned about the vagueness of standards such as "unusual complexity" in a prohibited transaction exemption all of the conditions of which must be relief in order to obtain relief from ERISA's prohibited transaction rules. They suggested that the DOL "should not impose ongoing monitoring requirements based on" those standards. Given the interpretative difficulties with such standards, some commenters requested greater "specificity on which investments are considered complex and risky." Others sought assurances that "annuities would not require ongoing monitoring," and still others asked the DOL to not require that a Financial Institution "provide monitoring, particularly where the Financial Institution clearly discloses it will not do so."

The Final Preamble states that the DOL is unwilling to give any further guidance on the subject. Thus, Financial Institutions "will need to make these decisions on a case-by-case basis. The Department expects that Financial Institutions and Investment Professionals have the expertise necessary to evaluate the need for monitoring based on all the facts and circumstances." While reiterating that the Final Exemption does not "require all Financial Institutions and Investment Professionals to offer monitoring because the exemption takes the approach of preserving the availability of a wide variety of investment advice arrangements and products," the DOL nonetheless "expects that Financial Institutions and Investment Professionals will consider whether the investment can be prudently recommended without some mechanism or plan for ongoing monitoring" as part of the Final Exemption's standards of care.

3. Specified Principal and Riskless Principal Transactions

In connection with the issuance of the 2016 Rule, the DOL issued the PrTE for principal transaction and riskless principal transactions. Principal transactions inherently involve adversity in that the Financial Institution is acting in a proprietary (its own) capacity on a given transaction rather than as a mere service provider. One type of principal transaction typically involves the sale of a security or other financial instrument out of the Financial Institution's own inventory, where the transaction is with an adverse counterparty. By contrast, agency transactions are services transactions that typically involve a commission or other fee for services rendered. While agency transactions are compensated on a commission or other basis, principal transactions often involve mark-ups, mark-downs or other payments so that there can be a profit (or reduced loss) on the transaction. Although in our experience principal transactions are the predominant way in which certain instruments, such as fixed income securities, trade, they may also include equity securities where the Financial Institution acts as underwriter in a fixed commitment offering or has a particular security in its inventory.

The Final Preamble defines a riskless principal transaction as 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. Riskless principal transactions are covered under the Final Exemption's more general provisions.

The Final Exemption applies less broadly to true principal transactions. Like the PrTE, the Final Exemption differentiates between sales from a Plan and sales to a Plan. The Final Exemption applies to any principal (or riskless principal) transaction involving a Plan's sale or disposition of any security or other property. Regarding purchases, only certain specified principal transactions are permitted under the Final Exemption. These are limited to transactions involving:

- corporate debt securities offered pursuant to a registration statement under the Securities Act of 1933;
- US Treasury securities;
- debt securities issued or guaranteed by a U.S. federal government agency other than the US Department of the Treasury;
- debt securities issued or guaranteed by a government-sponsored enterprise;
- certificates of deposit;
- interests in unit investment trusts; and
- municipal bonds.

As in the Proposed Preamble, the Final Preamble continues to warn that tax-exempt bonds are typically a "poor" choice for Plans.[19] Nevertheless, the DOL does not outright exclude them from coverage by the Final Exemption, stating that "there are certain limited circumstances where these investments may benefit a Retirement Investor. For example, a particular municipal bond may have a higher tax-equivalent yield than a comparable taxable bond. Alternatively, a fiduciary adviser may conclude based upon careful analysis that a particular tax-exempt municipal bond carries less risk than a comparable corporate bond."[20]

The DOL resisted calls from commenters to expand the list of common principal transactions that may be covered under the exemption. Thus, the Final Exemption is not available with respect to, for example, the following types of transactions: foreign-currency transactions; purchases of debt of foreign issuers and debt of foreign sovereigns; purchases of equity securities that are effected on a principal basis; purchases of securities in initial offerings where the institution (or an affiliate) participates in the placement or underwriting; initial offerings of registered closed end funds, to the extent effected on a principal or riskless principal basis; short sales and other margin transactions; overdraft protection; receipt of float generated by undeposited cash; error corrections; settlement accommodations; and prepayment of fees.

Some commentators took issue with the concept of an "approved list," suggesting that the DOL "should [not] eliminate or adjust exemption conditions that would limit Retirement Investors' access to full service brokerage accounts, including access to principal markets" and noting that such an "approved list" was inconsistent with Reg. BI. The DOL explained in response:

> Because an investment advice fiduciary engaging in a principal transaction is on both sides of the transaction, the firm has a clear and direct conflict of interest. In addition, the securities typically traded in principal transactions often lack pre-trade price transparency and Retirement Investors may, therefore, have

[19] The Final Preamble changed to word "often" to "typically." "Tax-exempt municipal bonds are typically a poor choice for investors in ERISA plans and IRAs because the plans and IRAs are already tax advantaged and, therefore, do not benefit from paying for the bond's tax-favored status."

[20] The DOL rejected calls from some "to flatly exclude tax-exempt investments." However, to underscore concerns about the potential advisability of tax-exempt investments in Retirement accounts, the DOL stated that "given the increased risk of imprudence when making such recommendations, Financial Institutions and Investment Professionals may wish to document the reasons for any recommendation of a tax-exempt municipal bond or other tax-exempt investment and why the recommendation is in the Retirement Investor's best interest."

> difficulty in prospectively evaluating the fairness of a particular principal transaction. These investments also can be associated with low liquidity, low transparency, and the possible incentive to sell unwanted investments held by the Financial Institution.[21]

With respect to harmonization with Reg BI, the DOL stated that the offerings were "consistent" with those that could be offered under Reg BI (without necessarily addressing the comment that the limitations under the Final Exemption produced a narrower investment universe than what is permitted under Reg BI). Thus, those who found certain of the restrictions under the PrTE to be constraining may have similar concerns with the Proposed Exemption. Indeed, in the DOL's words, the "approved list" is "intentionally narrow."

4. Debt Securities: Credit Risk and Liquidity

As was generally the case under the now-defunct PrTE, Financial Institutions that seek to advise Plans to purchase debt securities with respect to which relief is available under the Final Exemption would need to adopt policies and procedures "reasonably designed to ensure that the debt security, at the time of the recommendation, has no greater than moderate credit risk and has sufficient liquidity that it could be sold at or near its carrying value within a reasonably short period of time." The DOL stated in the Proposed Preamble that the "moderate credit risk" standard "is intended to identify investment grade securities, and is included to prevent the exemption from being available to Financial Institutions that recommend speculative debt securities from their own accounts."

Commenters raised concerns about such determinations. In rejecting calls to make changes, the DOL restated that it "does not believe the standards are unworkable. Financial Institutions regularly evaluate the credit risk associated with their investments and assess their liquidity. And it is important to note that the policies and procedures must be reasonably designed to ensure that the standards are met at the time of the transaction; the exemption does not require them to be satisfied for the duration of the investment." According to the DOL, "unique conditions, such as the credit and liquidity requirements, address the heightened conflicts of interest and are specifically tailored to address conflicts inherent with respect to debt securities." The DOL disagreed that it was "substituting its judgment for that of Retirement Investors" and defended its position by noting that "it is only setting necessary safeguards to prevent abuses by Financial Institutions relying on the exemption." The DOL also then stated that these limitations are "not necessary for self-directed retirement accounts or transactions that do not involve fiduciary investment advice. Therefore, such truly self-directed accounts and transactions may involve the purchase of any type of investment on a principal basis."

The Final Exemption will not be available for Investment Advice fiduciary relationships offered to Plans of the Financial Institution or its affiliates. The Final Exemption will also be unavailable for a named fiduciary or Plan administrator, or an affiliate thereof, who was selected to provide advice to the Plan by a fiduciary who is not "independent of the Financial Institution, Investment Professional, and their affiliates."

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[21] The DOL noted indicated that ERISA has a "unique starting point"—that "Congress statutorily prohibited these transactions in Title I and the Code." This perspective appears to have justified the DOL's reluctance to adopt a wider perspective.

F. Exclusions

1. Independence

The Final Exemption, like the Proposed Exemption, has a 2% revenue trigger for affiliated status. In this respect, the DOL stated in the Proposed Preamble that it:

> would [not] view a party as independent of the Financial Institution and Investment Professional if . . . the person has a relationship to or an interest in the Financial Institution, Investment Professional or any affiliate that might affect the exercise of the person's best judgment in connection with transactions covered by the [Proposed Exemption], or . . . the party [receives] or is projected [to receive] within the current federal income tax year, compensation or other consideration for his or her own account from the Financial Institution, Investment Professional or an affiliate, in excess of 2% of the person's annual revenues based upon its prior income tax year.

Several commenters resisted this threshold, indicating it was too low and "far more restrictive than any definition ever used." The DOL disagreed, stating that because the DOL's purpose is "to protect employees from abuse, employers generally should not be in a position to use their employees' retirement benefits as potential revenue or profit sources, without additional safeguards. Employers can always render advice and recover their direct expenses in transactions involving their employees without need of an exemption."[22] Financial Institutions that offer their investment professionals for Investment Advice that pertains to employees' participation in the Financial Institution's Plan would thus not be eligible to utilize the Final Exemption for the purpose of affiliated products or services.

2. Certain Robo-Advisors

Generally, a so-called "robo-advisor" is a financial institution that relies on computers—rather than human financial professionals—to build and manage investment management portfolios or otherwise provide investment advice.[23] The Proposed Exemption would not have applied to robo advice arrangements that do not involve interaction with an Investment Professional. The DOL noted that such arrangements may be eligible for relief under the reasoning of DOL Advisory Opinion 2001-09A (Dec. 14, 2001)[24] or Sections 408(b)(14) and 408(g) of ERISA (and the corresponding provisions of the Code). The DOL stated that, while "hybrid" robo-advice arrangements (i.e., arrangements that involve both computer software-based models and personal Investment Advice from an Investment Professional) "would be permitted under the [Proposed Exemption], arrangements in which the only

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22 The Final Preamble also continued by saying that the DOL did not "intend for the exemption to be used by a Financial Institution or Investment Professional that is the named fiduciary or plan administrator of a Title I Plan or an affiliate thereof, unless the Financial Institution or Investment Professional is selected as an advice provider by a fiduciary (such as the employer sponsoring the Title I Plan) that is independent of them. Named fiduciaries and plan administrators have significant authority over plan operations and accordingly, the Department believes that any selection of these parties to also provide investment advice to the Title I Plan or its participants and beneficiaries should be made by an independent party who will also monitor the performance of the investment advice services."

23 See *IM Guidance Update*, Robo-Advisers, U.S. Securities and Exchange Commission, Division of Investment Management, No. 2017-02 (February 2017).

24 "Only the parties described in the request for [an advisory] opinion may rely on the opinion . . .." ERISA Proc. 76-1, § 10. However, Advisory Opinions give an indication of the DOL's views on the matters addressed and are commonly looked to by ERISA practitioners for guidance.

investment advice provided is generated by a computer model would not be eligible for relief under the [Proposed Exemption].”

A number of commenters objected saying that the exemption should be available to all robo-advice arrangements. The DOL rejected the objections, reasoning that the Final Exemption “is tailored to investment advice that is provided through a human Investment Professional who is supervised by a Financial Institution. The conditions of this exemption are not designed to address advice without a [human] Investment Professional.”[25]

3. Pooled Employer Plans Under the SECURE Act

The Setting Every Community Up for Retirement Enhancement Act (the “SECURE Act”), passed in 2019, calls for Pooled Employer Plans (“PEPs”), which are a type of multiple employer defined contribution plans. We discussed the PEP provisions of the SECURE Act in a prior OnPoint.

PEPs potentially facilitate the ability of employers (particularly smaller employers) to share costs in operating a plan and use their combined bargaining power to allow for access to plan services and to negotiate lower fees. The SECURE Act mandates that a PEP must be established by a Pooled Plan Provider (a “PPP”) that is designated as a named fiduciary, plan administrator, and the person responsible for specified administrative duties.

Commentators had suggested that some PPPs may want to make investment advice available through PEPs, by utilizing themselves or an affiliate as the advice provider. Clarification was sought so that an employer that participates in a PEP could be considered “independent,” so that the “independence” exclusion of the Final Exemption would not be applicable despite the fact that the PPP or an affiliate is providing advice. The DOL responded that such comfort would be “premature” because of “their recent origination, unique structure, and likelihood of significant variations in fact patterns and potential business models.”

4. Discretionary Services

The Final Exemption applies to the provision of Investment Advice. Some wondered why discretionary investment management services are excluded. The DOL responded that the Final Exemption’s conditions “were designed specifically for non-discretionary investment advice arrangements, consistent with standards from other regulators regarding similar arrangements.” It further stated that it “does not believe this [decision] will unfairly prejudice discretionary arrangements because the same pool of exemptions for discretionary arrangements currently exists that existed before this exemption was proposed,” and “there are a variety of ways to avoid prohibited transactions in discretionary arrangements, including utilizing fee structures that ensure compensation does not vary based on investment choice.”

G. Impartial Conduct Standards

1. Overview

The Impartial Conduct Standards are a centerpiece of the Final Exemption, as were the predecessor impartial conduct standards in the case of the BIC Exemption and later the Proposed Exemption. The Impartial Conduct Standards have three components: a best interest standard; a reasonable compensation standard; and a requirement

[25] It continued by stating “[t]he policies and procedures required by this exemption contemplate consideration of factors beyond those that may be considered in a pure robo-advice situation” and somewhat cryptically, noted that Financial Institutions “may design a pure robo-advice model that incorporates other incentives than those addressed here.”

to make no misleading statements about investment transactions and other relevant matters. The DOL noted in the Proposed Preamble that the Impartial Conduct Standards "are, in the Department's view, aligned" with those of other regulators among other recent initiatives at the State and other authority. Indeed, there are provisions of the Final Exemption that are substantially identical to portions of Reg BI; however, there are also some significant departures from Reg BI.

2. Best Interest

The "Best Interest Standard" itself is comprised of several elements. Echoing to some extent ERISA's prudence standard, the Final Exemption provides that a Financial Institution relying on the exemption must offer advice that "reflects 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 and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, and does not place the financial or other interest of the Investment Professional, Financial Institution or any affiliate, related entity or other party ahead of the interests of the Retirement Investor, or subordinate the Retirement Investor's interests to their own."

This second part of the standard in the Final Exemption is substantially identical to Reg BI's formulation that a broker-dealer (and its associated persons) not place "the financial or other interest of the broker-dealer [or its associated persons] ahead of the interests of the retail customer." The Final Exemption adopts the same approach and adds that it

> does not believe there is a distinction between ERISA's section 404 standards of prudence and loyalty and the Impartial Conduct Standards, given that the best interest standard includes a prudence obligation and the Department has in the past described the duty of loyalty as prohibiting fiduciaries from subordinating the interests of participants and beneficiaries in their retirement income to unrelated objectives.

The DOL also noted in the Final Preamble that it "disagree[d] with the suggestion that the best interest standard is not a 'true' fiduciary standard." In response to commenters who asked for deference to securities law pronouncements on the interpretation of "best interest," the DOL indicated that "although the best interest standard is intended to be consistent with the securities law standards as discussed above, the Department declines to provide a safe harbor for compliance with the standards as interpreted by the SEC or FINRA." It is noted, however, that, while Reg BI and ERISA may use a substantially identical standard and both regimes call for equitable remedies and disgorgement of

profits in cases, the penalties for engaging in a non-exempt prohibited transaction can also involve, depending on the type of plan, material penalties under ERISA or excise taxes under Section 4975 of the Code.[26]

3. Reasonable Compensation

The Impartial Conduct Standards would require that fees and other compensation paid with respect to transactions covered under the Proposed Exemption not exceed reasonable compensation within the meaning of Section 408(b)(2) of ERISA (and the corresponding provisions of the Code). The Final Exemption requires as a condition to its use that "compensation not be excessive, as measured by the market value of the particular services, rights, and benefits" provided. Helpfully, the DOL specifically noted that "the Financial Institution and Investment Professional would not have to recommend the transaction that is the lowest cost or that generates the lowest fees without regard to other relevant factors." In fact, the DOL stated that recommendations of the "lowest cost" security or investment strategy, "without consideration of other factors, could in fact violate the exemption."

The DOL also suggested that the reasonable-compensation test would apply in the aggregate to "investment products that bundle together services and investment guarantees or other benefits, such as annuities." In the context of insurance products, it stated that, "[i]n assessing the reasonableness of compensation in connection with these products, it is appropriate to consider the value of the guarantees and benefits as well as the value of the services."

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[26] As noted by the SEC in the Reg BI adopting release, there are key "differences in the approach to the treatment of conflicts under ERISA and under the federal securities laws." According to the SEC: "ERISA starts by prohibiting conflicts and then through exemptions permits certain conflicts, whereas the federal securities laws generally start with disclosure and become more restrictive." The Final Exemption thus (like the BIC Exemption before it) would effectively adopt an ERISA-type prudence standard of care not only to regulate behavior, but also as an express condition to relief under a prohibited transaction exemption.

Commentators suggested the possibility that the application of prudence standards to non-ERISA IRAs may raise the kinds of overreach concerns that the Fifth Circuit had with the 2016 Rule and the BIC Exemption in the *Chamber of Commerce* case (cited above), even here. Arguably, however, the reach of the Final Exemption is not as extensive as the reach that the BIC Exemption had in light of the 2016 Rule. In this regard, the DOL noted "some commenters opined that the application of the best interest standard, including the prudence obligations, on IRAs is not permitted under the Fifth Circuit's *Chamber of commerce* opinion. In particular, these commenters asserted that the Fifth Circuit determined that the Department was acting outside its authority by adding to the requirements of the Code provisions that Congress chose not to apply to such accounts." The DOL responded: "The Department does not believe that including the Impartial Conduct Standards as conditions for transactions involving IRAs is impermissible in light of the Fifth Circuit's *Chamber of Commerce* opinion. The Fifth Circuit's opinion addressed the 2016 fiduciary rule and related exemptions, particularly the perceived 'over-inclusiveness' of the new definition of a fiduciary that the opinion indicated, in some circumstances, resulted in ordinary sales conduct activities causing a person to be classified as a fiduciary under Title I and the Code. Unlike the 2016 fiduciary rule and related exemptions, the present exemption provides relief to a more limited group of persons already deemed to be fiduciaries within the meaning of the five-part test and does not impose contract or warranty requirements on fiduciaries. . . . Further, the Fifth Circuit observed that the five-part test 'captured the essence of a fiduciary relationship known to the common law as a special relationship of trust and confidence between the fiduciary and his client.' [Citation omitted]. The same five-part test exists under the Code's regulations, based on an identical definition of fiduciary in the Code. This exemption merely recognizes that fiduciaries of IRAs, if they seek to use this exemption for relief from prohibited transactions, should adhere to a best interest standard consistent with their fiduciary status and a special relationship of trust and confidence." In the Preamble to the Final Regulation, the DOL repeated that neither Financial Professionals nor Investment Professionals are required to recommend the transaction that is the lowest cost or that generates the lowest fees without regard to other relevant factors. In fact, the Department agreed with commenters that recommendations of the "lowest cost" security or investment strategy, without consideration of other factors, could in some cases even violate the exemption.

Some commenters had asked for revisions to the Final Exemption "specifically [to] provide that the cost of an investment product is a factor, although it need not be the determinative factor, in applying the best interest standard." The DOL responded "that the cost of an investment product will be a factor in every recommendation, [and] the best interest standard envisions that all of the characteristics of an investment product—not just its cost—will be evaluated based on Retirement Investors' investment objectives, risk tolerance, financial circumstances, and needs." Nevertheless, the DOL also noted that it did not intend to suggest that reasonableness will be assessed solely against the existing market practices. The reasonable compensation standard will not be met if the fees bear little relationship to the value of the services actually rendered.

4. Misleading Statements and Exculpatory Clauses

The Impartial Conduct Standards would require that the Financial Institution and its Investment Professionals not provide misleading statements about the recommended transaction or other relevant matters at the time they are made. These "other relevant matters" include "fees and compensation, material conflicts of interest, and any other fact that could reasonably be expected to affect the Retirement Investor's investment decisions." The DOL noted that it "would consider it materially misleading for the Financial Institution or Investment Professional to include any exculpatory clauses or indemnification provisions in an arrangement with a Retirement Investor that are prohibited by applicable law."[27]

5. Best Execution

The Impartial Conduct Standards would require that Financial Institutions and Investment Professionals seek to obtain the "best execution" of the investment transaction reasonably available under the circumstances. Many Financial Institutions are already subject to a duty of best execution under common law, the Exchange Act, the Investment Advisers Act of 1940, the rules of FINRA or the Municipal Securities Rulemaking Board. Plainly stated by the DOL in the Proposed Preamble, a duty of best execution means that a Financial Institution must "execute customers' trades at the most favorable terms reasonably available under the circumstances." The Final Exemption continues the approach of the Proposed Exemption and effectively imports the best-execution requirement as a condition for relief.

Many commenters raised concerns that unclear facts and circumstances regarding whether best execution is obtained could cause uncertainty about the overall availability of the Proposed Exemption. The DOL did not delete

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[27] A footnote in the Final Preamble references Section 410 of ERISA and Interpretive Bulletin 75-4, and quotes from the latter as follows: "The Department of Labor interprets section 410(a) as rendering void any arrangement for indemnification of a fiduciary of an employee benefit plan by the plan. Such an arrangement would have the same result as an exculpatory clause, in that it would, in effect, relieve the fiduciary of responsibility and liability to the plan by abrogating the plan's right to recovery from the fiduciary for breaches of fiduciary obligations." This condition could turn out to be a trap for the unwary, as it appears to apply not only to impermissible exculpatory clauses under ERISA but under all applicable law. In certain other recent individual prohibited transaction exemptions, the DOL had focused primarily on exculpatory ERISA and related Code provisions. See e.g., Prohibited Transaction Exemption ("PTE") 2017-03, JPMorgan Chase & Co., D-11906; PTE 2017-04, Deutsche Investment Management Americas Inc. (DIMA) and Certain Current and Future Asset Management Affiliates of Deutsche Bank AG, D-11908; PTE 2017-05, Citigroup Inc., D-11909; PTE 2017-06, Barclays Capital Inc., D-11910; PTE 2017-07, UBS Assets Management (Americas) Inc.; UBS Realty Investors LLC; UBS Hedge Fund Solutions LLC; UBS O'Connor LLC; and Certain Future Affiliates in UBS's Asset Management and Wealth Management Americas Divisions, D-11907.

the requirement but did confirm that compliance with applicable securities law for purposes of best execution will result in compliance under the Final Exemption.[28]

H. Fiduciary Acknowledgment

Financial Institutions would have to acknowledge in writing that the Financial Institution and its Investment Professionals are fiduciaries under ERISA and Section 4975 of the Code, as applicable, with respect to any fiduciary Investment Advice provided by the Financial Institution or Investment Professional to the Retirement Investor. The DOL offered "model" language that may be used to acknowledge fiduciary status and model "supplementary" language that Financial Institutions can use to satisfy the acknowledgment-related condition.[29]

The DOL noted that such "disclosure is designed to ensure that the fiduciary nature of the relationship is clear to the Financial Institution and Investment Professional, as well as the Retirement Investor, at the time of the investment transaction" and the DOL "contemplates that the Financial Institution and Investment Professional will put down a marker as fiduciaries when they indeed are acting as such." Some expressed concern that, in combination with the highly indeterminate nature of the Five-Part Test, the condition may effectively "force" Financial Institutions into a legal position of acknowledging fiduciary status, and that firms may be forced to concede such status at a time when the actual nature of the relationship may still be evolving.

The DOL flatly rejected these concerns, stating that, "in light of the broad scope of relief in the exemption . . . it is critical for Financial Institutions and Investment Professionals who choose to rely on the exemption to determine up-front if they intend to act as fiduciaries, and structure their relationship with the Retirement Investor accordingly." The DOL went on to state: "This exemption is not designed as a backup method of compliance for Financial Institutions

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[28] The Final Preamble states: "[C]ompliance by the Financial Institution and Investment Professional with the applicable statutory and regulatory provisions is sufficient to comply with the requirement." In addition, "[t]he Department exercises its interpretive authority here to take the position that Financial Institutions and Investment Professionals that comply with applicable securities laws and their successors will satisfy this condition of the exemption, because of this requirement's origination in securities law. As a result, the Department does not believe the condition will result in divergent or inconsistent interpretations of securities laws."

[29] The model language is:

When we provide investment advice to you regarding your retirement plan account or individual retirement account, we are fiduciaries within the meaning of Title I of the Employee Retirement Income Security Act and/or the Internal Revenue Code, as applicable, which are laws governing retirement accounts. The way we make money creates some conflicts with your interests, so we operate under a special rule that requires us to act in your best interest and not put our interest ahead of yours.

The Preamble to the Final Regulation also highlights additional disclosures that a Financial Institution may wish to make to "more fully explain the exemption's terms." The model disclosure language that the Financial Institution would use is as follows:

Under this special rule's provisions, we must:

- Meet a professional standard of care when making investment recommendations (give prudent advice);
- Never put our financial interests ahead of yours when making recommendations (give loyal advice);
- Avoid misleading statements about conflicts of interest, fees, and investments
- Follow policies and procedures designed to ensure that we give advice that is in your best interest
- Charge no more than is reasonable for our services; and
- Give you basic information about conflicts of interest.

that intend to deny the fiduciary nature of their investment advice despite their actions to the contrary."[30] Reinforcing the point, the DOL emphasized that "[a] Financial Institution and Investment Professional that seek to provide investment advice to a Retirement Investor and otherwise engage in a relationship that satisfies the five-part test should, at a minimum (if they wish to avail themselves of this particular exemption), make a conscious up-front determination of whether they are acting as fiduciaries; tell their Retirement Investor customers that they are rendering advice as fiduciaries; and, based on their conscious decision to act as fiduciaries, implement and follow the exemption's conditions." The DOL reasoned that "Financial Institutions are unlikely to comply fully with the exemption if they are simply relying on the exemption as a fallback position in the event that a primary argument of non-fiduciary status fails."[31]

I. Policies and Procedures

The Proposed Release established "an overarching requirement" that Financial Institutions "establish, maintain and enforce written policies and procedures prudently designed to ensure that the Financial Institution and its Investment Professionals comply with the Impartial Conduct Standards." The DOL noted in the Proposed Preamble that compliance would require "ongoing vigilance as to the impact of conflicts in the provision of fiduciary advice to Retirement Investors." In some respects, the policies and procedures may seem to echo obligations of broker-dealers under Reg BI.[32]

These policies and procedures generally "would be required to mitigate conflicts of interest to the extent that the policies and procedures, and the Financial Institution's incentive practices, when viewed as a whole, are prudently designed to avoid misalignment of the interests of the Financial Institution and Investment Professionals and the interests of Retirement Investors." In particular, the DOL noted that these policies and procedures "would be required to be prudently designed to protect Retirement Investors from recommendations to make excessive trades or to buy investment products, annuities or riders that are not in the Retirement Investor's best interest or that allocate excessive amounts to illiquid or risky investments."[33]

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[30] A similar formulation is also articulated: "Financial Institutions and Investment Professionals may not rely on the exemption merely as a back-up protection for engaging in possible prohibited transactions when their ultimate intention is to deny the fiduciary nature of their investment advice."

[31] Some commenters had noted that long-standing prohibited transaction class exemptions, such as PTCE 84-24, permit relief for transactions engaged in by institutions that are fiduciaries even without any fiduciary acknowledgment. The DOL responded "that it is the responsibility of the Department to craft exemptions to ensure that they are protective of and in the interests of plans and plan participants." The DOL further noted that "financial services providers that are not fiduciaries have no need of this exemption."

[32] The DOL's use of the term "prudently" departs from the language of Reg BI's Compliance and Conflict of Interest Obligations as well as FINRA's Rule 3110, which sets forth the requirement that broker-dealers implement a supervisory system "that is reasonably designed to achieve compliance with applicable securities laws and regulations." The SEC expressly stated its view that the omission of an express prudence requirement does not affect Reg BI's "care obligation" (which requires that the Financial Institution "have a reasonable basis to believe that a recommendation, or series of recommendations, does not place the financial or other interest of the broker-dealer or its associated persons ahead of the interest of the particular" investor). Rather, the SEC said that it avoided the use of the term "prudence" to "address commenter concerns that it might create legal confusion and uncertainty." 84 Fed. Reg. 33,445 (July 12, 2019).

[33] One area that Financial Institutions and Investment Professionals will likely need to consider is how the best interest standard is intended to work with so-called "illiquid" or "risky" investments about which the DOL cautions, particularly where the Retirement Investor specifies that its investment objectives call for a significant allocation to such investments.

Regarding the standard on mitigation of conflicts, the Final Exemption's language, which is different than that of the Proposed Exemption, would require that the Financial Institution "mitigate conflicts of interest to the extent that a reasonable person reviewing the policies and procedures and incentive practices as a whole would conclude that they do not create an incentive for a Financial Institution or Investment Professional to place their interests ahead of the interest of the Retirement Investor." The DOL stated that this principles-based change "provides a standard that more clearly communicates the intent that incentives must be mitigated and provides a standard of mitigation based on the view of a 'reasonable person.'" The DOL continued by stating: "The preamble to the proposed exemption communicated this type of 'reasonable person' standard in discussing the meaning of the proposal's standard to avoid misalignment of interests." In responding to commenters who suggested that the Final Exemption proscribe certain practices believed to be conflict-laden, the DOL noted its belief that "the Financial Institution's written policies and procedures would necessarily express the criteria for determining that the exemption's standards will be met and describe the Financial Institution's conflict mitigation methods."[34] The DOL noted that examples of "misalignment" are the making of excessive trades, buying investment products, annuities, or riders that are not in the investor's best interest or that allocate excessive amounts to illiquid or risky investments.

1. Transaction-Based Compensation; Insurance Compensation

The Proposed Preamble indicated that a Financial Institution "would need to consider how to minimize the impact of these compensation incentives on fiduciary investment advice to Retirement Investors, so that the Financial Institution would be able to meet the exemption's standard of conflict mitigation." The DOL makes it clear that Financial Institutions "would be encouraged to focus on both financial incentives to Investment Professionals and supervisory oversight of investment advice." The DOL eschewed rigidity, stating in the Final Preamble that it "believes that prescriptive conflict mitigation provisions would decrease the utility of the exemption, now and in the future."

Oversight of recommendations and proper structuring of Investment Professional compensation remains key. Supervisory oversight "is an important component of a Financial Institution's policies and procedures" because transaction-based compensation makes it impossible to "fully mitigate compensation incentives." Accordingly, "Financial Institutions will always be required to oversee recommendations" especially given that interests may exist "that might incline a Financial Institution or Investment Professional—consciously or unconsciously—to make a recommendation that is not in the Best Interest of the Retirement Investor.[35]

The Final Preamble continues that a focus on Investment Professional compensation and on oversight of recommendations "would complement each other, and Financial Institutions would retain the flexibility, based on the characteristics of their businesses, to adjust the stringency of each component provided that the exemption's overall standards would be satisfied. . . . Financial Institutions that significantly mitigate commission-based compensation incentives would have less need to rigorously oversee Investment Professionals and investment recommendations." The DOL cautioned, however, that "Financial Institutions that have significant variation in compensation across different investment products would need to implement more stringent supervisory oversight." In a footnote in the Final Preamble, the DOL noted that in connection with rollovers, "[t]his is not to suggest that a Financial Institution

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[34] In explaining the change, the DOL indicated that the standard retains the requirement that the policies and procedures and incentive practices "must be viewed as a whole so that Financial Institutions have flexibility in adopting practices that both mitigate compensation incentives and use supervisory oversight to prudently ensure that the standard is satisfied."

[35] The DOL declined to define commission-based incentives as limited to ones where incentives are tied to the sale of specific financial or insurance products within a limited period of time.

that analyzes the conflicts associated with commission-based compensation incentives does not need to engage in a separate mitigation analysis with respect to the conflicts specifically associated with rollover recommendations as opposed to non-rollover recommendations." It continued by saying "[n]or does it suggest that every financial incentive can be effectively mitigated through oversight, no matter how severe the conflict of interest. As reflected in the SEC's ban on time-limited sales contests, some incentive structures are too prone to abuse to permit as part of firm policies and procedures."

Helpfully, the DOL also noted that Financial Institutions "could implement conflict mitigation strategies identified by the Financial Institutions' other regulators." For a non-exhaustive list, the DOL singles out the SEC's guidelines utilized in Reg BI:

- avoiding compensation thresholds that disproportionately increase compensation through incremental increases in sales;
- minimizing compensation incentives for employees to favor one type of account over another; or to favor one type of product over another, proprietary or preferred provider products, or comparable products sold on a principal basis, for example, by establishing differential compensation based on neutral factors;
- eliminating compensation incentives within comparable product lines by, for example, capping the credit that an associated person may receive across mutual funds or other comparable products across providers;
- implementing supervisory procedures to monitor recommendations that are: near compensation thresholds; near thresholds for firm recognition; involve higher compensating products, proprietary products or transactions in a principal capacity; or, involve the rollover or transfer of assets from one type of account to another (such as recommendations to roll over or transfer assets in an ERISA account to an IRA) or from one product class to another;
- adjusting compensation for associated persons who fail to adequately manage conflicts of interest; and
- limiting the types of retail customer to whom a product, transaction or strategy may be recommended.

The Final Preamble also states that "the final exemption would not permit Financial Institutions to pay Investment Professionals significantly more to recommend one investment product over another, without putting in place stringent oversight mechanisms to ensure that the compensation structure does not incentivize recommendations that do not adhere to the exemption's standards." The DOL has also taken note of commercial practices that have evolved in the wake of Reg BI, stating that "regulators in the securities and insurance industry have adopted provisions requiring policies and procedures to eliminate sales contests and similar incentives such as sales quotas, bonuses, and non-cash compensation that are based on sales of certain investments within a limited period of time." Without dictating any specific protocol, the DOL nonetheless indicated that a Financial Institution "would be required to carefully consider all performance and personnel actions and practices that could encourage violation of the Impartial Conduct Standards."

Compensation at the Investment Professional level is not the only focus here. The Final Preamble notes that "Financial Institutions also must review and mitigate incentives at the Financial Institution level. Firms should establish or enhance the review process for investment products that may be recommended to Retirement

Investors."[36] It adds that this process "should include procedures for identifying and mitigating conflicts of interest associated with the product or declining to recommend a product if the Financial Institution cannot effectively mitigate associated conflicts of interest." There is also a focus on "interests in proprietary products and limited menus of investment options that generate third party payments." According to the DOL, the purpose of this approach is to ensure "that Financial Institutions will take a broad-based approach to addressing their conflicts of interest, which will provide a strong threshold foundation for the formulation of best interest investment recommendations."[37]

There is also some special color for insurance companies. The DOL indicated that a Financial Institution that was an insurance company would only be responsible for recommendations concerning the sales of its own products and not those of unrelated insurers. The Final Preamble also states: "To comply with the exemption, the insurer could adopt and implement supervisory and review mechanisms and avoid improper incentives that preferentially [independent insurance agents] to push the products, riders, and annuity features that might incentivize Investment Professionals to provide investment advice to Retirement Investors that does not meet the Impartial Conduct Standards." And the DOL in the Final Preamble said its approach was intended to align with standards of the National Association of Insurance Commissioners (the "NAIC") by suggesting that insurance companies can promote oversight [of independent agents] and noted in the Proposed Preamble it could do so by "contracting with [an IMO] to implement policies and procedures designed to ensure that all of the agents associated with the intermediary adhere to the conditions of this exemption" and by "monitoring market prices and benchmarks for their products and services, and remaining attentive to any financial inducements they offer to independent agents that could result in a misalignment of the interests of the agent and his or her Retirement Investor customer." It is not immediately clear how easy it would be for the insurance industry to implement the steps suggested by the DOL, as many comments suggested the burdens for oversight and compliance would be demonstrable throughout insurance independent agent distribution channels.[38]

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[36] The Proposed Preamble had indicated that "Financial Institutions also should consider minimizing incentives at the Financial Institution level."

[37] The DOL demurred with respect to commenters' request to seek clarity on the application of the prudence standards of the Final Exemption to mitigate conflicts as compared to those under securities laws. The DOL stated "it does not have interpretive authority over the federal securities laws, and declines to provide interpretations as to how these standards may differ."

[38] The Final Preamble also indicates that an insurance company may want to negotiate terms with the agent where "the intermediary . . . eliminate[s] compensation incentives across all the insurance companies that work with the intermediary." The intermediary may therefore actually "[assist] each of the insurance companies with their independent obligations under the exemption."

The Final Preamble offers three examples of potentially problematic arrangements that would require oversight and mitigation. One relates primarily to the conflicts involved in providing rollover advice,[39] another relates to potential transaction-based compensation arrangements[40] and a third concerns insurance company business practices.[41]

2. Proprietary Products and Limited Investment Menus of Products

The Final Preamble notes that Financial Institutions can “provide investment advice on proprietary products or on a limited menu, including limitations to proprietary products and products that generate third party payments” but again calls out the fact that “limited menus, particularly if they focus on proprietary products and products that generate third party payments, can result in heightened conflicts of interest.” It is helpful that the DOL indicates that many of these conflicts can be resolved through a disclosure based approach, where the Financial Institution gives “complete and accurate disclosure of their material conflicts of interest in connection with such products or limitations and adopt policies and procedures that are prudently designed to prevent any conflicts of interest from causing a misalignment of the interests of the Financial Institution and Investment Professional with the interests of the Retirement Investor.” The Final Preamble even notes: “Product limitations can serve a beneficial purpose by allowing broker-dealers and associated persons to develop increased familiarity with the products they recommend.”

The Proposed Preamble noted that policies would be satisfied where the Financial Institution decides to recommend third party products when it “prudently determines that its proprietary products or limited menu do not offer Retirement Investors an investment option in their best interest when compared with other investment alternatives available in the marketplace.” In addition, the Final Preamble notes that the focus is on a “reasonable conclusion” about “whether

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[39] “A Financial Institution anticipates that prohibited conflicts of interest related to compensation in its business model will only arise in connection with advice to roll over Plan or IRA assets, because after the rollover, the Financial Institution and Investment Professional will provide ongoing investment advice and be compensated on a level-fee basis. The Financial Institutions decides to seek prohibited transaction relief in connection with rollover conflicts by relying upon the exemption. The Financial Institution's policies and procedures would focus on rollover recommendations. Additionally, the policies and procedures should appropriately address how to document rollover recommendations, consistent with the requirement in Section II(c)(3) to document the reason for a rollover recommendation and why such recommendation is in the best interest of the Retirement Investor.” (Internal citations omitted).

[40] “A Financial Institution intends to receive transaction-based compensation, and generate compensation for the Financial Institution and its Investment Professionals based on transactions that occur in a Retirement Investor's accounts, such as through commissions. The Financial Institution's policies and procedures would address the incentives created by these compensation arrangements.”

[41] “Insurance company Financial Institutions can comply with the new exemption by supervising independent insurance agents, or by creating oversight and compliance systems through contracts with insurance intermediaries. The Financial Institution and/or intermediary would address incentives created with respect to independent agents' recommendations of the Financial Institution's insurance or annuity products.”

the menu of investment options would permit Investment Professionals to provide fiduciary investment advice to Retirement Investors in accordance with the Impartial Conduct Standards."[42]

The DOL in the Final Preamble addressed concerns of commenters who worried that this standard would have the effect of requiring Financial Institutions to compare their product offerings to all available investment alternatives, and that doing so might be inconsistent with Reg BI. In its response, the DOL noted that the Final Exemption:

> does not require Financial Institutions to compare proprietary products with all other investment alternatives available in the marketplace. There is no obligation to perform an evaluation of every possible alternative, including those the Financial Institution or Investment Professional are not licensed to recommend, and the exemption does not contemplate that there is a single investment that is in a Retirement Investor's best interest. The exemption merely provides that Financial Institutions and Investment Professionals cannot use a limited menu to justify making a recommendation that does not meet the Impartial Conduct Standards.[43]

J. Description of Services and Conflicts of Interest

1. Overview

Under the Final Exemption, a Financial Institution must provide a written description of the services to be provided and material conflicts of interest arising out of the services and any recommended investment transaction. The description must be accurate in all material respects. For these purposes, a conflict of interest is "an interest that might incline a Financial Institution or Investment Professional – consciously or unconsciously – to make a recommendation that is not in the 'Best Interest' of the Retirement Investor."

The DOL stated that disclosures "should be in plain English, taking into consideration Retirement Investors' level of financial experience," clarified that it need not be in any one place and confirmed that other regulatory disclosures may possibly suffice. Importantly, the DOL also notes that the disclosures are not intended to "create a private right of action as between a Financial Institution or Investment Professional" and that the DOL "does not believe the exemption would do so."[44] The Proposed Preamble indicated that Proposed Exemption did "not require specific

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[42] This approach seems more flexible than that of the BIC Exemption (particularly that of the BIC Exemption's "without regard to" provision) so long as the Financial Institution and Investment Professional do not in fact place the financial or other interest of the Investment Professional, Financial Institution or any affiliate, related entity or other party ahead of the interests of the Retirement Investor, or subordinate the Retirement Investor's interests to their own. Certain institutions may have been concerned about maintaining offerings that included both affiliated and third-party products, except under very narrow circumstances. Financial Institutions considering an "open architecture" or "complementary" Investment Advice business model may still need carefully to consider the challenges that may be inherent at the institutional level in offering affiliated and third party products and services as well as at the Investment Professional level - although, as indicated in text, the Impartial Conduct Standards might be more flexible than the corresponding standards of the BIC Exemption.

[43] Insurance industry participants expressed concern that Investment Professionals that are insurance-only agents might then be required to compare annuities against securities, which they are not be licensed to sell (which would potentially cause compliance issues under state securities laws).

[44] The Proposed Preamble notes that the *Chamber of Commerce* case concluded that "the [DOL] did not have the authority to include certain contractual requirements in the new exemptions granted as part of the 2016 fiduciary rulemaking. The [DOL] is mindful of this holding and has not included any contract requirement [in the Proposed Exemption]."

disclosures to be tailored for each Retirement Investor or each transaction as long as a compliant disclosure is provided before engaging in the particular transaction for which the exemption is sought."

A number of commenters raised concerns about the timing of disclosure and suggested that the requirements be better aligned with those of Reg BI.[45] The DOL decided to leave the language otherwise unchanged from the Proposed Regulation.

2. Section 408(b)(2) Disclosure

The DOL confirmed that the information required by the Final Exemption may be included with or accompanied by the disclosure provided to responsible Plan fiduciaries under Section 408(b)(2) of ERISA, and that such disclosures may satisfy, in whole or in part, the disclosure obligations under the Final Exemption where the fiduciary of the Plan is the Retirement Investor receiving advice. However, in the context of participant-directed Plans "if advice is provided to individual Plan participants, disclosure to the Plan fiduciary will not satisfy the disclosure obligation under the exemption." In such cases, the Retirement Investor is the individual participant receiving the investment advice.

The DOL specifically reminded firms that "the requirements under this exemption are not merely a 'check-the-box' activity. Rather, it is imperative that Financial Institutions engage in a careful analysis to identify their material conflicts so that they and their Investment Professionals are able to provide accurate disclosures and make recommendations that satisfy the best interest standard." It further cautioned that, "although disclosures are required under the statutory exemption in ERISA section 408(b)(2) and the accompanying regulation at 29 CFR 2550.408b-2, the 408(b)(2) disclosures do not require an accompanying focus on conflict mitigation."[46]

3. Conflicts: Misalignment and Mitigation

The DOL stressed in the Final Preamble that "conflict mitigation is not the sole purpose of disclosure . . .. [It] also promotes consumer choice and permits Retirement Investors to enter into a professional relationship and make investments with a clear understanding of the nature of that relationship and of the investments' salient features." These, the DOL advises "are important values, independent of their impact in mitigating conflicts." The DOL also clarified that the "materiality" standard to be used is the one articulated in the securities rules for purposes of Reg BI.[47] Section VI identifies particular areas for consideration associated with policies and procedures intended to eliminate or mitigate conflicts.

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[45] Reg BI permits disclosure "prior to ***or at the time of*** the recommendation" giving rise to the Investment Advice. [Emphasis added].

[46] See also Steven W. Rabitz, Marissa J. Holob and Danielle S. Motelow, On Being Reasonable: DOL's Interim Final Fee Disclosure Rules, 37 *Pensions & Benefits Reporter* 1758 (Oct. 10, 2010) (including a detailed compliance chart); Andrew L. Oringer and Steven W. Rabitz, Is That Your (Interim) Final Answer? New Disclosure Rules Under ERISA To Impact Many Hedge Funds, *Hedge Fund Law Report* **(**Aug. 20, 2010).

[47] Specifically, the DOL confirmed that the standard for materiality in connection with this obligation is "consistent with" the one the Supreme Court articulated in *Basic, Inc.* v. *Levinson,* 485 U.S. 224 (1988), and "in the context of this exemption, the standard of materiality is centered on those facts that a reasonable Retirement Investor, as defined in the exemption, would consider important."

K. Annual Retrospective Review

1. In General

The Final Exemption offers a review-and-certification condition that was not present in the BIC Exemption or the PrTE. The DOL believes that "Financial Institutions must also monitor Investment Professionals' conduct to detect advice that does not adhere to the Impartial Conduct Standards or the Financial Institution's policies and procedures." The Final Exemption thus would require an annual review "reasonably designed to assist the Financial Institution in detecting and preventing violations of, and achieving compliance with, the Impartial Conduct Standards and the policies and procedures governing compliance with the exemption." The annual review contemplated would be required to be completed no later than six months following the end of the period covered by the review.

In the Final Preamble, the DOL stated that "the exemption does not specify that a compliance officer must be appointed." Nevertheless, the DOL "envisions that Financial Institutions will, as a practical matter, assign a compliance role to an appropriate officer." The DOL stated that in that case it "envisions that the review would involve testing a sample of transactions to determine compliance" and that the "methodology and results of the retrospective review" would be "reduced" to a report. For large Financial Institutions that conduct large numbers of transactions each year, the DOL stated that "sampling may not be the sole means of testing compliance, but it is an important and necessary component of any prudent review process, and should be performed in a manner designed to identify potential violations, problems, and deficiencies that need to be addressed."

A number of commenters expressed reservations about what they regarded as an overly "prescriptive" requirement. The DOL responded by stating that "Financial Institutions will be free to design the review process in the context of their own business models and the particular conflicts of interest they face." In declining a request to provide an express safe harbor for FINRA compliance, the DOL stated "that rule is aimed at reviewing compliance with FINRA rules, not the Financial Institution's separate compliance with the terms of this exemption."

The DOL expressed concern that "[s]ome Financial Institutions may take the position that adoption of policies and procedures is sufficient, without paying attention to whether the policies and procedures are prudently designed and whether Investment Professionals are complying with the policies and procedures and the Impartial Conduct Standards." The DOL believes the requirement:

properly focuses the Financial Institution's assessment of the ongoing effectiveness of the policies and procedures, the periodic testing of those policies and procedures, and the need to make modifications to the extent they are not working. A strong process to review the effectiveness of the Financial Institution's policies and procedures and to make course corrections as necessary is critical to the protection of Retirement Investors affected by the exemption.

2. Certification

Under the Proposed Exemption, the above-referenced compliance report would be delivered to the institution's chief executive officer (the "CEO") or equivalent officer, who would then be required to certify annually that:

- the CEO had reviewed the report of the retrospective review;
- the Financial Institution has in place policies and procedures prudently designed to achieve compliance with the conditions of this exemption; and

- the Financial Institution has in place a prudent process to modify such policies and procedures as business, regulatory and legislative changes and events dictate, and to test the effectiveness of such policies and procedures on a periodic basis, the timing and extent of which is reasonably designed to ensure continuing compliance with the conditions of this exemption.[48]

When proposed, many Financial Institutions objected to the requirements associated with the retroactive report. In addition, it was not immediately clear what the precise effect would have been under the terms of the Proposed Exemption if the annual review identified deficiencies.

The Final Exemption retains this requirement but permits a Financial Institution's senior executive officers to certify the report. The permitted officers include any of the following: the chief compliance officer, the CEO, the president, the chief financial officer or one of the three most senior officers of the Financial Institution.

L. Consequences of Adverse Findings

In the Final Preamble, the DOL stated a "Financial Institution remains liable for a prohibited transaction associated with the transaction for which there was a failure" that was disclosed in the report. This approach is in contrast to the approach that the DOL has sometimes used in the past.[49]

M. Error Correction

The Release adds a new Section II(e) to the Final Exemption under which Financial Institutions will be able to correct certain violations of the Final Exemption. Under new Section II(e), the DOL will not consider a non-exempt prohibited transaction to have occurred due to a violation of the Final Exemption's conditions, provided that:

- the violation did not result in investment losses to the Retirement Investor or the Financial Institution made the Retirement Investor whole for any resulting losses;
- the Financial Institution corrects the violation and notifies the DOL within 30 days of correction;
- the correction occurs no later than 90 days after the Financial Institution learned of the violation or reasonably should have learned of the violation; and

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[48] As the DOL acknowledged in the Proposed Exemption Preamble, FINRA already has certification and compliance protocols under its Rule 3130, which requires a broker-dealer's CEO (or equivalent) to certify annually, among other things, that the firm has in place processes to establish, maintain, review, test and modify written compliance policies and written supervisory procedures reasonably designed to achieve compliance with applicable FINRA rules, MSRB rules and federal securities laws and regulation. The DOL believed at the time of the Proposed Exemption, however, that the additional requirement would allow institutions to "find more effective ways to ensure that Investment Professionals are providing investment advice in accordance with the Impartial Conduct Standards, and to correct any deficiencies in existing policies and procedures."

[49] In at least one prominently used class exemption, evidence of a deficiency in the report does not itself vitiate the application of the exemption. Cf. Part V of PTCE 84-14 which calls for an annual review of certain provisions of the exemption by an "auditor" where the investment manager (or "QPAM") relying on the exemption manages assets of a Plan that is sponsored or maintained by the manager or certain affiliates. The DOL in that exemption noted that "an adverse finding in the auditor's report would not, in itself, render the exemption unavailable for any transaction engaged in by the QPAM on behalf of the Plan. The Department cautions that the failure of the QPAM to take appropriate steps to address any adverse findings in an unsatisfactory audit would raise issues under ERISA's fiduciary responsibility provisions."

- the Financial Institution notifies the persons responsible for conducting the retrospective review during the applicable review cycle, and the violation and correction is specifically set forth in the written report of the retrospective review.

This provision is in some ways reminiscent of Section 408(b)(20) of ERISA and Section 4975(d)(3) of the Code, which provide an exemption from the prohibited transaction rules of Section 4975 of the Code arising out of certain violations of the related-party prohibited transaction rules of Section 406(a) of ERISA (and, as applicable, the analogous provisions of the Code) if the violation is corrected by the end of the 14-day period beginning on the date on which the underlying transaction was discovered or reasonably should have been discovered. Here, however, the 90-day correction period is much longer than the statutory 14-day period, and, in contrast to the 14-day exemption, the Final Exemption requires, as a condition to its use, a formal notice of correction within 30 days of the correction, and the violation and correction must be set forth in the compliance report.[50]

The Final Preamble states that the Final Exemption's correction provision is predicated on the belief that it "will provide Financial Institutions with an additional incentive to take the retrospective review process seriously, timely identify and correct violations, and use the process to correct deficiencies in their policies and procedures, so as to avoid potential future penalties and lawsuits." The DOL specifically cautioned that "[a]lthough many commenters cited minor or technical violations [for which they requested, when acting in good faith, to avoid loss of the exemption for violations of the conditions], the Department does not view violations of any condition of the exemption as necessarily minor or technical."

N. Disqualification

Like the Proposed Exemption, the Final Exemption contains a disqualification provision in which "the grounds for ineligibility would involve certain criminal convictions or certain egregious conduct with respect to compliance with the exemption." The grounds include any disqualification event under Section 411 of ERISA "arising out of such person's provision of investment advice to Retirement Investors." The disqualification by reason of a conviction under Section 411 of ERISA would vitiate the application of the Final Exemption to non-ERISA IRAs, which, while subject to the prohibited transactions of the Code, are not subject to ERISA.[51] The DOL noted in the Final Preamble that it "intends that the phrase 'arising out of the provision of advice to Retirement Investors' be interpreted broadly to include, for example, a Financial Institution or Investment Professional embezzling money from the account of a Retirement Investor to whom they provide or provided investment advice."

The conviction of an individual of a crime that is convicted under Section 411 is an immediate disqualification event.[52] However, a Financial Institution may "petition" within 10 days of a criminal conviction giving rise to the unavailability of the Final Exemption. The DOL would seek to determine whether or not "continued reliance on the exemption would not be contrary to the purposes of the exemption." Because of the 10-day requirement, the DOL noted that "it does not expect the Financial Institution to set forth its entire position or argument in its initial petition." But it does allow

[50] The 30-day notice requirement apparently stems from the DOL's separate "investment advice" exemption under Section 408(g) of ERISA. See 29 CFR 2550.408g-1.

[51] Rejecting arguments that the *Chamber of Commerce* decision precluded such a reach, the DOL stated that "[d]espite the availability of action under ERISA section 411, it is appropriate to condition further reliance on the broad relief in the exemption more directly on the lack of such convictions, without the Department having to take further action."

[52] Most Financial Institutions already have existing protocols pursuant to which convictions similar to (and broader than those described in) Section 411 constitute grounds for termination of employment.

the "opportunity to be heard in person," which will be "limited to one in-person conference unless the Department determines in its sole discretion to allow additional conferences."[53] A Financial Institution may be presented with such an "opportunity," but "an Investment Professional will automatically become ineligible after a criminal conviction described in ERISA Section 411 arising out of provision of advice to Retirement Investors." The Final Exemption provides that its determination as to whether to grant the petition will be based solely on its discretion, although it describes the factors it expects to consider.

The disqualification triggers would apply not only if the Financial Institution was itself responsible for the purported violations, but also if any of their "control group" affiliates under Section 414(b) and (c) of the Code (the Proposed Exemption had referenced an 80% ownership chain) was guilty. The criminal-disqualification event would only apply with respect to a criminal conviction arising out of an entity's provision of investment advice to Retirement Investors. The disqualification would last for 10 years.

The Final Exemption is also be unavailable where the institution receives a "written ineligibility notice from the Director of the Office of Exemption Determinations that it (i) engaged in a systematic pattern or practice of violating the conditions of the exemption; (ii) intentionally violated the conditions of this exemption; or (iii) provided materially misleading information to the DOL in connection with the Investment Professional's or Financial Institution's conduct under the exemption." Prior to issuing a written ineligibility notice, the DOL will issue a written warning to the Investment Professional or Financial Institution, as applicable, identifying specific conduct implicating the notice, and providing a six-month opportunity to cure. At the end of the six-month period, if the DOL determines that the conduct persists, it will provide the Investment Professional or Financial Institution with the opportunity to be heard, in person or in writing or both, before the DOL issues the written ineligibility notice under protocols similar to those described with respect to crimes described in Section 411 of ERISA. The Final Exemption is still available for a "one-year winding down period" for Financial Institutions in the case of a conviction but would apparently be lost immediately upon notice from the DOL concerning other "ineligibility."

Commentators expressed concern under these disqualification provisions that, with the stakes so high, the standards are vague, and also noted that the determination as to whether the petition will be ultimately granted under either the Section 411 of ERISA or these additional disqualification conditions is based solely on the DOL's discretion. The DOL responded that the Final Exemption:

clearly states that an entity will be provided with a statement of the specific conduct at issue and will be provided with a six-month period to cure the conduct. Commenters expressed concern that the Department did not provide a specific number of violations a Financial Entity may commit before such violations become egregious (and, therefore, disqualifying). The Department has crafted a principles-based exemption and does not consider it appropriate to set forth all of the possible ways in which an entity may engage in egregious conduct. The Department continues to believe that providing entities with specific notice and an opportunity to cure better balances the issues at stake.

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[53] In determining whether to grant the petition, the DOL said it will consider "the gravity of the offense, the relationship between the conduct underlying the conviction and the Financial Institution's system and practices in its retirement investment business as a whole; the degree to which the underlying conduct concerned individual misconduct, corporate managers, and/or policy; how recently the underlying conduct occurred and any related lawsuit; remedial measures taken by the Financial Institution upon learning of the underlying conduct; and such other factors as the Department determines in its discretion are reasonable in light of the nature and purposes of the exemption." The DOL said it would consider "whether any extenuating circumstances indicate" the grant of a petition.

Commenters noted that other PTCEs that deal with conflicts of interest do not have disqualification provisions of the type mandated by the Final Exemption.[54] In response, the DOL stated that it did not think it was "problematic" and that "[i]t is the responsibility of the Department to craft exemptions to ensure they are protective of and in the interests of plans and plan participants." In addition, the DOL noted that it "intends to use its investigative, enforcement, and referral authority to enforce compliance with the exemption, and it will impose ineligibility on Financial Institutions or Investment Professionals that demonstrate the type of compliance issues described in the exemption."

II. DOL Commentary on the Five-Part Test

A. Background

Under the 1975 Rule, for advice to constitute Investment Advice, the advice must be given by one who is not otherwise an ERISA fiduciary in a situation in which the investment professional or institution:

- renders advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing, or selling securities or other property;
- on a regular basis;
- pursuant to a mutual agreement, arrangement, or understanding with the Plan, Plan fiduciary or IRA owner;
  - that the advice will serve as a primary basis for investment decisions with respect to Plan assets; and
  - that the advice will be individualized based on the particular needs of the Plan.

An entity or other person that renders advice that meets the Five-Part Test to a Plan and receives a fee or other compensation (direct or indirect), is a Plan fiduciary.

While the Release makes no changes to the text of the 1975 Rule, the DOL provides important color on the DOL's current thinking about key elements of the Five-Part Test. Referring to the revocation of the Deseret Letter (which had suggested that advice to take a distribution and roll assets out of a plan to an IRA does not generally constitute investment advice) to address the "potential conflicts of interest related to rollovers from Title I Plans to IRAs," the Final Preamble notes that "Title I and the Code prohibit an investment advice fiduciary from receiving fees resulting from investment advice to Title I Plan participants to roll over assets from the plan to an IRA." The DOL specifically stated its belief that a rollover "can represent a lifetime of savings, and often comprise[s] the largest sum of money a worker has at retirement." This appears to be a major driver for the interpretation.

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[54] See, e.g., PTCE 77-4 (investments in open-end registered mutual funds); Prohibited Transaction 84-24 (transactions involving insurance agents, brokers, pension consultants, insurance and investment companies, and investment company principal underwriters); PTCE 86-128 (agency transactions in securities with a broker-dealer affiliated with a fiduciary asset manager). In connection with relief from the prohibited transaction rules of Section 406(a) of ERISA, Part I(g) of PTCE 84-14 does set forth additional anti-criminal requirements applicable to QPAMs.

The DOL's interpretations of the Five-Part Test in the Final Preamble, while expansive in scope, are arguably not as expansive as the changes that had been made by the 2016 Rule before it was vacated.[55] Indeed, the DOL rejected those commenters who suggested that the Proposed Exemption "effectively reinstate[d] the 2016 fiduciary rule." In the Proposed Preamble, however, because the language of the 1975 Rule was not there proposed to be changed, the DOL did not include any express "hire me" comfort – although as discussed below the Final Preamble does address this in response to commentators' concerns. A number of other features that were incorporated into the 2016 Rule, such as the "sellers' exception" and "institutional investor" exception, also do not reemerge in the Release, because the Release, unlike the 2016 Rule, does not seek to alter the language of the 1975 Rule. Indeed, the DOL itself expressly noted in the Final Preamble that the Proposed Preamble "did not amend the 1975 regulation as the 2016 fiduciary rule sought to undertake."

The Final Preamble highlights its discussion of each of the prongs of the Five-Part Test as a "Facts and Circumstances Analysis." It also indicates that this is the DOL's "Final Interpretation" with respect to the aspects of the Five-Part Test it seeks to cover. The Release also calls attention to commenters who referred to Executive Order 13891, which cautions agencies from inappropriately effecting rulemaking outside of the rulemaking process of the Administrative Procedure Act.[56] The DOL responded that, "assuming the preamble interpretation is [even] guidance regulated by the Executive Orders, the proposed preamble statement provided notice of the interpretation and solicited public comments on it." In this response, the Release refers back to the Proposed Preamble's requests for comment "on all aspects of this part of its [Proposed Exemption and accompanying Release] proposal."[57]

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[55] For example, the reach of the 2016 Rule was so potentially broad that the DOL believed it appropriate to state expressly that the 2016 Rule did not generally convert ordinary-course attempts to be hired as a service provider (i.e., so-called "hire me" communications) into fiduciary conduct. See 81 Fed. Reg. 20,968 (Apr. 8, 2016).

[56] Exec. Order 13891 (Oct. 9, 2019). The Release also refers to commentators who raised concerns with respect to Executive Order 13892, which states:

> [A]gencies have sometimes used [the authority to issue guidance other than in the form of a regulation (or similar guidance)] inappropriately in attempts to regulate the public without following the rulemaking procedures of the [Administrative Procedure Act]. Even when accompanied by a disclaimer that it is non-binding, a guidance document issued by an agency may carry the implicit threat of enforcement action if the regulated public does not comply. . .. Agencies may impose legally binding requirements on the public only through regulations and on parties on a case-by-case basis through adjudications, and only after appropriate process, except as authorized by law or as incorporated into a contract.

[57] It is well-settled that an agency's statement in the preamble of a rule is not law nor does it overcome regulatory text to the contrary. See *Wy. Outdoor Council v. U.S. Forest Srvc.*, 165 F.3rd 43, 53 (D.C. Cir. 1999) ("[L]anguage in the preamble of a regulation is not controlling over the language in the regulation itself."). Such statements, however, may be given substantial deference, unless "clearly erroneous." "A court need not find that the agency's construction is the only possible one, or even the one that the court would have adopted in the first instance. *Belco Petroleum Corp. v. FERC*, 589 F.2d 680, 685 (D.C. Cir. 1978); *Cold Springs Granite Co. v. Federal Mine Safety and Health Review Comm'n*, 98 F.3d 1376, 1378 (D.C. Cir. 1996) ("The Secretary's plausible and sensible reading of his own regulation would prevail even if the company had presented an equally plausible alternative construction, which it has not."). So long as an agency's interpretation of ambiguous regulatory language is reasonable, it should be given effect. See *Martin v. Occupational Safety Health Review Comm'n*, 499 U.S. 144, 150 (1991). Thus, "in a competition between possible meanings of a regulation, the agency's choice receives substantial deference." *Rollins Envtl. Servs.* (NJ) Inc. v. EPA, 937 F.2d 649, 652 (D.C. Cir. 1991)." Furthermore, one court stated that a preamble may serve as "evidence of an agency's contemporaneous understanding of its proposed rules" and "it may serve as a source of evidence concerning contemporaneous agency intent." *Wy. Outdoor Council v. U.S. Forest Srvc.,* 165 F.3rd 43, 53 (D.C. Cir. 1999) (citing *Association of Am. Railroads v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977)).[Emphasis added].

B. A Regular Basis

The DOL in the Proposed Preamble presented new thinking regarding the way in which the regular-basis prong of the Five-Part Test should be viewed. The DOL's thinking, which was given further expression in the Final Preamble, was largely outlined in the context of the DOL's discussion of rollover advice. However, the potential implications may be broader than just in the context of rollovers, and the effect of the interpretations offered by the DOL could be extremely wide-ranging and significant.

C. Mutual Understanding

1. In General

The DOL in the Proposed Preamble noted that the "determination of whether there is a mutual agreement, arrangement, or understanding that the investment advice will serve as a primary basis for investment decisions is appropriately based on the reasonable understanding of each of the parties, if no mutual agreement or arrangement is demonstrated." [Emphasis in original]. The Preamble to the Final Regulation similarly states: "[F]iduciary status is determined by the facts as they exist at the time of the recommendation, including whether the parties, at that time, mutually intend an ongoing advisory relationship." Later in the Final Preamble, the DOL uses the Fifth Circuit case to suggest that a "confidential and intimate" relationship indeed helps to establish the requisite mutual understanding.[58]

Interestingly, the Preamble to the Final Regulation also states:

> The Department believes that Financial Institutions and Investment Professionals who meet the five-part test and are investment advice fiduciaries relying on this exemption should clearly disclose their fiduciary status to their Retirement Investor customers. By making this disclosure, they provide important clarity to the Retirement Investor and put themselves in the best possible position to meet their fiduciary obligations and comply with the exemption. By setting clear expectations and acting accordingly, the mutual understanding prong of the five-part test should seldom be an issue for parties relying on the exemption." [Emphasis added].

Later in in the Final Preamble, the DOL noted that it believes that its interpretation "will not deprive parties of the ability to define the nature of their relationship" so long as there is consistency between words and actions. The Final Preamble also clarifies that, "if a Financial Institution or Investment Professional does not want to assume a fiduciary relationship or create misimpressions about the nature of its undertaking, it can clearly disclose that fact to its customers up-front, clearly disclaim any fiduciary relationship, and avoid holding itself out to its Retirement Investor customer as acting in a position of trust and confidence." Thus, "if no mutual agreement or arrangement [such as written statements and other corroborative behavior] is demonstrated" the reasonable understanding of the parties will be determinative.

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[58] "Of particular importance, in the Department's view, is the court's approving discussion that the SEC has "repeatedly held" that '[t]he very function of furnishing [investment advice for compensation]—learning the personal and intimate details of the financial affairs of clients and making recommendations as to purchases and sales of securities—cultivates a confidential and intimate relationship.'" The DOL's interpretation comes well after 45 years following its initial pronouncement. During that time there has been no meaningful gloss, color or interpretation from the DOL with respect to the Five-Part Test.

2. Evidentiary Impact of Written Documentation

The DOL stated in the Proposed Preamble that "written statements disclaiming a mutual understanding or forbidding reliance on the advice as a primary basis for investment decisions are not determinative, although such statements are appropriately considered in determining whether a mutual understanding exists." The Final Preamble repeats this concept, and further states:

> A financial services provider should not, for example, expect to avoid fiduciary status through a boilerplate disclaimer buried in the fine print, while in all other communications holding itself out as rendering best interest advice that can be relied upon by the customer in making investment decisions. While financial services professionals may contractually disclaim engaging in activities that trigger elements of the five-part test, such as rendering advice that can be relied upon as a primary basis for the Retirement Investor's investment decisions, they must do so clearly and act accordingly to demonstrate that there is in fact no mutual agreement, arrangement, or understanding to the contrary.

The DOL went on to say that "after consideration of the comments, the Department also intends to consider marketing materials in which Financial Institutions and Investment Professionals hold themselves out as trusted advisers, in evaluating the parties' reasonable understandings with respect to the relationship."

3. Consistency

In all events, however, it is not only what is said, but what is done: the behavior of the parties will be equally critical. As the Final Preamble states: "[P]arties can make clear in their communications that they do not intend to enter into an ongoing relationship to provide investment advice" provided they act "in conformity with that communication . . .." The Final Preamble goes on to say that, if "financial professionals" wish to "contractually disclaim engaging in activities that trigger elements of the five part test" they "must do so clearly and act accordingly to demonstrate that there is in fact no mutual agreement, arrangement, or understanding to the contrary."

4. One-Time Sales; Periodic Check-Ins

Separately, the DOL in the Proposed Preamble highlighted that a "one-time sales transaction, such as the one-time sale of an insurance product, does not by itself confer fiduciary status under ERISA or the Code, even if accompanied by a recommendation that the product is well-suited to the investor and would be a valuable purchase." However, the DOL cautioned that "insurance agents may have or contemplate an ongoing advice relationship with a customer," citing as an example that "agents who receive trailing commissions on annuity transactions may continue to provide ongoing recommendations or service with respect to the annuity." In addition, as the DOL appears to gravitate to "objective" markers of a mutual agreement to establish a trusted individualized advice relationship, "parties agreeing to check-in periodically on the performance of the customer's post-rollover financial products" is specifically called out.[59]

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[59] In connection with its cost-benefit analysis of the Proposed Exemption, the DOL observed that half of the rollovers it studied were "self-directed" (i.e., effected without the assistance of a financial professional). While the DOL stated that "it is more than reasonable . . . that the advice provider would anticipate that advice about rolling over Plan assets would be a primary basis for . . . investment decisions" [internal quotations omitted], the DOL also noted that, of the rollovers that were handled by financial professionals and thus were not self-directed, there were at least some that "likely involved financial services professionals who were not fiduciaries under the Five-Part Test." The DOL stated that "the actual number of rollovers affected by this Proposed Exemption is likely lower than" the number the DOL assumed for purposes of the cost-benefit analysis.

D. Primary Basis and Individualized Advice

In the Preamble to the Proposed Regulation, the DOL specifically reminded the reader that the primary basis prong of the Five-Part Test concerns advice that forms "a" primary basis, not necessarily "the" primary basis, for an investment decision. The Preamble to the Final Regulation repeats this and rejects comments that suggest otherwise. As the Preamble notes, "[c]ommenters said the interpretation is at odds with the common understanding of the word 'primary' and will result in an unwarranted expansion of the five-part test."

The DOL in the Proposed Preamble stated that, "[w]hen financial service professionals make recommendations to a Retirement Investor, particularly pursuant to a best interest standard such as the one in the [Reg BI], or another requirement to provide advice based on the individualized needs of the Retirement Investor, the parties typically should reasonably understand that the advice will serve as at least a primary basis for the investment decision."[60] This interpretation may have significance for broker-dealers that are subject to Reg BI and other institutions that are subject to another "best interest" or similar standard of care.[61] Indeed, the DOL's formulation opens up the possibility that proceeding in accordance with Reg BI or "another requirement" could lead to different outcomes for similarly

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[60] Under Reg BI, recommendations to retail customers may no longer just be "suitable" for the client (and the Suitability Rule expressly does not apply if Reg BI applies). Instead, recommendations to retail customers must be in the retail customer's "best interest." Under this standard, broker-dealers cannot put their interests ahead of the interests of the retail customer. 84 Fed. Reg. 33,374 (July 12, 2019). Whether a communication is a "recommendation" such that the Reg BI standard of care is triggered is generally dependent on the applicable facts and circumstances. In the case of Reg BI, it may not always be the case that advice governed by Reg BI is individualized. Although the SEC, and FINRA with respect to the Suitability Rule, has not defined the term "recommendation," they have offered guidance for determining whether particular communications by broker-dealers and their associated persons are recommendations. For example, in its Notice to Members 01-23, FINRA stated that a communication will be deemed to be a recommendation if "given its content, context, and manner of presentation - a particular communication from a broker/dealer to a customer reasonably would be viewed as a 'call to action,' or suggestion that the customer engage in a securities transaction. . . . [T]he more individually tailored the communication to a specific customer or a targeted group of customers about a security or group of securities, the greater likelihood that the communication may be viewed as a 'recommendation.'" [Footnote incorporated into text]. Notice to Members 01-23 further states that there is a recommendation when "[a] member sends its customers an e-mail stating that customers should be invested in stocks from a particular sector (such as technology) and urges customers to purchase one or more stocks from a list with 'buy' recommendations." FINRA has also noted that an explicit recommendation to hold a particular security is tantamount to a "call to action" in the sense of a suggestion that the customer stay the course with the investment, and that a communication with customers to generally use a bond ladder would similarly be treated as a recommendation for these purposes. FINRA further noted that "recommendations to customers to invest in more specific types of securities, such as high dividend companies or the 'Dogs of the Dow'" would also be regarded as a recommendation that triggered suitability. FINRA Rule 2111 (Suitability) FAQ (available at https://www.finra.org/rules-guidance/key-topics/suitability/faq). Thus, it may well be the case that a communication can be a recommendation that is based on the particular retail customer's investment profile, as required by the Care Obligation of Reg BI, but the recommendation itself may be of general applicability to a number of customers of the broker-dealer.

[61] For example, FINRA's Rule 2111 imposes a suitability obligation on recommendations that are not otherwise subject to Reg BI.

situated institutions.[62] Potentially further complicating the analysis that results from the DOL's view, the determination of whether some non-ERISA standard is triggered is itself often facts-and-circumstances dependent. As just one example, there is no bright-line test for purposes of determining whether there is a recommendation for Reg BI purposes.[63]

Commenters to the Proposed Preamble "asserted that the statement [in the Proposed Preamble that the provision of investment advice that stated that 'the parties typically should reasonably understand that the advice will serve as at least a primary basis for the investment decision'] is inconsistent with the fact that the broker-dealer and insurance regulatory regimes do not incorporate a fiduciary standard."[64] The DOL rejected the request to "confirm that broker-dealers can disclaim a mutual agreement, arrangement or understanding in cases in which they provide investment recommendations that comply with Regulation Best Interest," stating:

> The fact that a financial services professional is not considered a fiduciary under other laws, such as securities law or insurance law, is not a determinative factor under the five-part test. The focus is on the facts and circumstances surrounding the recommendation and the relationship, including whether those facts and circumstances give rise to a mutual agreement, arrangement, or understanding that the advice will serve as a primary basis for an investment decision. While satisfying the other laws may implicate parts of the test, fiduciary status applies only if all five prongs are satisfied. [Emphasis added].

The word "implicate" is somewhat vague, and may not necessarily mean that satisfying one or more of these other (non-ERISA) standards of conduct rules is itself outcome determinative on the question of whether any of the prongs of the Five-Part Test have been met. Elsewhere in the Final Preamble, the DOL appears to reconfirm its earlier interpretation by focusing on the nature of an ongoing advisory relationship, noting that "the updated conduct

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[62] Identical advice could be Investment Advice for a provider that is subject to "another (non-ERISA) requirement" for one customer, and not constitute Investment Advice for that provider (or some other provider) where such (non-ERISA) requirement does not apply.

Some commenters "expressed concern about interaction with other laws, including the possibility that the [fiduciary] acknowledgment could be considered to create a 'contractual fiduciary duty' under Massachusetts securities law which could impose additional requirements on broker-dealers." The Massachusetts Securities Division amended its regulations for broker-dealers to apply a fiduciary conduct standard, under which broker-dealers and their agents must "[m]ake recommendations and provide investment advice without regard to the financial or any other interest of any party other than the customer." See 950 Mass. Code Regs. 12.204 & 12.207 as amended effective March 6, 2020.

The Release to the Proposed Exemption also referenced the New York State Department of Financial Services Insurance Regulation 187, 11 NYCRR 224, First Amendment, effective August 1, 2019, and NAIC Takes Action to Protect Annuity Consumers, available at https://content.naic.org/article/news_release_naic_takes_action_protect_annuity_consumers.html.

[63] The financial-services industry, with guidance from FINRA, has adopted interpretations and policies for determining when communications are recommendations. Would these practices be relevant to whether or not the "a primary basis" prong of the Five-Part Test has been met? If a broker-dealer is overly inclusive in determining whether communications are "recommendations" for purposes of Reg BI, should that determine whether the "a primary basis" prong of the Five-Part Test has been met?

[64] NAIC Suitability in Annuity Transactions Model Regulation. Iowa and Arizona have adopted principles of the NAIC Model Regulation. Iowa Code § 507B.48 (2020) (available at https://iid.iowa.gov/sites/default/files/bi_af.pdf); Arizona Senate Bill 1557 (2020), available at www.azleg.gov/legtext/54Leg/2R/laws/0090.pdf. The New York State Department of Financial Services also amended its insurance regulations to establish a best interest standard in connection with life insurance and annuity transactions. New York State Department of Financial Services Insurance Regulation 187, 11 NYCRR 224, First Amendment, effective August 1, 2019, for annuity transactions

standards adopted by the SEC and the NAIC reflect an acknowledgment of the fact that broker-dealers and insurance agents commonly provide investment and annuity recommendations to their customers" and "[t]o the extent these professionals engage in an ongoing advice relationship, they will likely satisfy the regular basis prong."

The DOL noted that it "has not provided a safe harbor in this exemption for compliance with other regulators' conduct standards. The Department also declines in this exemption to set forth evidentiary burdens applied to establish a mutual understanding, including any presumptions as one commenter suggested. That question is better left to development by the courts or, if necessary, future guidance or rulemaking." The DOL also stated:

> The Department believes that general alignment with the other regulators' conduct standards is beneficial in allowing for the development of compliance structures that lack complexity and unnecessary burden. The Department has not, however, offered a safe harbor based solely on compliance with regulatory conduct standards under federal or state securities laws. The Department disagrees with commenters' arguments that the failure to do so will create a redundant, cost-ineffective regime, or one that could create unexpected liabilities at the edges. This exemption is offered as a deregulatory option.

In this regard, it is noted that the SEC declined to adopt a fiduciary standard under the Investment Advisers Act of 1940 for broker-dealers. Indeed, it cited reduced investor choice following the imposition of a fiduciary standard under the 2016 Rule as a reason for deciding not to adopt a fiduciary standard for broker-dealers. The SEC stated: "Our concerns about the ramifications for investor access, choice, and cost from adopting either of these approaches are not theoretical. With the adoption of the now vacated [2016 Rule] there was a significant reduction in retail investor access to brokerage services, and we believe that the available alternative services were higher priced in many circumstances."[65] In the context of explaining the best interest standard utilized in the Final Exemption the DOL noted , however, that it "disagrees with the suggestion that the best interest standard is not a 'true' fiduciary standard."

It is possible that the DOL may be of the view that merely complying with Reg BI or another similar standard could make a broker-dealer (or other regulated entity under a similar applicable standard) more likely to be characterized as

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65 When adopting Reg BI, the SEC expressly "declined to subject broker-dealers to a wholesale and complete application of the existing fiduciary standard under the [Investment Advisers] Act [of 1940] because it is not appropriately tailored to the structure and characteristics of the broker-dealer business model (i.e., transaction-specific recommendations and compensation), and would not properly take into account, and build upon, existing obligations that apply to broker-dealers, including under FINRA rules." The SEC also noted that it "believes (and our experience indicates), that [the adoption of a fiduciary standard] would significantly reduce retail investor access to differing types of investment services and products, reduce retail investor choice in how to pay for those products and services, and increase costs for retail investors of obtaining investment recommendations." The SEC specifically "declined to craft a new uniform standard that would apply equally and without differentiation to both broker-dealers and investment advisers" noting that "we do not believe that applying the existing fiduciary standard under the Investment Advisers Act of 1940 to broker-dealers or adopting a new uniform fiduciary standard of conduct applicable to both broker-dealers and investment advisers would provide any greater investor protection (or, in any case, that any benefits would justify the costs imposed on retail investors in terms of reduced access to services, products, and payment options, and increased costs for such services and products)."

meeting the “a primary basis” test.[66] Such a view, without more, may itself be extremely significant.[67] The DOL is clear, however, that even if one “implicates” the “a primary basis” test, “fiduciary status applies only if all five prongs are satisfied.”[68]

Putting aside the question of whether the DOL’s interpretation would be upheld or is otherwise correct, institutions that are at risk for being considered to be Investment Advice fiduciaries may wish to consider the extent to which they are otherwise subject to any “best interest” or similar fiduciary-type requirements and, if so, the possible relevance thereof under the “primary basis” prong of the Five-Part Test in light of the DOL’s new interpretation. Given the overlapping standards, the DOL confirmed that, while “it will coordinate with other regulators, including the SEC, on enforcement strategies and will harmonize regimes to the extent possible,” it “will not defer to other regulators on enforcement under [ERISA].”

E. “Hire Me” Communications

The 1975 Rule seeks to delineate sales and educational communications on the one hand, and communications that involve tailored investment advice to serves as a primary basis for an investment decision, on the other hand. As noted above, the 2016 Rule had a very limited carve-out to Investment Advice fiduciary status that was referred to as

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[66] Broker-dealers that provide certain investment advice that is “solely incidental” to their business as broker-dealers and who not receive special compensation for such advice are excluded from the definition of “investment adviser” in Section 202(a)(11) of the Investment Advisers Act of 1940. In Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion From the Definition of Investment Adviser, 84 Fed. Reg. 33,681 (July 12, 2019), the SEC made clear that investment discretion (rather than price and time discretion when executing a customer’s order) and account monitoring pursuant to an agreement (rather than a broker’s voluntary review of a customer’s account and holdings) constitutes investment advice that is not “solely incidental” to the business of a broker-dealer. Nevertheless, not all account monitoring constitutes the provision of investment advice by a broker-dealer. “[A] broker-dealer that agrees to monitor a retail customer’s account on a periodic basis for purposes of buy, sell or hold recommendations may still be considered to provide advice in connection with and reasonably related to effecting securities transactions [and thus, qualify for the “solely incidental” exception].”

The SEC declined to “delineate every circumstance where agreed-upon monitoring is and is not solely incidental to a broker-dealer’s brokerage business.” The SEC further noted that policies and procedures may be adopted to demarcate when certain activities may be within and outside the exception: “For example, broker-dealers may provide in their policies and procedures that a registered representative may agree to monitor a customer’s account at specific time frames (e.g., quarterly) for the purposes of determining whether to provide a buy, sell or hold recommendation to the customer” but the policies and procedures “should not permit a broker-dealer to agree to monitor a customer account in a manner that in effect results in the provision of advisory services that are not in connection with or reasonably related to broker-dealer’s primary business of effecting securities transactions, such as providing continuous monitoring….”

[67] Reg BI requires that broker-dealers, when making recommendations about securities, put the interests of retail customers ahead of their own, and requires broker-dealers to disclose, mitigate, and in some cases eliminate, financial conflicts of interest. Disclosure of a financial conflict alone is not always considered adequate under Reg BI.

[68] The DOL noted that a “few commenters sought confirmation that compliance with Regulation Best Interest would not automatically result in satisfaction of the primary basis prong of the five-part test.” It also indicated that some “commenters stated that investors may consult multiple financial professionals and, therefore, the response by any one professional should not be considered a primary basis for the investment decision.” To the last point, the DOL answered in the Final Preamble that “the fact that a Retirement Investor may consult multiple financial professionals about a particular investment does not indicate that the Department's analysis is incorrect. If, in each instance, the parties reasonably understand that the advice is important to the Retirement Investor and could determine the outcome of the investor's decision, that is enough to satisfy the “primary basis” requirement.”

the "hire me" exception. The idea was that service providers should not be regarded as Investment Advice fiduciaries simply for "touting" their capabilities—so long as the sales pitch did not also provide Investment Advice.[69]

In response to commenters' concerns regarding whether the Proposed Preamble raised "hire me" concerns, the DOL in the Final Preamble pointed to a frequently asked question ("FAQ") issued by the SEC and confirmed that the fact pattern presented therein, absent other factors, would not itself result in Investment Advice fiduciary status:

> I have been working with our mutual friend, Bob, for fifteen years, helping him to invest for his kids' college tuition and for retirement. I would love to talk with you about the types of services my firm offers, and how I could help you meet your goals. Here is my business card. Please give me a call on Monday so that we can discuss.[70]

The DOL also noted that, in "the present exemption proceeding, the Department does not believe that there should be significant concerns about introductory 'hire me' conversations."

The DOL then stated:

> Nevertheless, the Department confirms that the interpretive statements in this preamble are not intended to suggest that marketing activity of the type described above [i.e., the SEC example] would be treated as investment advice covered under the five-part test. To the extent, however, that the marketing of advisory services is accompanied by an investment recommendation, such as a recommendation to invest in a particular fund or security, the investment recommendation would be covered if all five parts of the test were satisfied.

As was the case in connection with the issuance of the 2016 Rule, the DOL described the services involved in the "hire me" exception as touting one's "own advisory or investment management services." Similarly, the Final Preamble states that "these types of communications are an important part of the process for a Retirement Investor to select an investment advice provider." Noticeably absent in the 2016 Rule and the Final Exemption's formulation is any reference to service providers that are pitching non-fiduciary services. The DOL elsewhere recognizes the need for Plan fiduciaries to hire non-fiduciary, as well as fiduciary, service providers and recommends that Plan fiduciaries more broadly "[a]sk service providers about their services, experience with employee benefit plans, fees and expenses, customer references or other information relating to the quality of their services and customer satisfaction with such services" when they are considering hiring a Plan service provider.[71] Those service providers that do not intend to provide fiduciary services may be at a greater risk of being regarded as such where they learn "the personal and intimate details of the financial affairs of clients and mak[e] recommendations as to purchases and sales" or

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69 The Preamble to the 2016 Rule noted that an institution could "tout the quality of his, her, or its own advisory or investment management services" without being considered an investment advice fiduciary." 81 FR 20946, 20968 (April 8, 2016). In the Final Preamble the DOL stated "The 2016 fiduciary rule is not in effect, and statements made in the preamble to the vacated rule bear no weight."

70 See FAQs on Regulation Best Interest, available at www.sec.gov/tm/faq-regulation-best-interest.

71 Tips for Selecting and Monitoring Service Providers for Your Employee Benefit Plan, available at https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/fact-sheets/tips-for-selecting-and-monitoring-service-providers.pdf

where they are regarded as "cultivat[ing] a confidential and intimate relationship" that implicates an Investment Advice relationship.[72]

F. Rollovers and "Regular Basis"

1. In General

As in the Proposed Release, the Final Release focuses substantial attention on rollovers involving Plans and IRAs because "[a]mounts accrued in an ERISA-covered Plan can represent a lifetime of savings, and often comprise the largest sum of money a worker has at retirement" and a rollover is therefore "potentially a very consequential financial decision" for retirement investors. The DOL in the Proposed Preamble expressed concerns about incurring "transaction costs associated with moving the assets into new investments and accounts" and "the loss of economies of scale [with the result that] the cost of investing through an IRA may be higher than through a Plan." The DOL also indicated that IRA investors may "lose important ERISA protections, including the benefit of a Plan fiduciary representing their interests in selecting a menu of investment options or structuring investment advice relationships, and the statutory causes of action to protect their interests."[73]

The Proposed Preamble and the Final Preamble therefore both refer to rollovers as a "primary" concern of the whole proposal and the Final Preamble indicates that "a sound decision on the rollover will typically turn on numerous factors, including the relative costs associated with the new investment options, the range of available investment options under the plan and the IRA, and the individual circumstances of the particular investor."

2. Revocation of Certain Prior Interpretive Authority

In light of the newly-articulated analysis of the Five-Part Test announced in the Proposed Preamble and restated and clarified further in the Final Preamble, the DOL now believes that DOL Advisory Opinion 2005-23A (Dec. 7, 2005) (the "Deseret Letter") is "incorrect." The Deseret Letter had indicated that advice to roll assets out of a Plan did not generally constitute Investment Advice.[74] The DOL ultimately determined that "the better view is that a recommendation to roll assets out of a Plan is advice with respect to moneys or other property of the Plan."[75]

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[72] *Chamber of Commerce v. US Dep't of Labor*, 885 F.3d 360, 374 (5th Cir. 2018), citing to Hughes, Exchange Act Release No. 4048, 1948 WL 29537, at *4, *7 (Feb. 18, 1948), *aff'd sub nom., Hughes v. S.E.C.,* 174 F.2d 969 (D.C. Cir. 1949); see also Mason, Moran & Co., Exchange Act Release No. 4832, 1953 WL 44092, at *4 (Apr. 23, 1953).

[73] The Proposed Exemption Preamble and the Final Preamble also point to the fact that there have been large numbers of rollovers reported in the past years, and that there are embedded incentives for financial institutions to accrete IRA assets because they "can generally expect to earn transaction-based compensation such as commissions, or an ongoing advisory fee, from the IRA, but may or may not earn compensation if the assets remain in the Plan."

[74] The DOL stated in the Proposed Exemption Preamble that "advice to take a distribution of assets from an ERISA-covered Plan is actually advice to sell, withdraw, or transfer investment assets currently held in the Plan," and that "a recommendation to roll assets out of a Plan is necessarily a recommendation to liquidate or transfer the Plan's property interest in the affected assets, the participant's associated property interest in the Plan investments, and the fiduciary oversight structure that applies to the assets." In addition, it stated that the "distribution recommendation commonly involves either advice to change specific investments in the Plan or to change fees and services directly affecting the return on those investments."

[75] Some commenters believed that the revocation of the Deseret Letter required notice and comment. The DOL responded by saying "[a]dvisory opinions, such as the Deseret Letter, are interpretive statements that were not subject to the notice and comment process. As such, the Department need not go through notice and comment to offer a new interpretation of the regulation based on a better reading of governing statutory and regulatory authority, as here."

In responding to comments to this conclusion, the Preamble to the Final Regulation notes that "[a] recommendation to roll assets out of a Title I Plan is advice with respect to moneys or other property of the plan and, if provided by a person who satisfies all of the requirements of the five-part test, constitutes fiduciary investment advice." The DOL also indicated that this interpretation "is more aligned with both the facts and circumstances approach taken by Congress in drafting [ERISA's] statutory functional fiduciary test, and with an approach centered on whether the parties have entered into a relationship of trust and confidence." Stopping short of conferring per se fiduciary status on rollovers, the DOL acknowledged that "not all rollover recommendations can be considered fiduciary investment advice under the five-part test set forth in the Department's regulation." Indeed, the DOL rejected a conclusion that "a rollover transaction should always satisfy the regular basis prong on the grounds that it can be viewed as involving two separate steps—the rollover and a subsequent investment decision. These two steps do not, in and of themselves, establish a regular basis." As the DOL further noted, "[t]aken together, the five-part test as interpreted here and Interpretive Bulletin 96-1, regarding participant investment education, provide Financial Institutions and Investment Professionals a clear roadmap for when they are, and are not, Title I and Code fiduciaries."

Ultimately, if rollover solicitations may now commonly be deemed to meet all of the prongs of the Five-Part Test and the provider is thereby deemed to be an ERISA fiduciary, the provider may generally be prohibited from receiving fees resulting from its Investment Advice, unless an exemption (such as the Final Exemption) applies. Furthermore, in the case of a rollover from an ERISA plan, the full panoply of ERISA's general fiduciary requirements, including for example the prudence requirement, might be directly applicable. In contrast, where a provider solicits rollovers from an IRA, or advises on the investment of an IRA, there would be no private right of action or DOL enforcement as to Section 4975 of the Code,[76] and the only possible plaintiff, at least as to Section 4975 itself, would seem to be the Internal Revenue Service. This was confirmed in the Final Preamble.[77]

3. In Combination with Other Parts of the Five-Part Test

a. Mutual Agreement

In the context of rollovers, the DOL in the Proposed Preamble stated that "it is more than reasonable . . . that the advice provider would anticipate that advice about rolling over Plan assets would be a primary basis for . . . investment decisions" (internal quotation marks omitted), although some of its reasoning had raised some

[76] Reorganization Plan No. 4 of 1978 allocates to the DOL interpretive authority, but not enforcement authority, over Section 4975 of the Code. See Reorg. Plan No. 4 of 1978, §§ 102, 105; see also Pub. L. No. 98-532, 98 Stat. 2705 (statutorily ratifying and reaffirming prior reorganization plans).

[77] "ERISA section 502(a) provides a cause of action for fiduciary breaches and prohibited transactions with respect to Title I Plans (but not IRAs). Code section 4975 imposes a tax on disqualified persons participating in a prohibited transaction involving Plans and IRAs (other than a fiduciary acting only as such). These are the sole remedies for engaging in non-exempt prohibited transactions. The exemption does not create any new causes of action, nor does it require firms to make enforceable contractual commitments or give enforceable warranties to Retirement Investors, as was true of the 2016 fiduciary rulemaking which the Fifth Circuit set aside in its Chamber opinion."

questions.[78] Explaining its interpretation in the Proposed Exemption's Preamble, the DOL stated that whether or not the regular basis prong is established by the rollover itself depends on whether or not the parties "reasonably expect an ongoing advice relationship at the time of the rollover recommendation, and that again, "hold[ing oneself] out to the customer as providing such ongoing services" helps to establish that assumption. In a phrase that could well have come from a novel worthy of the saga of the amended fiduciary rule, the DOL also notes that "[e]very relationship has a beginning."

In addition, with respect to the mutual agreement prong of the analysis, the DOL stated in the context of rollovers that "the updated conduct standards adopted by the SEC and the NAIC reflect an acknowledgment of the fact that broker-dealers and insurance agents commonly provide investment and annuity recommendations to their customers" and "[t]o the extent these professionals engage in an ongoing advice relationship, they will likely satisfy the regular basis prong." Similarly, the Final Preamble states "[a] financial services provider that recommends that Retirement Investors roll potential life savings out of a Title I Plan with the expectation of offering ongoing advice to the same Retirement Investor whose retirement assets will now be held in an IRA should reasonably understand that the provider will be held to fiduciary standards."

b. Regular Basis

The DOL went on to discuss the regular-basis prong of the Five-Part Test specifically in the context of rollovers. Although the DOL acknowledged in the Proposed Preamble that "advice to take a distribution from a Plan and roll over the assets may be an isolated and independent transaction that would fail to meet the 'regular basis' prong" of the Five-Part Test, it said it "believes that whether advice to roll over Plan assets to an IRA satisfies the regular-basis prong of the five-part test depends on the surrounding facts and circumstances." The Proposed Preamble states that "advice to roll over Plan assets can occur as part of an ongoing relationship or an anticipated ongoing relationship that an individual enjoys with his or her advice provider." In the context of a preexisting relationship with a financial institution, "the advice to roll assets out of a Plan is part of an ongoing advice relationship that satisfies the 'regular basis' requirement."

The DOL also stated in the Proposed Preamble that "advice to roll assets out of the Plan into an IRA where the advice provider will be regularly giving financial advice regarding the IRA in the course of a more lengthy financial relationship would be the start of an advice relationship that satisfies the 'regular basis' requirement. In these scenarios, there is advice to the Plan – meaning the Plan participant or beneficiary – on a regular basis." Under this view, it may be the case that, even though the 1975 Rule requires that advice be provided on a regular basis, the

[78] The DOL then went on to state that "[n]umerous sources acknowledge that a common purpose of advice to roll over Plan assets is to establish an ongoing relationship in which advice is provided on a regular basis outside of the Plan, in return for a fee or other compensation" and cited to FINRA Regulatory Notice 13-45, which stated that "a financial adviser has an economic incentive to encourage an investor to roll Plan assets into an IRA that he will represent as either a broker-dealer or an investment adviser representative." The DOL also cited a study by the General Accounting Office for the proposition that "cross-selling IRA rollovers to participants, in particular, is an important source of income for service providers." The Final Preamble states that "[r]ollovers from Title I Plans to IRAs are expected to approach $2.4 trillion cumulatively from 2016 through 2020" and, similar to the observation in the Proposed Exemption indicate that "large sums of money eligible for rollover represent a significant revenue source for investment advice providers." It is not clear, however, that the pronouncements cited by the DOL necessarily lead to the conclusion that incentives to sell products and services and to obtain relationship assets, standing alone, are indicative of a mutual agreement to provide personalized advice on a regular basis.

regular-basis prong of the Five-Part Test could be considered to have been satisfied even before the relationship has developed into one where advice is being regularly provided.[79]

The DOL reconfirmed its view in the Final Preamble. In particular, the DOL responded in the Final Preamble that it disagreed with commentators who believed the DOL's interpretation would call "for the 'retroactive' imposition of fiduciary status on financial services providers in the event an ongoing relationship develops." It answered by noting that its "interpretation merely recognizes that the rollover recommendation can be the beginning of an ongoing advice relationship. It is important that fiduciary status extend to the entire advisory relationship." It also used *Chamber of Commerce* to reinforce this belief because "the court expressed agreement that investment advisers registered under the Investment Advisers Act may appropriately be considered fiduciaries without indicating that fiduciary status would only apply after a period of time." The DOL took particular note of the court's "approving discussion that the SEC has 'repeatedly held' that '[t]he very function of furnishing [investment advice for compensation]—learning the personal and intimate details of the financial affairs of clients and making recommendations as to purchases and sales of securities—cultivates a confidential and intimate relationship.'"[80] The DOL continued by noting that the "five-part test does not provide that the first instance of advice in an ongoing relationship is automatically free from fiduciary obligations. The fact that the relationship of trust and confidence starts with a recommendation to roll the investor's retirement savings out of a Title I Plan is not an argument for treating the recommendation as non-fiduciary."

4. Agreed-Upon Non-Fiduciary Services; Isolated Recommendations

It may be important to consider the interaction of the DOL's interpretation of the regular-basis prong with the mutual-agreement prong in the context of advice that is mutually agreed not to be fiduciary in nature. The Final Preamble provides:

> [I]f a Retirement Investor who is assisted with a rollover expresses the intent to direct his or her own investments in a brokerage account, without any expectation of entering into an ongoing advisory relationship and without receiving repeated investment recommendations from the investment professional, the Department would not view the regular basis prong as being satisfied merely because the investor subsequently sought the professional's advice in connection with another transaction long after receiving the rollover assistance.[81]

In that event, it seems possible that the advice in connection with the rollover could itself be "an isolated and independent transaction" and therefore not in the nature of Investment Advice.[82] Underscoring this point, the DOL notes that "a single instance of advice to take a distribution from a Title I Plan and roll over the assets would fail to meet the regular basis prong." More to the point, there may be situations in which advice that is conveyed is not

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[79] The DOL stated that it "is aware that some Financial Institutions pay unrelated parties to solicit clients for them. See Rule 206(4)-3 under the Investment Advisers Act of 1940; see also Investment Advisers Advertisements; Compensation for Solicitations, Proposed Rule, 84 FR 67518 (December 10, 2019). The Department notes that advice by a paid solicitor to take a distribution from a Plan and to roll over assets to an IRA could be part of ongoing advice to a Retirement Investor, if the Financial Institution that pays the solicitor provides ongoing fiduciary advice to the IRA owner."

[80] However, the *Chamber of Commerce* decision to which the DOL cites also notes: "The SEC cautioned that fiduciary status does not follow 'merely from the fact that [the broker-dealer] renders investment advice.'" *Hughes,* 1948 WL 29537, at *7.

[81] Query: What does "long after" mean in this context?

[82] Note that the SEC stated that broker-dealers' recommendations regarding rollovers are specifically covered by Reg BI, but the SEC did not take the view that broker-dealers who provide advice about rollovers are acting as investment advisers.

investment related.[83] Likewise, the Final Preamble provides that "sporadic interactions between a financial services professional and a Retirement Investor do not meet the regular basis prong."

However, the DOL also noted that it "does not intend to interpret 'regular basis' to be limited to relationships in which advice is provided at fixed intervals, as suggested by a commenter, but, instead, believes the term 'regular basis' broadly describes a relationship where advice is recurring, non-sporadic, and expected to continue." Still, the DOL also states that it "intends to preserve the ability of financial services professionals to engage in one-time sales transactions without becoming fiduciaries under [ERISA], including by assisting with a rollover."

In the context of annuities, the DOL noted:

> When insurance agents or broker-dealers frequently or periodically make recommendations to their clients on annuity or investment products or features, or on the investment of additional assets in existing products, they may meet the "regular basis" prong of the five-part test, and are appropriately treated as fiduciaries, assuming that they meet the remaining elements of the fiduciary definition.

However, the DOL notes that the existence of payments that are ongoing after the sale of a product, known as trailers, by themselves will not result in satisfaction of the regular basis test:

The Department clarifies that payment of a trailing commission will not, in and of itself, result in the Department taking the position that the regular basis prong of the five-part test is satisfied with respect to a transaction.

On the other hand, if the trailing commission is intended to compensate a financial professional for providing advice to the Retirement Investor on an ongoing basis, the conclusion could be different, depending on the full facts and circumstances of the advice arrangement.

Notwithstanding the DOL's approach to the regular-basis prong of the Five-Part Test and the Deseret Letter, there may still be an open question regarding whether the regular-basis prong can be met in the rollover context generally. While any advice regarding the rollover would appear to be provided with respect to the transferor Plan (indeed, the transferee IRA (or other Plan) might not even yet exist), one can legitimately ask whether later advice regarding a transferee IRA (or other Plan) can ever cause otherwise isolated and independent advice regarding the rollover from the transferor Plan to be considered to be provided on a "regular basis" for these purposes.[84] Indeed, any subsequent advice would seem clearly to be advice to the transferee IRA (or other Plan)[85] and not to the transferor Plan. Thus, query whether later advice regarding a transferee IRA (or other Plan) could cause otherwise isolated and

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[83] For example, tax advice which may not necessarily include investment advice.

[84] Cf. 81 Fed. Reg. 20,946, 20,964 (preamble to the final version of the 2016 Rule) ("Even if the assets will not be covered by ERISA or the Code when they are moved outside the plan or IRA, the recommendation to change the plan or IRA investments is investment advice under ERISA and the Code. Thus, recommendations on distributions (including rollovers or transfers into another plan or IRA) or recommendations to entrust plan or IRA assets to a particular IRA provider would fall within the scope of investment advice in this regulation, and would be covered by Title I of ERISA, including the enforcement provisions of section 502(a).").

[85] The Preamble in discussing the Deseret Letter seems to focus on the transferor Plan and not on the transferee IRA: "A recommendation to roll assets out of a Plan is necessarily a recommendation to liquidate or transfer the Plan's property interest in the affected assets, the participant's associated property interest in the Plan investments, and the fiduciary oversight structure that applies to the assets."

independent advice regarding the rollover from the transferor Plan to be considered to be provided on a "regular basis" for these purposes.[86]

The Final Preamble rejects this concern.[87] The DOL noted that "[i]t is enough, in the scenarios outlined above, that the same financial services provider is giving advice to the same person with respect to the same assets (or proceeds of those assets), pursuant to identical five-part tests."[88] Elsewhere, the Final Preamble specifically states that to

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[86] Unlike the Release, the 2016 Rule specifically added categories of investment advice that would render one an investment advice fiduciary, including "[a] recommendation as to the advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property or a recommendation as to how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA." 81 Fed. Reg. 20,948 (Apr. 8, 2016). The preamble to the 2016 Rule indicates that "paragraph (a)(1)(i) cover[ed] recommendations regarding the investment of plan or IRA assets, including recommendations regarding the investment of assets that are being rolled over or otherwise distributed from plans to IRAs." Indeed, the preamble to the 2015 proposal arguably acknowledges that the regular-basis prong of the Five-Part Test would not be met with respect to rollovers, and thus supported a change to the actual regulatory language, stating:

"One example of the five-part test's shortcomings is the requirement that advice be furnished on a 'regular basis' . . . [T]he 'regular basis' requirement also deprives individual participants and IRA owners of statutory protection when they seek specialized advice on a one-time basis, even if the advice concerns the investment of all or substantially all of the assets held in their account (e.g., as in the case of an annuity purchase or a roll-over from a plan to an IRA or from one IRA to another). . . The proposed regulation, if finalized, would supersede Advisory Opinion 2005-23A. Thus, recommendations to take distributions (and thereby withdraw assets from existing plan or IRA investments or roll over into a plan or IRA) or to entrust plan or IRA assets to particular money managers, advisers, or investments would fall within the scope of covered advice."

It seems, then, that the DOL in 2015 did not reach a different conclusion than the Deseret Letter regarding the proper application of the Five-Part Test, but instead felt it necessary to change the regulatory text (and in particular a change to the regular-basis prong of the Five-Part Test) in order to effect a change to the result in the Deseret Letter.

The Final Preamble notes in this regard that "statements made in the preamble to the vacated rule bear no weight" as the 2016 Rule is no longer in effect.

[87] The DOL notes: "The Department disagrees with commenters who suggested that the "regular basis" requirement must first be met with respect to the Title I Plan, and then again with respect to the IRA. Under the logic of this position, even if the investment advice provider specifically recommended the rollover to the IRA as part of a planned ongoing investment advice relationship, the 'regular basis' requirement would not be satisfied with respect to the rollover advice because there was only one instance of advice under the Title I Plan, notwithstanding the expectation of a continued advisory relationship with the same customer with respect to the same assets that were rolled out of the plan. Similarly, the argument asserts that even if the investment advice provider regularly advised the Plan participant on how to invest plan assets, recommended the rollover to an IRA, and then continued to give advice on the IRA account, the first instance of advice post-rollover did not count because the 'regular basis' requirement had only been satisfied with respect to the Title I Plan, but not the IRA."

[88] Specifically, the DOL says: "Given that the identical five-part test definition appears in the regulatory definition under both Title I and the Code, the advice is rendered to the exact same Retirement Investor (first as a Plan participant and then as IRA owner), and the IRA assets are derived, in the first place, from that Retirement Investor's Title I Plan account, it is appropriate to conclude that an ongoing advisory relationship spanning both the Title I Plan and the IRA satisfies the regular basis prong. It is enough, in the scenarios outlined above, that the same financial services provider is giving advice to the same person with respect to the same assets (or proceeds of those assets), pursuant to identical five-part tests." It continues by noting: "For similar reasons, the Department's interpretation of the regular basis prong does not artificially distinguish between advice to a Retirement Investor in a Title I Plan and advice to the same Retirement Investor in an IRA, when evaluating a rollover recommendation made in the context of a pre-existing advice relationship" and that it "does not arbitrarily subdivide advice rendered to a plan sponsor on multiple Title I Plans. It is enough, in that case, that the parties have an ongoing advisory relationship with respect to Title I Plans."

"meet the regular basis prong in that circumstance, there must be ongoing advice to a 'plan' (including Plans and IRAs) [emphasis added]."[89]

III. Continued Availability of FAB 2018-02

FAB 2018-02 sets forth a temporary enforcement policy under which the DOL will not pursue prohibited transactions claims against Investment Advice fiduciaries who work diligently and in good faith to comply with previously applicable impartial conduct standards for transactions that would have been exempted by the BIC Exemption or certain other PTCEs, or treat the fiduciaries as violating the applicable prohibited transaction rules. FAB 2018-02 is limited by its nature to DOL enforcement actions, and would not extend to potential claims by Plan participants and beneficiaries, in that satisfaction of the exemption would result in there being no violation of the applicable underlying ERISA (and Code) rules.

FAB 2018-02 was issued in response to the revocation of the 2016 Rule and potentially allowed institutions that had migrated to an operational structure that was compliant with the 2016 Rule and in many cases the BIC Exemption to continue to proceed on that basis. FAB 2018-02 was issued as "temporary" relief but continues to remain in force. The Final Preamble states that FAB 2018-02 will be withdrawn on December 20, 2021, so that the Final Exemption will be the primary exemption utilized in situations that had been covered under FAB 2018-02.

IV. Conclusion

While the return to the 1975 Rule has now been administratively confirmed, the Final Exemption, the Final Preamble and the other elements of the Release nevertheless signal an important new chapter in the now decades-long effort by the DOL to address the definition of Investment Advice, particularly with respect to participant-directed defined contribution plans and IRAs. Although the core principles of the 1975 Rule are reaffirmed, the Final Exemption and some of the new interpretive guidance will require many financial institutions carefully to study their current products, services and business models, resulting in new challenges and adjustments not only for those institutions but also for Plan sponsors, participants in employer Plans and IRA owners.

A new President from the other side of the aisle is about to take office, and there are indications that the effective date of the Final Exemption will be delayed. But that may only be the beginning of the next chapter in this saga. The Final Exemption may be altered or revoked, and there may be additional interpretive and other guidance relating to the 1975 Rule. Indeed, there may even be efforts to resurrect all or a portion of the 2016 Rule. Those who have borne witness to the DOL's continuing efforts to revamp the definition of "investment advice" under ERISA's fiduciary rules may have to keep "roll"-ing with the punches and navigating what now seem to be inevitable and continuing bumps on the long and winding road. As the Curse of Confucius is reputed to say, "May you live in interesting times."

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If you would like to discuss the Final Exemption or any other aspect of the saga of the amended fiduciary rule, please contact any of the Dechert lawyers listed below or any Dechert lawyer with whom you regularly work.

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[89] Would the regular basis prong of the Five-Part Test be satisfied even where there is "one time" advice with respect to a rollover and the post-rollover services are only for discretionary management (since they are discretionary services and not Investment Advice)?

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