

Might You Be Stumbling Into Being Subject to the U.S. Department of Labor's Conflict of Interest Regulatory World?

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The U. S. Department of Labor's Conflict of Interest regulatory package (the "COI Rules") reaches far more than traditional trustees named in retirement plan documents. Many financial advisors, tax advisors, investment advisors and wealth planning advisors for individuals, brokerage firms, banks and financial institutions (collectively "Financial Institutions") may accidentally wander into being subject to the regulation and need to comply with the more limited existing prohibited transaction exemptions and the new more intensive prohibited transaction exemptions to be able to continue providing advice and assisting customers with tasks they have historically done. The new rules are generally effective beginning on April 10, 2017, but will require substantial changes to be ready by that date.

1. Does anyone at your Financial Institution advise customers about making a rollover from their qualified retirement plan?

If a Financial Institution advises an individual about taking a distribution from their retirement plan and rolling it over to an individual retirement account from which the Financial Institution will receive any direct (e.g., account fee) or indirect (e.g., commission or 12b-1 fee on investments) compensation, the Financial Institution will be subject to the COI Rules. The Financial Institution's advice to that individual about taking the distribution and rolling it over resulted in his divesting from his investments in the plan and constitutes fiduciary investment advice and now the Financial Institution has become a fiduciary with respect to those plan assets and is subject to the COI Rules. This means the Financial Institution needs to comply with the new and the revised prohibited transaction exemptions in the COI Rules in order to be able to receive such compensation.

2. Does anyone at your Financial Institution advise customers about whether to take a distribution from a qualified retirement plan?

If your Financial Institution advises an individual about taking a distribution from their retirement plan and rolling it over to an individual retirement account or investing it in another account from which you will receive any direct (e.g., account fee) or indirect (e.g., commission or 12b-1 fee on investments or profit from a deposit account) compensation, the Financial Institution has become a fiduciary with respect to those plan assets and is subject to the COI Rules. This means the Financial Institution needs to comply with the new and the revised prohibited transaction exemptions in the COI Rules in order to be able to receive such compensation.

3. Does anyone at your Financial Institution advise a customer about the investments to select in their retirement plan?

If a Financial Institution advises an individual about which investments to make in their retirement plan and the Financial Institution will receive any direct (e.g., account fee) or indirect (e.g., commission or 12b-1 fee on investments or profit from a deposit account) compensation, the Financial Institution has become a fiduciary with respect to those plan assets and is subject to the COI Rules. This means the Financial Institution will need to comply with the new and the revised prohibited transaction exemptions in the COI Rules in order to be able to receive such compensation.

4. Does anyone at your Financial Institution advise a customer about the investments to select for their individual retirement account, health savings account, Archer Medical Savings Account or Coverdell Education Savings Account?

Such advice is subject to the COI Rule because the COI Rule expands the ERISA concept of fiduciary investment advice to apply to all of the above mentioned tax favored savings vehicles and any investment decision related to such vehicles. This means the Financial Institution will need to comply with the new and the revised prohibited transaction exemptions in the COI Rules in order to be able to receive such compensation.

5. Does anyone at your Financial Institution advise a customer about annuity products to select for their individual retirement account, health savings account, Archer Medical Savings Account or Coverdell Education Savings Account?

Such advice is subject to the COI rule because it expands the ERISA concept of fiduciary investment advice to apply to all of the above mentioned tax favored savings vehicles and any investment decision related to such vehicles. This means the Financial Institution will need to comply with the new and the revised prohibited transaction exemptions in the COI Rules in order to be able to receive such compensation.

6. Does your Financial Institution ever recommend and sell mutual fund shares to a customer with a retirement plan account or an individual retirement account or health savings account, Archer Medical Savings Account or Coverdell Education Savings Account and receive a commission, 12b-1 fees, revenue sharing, load or other form of indirect compensation related to such sale?

Such advice is subject to the COI Rule because it expands the ERISA concept of fiduciary investment advice to all of the above mentioned tax favored savings vehicles. This means the Financial Institution will need to comply with the new and the revised prohibited transaction exemptions in the COI Rules in order to be able to receive compensation related to investments purchased, sold or held in such accounts. The prohibited transaction exemptions that many had traditionally relied upon to receive such compensation have been significantly narrowed and some are now expressly limited to only apply to retirement plans. Compensation derived from transactions by individual retirement accounts must satisfy the new Best Interest Contract Exemption. The new and revised exemptions in the COI Rules include substantial additional requirements, including changes to agreements, satisfying an impartial contract standard, disclosure requirements, and documenting and maintaining records of compliance for the transactions.

7. Does your Financial Institution ever recommend and sell annuity products to a customer with a retirement plan account or an individual retirement account or health savings account, Archer Medical Savings Account or Coverdell Education Savings Account and receive a commission, 12b-1, revenue sharing, load or other form of indirect compensation related to such sale?

Such advice is subject to the COI Rule because it expands the ERISA concept of fiduciary investment advice to all of the above mentioned tax favored savings vehicles. This means your Financial Institution will need to comply with the new and the revised prohibited transaction exemptions in the COI Rules in order to be able to receive compensation related to the annuity products purchased, sold or held in such accounts. The prohibited transaction exemption that traditionally applied to the sale of annuity products to retirement vehicles has been significantly narrowed so that it only applies to sales of fixed rate annuities. Thus, the new more demanding Best Interest Contract Exemption will now need to be complied with to be able to sell variable or indexed annuities or any non-fixed rate annuity to any of such accounts or to a retirement plan.

8. Does anyone at your Financial Institution provide a customer desiring to establish a retirement savings vehicle with a list of potential vendors for establishing such an arrangement?

If the Financial Institution will receive any direct or indirect compensation as the result of providing such list, the Financial Institution becomes a fiduciary under the COI Rules as the result of providing such list and the compensation must satisfy a prohibited transaction exemption in order for the Financial Institution to avoid liability. This is true even if the list includes multiple possible vendors without any one recommended.

9. Does anyone at your Financial Institution provide a customer with a list of investment advisors to assist with investment in their retirement plan or in one of the tax favored savings accounts?

If the Financial Institution will receive any direct or indirect compensation as the result of providing such list, the Financial Institution becomes a fiduciary under the COI Rules as the result of providing such list and the compensation must satisfy a prohibited transaction exemption in order for the Financial Institution to avoid liability. This is true even if the list includes multiple possible vendors without any one recommended.

10. Does anyone in the brokerage arm of your Financial Institution ever fulfill an order for a customer with a retirement plan account or an individual retirement account or health savings account, Archer Medical Savings Account or Coverdell Education Savings Account using investments that are in the brokerage firm's inventory?

Under the COI Rules, the Financial Institution is a plan fiduciary and this is a prohibited transaction unless the Financial Institution complies with the new Principal Transaction prohibited transaction class exemption which includes new standards, disclosures and record keeping requirements.

11. Does anyone in the brokerage arm of your Financial Institution ever fulfill an order for a customer with a retirement plan account or an individual retirement account or health savings account, Archer Medical Savings Account or Coverdell Education Savings Account and in the process of doing so extend credit to the customer to prevent a failed securities transaction?

Under the COI Rules, if the Financial Institution is also a service provider to such plan or account (e.g., it has custody of the securities or investments) it is a plan fiduciary and this is a prohibited transaction unless the Financial Institution complies with the revised prohibited transaction class exemption which now requires certain safeguards, disclosures and record keeping requirements.

Financial Institutions should review their IRA custodian agreements and may need to revise those agreements. If a Financial Institution is not using the IRS model agreement, it will need to submit the revised agreement to the IRS for approval, unless the IRS waives such requirement. Financial Institutions will need procedures for establishing IRA accounts via rollovers to meet the new Best Interest Contract Exemption with new disclosures, new procedures, the new custody agreements and new record keeping requirements.

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