
In line with SEC, DOL issues broker-friendly 'best interest' rule

By Editorial Staff Thu, Dec 17, 2020

This version of the best interest rule reflects the spirit of the Trump administration. It is much more de-regulatory and less consumer-protective than the Obama administration's 2016 best interest rule.

The final version of the Department of Labor's "best interest" [rule](#) will hold retail financial advisers to the Impartial Conduct Standards, requiring them to charge only "reasonable compensation" and "make no materially misleading statements" to clients when giving advice.

The impartial conduct standard requires advisers to:

- Give advice that is in the "best interest" of the retirement investor. This best interest standard has two chief components: prudence and loyalty;
- Under the prudence standard, the advice must meet a professional standard of care as specified in the text of the exemption;
- Under the loyalty standard, the advice must be based on the interests of the customer, rather than the competing financial interest of the adviser or firm.

This version of the best interest rule reflects the spirit of the Trump administration. It is much more de-regulatory and less consumer-protective than the Obama administration's 2016 best interest rule, which extended pension law standards over tax-deferred assets even after the assets are rolled out of qualified plans and into brokerage IRAs.

The Obama rule also required advisers to pledge to act entirely in their clients' best interests, as fiduciaries, when recommending the purchase of indexed or variable annuities in rollover IRAs. That rule allowed investors to file federal class action suits against advisory firms for breaking that pledge, known as the "private right of action."

In a press release today that responded to the DOL announcement, the Insured Retirement Institute applauded the rule's:

- Change from the original proposal allows a senior executive officer to sign a retrospective compliance review instead of the chief operating officer.
- Exemption to allow financial institutions to engage in principal transactions with retirement plans and Individual Retirement Accounts (IRA) in which the financial institution purchases or sells certain investments from its own account.
- Provisions that [place] enforcement authority with DOL regulators and not through a private right of action.



Eugene Scalia

This week's DOL rule aligns with the Security & Exchange Commission's best interest rule, which was announced in June 2019.

This new DOL version of the "exemption from prohibited transactions"—that is, transactions involving conflicts of interest between adviser and client—puts no special limits on the kind of compensation that clients may be charged, including third-party compensation that introduces a conflict for the adviser. Today's DOL release said the exemption will be available to:

"Registered investment advisers, broker-dealers, banks, and insurance companies (Financial Institutions) and their individual employees, agents, and representatives (Investment Professionals) that provide fiduciary investment advice to Retirement Investors. The exemption defines Retirement Investors as Plan participants and beneficiaries, IRA owners, and Plan and IRA fiduciaries.

"Under the exemption, Financial Institutions and Investment Professionals can receive a wide variety of payments that would otherwise violate the prohibited transaction rules, including, but not limited to, commissions, 12b-1 fees, trailing commissions, sales loads, mark-ups and mark-downs, and revenue sharing payments from investment providers or third parties.

"The exemption's relief extends to prohibited transactions arising as a result of investment advice to roll over assets from a Plan to an IRA, as detailed later in this exemption. The exemption also allows Financial Institutions to engage in principal transactions with Plans and IRAs in which the Financial Institution purchases or sells certain investments from its own account."

Another part of the exemption says,

"The final exemption's recordkeeping requirements have been narrowed to allow only

the [DOL] and the Department of the Treasury to obtain access to a Financial Institution's records as opposed to plan fiduciaries and other Retirement Investors," the new rule said. "Second, the final exemption's disclosure requirements have been revised to include written disclosure to Retirement Investors of the reasons that a rollover recommendation was in their best interest."

In a press release Wednesday, American Council of Life Insurers vice president Jim Szostek said:

"We're reviewing what the department released today with that goal in mind. Consumers deserve to know the best interest protections will be in place and that access for lower- and middle-income savers is safeguarded. Now more than ever, average income individuals and families need the ability to access financial certainty. The best interest standard makes sure that opportunity isn't taken away — either inadvertently or with intent — by a fiduciary-only approach that shuts out the middle market from gaining a stronger financial footing.

The Insured Retirement Institute issued a statement that said in part, "The rule contains several positive changes that can help to ensure consumers will continue to access the financial products and services they need to achieve retirement goals," said Jason Berkowitz, IRI Chief Legal and Regulatory Affairs Officer.

"We appreciate that the final exemption in the rule aligns with a best interest standard similar to the U.S. Securities and Exchange Commission's Regulation Best Interest and the National Association of Insurance Commissioner's model best interest regulation that states have begun to adopt."