DESCRIPTION OF H.R. 4294, THE STRENGTHENING ACCESS TO VALUABLE EDUCATION AND RETIREMENT SUPPORT (OR "SAVERS") ACT OF 2015

Scheduled for Markup
by the
HOUSE COMMITTEE ON WAYS AND MEANS
on February 3, 2016

Prepared by the Staff
of the
JOINT COMMITTEE ON TAXATION

February 2, 2016
JCX-5-16

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INTRODUCTION

The House Committee on Ways and Means has scheduled a committee markup of H.R. 4294, the Strengthening Access to Valuable Education and Retirement Support (or "SAVERS") Act of 2015, a bill to amend the Internal Revenue Code of 1986 to ensure that retirement investors receive advice in their best interests, and for other purposes, on February 3, 2016. This document,[1] prepared by the staff of the Joint Committee on Taxation, provides a description of the bill.

[1] This document may be cited as follows: Joint Committee on Taxation, *Description of H.R. 4294, the Strengthening Access to Valuable Education and Retirement Support (or "SAVERS") Act of 2015*, (JCX-5-16), February 2, 2016. This document can also be found on the Joint Committee on Taxation website at www.jct.gov.

A. Rules Relating to the Provision of Investment Advice

Present Law

Tax-favored savings arrangements

Tax-favored retirement savings

The Internal Revenue Code of 1986 ("Code")[2] provides two general vehicles for tax-favored retirement savings: employer-sponsored retirement plans and individual retirement arrangements ("IRAs").[3] Various requirements must be met for tax-favored treatment to apply. Retirement plans of private employers are also generally subject to the Employee Retirement Income Security Act of 1974 ("ERISA"), over which the Department of Labor ("DOL") has jurisdiction.[4]

The most common type of tax-favored employer-sponsored plan is a qualified retirement plan, which may be a defined contribution plan or a defined benefit plan.[5] Under a defined contribution plan, benefits are based on a separate account for each participant, to which are allocated contributions, earnings and losses.[6] Defined contribution plans commonly allow participants to direct the investment of their accounts, usually by choosing among investment options offered under the plan. Under a defined benefit plan, benefits are determined under a plan formula, and benefits under a defined benefit plan are funded by the general assets of the trust established under the plan, which are invested by plan fiduciaries; individual accounts are not maintained for employees participating in the plan.[7]

A "section 401(k) plan" is a qualified defined contribution plan that includes a feature (a "qualified cash or deferred arrangement") under which an employee may elect to have contributions (elective deferrals) made to the plan, rather than receive the same amount in cash.[8]

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[2] All section references herein are to the Code unless otherwise indicated.

[3] Sections 219, 408 and 408A provide rules for IRAs.

[4] ERISA generally does not apply to church plans or plans of governmental employers.

[5] Sec. 401(a). A qualified annuity plan under section 403(a) is similar to a qualified retirement plan (and subject to similar requirements) except that plan assets plan assets consist of annuity contracts, rather than investments held in a trust or custodial account. References herein to a qualified retirement plan include a qualified annuity plan.

[6] Defined contribution plan is defined at section 414(i).

[7] As defined in section 414(j), a defined benefit plan is any plan that is not a defined contribution plan.

[8] Section 401(k) provides rules for qualified cash or deferred arrangements.

A "section 403(b) plan" is generally similar to a section 401(k) plan, but may be maintained only by a tax-exempt charitable organization or a public school.[9]

Some employer-sponsored plans are funded through contributions by the employer to an IRA established for each employee. Specifically, an employer may maintain a simplified employee pension ("SEP") plan and certain small employers may maintain a SIMPLE IRA plan.[10]

A distribution from an employer-sponsored retirement plan or IRA is includible in income except to the extent it consists of a return of basis or an excludible distribution from a Roth arrangement.[11] In most cases, however, a distribution may be rolled over on a nontaxable basis to another such plan or an IRA, either by a direct rollover or by contributing the distribution to the other plan or IRA within 60 days of receiving the distribution.[12]

Health savings accounts and Archer MSAs

An individual with a high deductible health plan (and, subject to exceptions, no other health plan) generally may make contributions to a health savings account ("HSA").[13] In some cases, such an individual may contribute to an Archer MSA.[14] Subject to limits, an individual's HSA and Archer MSA contributions are deductible in determining adjusted gross income and are excludable from an employee's income and wages if made by an employer. HSA and Archer MSA distributions used for qualified medical expenses are not includible in gross income. Distributions may also be rolled over to another HSA or Archer MSA.

Coverdell education savings accounts

A Coverdell education savings account ("Coverdell ESA") is an account created exclusively for the purpose of paying qualified education expenses of a designated beneficiary.[15] Subject to income limits, annual after-tax contributions up to $2,000 may be made until a designated beneficiary reaches age 18. Earnings on contributions to a Coverdell ESA generally are includible in income when withdrawn; however, distributions are excludable from income up to the beneficiary's qualified education expenses for the year. Amounts in a Coverdell ESA may

[9] Section 403(b) provides rules for these plans. Another type of tax-favored employer-sponsored plan is a State or local government eligible deferred compensation plan under section 457(b), which is similar to a qualified cash or deferred arrangement under section 401(k).

[10] Sec. 408(k) and (p).

[11] Sections 402A and 408A provide rules for Roth arrangements.

[12] Secs. 402(c), 403(a)(4), 403(b)(8), 408(d)(3), 408A(e) and 457(e)(16).

[13] Section 223 provides rules for HSAs.

[14] Section 220 provides rules for Archer MSAs.

[15] Section 530 provides rules for Coverdell ESAs.

be rolled over to another Coverdell ESA for the same beneficiary or certain family members. In general, the balance in a Coverdell ESA is deemed distributed within 30 days after the date that the beneficiary reaches age 30.

Prohibited transaction rules

In general

The Code prohibits certain transactions ("prohibited transaction") between a qualified retirement plan and a disqualified person.[16] The prohibited transaction rules under the Code apply also to IRAs, Archer MSAs, HSAs, and Coverdell ESAs.[17]

Prohibited transactions include the following transactions, whether direct or indirect, between a plan and a disqualified person: (1) the sale or exchange or leasing of property, (2) the lending of money or other extension of credit, (3) the furnishing of goods, services or facilities, (4) the transfer to, or use by or for the benefit of, the income or assets of the plan, (5) in the case of a fiduciary, an act dealing with the plan's income or assets in the fiduciary's own interest or for the fiduciary's own account, and (6) the receipt by a fiduciary of any consideration for the fiduciary's own personal account from any party dealing with the plan in connection with a transaction involving the income or assets of the plan.[18]

Disqualified persons include a fiduciary of the plan; a person providing services to the plan; an employer with employees covered by the plan; an employee organization any of whose members are covered by the plan; and certain owners, officers, directors, highly compensated employees, family members, and related entities.[19] A fiduciary includes any person who (1) exercises any discretionary authority or discretionary control respecting management of the plan or exercises any authority or control respecting management or disposition of the plan's assets, (2) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of the plan, or has any authority or responsibility to do so, or (3) has any discretionary authority or discretionary responsibility in the administration of the plan.[20]

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[16] Sec. 4975. The prohibited transaction rules under the Code generally do not apply to governmental plans or church plans. However, under section 503, the trust holding assets of a governmental or church plan may lose its tax-exempt status in the case of a prohibited transaction listed in section 503(b). The prohibited transaction rules under the Code also do not apply to section 403(b) plans. However, the prohibited transaction rules under ERISA may apply to a section 403(b) plan unless it is a governmental plan or church plan exempt from ERISA or is described in 29 C.F.R. section 2510.3-2(f).

[17] These are included in the definition of "plan" under section 4975(e)(1).

[18] Sec. 4975(c)(1).

[19] Sec. 4975(e)(2).

[20] Sec. 4975(e)(3). Fiduciary also includes any named fiduciary under ERISA section 405(c)(1)(B).

Certain transactions are statutorily exempt from prohibited transaction treatment, for example, certain loans to plan participants and arrangements with a disqualified person for legal, accounting or other services necessary for the establishment or operation of a plan if no more than reasonable compensation is paid for the services.[21] In addition, an administrative exemption may be granted, on either an individual or class basis, subject to a finding that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan. Before an administrative exemption is granted, notice must be provided to interested persons, notice must be published in the Federal Register of the pendency of the exemption, and interested persons must be given an opportunity to provide comments.

Excise tax on prohibited transactions[22]

If a prohibited transaction occurs, the disqualified person who participated in the transaction is generally subject to a two-tiered excise tax.[23] The first tier tax is 15 percent of the amount involved in the transaction. The second tier tax, imposed if the prohibited transaction is not corrected within a certain period, is 100 percent of the amount involved.

For purposes of the excise tax, the amount involved with respect to a prohibited transaction is generally the greater of (1) the amount of money and the fair market value of the other property given or (2) the amount of money and the fair market value of the other property received.[24] For purposes of the excise tax, "correction" and "correct" mean, with respect to a prohibited transaction, undoing the transaction to the extent possible, but in any case placing the plan in a financial position not worse than that in which it would be if the disqualified person were acting under the highest fiduciary standards.

Jurisdiction over the prohibited transaction rules

Jurisdiction over the Code provisions governing qualified retirement plans and similar ERISA provisions is divided between the Department of the Treasury ("Treasury") and DOL by Executive Order, referred to as Reorganization Plan No. 4 of 1978 ("Reorganization Plan").[25] As part of this division, with certain exceptions, Treasury authority was transferred to DOL with

[21] Sec. 4975(d)(1) and (d)(2).

[22] Under ERISA sections 409 and 502(a)(2), in the case of a breach of fiduciary responsibility with respect to a plan, including a prohibited transaction, a civil suit may be brought by DOL, a plan participant or beneficiary, or another fiduciary. The Code does not provide a private cause of action in the case of a prohibited transaction.

[23] In the case of an IRA, HSA, Archer MSA or Coverdell ESA, the sanction for some prohibited transactions is the loss of tax-favored status, rather than an excise tax. See section 408(e)(2), also cross-referenced in sections 220(e)(2), 223(e)(2) and 530(e).

[24] In the case of certain transactions for services for which more than reasonable compensation is paid, the amount involved is only the excess compensation.

[25] 43 Fed. Reg. 47713, October 17, 1978.

respect to regulations, rulings, opinions, and exemptions under the prohibited transaction provisions of the Code.[26] As a result, DOL regulations and other guidance relating to prohibited transactions applies for Code purposes, as well as for ERISA purposes, and DOL has the authority to grant individual and class exemptions applicable under the Code, including with respect to IRAs, HSAs, Archer MSAs, and Coverdell ESAs.

Rules relating to investment advice

Fiduciary status

As described above, a fiduciary includes a person who renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of the plan, or has any authority or responsibility to do so.

Existing DOL regulations, issued in 1975, provide that a person is deemed to be rendering "investment advice" to an employee benefit plan for this purpose only if:

- The person renders advice to the plan as to the value of securities or other property, or makes recommendation as to the advisability of investing in, purchasing, or selling securities or other property; and
- The person either directly or indirectly (for example, through or together with any affiliate) (1) has discretionary authority or control, whether or not pursuant to agreement, arrangement or understanding, with respect to purchasing or selling securities or other property for the plan, or (2) renders any advice as described above on a regular basis to the plan pursuant to a mutual agreement, arrangement or understanding, written or otherwise, between the person and the plan or a fiduciary with respect to the plan, that the person's services will serve as a primary basis for investment decisions with respect to plan assets, and that the person will render individualized investment advice to the plan based on the particular needs of the plan regarding matters such as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments.[27]

The regulations further provide that a person who is a fiduciary with respect to a plan by reason of rendering investment advice (as described above) for a fee or other compensation, direct or indirect, with respect to any moneys or other property of the plan, or having any authority or responsibility to do so, is not deemed to be a fiduciary regarding any assets of the plan with respect to which the person does not have any discretionary authority, discretionary control or discretionary responsibility, does not exercise any authority or control, does not render investment advice (as described above) for a fee or other compensation, and does not have any

[26] Secs. 102 and 105 of the Reorganization Plan. Rules for coordination concerning certain fiduciary actions are provided under section 103 of the Reorganization Plan. In addition, under section 3003 of ERISA, Treasury and DOL are directed to consult with each other from time to time with respect to the prohibited transaction rules and exemptions.

[27] 29 C.F.R. sec. 2510.3-21(c).

authority or responsibility to render such investment advice. However, this rule does not exempt the person from ERISA liability attributable to a breach of responsibility by a co-fiduciary or exclude the person from the definition of the term party in interest[28] based on providing services to the plan with respect to any assets of the plan.

In addition to the regulations, DOL Interpretive Bulletin 96-1 provides that the furnishing of mere investment education to a participant or beneficiary in a participant-directed individual account plan does not constitute the rendering of investment advice.[29] For this purpose, investment education includes the following categories of information and materials (described more fully in Interpretive Bulletin 96-1): plan information, general financial and investment information, asset allocation models, and interactive investment materials. Interpretive Bulletin 96-1 notes that the information and materials described in the four categories merely represent examples of the type of information and materials that may be furnished to participants and beneficiaries without such information and materials constituting investment advice, and there may be many other examples of information, materials, and educational services which, if furnished to participants and beneficiaries, would not constitute investment advice. Accordingly, Interpretive Bulletin 96-1 provides that no inferences should be drawn from the description of the four categories with respect to whether the furnishing of any information, materials or educational services not described therein may constitute investment advice.

Statutory exemptions relating to investment advice

If certain requirements are met, specific transactions relating to investment advice are exempt from prohibited transaction treatment if the advice is provided by a fiduciary advisor through an eligible investment advice arrangement.[30] The exemptions apply to (1) the provision of investment advice to a plan participant or beneficiary with respect to a security or other property available as an investment under the plan, (2) an investment transaction (that is, a sale, acquisition, or holding of a security or other property) pursuant to the advice, and (3) the direct or indirect receipt of fees or other compensation in connection with the provision of the advice or an investment transaction pursuant to the advice.

For purposes of the exemptions, an eligible investment advice arrangement is generally an arrangement that either (1) provides that any fees (including any commission or compensation) received by the fiduciary adviser for investment advice or with respect to an investment transaction with respect to plan assets do not vary depending on the basis of any

[28] Party in interest is the term under ERISA that corresponds to disqualified person under the Code and is defined in a similar manner.

[29] 29 C.F.R. sec. 2905.96-1. This treatment applies irrespective of who provides the information (for example, the plan sponsor, fiduciary or service provider), the frequency with which the information is shared, the form in which the information and materials are provided (for example, on an individual or group basis, in writing or orally, or via video or computer software), or whether an identified category of information and materials is furnished alone or in combination with other identified categories of information and materials.

[30] Sec. 4975(d)(17) and (f)(8). These exemptions and parallel exemptions under ERISA section 408(b)(14) and (g) were established by section 601 of the Pension Protection Act of 2006, Pub. L. No. 109-280.

investment option selected (sometimes referred to as "fee-leveling"), or (2) uses a computer model under an investment advice program that meets specified requirements in connection with the provision of investment advice to a participant or beneficiary.[31] The arrangement must be expressly authorized by a plan fiduciary other than (1) the person offering the investment advice program, (2) any person providing investment options under the plan, or (3) any affiliate of (1) or (2). In addition, the fiduciary adviser must provide disclosures applicable under securities laws; any investment transaction must occur solely at the direction of the investment advice recipient; the compensation received by the fiduciary adviser and affiliates in connection with the investment transaction must be reasonable;[32] and the terms of the investment transaction must be at least as favorable to the plan as an arm's length transaction would be.

DOL proposed regulations and "BIC" exemption[33]

On April 20, 2015, DOL proposed regulations that would replace the current regulations relating to investment advice with a new standard as to whether a person is a fiduciary based on rendering investment advice, generally to be applicable eight months after final regulations are published.[34] Under the proposed regulations, a person is a fiduciary based on rendering investment advice if the person−

- provides to a plan, a plan fiduciary, an IRA,[35] or an IRA owner certain types of recommendations or statements (as described below) that constitute investment advice with respect to plan or IRA assets in exchange for a fee or other compensation, and
- either directly or indirectly (such as through an affiliate), (1) represents or acknowledges that it is acting as a fiduciary with respect to the investment advice, or (2) renders the advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is individualized to, or that the advice is specifically

[31] Various requirements with respect to notices and disclosure, recordkeeping and audits must also be met.

[32] Affiliate for this purpose means an affiliated person as defined under section 2(a)(3) of the Investment Company Act of 1940.

[33] For a more detailed discussion of the DOL proposed guidance, see Joint Committee on Taxation, *Present Law and Background Relating to Prohibited Transactions, Investment Advice, and Fiduciary Status with respect to Retirement Plans and Individual Accounts* (JCX-131-15), September 28, 2015, pp. 32-58, available on the Joint Committee on Taxation website at www.jct.gov.

[34] Definition of the Term "Fiduciary"; Conflict of Interest Rule-Retirement Investment Advice, 80 Fed. Reg. 21928, April 20, 2015. The proposed regulations would apply for purposes of ERISA and the prohibited transaction rules of the Code.

[35] IRA is defined in the proposed guidance to include HSAs, Archer MSAs, and Coverdell ESAs, as well as IRAs. In Part IV.E of the preamble to the proposed regulations, DOL requests comments as to whether it is appropriate to cover individual accounts other than IRAs and treat them in a manner similar to IRAs. 80 Fed. Reg. at 21947.

directed to, the advice recipient for consideration in making investment or management decisions with respect to securities or other property of the plan or IRA.

Under the proposed regulations, investment advice includes:

- a recommendation as to the advisability of acquiring, holding, disposing of or exchanging securities or other property, including a recommendation to take a distribution of benefits or a recommendation as to the investment of securities or other property to be rolled over or otherwise distributed from the plan or IRA;[36]
- a recommendation as to the management of securities or other property, including recommendations as to the management of securities or other property to be rolled over or otherwise distributed from the plan or IRA;
- an appraisal, fairness opinion, or similar statement, whether verbal or written, concerning the value of securities or other property if provided in connection with a specific transaction or transactions involving the acquisition, disposition, or exchange, of such securities or other property by the plan or IRA;
- a recommendation of a person who is also going to receive a fee or other compensation for providing any of the types of advice described above.

Subject to specified requirements for each exception, the proposed regulations provide exceptions (referred to as "carve-outs") for (1) certain counterparties in transactions with an employee benefit plan (referred to as the "seller's carve-out"); (2) swap and security-based swap transactions with an employee benefit plan; (3) employees of an employee benefit plan sponsor; (4) platform providers to employee benefit plans; (5) persons providing selection and monitoring assistance to employee benefit plans; (6) financial reports and valuations (including to an IRA or IRA owner); and (7) investment education (including to an IRA or IRA owner), under standards somewhat different from the standards in the existing DOL guidance. However, an exception does not apply if the person represents or acknowledges that it is acting as a fiduciary with respect to the advice. In conjunction with the proposed regulations, DOL has proposed two new

[36] DOL Advisory Opinion 2005-23A (December 7, 2005) addresses the question of whether a recommendation that a participant in a pension plan roll over his or her account balance to an IRA to take advantage of investment options not available under the plan constitutes investment advice with respect to plan assets. The advisory opinion expresses the view that, with respect to a person who is not otherwise a plan fiduciary, merely advising a plan participant to take an otherwise permissible plan distribution, even when the advice is combined with a recommendation as to how the distribution should be invested, does not constitute investment advice within the meaning of the existing DOL investment advice regulations defining when a person is a fiduciary by virtue of providing investment advice with respect to employee benefit plan assets. The advisory opinion provides that DOL does not view a recommendation to take a distribution as advice or a recommendation concerning a particular investment (that is, purchasing or selling securities or other property) as contemplated by the regulations and that any investment recommendation regarding the proceeds of a distribution would be advice with respect to funds that are no longer plan assets. Part IV.A(1) of the preamble to the proposed regulations notes that the proposed regulations, if finalized, would supersede Advisory Opinion 2005-23A. 80 Fed. Reg. at 21939.

prohibited transaction class exemptions, including a "best interest contract" (or "BIC") exemption,[37] as well as proposing changes to various existing class exemptions.

The proposed BIC class exemption generally applies to compensation received by an investment adviser or related party in connection with a transaction (that is, a purchase, sale or holding of assets) resulting from investment advice provided to "retirement investors," meaning plan participants or beneficiaries who direct the investment of the assets in their accounts, IRA owners who make investment decisions with respect to their IRAs, and a plan sponsor (or employee, officer, or director thereof) of a plan with fewer than 100 participants where the plan does not provide for participant-directed investments and the plan sponsor acts as a fiduciary who has authority to make plan investment decisions. Under the proposed exemption, investment advice is in the best interest of a retirement investor when the adviser and financial institution providing the advice act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the retirement investor, without regard to the financial or other interests of the adviser, financial institution or any affiliate, related entity, or other party.[38]

Assets subject to the proposed BIC class exemption include the following: bank deposits; certificates of deposit (CDs); shares or interests in mutual funds; bank collective funds; insurance company separate accounts; exchange-traded REITs (Real Estate Investment Trusts); exchange-traded funds; corporate bonds offered pursuant to a registration statement under the Securities Act of 1933; agency debt securities and U.S. Treasury Securities; insurance and annuity contracts, guaranteed investment contracts, and exchange-traded equity securities. In order for the proposed exemption to apply, specific requirements must be met relating to the investment advice contract (described below), impartial conduct with respect to the advice, range of investment options, cost and fee disclosures to retirement investors, disclosures to DOL and recordkeeping.

The proposed BIC class exemption requires that, before making any recommendations on investment transactions, the adviser and financial institution enter into a written contract with the retirement investor as follows:

- The contract affirmatively states that the adviser and financial institution are fiduciaries under the ERISA or the Code, or both, with respect to any investment recommendation to the retirement investor;
- Under the contract, the adviser and financial institution specifically agree to adhere to certain impartial conduct standards, which include providing investment advice that is

[37] Proposed Best Interest Contract Exemption, 80 Fed. Reg. 21960, April 20, 2015. This class exemption is proposed to become applicable at the same time as the 2015 proposed fiduciary regulations, eight months after publication of final regulations.

[38] The preamble to the proposed exemption states, "Under this standard, the Adviser and Financial Institution must put the interests of the Retirement Investor ahead of the financial interests of the Adviser, Financial Institution or their Affiliates, Related Entities or any other party." 80 C.F.R. at 21970.

in the best interest of the retirement investor, not recommending investment in an asset if they (or affiliates) will receive more than reasonable compensation in relation to the total services they provide to the retirement investor with respect to the investment, and not providing any statements about an asset, fees, material conflict of interest, and any other matter related to the retirement investors investment decision that are misleading;

- Under the contract, the adviser and financial institution provide certain warranties and make certain disclosures related to fees and conflicts of interest; and
- The contract must not have exculpatory provisions disclaiming or otherwise limiting liability of the adviser or financial institution for a violation of the contract's terms, or a provision under which a plan, IRA, or retirement investor waives or qualifies its right to bring or participate in a class action or other representative action in court in a dispute with the adviser or financial institution.[39]

Description of Proposal

In general

The proposal adds a statutory definition of investment advice to the prohibited transaction provisions of the Code.[40] In addition, subject to specified requirements, the proposal adds new statutory exemptions for the provision of investment advice by a fiduciary to a plan, plan participant, or beneficiary with respect to the plan, referred to as a "best interest recommendation," and any transaction between a person providing investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of the plan.

Definition of investment advice

General rule

The statutory definition of investment advice under the proposal applies (as the regulatory definition applies under present law) for purposes of determining if a person is a fiduciary with respect to a plan based on rendering investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of the plan, or having any authority or responsibility to do so, and thus, is a disqualified person with respect to the plan. As defined under the proposal, investment advice includes certain recommendations rendered under certain conditions.

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[39] As described in DOL's background discussion of the proposed exemption, the contract terms to which advisors and financial institutions must agree in order to qualify for the proposed BIC class exemption potentially create a cause of action that may be used by retirement investors to enforce these contract terms. 80 Fed. Reg. at 21972-21973. For example, an IRA owner could have a contract claim if the adviser recommends an investment product that is not in the IRA owner's best interest, even though neither the Code nor ERISA otherwise creates such a cause of action for an IRA owner.

[40] The proposal would supersede both existing DOL regulations and the proposed regulations and exemptions issued by DOL in April 2015, as described in Present Law.

Specifically, under the proposal, the recommendations that may be investment advice (if rendered under the conditions described below) are those that relate to the following:

- the advisability of acquiring, holding, disposing, or exchanging any moneys or other property of a plan by the plan, plan participants, or plan beneficiaries, including any recommendation whether to take a distribution of benefits from the plan or any recommendation relating to the investment of any moneys or other property of the plan to be rolled over or otherwise distributed from the plan;
- the management of moneys or other property of the plan, including recommendations relating to the management of moneys or other property to be rolled over or otherwise distributed from the plan; or
- the advisability of retaining or ceasing to retain a person who would receive a fee or other compensation for providing any of these types of advice.

In order for a recommendation to be investment advice, it must be rendered pursuant to either of the following:

- a written acknowledgment that the person is a fiduciary with respect to the provision of the recommendation; or
- a mutual agreement, arrangement, or understanding which may include limitations as to the scope, timing, and responsibility to provide ongoing monitoring or advice services, between the person making the recommendation and the plan, plan participant, or beneficiary that (1) the recommendation is individualized to the plan, plan participant, or beneficiary and (2) the plan, plan participant, or beneficiary intends to materially rely on the recommendation in making investment or management decisions with respect to any moneys or other property of the plan.

Disclaimer of a mutual agreement, arrangement, or understanding

Under the proposal, any disclaimer of a mutual agreement, arrangement, or understanding with respect to a recommendation must only state the following: "This information is not individualized to you, and there is no intent for you to materially rely on this information in making investment or management decisions." Further, this disclaimer is not effective unless it is in writing and is communicated in a clear and prominent manner and an objective person would reasonably conclude that, based on all the facts and circumstances, there was not a mutual agreement, arrangement, or understanding.

Information not treated as investment advice

Under the proposal, information provided in the circumstances described below is not treated as a recommendation made pursuant to a mutual agreement, arrangement, or understanding for purposes of the definition of investment advice. The information in these circumstances shall contain the disclaimer described above.

Seller's exception.−The information is provided in conjunction with full and fair disclosure in writing to a plan, plan participant, or beneficiary that the person providing the

information is doing so in its marketing or sales capacity, including any information regarding the terms and conditions of the engagement of the person providing the information, and that the person is not intending to provide investment advice (as defined under the proposal) or to otherwise act as a fiduciary to the plan or to act under the obligations of a best interest recommendation (described below).

Swap and security-based swap transaction.−The person providing the information is a counterparty or service provider to the plan in connection with any transaction based on the information (including a service arrangement, sale, purchase, loan, bilateral contract, swap,[41] or security-based swap[42]). In addition, the plan is represented, in connection with the transaction, by a plan fiduciary that is independent of the person providing the information, and, except in the case of a swap or security-based swap, independent of the plan sponsor. Further, prior to entering into the transaction, the independent plan fiduciary represents in writing to the person providing the information that it is aware that the person has a financial interest in the transaction and that it has determined that the person is not intending to provide investment advice (as defined under the proposal) or to otherwise act as a fiduciary to the plan, plan participants, or plan beneficiaries.

Employees of a plan sponsor.−The person providing the information is an employee of any sponsoring employer or employee organization who provides the information to the plan for no fee or other compensation other than the employee's normal compensation.

Platform providers selection and monitoring assistance.−The person providing the information discloses in writing to the plan fiduciary that the person is not undertaking to provide investment advice as a fiduciary or under the obligations of a best interest recommendation. In addition, the information provided consists solely of either of the following:

- making available to the plan, plan participants, or plan beneficiaries, without regard to the individualized needs of the plan, plan participants, or plan beneficiaries, securities or other property through a platform or similar mechanism from which a plan fiduciary may select or monitor investment alternatives, including qualified default investment alternatives, into which plan participants or beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts, or
- in connection with a platform or similar mechanism described above, either (1) identifying investment alternatives that meet objective criteria specified by the plan, such as criteria concerning expense ratios, fund sizes, types of asset, or credit quality, or (2) providing objective financial data and comparisons with independent benchmarks to the plan.

Valuation.−The information consists solely of valuation information.

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[41] A swap for this purpose is defined in section 1a of the Commodity Exchange Act (7 U.S.C. sec. 1a).

[42] A security-based swap for this purpose is defined in section 3(a) of the Securities Exchange Act (15 U.S.C. sec. 78c(a)).

Financial education.−The information consists solely of the following:

- information described in DOL Interpretive Bulletin 96-1 as in effect on January 1, 2015, regardless of whether the education is provided to a plan or plan fiduciary or a participant or beneficiary,
- information provided to participants or beneficiaries regarding the factors to consider in deciding whether to elect to receive a distribution from a plan and whether to roll over the distribution to a plan, so long as any examples of different distribution and rollover alternatives are accompanied by all material facts and assumptions on which the examples are based, or
- any additional information treated as education by the Secretary.

Exemptions relating to investment advice

Best interest recommendation exemption

The proposal includes a prohibited transaction exemption for the provision of investment advice by a fiduciary to a plan, plan participant, or beneficiary with respect to the plan in the case of a "best interest recommendation."

As defined under the proposal, a best interest recommendation is a recommendation:

1. for which no more than reasonable compensation is paid (determined as described below),

2. provided by a person (referred to in this description as the "adviser") acting with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the information obtained through the adviser's reasonable diligence regarding factors such as the advice recipient's age and any other information that the advice recipient discloses to the adviser in connection with receiving the recommendation,

3. where the adviser places the interests of the plan or advice recipient above its own.

A best interest recommendation may include a recommendation (1) that is based on a limited range of investment options, which may consist, in whole or in part, of proprietary products, but only if any limitations (including a clearly-stated notice that the same or similar investments may be available at a different cost (greater or lesser) from other sources) are clearly disclosed to the advice recipient before any transaction based on the recommendation, or (2) that may result in variable compensation to the adviser (or any affiliate[43] of the adviser), but only if the receipt of the compensation (including a clearly-stated notice that the same or similar investments may be available at a different cost (greater or lesser) from other sources) is clearly

[43] Under the proposal, affiliate is defined as under the present-law exemption relating to investment advice, that is, an affiliated person as defined under section 2(a)(3) of the Investment Company Act of 1940.

disclosed to the advice recipient before any transaction based on the recommendation. The notices required under this rule must state only the following: "The same or similar investments may be available at a different cost (greater or lesser) from other sources."

In addition, for purposes of the required disclosure of variable compensation, variable compensation is considered clearly disclosed if notification is provided at any time before a transaction based on the adviser's recommendation, in a manner calculated to be understood by the average individual. The notification must include the following: (1) a notice in writing (including a clearly-stated notice that the same or similar investments may be available at a different cost (greater or lesser) from other sources) that the adviser (or its affiliate) may receive varying amounts of fees or other compensation with respect to the transaction, (2) a description of any fee or other compensation that is directly payable to the adviser (or its affiliate) from the advice recipient with respect to the transaction (expressed as an amount, formula, percentage of assets, per capita charge, or estimate or range of the compensation), (3) a description of the types and ranges of any indirect compensation that may be paid to the adviser (or its affiliate) by any third party in connection with a transaction based on the adviser's recommendation (expressed as an amount, formula, percentage of assets, per capita charge, or estimate of the ranges of compensation), (4) on request of the advice recipient, a disclosure of the specific amounts of compensation described in (3) that the adviser will receive in connection with the particular transaction (expressed as an amount, formula, percentage of assets, per capita charge, or estimate of the compensation).

Under the proposal, a recommendation will not fail to be a best interest recommendation solely because a person who, acting in good faith and with reasonable diligence, makes an error or omission in disclosing the information specified above if the person discloses the correct information to the advice recipient as soon as practicable, but not later than 30 days from the date on which the person knows of the error or omission.

The proposal also provides special rules relating to the amount involved and correction with respect to a prohibited transaction arising by the failure of investment advice to be a best interest recommendation. In that case, the amount involved is the amount paid to the person providing the advice (or its affiliate) that has not been paid or reimbursed to the plan, plan participants, or plan beneficiaries, including payments and reimbursements made pursuant to a correction (as described in the following sentence). In addition, "correction" and "correct" in this case mean the payment to, or reimbursement of, actual damages of the plan, plan participants, or plan beneficiaries resulting directly from the plan's, plan participant's, or plan beneficiary's reliance on the investment advice, if any, that have not otherwise been paid or reimbursed to the plan, plan participants, or plan beneficiaries, including payments and reimbursements made pursuant to the general correction rule under present law (that is, undoing the transaction to the extent possible, but in any case placing the plan in a financial position not worse than that in which it would be if the disqualified person were acting under the highest fiduciary standards).

Exemption for certain fee arrangements

The proposal also provides a prohibited transaction exemption for any transaction, including a contract for service, between a person (referred to in this description as the

"investment adviser") providing investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of the plan, and the advice recipient in connection with the investment advice.

The exemption applies if--

1. no more than reasonable compensation is paid for the investment advice,[44]

2. in a case in which the investment advice is based on a limited range of investment options, which may consist, in whole or in part, of proprietary products, the limitations (including a clearly-stated notice that the same or similar investments may be available at a different cost (greater or lesser) from other sources) must be clearly disclosed to the advice recipient before any transaction based on the investment advice,

3. in a case in which the investment advice may result in variable compensation to the investment adviser (or any affiliate), the receipt of the compensation (including a clearly-stated notice that the same or similar investments may be available at a different cost (greater or lesser) from other sources) must be clearly disclosed to the advice recipient (in accordance with the requirements under the best interest recommendation exemption), and

4. in any case in which a person who, acting in good faith and with reasonable diligence, makes an error or omission in disclosing the required information, the person discloses the correct information to the advice recipient as soon as practicable, but not later than 30 days from the date on which the person knows of the error or omission.

Effective Date

The amendments made by the proposal generally are effective on the 61st day after the date of enactment of the proposal and apply with respect to information provided or recommendations made on or after two years after the date of enactment. However, if, before the 61st day after the date of enactment, a bill or joint resolution is enacted that specifically approves any rules or administrative positions that are promulgated under the Code and ERISA statutory definitions of fiduciary[45] and are not in effect on January 1, 2015, the amendments made by the proposal will not take effect. In addition, the amendments made by the proposal do not apply to any service or transaction rendered, entered into, or for which a person has been compensated before the date on which the amendments generally become effective.

[44] Reasonable compensation for this purpose is determined as under the present-law prohibited transaction exemption for an arrangement with a disqualified person for services necessary for the establishment or operation of a plan if no more than reasonable compensation is paid therefor (sec. 4975(d)(2)).

[45] Sec. 4975(e)(3) and ERISA sec. 3(21).

DOL is prohibited from amending any rules or administrative positions promulgated under the Code and ERISA statutory definitions of fiduciary (including DOL Interpretive Bulletin 96-1 and Advisory Opinion 2005-23A, discussed in Present Law), and no rule or administrative position promulgated by DOL before the date of enactment of the proposal but not effective on January 1, 2015, may become effective unless a bill or joint resolution as described above is enacted not later than 60 days after the date of enactment of the proposal. If the amendments made by the proposal take effect, nothing in the proposal is to be construed to prohibit the issuance of guidance to carry out the amendments so long as the guidance is necessary to implement the amendments. Until the time when regulations or other guidance is issued to carry out the amendments, a plan and a fiduciary will be treated as meeting the requirements of the amendments if the plan or fiduciary, as applicable, makes a good faith effort to comply with the requirements.

B. Estimated Revenue Effect of the Proposal

The proposal is estimated to have a negligible effect on Federal fiscal year budget receipts for the period 2016-2026.