

CONFLICT OF INTEREST FAQs (PART II - RULE)

U.S. Department of Labor
Employee Benefits Security Administration
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Set out below are a number of Frequently Asked Questions (FAQs) regarding implementation of the conflict of interest (COI) final rule (Rule) on fiduciary investment advice. Since the publication of the Rule last April, the Department has held many meetings with stakeholders to assist in their compliance efforts. Many of the questions they raised related to the various Rule provisions that draw lines between fiduciary and non-fiduciary communications. Like the FAQs the Department issued on October 27, 2016, on the Prohibited Transaction Exemptions, these FAQs focus particularly on specific technical questions raised by financial service providers. These FAQs are generally limited to investment advice concerning ERISA-covered plans, IRAs, and other plans covered by section 4975(e)(1) of the Internal Revenue Code (Code).

Investment Recommendations Covered Under the Rule

Under the Rule, fiduciary investment advice status depends on whether the advising person makes a “recommendation” regarding an investment or investment management and receives direct or indirect fees or other compensation.

Q1. Is every communication with a financial adviser about retirement accounts a fiduciary recommendation?

No. Covered investment advice is defined as a recommendation to a plan, plan fiduciary, plan participant and beneficiary, IRA, or IRA owner for a fee or other compensation, direct or indirect.

As a threshold issue, the communications must be a “recommendation” to be fiduciary investment advice. 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 investment-related course of action. In general, a recommendation is a “call to action” -- a communication that a reasonable person would view as recommending that he or she actually buy, hold, or sell a particular investment, or as a recommendation on managing investments or investment accounts. Providing a selective list of securities to a particular advice recipient as appropriate for that investor would be a recommendation as to the advisability of acquiring securities even if no recommendation is made with respect to any one security. 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.

The Rule provides for clarifications of communications that do not constitute recommendations and for communications that are excluded from the operation of the Rule even though they may technically rise to the level of recommendations. As an example, as mentioned later in these FAQs, merely furnishing information and materials that describe the terms or operation of a plan or IRA or product features of investment alternatives available under a plan or IRA, general financial, investment, and retirement information, certain asset allocation models and interactive investment materials, all would be investment education under the Rule and not advice. As a result, merely describing to a potential customer the attributes and features of an investment product without a specific recommendation would not be investment advice.

In order for a recommendation to constitute fiduciary investment advice, it must be a recommendation as to the advisability of buying, holding, selling, or exchanging securities or other investment property, including recommendations as to the investment of securities or other property after the securities or other property are rolled over, transferred or distributed from a plan or IRA. Covered investment advice also includes recommendations as to the management of securities or other investment property, including, among other things, recommendations on investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, selection of investment account arrangements (e.g., brokerage versus advisory); or recommendations 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.

The adviser must also receive a “fee or other compensation” for a communication to be investment advice covered under the Rule. This includes both any explicit fee or compensation for the advice which is received by the adviser (or by an affiliate) from any source, as well as any other fee or compensation received from any source in connection with or as a result of the recommended transaction or service, including such things as commissions, loads, finder's fees, revenue sharing payments, shareholder servicing fees, marketing or distribution fees, underwriting compensation, payments to firms in return for shelf space, recruitment compensation, gifts and gratuities, and expense reimbursements. The Rule provides that “[a] fee or compensation is paid ‘in connection with or as a result of’ such transaction or service if the fee or compensation would not have been paid but for the transaction or service or if eligibility for or the amount of the fee or compensation is based in whole or in part on the transaction or service.”

Q2. Do fiduciary investment recommendations include the communications a financial services company has with its own employees in their capacity as employees regarding their job responsibilities merely because the employees may in the ordinary course of their employment provide fiduciary investment advice to plans or IRAs?

No. A firm's internal communications with its employees regarding their job responsibilities, including training materials prepared for internal use, would not be treated as investment recommendations to a plan fiduciary in such circumstances. If, on the other hand, such internal communications are forwarded or made available to any retirement investor, the facts and circumstances would need to be evaluated to determine whether an objective person would view the communication as a recommendation or part of a recommendation to engage in a transaction.

Q3. An employee works for a financial adviser who provides investment advice to 401(k) participants and IRA owners. The employee's normal job responsibilities include development of models and materials for the adviser to use when presenting recommendations. Is the employee providing fiduciary investment advice under the Rule when he or she develops these materials for his or her employer?

No. The Rule includes an exception for employees of a plan sponsor or an affiliate of the sponsor, employees of an employee benefit plan, employees of an employee organization, and employees of a plan fiduciary. When such employees develop reports, recommendations, and products for their employer, that activity is not fiduciary investment advice.

Q4. An investment adviser who is also a licensed insurance agent approaches a client who will soon begin receiving minimum required distributions from the client's 401(k) plan accounts and IRAs. The adviser recommends that once the client receives these required minimum distributions they should be used to fund a permanent life insurance product. The investment adviser in his or her capacity as insurance agent will receive a commission on the sale of the permanent life insurance product. Is the recommendation of the permanent life insurance product investment advice covered by the Rule?

Yes. Because the minimum required distributions are compelled by the Code, the adviser has not recommended a distribution from a plan or IRA simply by explaining the tax requirements and telling the plan participant that the law requires those distributions. However, the adviser has made a recommendation as to how securities or other investment property of a plan or IRA should be invested after the funds are distributed from the plan or IRA within the meaning of paragraph (a)(1)(i) of the Rule.

Q5. The governing documents of an individual account defined contribution plan require that the account balances of terminated vested plan participants of less than \$5,000 be cashed out and automatically rolled over to an IRA in accordance with applicable rules and regulations. The plan sponsor has contracted with a vendor to serve as custodian of the rollover IRAs. Communications sent to participants upon termination explain that, in the absence of participant election, accounts under \$5,000 will be automatically rolled over to an IRA. The arrangement between the plan and the vendor is intended to satisfy the Department’s automatic rollover safe harbor at 29 CFR § 2550.404a-2. Does the plan sponsor or vendor provide a recommendation, as defined under the Rule, to a participant subject to the plan’s automatic rollover provision by explaining that the rollover will occur absent participant action?

No. Paragraph (b)(1) of the Rule defines a “recommendation” as 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 plan sponsor’s or vendor’s actions to implement the plan’s cash out and automatic rollover provisions, including disclosures required by the Code and ERISA, do not involve a communication that suggests a particular course of action.

Q6. Is an adviser liable as an investment advice fiduciary for investment decisions made by the client against the adviser’s recommendation, e.g., the adviser recommends selling a security that it at one time recommended for purchase, but the client instead holds or adds to the investment? Likewise, is a financial institution relying on the Best Interest Contract Exemption liable for such investment decisions because, for example, the exemption requires it to acknowledge fiduciary status with respect to investment advice and, in some cases, enter into a contract with its clients with certain enforceable promises regarding the advice?

No. Neither the Rule nor the Best Interest Contract Exemption requires an adviser or financial institution to take responsibility for a client’s investment decisions made against the adviser’s recommendation. Of course, depending on the nature of the relationship between the parties under their contract or arrangement, the adviser or financial institution may have ongoing duties to monitor and advise the client regarding investment decisions. Also, in the plan context, if the adviser or financial institution is a trustee, it may have other fiduciary obligations under ERISA with respect to implementing the client’s investment decision. See, e.g., FAB 2004-03 and 29 CFR § 2550.404c-1(b)(2)(ii)(B) and (d)(2)

Q7. A financial institution with an existing relationship with an ERISA plan charges the ERISA plan a mutually agreed upon asset-based fee of 35 basis points to provide ongoing investment advice regarding mutual funds that are available on the plan's platform. The firm may receive revenue sharing or other payments as a result of plan investments in the mutual funds recommended by the adviser. The fees paid to the firm are generally 12b-1 fees, sub-transfer agency fees, or other third-party compensation.

The firm will disclose to the plan the extent to which it may receive such fees, and will expressly provide that any fees received as a result of the plan's investment in such mutual funds will be used to pay all or a portion of the compensation that the plan is obligated to pay to the adviser, and that the plan will be entitled to any such fees that exceed the plan's liability. May the firm rely on the analysis in Advisory Opinion 97-15A (May 21, 1997) as providing that its receipt of these payments does not result in a non-exempt prohibited transaction under ERISA?

Yes. As described in the preamble to the Rule and the Best Interest Contract Exemption, nothing in the Rule or the Exemption alters the analysis of Advisory Opinion 97-15A. Although, the receipt of any of these fees in connection with, or as a result of, the purchase or sale of a security or the provision of advice would cause the adviser to be a fiduciary under the Rule, a prohibited transaction would not arise as a result of the adviser affecting the amount or timing of its compensation to the extent that the adviser appropriately offsets against its 35 basis point advisory fee any fully disclosed 12b-1 fees, sub-transfer agency fees, or other third-party payments.

Investment Education

The Rule draws an important distinction between *non-fiduciary investment education* and *fiduciary recommendations* (as discussed above). The Rule in paragraph (b)(2)(iv) defines non-fiduciary education as covering four categories of information and materials:

- ***Plan and investment information*** (information and materials that describe investments or plan alternatives without specifically recommending particular investments or strategies). Thus, for example, an adviser would not act as a fiduciary merely by describing the investment objectives and philosophies of plan investment options, mutual funds, or other investments; their risk and return characteristics; historical returns; the fees associated with the investment; distribution options; contract features; or similar information about the investment.
- ***General financial, investment, and retirement information***. Similarly, one does not become a fiduciary merely by providing information on standard financial and investment concepts, such as diversification, risk and return, tax deferred investments; historic differences in rates of return between different asset classes

(e.g., equities, bonds, cash); effects of inflation; estimating future retirement needs and investment time horizons; assessing risk tolerance; or general strategies for managing assets in retirement. All of this is non-fiduciary education as long as the adviser does not cross the line to recommending a specific investment or investment strategy.

- ***Asset allocation models.*** Here too, firms and advisers can provide non-fiduciary information and materials on hypothetical asset allocations as long as they are based on generally accepted investment theories, explain the assumptions on which they are based, and do not cross the line to making specific investment recommendations. In the case of ERISA-covered plans, the models may reference specific designated investment alternatives on the plan's menu as hypothetical examples to aid participant understanding, as long as the examples meet the Rule's protective conditions.
- ***Interactive investment materials.*** Again, firms and advisers can provide a variety of questionnaires, worksheets, software, and similar materials that enable workers to estimate future retirement needs and to assess the impact of different investment allocations on retirement income, as long as the adviser meets conditions similar to those described for asset allocation models.

Q8. A 401(k) plan purchases a group annuity product with a menu of available investment alternatives selected by the plan fiduciary. The menu includes a target retirement date series of funds with an optional guaranteed lifetime income feature. Would the provision of a factual explanation of the guaranteed lifetime income feature by the annuity provider's call center representative constitute the provision of non-fiduciary "plan information" as described in paragraph (b)(2)(iv)(A) of the Rule?

Yes. "Plan information" includes communications that "describe product features, investor rights and obligations, fee and expense information, applicable trading restrictions, investment objectives and philosophies, risk and return characteristics, historical return information, or related prospectuses of investment alternatives available under the plan or IRA." The call center representative's description of the product feature, without addressing the appropriateness of the guaranteed lifetime income feature for that particular plan participant would be "plan information" within the meaning of the Rule.

Q9. Does the investment education provision cover information that a call center employee provides to a plan participant about the benefits of increasing plan contributions in order to maximize the employer match?

Yes. Non-fiduciary plan information and education includes information and materials that, without reference to the appropriateness of any individual investment alternative or any individual benefit distribution option for the plan participant, inform the plan participant "about

the benefits of plan or IRA participation [and] the benefits of increasing plan or IRA contributions” If a plan participant contacts a call center and the call center employee notices in reviewing the participant’s plan participation status that the participant is not taking full advantage of the employer’s matching contribution, the call center employee may, without giving fiduciary advice, inform the participant that, based upon her current contribution percentage, she is not taking full advantage of the employer’s matching contribution, explain the company’s matching formula and calculate how much the participant would need to contribute in order to maximize the employer match. The call center employee can also describe the plan procedure or form used to increase contributions.

Q10. Can an employer recommend that a plan participant increase plan contributions to a suggested percentage of compensation to maximize the employer match without the communication being treated as fiduciary investment advice?

Yes. To constitute fiduciary investment advice under the Rule, the person making the recommendation must receive a fee or other compensation in connection with or as a result of the recommended transaction or service. Employers generally do not receive fees or other compensation in connection with or as a result of such communications. Accordingly, such a recommendation from an employer would not be investment advice covered under the Rule so long as the employer does not receive a fee or other compensation for the recommendation.

Q11. Could a defined contribution plan service provider’s interactive investment tool be treated as investment education and not fiduciary investment advice under the Rule if the tool asks plan participants to input data (such as age, expected retirement date, current retirement savings, annual retirement contributions, current tax rate, estimated retirement tax rate, etc.) and then the tool generates the estimated future retirement income needs of the participant?

Yes. The investment education provision in the Rule includes specific conditions for non-fiduciary interactive tools that help the participant estimate future retirement income needs and assess the impact of different asset allocations on retirement income, or estimate a retirement income stream that could be generated by an actual or hypothetical account balance. A service provider who uses such interactive tools in her communications with clients should ensure that the tools satisfy the conditions within paragraph (b)(2)(iv)(D) of the Rule.

Q12. If a person provides general educational information to a plan participant about rollover options, in marketing materials, in person, or on the phone, such as options to leave assets in the plan account, cash out or roll over the assets to a new plan or IRA, would that person be considered an investment advice fiduciary if the person received a fee for providing that general educational information?

Charging compensation for providing educational services does not change the nature of the communication into investment advice. Rather, whether a communication is an investment recommendation is governed by the definition of investment recommendation in the Rule (described above). Accordingly, a person can charge a fee for providing educational materials without the mere receipt of the fee changing the communication into a fiduciary investment recommendation.

Q13. Assume the same facts as in Q12 above but, after providing the participant with the information about rollovers, the person then refers the plan participant to a recommended third party who provides investment advice and the person receives a referral fee from the third party. Would that person be considered an investment advice fiduciary?

Yes. Recommending a third party who provides investment advice and receiving a referral fee as a result of that recommendation would be investment advice covered by the Rule, and the receipt of a referral fee for such a recommendation would also be a prohibited transaction unless the person complied with an applicable exemption.

Q14. Can an adviser give educational information and materials on rollover options to a plan participant who is an existing client, without being deemed to be providing fiduciary investment advice on the rollover options?

Yes. Whether a communication is an investment recommendation is governed by the definition of investment recommendation in the Rule (described above).

Q15. Assume a plan offers a core menu of 15 investment options and makes available 2000 other investment options through a brokerage window. Can an asset allocation model limited to the 15 core designated investment alternatives be treated as education under the education provision in the Rule even if the model does not reference any of the other 2000 options available through the brokerage window?

Yes. The education provision in the Rule permits asset allocation models to include designated investment alternatives in the plan if conditions in the Rule are satisfied, including the provision of certain information about all the other designated investment alternatives available under the plan that have similar risk and return characteristics, if any. Investment options available through a brokerage window would not be designated investment alternatives for purposes of the asset allocation model provision in the Rule. See paragraph (b)(2)(iv)(C)(4) of the Rule.

General Communications

Under the Rule, certain general communications are not considered fiduciary investment advice if a reasonable person would not view the communication as an investment recommendation. General communications for this purpose include, for example, general circulation newsletters; television, radio, and public media talk show commentary, remarks in widely attended speeches and conferences, research or news reports prepared for general distribution, general marketing materials, and general market data.

Q16. A broker-dealer holds a conference on trends in the retirement industry. The conference is generally open to professionals in the retirement industry, including financial advisers, other service providers, consultants, and fiduciaries of ERISA-covered plans, but is not open to individual retirement investors. The broker-dealer invites a representative of a life insurance company – a “wholesaler” – to make a presentation about the new features of the life insurance company recordkeeping services and a group annuity product available to 401(k) plans. Approximately 300 people are present at the conference, including consultants, other service providers, plan sponsors and plan fiduciaries of ERISA-covered plans. Over the course of her presentation, the wholesaler describes the group annuity contract, including its flexible pricing features, and describes how the contract can accommodate a variety of broker-dealer compensation structures. The wholesaler’s remarks include statements about the quality of the contract and the value that it would provide for “many” 401(k) plans, but do not purport to make specific or individualized plan-based recommendations. Are the wholesaler’s statements about the group annuity product “general communications” under paragraph (b)(2)(iii) of the Rule?

Yes. The Rule defines a recommendation, in relevant part, as 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 wholesaler’s remarks were made at a speech or conference widely attended by retirement professionals (but not individual retirement investors) and concerned the attributes of the annuity contract with respect to 401(k) plans in general, rather than with respect to any particular plan. Under the circumstances described, the attendees could not reasonably conclude that the remarks were investment recommendations under the Rule.

Q17. Would a free dinner seminar offered by an investment adviser as a means of marketing services or investments to a group of retirees or individuals approaching retirement be a widely attended speech or conference within the meaning of the general communications provision of the Rule?

The Department does not consider such free-meal seminars to be widely attended speeches or conferences within the meaning of the general communications provision. Moreover, in the Department's view, a reasonable person attending such a seminar could view statements by the investment adviser as investment recommendations even if the statements were made to all the attendees. Whether the particular communications at the seminar could reasonably be viewed as a suggestion that the advice recipients engage in or refrain from taking a particular course of action (i.e., a recommendation) would be a matter of facts and circumstances.

Q18. A third-party administrator (TPA) is asked by the plan fiduciaries of a defined contribution plan to recommend a recordkeeper for the plan. The TPA recommends that the plan fiduciaries consider two recordkeepers. Both recordkeepers would provide revenue sharing payments to the TPA to compensate the TPA for various shareholder services that the TPA will provide to the plan and its participants. The revenue sharing payments do not vary based upon the investment options that are included on the recordkeeper's platform or those selected as designated investment alternatives for the plan. In recommending the recordkeepers, the TPA generally describes differences between the services offered by the two respective recordkeepers (e.g., open architecture versus a limitation to proprietary funds) but makes no representations regarding the investment options available on such platforms. Is the TPA's recommendation of the two recordkeepers "investment advice" under the Rule?

No. The Rule does not treat a recommendation to hire a non-fiduciary recordkeeper as fiduciary advice, although a recommendation to invest in a particular investment alternative or to hire a third party to serve as an asset manager or adviser would constitute fiduciary advice. Based on the facts presented, the recommendation of a recordkeeper to perform recordkeeping and related administrative services is not necessarily a recommendation regarding the investment alternatives available on the recordkeeper's platform. Whether the TPA made a recommendation regarding available investment alternatives would depend on the facts and circumstances.

Q19. A financial institution offers a self-directed brokerage program, an investment advice program, a discretionary investment management program, and an on-line model portfolio program (e.g., robo-advice). A prospective customer approaches the financial institution and says she wants to roll over her money from her qualified plan into an IRA with the financial institution. A representative of the financial institution explains the services provided in each of the programs and tells the customer that the financial institution is a recognized leader in the industry for providing high-quality services with fees that are lower than many of its competitors. Does this constitute an investment recommendation under the Rule?

No. The Rule covers the recommendations of others to provide investment advice or investment management services and recommendations on the selection of investment account arrangements (e.g., brokerage versus advisory). Here, the financial institution, through the representative, only recommended itself, not another person to provide investment advice and investment management services, and the description of the range of services that the financial institution can provide does not constitute a recommendation of any particular account type as appropriate for the prospective customer merely because the financial institution represented that it provides high-quality services for competitive fees. However, if the financial institution actually recommends a particular account type or service, that would be a fiduciary investment advice recommendation under the Rule.

Transactions with Independent Fiduciaries with Financial Expertise

A party transacting business with an independent fiduciary of a plan or IRA in an arm's length transaction is excepted from the Rule if certain disclosure requirements are met and the party reasonably believes that the independent fiduciary of the plan or IRA is a bank, insurance carrier, or registered broker-dealer or investment adviser, or any other independent fiduciary who manages or controls at least \$50 million.

Q20. Does the independent fiduciary exception require that the \$50 million be attributable to only one plan or involve only plan assets?

No. The exception allows plan and non-plan assets and the assets of multiple plans and non-plan investors to be taken into account. For example, the \$50 million requirement would be met by a plan's fiduciary committee that has under its management or control \$42 million in a defined contribution plan and \$10 million in a defined benefit plan. The same conclusion would apply in the case of chief financial officer of a company that is a plan fiduciary with management or control of a company plan that has \$42 million in total assets and who also is responsible for management of \$10 million in cash and securities held in the company's treasury department.

Q21. Can a party's reasonable belief be based on representations from the independent plan fiduciary?

Yes. The representations must be in place at the time the transaction takes place and must cover the period over which the communications are to take place. For example, in the case of an ongoing commercial relationship, a party could reasonably rely on written disclosures (for example, in a contract or account opening agreement) that include a representation by the independent plan fiduciary that it manages at least \$50 million as of the date of the contract, and that requires the plan fiduciary to notify the service provider in writing if the amount drops below \$50 million.

Q22. Does the exception apply to communications (including recommendations) with respect to entering into investment advisory or investment management arrangements as well as with respect to transactions that involve investments in securities or other investment property?

Yes. The exception applies to communications with respect to *any* “transaction related to” the investment of securities or other investment property. Advice regarding entering into investment advisory and investment management arrangements relates to the investment of securities or other investment property for purposes of the Rule.

Q23. Does the exception apply to communications a party has with an independent fiduciary of a plan or IRA who is a representative of a registered investment adviser?

Yes, provided the representative is acting under the control and supervision of the registered investment adviser in accordance with applicable securities laws.

Q24. If a recordkeeper has a meeting with a registered investment adviser who is acting as a plan fiduciary with the responsibility to evaluate and make a recommendation to the plan’s fiduciary committee regarding a potential transaction between the plan and the recordkeeper, would the presence of the members of the plan’s fiduciary committee in the meeting preclude the recordkeeper from relying on the independent fiduciary exception for recommendations to an independent fiduciary with financial expertise?

No, provided the recordkeeper knows or reasonably believes that the registered investment adviser is acting as a plan fiduciary with responsibility for exercising independent judgment in making a fiduciary recommendation to the plan’s fiduciary committee with respect to the transaction at issue and the other conditions of the exception are satisfied. Ongoing communications between the recordkeeper and the members of the plan’s fiduciary committee would not fall within the exception, however, unless the registered investment adviser participated in the particular subsequent communication and it was clear that the registered investment adviser continued to have responsibility to exercise independent judgment in making fiduciary recommendations with respect to the transaction that is the subject of the subsequent communication.

Q25. Is the exception available for transactions involving an IRA if the IRA is represented by a registered investment adviser acting as an independent fiduciary of the IRA?

Yes. The exception applies to parties in transactions involving IRAs provided the conditions of the exception are met, including the requirement that the party know or reasonably believe that the registered investment adviser is responsible for exercising independent judgment in evaluating the transaction. The party may rely on written representations from the IRA or

independent fiduciary to satisfy this requirement, but the mere fact that the registered investment adviser is a fiduciary under the Code would not be sufficient to establish that the condition of the exception requiring that the party have a reasonable belief that the registered investment adviser was responsible for exercising independent judgment with respect to the transaction at issue was met.

Q26. Can an IRA owner who has assets of more than \$50 million dollars in personal and IRA assets be an independent fiduciary with respect to his or her IRA for purposes of the exception?

No. The exception concerns advice provided to a fiduciary of a plan or IRA who is independent of the advice provider and meets certain conditions. Paragraph (g)(7) of the Rule defines the term “plan fiduciary” and states that, for purposes of the Rule, an IRA owner or relative is not a “plan fiduciary” with respect to the IRA. If a person cannot be a “plan fiduciary” with respect to an IRA for purposes of the Rule, the person by definition cannot be an “independent fiduciary” with respect to the IRA for purposes of the Rule. The Department explained this limitation in the preamble where we noted that we would not expand the exception to retail retirement investors through the application of an accredited or sophisticated investor test that uses wealth as a proxy for investor sophistication. The Department noted that merely concluding someone may be wealthy enough to be able to afford to lose money by reason of bad advice should not be a reason for treating advice given to that person as non-fiduciary.

Q27. Can a corporate officer, such as the chief financial officer, who is a participant in the company’s 401(k) plan and a member of the plan’s fiduciary investment committee, be an independent plan fiduciary for purposes of the exception in paragraph (c)(1) of the Rule if his or her job responsibilities include managing at least \$50 million in assets?

Yes. If the corporate officer is receiving advice in his or her capacity as a fiduciary for the plan, and not merely with respect to his or her own individual participant account, the fact that the corporate officer is also a participant in the plan would not preclude the officer from being the independent fiduciary for purposes of the exception.

Q28. Assume a recordkeeper is working with a broker-dealer hired by a 401(k) plan to act as a fiduciary in evaluating whether to select the recordkeeper’s platform for the plan, including the selection of mutual funds on the platform as investment alternatives for the plan. Can the broker-dealer represent that it is independent for purposes of the independent fiduciary exception if the broker-dealer, or an affiliate, receives indirect compensation as a result of plan investments in the selected mutual funds, such as revenue sharing or 12b-1 fees?

The Rule does not specifically define “independent.” However, the preamble to the Rule states that “[w]hether a party is ‘independent’ for purposes of the [Rule] will generally involve a determination as to whether there exists a financial interest (*e.g.*, compensation, fees, etc.), ownership interest, or other relationship, agreement or understanding that would limit the ability of the party to carry out its fiduciary responsibility to the plan or IRA beyond the control, direction or influence of other persons involved in the transaction.” Further, the preamble provides that parties would likely not be independent in any of the following circumstances: (i) the parties belong to a group of corporations under common control or are members of an affiliated service group, (ii) the transaction includes an agreement designed to relieve the fiduciary from any responsibility to the plan or IRA, (iii) the fiduciary is under substantial control and close supervision by a common parent, or (iv) a fiduciary receives compensation in violation of ERISA sections 406(b)(1), (2) or (3). Where the broker-dealer provides fiduciary advice as to the purchase of the mutual funds and receives compensation, direct or indirect, as a result of that recommendation, a prohibited transaction under section 406(b)(1) of ERISA occurs. However, if the broker-dealer complies with the Best Interest Contract Exemption, the receipt of the compensation would be exempted from a violation under ERISA section 406(b)(1). Thus, solely for the purposes of this exception to the Rule, in the absence of any common ownership or control affiliation, the broker-dealer can still represent that it is independent of the recordkeeper for purposes of the exception if the conditions of the BIC Exemption are satisfied (including full disclosure of the revenue sharing or 12b-1 fees to plan), and there is no agreement or understanding between the broker-dealer and the recordkeeper that would limit the broker-dealer’s ability to carry out its fiduciary duty to the plan. Accordingly, under the circumstances described and assuming the other conditions of the exception are satisfied, the recordkeeper can rely on the independent fiduciary exception.

Q29. A financial institution recommends that independent investment advisers use the financial institution’s model portfolio services to assist the investment advisers in developing asset allocation recommendations for plan and IRA clients using the financial institution’s investment products. If the financial institution charges the investment adviser a fee for access to the model portfolio services, would that be treated as payment of a direct fee for investment advice for purposes of the independent fiduciary exception?

The person relying on the exception cannot receive a fee or other compensation directly from the plan, plan fiduciary, plan participant or beneficiary, IRA or IRA owner, for the provision of investment advice (as opposed to fees or compensation for other services) in connection with the transaction. The Department would not treat a fee paid between financial intermediaries as a direct fee for investment advice for purposes of the exception unless the fee is directly paid by the plan or IRA or with plan or IRA assets. A fee paid by the plan or IRA or with plan or IRA assets would include a situation in which the investment adviser pays the fee out of its own general assets but then is separately reimbursed by the plan, plan participant or IRA (*e.g.*, the

investment adviser's invoice to the plan, participant or IRA includes a separate line item for model portfolio service fee).

Marketing Platforms for Individual Account Plans and Providing Assistance in Selection and Monitoring Investment Alternatives

A person can market or make available to an independent plan fiduciary a platform or similar mechanism from which the fiduciary may select or monitor plan investment alternatives for an individual account plan without making a fiduciary recommendation under the Rule as long as the marketing is done without regard to the individualized needs of the plan and the other conditions of the provision of the Rule are met. Similarly, a person who identifies investment alternatives for such a platform based on objective criteria (e.g., expense ratios, types of assets) specified by the plan fiduciary also does not make a fiduciary recommendation as long as the person sets forth in writing certain disclosures to the fiduciary.

Q30. Can a group annuity contract constitute a “platform or similar mechanism” within the meaning of the Rule?

Yes. The fact that investment alternatives are made available under a group annuity contract does not, in and of itself, affect the availability of the platform provider provision in the Rule. For example, a life insurance company could rely on the platform provider provision in offering a range of investment alternatives to a 401(k) plan sponsor as part of a group annuity product that included recordkeeping services.

Q31. Assuming a group annuity contract offers a range of investment alternatives, would the platform provider provision still be available if the only investment alternative available in the capital preservation asset class on the platform is the life insurance company's proprietary fixed income separate account?

Yes, the group annuity would still be a “platform or similar mechanism.” Inclusion of proprietary investment options on the platform does not make the platform provider exception unavailable. Similarly, the fact that only one investment option is available in certain asset classes does not make the platform provider exception unavailable.

Q32. Can a recordkeeper rely on the platform provider provision to make available to plans a third party's platform of investment options for which it provides recordkeeping services?

Yes. Subject to the conditions in the exception, the platform provider provision is available to persons who market or make available a platform, including a third party's platform as part of a broader set of recordkeeping, participant communication, or other administrative services.

Q33. The plan sponsor provides the plan's investment policy statement to a recordkeeper and requests that the recordkeeper provide a list of investment alternatives available on its platform that would meet the statement's requirements. The plan's investment policy statement lists the asset classes, investment strategy, expense ratio range, risk and return characteristics, and type of investment vehicle for investment alternatives that may be included in the plan. The investment policy statement also provides that at least one investment alternative should constitute a "qualified default investment alternative," as defined under the Department's regulations at 29 CFR § 2550.404c-5. Would the recordkeeper provide fiduciary investment advice by providing a complete list of the investment alternatives available on the platform that meet these requirements?

No. The recordkeeper would not be treated as making a recommendation for purposes of the Rule if it provided a list of all of the investment alternatives available on the platform that meet the requirements of the plan's investment policy statement. However, if the recordkeeper exercises discretion in narrowing the response to a selective list of investment alternatives, in the Department's view, the communication could constitute an investment recommendation for purposes of the Rule if a reasonable person would view the communication as a recommendation that the fiduciary choose investments from the selective menu screened by the recordkeeper.

Q34. Is it fiduciary investment advice under the Rule if a financial institution offers an automated daily cash sweep service to its clients, including IRA account owners and small plans that will, pursuant to a client's standing directions, automatically sweep uninvested cash from the client's account into a short-term investment vehicle of the client's choice on a daily basis? The client electing to use the service may select from a limited list of short-term investment vehicles available as part of the automated cash sweep service, from which the financial institution receives fully-disclosed shareholder servicing fees. If the client does not select the sweep service, the service will not be used.

No, the communication would not constitute an investment recommendation if the financial institution merely offers the cash sweep service and describes the features of the service. Further, the fact that the financial institution's cash sweep service offers a limited list of short-term investment vehicles would not by itself mean that the financial institution is recommending all of the investment vehicles as appropriate for the plan or IRA. The financial institution could

rely on the investment education provision to describe the product features, investor rights and obligations, fee and expense information, applicable trading restrictions, investment objectives and philosophies, risk and return characteristics, historical return information, or related prospectuses for the short term investment vehicles. If the communication recommended using a particular cash sweep service, such a communication, however, may constitute a recommendation subject to the Rule.

Q35. Is the platform provider provision available to a recordkeeper who includes recordkeeping and other services as part of a platform of investment alternatives?

Yes. The concept of a platform for a 401(k) plan generally includes available investment alternatives along with a bundle of recordkeeping and other services. For example, a recordkeeper could rely on the platform provider provision for a platform that includes access to one or more investment advisory firms that a plan sponsor or plan participant may use to assist in selecting specific investment alternatives from the available alternatives. Merely offering connectivity services to investment advisory firms as an elective option within a bundle of services would not necessarily constitute a “recommendation” that the plan sponsor or participant use the investment advisory firm for investment advice. Rather, whether such a recommendation was made would depend on the content, context, and presentation of the available services.