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Department of Labor's 2016 Fiduciary Rule: Background and Issues

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Summary

Regulations issued in 1975 (called the 1975 rule in this report) defined investment advice using a five-part test. To be held to ERISA's fiduciary standard with respect to his or her advice, an individual had to (1) make recommendations on investing in, purchasing, or selling securities or other property, or give advice as to the value (2) on a regular basis (3) pursuant to a mutual understanding that the advice (4) will serve as a primary basis for investment decisions, and (5) will be individualized to the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments.

On April 8, 2016, the Department of Labor (DOL) issued a final regulation (called the 2016 final rule in this report) that redefined the term investment advice within pension and retirement plans. Under the Employee Retirement Income Security Act of 1974 (ERISA; P.L. 93-406), a person who provides investment advice has a fiduciary obligation, which means that the person must provide the advice in the sole interest of plan participants. Thus, redefining the term investment advice could affect who is subject to this fiduciary standard. With the 2016 rule, DOL broadened the term's definition to capture activities that currently occur within pension and retirement plans, but did not meet the 1975 definition of investment advice.

The 2016 final rule replaced the five-part test of the 1975 rule with a more inclusive definition. (**Table 1** compares the prior and current definitions.) For example, under the prior regulation, an individual had to provide advice on a regular basis to be a fiduciary, which generally would not have included recommendations on whether to roll over a 401(k) account balance to an Individual Retirement Account (IRA). The expanded definition removed the requirement that advice be given on a regular basis.

Under the prior regulation, securities brokers and dealers who provided services to retirement plans and who were not fiduciaries were not required to act in the sole interests of plan participants. Rather, their recommendations had to meet a suitability standard, which requires that recommendations be suitable for the plan participant, given factors such as an individual's income, risk tolerance, and investment objectives. The suitability standard is a lower standard than a fiduciary standard. Under DOL's 2016 regulation, brokers and dealers are generally considered to be fiduciaries when they provide recommendations to participants in retirement plans.

In addition to broadening the definition of investment advice, the rule provides carve-outs for situations that are not considered to be investment advice. For example, providing generalized investment or retirement education is not considered investment advice under the final rule.

The 2016 final rule is accompanied by new prohibited transaction exemptions (PTEs) and amendments to existing PTEs. These allow fiduciaries to continue to engage in certain practices that would otherwise be prohibited (such as charging commissions for products they recommend or having revenue-sharing agreements with third parties).

DOL first proposed broadening the definition of investment advice in October 2010. The proposed regulation generated much controversy and was withdrawn in September 2011. The revised proposals issued in April 2015 also generated considerable controversy. Following the release of the proposals, DOL received public comments and held three-and-a-half days of public hearings on the proposals. DOL issued the 2016 final rule on April 8, 2016, with an effective date June 7, 2016, and an applicability date of April 10, 2017.

On February 3, 2017, President Trump issued a memorandum on the fiduciary rule that directed DOL to (1) review the rule to determine whether it adversely affects access to retirement information and financial advice, and if it finds that it does so then (2) publish a proposed rule to rescind or revise the rule.

On March 2, 2017, DOL proposed delaying the rule's applicability date by 60 days. On March 10, 2017, DOL issued a Temporary Enforcement Policy indicating it will not initiate enforcement actions against financial advisers or financial institutions that fail to satisfy the conditions of the rule or PTEs in the period between the applicability date and when DOL decides to either delay or not delay the applicability date of the 2016 final rule and PTEs.

On April 7, 2017, DOL issued a 60-day delay of the 2016 final rule's applicability date while it reviews the effects of the rule pursuant to the presidential memorandum of February 3, 2017. DOL delayed the applicability date by 60 days from April 10, 2017, to June 9, 2017, of (1) the expanded definition of investment advice and (2) the Impartial Conduct Standard of the Best Interest Contract (BIC) exemption. While these two aspects of the rule are currently in place, other aspects of the exemption, such as requirements to make specific disclosures and warrant policies and procedures and to execute written contracts are to become applicable on January 1, 2018.

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Overview

On April 8, 2016, the Department of Labor (DOL) issued a final rule (2016 final rule) that expanded the definition of *investment advice* within employer-sponsored private-sector pension plans and Individual Retirement Accounts (IRAs).¹ Individuals who provide recommendations that meet the definition of investment advice are held to a *fiduciary standard*, which is a higher standard of conduct than for individuals who provide recommendations that do not meet the definition. Individuals who are held to fiduciary standards are required to act solely in the interests of plan participants and beneficiaries. Therefore, expanding the definition of investment advice may increase the number of individuals held to this higher standard. On April 7, 2017, DOL delayed two aspects of the rule's applicability date by 60 days, from April 10, 2017, to June 9, 2017: (1) the expanded definition of investment advice and (2) the impartial conduct standard of the best interest contract (BIC) exemption. While these two aspects of the rule are currently in place, other aspects of the exemption, such as requirements to make specific disclosures and warrant policies and procedures and to execute written contracts, are to become applicable on January 1, 2018.

Background on Pensions, Individual Retirement Accounts, and Investments

Although most workers can expect to become eligible to receive Social Security benefits after the age of 62, a number of tax-advantaged methods of preparing for retirement might also be available to them.² For example, their employers might sponsor a pension plan or the workers might establish and contribute to IRAs to use as a source of income in retirement.

Pension Plans

The two types of employer-sponsored pension plans are defined benefit (DB) and defined contribution (DC) pension plans.

Defined Benefit Pension Plans

Participants in DB pension plans receive monthly payments in retirement. The payment amount is calculated using a formula established by the plan. The formula used by single-employer plans is typically different from the formula used by multiemployer plans.

In most single employer plans, participants receive a monthly payment in retirement that is based on a formula that typically uses a combination of length of service, accrual rate, and average of final years' salary. In collectively bargained single employer and multiemployer DB pension plans, the payment is typically calculated as the length of service with employers that contribute to the plan multiplied by a dollar amount.

¹ See Department of Labor (DOL), Employee Benefits Security Administration (EBSA), "Definition of the Term 'Fiduciary'; Conflict of Interest Rule—Retirement Investment Advice; Best Interest Contract Exemption; ... Final rule," 81 *Federal Register*, April 8, 2016.

² For more information on Social Security, see CRS Report R42035, *Social Security Primer* and for more information on the tax treatment of retirement savings, see U.S. Congress, Joint Committee on Taxation, *Present Law and Background Relating to the Tax Treatment of Retirement Savings*, prepared by Joint Committee on Taxation, 112th Cong., 2nd sess., JCX-32-12, April 13, 2012.

The pension plan provides these payments for the lifetime of the worker after retirement. Married plan participants receive a joint-and-survivor annuity, which is an annuity payable for the lifetime of the participant or the participant's spouse, whichever is longer.³ Many DB pension plan participants are offered the option to receive their benefit as a single, lump-sum benefit payment.

DB pension plans in the private sector are generally funded entirely by employer contributions. DOL data in 2011 indicated that among private-sector workers who participated in DB plans, 4% were required to make an employee contribution to the plans.⁴

The Federal Reserve reported that there were \$3.3 trillion in assets in private-sector DB pension plans at the end of 2016.⁵

Defined Contribution Pension Plans

Workers in DC pension plans typically contribute a percentage of their wages to an individually established account. Employers may also contribute a match to the DC plan, which is an additional contribution equal to some or all of the worker's contribution. The account accrues investment returns and is then used as a basis for income in retirement. DC plans do not provide guarantees of lifetime income, unless participants purchase an annuity. Examples of DC plans are 401(k), 403(b), and 457(b) plans, and the Thrift Savings Plan (TSP).⁶

The Federal Reserve reported that there were \$5.7 trillion in assets in private-sector DC pension plans at the end of 2016.⁷

IRAs

IRAs are tax-advantaged accounts that individuals (and their spouses) can establish to accumulate funds for retirement. Any individual under the age of 70½ who has earnings from work may establish and contribute to an IRA.⁸ The two types of IRAs are differentiated primarily by the tax treatment of contributions and distributions. Contributions to traditional IRAs may be tax deductible,⁹ and distributions are included in taxable income.¹⁰ Contributions to Roth IRAs are not tax deductible, but distributions are not included in taxable income.

³ A married participant may choose to receive a single-life annuity (payments for the life of the participant only) with the consent of the spouse.

⁴ See DOL, *National Compensation Survey: Employee Benefits in the United States*, March 2011, at <http://www.bls.gov/ncs/ebs/benefits/2011/ebb10048.pdf>.

⁵ See Board of Governors of the Federal Reserve System, *Financial Accounts of the United States*, p. Table L.118.b, <http://www.federalreserve.gov/releases/z1/Current/z1.pdf>.

⁶ The plans, apart from the Thrift Savings Plan (TSP), are named for the section of the tax code that authorized them. Private-sector employers establish 401(k) plans, public school systems and nonprofits establish 403(b) plans, and state and local governments and nonprofits establish 457(b) plans. The TSP is a defined contribution (DC) plan for federal government employees.

⁷ See Board of Governors of the Federal Reserve System, *Financial Accounts of the United States*, p. Table L.118.c, <http://www.federalreserve.gov/releases/z1/Current/z1.pdf>.

⁸ A spouse may make contributions to a non-working spouse's Individual Retirement Account (IRA).

⁹ Contributions to traditional IRAs are tax deductible for individuals who (1) are not covered by a pension plan at work or (2) are covered by a pension plan at work but have income under specified thresholds. The income thresholds are available in CRS Report RL34397, *Traditional and Roth Individual Retirement Accounts (IRAs): A Primer*.

¹⁰ Distributions before the individual is aged 59½ are subject to an additional 10% tax penalty unless one of the exceptions found in 26 U.S.C. 72(t) applies. See CRS Report RL34397, *Traditional and Roth Individual Retirement Accounts (IRAs): A Primer*.

Individuals may rollover their lump-sum payments from a DB plan or their DC plan assets to an IRA or another employer-sponsored DC plan.¹¹ A *rollover* is the transfer of assets from an IRA or employer-sponsored plan to an IRA or employer-sponsored plan upon separation from the original employer due to job change or retirement.¹² Rollovers are an important source of funds in IRAs. In 2016, 59% of traditional IRA owners included rollover assets and 52% of traditional IRA owners did not make a contribution to the IRAs other than the rollover.¹³

The Federal Reserve reported that there were \$7.8 trillion in assets in IRAs as of September 30, 2016.¹⁴

Investment Options in Defined Contribution Plans and IRAs

Participants in DC pension plans and IRAs typically have a number of investment options from which to choose. Common options include mutual funds, company stock, and variable annuities.

A *mutual fund* is a company that invests in stocks, bonds, and other financial securities and assets.¹⁵ Mutual funds are regulated by the Securities and Exchange Commission (SEC) under the Investment Company Act of 1940 (P.L. 76-768).

IRA owners and sometimes DC pension plan participants may own the stock of individual companies. The stock of the employer that sponsors the plan is sometimes an investment option within DC plans.

An *annuity* is an insurance product in which an investor receives a regular (typically monthly) payment beginning at a specified date for the lifetime of the investor (and spouse or other designated person if the investor chooses). To acquire the annuity, the investor makes either a one-time purchase or a series of purchase payments. A fixed annuity pays a specified regular payment, whereas a variable annuity's payments may change depending on the performance of the investment options the investor chooses. In general, annuities are regulated by the state in which they are sold; variable annuities are also subject to SEC regulation.¹⁶

Investment products are typically bought and sold using securities brokers and dealers. A *broker* is an individual engaged in the business of buying and selling securities for the account of others.¹⁷ When an investor buys or sells a security using a broker, the broker acts as the agent for the investor. A *dealer* is an individual who is in the business of buying and selling securities for

¹¹ Some rollovers, such as transfers from a Roth 401(k) plan to a traditional IRA are not allowed. See the Internal Revenue Service (IRS) Rollover Chart at http://www.irs.gov/pub/irs-tege/rollover_chart.pdf.

¹² More information on IRAs is available in CRS Report RL34397, *Traditional and Roth Individual Retirement Accounts (IRAs): A Primer*.

¹³ See Investment Company Institute, *The Role of IRAs in US Households' Saving for Retirement, 2016*, ICI Research Perspective vol. 23, no. 1, January 2017, Figure 12, <https://www.ici.org/pdf/per23-01.pdf>.

¹⁴ See Board of Governors of the Federal Reserve System, *Financial Accounts of the United States*, p. Table L.117 line 27, <http://www.federalreserve.gov/releases/z1/Current/z1.pdf>.

¹⁵ Mutual funds are an important part of Americans' retirement savings: in 2014, about 55% of DC assets and 48% of IRA assets were invested in mutual funds. See Investment Company Institute, *2015 Investment Company Fact Book*, Figure 1.5, http://www.icifactbook.org/pdf/2015_factbook.pdf. Other DC and IRA investments include the stock and bonds of individual companies, and variable annuities.

¹⁶ More information on the regulation of fixed and variable annuities is available from the Insured Retirement Institute at <http://irionline.org/government-affairs/annuities-regulation-industry-information> and from the Securities and Exchange Commission (SEC) at <http://www.sec.gov/investor/pubs/varannnty.htm>.

¹⁷ See 15 U.S.C §78c(a)(4).

the individual's own account (often through a broker).¹⁸ Dealers take ownership of securities and use their own inventory of securities for sales and purchases. The term *broker-dealer* is often used because of the overlap in brokers' and dealers' duties and because one financial firm often performs both duties.¹⁹

A *registered investment adviser* is an individual who advises clients about financial securities, such as stocks, bonds, and mutual funds.²⁰ Investment advisers are regulated by the SEC under the Investment Advisers Act of 1940 (P.L. 76-768).

Regulations for Pension Plans and IRAs

To protect the interests of pension plan participants and beneficiaries, Congress passed the Employee Retirement Income Security Act of 1974 (ERISA; P.L. 93-406). ERISA is codified in the *United States Code* in Title 26 (Internal Revenue Code, or IRC) and Title 29 (Labor Code). ERISA sets standards that pension plans must follow with regard to plan participation (who must be covered); minimum vesting requirements (how long a person must work for an employer to acquire a non-forfeitable right to the benefit earned); plan funding (how much must be set aside to pay for future benefits); and fiduciary duties (standards of conduct for certain individuals who have discretion over plan operations or who provide investment advice to the plan or plan participants). The fiduciary duty requires that individuals such as plan sponsors, administrators, and others who oversee pension plans operate these plans prudently and in the sole interests of plan participants.

ERISA also established the Pension Benefit Guaranty Corporation (PBGC), which is an independent federal agency that insures DB pension plans covered by ERISA.²¹ ERISA covers only private-sector pension plans and exempts pension plans established by federal, state, and local governments and by churches.

IRAs were first authorized by ERISA. Provisions that affect IRAs are found only in the IRC. The Labor code does not have any IRA provisions. However, DOL does oversee employer-sponsored IRA plans such as Savings Incentive Match Plan for Employees (SIMPLE) and Simplified Employee Pension (SEP) IRAs.²²

Role of the Department of Labor and the Department of Treasury

Both DOL and the U.S. Treasury oversee private-sector pension plans and IRAs.²³ In general, DOL oversees issues concerning the protection of pension plan participants and the IRS, under the Treasury, oversees issues related to contributions to pension plans and taxes. Because IRA provisions are found only in the IRC, the Treasury oversees most issues regarding IRAs.

¹⁸ See 15 U.S.C §78c(a)(5).

¹⁹ For more information, see CRS Report R41381, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: Standards of Conduct of Brokers, Dealers, and Investment Advisers*.

²⁰ For more information, see SEC, *Investment Advisers: What You Need to Know Before Choosing One*, at <http://www.sec.gov/investor/pubs/invadvisers.htm>.

²¹ For more information on the Pension Benefit Guaranty Corporation (PBGC), see CRS Report 95-118, *Pension Benefit Guaranty Corporation (PBGC): A Primer*.

²² SIMPLE and SEP retirement plans are designed for small businesses. More information is available at <http://www.dol.gov/ebsa/publications/choosing.html>.

²³ The proposed regulation applies to private-sector pension plans. It would not apply to the pension plans of state and local governments, the federal government, and plans operated by churches.

However, a 1978 executive order, among other things, transferred authority over certain issues regarding prohibited transactions from the Secretary of the Treasury to the Secretary of Labor.²⁴

Prohibited Transaction Exemptions

ERISA prohibits certain transactions between a plan and individuals who are fiduciaries. Fiduciaries may not

- deal with the assets of the plan in their own interests or for their own accounts;
- act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries; or
- receive any consideration for their own personal accounts from any party dealing with such plan in connection with a transaction involving the assets of the plan.

ERISA allows DOL to issue exemptions to prohibited transactions that allow an individual, a plan, or a group of individuals or plans (a class) to engage in transactions that otherwise would violate ERISA.²⁵ These exemptions are referred to as prohibited transaction exemptions (PTEs).

Securities and Exchange Commission²⁶

The SEC is an independent government agency that regulates many aspects of investing in financial securities, such as the offering of securities by companies, the buying and selling of securities by brokers and dealers, and the markets on which securities are bought and sold.

SEC Regulation of Those Who Give Investment Advice

This section is intended to be generic in content and is not specific to retirement plans under ERISA per se. Registered investment advisers and broker-dealers are subject to different regulatory regimes. Under the Investment Advisers Act of 1940, registered investment advisers are fiduciaries and must act in their clients' best interest. Securities brokers and dealers are not covered by the act if the advice they provide is incidental to the transaction and they do not receive a fee for the advice.

The Financial Industry Regulatory Authority (FINRA), the self-regulatory organization of securities brokers, which is overseen by the SEC, requires that recommendations by brokers and dealers be suitable for the customer, taking into account the customer's investment profile.²⁷

Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank; P.L. 111-203) required the SEC to conduct a study of (1) the effectiveness of the existing regulatory environment for providing recommendations and investment advice about securities to retail customers; (2) whether statutes or recommendations should be changed to address any shortcomings that were identified; (3) whether the exemption from fiduciary duty for securities

²⁴ See the "Reorganization Plan No. 4 of 1978" at http://www.dol.gov/ebsa/regs/exec_order_no4.html.

²⁵ The procedures governing the filing and processing of Prohibited Transactions Exemptions are at 29 C.F.R. §2570.30 to 29 C.F.R. §2570.52.

²⁶ This section was written by Gary Shorter, specialist in Financial Economics.

²⁷ See Financial Industry Regulatory Authority (FINRA), "Rule 2111, Suitability," at http://finra.complinet.com/en/display/display.html?rbid=2403&record_id=13390&element_id=9859&highlight=2111.

brokers and dealers should be eliminated; and (4) the potential costs of eliminating the exemption.

In 2011, the SEC released the mandated report, *Study on Investment Advisers and Broker-Dealers*,²⁸ which recommended that brokers and dealers be subject to a uniform fiduciary standard that is no less stringent than the standard to which investment advisers are subject.

Standards in Pension Plans

Retirement plans are complex, and individuals often rely on financial services professionals to assist them with their decision making. For example, an employer might seek out assistance in determining what investments to offer in a 401(k) plan it has established; participants in 401(k) plans might seek assistance in choosing their investments from among the options offered by the plan; or workers who participate in employer-sponsored 401(k) plans might seek assistance on whether to leave their 401(k) account balance in the plan or roll it over into an IRA or into another employer's DC plan either upon job change or at retirement.

The way in which some financial services professionals are compensated may give rise to conflicts of interests, if these professionals' recommendations result in larger commissions or otherwise benefit them. These potential conflicts could lead to the professionals making recommendations that are not in the interests of their clients. By contrast, some financial services professionals have compensation structures that do not vary based on which products clients choose. This type of compensation structure could mitigate any conflicts of interest.

Individuals who transact with a pension plan may be required to meet certain standards. The standard that applies depends on the individuals' roles and the actions they are taking. For example, an individual providing investment advice is subject to the high fiduciary standard, whereas an individual who is acting on the direction of the plan participant to buy or sell a particular security or mutual fund may have a lower standard of duty.

Fiduciary Duty

ERISA Section 3(21)(A) provides that a person is a fiduciary to the extent that the person

- exercises any discretionary authority or control with respect to the management of the plan or exercises any authority with respect to the management or disposition of plan assets;
- renders investment advice for a fee or other compensation with respect to any plan asset or has any authority or responsibility to do so; or
- has any discretionary responsibility in the administration of the plan.²⁹

An individual who is a fiduciary is required, among other duties, to “discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries.”³⁰ ERISA identifies four standards of conduct: (1) a duty of loyalty, (2) a duty of prudence, (3) a duty to diversify

²⁸ SEC, “Study on Investment Advisers and Broker-Dealers As Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act,” January 2011, at <http://www.sec.gov/news/studies/2011/913studyfinal.pdf>.

²⁹ See ERISA §3(21)(A).

³⁰ ERISA §404(a).

investments, and (4) a duty to follow plan documents to the extent that they comply with ERISA.³¹

Suitability Standard

Other individuals who do not have a fiduciary duty under ERISA may be bound by other standards of conduct. For example, brokers and dealers (who might make recommendations regarding the purchase or sale of securities) may be held to a suitability standard. FINRA, the self-regulatory organization of securities brokers, provides that recommendations be suitable for the customer, taking into account the customer's investment profile.³²

In some instances, individuals who provide routine plan services (such as record keeping) might not be under any standard. For example, a class of activities relating to the formation of a plan is called *settlor functions*. These settlor functions include decisions to establish a plan or certain features or benefits that are considered business decisions and are not governed by ERISA.³³

Investment Advice

As noted above in the section under Fiduciary Duty, ERISA Section 3(21)(a) established situations in which a person qualifies as a fiduciary. One of these situations, in which an individual renders investment advice for a fee or other compensation, is the subject of the rule that DOL issued on April 8, 2016. The rule replaced a rule that was promulgated in 1975.

1975 Rule

In 1975, DOL addressed the second of the three actions that render an individual a fiduciary. DOL issued regulations that created a five-part test to determine whether an individual provided investment advice and thus was subject to the fiduciary standard.

To have been held to the 1975 fiduciary standard with respect to his or her advice, an individual must have (1) made recommendations on investing in, purchasing, or selling securities or other property or give advice as to the value (2) on a regular basis, (3) pursuant to a mutual understanding that the advice (4) would serve as a primary basis for investment decisions and (5) would be individualized to the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments. An investment adviser was not treated as a fiduciary unless each of the five elements of the test was satisfied for each instance of advice.³⁴

Proposed and Re-proposed Rule Process

On October 22, 2010, DOL proposed an update to the regulation that would have changed the definition of fiduciary. The 2010 proposed rule would have increased the types of activities subject to the fiduciary standard.

³¹ ERISA §404(a)(1)(A) – 404(a)(1)(D).

³² See FINRA, “Rule 2111: Suitability,” at http://finra.complinet.com/en/display/display.html?rbid=2403&record_id=13390&element_id=9859&highlight=2111.

³³ See Employee Benefits Security Administration (EBSA), *Meeting Your Fiduciary Responsibilities*, at <http://www.dol.gov/ebsa/publications/fiduciaryresponsibility.html>.

³⁴ See <http://www.dol.gov/ebsa/newsroom/fsfiduciary.html>.

The 2010 proposed rule generated considerable controversy. DOL received 202 public comments on the proposed rule between October 26, 2010, and February 11, 2011.³⁵ In addition, DOL held a public hearing in March 2011 in which several stakeholders' views were heard.³⁶ Following this public hearing, DOL received 114 public comments, including 45 comments from Members of the House and Senate.³⁷ On September 19, 2011, DOL announced that it would re-propose the rule with the intent of reissuing it in early 2012.³⁸

On February 23, 2015, DOL indicated that it was forwarding the re-proposed rule to the Office of Management and Budget (OMB) for review. On that same day, President Obama said that he was "calling on the Department of Labor to update the rules and requirements that retirement advisers put the best interest of their clients above their own financial interests."³⁹ On April 20, 2015, the Employee Benefits Security Administration (EBSA) published the re-proposed rule (referred to as the *2015 proposed rule* in this report) in the *Federal Register*⁴⁰ along with two proposed class exemptions that would allow certain transactions to occur that could otherwise be prohibited under ERISA, as well as the proposed amendments to several other existing class exemptions.⁴¹

The comment period for the 2015 proposed rule ended July 21, 2015.⁴² DOL held a public hearing during the week of August 10, 2015, with a comment period lasting through September 24, 2015.⁴³ DOL received more than 3,000 comments in the two comment periods. DOL issued the 2016 final rule on April 8, 2016, with an effective date of June 7, 2016. To allow retirement plans and financial services providers time to adjust to the new rule, the 2016 final rule had an applicability date of April 10, 2017.

On February 3, 2017, President Trump issued a memorandum on the fiduciary rule directing DOL to (1) review the rule to determine whether it adversely affects access to retirement information and financial advice, and if it finds that it does so then (2) publish a proposed rule to rescind or revise the rule.⁴⁴

On March 2, 2017, DOL proposed a 60-day delay of the rule's applicability date. On March 10, 2017, DOL issued a Temporary Enforcement Policy indicating that DOL would not initiate enforcement actions against financial advisers or institutions that failed to satisfy the conditions of the rule or PTEs in the period between the applicability date and when DOL decides to either delay or not delay the applicability date of the 2016 final rule and PTEs.

³⁵ See <http://www.dol.gov/ebsa/regs/cmt-1210-AB32.html#comments>.

³⁶ See <http://www.dol.gov/ebsa/pdf/1210-AB32hearingagenda.pdf>.

³⁷ See <http://www.dol.gov/ebsa/regs/cmt-1210-AB32.html#phcomments>.

³⁸ DOL, EBSA, "US Labor Department's EBSA to Re-propose Rule on Definition of a Fiduciary," press release, September 19, 2011, <http://www.dol.gov/opa/media/press/ebsa/EBSA20111382.htm>.

³⁹ See The White House, "Remarks by the President at the AARP," press release, February 23, 2015, <https://www.whitehouse.gov/the-press-office/2015/02/23/remarks-president-aarp>.

⁴⁰ See DOL, EBSA, "Definition of the Term 'Fiduciary'; Conflict of Interest Rule—Retirement Investment Advice; Proposed Rule," 80 *Federal Register* 21928-21960, April 20, 2015.

⁴¹ See DOL, EBSA, "Proposed Best Interest Contract Exemption," 80 *Federal Register* 21960-21989, April 20, 2015 and Employee Benefits Security Administration, "Proposed Class Exemption for Principal Transactions in Certain Debt Securities between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs," 80 *Federal Register* 21989-22004, April 20, 2015.

⁴² The comments are available at <http://www.dol.gov/ebsa/regs/cmt-1210-AB32-2.html>.

⁴³ See DOL, EBSA, "Hearing on Definition of the Term 'Fiduciary'; Conflict of Interest Rule-Retirement Investment Advice and Related Proposed Prohibited Transaction Exemptions," 80 *Federal Register* 34869-34871, June 18, 2015.

⁴⁴ See U.S. President (Donald Trump), "Fiduciary Duty Rule: Memorandum for the Secretary of Labor," 82 *Federal Register* 9675-9676, February 2, 2017.

On April 7, 2017, DOL issued a delay of the 2016 final rule's applicability date while it reviews the effects of the rule pursuant to the presidential memorandum. It delayed the rule's applicability date to June 9, 2017, for two sections: (1) the expanded definition of investment advice and (2) the Impartial Conduct Standard of the Best Interest Contract (BIC) exemption. While these two aspects of the rule are currently in place, other aspects of the exemptions, such as requirements to make specific disclosures and warrant policies and procedures and to execute written contracts are to become applicable on January 1, 2018.

In the April 7, 2017, final rule announcing the delay, DOL indicated that there was little evidence that advisers needed additional time to give advice that is in the retirement investor's best interest and is free from misrepresentations in exchange for reasonable compensation. DOL indicated that its review of the rule's impact will likely take longer than 60 days but that it would be inappropriate to delay the rule for an extended period of time.

Details of the 2016 Final Rule

The 2016 final rule replaced the 1975 rule's five-part test with language that describes the activities and communications that, if done for a fee or other compensation, constitute fiduciary investment advice. The 2016 final rule also provides a list of activities and communications that are not treated as investment advice.

Definition of Investment Advice

The types of activities that constitute investment advice under the 2016 final rule, if they are done for a fee or other compensation are recommendations pertaining to

- the advisability of buying, selling, holding, or exchanging investments;
- how investments should be invested after being rolled over, transferred, or distributed from an IRA;
- the management of investments; or
- IRAs, including whether, in what form, in what amount, and to what destination rollovers, distributions from IRAs and transfers from IRAs should be made.

In addition, the person who makes the recommendation must

- represent or acknowledge that the person is acting as a fiduciary,
- provide a written or verbal understanding that the advice is based on the particular needs of the advice recipient, or
- direct the advice to a specific recipient.

For the purposes of the rule, a recommendation means a communication that based on its context, content, and presentation would be reasonably viewed as a suggestion to engage or refrain from a specific action. The more individually tailored a communication is, the more likely it is to be viewed as a recommendation.

Activities That Do Not Constitute Advice

Certain activities do *not* constitute investment advice under the final rule. These activities include

- marketing by platform providers who market to a plan without regard to the individual needs of the plan or the plan's participants;⁴⁵
- providing selection and monitoring assistance if an individual is identifying alternatives that meet objective criteria specified by the plan fiduciary or is providing objective financial data and benchmarks;
- making available general communications, such as general circulation newsletters, commentary in publicly broadcast talk shows, or general marketing data;
- providing investment education, such as information about the plan or IRA, or general financial, investment, or retirement information;⁴⁶ or
- executing securities transactions on behalf of the plan or an IRA.

The rule states that a person is not considered to be providing investment advice if the advice is

- given, provided certain disclosures are made, to independent fiduciaries with financial expertise, such as a bank, insurance carrier, investment adviser, broker-dealer, or an independent fiduciary who has at least \$50 million of assets under management;
- provided to a plan by a swap dealer or security-based swap dealer;⁴⁷ or
- given by employees of the plan sponsor or employee organization provided they do not receive compensation for the advice beyond their normal compensation.

Prohibited Transaction Class Exemptions

In addition to requiring plan fiduciaries to adhere to certain standards of conduct, ERISA prohibits fiduciaries from engaging in specified transactions deemed likely to injure a pension plan. Section 406(b) of ERISA bars certain transactions between a plan and a party of interest with respect to a plan.⁴⁸ A number of exemptions from these prohibited transactions exist, both in statute and via DOL-issued exemptions to individuals or classes of individuals. Among the new or amended PTEs are the Best Interest Contract (BIC) exemption, Principal Transactions Exemption, and an amended PTE 84-24, which affects the sale of annuity products.

Best Interest Contract (BIC) Exemption

Under the 1975 rule, broker-dealers generally were not providing investment advice and could receive commissions and other forms of compensation that are prohibited to fiduciaries. To allow broker-dealers to receive commissions and other forms of compensation, DOL issued a BIC

⁴⁵ A *platform provider* is a service provider who provides investment options from which the plan sponsor can choose to include in the plan.

⁴⁶ The information can provide asset allocations (such as how much should be invested in stocks versus bonds) for hypothetical individuals based on different time horizons and risk profiles; or interactive investment materials, such as worksheets and software, to estimate future retirement income under various asset allocation scenarios. The models can identify specific investments in plans if the investment is a designated investment alternatives under 29 C.F.R. 2550.404a-5(h)(4).

⁴⁷ A *swap* is a type of financial contract in which two parties agree to exchange (or swap) payments with each other as a result of changes in things such as a stock price or interest rate. For more information, see SEC, "Defining Swaps-Related Terms," at <http://www.sec.gov/News/Article/Detail/Article/1365171492905>.

⁴⁸ ERISA §(3)(14) lists, among others, the following as parties of interest: plan fiduciaries, a person providing services to the plan, and an employer that has employees covered by the plan.

exemption accompanying the 2016 final rule. For example, absent the exemption, fiduciaries would not be able to receive commissions, load fees, or 12b-1 fees for their advice.⁴⁹

The final BIC exemption requires compliance with certain conditions. Among the conditions, the financial institution must

- *acknowledge fiduciary status* with the retirement investor;⁵⁰
- *adhere to Impartial Conduct Standards*, which include acting in the best interest of the retirement investor,⁵¹ not accepting more than reasonable compensation,⁵² and not making misleading statements about investment transactions, compensation, and conflicts of interest;
- *warrant that it has adopted written policies* to adhere to the Impartial Conduct Standards, it has identified and documented Material Conflicts of Interest associated with a recommendation, and does not rely on bonuses, quotas, or contests to compensate advisers that would cause them to make recommendations not in the best interest of the retirement investor; and
- *provide disclosures* to the retirement investor. The disclosures must
 - state the Best Interest Standard of care, inform of the services provided by the financial institution and adviser, and describe how the retirement investor will pay for services;
 - describe material conflicts of interest, retirement investor fees, and third-party compensation;
 - inform the retirement investor of the right to receive information about the financial institution's policies adopted to adhere to the Impartial Conduct Standards and specific disclosure of fees, costs, and compensation connected to the costs of the transaction;
 - disclose whether the financial institution offers proprietary products or receives third-party payments with respect to any recommended investments;
 - provide the financial institution representative's contact information to the retirement investor; and
 - describe how the financial institution and adviser will monitor the retirement investor's investments and alert to any recommended changes.⁵³

⁴⁹ Brokers and dealers often receive *commissions* (also known as loads) as a result of a sale of a security. *Rule 12b-1 fees* are annual fees that mutual funds may charge fund assets to pay for promotional costs and commissions to brokers and other salespeople. More information on mutual fund fees is available at SEC, "Mutual Fund Fees and Expenses," at <http://www.sec.gov/answers/mffees.htm>.

⁵⁰ Advice of retirement investors in IRAs and non-ERISA plans (such as Keogh plans for self-employed individuals) must be pursuant to written, enforceable contracts.

⁵¹ The 2016 rule defines *best interest* as advice "that reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party."

⁵² The regulation does not define *reasonable compensation* but notes that it depends on the particular facts and circumstances of the transaction.

⁵³ The financial institution must also (1) inform the retirement investor of the right to obtain written copies of the financial institution's policies and disclosure of fees and third-party payments regarding the recommended transactions and (2) provide a link to the financial institution's website.

In addition, other compliance conditions are as follows:

- The financial institution *must maintain a public website* that includes, among other items, a discussion of its business model and associated conflicts of interest, a schedule of the typical account fees, and a model contract of the terms and required disclosures described in the BIC exemption.
- The financial institution's contract *may not contain clauses that waive the retirement investor's right to bring or participate in a class action in court* in a dispute with the adviser or financial institution. The contract cannot require arbitration or mediation in venues that are distant or difficult for the retirement investor to reach.
- Financial institutions that sell *proprietary products* may use the BIC exemption provided they take specified actions to clearly inform the retirement investor in writing that the institution offers proprietary products, inform the retirement investor of any material conflicts of interest, and adopt policies and procedures to mitigate the conflicts of interest.
- The financial institution *must notify EBSA* of its intent to rely on the BIC exemption.
- The financial institution *must maintain records for 6 years* that demonstrate compliance with BIC exemption terms.

Principal Transactions Exemption

DOL issued a principal transactions exemption to allow individuals and financial institutions engaging in principal transactions to provide investment advice.⁵⁴ Principal transactions are purchases and sales of assets out of an individual's or a financial institution's own inventory.⁵⁵ Principal transactions generally violate ERISA's prohibitions on self-dealing, so a PTE is needed to allow principal transactions to occur. The PTE limits the types of securities that can be sold and requires that financial institutions and advisers adhere to certain conditions. Under the PTE, financial institutions and advisers may sell certain debt securities, unit investment trusts, and certificates of deposit to a plan or IRA provided the institution and adviser adhere to specified conditions, including following Impartial Conduct Standards.

Amended PTE 84-24 (For Selling Annuities Contracts)

DOL also amended other PTEs, including PTE 84-24. Prior to being amended, PTE 84-24 had allowed individuals to receive commissions for selling various types of annuities. As amended, PTE 84-24 allows individuals who sell fixed annuities to receive commissions provided they adhere to certain conditions (such as Impartial Conduct Standards). However, individuals who sell other types of annuities, such as variable annuities and index annuities, must use the more stringent BIC exemption if their compensation includes commissions. DOL's reasoning is that

⁵⁴ Department of Labor (DOL), EBSA, "Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs," 81 *Federal Register* 21089-21139, April 8, 2016.

⁵⁵ In general, securities transactions are conducted either on a principal or agency basis. In a principal transaction, a financial institution sells a security out of its own inventory. In an agency transaction, a financial institution sells a security on behalf of another party.

these financial products “are often quite complex and subject to significant conflicts of interest at the point of sale.”⁵⁶

Comparison of 1975 Rule and 2016 Final Rule

Table 1 compares the definition of investment advice under DOL’s 1975 regulation and under the 2016 final regulation.

Table 1. Investment Advice in Private-Sector Employer-Sponsored Retirement Plans and Individual Retirement Accounts (IRAs)

(Department of Labor’s 1975 rule and 2016 final rule)

1975 Rule	2016 Final Rule
<p>An investment adviser is a fiduciary if all of the following apply:</p> <ul style="list-style-type: none"> (1) the adviser makes recommendations on investing in, purchasing, or selling securities or other property, or gives advice as to their value; (2) the adviser provides the advice on a regular basis; (3) the advice is provided pursuant to a mutual understanding; (4) the advice will serve as a primary basis for investment decisions; and (5) the advice will be individualized to the particular needs of the plan. <p>Investment advisers who are fiduciaries can only receive compensation if it is for a level fee unless they are covered by an appropriate Prohibited Transaction Exemption (PTE).</p> <p>Brokers and dealers who are not fiduciaries are subject to the Securities and Exchange Commission’s (SEC’s) suitability standard, which says that recommendations must be “suitable” for the investor.</p> <p>Brokers and dealers, when not acting as fiduciaries, may receive compensation in the form of commissions and other fees that vary depending on the financial product purchased.</p> <p>The current rule does not apply to IRAs. However, IRAs are subject to prohibited transaction provisions in the Internal Revenue Code.</p>	<p>A person would be considered a fiduciary if he or she receives a direct or indirect fee and provides a recommendation regarding:</p> <ul style="list-style-type: none"> • the purchase or sale of securities or other property; • the advisability of taking a distribution from a plan or IRA; • the investment of securities or other property that are rolled over from a plan or an IRA; • the management of securities or other property, including rollovers from a plan or IRA; or • a recommendation of a person who is going to provide investment advice for a fee or other compensation. <p>Brokers and dealers who are not fiduciaries would continue to be subject to the SEC’s suitability standard. Commissions and third-party fees would be prohibited unless a broker or dealer abides by the best interest contract (BIC) or another exemption. The BIC exemption would allow most current compensation practices to continue provided the individual or financial institution agrees to provide advice in the best interest of the retirement investor and to adhere to other provisions that would ensure that the best-interests standard is met.</p> <p>The rule applies to rollover decisions and to IRAs.</p>

Source: Congressional Research Service analysis of Department of Labor’s regulation that defines investment advice (29 C.F.R. §2510.3-21) and the April 6, 2016, proposed regulation.

⁵⁶ DOL, “Amendment to and Partial Revocation of Prohibited Transaction Exemption (PTE) 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters,” 81 *Federal Register* 21153, April 8, 2016.

Changes from 2015 Proposed Rule to 2016 Final Rule

In response to the 2015 proposed rule, DOL received more than 6,000 public comments and held four days of public hearings.⁵⁷ DOL made several changes in response to the comments,⁵⁸ including

- clarifying that marketing oneself without making an investment recommendation is not fiduciary investment advice;
- removing appraisals of investments from the definition of investment advice in the 2016 final rule;
- expanding the definition of investment education to allow asset allocation models to identify specific investment alternatives to ERISA plans (but not to IRAs)⁵⁹;
- making the BIC exemption available to small plans;
- eliminating certain asset classes that could be covered by the BIC exemption;
- modifying the contract requirements so that the contract is between the firm and the client;⁶⁰
- streamlining the required disclosures and eliminating the requirement for annual disclosures;
- grandfathering compensation based on investments made prior to the applicability date; and
- allowing a *negative consent* procedure that allows changes to existing clients' contracts to become effective unless the client terminates the contract within 30 days.

Issues

The new fiduciary rule has generated much controversy both as it was proposed and in its final form. Controversial issues include questions about the Obama Administration's rationale for the rule; concerns about the rule's effect on small businesses and small investors; and suggestions that DOL should wait for the SEC to issue a rule requiring a fiduciary standard for securities brokers and dealers.

Rationale for the Rule

The Obama Administration put forward several reasons explaining the need to update the definition of investment advice. These reasons included changes in how Americans prepare for retirement, quantitative estimates of the cost of conflicted financial advice, and concerns

⁵⁷ These are available at DOL's "Conflict of Interest Proposed: Rule Regulation and Exemptions" at <https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/proposed-regulations/1210-AB32-2>.

⁵⁸ See "Chart Illustrating Changes From Department of Labor's 2015 Conflict of Interest Proposal to Final," available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/conflict-of-interest-chart.pdf>.

⁵⁹ DOL indicated that IRAs do not have independent fiduciaries to review the results of such models.

⁶⁰ Public comments had expressed concerns that a new contract would need to be executed every time a client interacted with a different person at the financial institution.

regarding rollovers from DC plans to IRAs when workers change jobs or retire. Some stakeholders questioned the validity of the evidence used to justify the rule.

Changes in How Americans Prepare for Retirement

DOL argued that the definition of investment advice needed to be updated because the nature of how Americans prepare for retirement had changed since 1975.⁶¹ In the mid-1970s, Americans who participated in an employer-sponsored pension plan most likely participated in a DB pension. Since then, the number of participants in DB plans has decreased and the number of participants in DC plans has increased. According to DOL data on participation counts,⁶² in 1975, 74% of participation in private-sector plans was in DB pension plans and 26% was in DC plans; by 2014, 28% of participation in private-sector plans was in DB pension plans and 72% was in DC plans.⁶³ Participants in DC plans have more decisions to make than participants in DB plans (such as decisions on contribution amounts, investment allocations, rollovers, and withdrawals). Because financial decisions can be complicated, DC plan sponsors sometimes provide investment advice or investment education to plan participants. In addition, retirement investors may receive outside help with these decisions.

Evidence in Support of Rule

The Obama Administration's rationale for the need to update the investment advice rule was laid out in two documents: (1) a February 2015 report from the Council of Economic Advisers (CEA) on conflicted investment advice⁶⁴ and (2) the Regulatory Impact Analysis (RIA) by DOL that was released with the 2015 proposed rule.⁶⁵

The CEA estimated that conflicted advice costs IRA investors about \$17 billion per year.⁶⁶ This cost is a result of both (1) lower investment returns of funds purchased and (2) higher fees associated with investments recommended as result of conflicted advice.

Some said that the CEA analysis was flawed. For example, one report critical of the CEA analysis said that the conclusions in the academic literature that CEA cites are more nuanced than presented in the CEA analysis. This report also said that the CEA analysis does not attempt to quantify the benefits that brokers provide under current regulations.⁶⁷

⁶¹ See, for example, DOL, EBSA, "Definition of the Term 'Fiduciary'; Conflict of Interest Rule—Retirement Investment Advice; Proposed Rule," 80 *Federal Register* 21934, April 20, 2015.

⁶² Pension plans report the number of participants in their plans to DOL. Because individuals can be in more than one plan, the number of participants reported by DOL overstates the total number of participants.

⁶³ See DOL, EBSA, *Private Pension Plan Bulletin Historical Tables and Graphs*, September 2016, Table E-4, at <http://www.dol.gov/ebsa/pdf/historicaltables.pdf>.

⁶⁴ See Council of Economic Advisers, *The Effects of Conflicted Investment Advice on Retirement Savings*, February 2015, at https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_coi_report_final.pdf.

⁶⁵ See DOL, EBSA, *Fiduciary Investment Advice: Regulatory Impact Analysis*, April 14, 2015, at <http://www.dol.gov/ebsa/pdf/conflictsofinterestria.pdf>.

⁶⁶ The CEA analysis described conflicted advice as advice as a "result from the incentives conflicted payments generate for financial advisers to steer savers into products or investment strategies that provide larger payments to the adviser but are not necessarily the best choice for the saver." See Council of Economic Advisers, *The Effects of Conflicted Investment Advice on Retirement Savings*, February 2015, at https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_coi_report_final.pdf.

⁶⁷ See Jeremy Berkowitz, Renzo Comolli, and Patrick Conroy, *Review of the White House Report Titled, "The Effects of Conflicted Investment Advice on Retirement Savings"*, NERA Economic Consulting, March 15, 2015, at <http://www.nera.com/content/dam/nera/publications/2015/>

(continued...)

Among the points the RIA made in support of the proposal are the following:

- The structure of the market in which retirement plans operate creates conflicts of interest that are not adequately addressed by current regulations. For example, a Government Accountability Office (GAO) report indicated that plan sponsors may be confused as to whether their advisers are subject to a fiduciary standard.⁶⁸
- Advisers that offer advice to plans regarding which investment options to include in their plans (platform providers) might have fee arrangements that create conflicts of interest. For example, a platform provider might have a revenue sharing arrangement in which the provider receives a commission when particular investment options are included in a plan.⁶⁹
- DOL indicated that it found enforcement challenging because it had to demonstrate that an individual met each element of the five-part test. For example, when a DB plan terminates, in order to guarantee participants' future benefits, the plan had to purchase annuity contracts for each of the plan participants. However, purchasing these annuity contracts were generally one-time events that would not have met the requirement for advice to be provided on a regular basis. An adviser providing recommendations on the purchase of the contracts thus might not be considered a fiduciary.⁷⁰
- IRA investors might have been particularly vulnerable to advisers' conflicts of interest in the existing regulatory framework and benefit from a new rule. The RIA indicated that IRA investors would see gains from the proposal of between \$40 billion and \$44 billion over 10 years and compliance costs among financial institutions would be between \$2.7 billion and \$5.7 billion over 10 years.⁷¹
- The RIA also looked at changes to the investment advice regulation in Great Britain (which implemented new regulations on financial advisers in January 2013) and how these changes affected investors with smaller account balances. Some have expressed concerns about the impact of the proposal on U.S. investors with smaller account balances.⁷² The RIA concluded that there had been little impact on the ability of small investors to receive advice.⁷³

Some stakeholders questioned the validity of the evidence in the RIA and claimed that the RIA did not justify the adoption of the 2015 proposed rule. For example, in a comment letter to DOL, the Investment Company Institute (ICI) challenged the RIA's conclusion that mutual funds that

(...continued)

PUB_WH_Report_Conflicted_Advice_Retirement_Savings_0315.pdf.

⁶⁸ See U.S. Government Accountability Office (GAO), *Improved Regulation Could Better Protect Participants from Conflicts of Interest*, GAO-11-119, January 28, 2011, at <http://www.gao.gov/assets/320/315363.pdf>.

⁶⁹ See DOL, EBSA, *Fiduciary Investment Advice: Regulatory Impact Analysis*, Section 4.2.1.3, Platform Providers, p. 141, April 14, 2015, at <http://www.dol.gov/ebsa/pdf/conflictsofinterestria.pdf>.

⁷⁰ See DOL, EBSA, *Fiduciary Investment Advice: Regulatory Impact Analysis*, Section 4.2.3, Department Enforcement Challenges, p. 149, April 14, 2015, <http://www.dol.gov/ebsa/pdf/conflictsofinterestria.pdf>.

⁷¹ See DOL, EBSA, *Fiduciary Investment Advice: Regulatory Impact Analysis*, Section 3.3.1, Quantified Gains to Investors, p. 101, April 14, 2015, <http://www.dol.gov/ebsa/pdf/conflictsofinterestria.pdf>.

⁷² See, for example, PFS Investments, Inc. of Primerica Inc., *Comment Letter of DOL's Proposed Conflict of Interest Rule*, July 21, 2015, at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00615.pdf>.

⁷³ See DOL, EBSA, *Fiduciary Investment Advice: Regulatory Impact Analysis*, pp. 42-47, April 14, 2015, at <http://www.dol.gov/ebsa/pdf/conflictsofinterestria.pdf>.

are sold by securities brokers underperform relative to other mutual funds. ICI also argued that the RIA failed to account for the societal harms as a result of the rule (e.g., some investors might lose access to investment advice).⁷⁴

Concerns Regarding Rollovers from DC Plans to IRAs

The Obama Administration and other policymakers expressed concerns regarding rollovers from DC plans (such as 401(k) accounts) to IRAs.⁷⁵ In addition, the SEC included as one of its 2014 examination priorities the sales practices of investment advisers who target retirement-aged workers to roll over their account balances to higher-cost investments.⁷⁶ One reason for the concern is the large amount of funds that are rolled over from employer-sponsored plans to IRAs. According to ICI, in 2013, 86% of traditional IRAs were opened by individuals making rollovers from employer-sponsored plans.⁷⁷ ICI indicated that in 2014, \$424 billion was transferred from employer-sponsored pension plans to traditional IRAs.⁷⁸

A GAO report issued in March 2013 found that, upon separation from their employer, due to job change or retirement, individuals do not always receive recommendations that are in their best interests. The report also identified several factors that encouraged them to roll over their 401(k) account balances to IRAs.⁷⁹ For example, plan participants often find the process confusing; there is a lack of assistance from their employers; and the marketing of IRAs by financial institutions is pervasive and may be misleading, particularly with regard to fees.⁸⁰

Pension plan participants have a variety of factors to consider when deciding to roll over an account balance from a 401(k) plan to an IRA. For example, the fees in a 401(k) plan are typically lower than in an IRA (because of economies of scale); IRAs often offer a greater number and variety of investment options; individuals sometimes prefer to consolidate 401(k) plans from multiple jobs into a single IRA; and ERISA's fiduciary protections generally do not apply to IRAs.

Recognizing concerns over the IRA rollover market, in December 2013, Financial Industry Regulatory Authority (FINRA, the securities industry self-regulating association) issued guidance

⁷⁴ See Investment Company Institute, *Public Comment to Conflict of Interest Proposed Rule (Regulatory Impact Analysis)*, July 21, 2015, at <http://www.dol.gov/ebsa/pdf/1210-AB32-2-00749.pdf>.

⁷⁵ See, for example, DOL, EBSA, *Fiduciary Investment Advice: Regulatory Impact Analysis*, April 14, 2015, at <http://www.dol.gov/ebsa/pdf/conflictsofinterestria.pdf> and U.S. Senate Committee on Health, Education, Labor, and Pensions, "GAO Uncovers Troubling Practices Carried Out by Financial Firms That Drain Americans' 401(k) Retirement Savings in Report Requested by Sen. Harkin, Rep. Miller, and Sen. Nelson," press release, April 2013, at <http://www.help.senate.gov/ranking/newsroom/press/gao-uncovers-troubling-practices-carried-out-by-financial-firms-that-drain-americans-401k-retirement-savings-in-report-requested-by-sen-harkin-rep-miller-and-sen-nelson>.

⁷⁶ The SEC examination priorities target areas that the SEC believes to have heightened risk. See SEC, *Examination Priorities for 2014*, January 9, 2014, at <http://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2014.pdf>.

⁷⁷ See Investment Company Institute, *2016 Investment Company Factbook*, Figure 7.18, at https://www.ici.org/pdf/2016_factbook.pdf.

⁷⁸ See Investment Company Institute, *The Role of IRAs in U.S. Households' Saving for Retirement, 2014*, ICI Research Perspective, vol. 21, no. 1 (January 2015), p. 14, at <https://www.ici.org/pdf/per21-01.pdf>.

⁷⁹ See GAO, *401(k) Plans: Labor and IRS Could Improve the Rollover Process for Participants*, GAO-13-30, March 7, 2013, at <http://www.gao.gov/products/GAO-13-30>.

⁸⁰ Upon separation from employment, DC plan participants might have the option to maintain their accounts with the plan, although there are some circumstances in which an employer can force a rollover.

reminding broker-dealers that their recommendations regarding rollovers into IRAs must adhere to the suitability standard.⁸¹

In 2005, DOL issued an advisory opinion that a recommendation regarding a rollover decision is *not* investment under current regulations and *not* subject to a fiduciary standard under ERISA.⁸² The 2016 final rule supersedes the 2005 advisory opinion on recommendations regarding rollovers from 401(k) accounts to IRAs and considers recommendations regarding rollovers to be investment advice subject to the 2016 final rule.

Trump Administration's Perspective on the Rule

The Trump Administration reviewed the 2016 final rule to determine whether it would likely harm retirement investors by (1) restricting access to retirement savings offerings and products, (2) disrupting the retirement savings industry in a way that adversely affects investors and retirees, and (3) causing an increase in litigation.⁸³

As mentioned earlier, DOL delayed the applicability date of (1) the expanded definition of investment advice and (2) the Impartial Conduct Standard of the Best Interest Contract (BIC) exemption until June 9, 2017. Other aspects of the exemption, such as requirements to make specific disclosures and warrant policies and procedures and to execute written contracts are to become applicable on January 1, 2018.

In an op-ed, the Secretary of Labor indicated that there was “no principled legal basis” to continue delay of the applicability date past June 9, 2017.⁸⁴ On May 22, 2017, DOL issued a temporary enforcement policy indicating that until January 1, 2018, it would not “pursue claims against fiduciaries who are working diligently and in good faith to comply with the fiduciary duty rule and exemptions, or treat those fiduciaries as being in violation of the fiduciary duty rule and exemptions.”⁸⁵

Perspectives from Stakeholders

As evidenced by the comments DOL received, stakeholders (such as some Members of Congress, financial services professionals and firms, and advocacy groups) had a variety of views on the 2015 proposed rule and on the 2016 final rule. Some supported the proposal rule, some broadly supported the goals of the rule but disagreed on the specifics of the rule, and others opposed the rule.⁸⁶

⁸¹ See Financial Industry Regulatory Authority (FINRA), *FINRA Reminds Firms of Their Responsibilities Concerning IRA Rollovers*, Regulatory Notice 13-45, December 2013, at <https://www.finra.org/sites/default/files/NoticeDocument/p418695.pdf>.

⁸² The advisory opinion applies only with respect to ERISA. See ESBA, *Deseret Mutual Benefit Administrators*, Advisory Opinion 2005-23A, December 7, 2005, at <http://www.dol.gov/ebsa/regs/aos/ao2005-23a.html>.

⁸³ Executive Order, “Fiduciary Duty Rule,” 82 *Federal Register* 9675, February 3, 2017.

⁸⁴ See Alex Acosta, “Deregulators Must Follow the Law, So Regulators Will Too,” *Wall Street Journal*, May 18, 2017, at <https://www.wsj.com/articles/deregulators-must-follow-the-law-so-regulators-will-too-1495494029>.

⁸⁵ See Employee Benefits Security Administration, *Temporary Enforcement Policy on Fiduciary Duty Rule*, Field Assistance Bulletin No. 2017-02, May 22, 2017, at <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2017-02>.

⁸⁶ The public comments to the 2015 proposed rule and the webcast of DOL’s public hearing are available at <http://www.dol.gov/ebsa/regs/cmt-1210-AB32-2.html>.

Support for Best-Interests Standard for Broker-Dealers

Professionals in the financial services industry indicated that they support a best-interests standard; that is, they feel that they should be required to operate in the best interests of their clients.⁸⁷ Many indicated that they already do so. For example, at a congressional hearing, one witness indicated that “the vast majority of the financial services industry is completely fine with being required to act in the best interest of their customers.”⁸⁸ Another witness said that his financial services company “acts in the best interest of its clients and ... support[s] a best interest fiduciary standard.”⁸⁹ Although many financial services professionals supported the best-interests standard, they also felt that the 2015 proposed rule may not have been the way to achieve it because certain aspects may be too challenging to implement. For example, a large financial services firm indicated that the rule would be “unworkable” and would prevent the firm from “providing investment assistance that plans, participants and IRA owners need to invest successfully for retirement.”⁹⁰

Rule Could Have Restricted Firms from Offering Own Products

Marketing materials from financial institutions might contain information about products that a particular financial institution offers. Such communications could have been prohibited under the 2015 proposed rule. For example, a financial adviser could recommend having a particular class of mutual fund as an investment option but might not be allowed to indicate that his or her financial institution offers a particular fund. The chief executive officer of a large financial services firm said that “the proposed rule effectively makes it a conflict of interest to sell your own products.”⁹¹ DOL addressed this concern in the final rule by providing guidance on how offering specific products can satisfy the BIC exemption.

Disclosures and Compliance Under the 2016 Rule

One of the concerns expressed by some industry professionals about the BIC exemption as proposed was that the many disclosures required from service providers made it unworkable. Fiduciary advisers that make use of the BIC exemption were required to enter into a written contract with the plan or IRA investors; provide information about the costs of the investments prior to the purchase (including acquisition and ongoing costs); disclose via a public web page the

⁸⁷ See, for example, Securities Industry and Financial Markets Association, *Comment Letter 506*, July 20, 2015, at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00506.pdf>, the American Council of Life Insurers, *Comment Letter 621*, July 21, 2015, at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00621.pdf>, or Plan Sponsor Council of America, *Comment Letter 614*, July 21, 2015, at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00614.pdf>.

⁸⁸ See Testimony of Kent A. Mason of Davis & Harman LLP before the Subcommittee on Health, Employment, Labor, and Pensions of the House Education and Workforce Committee for the hearing entitled Restricting Access to Financial Advice: Evaluat[ing] the Costs and Consequences for Working Families and Retirees, June 17, 2015, <http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/Mason%20Testimony.pdf>.

⁸⁹ See Testimony of John F. “Jack” Haley, Jr., executive vice president, Fidelity Investments, before a hearing of the House Committee on Education and the Workforce Subcommittee on Health, Education, Labor, and Pensions, June 15, 2015, at http://edworkforce.house.gov/uploadedfiles/testimony_haley.pdf.

⁹⁰ See Fidelity Investments, *Comment Letter to the Department of Labor on the Definition of the Term Fiduciary*, <http://www.dol.gov/ebsa/pdf/1210-AB32-2-00658.pdf>.

⁹¹ See Katherine Chiglinsky and Selina Wang, “MetLife Says Fiduciary Rule Threatens Ability to Advise,” *Bloomberg BNA Benefits Practice Resource Center*, July 30, 2015.

compensation arrangements with third parties; and maintain records about the investments and returns for six years for analysis by DOL.

DOL indicated that it addressed some of the concerns regarding disclosures. For example, the final rule does not contain a requirement for annual disclosures and DOL indicated that it streamlined the requirements for online disclosures. These changes have not satisfied all stakeholders. For example, the U.S. Chamber of Commerce indicated that the disclosures in the final rule are far more onerous than disclosures required from service providers to plan fiduciaries under a rule issued in 2012 and present “significant ongoing cost and compliance challenges.”⁹²

View of Some Consumer Advocacy Groups

Some consumer advocacy groups were supportive of the DOL proposal although a comprehensive survey of their views is beyond the scope of this report. For example, the Consumer Federation of America indicated their “strong support”⁹³ for the proposal and noted in January 2017 that the final rule was already delivering benefits.⁹⁴ AARP was strongly supportive of the proposal and of the final rule.⁹⁵ Finally, the AFL-CIO supported the proposed and final rule, indicating that

the final Rule’s functional definition of investment advice will provide a clear, common-sense approach to determining fiduciary status. This will benefit plan sponsors directly, as well the workers and retirees who are counting on these pensions and 401(k)s to provide them with a measure of retirement security, because whether they benefit from ERISA’s fiduciary protections will no longer depend on their market power or the sophistication of their counsel or themselves.⁹⁶

Coordination with SEC⁹⁷

Prior to the DOL rulemaking, some Members of Congress and some financial services companies suggested that the SEC and DOL should better coordinate their efforts to create a uniform fiduciary standard for all advisers, including registered investment advisers and broker-dealers.⁹⁸

During the Obama Administration, DOL addressed the suggestion that DOL wait for the SEC to complete its rulemaking. DOL noted that under current law, fiduciary standards are different

⁹² See U.S. Chamber of Commerce, *Assessing the Final DOL Fiduciary Rule*, at https://www.uschamber.com/sites/default/files/documents/files/u.s._chamber_-_assessment_of_the_dol_fiduciary_rule.pdf.

⁹³ See Consumer Federation of America, *Comment Letter on DOL’s Proposed Conflict of Interest Rule*, July 21, 2015, at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00660.pdf>.

⁹⁴ See Consumer Federation of America, *Department of Labor Conflict of Interest Rule is Already Delivering Benefits to Workers and Retirees*, January 31, 2017, at http://consumerfed.org/wp-content/uploads/2017/01/1-31-17-DOL-Rule-Delivering-Benefits_Fact-Sheet.pdf.

⁹⁵ See AARP, *Comment Letter of DOL’s Proposed Conflict of Interest Rule*, July 21, 2015, at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00695.pdf> and AARP, *Fiduciary Rule Reexamination*, April 17, 2017, at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01388.pdf>.

⁹⁶ See AFL-CIO, *Fiduciary Rule Examination*, April 17, 2017, at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB79/01427.pdf>.

⁹⁷ This section was written by Gary Shorter, specialist in Financial Economics, gshorter@crs.loc.gov, 7-7772.

⁹⁸ See, for example, *Comment Letter from Members of the Majority of the House Committee on Education and the Workforce to Thomas E. Perez, Secretary of Labor*, July 21, 2015, <http://www.dol.gov/ebsa/pdf/1210-AB32-2-00772.pdf>.

under ERISA and the IRC compared with the standards under the Investment Advisers Act. It also noted that in ERISA, Congress provided higher standards of conduct because of the importance of retirement plans and IRAs to retirement income security and because of the tax advantages they receive.⁹⁹

SEC Chair Mary Jo White left office in January 2017. During her administration, she observed “that broker-dealers and investment advisers should be subject to a uniform fiduciary standard of conduct when providing personalized securities advice to retail investors.”¹⁰⁰ As part of this, in 2015, she noted that she had asked the SEC staff to “develop rulemaking recommendations” for implementing the uniform fiduciary goal.¹⁰¹

During a hearing before the House Subcommittee on Financial Services and General Government Committee on Appropriations on March 22, 2016, Chair White said that if there was “a DOL rule that preceded ours [the SEC’s] and overlapped, we would continue to talk about coordination and making our rules and the regime as compatible as possible. [Such rules] don’t always land identically; you try to make them land identically if you can, but [the SEC and DOL] are separate agencies, [with] separate statutory mandates.”¹⁰²

In May 2017, the Senate confirmed President Trump’s nominee for SEC chair, Jay Clayton, a Republican and corporate attorney. Chair Clayton succeeded standing Republican Commissioner Michael Piwowar, who served as acting chair in the several months between Mary Jo White and Jay Clayton’s chairmanships.¹⁰³

On June 1, 2017, on the eve of the applicability of the DOL Fiduciary Rule, Chair Clayton issued a public pronouncement:

The Department of Labor’s Fiduciary Rule may have significant effects on retail investors and entities regulated by the SEC. It also may have broader effects on our capital markets. Many of these matters fall within the SEC’s mission of protecting investors; maintaining fair, orderly, and efficient markets; and facilitating capital formation... I welcome the Department of Labor’s invitation to engage constructively as the Commission moves forward with its examination of the standards of conduct applicable to investment advisers and broker-dealers, and related matters.¹⁰⁴

⁹⁹ See DOL, EBSA, *Fiduciary Investment Advice: Regulatory Impact Analysis*, pp. 191–193, April 14, 2015, at <http://www.dol.gov/ebsa/pdf/conflictsofinterestria.pdf>.

¹⁰⁰ See Testimony of SEC Chair Mary Jo White, U.S. Congress, House Committee on Financial Services, *Examining the SEC’s Agenda, Operations and FY 2016 Budget Request*, hearing, 114th Cong., 1st sess., March 24, 2015.

¹⁰¹ Testimony of Mary Jo White, chair of U.S. Securities and Exchange Commission, U.S. Congress, House Committee on Financial Services, *Examining the SEC’s Agenda, Operations and FY 2016 Budget Request*, 114th Cong., 1st sess.

¹⁰² House Appropriations Subcommittee on Financial Services and General Government Holds Hearing on President Obama’s Fiscal 2017 Budget Request for the Securities and Exchange Commission. *CQ Financial Transcripts*, March 22, 2016, at <http://www.cq.com/doc/financialtranscripts-4857644?4&search=PW8PmtEA>.

¹⁰³ Regarding the SEC’s uniform fiduciary issue, then Acting Chair Piwowar reportedly observed that debate on the issue has largely flowed from the aforementioned Dodd-Frank Act mandate to the SEC on the matter, a debate that he said had been both fraught and polarizing. As such, he asserted that going forward, while the uneven standards of client care remain unchanged, his hope was that concerned parties would “take the opportunity to step back from that and have a more fulsome discussion [on the SEC and the uniform fiduciary issue].” (No transcript with Mr. Piwowar’s commentary appears to be available). The reported comments come from Kenneth Corbin, “SEC Chief Rips into Fiduciary Rule,” *On Wall Street*, March 2, 2017, at <https://www.onwallstreet.com/news/sec-chair-rips-into-dol-fiduciary-rule>

¹⁰⁴ See SEC Chairman Jay Clayton, “Public Comments from Retail Investors and Other Interested Parties on Standards of Conduct for Investment Advisers and Broker-Dealers,” SEC, June 1, 2017, at <https://www.sec.gov/news/public-statement/statement-chairman-clayton-2017-05-31>.

In the public document, Chair Clayton, however, also spoke of the complicated public policy decisionmaking faced by the agency going forward. Among other things, such decisionmaking, he noted, was challenged by ongoing changes in the ways in which investment advice was being provided.

Critically, the chairman also observed that the agency's decisionmaking was further complicated by the wide range of possible actions that confronted it:

The range of potential actions previously suggested to the Commission is also broad, from maintaining the existing regulatory structure, to requiring enhanced disclosures intended to mitigate reported investor confusion, to the development of a best interests standard of conduct for broker-dealers, and, finally, to pursuing a single standard of conduct combined with a harmonization of other rules and regulations applicable to both investment advisers and broker-dealers when they provide advice to retail investors—and a variety of points in-between.¹⁰⁵

To help direct it toward the best decision-making, Chair Clayton invited the public to electronically share their views on the standards of conduct for investment advisers and broker-dealers who provide investment advice to retail investors. As part of this, among the questions that the chair asked the public to consider were the following:

What has been the experience of retail investors and market participants thus far in connection with the implementation of the [DOL] Fiduciary Rule? How should these experiences inform the Commission's analysis? Are there other ways in which the Commission should take into account the Department of Labor's Fiduciary Rule in any potential actions relating to the standards of conduct for retail investment advice?¹⁰⁶

Congressional Activity

Legislation has been introduced in the 114th and 115th Congresses to prevent or delay the implementation of the fiduciary rule or to codify a definition of investment advice, which would take precedence over the regulation.

Legislation in the 115th Congress

A number of bills have been introduced in the 115th Congress that would

- prevent or delay implementation of the fiduciary rule,¹⁰⁷ or
- define investment advice in U.S. Code and provide for a best-interest PTE. H.J.Res. 88.¹⁰⁸

Legislation in the 114th Congress

A number of bills were introduced in the 114th Congress that would have

- rescinded the fiduciary rule,¹⁰⁹

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ See, for example, and H.R. 355, the Protecting American Families' Retirement Advice Act or Section 841 of H.R. 10, the Financial CHOICE Act of 2017.

¹⁰⁸ See, for example, H.R. 2823, the Affordable Retirement Advice for Savers Act, and S. 1321, the Affordable Retirement Advice Protection Act.

- prevented or delayed the implementation of the fiduciary rule,¹¹⁰ or
- defined investment advice in the *U.S. Code* and provided for a best-interest PTE.¹¹¹

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(...continued)

¹⁰⁹ See, for example, which passed the House and Senate and was vetoed by President Obama.

¹¹⁰ See, for example, H.R. 1090, the Retail Investor Protection Act, and provisions in the appropriations bills for the Departments of Labor, Health and Human Services, and Education: H.R. 3020, the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2016, and S. 1695, the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2016,

¹¹¹ See, for example, H.R. 3922, the Retirement Choice Protection Act of 2015, H.R. 4293, the Affordable Retirement Advice Protection Act, H.R. 4294, the Strengthening Access to Valuable Education and Retirement Support Act of 2015, S. 2502, the Affordable Retirement Advice Protection Act, and S. 2505, the SAVERS Act of 2016.