

CLIENT MEMORANDUM

The Department of Labor Re-Proposes Fiduciary Rulemaking for Employee Benefit Plans and IRAs

May 8, 2015

AUTHORS

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On April 14, 2015, the Department of Labor (the “DOL”) issued proposed regulations (the “Proposed Regulations”) clarifying who is a “fiduciary” of an employee benefit plan under the Employee Retirement Income Security Act of 1974 (“ERISA”) by virtue of giving investment advice to a plan or its participants. The Proposed Regulations also apply to the definition of a “fiduciary” for purposes of IRAs under the Internal Revenue Code of 1986 (the “Code”). Further, the Proposed Regulations propose two new, and amend certain existing, class exemptions from the prohibited transaction rules. This Client Memorandum provides an overview of these proposed changes.¹

The Proposed Regulations could transform the way financial services firms market their products and services by requiring financial advisers to comply with a best interest standard of care when advising IRAs and small plans. Advisers to these plans and IRAs will need to examine whether their existing compensation models remain viable.

¹ See Chart I for an overview of the test for fiduciary status, carve-outs, new exemptions and amended exemptions.

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I. Re-Proposed Fiduciary Definition

In issuing the Proposed Regulations, the DOL sought to broaden the scope of the types of advice relationships that would give rise to fiduciary status, as compared to the current regulations (the “Current Regulations”).² In support of the Proposed Regulations, the DOL cited the increased significance of the financial advice being provided to employee benefit plans and their participants and the increasing share of retirement funds that are held by participant-directed plans and IRAs. The Proposed Regulations are particularly concerned with heightening protections for retail investors who receive investment advice, including small plans and IRAs.

The DOL issued the Current Regulations in 1975, employing a five-part test for determining whether a person is providing investment advice for a fee. In the view of the DOL, the Current Regulations have the effect of improperly narrowing the statutory scope of the definition. The Current Regulations provide that a person without discretionary authority or control with respect to the purchase or sale of securities must (1) render advice as to the value of securities or make 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 with the plan or plan fiduciary that (4) the advice will serve as a primary basis for investment decisions of the plan’s assets and that (5) the advice is individualized and particularized for the plan. In the Proposed Regulations, the DOL sought to rectify what it saw as the potential for advisers to give self-interested advice because they would not meet all of the elements of the narrow definition of fiduciary under the Current Regulations.

The Proposed Regulations characterize “investment advice” with respect to a plan or IRA for purposes of the definition of fiduciary under ERISA Section 3(21)(A)(ii) and Code Section 4975(e)(3)(B) as:

(A) Any of the following:

- (1) a recommendation as to the advisability of acquiring, holding, disposing or exchanging a security, including taking a distribution of benefits or rolling over benefits from a plan or IRA;
- (2) a recommendation as to the management of securities, including taking a distribution of or rolling over benefits from a plan or IRA;
- (3) an appraisal, fairness opinion or similar statement concerning the value of a security if provided in the context of the acquisition, disposition or exchange of such security; or
- (4) a recommendation by a person who will receive a fee or other compensation in providing any of the advice described in (1), (2) or (3); AND

(B) The person who is providing the advice either represents or acknowledges that such advice gives rise to fiduciary status within the meaning of ERISA or the Code, or gives the advice

² See Chart II for a comparison of the Current Regulations’ and the Proposed Regulations’ definitions of investment advice fiduciary.

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pursuant to an agreement, arrangement or understanding that the advice is individualized or specifically directed to the recipient for purposes of making an investment or management decision with respect to a plan's assets.³

The Proposed Regulations contain exemptions for certain types of advice provided by advisers who do not represent that they are fiduciaries with respect to such advice:

- counterparties transacting with a plan fiduciary who exercises control as to the management of the assets of a plan with at least 100 participants or who has responsibility for managing at least \$100 million in ERISA assets⁴
- offers to enter into certain swap or security-based swap transactions under the Commodity Exchange Act or the Securities Exchange Act of 1934⁵
- recommendations by employees of the plan sponsor within the scope of their employment and without receiving any additional compensation
- the provision of a platform of investment alternatives to participants in self-directed ERISA plans or investment alternatives meeting objective criteria set forth by the plan fiduciary or other objective financial data or benchmarking services
- the provision of certain financial reports, fairness opinions and valuations
- the provision of investment education and certain assistance in selecting investment alternatives and other activities

II. Prohibited Transactions and Proposed New Exemptions and Amendments to Existing Exemptions

Fiduciaries of employee benefit plans and IRAs may not engage in self-dealing or transactions that could give rise to conflicts of interest, as provided in ERISA Section 3(21)(A)(ii) and Code Section 4975(e)(3)(B) (the "Prohibited Transaction Rules"). The Prohibited Transaction Rules prevent fiduciaries from engaging in transactions where these conflicts arise by preventing a fiduciary from (1) dealing with the assets of a plan or IRA in its own interest or own account; (2) acting in any transaction involving the plan on behalf of a party whose interests are adverse to those of the plan or its participants or beneficiaries; and (3) receiving consideration for its own account from any party dealing with a plan or IRA in transactions involving the assets of the plan or IRA.

³ In practice, this is not a new requirement because ERISA Section 408(b)(2) requires an acknowledgment of fiduciary status where the adviser is acting in such capacity.

⁴ See Chart III for details on the seller exception.

⁵ See Chart IV for details on the swaps exception.

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In conjunction with broadening the types of advice relationships that give rise to fiduciary status, the DOL has proposed two new, and amends certain existing, prohibited transaction class exemptions so as to permit certain common compensation arrangements of broker-dealers, insurance agents and other investment advice fiduciaries that otherwise would be impermissible under the Prohibited Transaction Rules. For example, an investment advice fiduciary receiving commissions paid by a plan, participant, beneficiary or IRA, and commissions, 12b-1 fees, revenue sharing arrangements, sales loads and other payments from parties providing investment products would constitute prohibited transactions unless an exemption applies.

A. Proposed New Exemptions

i. Best Interest Contract Exemption

This new exemption is intended to encourage access to investment advice for retail investors, such as small plan participants and IRA owners who could benefit from such investment advice, but who the DOL also believes may be particularly susceptible to the risk of receiving and acting on conflicted advice. The exemption applies to otherwise prohibited compensation received by both individual advisers and the financial institutions that employ or otherwise engage them. It is intended to provide exemptive relief from the Prohibited Transaction Rules for various types of compensation frequently used in the retail market for investment advice fiduciaries whose compensation would otherwise be prohibited.

The DOL describes its approach to the Best Interest Contract Exemption as a flexible, “standards-based”⁶ exemption. Under the Best Interest Contract Exemption, “Advisers,”⁷ “Financial Institutions,”⁸ “Affiliates,”⁹ and “Related Entities”¹⁰ who

⁶ “The Department has sought to preserve beneficial business models by taking a standards-based approach that will broadly permit firms to continue to rely on common fee practices, as long as they are willing to adhere to basic standards aimed at ensuring that their advice is in the best interest of their customers.”

⁷ “Adviser” is an individual person who is an investment advice fiduciary of a plan or IRA who is an employee, independent contractor, agent or registered representative of a “Financial Institution” and who must satisfy applicable federal and state regulatory and licensing requirements of insurance, banking, and securities laws with respect to the receipt of the compensation.

⁸ A “Financial Institution” is the entity that employs or otherwise retains an “Adviser” and must be a registered investment adviser, bank, insurance company or registered broker-dealer.

⁹ An “Affiliate” is (i) any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the Adviser or Financial Institution; (ii) any officer, director, employee, agent, registered representative, relative, member of family, or partner in, the Adviser or Financial Institution; and (iii) any corporation or partnership of which the Adviser or Financial Institution is an officer, director or employee or in which the Adviser or Financial Institution is a partner. For this purpose, “control” means the power to exercise a controlling influence over the management or policies of a person other than an individual.

¹⁰ A “Related Entity” is an entity other than an Affiliate in which an Adviser or Financial Institution has an interest that may affect the exercise of their best judgment as a fiduciary.

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provide investment advice to “Retirement Investors”¹¹ would be permitted to receive compensation for services relating to the purchase, sale or holding of an “Asset”¹² by a plan, participant or beneficiary account, or IRA, subject to the satisfaction of certain conditions.

Significantly, the Best Interest Contract Exemption is only available to retail investors such as self-directed plan participants and beneficiaries, IRA owners and small non-participant-directed plans (see definition of “Retirement Investor”). Non-participant directed defined contribution plans and large defined benefit pension plans are excluded from relief under this exemption. Also, only investments that are relatively transparent, are liquid and frequently have a market price, such as bank deposits, CDs, registered investment company shares, bank collective funds, insurance company separate accounts, exchange-traded REITs, exchange-traded funds, insurance and annuity contracts, guaranteed investment contracts, exchange-traded equity securities, and certain corporate bonds, agency debt securities, and U.S. Treasury securities, are available under this exemption. Examples of the types of compensation permitted under this exemption include commissions paid directly by the plan or IRA and commissions, trailing commissions, sales loads, 12b-1 fees and revenue sharing payments paid by the investment providers or other third parties to advisers and financial institutions, as well as other compensation received by an adviser, financial institution or their affiliates as a result of a plan, participant or beneficiary account or IRA’s investment, and investment management fees or administrative services fees from an investment vehicle in which the plan, participant or beneficiary account or IRA invests.

The following conditions would have to be met to use the Best Interest Contract Exemption under the Proposed Regulations:

1. *The Adviser and Financial Institution must enter into a written contract with the Retirement Investor prior to recommending the purchase, sale or holding of an Asset.*

The contract must contain the following elements:

- The Adviser and Financial Institution must acknowledge fiduciary status with respect to its recommendations
- The Adviser and Financial Institution must adhere to “Impartial Conduct Standards” when providing such recommendations

¹¹ A “Retirement Investor” may be a plan participant or beneficiary with authority to direct the investment of assets in his plan account or to take a distribution; in the case of an IRA, the beneficial owner of the IRA; or a plan sponsor of a non-participant-directed ERISA plan that has fewer than 100 participants (e.g., a defined benefit pension plan).

¹² “Assets” are summarized on Chart V and include bank deposits, CDs, shares or interests in registered investment companies, bank collective funds, insurance company separate accounts, exchange-traded REITs, exchange-traded funds, corporate bonds offered pursuant to a registration statement under the Securities Act of 1933, agency debt securities as defined in FINRA Rule 6710(p) or its successor, U.S. Treasury securities as defined in FINRA Rule 6710(p) or its successor, insurance and annuity contracts, and equity securities within the meaning of 17 C.F.R. 230.405 that are exchange-traded securities within the meaning of 17 C.F.R. 242.600. Excluded from the definition are futures, puts, calls, straddles, or any other option or privilege to buy or sell an equity security, without being bound to do so, foreign corporate bonds, municipal bonds, over-the-counter equity, micro cap securities, penny stocks, structured products, hedge funds and private equity funds.

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- The advice rendered must be in the “best interest” of the Retirement Investor, meaning with the care, skill, prudence and diligence that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor
- The Adviser and Financial Institution may not be influenced by their own financial or other interests and must put those of the Retirement Investor ahead of their own interests or the interests of any other party
- The Adviser and Financial Institution may not recommend an Asset if the total compensation expected to be received by the Adviser, Financial Institution, Affiliates and Related Entities in connection with the transaction will exceed reasonable compensation in relation to the services provided to the Retirement Investor
- The Adviser’s and Financial Institution’s statements about Assets, fees, material conflicts of interest, and any other relevant matters must not be misleading
- A warranty that the Adviser, Financial Institution and their Affiliates will comply with all applicable federal and state laws regarding the rendering of investment advice, the purchase, sale or holding of the Asset and payment of compensation related to the transaction
- A warranty that the Financial Institution has adopted written policies and procedures reasonably designed to mitigate the impact of material conflicts of interest that exist with respect to the provision of investment advice to Retirement Investors
- Disclosure of material conflicts of interest and that the Retirement Investor is entitled to complete information about all fees (direct and indirect) associated with the Assets in which it is investing, including fees payable to the Adviser, Financial Institution, Affiliates and Related Entities

The contract must not contain certain elements:

- Exculpatory provisions disclaiming or otherwise limiting liability for an Adviser’s or Financial Institution’s violation of the contract provision
 - A requirement that the Retirement Investor waive or qualify its right to bring or participate in a class action in a contract dispute with the Adviser or Financial Institution
2. *The Adviser and Financial Institution must provide certain public disclosures and disclosures to Retirement Investors:*
- A webpage must show direct and indirect material compensation payable to the Adviser, Financial Institution and any Affiliate for services provided in connection with each eligible Asset and how the compensation varies within and among Asset classes

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- Point-of-sale disclosure prior to the investment transaction, regarding the all-in cost and anticipated future costs of the Assets¹³
 - Individual annual disclosures identifying (a) Assets purchased or sold during the period, and the price at which the Asset was purchased or sold, (b) total dollar amount of all fees and expenses paid with respect to all Assets purchased or sold during the period, and (c) total dollar amount of all (direct and indirect) compensation received by the Adviser and Financial Institution as a result of each Asset sold, purchased or held by the plan or IRA
3. *The Financial Institution must provide a broad range of investment options, and if investment options are limited, it must be done in accordance with certain conditions*
 - A Financial Institution must conclude, in writing, that any limitation of investment options does not prevent an Adviser from rendering advice in the best interest of the Retirement Investor or otherwise complying with the Impartial Conduct Standards before the Financial Institution limits investment options
 4. *The Financial Institution must notify the Employee Benefits Security Administration of the DOL of its intention to rely on this exemption before receiving any compensation in reliance on the exemption*
 5. *The Financial Institution must maintain certain important data related to the exemption for six years from the date of the applicable transaction*
 6. *The Financial Institution must keep records necessary for the DOL and certain other entities to determine whether the conditions of the Best Interest Contract Exemption have been met*

The Best Interest Contract Exemption is not available to certain parties or with respect to certain transactions, including (1) employers advising participants in an ERISA plan (does not apply to IRAs), (2) Advisers or Financial Institutions who are named fiduciaries or plan administrators with respect to an ERISA plan, (3) principal transactions (by an Adviser or Financial Institution) with the plan, participant or beneficiary account, or IRA, (4) “robo-advice,”¹⁴ and (5) Advisers who have discretionary authority with respect to a plan’s assets or discretionary authority over the administration of the plan or IRA.

A Financial Institution intending to avail itself of the Best Interest Contract Exemption may need to significantly amend documents supporting the advisory function, implement technological, legal and compliance systems, and alter existing compensation programs to ensure ongoing compliance with the exemption, if adopted substantially in the form of the

¹³ The DOL suggests inclusion of a chart showing the total cost of the investment if held for 1 year, 5 years and 10 years.

¹⁴ “Robo-advice” is advice that is generated solely by an interactive website in which computer software-based models or applications provide investment advice to Retirement Investors based on personal information each investor supplies through the website without any personal interaction or advice from an individual Adviser.

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Proposed Regulations.¹⁵ For example, in adopting written policies and procedures that are reasonably designed to mitigate the impact of material conflicts of interest and ensure adherence to the Impartial Conduct Standards, a Financial Institution that wishes to implement the DOL recommendation to monitor behavior around key liquidity events, such as an IRA rollover, and adopting neutral compensation grids that pay Advisers a flat payout regardless of product type sold, may have to develop new or add on to existing technology to monitor Adviser activity around those particular events. From a documentary standpoint, the agreement between the Financial Institution and Retirement Investor will need to be revised to contain a warranty that such policies and procedures have been adopted. Specific policies and procedures would need to be adopted and reviewed for ongoing compliance. The Proposed Regulations also suggest that a dedicated person or group of persons be assigned responsibility to address compliance issues, such as handling complaints, disciplinary measures for violations of the policies and procedures and reporting conflicts. Existing compensation arrangements may need to be modified if they permit the use of quotas, contests, special awards, differentiated compensation and other compensation arrangements that could encourage conflicted recommendations. Instead, Financial Institutions will be encouraged to use favored compensation structures such as independent computer models, asset-based (versus product-based) compensation, fee offsets, differential payments based on neutral factors and alignment of Advisers' interests with that of the Retirement Investors. The Proposed Regulations also suggest implementing clawbacks of deferred compensation in situations where conflicted advice is rendered. The foregoing are just a few examples of the significant impact the Proposed Regulations could have on the manner in which financial services providers do business and compensate their Advisers.

ii. Principal Transactions in Debt Securities Exemption¹⁶

The DOL recognizes that certain "debt securities" may be available only through principal transactions¹⁷ with the Financial Institutions, who may also act as investment advice fiduciaries with respect to transactions in such debt securities. For example, a Financial Institution or its Affiliate may have originally underwritten a debt security that later is obtained for sale by the Financial Institution in the secondary market. Recognizing that the ability to invest in these types of debt issuances could be beneficial to Retirement Investors, the DOL has included in the Proposed Regulations the Principal Transactions in Debt Securities Exemption that would permit Advisers and Financial Institutions to receive mark-ups, mark-downs and other compensation¹⁸ in connection with a Retirement Investor's purchase or sale of principal debt securities resulting from the Adviser's or Financial Institution's advice.

¹⁵ See Chart VI for a discussion of each condition of the Best Interest Contract Exemption and the corresponding potential documentary, technological, legal and compliance and compensation impact of satisfying such condition.

¹⁶ See Chart VII for a graphical presentation of the Proposed Exemption for Principal Transactions in Debt Securities.

¹⁷ For purposes of the proposed exemption, a principal transaction is a purchase or sale of a debt security where an Adviser or Financial Institution is purchasing from or selling to the plan, participant or beneficiary account, or IRA on behalf of the account of the Financial Institution or the account of any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the Financial Institution.

¹⁸ The DOL is not precise in terms of what is encompassed in "other compensation," but it seems to include commissions and perhaps other payments.

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The Principal Transactions in Debt Securities Exemption is similar in structure to the Best Interest Contract Exemption in that a written contract between the Financial Institution, Adviser and Retirement Investor is required and must contain, among other provisions, (1) an acknowledgement of the Adviser and Financial Institution's fiduciary status with respect to their investment recommendations, (2) an agreement to provide advice in the "best interest" of the Retirement Investor, (3) a clear statement of fees, conflicts of interest and other matters, (4) certain warranties, including with respect to compliance with applicable law and the adoption of written policies intended to mitigate the negative impact of conflicts of interest, (5) disclosures regarding the transactions, including the circumstances under which the Adviser and Financial Institution may engage in principal transactions with the Retirement Investor and identification of material conflicts of interest, and (6) the Retirement Investor's affirmative written consent on a prospective basis to enter into principal transactions.

The transaction itself must not involve debt securities (1) issued by the Financial Institution or its affiliate, (2) purchased in an initial public offering in which the Financial Institution or its affiliate is an underwriter or member of the underwriting syndicate, (3) with greater than "moderate credit risk" or (4) that are not sufficiently liquid such that sale at approximately fair market value would not be possible within a reasonably short period. The Adviser and Financial Institution must transact in the debt securities at a price at least as favorable to the Retirement Investor as would be available (1) in a non-principal transaction and (2) contemporaneously offered by two counterparties available to transact and that are not affiliates of the Adviser or Financial Institution.

B. Proposed Amendments to Existing Exemptions

In addition to the Best Interest Contract Exemption and the Principal Transactions in Debt Securities Exemption, the DOL also proposes amendments to certain existing prohibited transaction class exemptions including relating to investment advice fiduciaries receiving fees for acting as agent in securities transactions and receiving sales commissions on products purchased by plans or IRAs.¹⁹

III. Considerations

A. Important Dates

- The DOL will receive comments through July 6, 2015, absent an extension of the 75-day comment period
- Hearing is expected to occur within 30 days of the close of the comment period
- The effective date of the Final Regulations will likely be 60 days after publication of the final rules
- Compliance with the final rules would be required eight months after publication of the final rules, absent an extension

¹⁹ See Chart I for a list of class exemptions that would be amended.

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B. Action Items

Given the significant changes Financial Institutions would need to make to comply with the new regulatory scheme if the Final Regulations are adopted in substantially the form of the Proposed Regulations, Financial Institutions and Advisers should consider concurrently engaging in an early and thorough evaluation of their existing services available to retail plan investors and the corresponding compensation arrangements in order to identify documentary, compensation design and process changes that would likely have to be made to comply with new regulations.

If you have any questions about this memorandum or would like additional information, please contact Peter E. Haller (212 728-8271, phaller@willkie.com), Michael A. Katz (212 728-8204, mkatz@willkie.com), Mark A. Holdsworth (212 728-8286, mholdsworth@willkie.com), Peter J. Allman (212 728-8101, pallman@willkie.com), Helen A. Skinner (212 728-8824, hskinner@willkie.com), Ryan D. Stott (212 728-8845, rstott@willkie.com) or the Willkie attorney with whom you regularly work.

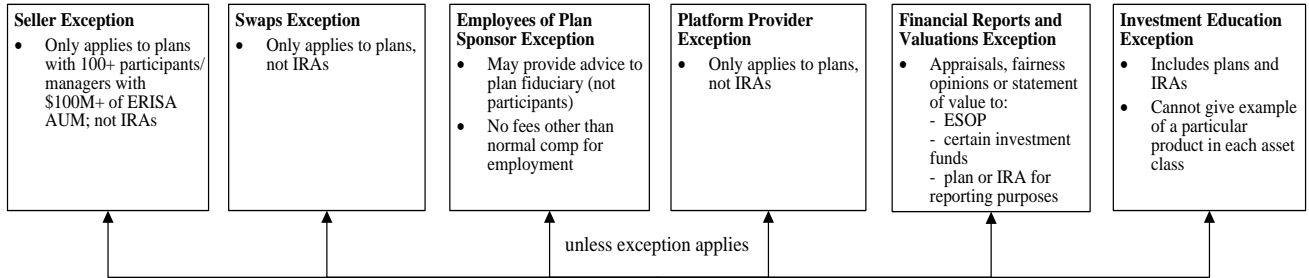
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Chart I Fiduciary Status Flow Chart



Test For Fiduciary Status	
<p>Types of Information</p> <ul style="list-style-type: none"> (i) Recommendation as to advisability of acquiring, holding, disposing or exchanging security or other property, including, taking a distribution of benefits or a recommendation as to the investment of securities or other property to be rolled over or otherwise distributed from the plan or IRA; (ii) Recommendation as to the management of securities or other property, including management of securities or other property to be rolled over or otherwise distributed from the plan or IRA; (iii) An appraisal, fairness opinion, or similar oral or written statement concerning the value of securities or other property provided in connection with a specific transaction(s) involving the acquisition, disposition, or exchange of such securities or other property by the plan or IRA; OR (iv) A recommendation of a person who will receive a fee or other compensation for providing any of the types of advice described in (i) through (iii) 	<p>AND</p> <div style="border: 1px solid black; padding: 5px;"> <p>Status</p> <ul style="list-style-type: none"> (i) Represents or acknowledges that such person is acting as a fiduciary; OR (ii) Renders the advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is individualized or specifically directed to the recipient for consideration in making investment or management decisions with respect to securities or other property </div> <div style="border: 1px solid black; padding: 5px; margin-top: 10px;"> <p style="text-align: center;">Important Definitions</p> <p>“Recommendation” means a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action.</p> <p>“Fee or other compensation” means any fee or compensation for the advice received by the person (or an affiliate) from any source and any fee or compensation incident to the transaction in which the investment advice has been rendered or will be rendered (e.g., brokerage fees, mutual fund and insurance sales commissions).</p> </div>

If Financial Institution is a fiduciary, need exemption to avoid otherwise prohibited fees

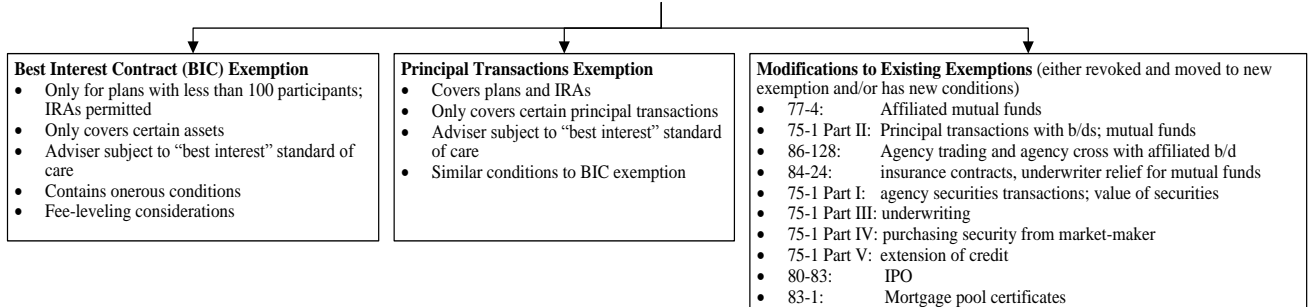


Chart II
Comparison of Definitions of Investment Advice Fiduciary
Under Proposed Regulations and Current Regulations

Conditions for Adviser to Become a Fiduciary Under the <u>Proposed Regulations</u>	Conditions for Adviser to Become a Fiduciary Under the <u>Current Regulations</u>
(A) Provision of the following advice in exchange for a fee or other direct or indirect compensation:	(A) A person without discretionary authority or control with respect to the purchase or sale of securities must:
<p>(i) A recommendation as to the advisability of acquiring, holding, disposing of or exchanging securities or other property, including to take a distribution of benefits, or as to the investment of securities or other property to be rolled over or otherwise distributed from the plan or IRA;</p> <p>(ii) A recommendation as to the management of securities or other property, including securities or other property to be rolled over or otherwise distributed from the plan or IRA;</p> <p>(iii) An appraisal, fairness opinion, or similar oral or written statement concerning the value of securities or other property provided in connection with a specific transaction(s) involving the acquisition, disposition, or exchange of such securities or other property by the plan or IRA; or</p> <p>(iv) A recommendation of a person who will receive a fee or other compensation for providing any of the types of advice described in (i) through (iii); AND</p>	<p>(i) Render advice as to the value of securities or make recommendations as to the advisability of investing in, purchasing or selling securities</p> <p>(ii) on a regular basis</p> <p>(iii) pursuant to a mutual agreement, arrangement or understanding with the plan or plan fiduciary that</p> <p>(iv) advice will serve as a primary basis for investment decisions of the plan's assets and</p> <p>(v) the advice is individualized and particularized for the plan.</p>
(B) Such person directly or indirectly (e.g., through or together with any affiliate) does either of the following:	
<p>(i) Represents or acknowledges that such person is acting as a fiduciary with respect to the advice described in column (A); or</p> <p>(ii) Renders the advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is individualized or specifically directed to, the advice recipient for consideration in making investment or management decisions with respect to securities or other property of the plan or IRA.</p>	

Chart III
Seller Exception

Seller Exception	
<p>General. Carve-out for investment advice provided in connection with an arm’s-length sale, purchase, loan or bilateral contract between an expert plan investor and the broker-dealer, if the advice is provided to a plan fiduciary who is independent of the broker-dealer and who exercises authority or control regarding the management of the plan’s assets regarding such transaction, provided that one of two alternative conditions is satisfied:</p>	
<p>Condition 1: Plans with 100+ Participants Before providing any recommendations, the broker-dealer must:</p> <ul style="list-style-type: none"> • Obtain a written representation from the plan fiduciary that: <ul style="list-style-type: none"> (i) the plan fiduciary exercises authority or control with regard to the plan’s assets under ERISA Section 3(21)(A)(i); (ii) the plan has 100 or more covered participants; and (iii) the plan fiduciary will not rely on the broker-dealer to act in the best interests of the plan, provide impartial investment advice or give advice in a fiduciary capacity. • Fairly inform the plan fiduciary of the existence and nature of the broker-dealer’s financial interests in the transaction; • Not receive a fee or other compensation directly from the plan or the plan fiduciary for investment advice rendered for the transaction; and <p>Know or reasonably believe that the plan fiduciary has sufficient expertise to evaluate the transaction and determine whether it is prudent and in the best interest of the plan. A written representation from the plan or the plan fiduciary will satisfy this condition.; <u>OR</u></p>	<p>Condition 2: Managers with \$100 Million+ of ERISA AUM Before providing any recommendations, the broker-dealer must:</p> <ul style="list-style-type: none"> • Know or reasonably believe that the plan fiduciary has responsibility for managing at least \$100 million in employee benefit plan assets; • Fairly inform the plan fiduciary that the broker-dealer: <ul style="list-style-type: none"> (i) is not providing impartial investment advice; (ii) is not providing investment advice in a fiduciary capacity; and (iii) cannot receive a fee or other compensation from the plan or plan fiduciary for the provision of investment advice in connection with the transaction. • Reasonably believe that the plan fiduciary has sufficient expertise to prudently evaluate the transaction.

Chart IV
Swaps Exception

Swaps Exception
<p>General. Carve-out for swap dealers, security-based swap dealers, major swap participants and major security-based swap participants who make recommendations to plans (but <u>not</u> pooled funds) from becoming ERISA investment advice fiduciaries when they act as counterparties to a swap or security-based swap transaction.</p>
<p>Conditions:</p>
<ul style="list-style-type: none">(i) The plan is represented by a fiduciary independent of the swap dealer;(ii) The swap dealer may not act as an adviser to the plan (within the meaning of the CFTC or SEC business conduct standards); and(iii) The person providing the recommendation must obtain a written representation from the plan fiduciary that the fiduciary will not rely on the recommendations provided by that person.

Chart V
Definition of “Assets” Under Best Interest Contract (BIC) Exemption

Permitted Assets:	Non-Permitted Assets:
<ul style="list-style-type: none"> • Bank deposits • CDs • Shares/interests in registered investment companies • Bank collective funds • Insurance company separate accounts • Exchange-traded REITs • ETFs • Corporate bonds offered pursuant to a registration statement under the '33 Act • Agency debt securities • U.S. Treasury securities • Insurance and annuity contracts • Guaranteed investment contracts • Exchange-traded equity securities • Cash sweep programs (potentially) 	<ul style="list-style-type: none"> • Futures • Options (put, call, straddle or other) • Structured products • Foreign bonds • Municipal bonds • Currency • Extensions of credit (including short sales and margin) • Hedge fund and other private fund investments

Chart VI
Summary of Best Interest Contract (BIC) Exemption Conditions

Condition	Documentation Requirements	IT Requirements	Legal and Compliance Requirements	Compensation Impact	Consequences of Noncompliance	Elements of Condition	Comments
Written contract	Adviser and Financial Institution (“FI”) enter into written contract with the Retirement Investor (“RI”)	Limited	Ongoing contract drafting and review Agreements with existing clients: <ul style="list-style-type: none"> • Identification of all current account agreements • Review for non-permitted terms • Drafting of new terms • Re-execution with three signatories – Adviser, FI and RI 	N/A	Relief under the BIC exemption is no longer available (however, where the failure is compliance with applicable laws, result is potential breach, but not loss of exemption) ¹	Contract must be executed prior to the purchase, hold or sale recommendation for the Asset ² Adviser and FI must affirmatively acknowledge fiduciary status Adviser and FI must affirmatively commit to Impartial Conduct Standards (<i>i.e.</i> , prudence and loyalty), reasonable compensation and non-misleading statements Adviser and FI must warrant that: <ul style="list-style-type: none"> • Adviser and FI will comply with all applicable state and federal laws • FI has adopted written policies and procedures designed to mitigate impact of material conflicts (see below) • FI has specifically identified material conflicts and has adopted measures to prevent violation of Impartial Conduct Standards 	Contract may be part of a master agreement (<i>i.e.</i> , no requirement to execute contract for each separate recommendation) The warranty that Adviser and FI will comply with all applicable state and federal laws could form the basis for permitting RIs to bring state law claims that would otherwise be preempted by ERISA

¹ The effect of noncompliance with a condition depends on whether the condition applies to a single transaction or multiple transactions.

² See Chart V for list of permitted and non-permitted Assets.

Condition	Documentation Requirements	IT Requirements	Legal and Compliance Requirements	Compensation Impact	Consequences of Noncompliance	Elements of Condition	Comments
						<ul style="list-style-type: none"> Neither FI nor any affiliate uses incentives that would encourage Advisers to make recommendations not in the best interests of the RI <p>Contract must contain specific disclosures about conflicts, fee information, proprietary products and third-party payments (see below)</p> <p>Contract may not contain exculpatory provisions or waivers of class actions</p>	
Written policies and procedures	Warranty included in the contract	Generally limited, unless adopt suggested approaches to monitor recommendations around key liquidity events (e.g., IRA rollover) and compensation grid thresholds	<p>Initial drafting of policies and procedures</p> <p>Ongoing review and surveillance to ensure compliance with the new policies and procedures</p> <p>Proposed Regulations suggest designating an individual or group to address compliance (e.g., to report conflicts or handle complaints, handle disciplinary measures for violations of conduct standard)</p>	<p>Policies to provide that quotas, contests, special awards, differentiated compensation, etc., will not be used to encourage conflicted recommendations</p> <p>Proposed Regulations suggest developing metrics for good and bad behavior and using “clawbacks” of deferred compensation³</p>	Contractual liability for breach of warranty	<p>FI must adopt written policies and procedures that are reasonably designed to:</p> <ul style="list-style-type: none"> Mitigate impact of material conflicts of interest Ensure adherence to the Impartial Conduct Standard 	<p>Consider DOL’s suggested five “broad approaches to compensation structures” to satisfy the warranty (non-exclusive):</p> <ul style="list-style-type: none"> Independent computer models Asset-based compensation (Adviser) Fee offsets (FI) Differential payments based on neutral factors (Adviser) Alignment of interests

³ This provision would benefit from clarification from the DOL.

Condition	Documentation Requirements	IT Requirements	Legal and Compliance Requirements	Compensation Impact	Consequences of Noncompliance	Elements of Condition	Comments
Contractual disclosures	Identification of “material conflicts of interest”	More specific description of the “material conflicts of interest” to be available on the FI webpage and by mail	Initial drafting of disclosures Ongoing review and surveillance to ensure compliance	N/A	Relief under BIC exemption is no longer available	Written contract must include the following disclosures: <ul style="list-style-type: none"> • Identification of “material conflicts of interest” • RI has the right to obtain information about the direct and indirect fees currently associated with the Assets (in which the investor is invested), including fees payable to FI affiliates • Disclose whether FI offers proprietary products⁴ or receives third-party payments with respect to purchase, sale or holding of any Asset 	
Additional disclosures (web page)	Provide information that is easily accessible to the RI and the general public and formatted in a machine-readable manner (See DOL web site disclosure model form as part of Proposed Regulations)	Initial requirements: <ul style="list-style-type: none"> • Build web page Ongoing requirements: <ul style="list-style-type: none"> • Update web page not less frequently than quarterly 	Initial drafting of web page text information Ongoing review and surveillance to ensure compliance	N/A	Relief under BIC exemption is no longer available	FI must maintain a web page with the following information: <ul style="list-style-type: none"> • Direct and indirect material compensation⁵ payable to Adviser, FI and any FI affiliate in connection with each Asset that an RI is able to purchase, hold or sell through the Adviser or FI, and that an RI has purchased, held or sold within the last 365 days 	

⁴ Defined as “a product that is managed by the FI or any of its Affiliates.”

⁵ Expressed as a monetary amount, formula or percentage of the assets involved in the purchase, sale or holding.

Condition	Documentation Requirements	IT Requirements	Legal and Compliance Requirements	Compensation Impact	Consequences of Noncompliance	Elements of Condition	Comments
						<ul style="list-style-type: none"> The source of the compensation How the compensation varies within and among the Asset classes 	
Additional disclosures (individual <u>transactional</u> disclosure)	Point of sale disclosure provided to the RI <u>prior</u> to the execution of an investment transaction (See DOL transaction disclosure model chart)	Development of Total Cost information	Initial requirements: <ul style="list-style-type: none"> Drafting of additional transactional disclosures Identification of existing contracts that need to be updated Ongoing review and surveillance to ensure compliance	N/A	Relief under BIC exemption is no longer available	Point of sale disclosure requires: <ul style="list-style-type: none"> Provision prior to the execution of a transaction Total Cost⁶ and anticipated future cost of recommended Assets in a summary chart (1-, 5- and 10-year periods, expressed as a dollar amount; assuming an investment of the dollar amount recommended by the Adviser, and reasonable assumptions about investment performance) 	If the same Asset is recommended more than once within a 12-month period and the Total Cost has not materially changed, a second point of disclosure would not be required
Additional Disclosures (individual <u>annual</u> disclosure)	Annual written disclosure requirement	Development of system to provide each RI with an annual written disclosure within 45 days of the end of the year	Initial drafting of additional annual disclosures Ongoing review and surveillance to ensure compliance	N/A	Relief under BIC exemption is no longer available	Individual annual disclosure requirements: <ul style="list-style-type: none"> A list identifying each Asset purchased or sold during the applicable period and the price at which the Asset was purchased or sold A statement of the total dollar amount of all fees and expenses paid by the RI, both directly and 	There is no prescribed format for the annual disclosure; it may be done electronically, in a written statement, etc.

⁶ The “Total Cost” of investing in an Asset means the sum of the following, as applicable: acquisition costs, ongoing costs, disposition costs, and any other costs that reduce the Asset’s rate of return, are paid by direct charge to the plan, participant or beneficiary account, or IRA, or reduce the amounts received by the plan, participant or beneficiary account, or IRA (e.g., contingent fees, such as back-end loads, including those that phase out over time).

Condition	Documentation Requirements	IT Requirements	Legal and Compliance Requirements	Compensation Impact	Consequences of Noncompliance	Elements of Condition	Comments
						<p>indirectly, with respect to each Asset purchased, held or sold during the applicable period</p> <ul style="list-style-type: none"> • A statement of the total dollar amount of all compensation received by the Adviser and FI, directly and indirectly, from any party, as a result of each Asset sold, purchased or held by the RI during the applicable period • The annual disclosure requirement does apply to insurance and annuity contracts that are securities under federal securities laws 	
Range of investment options	Preparation of disclosure requirement (likely only required to be included in the contract disclosure, but the proposal is not clear)	Likely limited	<p>Ongoing review and surveillance to ensure compliance:</p> <ul style="list-style-type: none"> • <u>Specific written finding</u> that the limitations <u>do not prevent</u> Adviser from providing advice that is in the best interest of the RI required before limiting the available investment products to an RI • <u>Clear written notice</u> by FI or Adviser of limitation before giving advice to an RI 	N/A	Relief under BIC exemption is no longer available	<p>FI must offer for purchase, sale or holding and Adviser must make available a range of investment options that is broad enough to enable an Adviser to make recommendations to the RI with respect to all of the asset classes reasonably necessary to serve the best interests of the RI in light of the RI's:</p> <ul style="list-style-type: none"> • Objectives • Risk tolerance • Specific financial circumstances <p>FI may limit investment options and rely on the BIC</p>	Notice of the limitations placed on the Assets available to RI is insufficient if it states that FI or Adviser "may" limit investment recommendations based on whether the Assets are proprietary or generate third-party fees, or for other reasons, without specific disclosure of the extent to which recommendations are, in fact, limited on that basis

Condition	Documentation Requirements	IT Requirements	Legal and Compliance Requirements	Compensation Impact	Consequences of Noncompliance	Elements of Condition	Comments
			<ul style="list-style-type: none"> Notification by Adviser if Adviser does not recommend a sufficiently broad range of Assets 			exemption only if: <ul style="list-style-type: none"> FI makes a specific written finding that the limitation does not prevent Adviser from providing advice that is in the best interests of the RI Payments received in connection with the limited options are reasonable in relation to the value of the specific services provided to RIs and not in excess of the services' fair market value⁷ Before giving advice to RI, FI or Adviser gives clear written notice of limitations Adviser notifies RI if Adviser does not recommend a sufficiently broad range of Assets to meet RI's needs 	
EBSA disclosure	Prepare notice to the EBSA	N/A	Provide a one-time notice to the EBSA, via email or regular mail, which will be effective until revoked in writing ⁸	N/A	Relief under BIC exemption is not available until the notice is provided to the EBSA	Before receiving compensation in reliance on the BIC exemption, FI must notify the EBSA of its intention to rely on the exemption	The notice need not identify any specific plan or IRA
Data requests	Would require FI to maintain and <u>disclose to the DOL upon request</u>	The required information may be maintained by FI "in any form	Data must be provided within a reasonable period of time, but not later than six months	N/A	Relief under BIC exemption is no longer available	FI must maintain, for six years, the following data in a manner that is accessible for examination by the DOL. ⁹	

⁷ The Proposed Regulations provide that "The [DOL] intends to ensure that such additional payments received in connection with the advice are for specific services to Retirement Investors."

⁸ The Proposed Regulations are not clear who would revoke, but presumably it is the FI.

⁹ "Inflows," "Outflows," "Holdings" and "Returns" are defined as follows:

Condition	Documentation Requirements	IT Requirements	Legal and Compliance Requirements	Compensation Impact	Consequences of Noncompliance	Elements of Condition	Comments
	specific information regarding purchases, sales and holdings by RIs made pursuant to the BIC exemption	that may be readily analyzed by the DOL or simply as raw data”	after receiving a request from the DOL			<ul style="list-style-type: none"> • Inflows • Outflows • Holdings • Returns 	
Recordkeeping	FI would be required to comply with certain recordkeeping requirements and provide the DOL with access to FI’s records	Access to records and information covered by the recordkeeping condition may be stored in computer systems, and as such would have to be made available to authorized members of the DOL, plan fiduciaries, contributing employer covered by a plan, and participant or beneficiary of a plan or IRA	If FI refused disclosure on the basis that the information is exempt from disclosure, FI would have to provide written notice to the DOL providing the reason for such refusal	N/A	Relief under BIC exemption is no longer available	FI must maintain, for six years, records necessary to enable authorized persons to determine whether conditions of BIC exemption have been met	<p>The persons authorized to review the records covered by this condition would not be authorized to examine:</p> <ul style="list-style-type: none"> • Privileged trade secrets of FI • Privileged commercial or financial information of FI • Information identifying “other individuals”

(a) Inflows. At FI level, for each Asset purchased, for each quarter: (1) the aggregate number and identity of shares/units bought; (2) the aggregate dollar amount invested and the cost to the plan, participant or beneficiary account, or IRA associated with the purchase; (3) the revenue received by FI and any affiliate in connection with the purchase of each Asset disaggregated by source; and (4) the identity of each revenue source (e.g., mutual fund, mutual fund adviser) and the reason the compensation was paid.

(b) Outflows. At FI level for each Asset sold, for each quarter: (1) the aggregate number and identity of shares/units sold; (2) the aggregate dollar amount received and the cost to the plan, participant or beneficiary account, or IRA, associated with the sale; (3) the revenue received by FI and any affiliate in connection with the sale of each Asset disaggregated by source; and (4) the identity of each revenue source (e.g., mutual fund, mutual fund adviser) and the reason the compensation was paid.

(c) Holdings. At FI level for each Asset held at any time during each quarter: (1) the aggregate number and identity of shares/units held at the end of such quarter; (2) the aggregate cost incurred by the plan, participant or beneficiary account, or IRA, during such quarter in connection with the holdings; (3) the revenue received by FI and any affiliate in connection with the holding of each Asset during such quarter for each Asset disaggregated by source; and (4) the identity of each revenue source (e.g., mutual fund, mutual fund adviser) and the reason the compensation was paid.

(d) Returns. At RI level: (1) The identity of the Adviser; (2) the beginning-of-quarter value of RI’s Portfolio; (3) the end-of-quarter value of RI’s Portfolio; and (4) each external cash flow to or from RI’s Portfolio during the quarter and the date on which it occurred. For purposes of this subparagraph (d), “Portfolio” means RI’s combined holding of Assets held in a plan account or IRA advised by the Adviser.

Chart VII
Summary of Exemption for Principal Transactions in Certain Debt Securities Conditions

Allows “Advisers” and “Financial Institutions” to enter into “principal transactions”¹ in “debt securities”² with “Retirement Investors”,³ subject to the following conditions:

Condition 1: Contractual Obligations

- (i) The Adviser and FI must enter into a written contract with the Retirement Investor prior to engaging in a principal transaction in debt securities
- (ii) The contract may be part of a master agreement and need not be executed prior to each principal transaction
- (iii) The contract must contain the following elements:
 - Adviser and FI must affirmatively acknowledge fiduciary status
 - Adviser and FI must affirmatively commit to Impartial Conduct Standards (*i.e.*, prudence and loyalty), reasonable compensation and non-misleading statements
 - Agreement that the Adviser and FI will not enter into a principal transaction if the purchase or sales price of the debt security (including the mark-up or mark-down) is unreasonable under the circumstances
 - Agreement not to make misleading statements about the debt securities, fees, material conflicts of interest and other matters relevant to a Retirement Investor’s investment decision
 - Warranty of compliance with applicable federal and state laws regarding the rendering of investment advice and the purchase and sale of debt securities
 - Warranty that FI has adopted written policies and procedures that are reasonably designed to mitigate the impact of material conflicts of interest that exist with respect to the provision of investment advice to Retirement Investors
 - Warranty that FI specifically identified material conflicts of interest and adopted measures to prevent them from causing violations of the Impartial Conduct Standards
 - Warranty that neither the FI nor its Affiliates will use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differentiated compensation or other actions or incentives if they would encourage recommendations that are not in the best interest of Retirement Investors
 - Contractual disclosures:
 - Circumstances under which the Adviser and FI may engage in principal transactions with the plan, participant or beneficiary account, or IRA
 - Material conflicts of interest associated with principal transactions
 - Document the Retirement Investor’s affirmative written consent, on a prospective basis, to the principal transactions
 - Inform the Retirement Investor (i) that the consent to principal transactions is terminable at will by the Retirement Investor at any time, without penalty and (ii) of the right to obtain complete information about all the fees and other payments currently associated with its investment transactions with the Adviser or FI

¹ Defined as a purchase or sale of a debt security where an Adviser or FI is purchasing from or selling to the plan, participant or beneficiary account, or IRA on behalf of the account of the FI or the account of any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the FI.

² Defined by reference to Rule 10b-10(d)(4) under the Securities Exchange Act of 1934. The categories of covered debt securities include securities that are (1) dollar denominated, issued by a U.S. corporation and offered pursuant to a registration statement under the Securities Act of 1933; (2) U.S. agency debt securities (as defined in FINRA Rule 6710(l)); and (3) U.S. Treasury securities (as defined in FINRA Rule 6710(p)). Excludes debt issued by the FI and underwritten by the FI (unless in the case of underwriting, the debt security is sold in a secondary offering). The debt security must not carry greater than moderate credit risk and be sufficiently liquid that it could be sold at or near its fair market value within a reasonably short period of time.

³ Defined as a plan fiduciary of a non-participant directed ERISA plan with authority to make investment decisions for the plan, a plan participant or beneficiary with authority to direct the investment of assets in his or her plan account or to take a distribution, or, in the case of an IRA, the beneficial owner.

(iv) The contract must not contain any of the following elements:

- Exculpatory provisions disclaiming or limiting liability for Adviser or FI's violations of the contract terms
- Requirement that the Retirement Investor agree to waive its right to bring or participate in a class action or other representative action in court or a contract dispute with the FI or Adviser

Condition 2: General Conditions Applicable to Each Transaction

- (i) The principal transaction may not be part of an agreement, arrangement, or understanding devised to evade compliance with ERISA or the Code or to otherwise impact the value of the debt security
- (ii) The purchase or sale of the debt security must be for no consideration other than for cash (not available for transactions done on an "in-kind" basis)
- (iii) The purchase or sale of the debt security must be executed at a price that the Adviser and FI reasonably believe is at least as favorable to the Retirement Investor as the price available to the Retirement Investor in a transaction that is not a principal transaction
- (iv) The purchase or sale of the debt security must be at least as favorable to the plan, participant or beneficiary account, or IRA as the contemporaneous price for the debt security, or a similar security if a price is not available with respect to the same debt security, offered by two ready and willing counterparties that are not Affiliates in agency transactions

Condition 3: Disclosure Requirements

- (i) Prior to engaging in a principal transaction, the Adviser or FI must provide a pre-transaction disclosure to the Retirement Investor, either orally or in writing:
 - Notifying the Retirement Investor that the purchase or sale of the debt security will be executed as a principal transaction
 - Providing the Retirement Investor with any available pricing information regarding the debt security, including two quotes obtained from unaffiliated parties, including mark-up or mark-down
- (ii) Written confirmation of the principal transaction, including the mark-up or mark-down or other payment to the Adviser, FI or Affiliate
- (iii) Annual Statement:
 - Including a list of the principal transactions entered into during the year, including the prevailing market price at which the debt security was purchased or sold, and the mark-up or mark-down for each security
 - Including a reminder that the Retirement Investor may withdraw its consent to principal transactions at any time, without penalty
- (iv) Upon reasonable request, the FI or Adviser must provide the Retirement Investor with additional information regarding the debt security and the transaction for any principal transaction that has occurred within the 6 years preceding the date of the request

Condition 4: Recordkeeping Requirements

- For 6 years following the date of each principal transaction, records must be kept that would allow the DOL or IRS, plan or IRA fiduciaries, employers of participants and beneficiaries and plan participants and beneficiaries to determine whether the conditions of the exemption have been satisfied. The documents must be generally available for examination during normal business hours.