

*FI360 Annual Conference 2018*

## Competing & Complying under Dueling Fiduciary Paradigms

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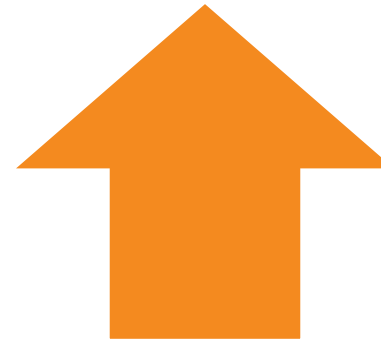


1. State & Fate of DOL Fiduciary Rule
2. Definition of Investment Advice under ERISA
3. Fiduciary Duties & Prohibited Transactions
4. IRA Rollovers & Participant-Level Services
5. Conflict Analysis & Resolution
6. Best Practices for Best Interest™



- DOL/DOJ Appeal to Full 5<sup>th</sup> Circuit (by 4/30)
- Consumer Groups Appeal to Full 5<sup>th</sup> Circuit
- DOL/DOJ Petition Supreme Court (by 6/13)
- Consumer Groups Petition Supreme Court

- DOL/DOJ & Do Not Defend
- Individual States Continue to Impose Fiduciary Standard of Care



## Legal Impact of Vacatur

- The ruling to vacate applies nationwide, though the rule will not formally be vacated until May 7, 2018, at the earliest;
- The result would be to return to the rules that were in force and applicable before June 9, 2017; and
- There remain several avenues for a contrary (or delayed) resolution.

## Practical Impact of Vacatur

- Available Prohibited Transaction Exemptions (PTEs) will be limited (e.g., no BICE);
- Increased scrutiny and awareness around fiduciary status and prohibited transactions is amplified among investors and regulators;
- Affected firms should prepare to defend decisions to pullback new DOL-related policies/procedures, incentives, investment and product due diligence requirements, etc. to other (state and federal) regulators and/or SROs; and
- DOL reported record enforcement levels in 2017.

## A person is a fiduciary if he/she:

- Exercises discretion over the management of the plan or plan assets
- **Renders investment advice to a plan or plan participant for compensation**
- Has any discretionary authority in the administration of the plan.

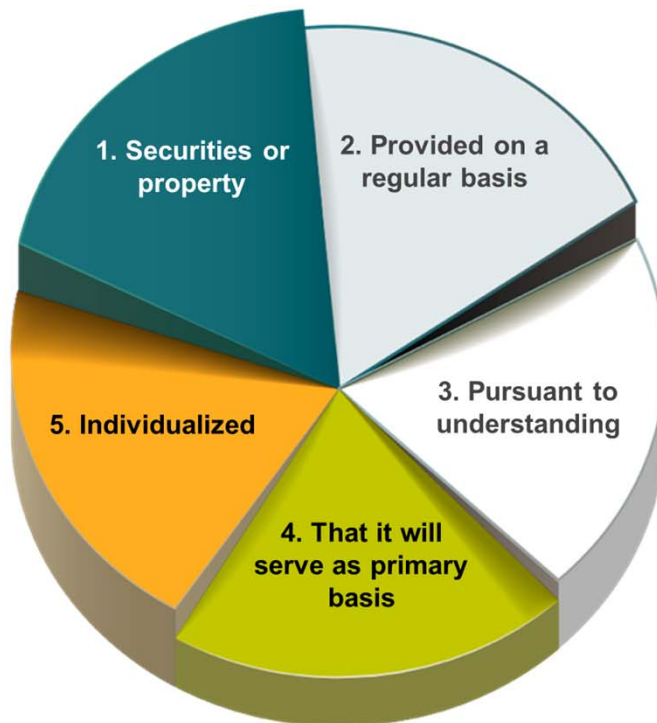
See [ERISA Sec. 3\(21\)](#)

*A person is a NOT a fiduciary with respect to other services provided, which are authorized, even if the person is acting as an ERISA fiduciary with respect to one or more of the above functions.*

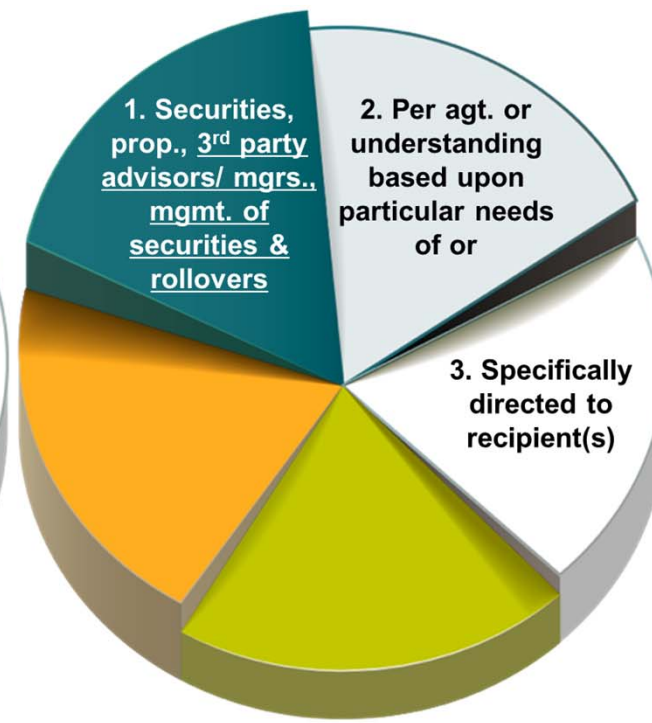
## Definition of “Investment Advice”



1975 test



June 9, 2017 Test



## Management of Securities =

Recommendations regarding:

- Investment policies or strategies;
- Portfolio composition;
- ~~Investment account types (e.g., brokerage vs. advisory); or~~
- ~~Distributions, including rollovers from a plan or IRA.~~

*Note: The 1975 definition did not cover the last two items which were added by the 2017 regulation.*



## Recommendation =

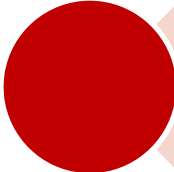
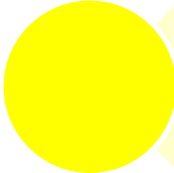

- ~~Communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action;~~
- ~~Providing a select list of securities; or~~
- ~~A series of actions not otherwise recommendations but viewed in the aggregate may be; and~~
- ~~It makes no difference if communication was initiated by a person or a computer software program.~~





Note: *Recommendation is undefined under 1975 definition, but advice must be on regular basis.*

## Potential Reversion to 1975 Definition



	2017 Rule	1975 Rule
<b><i>Participant-Directed Plans</i></b>		
IPS advice	✓	⚠
DIA/QDIA/Models advice	✓	✓
3 <sup>rd</sup> – Party Advisor/Mgr. advice	✓	⚠
One-time/PIT Participant advice	✓	
<b><i>Trustee-Directed Plans</i></b>		
IPS	✓	⚠
Trust account advice	✓	✓
3 <sup>rd</sup> – Party Advisor/Mgr. advice	✓	⚠
<b><i>IRAs</i></b>		
Regular basis advice	✓	✓
One-time/PIT advice	✓	
Commission to Fee	✓	
Rollover advice	✓	⚠
3 <sup>rd</sup> – Party Advisor/Mgr. advice	✓	⚠

-  Preexisting violation and applicable PTE (i.e., BICE) no longer exists.
-  PTE conditions go away but risk does not (i.e., reverse churning, rollovers, share class, etc.).
-  PTE conditions and risk go away.

-  **Advisor Opinion 2005-23A** – cautions advisors who have pre-existing fiduciary relationship w/ plan or participant that recommendation to roll over may trigger prohibited transaction under ERISA 406(b)
-  **Interpretative Bulletin 96-1** – describing the circumstances under which information will be considered “investment education” (vs. advice) in the context of plan participants (but not plans or IRAs)
-  **PTE 86-128** – will apply to non-discretionary & discretionary services
-  **PTE 84-24** – will apply to fixed & variable annuity sales

[Advisory Opinion 2005-23A](#) sets forth the DOL's position with respect to cross-selling (marketing additional services or products, including IRA rollovers, to plan participants and beneficiaries) stating that:

- ✓ using one's "authority" which makes him/her a fiduciary;
- ✓ to cause a participant to take a distribution; and
- ✓ coupled with a recommendation to invest the proceeds in a manner that results in greater compensation; being paid to the fiduciary (or his/her affiliates)

... may result in a violation of [ERISA § 406\(b\)](#).

	Least Risk	Proceed with Caution	Most Risk
Plan-Level Services	Advisor's role is limited to investment education, and the sponsor decides to add or replace investments.	Advisor provides investment advice to the sponsor or exercises discretion over the investments.	
Participant-Level Services	Advisor's role is limited to investment education, and the participants direct their own investments.	Advisor's role is limited to investment education, and the participants direct their own investments.	Advisor provides ongoing, individualized investment advice to participants.

	Most Risk	
<b>Plan-Level Services</b>	Recommendation to take a distribution or invest proceeds in IRA	<p>"When one door closes, another opens; but we often look so long and so regretfully upon the closed door that we do not see the one which has opened for us." - Alexander Graham Bell</p> <p>Advisor who is a fiduciary by providing plan- or participant-level investment advice is now treated the same as one w/ no relationship.</p>
<b>Participant-Level Services</b>	Recommendation to take a distribution or invest proceeds in IRA	
<b><u>No Pre-Existing Relationship</u></b>	Recommendation to take a distribution or invest proceeds in IRA	

## Non-fiduciary education =

- Plan information;
- General financial, investment and retirement information;
- Asset allocation models; and/or
- Interactive investment materials.

*Note: DOL Interpretative Bulletin 96-1 only applies to plan participants vs. sponsors and/or IRAs.*



Advice = Recommendation(s)	Education = Describing
<p>...as to how securities/property should be invested after rolled over, transferred or distributed from a plan or IRA; <u>or</u></p> <p>... with respect to rollovers, transfers, or distributions from a plan or IRA, including whether, in what amount, in what form, and to what destination such a rollover, transfer, or distribution should be made...</p>	<ul style="list-style-type: none"> <li>▪ terms or operation of the plan/IRA</li> <li>▪ benefits of plan/IRA participation or increasing plan/IRA contributions</li> <li>▪ retirement income needs, impact of preretirement withdrawals on retirement income, varying forms of distributions, including rollovers, annuitization and other forms of lifetime income payment options</li> <li>▪ advantages, disadvantages &amp; risks of different forms of distributions, including rollovers</li> <li>▪ product features and fee &amp; expense information</li> <li>▪ investment alternatives available under the plan or IRA</li> </ul> <p><b>PROVIDED NO REFERENCES RE appropriateness of any individual ...or any individual benefit distribution option</b></p>

2017 Fiduciary Rule

## LFF BICE requirements Sec. 11(h)...

- Written fiduciary acknowledgment (**required 1/1/2018**)
- Adherence w/ Impartial Conduct Standards
- Documentation of specific reason(s) why recommendation considered to be in the Best Interest; and
- When recommending an IRA rollover from ERISA plan, your written analysis must compare:
  - alternatives to rollover, including leaving money in the plan; and must take into account
  - all fees and expenses associated w/ both the plan and IRA, whether the employer pays for some or all of the administrative expenses in plan, and the different levels of service and investments available in plan vs. IRA.

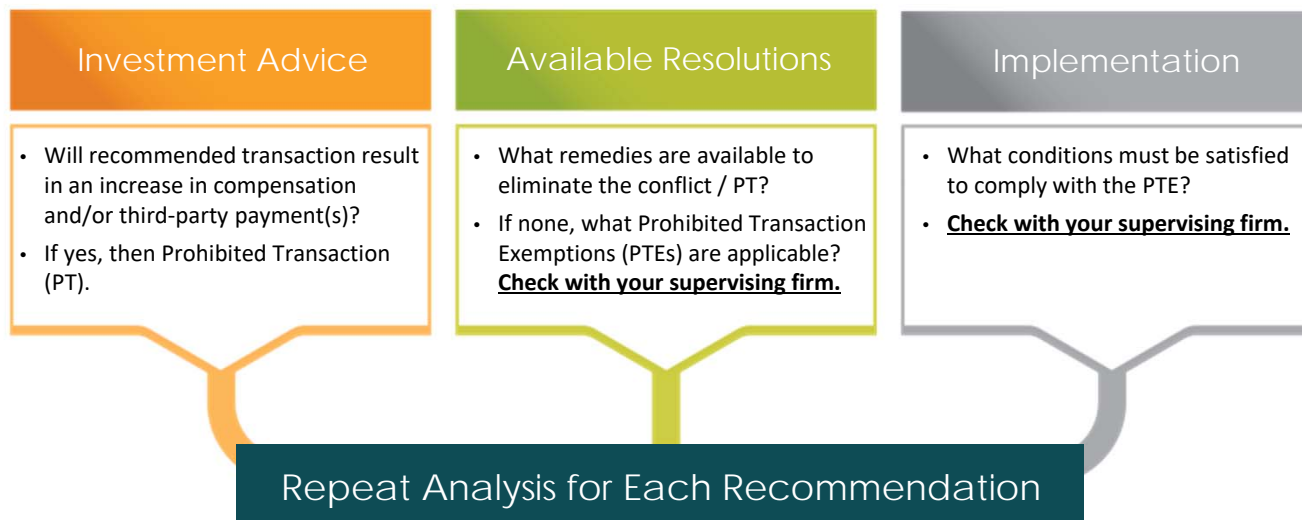
## A fiduciary must use objective process..

*that, among other things, gives "appropriate consideration" to those facts and circumstances that... the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role the investment or investment course of action plays in that portion of the [client's] investment portfolio with respect to which the fiduciary has investment duties.*

*See 29 CFR 2550.404a-1*

## Fiduciaries are prohibited from...

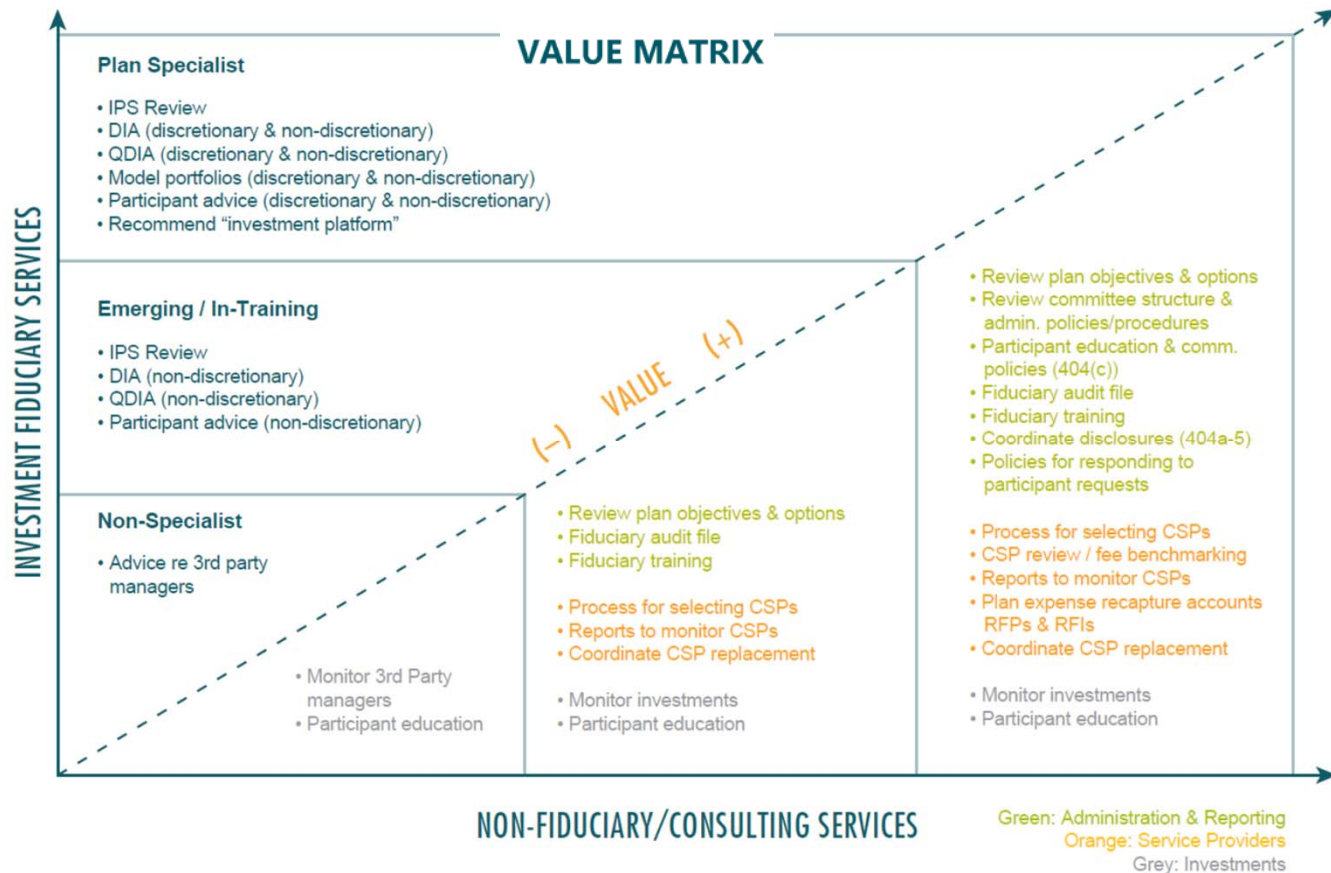
- Self dealing – providing advice that will increase the compensation paid to the advisor, his/her supervising firm and/or any affiliate(s);
- Dual representation – acting on behalf of or representing a party dealing with the plan in a transaction involving the assets of the plan; or
- Third party payments – receiving any consideration for his/her own personal account from any party dealing with the plan in connection with a transaction involving the assets of the plan.

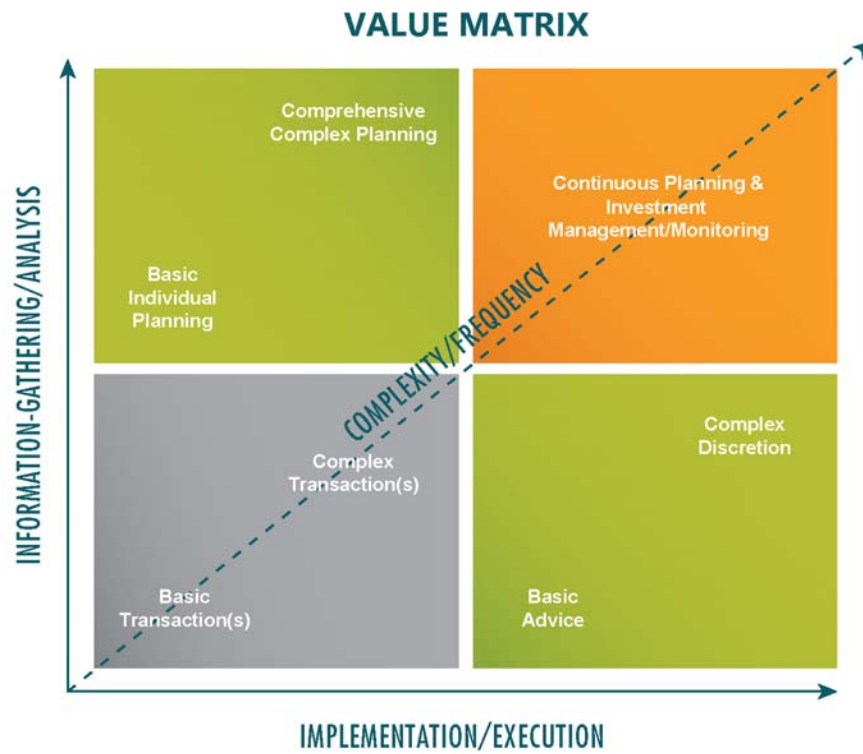


## Reasonable compensation =

- Value of services provided in alignment with the needs of the client;
- “value” is based upon the nature, scope and frequency of services provided; and
- background, experience and credentials of the fiduciary.

*Note that value must be within industry averages/benchmarks. Check with your supervising firm.*







1. Stay current on developments on DOL, SEC and State-by-State initiatives;
2. Do not eliminate any express DOL requirements *already formally implemented* until rule is definitively vacated and/or risks are identified and appropriately mitigated;
3. Consider continuing to utilize comparative factors from BICE when recommending IRA rollovers;
4. Evaluate fiduciary status under 1975 definition and availability of PTEs and triage impact (i.e., red, yellow & green); and
5. Consider intended and unintended consequences when communicating state and fate of rule with clients.

## FOR MORE INFORMATION:



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