Protecting Retirement Savings FAQs

as released by the U.S. Department of Labor in April 2016, except for annotations in red added by NELP in June 2017

NELP Note: On February 3, 2017, President Trump directed the Department of Labor to re-examine whether the Conflict of Interest regulatory package would adversely affect the ability of Americans to gain access to retirement information and financial advice, and to prepare and updated economic and legal analysis concerning the likely impact of the package. The re-examination is to include:

> ***(i) Whether the anticipated applicability of the Fiduciary Duty Rule has harmed or is likely to harm investors due to a reduction of Americans' access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice;***
>
> ***(ii) Whether the anticipated applicability of the Fiduciary Duty Rule has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees; and***
>
> ***(iii) Whether the Fiduciary Duty Rule is likely to cause an increase in litigation, and an increase in the prices that investors and retirees must pay to gain access to retirement services.***

These issues were thoroughly examined – and conclusively resolved -- during the lengthy rulemaking process preceding the package's release, and the directive was widely interpreted by commentators as an effort by the White House to kill the reform on behest of certain industry opponents.

In response to the directive, the Department of Labor initiated a rulemaking, which resulted in a delay of the principal components of the new regulatory package's applicability date from April 10, 2017 to June 9, 2017. Aspects of the package that were not originally scheduled to take effect until January 1, 2018, such as the contract requirement under the Best Interest Contract Exemption, will still become effective on that date. In addition, certain narrow provisions of the package that were supposed to take effect on April 10, 2017, such as the requirement that advisers utilizing these exemptions make specific written disclosures and representations to investors, have been further postponed to January 1, 2018.

The Department of Labor has indicated that it will conduct the White House-mandated re-examination while the regulatory package is largely in effect. NELP strongly opposes any changes to the enforcement provisions that are necessary to ensure that retirement savers get the full benefit of this important rule.

Background and Impact on Retirement Savers

1. What do you mean when you say "conflicts of interest"?

Advisers giving sound advice deserve to be well paid for the important work they do, helping workers build their nest eggs so they can retire after years of hard work. However, an adviser may have a conflict of interest if he or she gets paid more for steering clients into one investment product instead of another. Clients are sometimes unaware of these payments because they can be hidden in fine print or not disclosed at all. These fees can give advisers an incentive to make recommendations that generate the highest fees for them, rather than the best investment return for their client. Independent research suggests that conflicts of interest are costing middle class families receiving conflicted advice billions of dollars each year.

Many advisers do not accept conflicted payments, and not all who receive such payments respond by providing bad advice. Furthermore, there are many advisers who already commit to providing high-quality advice that always puts their client's best interest first. They are hardworking men and women who got into this work to help families achieve retirement security, and want a system that provides a level playing field for those who provide unbiased, quality advice. This final rule does this and helps align advisers' interests with those of their clients.

2. What evidence demonstrates that financial advisers' conflicts of interest harm savers?

The Department's regulatory impact analysis suggests that IRA holders receiving conflicted investment advice can expect their investments to underperform by an average of one-half to one percentage point per year over the next 20 years. The under-performance associated with conflicts of interest in just one slice of the market — the mutual funds segment alone —could cost IRA investors between $95 billion and $189 billion over the next ten years and between $202 billion and $404 billion over the next 20 years. While these expected losses are large, they represent only a portion of what retirement investors stand to lose as a result of adviser conflicts, which affect a broader set of investments than mutual funds. These estimates are grounded in a growing body of academic literature that provides empirical evidence of firm conflicts in financial advice.

3. How much will this rule help retirement investors?

The Department expects the final rule and exemptions to deliver large gains for retirement investors by reducing losses attributable to conflicts of interest. For example, the expected quantified gains in just one segment of the market – IRA front-end-load mutual fund investors alone – will be worth between $33 billion and $36 billion over ten years and between $66 billion and $76 billion over 20 years. These gains do not include additional large, expected gains to IRA investors resulting from reducing or eliminating other negative effects of conflicts in IRA advice on financial products other than front-end-load mutual funds or the effect of conflicts on advice to plan investors on any financial products.

4. What does it mean to be a fiduciary? Why is it important that my adviser be a fiduciary?

Federal pension and tax law protects retirement plans, plan participants and IRA owners by imposing fundamental duties on their investment advisers. Individuals and firms that are held to these standards are called "fiduciaries." Under the final rule and related exemptions, fiduciaries to plans and plan participants are required to act impartially and provide advice that is in their clients' best interest. In addition, fiduciaries to plans, plan participants, and IRA owners are not permitted to receive payments creating conflicts of interest unless they comply with conditions (required by a "prohibited transaction exemption") designed to minimize the potential effects of a conflict.

Having your investment adviser be a fiduciary is important because, under the Department's regulatory package, it means that they are required to give you advice that is in your best interest, not their own.

5. What is the Labor Department's role in regulating retirement investment advice?

The Labor Department is responsible for ensuring that the retirement savings vehicles used by America's workers – including traditional pensions and 401(k)-type plans – are secure and operated in accordance with federal pension laws and regulations. This includes setting the rules that govern conflicts of interest for both IRAs and employment-based plans. People with their retirement savings in these tax-favored retirement

savings vehicles increasingly are looking for help in making decisions about investing in stocks, bonds, other securities, insurance, and banking products. The Labor Department's job is to help design and enforce rules and regulations under the federal pension law that help protect America's workers when they put their retirement savings in the hands of brokers and other financial advisers.

6. Is this rule necessary? Aren't my retirement savings already protected by the SEC, FINRA and state securities and insurance regulators?

Retirement savings are supposed to receive special protections under federal retirement and employee benefits law. However, the regulations underlying these laws on retirement advice have not been updated in more than four decades. When the Employee Retirement Income Security Act of 1974 (ERISA) was first passed almost 42 years ago, professional pension managers typically were the ones making complex decisions on retirement investing. Individual Retirement Accounts (IRAs) were created by ERISA, and 401(k) plans would not exist for several more years. But there has been a dramatic shift in our retirement system in the intervening decades: today, workers are largely responsible for managing their own savings through 401(k)-type plans and IRAs, and so millions of Americans rightfully turn to advisers for recommendations on how much to save and how to invest and manage those savings.

But under these outdated rules, savers cannot count on the retirement investment advice they receive being in their best interest because many advisers are not required to abide by what is called a "fiduciary standard." In other words, today's rules allow some financial advisers to put their bottom line ahead of their clients' retirement security. This is especially true for rollovers and IRAs, which almost never receive fiduciary protections under the current ERISA and tax rules. Recent studies show that the vast majority of Americans understandably but mistakenly believe their financial advisers are required to act in their clients' best interest. The reality is very different.

Many advisers do put their clients' best interests first. They are hard working men and women who got into their jobs to help families achieve a secure retirement. But some do not, and the current rules make it harder for all of the financial advisers who are trying to do right to compete—and hard for consumers to know whom to trust. Independent research suggests that conflicts of interest are costing middle class families receiving conflicted advice billions of dollars per year.

The final regulatory package would require retirement investment advisers to put their clients' best interest first.

The SEC has separate related authority to regulate securities markets. And while advice on securities in tax-preferred retirement savings accounts is regulated by both the Department and the SEC, there is much advice involving retirement savings (like advice to purchase some insurance annuity and bank products) over which the SEC has no jurisdiction to protect consumers. The same is true of the Financial Industry Regulatory Authority (FINRA). Meanwhile, the states have a patchwork of laws that fill in only some of the gaps.

The new rule uses the Department's authority to ensure that retirement investment advice will be treated as fiduciary advice. Advisers covered by the rule and the related exemptions will be obligated to put the customer's interests first and adhere to fiduciary standards. This will be a change for many advisers in the retirement market today who are not currently required to adhere to these standards. Change is past due. The ERISA regulations on retirement investment advice have not been significantly updated in more than 40 years. The rules need to be modernized to address a changing retirement landscape and the billions of dollars lost to conflicts of interest each year.

7. How is the DOL approach different from the financial service reform initiatives of the United Kingdom?

The Department's regulatory efforts and the UK's Retail Distribution Review (the RDR) differ dramatically in scope. The majority of changes arising from the RDR were effective at the end of 2012. The RDR introduced higher minimum levels of adviser qualifications, amended disclosure rules in relation to adviser charging and services, and realigned adviser and platform incentives with those of consumers by prohibiting advisers from receiving commissions in return for selling or recommending investment products. Instead, UK investors now have to agree to the fees for the advice up-front. The RDR also requires advisers to disclose whether they are "independent"-- providing unbiased and unrestricted advice -- or "restricted"-- limited to certain products or product providers' advice.

The Department's regulatory initiative represents a middle ground between no reform and the outright bans on conflicted payments implemented in the UK. The Department's approach does not ban commissions and allows businesses to continue to use a wide range of compensation practices while minimizing the harmful impact of conflicts of interest on the quality of advice. Advisers and financial institutions that opt to continue to receive compensation that would otherwise be prohibited must adopt a new best interest standard and enact policies and procedures to manage and mitigate the harmful impact of conflicted investment advice as provided in the Best Interest Contract Exemption. The Department's regulation also does not include any new qualification standards for advisers.

8. Are appraisals covered by the rule?

No. The Department has reserved all appraisal issues for a separate future rulemaking.

Rule Requirements

9. Who will now be treated as a fiduciary under the rule?

ERISA and the Internal Revenue Code broadly define fiduciaries to include persons who give investment advice for a fee, regardless of whether that fee is paid directly by the customer or by a third party (for example, a firm that compensates the adviser for steering customers to one of its investment products). This regulatory package revises a 40-year-old Department of Labor rule to protect retirement savings and ensure that more retirement advisers in today's marketplace are treated as fiduciaries.

Today, large loopholes in the current rule's definition of retirement investment advice make it hard for middle-class families, and especially IRA owners, to know whom they can trust to give them advice that is in their best interest. Under the rule, a person is a fiduciary if the person receives compensation for providing advice with the understanding it is based on the particular needs of the person being advised or that it is directed to a specific plan sponsor, plan participant, or IRA owner. Such decisions can include, but are not limited to, what assets to purchase or sell and whether to rollover from an employment-based plan to an IRA. The fiduciary can be a broker, registered investment adviser or other type of adviser (together referred to as "advisers"), some of which are subject to federal securities laws and some of which are not.

10. What does the final rule require of fiduciaries?

At its core, the regulatory package is very simple: it requires more retirement investment advisers to put their clients' best interest first. It does this by closing existing loopholes and expanding the types of retirement advice subject to fiduciary protections. At the same time, the rule distinguishes activities that are not advice, like education. The regulatory package also includes broad exemptions that give fiduciary advisers flexibility to continue many common fee and compensation practices so long as protections are in place to ensure that their advice is in their clients' best interest.

The Department believes the final regulatory package is a balanced approach that improves protections for retirement savers by ensuring that advisers provide advice in their client's best interest, while also minimizing any potential disruptions to all of the good advice in the market.

11. How can I know if my adviser is acting in my best interest? How does the rule help better protect my retirement savings?

Under current rules, investors rarely know whether their adviser is supposed to act in their best interest. Many brokers, consultants, and advisers hold themselves out as expert advisers, but are not, in fact, required to adhere to a fiduciary standard. Under the rule's updated definition of fiduciary investment advice, advisers to plan participants and sponsors are required under ERISA to provide investment advice in their client's best interest. Likewise, under the rule and the associated prohibited transaction exemptions, advisers to IRA savers are required to put their client's best interest first when recommending investments if they wish to continue receiving payments creating conflicts of interest.

The Department's new regulatory package will provide meaningful recourse for consumers when advisers abuse their trust and put their own financial interests first. Any such abuse will breach the adviser's obligation to act in their customers' best interest. Even if any single investor is hard pressed to spot the abuse, the final rule and its accompanying exemptions will help ensure that an adviser who makes a practice of such abuse is likely to be caught.

Under current law, ERISA gives the Secretary of Labor, a plan participant or plan fiduciary a private right of action if his or her adviser is a fiduciary and fails to provide advice in his best interest. By eliminating loopholes in the definition of a fiduciary investment adviser, the rule expands the circumstances in which plan participants and plan sponsors have these protections.

Under the rule and exemptions, firms that do not already do so will have a strong incentive to create policies and business practices that encourage their representatives to give advice that is the best interest of their customers. And when advice does not comport with these standards, investors will have a way to hold their advisers accountable.

12. How are IRA protections different from the protections for pensions and 401(k)-type plans?

For traditional pensions (also called defined benefit plans), a fiduciary is required to manage the plan's funds to help assure that there will be sufficient assets to pay the monthly pension benefits promised under the plan. In a 401(k)-type plan, a fiduciary, who is often the employer, must prudently select and monitor the investment options offered to employees covered under the plan. In either case, the law requires plan fiduciaries to act prudently and with undivided loyalty to the plan and its participants. In other words, plan fiduciaries have to act in the worker's best interest. This provides retirement savers in employment-based plans with a level of protection that is typically missing in the IRA marketplace.

For IRA investors, there are few restrictions on investment choices, so savers may look to a financial adviser to help select the right product. These advisers may be brokers, insurance agents, registered investment advisers, or others holding themselves out as financial planning or retirement experts. These "advisers" are subject to different legal standards, and are not always required to act in their customer's best interest.

While investors often believe they are receiving impartial expert advice, many advisers have conflicts of interest. For example, they may receive a payment from a product provider if they convince their client to invest in one of that firm's products, even if that product is not the best one for their customer. As a result, investment recommendations may be based on the adviser's financial interest, rather than the best interest of the consumer.

13. What is the Best Interest Contract Exemption?

NELP Note: The independent conduct standards of the Best Interest Contract Exemption are in force as of June 9, 2017. Other aspects of the Exemption and the Principal Transaction Exemption, including various compliance requirements – such as the requirement that advisers utilizing these exemptions enter into contracts with, and make specific written disclosures and representations to, investors – are scheduled to take effect on January 1, 2018.

The Best Interest Contract Exemption is a component of the regulatory package that aligns individual advisers' interests with those of the plan or IRA customer, while leaving the adviser and financial institution substantial flexibility in designing the business model that best serves their clients.

Specifically, the exemption allows firms to continue to use certain compensation arrangements that might otherwise be forbidden so long as they, among other things, commit to putting their client's best interest first, adopt anti-conflict policies and procedures (including avoiding certain incentive practices), and disclose any conflicts of interest that could affect their best judgment as a fiduciary rendering advice. Common forms of compensation, such as commissions, revenue sharing and 12b-1 fees, are permitted under this exemption, whether paid by the client or a third party such as a mutual fund, provided the conditions of the exemption are satisfied. This exemption is available to advisers that advise IRA savers, individual plan participants, and small plans.

In addition to this new Best Interest Contract Exemption, the regulatory package revises many existing exemptions. It also includes a new exemption for principal transactions, which allows advisers to recommend investments, such as certain debt securities, and sell them to the customer directly from the adviser's own inventory, or purchase investment property from the customer, as long as the adviser adheres to the exemption's consumer-protective conditions.

In response to comments received during the notice and comment period, the Best Interest Contract Exemption was revised in a number of ways to facilitate implementation and compliance with the exemption's terms. Examples include: streamlining conditions for 'level fee' fiduciaries that receive only a level fee for advisory or investment management services; eliminating the contract requirement for advisers to ERISA plans and participants; permitting reliance on a negative consent process for existing contract holders; simplifying the pre-transaction disclosure to eliminate the proposed required projections of the total costs of the investment over time; and eliminating the proposed annual disclosure and proposed data collection conditions.

14. When do I need to sign a contract with my adviser and what should that contract include?

The contract provisions of the exemptions will not go into effect until January 1, 2018. As of that date, IRA customers entering into a new advisory relationship should expect to sign the contract any time before, or at the same time as, the execution of a new recommended transaction. The contract may be a stand-alone document, or it may be incorporated into another agreement between the customer and the firm. IRA customers already working with an investment adviser as of January 1, 2018, may receive a notice from their adviser or firm describing the customer's new rights. It will not require the customer to take any action unless they object to the terms of the notice.

For customers who execute a contract, the firm will state that it and its individual advisers are acting as fiduciaries when they provide investment advice, and make certain commitments, including to provide advice that is in the customer's best interest, charge no more than reasonable compensation, and make no misleading statements regarding investment transactions, compensation, and conflicts of interest. The firm will also commit to put in place, and comply with, policies and procedures designed to prevent violations of the impartial conduct standards, and to refrain from giving or using incentives (such as compensation payments and bonuses) for individual advisers to act contrary to the customer's best interest. The contract will also disclose the fees, compensation, and material conflicts of interest associated with the recommendations.

Customers receiving advice about investments in an ERISA plan (such as an employer-sponsored 401(k) plan) will receive the same general protections and disclosure, but will not receive a contract to sign.

15. Is every communication with a financial adviser about retirement accounts a fiduciary conversation?

Not all communications with financial professionals will be fiduciary investment advice. As a threshold issue, if the communications do not meet the definition of a "recommendation", the communications will be considered non-fiduciary. A "recommendation" is a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action. The more individually tailored the communication is to a specific advice recipient or recipients, the more likely the communication will be viewed as a recommendation.

16. Can I still get information and educational material about retirement savings?

Yes. The Department believes that education about retirement savings and general financial and investment information is beneficial and helpful to plans, plan participants, and IRA owners, and the final rule provides greater clarity on the line between education and advice. Plan sponsors and service providers can provide investment education without becoming investment advice fiduciaries.

This includes the use of asset allocation models and interactive investment materials to identify specific investment alternatives under a plan if certain conditions are met. Such communications from plans that identify specific investment alternatives can be considered "education" and not a "recommendation" because plans have a fiduciary who is responsible for making sure the alternatives in the plan are prudent. There is no such responsible fiduciary in the IRA context and so references to specific investment alternatives are treated as fiduciary recommendations and not merely "education."

17. Does this regulatory package mandate the terms that firms may use to compensate the individuals they employ or retain as advisers? Will firms have to pay their advisers by the hour or as a percentage of assets under management?

No. The Best Interest Contract Exemption allows the use of many different compensation arrangements. As long as the firms and the advisers provide advice in customers' best interest and comply with the impartial conduct standards and other requirements of the rule and the exemptions, any agreed-upon compensation arrangement will be permitted. The principles-based exemptions flexibly accommodate a wide range of compensation practices, while minimizing the harmful impact of conflicts of interest on the quality of advice.

18. If an adviser offers only a limited set of proprietary products, are there special rules for those organizations?

The Best Interest Contract Exemption includes conditions for those firms that limit their recommendations, in whole or in part, to proprietary products, to clarify how they can satisfy the Best Interest standard. Proprietary products are products which the firm or its affiliate manage, issue, or sponsor, and an adviser may face increased conflicts of interest with respect to advice on such products due to the benefit to the firm.

Such firms must fully disclose that they are offering only a restricted menu of products, and also disclose the associated conflicts of interest, adopt measures to protect investors from those conflicts, and insulate the

adviser from conflicts when making recommendations from the restricted menu. In addition, advisers that recommend a limited set of products must consider what is in the retirement investor's best interest, and, if it is a product that they do not offer, they cannot recommend a product from their limited menu.

19. How can I find out more about the differences between the proposed rule and the final rule?

Since the Department issued its first proposal in 2010 and its second proposal in April 2015, it has received extensive feedback from industry, advocates, Congress, federal and state regulators, and others. As a result of the input, the Department streamlined the rule and exemptions to reduce the compliance burden and ensure continued access to advice, while maintaining an enforceable best interest standard that protects consumers. For more information about specific changes made from the 2015 proposal to the final rule, refer to "Chart Illustrating Changes from Department of Labor's 2015 Conflict of Interest Proposal to Final."

20. Will savers with small balances lose access to financial advice or investment products as a result of this rule? Will small savers still have access to actual advisors or will they only be able to get robo-advice?

Plenty of retirement investment advisers already put their customer's interests first, proving that it is possible to provide advice that is in the best interest of all kinds of savers – including those with small balances – while running a successful business. And many low-cost options are already available, with more becoming available due in part to advances in financial technology. But backdoor payments, complicated and hidden fees often buried in fine print, and supposedly free advice that is conflicted may make it difficult for new entrants to the advice marketplace providing quality, low-cost, unbiased advice to compete. The rule and the exemptions level the playing field for all the firms to prevent competitive disadvantages for those that provide quality, low-cost, unbiased advice.

The Department is not prohibiting common compensation practices, such as commissions and revenue sharing. Instead, the regulatory package gives firms the flexibility to figure out how to structure their business in order to provide quality advice that is in their clients' best interest. Given that the Department is not banning commissions or other common types of compensation, but rather is requiring advisers to provide advice that is in their client's best interest, the rule and exemptions as crafted, preserve and expand access to good retirement advice for small savers that helps them lay the groundwork for a secure retirement.

Impacts on Industry

21. How will the rule affect small advisory firms and independent advisers?

Small firms play a critical role in providing advice, especially to many savers with small balances. Many of these small firms want to do their very best for their clients and that is why many already comply with a fiduciary standard—serving their clients' best interests while making a profit. And since the regulatory package does not prohibit common compensation practices, including commissions, proprietors of small firms will be able to continue operating their businesses in the way that makes sense for them so long as they put their clients' best interest first.

But today some large financial companies pressure independent advisers to recommend products that profit the large companies the most over those that are better for investors. Under the new regulatory package, mutual funds, insurance companies, and broker-dealer firms that contract with independent advisers will need to adapt

their practices to reward financial advisers more for doing what is right for their clients—making it easier for independent advisers to follow and succeed under the new rules.

This focus on the client's best interest levels the playing field so independent advisers who put their clients first aren't squeezed out of the market by the unfair practices of advisers who don't act in their clients' best interests.

The Best Interest Contract Exemption is available to advisory firms of all sizes, including independent advisers, providing a way for them to continue to receive many common forms of commission-based compensation while ensuring they act in the best interest of their clients.

22. Does the regulatory package ban commissions?

No. Firms will be able to continue operating their businesses in the way that makes sense for them while putting their clients' interests first. The principles-based exemptions flexibly accommodate a wide range of compensation practices, including commission-based accounts, while minimizing the harmful impact of conflicts of interest on the quality of advice.

23. This is a complicated rule – what assistance does the Department intend to provide to the industry to help advisers and firms understand their new responsibilities?

The Department will work with interested parties on compliance assistance activities and materials and invites stakeholders to identify areas or specific issues where they believe additional clarifying guidance is needed. The Department provides such assistance following its issuance of significant rules and regulations.

Compliance Dates

24. Are all the new protections and responsibilities in effect immediately?

See NELP Notes above for relevant updates regarding this question.

No. The Department has determined that, in light of the importance of the final rule's consumer protections and the significance of the continuing harm to investors saving for retirement without the rule's changes, an applicability date of one year after publication of the final rule in the Federal Register is appropriate and provides adequate time for plans and their affected financial services and other service providers to adjust to the change from non-fiduciary to fiduciary status.

In addition, the Department has adopted a "phased" implementation approach for the Best Interest Contract Exemption and the Principal Transaction Exemption so that firms will have more time to come into full compliance. In particular, the full disclosure provisions, the policies and procedures requirements, and the contract requirement do not go into full effect until January 1, 2018.