CLIENT MEMORANDUM

DOL Publishes Final Rule Defining "Fiduciary" and Related Exemptions

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AUTHORS

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On April 6, 2016, the Department of Labor (the "DOL") published the long-awaited final regulation on the definition of fiduciary for purposes of the Employee Retirement Income Security Act of 1974 ("ERISA") and the prohibited transaction rules under the Internal Revenue Code of 1986 (the "Code"). The final rule amends the definition of fiduciary and broadens the categories of service providers who will become fiduciaries with respect to plans and Individual Retirement Accounts ("IRAs"). The DOL also issued two new prohibited transaction exemptions--the Best Interest Contract Exemption (the "BIC Exemption") and the Principal Transaction Exemption--and amended several existing prohibited transaction class exemptions. The new exemptions and amendments will permit Advisers, Financial Institutions[1], and other service providers to continue to receive compensation that would otherwise be prohibited, *provided* that they comply with certain conditions designed to mitigate conflicts of interest. The new regulations are expected to reshape the way in which Advisers and Financial Institutions interact with retail investors and retirement accounts such as 401(k) plans and IRAs.

The final rule, the new exemptions, and the amendments will become applicable on April 10, 2017, but the DOL provided a compliance transition period from April 10, 2017 until January 1, 2018, during which time Advisers and Financial Institutions relying on the BIC Exemption or the Principal Transaction Exemption will have to comply with some, but not all conditions of the exemptions.

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[1] See definitions in Chart I on page 34 of this memo.

In the memorandum we provide a summary overview of the DOL's new rules. The first section of this memorandum provides a detailed summary of the final rule defining who is an "Investment Advice Fiduciary" under ERISA and the exceptions from that definition. The following section details the scope and conditions to the BIC Exemption and the Principal Transaction Exemption. The third section of this memorandum and Chart II summarize the material amendments to the existing prohibited transaction class exemptions. In addition, highlighted throughout this memorandum are evaluative commentary and explanatory commentary that may be of practical importance to affected parties. Capitalized terms used, but not defined in this memorandum, are defined in Chart I.

I. DEFINITION OF INVESTMENT ADVICE FIDUCIARY

A. Background

As noted in our prior client memorandum on the DOL's proposed definition of fiduciary and related exemptions[2], ERISA is a comprehensive statute designed to protect the rights and interests of plan participants and beneficiaries by requiring that a plan fiduciary manage plan assets in accordance with its fiduciary duty. To meet its fiduciary duty under ERISA, a fiduciary must manage plan assets prudently and with undivided loyalty to the plan and its participants and beneficiaries, and avoid engaging in prohibited transactions. When a fiduciary breaches its fiduciary duty, it can be subject to personal liability for any losses suffered by a plan or its participants and beneficiaries, and also be responsible for excise taxes arising under the Code.

B. Fiduciary Status

1. Overview

The statutory definition of fiduciary under ERISA assigns fiduciary status to a broad range of persons and entities that provide services to plan assets. A fiduciary with respect to plan assets is a person who:

- exercises any discretionary authority or control with respect to management of the plan or the disposition of its assets (a "Discretionary Fiduciary"); or
- renders *investment advice* for a *fee or other compensation*, or has any authority to do so (an "Investment Advice Fiduciary"); or
- has any discretionary authority or discretionary responsibility in the administration of the plan (an "Administrative Fiduciary").

The final rule expands the definition of Investment Advice Fiduciary by broadening the meaning of what constitutes investment advice for purposes of ERISA (*i.e.*, the second prong above). In recognizing the breadth and reach of the final rule, the DOL provided certain exceptions to avoid fiduciary status that are divided into two broad categories: (i) communications or activities that are not considered recommendations and (ii) transactions or activities that would involve a recommendation but that are not deemed to give rise to fiduciary status.

2 *See* The Department of Labor Re-Proposes Fiduciary Rulemaking for Employee Benefit Plans and IRAs (May 8, 2015) and DOL Publishes Final Fiduciary "Conflict of Interest" Regulations and Related Exemptions (April 6, 2016).

The final rule replaces the DOL's five-part test[3] that had been in place since 1975 and had defined what constituted investment advice under ERISA. The DOL reasoned that, among other reasons, the five-part test was outdated because it was adopted before self-directed plans and IRAs became prevalent. As a consequence, many investment professionals, consultants, and Advisers have had no obligation to adhere to ERISA's fiduciary standards due to the narrowness of the test, despite the critical role they have played in guiding plan and IRA investments. The new definition is a result of a significant and sustained effort by the DOL to apply ERISA's fiduciary standards to the current investment advice marketplace. The rule was originally proposed in 2010, withdrawn in 2011, and then re-proposed in May 2015. The final rule largely tracks the May 2015 proposal, although it also departs in certain important respects, as described further in this memorandum.

The final rule defines an Investment Advice Fiduciary as someone who provides the following types of investment advice to a plan, participant, IRA, or IRA owner in exchange for a fee or other compensation:

PERSON SATISFIES AT LEAST ONE IN EACH COLUMN	
Types of Investment Advice	**By a Person Who:**
Makes a "recommendation" as to:	
• Buying, holding, selling, or exchanging securities or other investment property in a plan or IRA[4];	• Acknowledges fiduciary status under ERISA or the Code;
• How investments should be invested after they are rolled over, transferred, or distributed from a plan or IRA; or	• Renders the advice under an agreement, arrangement or understanding that the advice is based on the recipient's particular needs; or
• Management of securities or other investment property, including recommendations with respect to rollovers from the plan and selection of investment advisers.	• Provides individualized or specifically directed advice regarding a specific investment management decision (including rollovers from a plan or IRA).

Importantly, IRAs are defined in the final rule to include other plans described in the Code section 4975(e)(1)(B)-(F), including Archer MSAs, Health Savings Accounts, and Coverdell education savings accounts.

3 Under the prior rule a person would be treated as a fiduciary by reason of providing "investment advice," if the person: (1) renders advice as to the value of securities or makes recommendations as to the advisability of investing in, purchasing, or selling securities (2) on a regular basis (3) pursuant to a mutual agreement, arrangement, or understanding that (4) the advice will serve as the primary basis for investment decisions, and that (5) the advice will be individualized based on the particular needs of the plan.

4 The final rule clarifies that advice regarding investment property does not include health, disability, and term life insurance policies and other assets that do not contain an investment component.

a. *Definition of Recommendation*

A “recommendation” is defined in the final rule as a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion for a particular course of action. The determination of whether a recommendation has been made is intended to be an objective rather than a subjective inquiry, and the more individually tailored the communication, the more likely the communication will be viewed as a recommendation. This definition tracks guidance issued by the Financial Industry Regulatory Authority, Inc. (“FINRA”) as to what constitutes a recommendation for purposes of FINRA Rule 2210.

Furthermore, a series of actions or communications that may not constitute a recommendation when viewed individually, may constitute a recommendation when considered in the aggregate. The DOL also adopted FINRA’s position that, in determining the existence of a recommendation, it makes no difference whether the communication was initiated by a person or a computer software program. Under the final rule:

- A recommendation to transition from a commissionable account to a fee-based account would be considered a covered recommendation;
- Providing a selective list of securities to a particular advice recipient would be a covered recommendation even if no recommendation is made with respect to any one security;
- A recommendation as to proxy voting would be a covered recommendation, but providing guidelines or information to a broad class of investors without regard to the client’s individual interests generally would not; and
- Rollover recommendations are now defined as investment advice, as is advice on the type of account (brokerage versus advisory).

b. *Definition of Fee or Compensation*

The final rule requires that the recommendation be given for a “fee or other compensation.” The term “fee or other compensation” is defined as any explicit fee or compensation for the advice received by the person from any source, and any other fee or compensation received from any source in connection with or as a result of the purchase or sale of a security or provision of investment advice services, including, but not limited to, commissions, loads, finder’s fees, marketing or distribution fees, and underwriting compensation.[5] Fees also include trailing commissions, sales loads, 12b-1 fees, and revenue-sharing payments.

2. Communications That Do Not Constitute a Recommendation

The final rule excludes four types of communication from the definition of recommendation on the theory that they are more closely related to sales-type information or general commentary: (i) communications made by so-called “platform providers”; (ii) general communications (*e.g.*, widely disseminated publications and marketing materials); (iii) investment

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[5] *See* 29 U.S.C. § 2510.3-21(g)(3)(2016).

education information and materials; and (iv) so-called “hire-me” communications that occur in the course of an Adviser marketing the value of its own advisory or investment management services. These exclusions are outlined below.

a. *Communications Made by Platform Providers*

Under this exception, a service provider that offers an investment platform to an independent plan fiduciary from which the plan fiduciary may select or monitor investment alternatives will not be deemed to have made a recommendation, so long as the platform of investments is established without regard to the individualized needs of the plan or its participants or beneficiaries. The exception does not apply to IRAs, because, unlike plans, there generally is no independent fiduciary representing the IRA owner, and the DOL did not believe that IRA owners would be sufficiently protected.

The platform provider exception also excludes certain common activities performed by a service provider to assist an independent plan fiduciary in selecting and monitoring investment alternatives. A provider, under the exception, will not be deemed to have made a recommendation when it:

- assists in identifying investment alternatives that meet objective criteria specified by a plan fiduciary;
- provides sample sets of investment alternatives in response to a request for information, request for proposal, or similar solicitation by the plan, based only on the size of the employer or plan, the current investment alternatives designated under the plan, or both; or
- provides objective financial data and comparisons with independent benchmarks to the plan fiduciary.

A service provider relying on the platform provider exception must disclose in writing that it is not undertaking to provide impartial investment advice or give advice in a fiduciary capacity. A provider assisting an independent plan fiduciary in identifying investment alternatives is also required to disclose in writing whether it has a financial interest in any of the identified investment alternatives and, if so, the precise nature of such interest.

- A response to a request for proposal would not be a recommendation if the identified investment alternatives are based on objective third-party criteria, such as expense ratios and types of assets specified by the plan fiduciary.

b. *General Communications*

A recommendation does not include general communications that a reasonable person would not view as an investment recommendation. General communications include, but are not limited to, commentary on talk shows, remarks and presentations in widely attended speeches and conferences, and broadly disseminated newsletters and general marketing materials (including prospectuses, general market data, price quotes, and performance reports).

c. *Investment Education Information and Materials*

The final rule incorporates much of the DOL’s long-standing investment education guidance provided in Interpretive Bulletin 96-1. The rule provides that a recommendation does not include furnishing or making available certain categories of investment education information and materials to a plan, plan fiduciary, plan participant, or IRA owner, *provided* that the information and materials, with certain exceptions, do not include recommendations with respect to a specific investment product, specific plan or IRA alternative, or the investment or management of a particular security or other investment property. Examples of investment education information and materials include, among other things, information about the terms or operation of the plan or IRA, the benefits of participating in the plan or IRA, general financial, investment and retirement information, asset allocation models (*e.g.*, charts, graphs, and case studies), and interactive investment materials that provide the means for estimating future retirement needs (*e.g.*, questionnaires and worksheets).

As provided in the preamble, asset allocation models and interactive investment materials may consider the impact of a specific investment, as long as the investment is specified by the plan participant, beneficiary, or IRA owner. In addition, an asset allocation model or interactive investment material can identify a specific investment for a plan (but not an IRA) if the investment is a designated investment alternative under the plan, the model or material identifies all other designated investment alternatives with similar risk and return characteristics, if any, and the model or material is accompanied by certain disclosures.

d. *The "Hire Me" Exception*

The DOL believes that marketing oneself generally is not a recommendation. However, a recommendation to hire another person as a Discretionary Fiduciary or Investment Advice Fiduciary is a recommendation covered by the final rule. The "Hire Me" exception therefore permits an Adviser to market its own services without being subject to the prohibited transaction rules, as long as the marketing of one's own services is not coupled with a separate investment recommendation (such as to roll money out of a plan to an IRA or invest in a particular investment).

- The "Hire Me" exception may provide relief for certain marketing practices, but it likely will not provide relief if a recommendation is made to buy a particular security or to invest in a managed fund. The challenge will be knowing where a marketing pitch ends and a recommendation to buy a particular security (*e.g.*, to invest in a manager's fund) will begin. The context, content, and presentation of the communication will be determinative.

3. Persons Not Considered Investment Advice Fiduciaries

The final rule exempts three categories of persons and service providers from the definition of Investment Advice Fiduciary: (i) transactions with sophisticated independent plan fiduciaries; (ii) swap counterparties; and (iii) employees of plan sponsors. In addition, the final rule also confirms the treatment of execution of securities transactions. These exceptions are outlined below.

a. *Transactions with Sophisticated Independent Plan Fiduciaries*

The sophisticated counterparty exception permits a service provider to provide any advice (including asset allocation models or other financial analysis tools) to a sophisticated fiduciary of a plan, IRA, or plan asset entity (within the meaning of section 3(42) of ERISA) without being deemed an Investment Advice Fiduciary under certain circumstances. The exception requires that the sophisticated fiduciary in receipt of the advice be independent of the advice provider with respect to the transaction. A fiduciary is sophisticated for purposes of the exception if it is either: (1) a qualified U.S. bank;

(2) an insurance carrier; (3) a registered investment adviser; (4) a registered broker-dealer; or (5) an independent fiduciary that has at least $50 million in total assets under management or control. The $50 million threshold includes both plan and non-plan assets. In addition, a service provider relying on the exception must:

- Reasonably believe that the fiduciary is capable of evaluating the investment risks;
- Inform the fiduciary that the person is not giving advice in a fiduciary capacity;
- Inform the fiduciary of any financial interests the provider may have with respect to the transaction; and
- Not receive a fee or compensation directly from the plan, plan fiduciary, IRA, or IRA owner in connection with the transaction.

Language in the preamble could lead to the conclusion that the DOL did not include individual retail investors (*i.e.*, IRA owners) in the exception due to the belief that wealth is not necessarily correlated with financial sophistication.

➢ Independence in this context relates to plan or IRA fiduciaries who are independent from the service provider providing the advice.

➢ Unless the DOL clarifies that the exception would apply to IRA owners managing their own IRA accounts, it does not appear that service providers providing advice to such individuals will be excepted from the definition of Investment Advice Fiduciary. In that case, the provider would have to rely on the "Hire Me" exception or otherwise not make a recommendation directly to the IRA owner about a particular investment or advisory services.

b. *Swap Counterparties*

The swap exception provides that a swap dealer, security-based swap dealer, major swap participant, major security-based swap participant, and a swap clearing firm that provide any advice to an ERISA Plan in connection with a swap or security-based swap (as defined by the Securities Exchange Act of 1934 (the "Exchange Act") or the Commodity Exchange Act (the "CEA")) are excepted from the definition of Investment Advice Fiduciary if the conditions of the exemption are met. The exemption does not apply to an IRA or individual participants and requires that:

- The ERISA Plan is represented by a fiduciary independent of the swap counterparty;
- In the case of a swap dealer or security-based swap dealer, the counterparty is not acting as an adviser (within the meaning of section 4s(h) of the CEA or section 15F(h) of the Exchange Act) to the plan in connection with the transaction;
- The swap counterparty does not receive compensation for providing the investment advice directly from the plan or plan fiduciary; and
- Before providing a recommendation in connection with the transaction, the swap counterparty obtain a written representation from the independent fiduciary that the independent fiduciary understands that the counterparty is

not undertaking to provide impartial investment advice or to give advice in a fiduciary capacity in connection with the transaction, and that the independent fiduciary is exercising independent judgment in evaluating the recommendation.

- The DOL clarified that the swap exemption applies to cleared and uncleared swaps because the CEA’s business conduct standards apply to both types of transactions. The DOL views the exclusion of pooled funds from special entity status under the CEA’s business conduct standards as also requiring sponsors of pooled funds to be excluded from swap exemption, despite the different purposes of the provisions. Plan asset hedge funds and bank collective funds, accordingly, cannot rely on the swap exception.

c. *Employees of Plan Sponsors*

The final rule provides an exception from the definition of Investment Advice Fiduciary for an employee of the plan sponsor (or an affiliate) who provides advice to a plan fiduciary or an employee (other than in the employee’s capacity as a participant in the plan), *provided* that the employee does not receive additional compensation for the advice beyond the employee’s regular pay. The DOL acknowledged that this exception is to ensure that certain employees of the plan sponsor, such as human resources and payroll employees, would not be treated as an Investment Advice Fiduciary as a result of communications that are part of their normal employment duties.

- Employees who regularly create reports and recommendations for their employer’s plan or other named fiduciaries of the plan are exception from the definition of Investment Advice Fiduciary to the extent they are operating within the scope of their employment.

d. *Broker-Dealers and Banks Executing Securities Transactions*

The final rule confirms that a registered broker-dealer, reporting dealer who makes primary markets in government securities, or U.S. or state supervised bank that executes a securities transaction pursuant to instructions of a fiduciary will not be deemed an Investment Advice Fiduciary solely because of executing the transaction, subject to certain conditions. This type of service has historically been seen as not constituting fiduciary advice.

II. NEW PROHIBITED TRANSACTION EXEMPTIONS

A. Overview of New Exemptions

Concurrently with its adoption of the final rule defining an Investment Advice Fiduciary, the DOL adopted the new BIC Exemption and the Principal Transaction Exemption to provide additional relief to Investment Advice Fiduciaries from the prohibited transaction rules under ERISA and the Code. The BIC Exemption provides relief from the prohibited transaction rules that prevent an Investment Advice Fiduciary to a plan or an IRA from receiving, in connection with its advice, compensation that varies based on the advice provided (*e.g.*, commissions and other incentive payments) and compensation payable by third parties (*e.g.*, 12b-1 fees, certain sales loads, and revenue-sharing payments). The Principal Transaction Exemption provides relief from the prohibited transaction rules that prevent an Investment Advice Fiduciary from engaging in self-dealing or acting in any transaction involving a plan on behalf of a party whose interests are adverse to the interests of the plan or the interests of its participants and beneficiaries. The exemptions have similar conditions that must be satisfied to avoid application of the prohibited transaction provisions of ERISA and the Code, and each exemption reflects the DOL's view that investors should be protected by a consistent application of fundamental fiduciary standards across a wide range of investment products and advice relationships.

B. Best Interest Contract Exemption

1. Overview of BIC Exemption

The DOL indicated that the BIC Exemption "was carefully calibrated to permit a wide variety of compensation structures, while protecting Retirement Investors' interest in receiving sound advice on vitally important investments." In broad terms, Advisers and Financial Institutions that rely on the BIC Exemption must give advice that is in their customers' best interest, and must implement basic protections against the hazards posed by conflicts of interest, including by:

- Acknowledging fiduciary status with respect to providing investment advice;
- Adhering to certain "Impartial Conduct Standards" that require an Adviser to (i) provide prudent advice based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, without regard to financial or other interests of the Adviser and its Affiliates; (ii) charge no more than reasonable compensation; and (iii) make no misleading statements concerning the advice, compensation, and conflicts of interest;
- Implementing policies and procedures reasonably designed to prevent violations of the Impartial Conduct Standards;
- Refraining from giving or using incentives that may act contrary to the customer's best interest; and
- Fairly disclosing the fees, compensation, and material conflicts of interest.

The exemption applies to IRAs and employee benefit plans not subject to Title I of ERISA (*e.g.*, Keogh Plans) in the same manner and generally requires the Financial Institution and Adviser to commit to the Impartial Conduct Standards in an enforceable contract with the investor that provides a remedy to redress damages (although the enforceable contract requirement does not apply to ERISA plans). The BIC Exemption provides for more streamlined requirements in the case of Advisers to plans and in the case of so-called "Level Fee Fiduciaries" (as defined below) that provide ongoing advice for a fixed, asset based fee. The BIC Exemption, its conditions, and the scope of its availability are detailed below.

2. Key Dates

Although the BIC Exemption will be applicable to transactions beginning on April 10, 2017, the DOL has provided for a compliance transition period from April 10, 2017 until January 1, 2018, during which time Advisers and Financial Institutions will only have to comply with certain conditions of the exemption.

3. General Exemption and Exclusions

The BIC Exemption is not available under four circumstances:

Exclusions Under the BIC Exemption	
In-House Plans	When the Adviser, Financial Institution or any Affiliate is the employer of employees covered by the ERISA Plan, or the Adviser or Financial Institution or Affiliate is a named fiduciary or plan administrator with respect to the ERISA Plan that was selected to provide advice to the plan by a non-independent fiduciary.
Principal Transactions	When the compensation is received as a result of a principal transaction involving the Financial Institution and/or its Affiliates on the one hand, and a plan, participant or beneficiary account, or IRA, on the other hand (other than principal transactions involving insurance products or mutual fund shares, and riskless principal transactions).
Robo-Advice	When the compensation is received solely as a result of so-called "robo-advice" (*i.e.*, an interactive website in which models or applications provide investment advice based on personal information supplied through the website without any personal interaction), unless the robo-advice provider is a Level Fee Fiduciary.
Discretionary Fiduciary	When the Adviser has or exercises any discretionary authority or discretionary control with respect to the recommended transaction.

4. General Exemption – Key Requirements

a. *Advice to IRAs – Contract Requirement*

Among the BIC Exemption's key conditions is a requirement that any advice provided to an IRA must be governed by a written contract between the Retirement Investor and the Financial Institution, where the Financial Institution agrees to abide by the BIC Exemption's principles of full and complete disclosure (the "Best Interest Contract"). The Best Interest Contract must cover advice that is provided not later than the date the contract is executed, and must set out an "enforceable commitment to safeguard Retirement Investors from biased advice that is not in the investor's best interest." The contractual requirement is a hallmark of the BIC Exemption as it relates to IRAs, because, unlike participants and beneficiaries in ERISA Plans, IRA owners do not have an independent statutory right to bring an action against fiduciaries for violation of the prohibited transaction rules, and the Secretary of Labor does not have the authority to enforce the prohibited transactions rules on their behalf.

Contract Execution Mechanics

A Best Interest Contract entered into on or after January 1, 2018 must contain the representations, warranties, and other provisions discussed below under "Operational Standards and Requirements and Required Disclosures." The contract may be set out in a separate agreement, or its terms may be incorporated into an investment advisory agreement, account opening agreement, insurance or annuity contract or application, or similar document. For contracts with Retirement Investors that will be in effect on January 1, 2018, the Financial Institution may amend the terms of the contracts to comply with the BIC Exemption by delivering a proposed amendment by that date, and considering the failure to terminate the amended contract within 30 days as negative consent. The amendment may not impose any new restrictions or liabilities on the Retirement Investor. The Retirement Investor must be able to access an electronic copy of its contract on the Financial Institution's website. Finally, the BIC Exemption contains a limited safe harbor for circumstances where the Financial Institution fails to enter into a Best Interest Contract but nonetheless provides advice to the Retirement Investor.

Prohibited Contractual Provisions

The Best Interest Contract may not include:

- Exculpatory provisions disclaiming or otherwise limiting liability of the Adviser or Financial Institution;
- A provision under which the benefit plan, IRA, or Retirement Investor waives or qualifies its right to bring or participate in a class action or other representative action in a dispute with the Adviser or Financial Institution; or
- An agreement to arbitrate or mediate individual claims in venues that are distant or that otherwise unreasonably limit the ability of the Retirement Investor to assert relevant claims.

5. Operational Standards and Requirements and Required Disclosures

a. *Operational Standards and Requirements Applicable to All Clients*

Regardless of whether advice is provided to an IRA or an ERISA Plan, an Adviser and Financial Institution must comply with the operational standards and requirements set out below. For advice provided to an IRA, these standards and requirements must be set out in the Best Interest Contract.

Operational Standards and Requirements Under the BIC Exemption	
Acknowledgement of Fiduciary Status	The Financial Institution must affirmatively acknowledge in writing that it and the Adviser act as fiduciaries under ERISA or the Code with respect to any investment advice provided by them.
Impartial Conduct Standards	• ***Best Interest Standard.*** The Adviser and Financial Institution will provide investment advice that is in the best interest of the Retirement Investor (the "Best Interest Standard"). Advice that is in a Retirement Investor's best interest is similar to the existing ERISA fiduciary standard of care, but must be considered without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate. • ***Reasonable Compensation.*** Any compensation received must be reasonable, as determined under ERISA and the Code. • ***No Misleading Statements.*** Statements by the Financial Institution and its Advisers to the Retirement Investor about transactions, fees, compensation and conflicts must not be materially misleading. With respect to IRAs, the Financial Institution must contractually agree in the Best Interest Contract that it and its Advisers will adhere to the Impartial Conduct Standards.
Anti-Conflict Policies and Procedures	The BIC Exemption requires a Financial Institution to adopt and comply with policies and procedures that give effect to the exemption's principles. • ***Impartial Conduct Standards.*** The policies and procedures must be designed to ensure that Advisers adhere to the Impartial Conduct Standards; • ***Material Conflicts of Interest.*** The Financial Institution must identify and document material conflicts of interest,[6] adopt measures designed to prevent material conflicts of interest, and designate a person to be responsible for addressing material conflicts of interest and monitoring Advisers' adherence to the Impartial Conduct Standards; and • ***Differential Compensation.*** The policies and procedures must prohibit the Financial Institution and its Affiliates from using or relying on quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or similar incentives that are intended or would reasonably be expected to cause Advisers to make recommendations that do not comply with the Best Interest Standard. The policies may permit a Financial Institution and its Affiliates to provide Advisers with differential

[6] In this context, a material conflict of interest is a conflict that exists when an Adviser or Financial Institution has a financial interest that a reasonable person would conclude could affect the exercise of its best judgment in rendering advice to a Retirement Investor.

	compensation (including commissions) if the policies are designed to avoid a misalignment of the interests of Advisers with the interests of the Retirement Investors. The DOL stated that compensation practices can include differential compensation based on "neutral factors" (*e.g.*, time or complexity of the advisory work).[7] • With respect to IRAs, the Financial Institution must warrant in the Best Interest Contract that its policies and procedures satisfy the foregoing requirements.

b. *Written Disclosures Concerning the Advisory Relationship*

The BIC Exemption requires a Financial Institution to provide a Retirement Investor with written disclosures concerning their advisory relationship. With respect to IRAs, the written disclosures can be incorporated into the Best Interest Contract or set out in a separate document and provided not later than the time the recommended transaction is executed. For ERISA Plans, the disclosures must be set out in a document that is provided to the Retirement Investor not later than the time the recommended transaction is executed.

Written Disclosures	
Written Disclosures	The Financial Institution must provide a Retirement Investor with written disclosures that clearly and prominently: • State the Best Interest Standard; inform the Retirement Investor of the services provided by the Adviser and Financial Institution; and describe how the Retirement Investor will pay for services; • Describe material conflicts of interest; • Include a link to the Financial Institution's website; • Disclose whether the Financial Institution offers proprietary products, and, if the Adviser or Financial Institution limits its investment recommendations to proprietary products or investments that generate payments from third parties, the Financial Institution must notify the Retirement Investor of the limitations placed on the universe of offered investments; and • Provide contact information for a representative of the Financial Institution.

[7] The DOL indicated that a Financial Institution could not, for example, provide an incentive for an Adviser to recommend one mutual fund over another, or to recommend one category of investments over another based on the greater compensation the Financial Institution would receive, but could draw a distinction between variable annuities and mutual funds based on the additional time it has determined is necessary for client communications and oversight with respect to these annuities. *See* 81 FR 21039.

c. *Point of Sale and Website Disclosures*

The BIC Exemption also requires a Financial Institution to make certain point-of-sale disclosures to a Retirement Investor and to maintain a publicly available website with detailed information about its business operations. The website disclosures are designed to provide information about compensation received from third parties in connection with recommendations (*e.g.*, revenue-sharing payments and 12b-1 fees) and to describe the Financial Institution's business and compensation model for its Advisers. The DOL noted that the website disclosures are designed to enable a Retirement Investor to make cost comparisons of the services provided by different firms.

Point of Sale and Website Disclosures	
Point of Sale Disclosures	A Financial Institution must provide a Retirement Investor with a single document that: • States the Best Interest Standard and describes any material conflicts of interest; and • Includes a link to the Financial Institution's website and informs the Retirement Investor that the following is available and accessible on the website: (i) model contract disclosures, and (ii) a written description of the policies and procedures required under the BIC Exemption. Importantly, absent material changes in the subject of the disclosures, the required disclosures do not have to be repeated for subsequent recommendations of the same investment product, either within one year of providing the Best Interest Contract disclosures or within one year of previously providing point of sale disclosure about the same investment.
Web Disclosures	A Financial Institution must maintain a freely accessible website that is updated at least quarterly and contains the following: • A discussion of the Financial Institution's business model and associated material conflicts of interest; • A schedule of typical account or contract fees and service charges; • A model contract or model notice of contractual terms; • A written description of the Financial Institution's policies and procedures summarizing its conflict-mitigation and incentive practices; • A list of all product manufacturers and other third parties that compensate either the Adviser or the Financial Institution with respect to specific investment products, along with a description of the third party compensation arrangements, how the arrangements affect Adviser compensation, and a statement on any benefits the Financial Institution provides to the product manufacturers or other parties in exchange for the compensation paid; and • Disclosure of the Financial Institution's compensation and incentive arrangements with Advisers.

d. *Safe Harbor for Errors or Omissions in Disclosures*

The BIC Exemption provides a safe harbor for an error or omission in disclosing the required information, as long as the Financial Institution has acted in good faith and:

- In the case of an error or omission with respect to the written or point of sale disclosures, the Financial Institution discloses the correct information as soon as practicable, but not later than 30 days after the date on which it discovers or reasonably should have discovered the error or omission; and
- In the case of an error or omission on the website, the Financial Institution discloses the correct information as soon as practicable, but not later than seven days after the date on which it discovers or reasonably should have discovered the error or omission.

6. Proprietary Products and Third Party Payments

Generally

The BIC Exemption permits a Financial Institution to limit investment recommendations to “Proprietary Products” or to investments that generate “Third Party Payments” as long as certain conditions are met. The term “Proprietary Product” means a product that is managed, issued or sponsored by the Financial Institution or any Affiliates. The term “Third Party Payments” includes sales charges when not paid directly by the plan, participant or beneficiary account, or IRA; gross dealer concessions; revenue-sharing payments; 12b-1 fees; distribution, solicitation or referral fees; volume-based fees; fees for seminars and educational programs; and any other compensation, consideration or financial benefit provided to the Financial Institution or an Affiliate by a third party as a result of a transaction involving a plan, participant or beneficiary account, or IRA.

It is important to note that a Financial Institution that limits recommendations to Proprietary Products or to investments that generate Third Party Payments must satisfy the conditions of the general BIC Exemption--in addition to the conditions set out below--to avoid having the recommended transaction be deemed a prohibited transaction.

Conditions

A Financial Institution that limits Advisers’ investment recommendations to Proprietary Products or products that generate Third Party Payments, and an Adviser making recommendations subject to such limitations, will be deemed to satisfy the Best Interest Standard if:

- Not later than the time the recommended transaction is executed, the Retirement Investor is informed in writing that the Financial Institution offers Proprietary Products or receives Third Party Payments with respect to the recommended investments; and the Retirement Investor is informed in writing of the limitations placed on the universe of investments that the Adviser may recommend to the Retirement Investor[8];

- Not later than the time the recommended transaction is executed, the Retirement Investor is informed in writing of any material conflicts of interest that the Adviser or Financial Institution has with respect to the recommended transaction, and the Adviser and Financial Institution comply with the web- and transaction-based disclosure requirements discussed above;

- The Financial Institution documents its limitations on the universe of recommended investments; documents the material conflicts of interest associated with any Third Party Payments or Proprietary Products; documents any services it will provide to Retirement Investors in exchange for Third Party Payments, as well as any services or consideration it will furnish to any other party in exchange for the Third Party Payments; reasonably concludes that the limitations on the universe of recommended investments and material conflicts of interest will not cause the Financial Institution or its Advisers to receive compensation in excess of reasonable compensation; reasonably determines that these limitations and material conflicts of interest will not cause the Financial Institution or its Advisers to recommend imprudent investments; and documents the bases for its conclusions;

- The Financial Institution adopts, monitors, implements, and adheres to policies and incentive practices that ensure compliance with the Impartial Conduct Standards, and neither the Financial Institution nor any Affiliate uses or relies upon differential compensation or other incentives that are intended or would reasonably be expected to cause the Adviser to make recommendations that do not comply with the Best Interest Standard;

- The amount of compensation reasonably expected to be paid to the Adviser, the Financial Institution, or their Affiliates in connection with the recommended transaction is not in excess of reasonable compensation within the meaning of ERISA section 408(b)(2) and the Code section 4975(d)(2); and

- The Adviser's recommendation reflects the care, skill, prudence, and diligence of a prudent person acting in a like capacity.

7. Exculpation Limitations for Advice to ERISA Plans

With respect to advice provided to an ERISA Plan, the BIC Exemption imposes additional limitations on an Adviser's and Financial Institution's ability to exculpate themselves from liability. These limitations are similar to the contractual provisions that are prohibited in Best Interest Contracts. Specifically, the Adviser and Financial Institution are prohibited, in any contract, instrument or communication with an ERISA Plan, from (i) purporting to disclaim any responsibility or liability for any responsibility, obligation, or duty under Title I of ERISA in a manner that is inconsistent with ERISA, (ii) purporting to waive or qualify the right of the Retirement Investor to bring or participate in a class action or other

[8] The BIC Exemption provides that such notice is insufficient if it merely states that the Adviser or Financial Institution *may* limit investment recommendations based on whether the investments are Proprietary Products or generate Third Party Payments, without specific disclosure of the extent to which recommendations are, in fact, limited.

representative action in court in a dispute with the Adviser or Financial Institution, and (iii) requiring arbitration or mediation of individual claims in distant locations or that otherwise unreasonably limit the ability of the Retirement Investor to assert protected claims.

8. Notice and Recordkeeping Requirements

Notice to the DOL

A Financial Institution must notify the DOL of its intention to rely on the BIC Exemption before receiving compensation in reliance on the exemption.

Recordkeeping

The Financial Institution must maintain for a period of six years records necessary to demonstrate that the conditions of the exemption have been met, and such records must be available for inspection by the DOL, the Internal Revenue Service (the "IRS"), any IRA owner, and any fiduciary, participant, or beneficiary of a plan that engaged in a transaction pursuant to the exemption.

9. Arrangements Where Streamlined Conditions Apply

The BIC Exemption permits an Adviser and Financial Institution to comply with streamlined compliance conditions in two circumstances: (1) where the Adviser and Financial Institution are acting as Level Fee Fiduciaries; and (2) where referral compensation is paid to banks and bank employees under "Bank Networking Arrangements."

a. Level Fee Fiduciaries

Background

An Adviser and Financial Institution act as "Level Fee Fiduciaries" when the only compensation received in connection with their fiduciary advice is a "Level Fee" that is disclosed in advance to the Retirement Investor. A "Level Fee" is a fee based on a fixed percentage of the value of the Retirement Investor's assets or a set fee that does not vary with the particular investment recommended. The rationale underlying the Level Fee rules is the notion that a fiduciary's interests are aligned with those of its client when the fiduciary's compensation depends solely on the value of the client's assets: the better the performance of the client's investments, the more the fiduciary stands to earn. On the other hand, the DOL acknowledged that there is "a clear and substantial conflict of interest" when an Adviser recommends that an investor roll assets into a Level Fee account that will generate ongoing fees, and the streamlined conditions applicable to Level Fee Fiduciaries are designed to control for this conflict.

Conditions

To comply with the BIC Exemption as a Level Fee Fiduciary, (i) the Financial Institution must provide the Retirement Investor with a written statement of the Adviser's and Financial Institution's fiduciary status not later than the execution of the recommended transaction; and (ii) the Adviser and Financial Institution must comply with the Impartial Conduct

Standards. When the fiduciary recommends that the Retirement Investor roll over from an ERISA Plan to an IRA or roll over from another IRA or switch from a commission-based arrangement to a Level Fee account, the Financial Institution must document the reason why the recommendation was considered to be in the best interest of the Retirement Investor.

In addition, even though the BIC Exemption is generally not available when a fiduciary’s compensation results solely from the provision of robo-advice, Financial Institutions that provide such robo-advice can rely on the exemption, with respect to robo-generated recommendations, if they comply with the Level Fee conditions.

The DOL stressed that the definition of Level Fee explicitly excludes commissions or other transaction-based payments. Accordingly, if an Adviser, Financial Institution or their Affiliates receive any such compensation (*e.g*., commissions, 12b-1 fees or revenue-sharing payments) beyond the Level Fee in connection with their advice, they would need to comply with the more stringent requirements applicable to non-Level Fee advice.

b. *Bank Networking Arrangements*

The BIC Exemption also provides relief for referral fees received by banks and bank employees under “Bank Networking Arrangements.” A “Bank Networking Arrangement” is an arrangement where bank employees refer bank customers to an unaffiliated registered investment adviser, insurance company, or broker-dealer for retail non-deposit investment products. The exemption provides relief for the receipt of referral compensation by an Adviser who is a bank employee and a Financial Institution that is a bank or similar financial institution, as long as their investment advice complies with the Impartial Conduct Standards. The DOL noted that the basis for the streamlined relief was the fact that that bank employees generally only receive nominal one-time fixed-cash amounts for referring bank customers to investment products.

10. Exemption for Purchases and Sales, Including Insurance and Annuity Contracts

The BIC Exemption includes relief that permits an Adviser and Financial Institution to receive compensation that would otherwise be prohibited by the self-dealing and conflicts of interest provisions of ERISA and the Code. These provisions broadly prohibit a Retirement Investor’s purchase of an investment product from a Financial Institution that is a service provider to the Retirement Investor or other party in interest or disqualified person. The DOL noted that the exemption was provided because investment transactions often involve prohibited purchases and sales involving entities that have a pre-existing party-in-interest relationship to an ERISA Plan or IRA.

a. *General Conditions*

The exemption permits the purchase of an investment product by a plan, participant or beneficiary account, or IRA from a Financial Institution that is a party in interest or disqualified person if:

- The transaction is effected by the Financial Institution in the ordinary course of its business;
- The compensation for any service is reasonable as determined under ERISA and the Code; and
- The terms of the transaction are at least as favorable to the plan, participant or beneficiary account, or IRA as those available in an arm’s length transaction with an unrelated party.

b. *Exclusions*

Similar to the general BIC Exemption, this relief is not available for in-house plans, principal transactions, robo-advice, and transactions involving a Discretionary Fiduciary.

11. Exemption for Pre-existing Transactions

The BIC Exemption also provides supplemental relief that enables an Adviser and Financial Institution to continue to receive compensation related to transactions that occur prior to April 10, 2017, and compensation for recommendations to continue to adhere to a systematic purchase program that was established before that date. The DOL reasoned that this relief was necessary because some Advisers and Financial Institutions may not consider themselves Investment Advice Fiduciaries before that date, while other Advisers and Financial Institutions may have entered into transactions involving plans, participant or beneficiary accounts, or IRAs before April 10, 2017, in accordance with the terms that otherwise would have been prohibited.

The relief provides that certain restrictions of ERISA and the excise taxes imposed under the Code will not apply to the receipt of compensation by an Adviser, Financial Institution, and any of their Affiliates as a result of investment advice provided to a plan, participant or beneficiary, or IRA owner in connection with investment advice that (i) was acquired before April 10, 2017, or (ii) was acquired pursuant to a recommendation to continue to adhere to a systematic purchase program established before that date, *provided* that certain conditions are met.

12. Exemption During Transition Period

Although the BIC Exemption will be applicable to transactions beginning on April 10, 2017, the DOL has provided for a compliance transition period until January 1, 2018, at which time all the conditions of the exemption will apply.

During the transition period, an Adviser and Financial Institution may receive otherwise prohibited compensation if they adhere to the Impartial Conduct Standards and comply with the following conditions:

Disclosures. The Financial Institution must provide to the Retirement Investor, not later than the execution of the recommended transaction, a single written disclosure, which may cover multiple transactions or all transactions occurring within the transition period, that:

- Affirmatively states that the Financial Institution and the Advisers act as fiduciaries under ERISA or the Code, or both, with respect to the recommendation;
- Sets forth the Best Interest Standard and affirmatively states that the Financial Institution and Advisers will adhere to it in recommending the transaction;
- Describes the Financial Institution's material conflicts of interest; and
- Discloses to the Retirement Investor whether the Financial Institution offers Proprietary Products or receives Third Party Payments with respect to any investment recommendations; and to the extent the Financial Institution or

Adviser limits investment recommendations, in whole or part, to Proprietary Products or investments that generate Third Party Payments, notifies the Retirement Investor of the limitations placed on the universe of investment recommendations.

These disclosures may be provided in person, electronically or by mail, and they do not have to be repeated for any subsequent recommendations during the transition period.

Compliance Representative. The Financial Institution must designate individuals who are responsible for addressing material conflicts of interest and monitoring Advisers' adherence to the Impartial Conduct Standards.

Recordkeeping. The Financial Institution must maintain for a period of six years records necessary to demonstrate that the conditions of the exemption have been met with respect to a transaction and such records must be available for inspection.

Exclusions. Exclusions similar to the general BIC Exemption also apply.

No Website Required. Notably, the website disclosure requirement--widely considered to be among the most onerous of the BIC Exemption's conditions--will not apply during the transition period.

C. Exemption for Principal Transactions

1. Overview of Principal Transaction Exemption

The Principal Transaction Exemption permits an Adviser and a Financial Institution to engage in a principal transaction and a riskless principal transaction involving certain investments with a plan, participant and beneficiary account, and IRA, and to receive a mark-up, mark-down or other similar payment in connection with the transaction. The Principal Transaction Exemption limits the type of investments that may be purchased or sold and contains conditions that the Adviser and Financial Institution must satisfy when relying on the exemption. The exemption, similar to the BIC Exemption, will not apply if, among other thing, the Adviser is a Discretionary Fiduciary with respect to the plan, participant or beneficiary account, or IRA involved in the transaction. In addition, the exemption applies to IRAs and employee benefit plans not subject to Title I of ERISA (*e.g.*, Keogh Plans) in the same manner and generally requires the Adviser to commit to the Impartial Conduct Standards in an enforceable contract with the investor that provides a remedy to redress damages.

2. Key Dates

Although the Principal Transaction Exemption will be applicable to transactions occurring from and after April 10, 2017, the DOL has provided for a compliance transition period until January 1, 2018, during which time an Adviser and Financial Institution will have to comply with some, but not all conditions of the exemption.

3. General Exemption and Exclusions

a. *Principal Transactions – Distinction Between Assets That Are Purchased and Sold*

The Principal Transaction Exemption covers the purchase and sale of certain investments in a principal transaction[9] between a plan, participant or beneficiary account, or IRA, and an Adviser, Financial Institution, or Affiliate, when the transaction is a result of the Adviser or Financial Institution providing investment advice. For the exemption to apply, the principal transaction must involve either the purchase or sale of a “Principal Traded Asset,” which the exemption defines differently based on the type of transaction. In the case of a **sale** by a Retirement Investor, a “Principal Traded Asset” is defined as securities or other investment property.

In the case of a **purchase** by a Retirement Investor, the definition of “Principal Traded Assets” is limited to a “debt security,” a Certificate of Deposit, and an interest in a unit investment trust. A “debt security” is defined as a bond, debenture, note, or any other similar instrument that evidences a liability of the issuer and fractional or participation interests in one or more of any of the foregoing that is:

- U.S. dollar denominated, issued by a U.S. corporation, and offered pursuant to a registration statement under the Securities Act of 1933;
- an agency debt security as set out in FINRA Rule 6710(l);
- an asset backed security as set out in FINRA Rule 6710(m) that is guaranteed by an agency or a government sponsored enterprise[10]; or
- a U.S. treasury security as set out in FINRA Rule 6710(p).

The definition of debt security also specifically excludes a security by an investment company registered (a “mutual fund”) under the Investment Company Act of 1940 (the “1940 Act”). Transactions with mutual funds will need to comply with the BIC Exemption.

- ➢ The exemption allows the DOL to add an instrument to the definition of debt security through an individual exemption, although this could prove to be a time-consuming and costly alternative.
- ➢ A debt security is defined by reference to Rule 10b-10(d)(4) of the Exchange Act, and in addition to traditional debt may also include structured notes.
- ➢ Foreign currency transactions do not appear to be eligible for this exemption.

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9 A principal transaction means a purchase or sale of a Principal Traded Asset in which an Adviser or Financial Institution is purchasing from or selling to a plan, participant or beneficiary account, or IRA on behalf of the Financial Institution’s own account or the account of a person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the Financial Institution.

10 The definition of agency is set out in FINRA Rule 6710(k), and the definition of government sponsored enterprise is set out in FINRA Rule 6710(n).

b. *Riskless Principal Transactions*

The Principal Transaction Exemption also applies to the purchase and sale of Principal Traded Assets in "riskless principal transactions" between a plan, participant or beneficiary account, or IRA, and an Adviser, Financial Institution or an Affiliate. A "riskless principal transaction" is defined as a transaction in which a Financial Institution purchases or sells a Principal Traded Asset for the Financial Institution's own account to offset the simultaneous transaction with the Retirement Investor. The definition of Principal Traded Assets applies to a riskless principal transaction in the same manner as a principal transaction.

An Adviser and Financial Institution engaging in a riskless principal transaction can seek relief under either the BIC Exemption or the Principal Transaction Exemption, but a purchase by a Retirement Investor in a riskless principal transaction is limited to Principal Traded Assets under the Principal Transaction Exemption, whereas the BIC Exemption provides broader relief for all securities. The DOL noted that this overlap was intended to provide flexibility to Advisers and Financial Institutions.

c. *Additional Conditions*

The following conditions apply to the terms of each principal transaction or riskless principal transaction entered into under the exemption:

Requirements For Relief Under The Principal Transaction Exemption	
Purchases of Certain Securities	The principal transaction cannot involve the *purchase* by a plan, participant or beneficiary account, or IRA of a debt security issued or, at the time of the principal transaction, underwritten by the Financial Institution or any Affiliate.
Moderate Credit Risk	The Adviser, using information reasonably available to it, must determine that, at the time of the transaction, the debt security being purchased possesses no greater than a *moderate credit risk*[11] and is sufficiently liquid that the security could be sold at or near its carrying value.
Agreement to Evade Compliance	The principal transaction cannot be part of an agreement or understanding designed to evade compliance with ERISA or the Code, or to otherwise impact the value of the Principal Traded Asset.
Cash	The purchase or sale of the Principal Traded Asset must be made with cash.

[11] While the DOL did not define moderate credit risk, it noted that the standard is similar to the standard used in Rule 6a-5 under the 1940 Act, and moderate credit risk would denote a current low expectation of default risk, with an adequate capacity for payment of principal and interest.

4. General Exemption – Key Requirements

a. *Advice to IRAs – Contract Requirement*

A principal transaction or a riskless principal transaction between an IRA and an Adviser or Financial Institution must be subject to an *enforceable written contract* between the Financial Institution and the Retirement Investor. Written contracts entered into on or after January 1, 2018, must contain the representations, warranties, and other provisions discussed below under "Operational Standards and Requirements and Required Disclosures." The Principal Transaction Exemption's requirements for contracts entered into beginning on January 1, 2018 are the same as those in the BIC Exemption.[12] In addition, the Principal Transaction Exemption and the BIC Exemption prohibit the same contractual provisions.[13]

5. Operational Standards and Requirements and Required Disclosures

a. *Conduct and Operational Requirements Applicable to All Clients*

Regardless of whether the principal transaction or a riskless principal transaction involves an IRA or ERISA Plan, the Adviser and Financial Institution must comply with the conduct and operational requirements, as set out in the table in the BIC Exemption Section above under "Operational Standards and Requirements Applicable to All Clients." The "Impartial Conduct Standards" with respect to the Principal Transaction Exemption require that the Adviser: (1) adhere to the Best Interest Standard; (2) seek to obtain best execution with respect to the transaction, which FINRA members can satisfy by complying with FINRA Rules 2121 and 5310; and (3) make statements that are not materially misleading. For transactions involving an IRA, the requirements must be set out in the written contract.

b. *Written and Website Disclosures Concerning the Principal Transaction*

The Principal Transaction Exemption requires a Financial Institution to make certain written and web disclosures to the Retirement Investor, as described in the table below. With respect to an IRA, the written disclosures can be incorporated into the written contract or set out in a separate accompanying document. For ERISA Plans, the disclosures must be set out in a document that is provided to the Retirement Investor not later than the execution of the recommended transaction.

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12 *See* "Contract Execution Mechanics" above.

13 *See* "Prohibited Contractual Provisions" above.

<table>
<tr><th colspan="2">Written and Website Disclosures Concerning the Principal Transaction</th></tr>
<tr><td>Written Disclosures</td><td>The Financial Institution must provide Retirement Investors with written disclosures that clearly and prominently:
disclose (1) the circumstances under which the Adviser and Financial Institution may engage in a principal transaction and riskless principal transaction with the IRA, (2) the types of compensation that may be received in connection with the transaction, and (3) the material conflicts of interest associated with the transaction;
except for existing contracts, document the Retirement Investor’s affirmative written consent;
inform the Retirement Investor that its consent is terminable at will;
inform the Retirement Investor that it has a right to obtain, free of charge, copies of the Financial Institution’s written description of its policies and procedures, as well as certain other information about the trades;
inform the Retirement Investor that it can access certain information on the Financial Institution’s website; and
describe whether or not the Adviser and Financial Institution will monitor the investment acquired through the transactions and alert the Retirement Investor to any recommended change to the investment and provide other information.</td></tr>
<tr><td>Web Disclosures</td><td>All Financial Institutions must maintain a freely accessible website that is updated at least quarterly. The website must contain the following information:
model contract disclosures or model notice of the contractual terms that are reviewed no less than quarterly;
the Financial Institution’s policies and procedures relating to the exemption’s conduct and operational requirements; and
a written description of the Financial Institution’s policies and procedures that accurately describes or summarizes key components of the policies and procedures relating to conflict-mitigation and incentive practices.</td></tr>
</table>

c. *Transaction Disclosures*

The Principal Transaction Exemption requires Financial Institutions to make several types of transaction disclosures to the Retirement Investor, as further described in the table below.

Transaction Disclosures Concerning the Principal Transaction	
Pre-Transaction Disclosure	The Adviser or Financial Institution must provide to the Retirement Investor, no later than the time the principal transaction or riskless principal transaction is executed, a disclosure of the capacity in which the Financial Institution may act with respect to the transaction (*i.e.*, whether it may act as principal in the transaction).
Confirmation	An Adviser or a Financial Institution must provide a written confirmation of the transaction, which the Adviser or Financial Institution may satisfy by complying with Rule 10b–10 under the Exchange Act.[14]
Annual Disclosure	An Adviser or a Financial Institution must provide a single written disclosure to the Retirement Investor on an annual basis that includes: • a list identifying each principal transaction executed in the Retirement Investor's account, and the date and price at which each transaction occurred; • a statement that the Retirement Investor's consent with respect to engaging in a principal transaction or riskless principal transaction is terminable at will; • a statement that the Retirement Investor has the right to obtain, free of charge, information about the Principal Traded Asset; and • a statement to the Retirement Investor that it can access certain information on the Financial Institution's website.

d. *Safe Harbor for Errors or Omissions in Disclosures*

The Principal Transaction Exemption and the BIC Exemption provide the same safe harbor for an error or omission in disclosing the required information. The conditions to the safe harbor are set out in the BIC Exemption Section above under "Safe Harbor for Errors or Omissions in Disclosures."

[14] Rule 10b-10 generally requires disclosure of, among other things, the date, identity, price, and number of shares bought or sold; the capacity of the broker-dealer; the net dollar price and yield of a debt security; and, under specified circumstances, the amount of compensation paid to the broker-dealer and whether payment for order flow is received.

6. Exculpation Limitations for Advice to ERISA Plans

With respect to advice provided to ERISA Plans, the Principal Transaction Exemption imposes the same additional limitations set out in the BIC Exemption.[15]

7. Exemption During Transition Period

Although the Principal Transaction Exemption will be applicable to transactions occurring from and after April 10, 2017, the DOL has provided for a compliance transition period until January 1, 2018. During the transition period, Advisers and Financial Institutions must adhere to the Impartial Conduct Standards applicable to the Principal Transaction Exemption and make the same disclosures and meet the other requirements, as set forth in the BIC Exemption.[16]

8. Recordkeeping Requirements

A Financial Institution has the same recordkeeping requirements under the BIC Exemption and the Principal Transaction Exemption.[17] A Financial Institution will be unable to rely on the Principal Transaction Exemption with respect to a transaction for which it fails to maintain required records necessary to demonstrate that the conditions of the exemption have been met with respect to the transaction.

III. AMENDMENTS TO EXISTING PROHIBITED TRANSACTION CLASS EXEMPTIONS

The DOL, in conjunction with adopting the BIC Exemption and the Principal Transaction Exemption, amended certain existing prohibited transaction class exemptions (“PTEs”) to permit the receipt of sales commissions on products purchased by plans or IRAs by certain fiduciaries, broker-dealers, and insurance agents that would otherwise be prohibited by the provisions of ERISA and the Code. The DOL also revoked certain provisions of existing PTEs because the transactions previously covered by those PTEs are now covered by one of the new or amended exemptions. The amendments, in an effort to have fiduciaries adhere to a common set of standards across exemptions, incorporated into the PTEs the Impartial Conduct Standards, which generally require a fiduciary to comply with the Best Interest Standard, limit compensation to what is reasonable, disclose material conflicts of interest, and not make misleading statements about recommended investments, fees, material conflicts of interest, and any other matters relevant to the investor’s decision, and thereby conditioned the relief provided by each PTE on the fiduciary satisfying the Impartial Conduct Standards. The discussion below and the attached Chart II summarize certain of the material amendments.

The amendments to the existing PTEs will become applicable to transactions beginning on April 10, 2017.

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[15] *See “*Exculpation Limitations for Advice to ERISA Plans” in the BIC Exemption Section above.

[16] *See* “Exemption During Transition Period” in the BIC Exemption Section above.

[17] *See* “Notice and Recordkeeping Requirements” above.

A. Amendments to PTEs 86-128, 75-1 Parts I(b) and I(c), and 75-1 Part II(2)

The DOL’s amendments to PTE 86-128 materially limit not only the ability of a fiduciary to rely on the exemption, but also the fees that a fiduciary can receive in connection with certain mutual fund and other securities transactions entered into by plans and IRAs. The amendments narrow the relief previously provided by the exemption to (1) a fiduciary to a plan and (2) a Discretionary Fiduciary to an IRA. In addition, the compensation permitted under the exemption is restricted to “commissions,” which the DOL narrowly defined as “brokerage commission or sales load paid for the service of effecting or executing the transaction, but not a 12b-1 fee, revenue-sharing payment, marketing fee, administrative fee, sub-TA fee or sub-accounting fee.”

The DOL also incorporated into PTE 86-128 transactions that were previously the subject of PTE 75-1 Part II(2), which permitted a fiduciary to receive a fee in connection with the purchase or sale of mutual fund shares by a plan or IRA in certain circumstances; accordingly, the DOL revoked PTE 75-1 Part II(2). PTE 86-128 will, after the applicability date of April 10, 2017, cover these transactions and limit the fees allowed to be received by a fiduciary to commissions. PTE 86-128, however, will not cover mutual fund transactions with respect to an IRA; these transaction will instead be covered by the BIC Exemption. In its final form, PTE 86-128 permits a fiduciary to receive a commission and avoid the application of the prohibited transaction provisions of ERISA and the Code in the following types of transactions:

Transactions Permitted Under PTE 86-128	
A Securities Transaction Where the Commission is Paid Directly	A securities transaction in which a fiduciary using its authority causes a plan or IRA to pay a commission *directly* to the fiduciary (or a related party) as agent for the plan or IRA, but only to the extent that the securities transaction is not excessive, under the circumstances, in either amount or frequency. *Limitation of Relief*. Relief for this transaction does not apply if the transaction involves an IRA and the fiduciary is an Investment Advice Fiduciary.
An Agency Cross Transaction	An agency cross transaction in which a fiduciary acts as an agent for a plan or IRA and one or more counterparties and receives a commission from one or more other parties to the transaction. *Limitation of Relief*. Relief for this transaction does not apply if the transaction involves an IRA and the fiduciary is an Investment Advice Fiduciary.
A Mutual Fund Transaction	A securities transaction in which a fiduciary using its authority causes a plan (*and not an IRA*) to purchase mutual fund shares from the fiduciary and, in connection with the transaction, for the fiduciary to receive a commission, *directly or indirectly*, but only to the extent that the mutual fund transaction is not excessive, under the circumstances, in either amount or frequency. *Limitation of Relief*. Relief for this transaction only applies if the fiduciary (1) is a registered broker-dealer acting as such, and (2) is not a principal underwriter for, or an affiliated person of, the mutual fund.

- Under the final rule, an Investment Advice Fiduciary to an IRA is no longer able to rely on PTE 86-128 and will need to rely on the BIC Exemption.

The DOL, simultaneous with amending PTE 86–128 and revoking PTE 75-1 Part II(2), revoked PTE 75-1 Parts I(b) and I(c). PTE 75-1 Parts I(b) and I(c) permitted effecting securities transactions, including, among other things, clearance, settlement or custodial functions incidental to effecting the transactions, and furnishing advice regarding securities by parties in interest or disqualified persons other than fiduciaries. According to the DOL, the relief provided in PTE 75-1 Parts I(b) and I(c) duplicated the relief available under ERISA section 408(b)(2) and the Code section 4975(d)(2), and, therefore, the DOL revoked these parts, so that affected parties providing these services would need to rely on the statutory exemptions.

B. Amendments to PTE 84-24

The amendments to PTE 84-24 will likely significantly affect insurance agents, insurance brokers, pension consultants and mutual fund principal underwriters that previously relied on the exemption to avoid the application of the prohibited transaction provisions of ERISA and the Code with respect to transactions in certain insurance products. The exemption previously allowed these service providers to receive a commission in connection with the purchase of insurance and annuity contracts, including variable annuity contracts and indexed annuities, by a plan and IRA, and the purchase of mutual fund shares by a plan and IRA. The DOL, in amending PTE 84-24, revoked the relief that PTE 84-24 previously provided for compensation received in connection with the purchase of annuity contracts that do not meet the definition of "fixed rate annuity contracts," which expressly excludes variable annuity contracts, indexed annuity contracts, or similar contracts. In addition, the DOL revoked the relief with respect to purchases of mutual fund shares by IRAs, as those shares will now be covered under the BIC Exemption.

The DOL, in the final rule, added two new definitions that limit the types of payments that can be received by agents, brokers, pension consultants and principal underwriters under the exemption. Payments received by an agent, broker and pension consultant in connection with the purchase of a fixed rate annuity contract with the assets of a plan or IRA are now restricted to an "insurance commission" and related employee benefits from an insurance company. Payments received by underwriters in connection with the purchase of mutual fund shares by a *plan* are restricted to a "mutual fund commission."

Compensation Permitted Under PTE 84-24	
Insurance Commission	A sales commission paid by the insurance company to the insurance agent or broker or pension consultant for the service of effecting the purchase of a fixed rate annuity contract or insurance contract, including renewal fees and trailers, but not revenue sharing payments, administrative fees, or marketing payments.

Mutual Fund Commission	A commission or sales load paid either by the plan or the mutual fund for the service of effecting or executing the purchase of investment company securities, but does not include a 12b-1 fee, revenue sharing payment, administrative fee, or marketing fee.

The DOL acknowledged that the amendments to PTE 84-24 were an effort to focus the exemption on guaranteed lifetime income products (such as immediate and deferred income annuities), leaving the BIC Exemption as the sole exemption for insurance agents, insurance brokers, pension consultants and mutual fund principal underwriters transacting in variable annuity contracts, indexed annuity contracts and other similar annuity contracts.

C. Amendments to PTE 75-1 Part V

PTE 75-1 Part V permits the extension of credit to a plan or IRA by a broker-dealer in connection with the purchase or sale of securities. The DOL has acknowledged that the exemption covers:

- the settlement of securities transactions;
- short sales of securities;
- the writing of option contracts on securities; and
- the purchasing of securities on margin.

The exemption, however, does not permit a broker-dealer that is a fiduciary with respect to a plan or IRA involved in the transaction to receive compensation for such an extension of credit. The DOL expanded PTE 75-1 Part V to permit an Investment Advice Fiduciary that is a broker-dealer to receive *reasonable compensation* for lending money or otherwise extending credit to a plan or IRA for the limited circumstance of *avoiding a failed securities transaction*. The exemption is conditioned on, among other things, the fiduciary not causing the failed securities transaction and the terms of the extension of credit being at least as favorable to the plan or IRA as the terms available in an arm's length transaction between unrelated parties.

D. Amendments to PTEs 75-1 Parts III And IV, 77-4, 80-83, and 83-1

The DOL amended PTEs 75-1 Parts III and IV, 77-4, 80-83, and 83-1, to require that Investment Advice Fiduciaries and Discretionary Fiduciaries satisfy the Impartial Conduct Standards to obtain the relief available under each exemption. The PTEs provide relief for the following transactions:

- PTE 75-1 Part III permits a fiduciary to cause a plan or IRA to purchase securities from a member of an underwriting syndicate other than the fiduciary when the fiduciary is also a member of the syndicate.
- PTE 75-1 Part IV permits a plan or IRA to purchase or sell securities in a principal transaction from a fiduciary that is a market maker with respect to such securities.

- PTE 77-4 permits a plan or IRA to purchase or sell mutual fund shares where the fund's investment adviser is also a fiduciary to the plan or IRA.
- PTE 80-83 permits a fiduciary to cause a plan or IRA to purchase a security when the proceeds of the securities issuance may be used by the issuer to retire or reduce indebtedness to the fiduciary or its affiliate.
- PTE 83-1 permits the sale of certificates in an initial issuance of certificates by the sponsor of a mortgage pool to a plan or IRA when the sponsor, trustee or insurer of the pool is a fiduciary with respect to the assets of the plan or IRA invested in such certificates.

IV. CONCLUSION

The final rules and amendments reflect the DOL's efforts over many years to update the fiduciary rules that apply to retail investors. These rules establish a complex framework that will likely require significant changes to existing business practices and compliance programs to ensure conformance with the numerous documentation and disclosure requirements. Also, partly because the rules are so lengthy and complex, many interpretive issues remain, and it will undoubtedly take time for the market to process these changes and allow certain trends to develop. Firms that will be impacted by the final rules and exemptions should consider engaging in a thorough evaluation of their existing products and services available to retail plan investors and the corresponding compensation arrangements in order to analyze the changes that will need to be made.

If you have any questions regarding this memorandum, please contact Barry P. Barbash (202-303-1201; bbarbash@willkie.com), Peter E. Haller (212-728-8271; phaller@willkie.com), Justin L. Browder (202-303-1264; jbrowder@willkie.com), Arthur C. Damoulakis (202-303-1177; adamoulakis@willkie.com), Sharon Mori (212-728-8168; smori@willkie.com), or the Willkie attorney with whom you regularly work.

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Chart I

Fiduciary Rule, BIC and Principal Transaction Exemptions – Common Defined Terms

Adviser	An employee, independent contractor, agent, or registered representative of a Financial Institution that satisfies applicable regulatory and licensing requirements with respect to a covered transaction.
Affiliate	Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the Adviser or Financial Institution.
ERISA Plan	A participant or beneficiary of a plan subject to Title I of ERISA with authority to direct the investment of assets in his or her plan account or to take a distribution.
Financial Institution	An entity that employs an Adviser and that is a registered investment adviser, bank, insurance carrier, broker-dealer or other entity designated as such by the DOL.
Related Entity	Any entity other than an Affiliate in which the Adviser or Financial Institution has an interest that may affect the exercise of its best judgment as a fiduciary.
Retail Fiduciary	A fiduciary that is **not** a registered investment adviser, registered broker-dealer, insurance carrier, or plan fiduciary that holds, manages, or controls $50 million or more of assets.
Retirement Investor	• An ERISA Plan; • A participant or beneficiary of a plan described in section 4975(e)(1)(A) of the Code with authority to direct the investment of assets in his or her plan account or to take a distribution; • The beneficial owner of an IRA acting on behalf of the IRA; or • A Retail Fiduciary with respect to a plan described in section 4975(e)(1)(A) of the Code, or an IRA.

Chart II

Summary of Amendments to Existing Prohibited Transaction Exemptions

Prohibited Transaction Exemption	Current Covered Transactions	Amendments to Prohibited Transaction Exemption
PTE 75-1 Part I(b)	The execution of a securities transaction on behalf of a plan by a party in interest or disqualified person acting as agent, and the performance by such person of clearance, settlement, or custodial functions incidental to effecting such transaction.	Part I(b) was revoked. The relief provided in PTE 75-1 Part I(b) duplicated the relief available under ERISA section 408(b)(2) and the Code section 4975(d)(2); therefore, the DOL revoked this part, so that affected parties providing these services must rely on the statutory exemptions.
PTE 75-1 Part I(c)	The furnishing of investment advice, analyses or reports, either directly or through publications, by a party in interest or disqualified person to a plan or IRA under circumstances that do not make the party in interest or disqualified person an investment advice fiduciary with respect to the plan or IRA.	Part I(c) was revoked. The relief provided in PTE 75-1 Part I(c) duplicated the relief available under ERISA section 408(b)(2) and the Code section 4975(d)(2); therefore, the DOL revoked this part, so that affected parties providing these services must rely on the statutory exemptions.
PTE 75-1 Part II(1)	The purchase or sale of a security in a principal transaction between a plan and a registered broker-dealer, a reporting dealer who makes primary markets in government securities, or a U.S. or state supervised bank.	Part II(1) was amended to require the broker-dealer, reporting dealer, or bank engaging in the covered transaction to maintain the records with respect to the transaction, as opposed to the plan or IRA. The recordkeeping provisions require the broker-dealer, reporting dealer, or bank to: • maintain for a period of six years records necessary to demonstrate that the conditions of the exemption have been met with respect to a transaction; and

		• make the records available for inspection by the DOL, the IRS, any IRA owner, any fiduciary, and any participant or beneficiary of a plan that engaged in a transaction pursuant to the exemption. • Failure to maintain the required records necessary to determine whether the conditions of the exemption have been met will result in the loss of the exemption only for the transaction or transactions for which records are missing or have not been maintained.
PTE 75-1 Part II(2)	The purchase or sale by a plan of mutual fund shares, *provided* that no fiduciary with respect to the plan who makes the decision on behalf of the plan to enter into the transaction is a principal underwriter for, or affiliated with, such mutual fund.	Part II(2) was incorporated into PTE 86-128 and revoked.
PTE 75-1 Part III	A fiduciary causing a plan or IRA to purchase securities from a member of an underwriting syndicate other than the fiduciary when the fiduciary is also a member of the syndicate.	PTE 75-1 Part III was amended to require that a fiduciary engaging in a covered transaction comply with the Impartial Conduct Standards, which require that the fiduciary: (1) adhere to the Best Interest Standard; (2) receive reasonable compensation; and (3) make statements in connection with the transaction that are not materially misleading.
PTE 75-1 Part IV	The purchase of securities in a principal transaction by a plan or IRA from a fiduciary that is a market maker with respect to such securities.	PTE 75-1 Part IV was amended to require that a fiduciary engaging in a covered transaction comply with the Impartial Conduct Standards, which require that the fiduciary: (1) adhere to the Best Interest Standard; (2) receive reasonable compensation; and (3) make statements in connection with the transaction that are not materially misleading.
PTE 75-1 Part V	The extension of credit by a registered broker-dealer to a plan or IRA in connection with the purchase or sale of securities.	• *Reasonable Compensation.* PTE 75-1 Part V was amended to permit the receipt of reasonable compensation by an investment advice fiduciary that is a broker-dealer in connection with extending credit to a plan or IRA, *provided* that:

		◦ the extension of credit was to avoid a failed securities transaction (other than a failure caused by the fiduciary); and ◦ the terms of the extension of credit are at least as favorable to the plan or IRA as the terms available in an arm's length transaction between unaffiliated parties. • *Recordkeeping Requirement.* A broker-dealer engaging in a covered transaction is required to: ◦ maintain for a period of six years records necessary to demonstrate that the conditions of the exemption have been met with respect to a transaction; and ◦ make the records available for inspection by the DOL, the IRS, any IRA owner, any fiduciary, and any participant or beneficiary of a plan that engaged in a transaction pursuant to the exemption. • Failure to maintain the required records necessary to determine whether the conditions of the exemption have been met will result in the loss of the exemption only for the transaction or transactions for which records are missing or have not been maintained.
PTE 77-4	The purchase or sale of mutual fund shares by a plan or IRA when the fund's investment adviser is also a fiduciary to the plan or IRA.	PTE 77-4 was amended to require that a fiduciary engaging in a covered transaction comply with the Impartial Conduct Standards, which require that the fiduciary: (1) adhere to the Best Interest Standard; (2) receive reasonable compensation; and (3) make statements in connection with the transaction that are not materially misleading.
PTE 80-83	A fiduciary causing a plan or IRA to purchase a security when the proceeds of the securities issuance may be used by the issuer to retire or reduce indebtedness to the fiduciary or its affiliate.	PTE 80-83 was amended to require that a fiduciary engaging in a covered transaction comply with the Impartial Conduct Standards, which require that the fiduciary: (1) adhere to the Best Interest Standard; (2) receive reasonable compensation; and (3) make statements in connection with the transaction that are not materially misleading.

<table>
<tr><td>PTE 83-1</td><td>The sale of certificates in an initial issuance of certificates by the sponsor of a mortgage pool to a plan or IRA when the sponsor, trustee or insurer of the pool is a fiduciary with respect to the assets of the plan or IRA invested in such certificates.</td><td>PTE 83-1 was amended to require that a fiduciary engaging in a covered transaction comply with the Impartial Conduct Standards, which require that the fiduciary: (1) adhere to the Best Interest Standard; (2) receive reasonable compensation; and (3) make statements in connection with the transaction that are not materially misleading.</td></tr>
<tr><td>PTE 84-24</td><td>The receipt of commissions in connection with the purchase of insurance products and mutual fund shares by a plan and IRA.</td><td>• Annuity Contracts. The DOL revoked relief for compensation received in connection with the purchase of annuity contracts that do not meet the definition of "Fixed Rate Annuity Contracts."
• Annuity Transactions. Relief in connection with covered annuity transactions is limited to plan and IRA transactions involving a Fixed Rate Annuity Contract and insurance contracts. A Fixed Rate Annuity Contract is defined as a fixed annuity contract issued by an insurance company that is either an immediate annuity contract or a deferred annuity contract that:
o satisfies applicable state standard nonforfeiture laws at the time of issue, or
o in the case of a group fixed annuity, guarantees return of principal net of reasonable compensation and provides a guaranteed declared minimum interest rate in accordance with the rates specified in the standard nonforfeiture laws in that state that are applicable to individual annuities; in either case, the benefits of which do not vary, in part or in whole, based on the investment experience of a separate account or accounts maintained by the insurer or the investment experience of an index or investment model; and
o is not a variable annuity or an indexed annuity or similar annuity.</td></tr>
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		• *Insurance Commissions.* Compensation received by an agent, broker or pension consultant in connection with the purchase of a Fixed Rate Annuity Contract with the assets of a plan or IRA is now restricted to an "insurance commission" and related employee benefits from an insurance company. o Insurance Commission is defined as a sales commission paid by the insurance company to the insurance agent or broker or pension consultant for the service of effecting the purchase of a fixed rate annuity contract or insurance contract, including renewal fees and trailers, but not revenue sharing payments, administrative fees, or marketing payments. • *Mutual Fund Transactions.* Relief for receipt of compensation by an underwriter in connection with the purchase of mutual fund shares by an IRA. • *Mutual Fund Commission.* Compensation received by underwriters in connection with the purchase of mutual fund shares by a plan are restricted to a "mutual fund commission." o Mutual Fund Commission is defined as a commission or sales load paid either by the plan or the mutual fund for the service of effecting or executing the purchase of investment company securities, but does not include a 12b-1 fee, revenue sharing payment, administrative fee, or marketing fee. • *Impartial Conduct Standards.* The exemption requires that a fiduciary engaging in a covered transaction comply with the Impartial Conduct Standards, which require that the fiduciary: (1) adhere to the Best Interest Standard and (2) make statements in connection with the transaction that are not materially misleading. • *Reasonable Compensation.* The exemption is conditioned on the combined total of all fees and

		compensation received in connection with a covered transaction not exceeding reasonable compensation within the meaning of ERISA and the Code.
		• *Rollover.* The exemption applies in the context of a rollover or distribution.
		• *Disclosure.* The exemption requires that parties relying on the exemption make certain pre-transaction and annual disclosures.
		• *Approval.* The exemption requires that the fiduciary or IRA owner acknowledge in writing receipt of the pre-transaction disclosure and approve the transaction.
		• *Recordkeeping Requirement.* An agent, broker, pension consultant, insurer or underwriter engaging in a covered transaction is required to:
		  o maintain for a period of six years records necessary to demonstrate that the conditions of the exemption have been met with respect to a transaction; and
		  o make the records available for inspection by the DOL, the IRS, any IRA owner, any fiduciary and any participant or beneficiary of a plan that engaged in a transaction pursuant to the exemption.
		• Failure to maintain the required records necessary to determine whether the conditions of the exemption have been met will result in the loss of the exemption only for the transaction or transactions for which records are missing or have not been maintained.

PTE 86-128	The receipt of a fee by a fiduciary in connection with certain mutual fund transactions and other securities transactions entered into by a plan and IRA.	• *IRAs.* The DOL revoked relief for transactions between an investment advice fiduciary and an IRA; investment advice fiduciaries will need to rely on the BIC Exemption to engage in the covered transactions for IRAs. • *Commissions.* The DOL limited the compensation permitted in connection with a covered transaction to “commissions,” which is defined as “brokerage

		commission or sales load paid for the service of effecting or executing the transaction, but not a 12b-1 fee, revenue sharing payment, marketing fee, administrative fee, sub-TA fee or sub-accounting fee.” • *Commissions Received Directly.* The DOL limited the relief for securities transactions to permit only commissions that are paid directly by the plan or IRA. • *Mutual Fund Transactions.* Mutual fund transactions involving a plan (and not an IRA) that were previously the subject of PTE 75-1 Part II(2) were incorporated into PTE 86-128; however, the exemption only applies if the fiduciary (1) is a registered broker-dealer acting as such, and (2) is not a principal underwriter for, or an affiliated person of, the mutual fund. • *Impartial Conduct Standards.* The exemption requires that a fiduciary engaging in a covered transaction comply with the Impartial Conduct Standards, which require that the fiduciary: (1) adhere to the Best Interest Standard; (2) receive reasonable compensation; and (3) make statements in connection with the transaction that are not materially misleading. • *Related Entities.* The exemption expands its coverage to include a securities transaction in which a Related Entity receive a commission in connection with the transaction. • *Written Contract.* Covered transaction must occur pursuant to a written authorization executed in advance by an independent fiduciary of each plan whose assets are involved in the transaction or, in the case of an IRA, the IRA owner. • *Annual Reauthorization.* An annual reauthorization is necessary for a fiduciary to continue to engage in transactions pursuant to the exemption.

		• *Portfolio Turnover Ratio.* The exemption requires that the fiduciary relying on the exemption provide a portfolio turnover ratio at least once per year, *provided* that the fiduciary exercised discretionary authority over trading in the plan's account during the applicable year.
		• *Recapture of Profits.* The exemption permits discretionary trustees to rely on the recapture of profits provision of PTE 86-128 as an alternative to complying with Section III.
		• *Rollovers.* The exemption will not provide relief for a recommended rollover from an ERISA plan to an IRA, where the resulting compensation is a commission on the IRA investments.
		• *Pooled Funds.* The amendments provided special rules for a person engaging in a covered transaction on behalf of an account or fund for the collective investment of the assets of a pooled fund, which limit the applicability of the contractual requirements if certain conditions are met.
		• *Recordkeeping Requirement.* A fiduciary engaging in a covered transaction is required to:
		  o maintain for a period of six years records necessary to demonstrate that the conditions of the exemption have been met with respect to a transaction; and
		  o make the records available for inspection by the DOL, the IRS, any IRA owner, any fiduciary, and any participant or beneficiary of a plan that engaged in a transaction pursuant to the exemption.
		• Failure to maintain the required records necessary to determine whether the conditions of the exemption have been met will result in the loss of the exemption only for the transaction or transactions for which records are missing or have not been maintained.