July 28, 2020

Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor

Via Federal eRulemaking Portal: www.regulations.gov

Attn: Application No. D-12011 EBSA-2020-0003

Re. ZRIN 1210-ZA29
Improving Investment Advice for Workers & Retirees

DALBAR appreciates the opportunity to comment on the *Improving Investment Advice for Workers & Retirees* Proposed Regulation ("*Proposed Regulation*").

DALBAR has a 40-year history and is recognized by industry and government as an independent third-party expert in the business of providing evaluations, ratings, and due diligence. DALBAR certifications are recognized as a mark of excellence in the financial community for financial services in general and specifically for retirement plans.

We have carefully analyzed the *Proposed Regulation* with respect to the retrospective review of rollovers. We took the further step to create a process, checklist and report templates that would be needed to comply with the specified *Impartial Conduct Standards*. The result is attached hereto.

Based on our analysis of the *Proposed Regulation* and the process developed to comply, it appears that the cost of the *Retrospective Review* may have been underestimated. Please consider the following references from the *Proposed Regulation* and our comments.

> *Under the proposal, Financial Institutions would be required to conduct a retrospective review, at least annually, that is reasonably designed to assist the Financial Institution in detecting and preventing violations of, and achieving compliance with, the Impartial Conduct Standards and the policies and procedures governing compliance with the exemption. The Department envisions that the review would involve testing a sample of transactions to determine compliance.*
>
> > Comment: Sampling is not an appropriate methodology since the mix would typically include a large number of small transactions and few large ones. The concentration of non-compliance is likely in the large transactions.
>
> *The methodology and results of the retrospective review would be reduced to a written report that is provided to the Financial Institution's chief executive officer (or equivalent officer).*
>
> > Comment: The review of the written report may be simple, but such a report requires new time-consuming practices for every *Investment Professional* and extensive new procedures and documentation for the *Financial Institution*. It should be noted that at the present time, *Impartial Conduct Standards* are rarely in practice for rollover recommendations.

Based on these regulatory baselines, the Department believes the compliance costs attributable to this requirement would be modest.

> Comment: The "*regulatory baselines*" referenced here do not currently exist for rollovers. These practices will have to be developed and will be costly to operate in the absence of technology designed for this.

SEC-registered IAs are already subject to Rule 206(4)-7, which requires them to adopt and implement written policies and procedures reasonably designed to ensure compliance with the Advisers Act and rules adopted thereunder and review them annually for adequacy and the effectiveness of their implementation. Under the same rule, SEC-registered IAs must designate a chief compliance officer to administer the policies and procedures. However, they are not required to conduct an internal audit nor produce a report detailing findings from its audit. Nonetheless, many seem to voluntarily produce reports after conducting internal audits. One compliance testing survey reveals that about 92 percent of SEC-registered IAs voluntarily provide an annual compliance program review report to senior management. Relying on this information, the Department estimates that only 8 percent of SEC-registered IAs advising retirement plans would incur costs associated with producing a retrospective review report.

> Comment: Neither the Adviser's Act nor SEC regulations extend to rollover recommendations, which must consider very different factors than the investment decisions contemplated by securities laws. It will therefore be necessary to develop and implement separate new rules. The survey referenced does not mention rollovers so the 8% estimate is not relevant.

In sum, the Department estimates that the costs associated with the retrospective review requirement of the proposed exemption would be approximately $1.7 million each year.

> Comment: This sum is grossly understated and should not be relied on.

Thank you for this opportunity.

Regards,

Louis S Harvey

President & CEO

Retrospective Review Checklist & Reports

July 27, 2020

The proposed regulation, *Improving Investment Advice for Workers & Retirees*, carves out rollovers for specialized compliance with *Impartial Conduct Standards*.

The accompanying rollover checklist and sample reports ("*Checklist/Reports*") represent a standard form of compliance with the rollover regulatory requirement[1] ("*Review Regulation*")) and are intended to be used as a point of departure for the required internal reviews. The *Checklist/Reports* are designed to be inclusive of all likely circumstances and are not intended to be used as is. Compliance with the *Review Regulation* requires each *Financial Institution* to also develop procedures for conducting the reviews that answer the applicable checklist questions, act when necessary and to prepare and certify the resulting report.

The *Checklist/Reports* are adapted to a *Financial Institution*'s specific circumstances by removing items that are not applicable and adding unique factors. Each annual review should include a determination if changes warrant adding or removing checklist items.

The rollover *Checklist/Reports* are derived from audit practices that have been in place and continuously updated since the 2006 passage of the Pension Protection Act and include requirements for reasonableness specified in ERISA Section 408(b)(2) regulations. Practices have been examined as part of investigations and have never been found to be wanting.

The portions of practices that have direct bearing on *Impartial Conduct Standards* as they apply to rollovers were extracted and reflect the most thorough retrospective review available.

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[1] V(c) *Policies and Procedures*.
(3) The Financial Institution documents the specific reasons that any recommendation to roll over assets from a Plan to another Plan or IRA as defined in Code section 4975(e)(1)(B) or (C), from an IRA as defined in Code section 4975(e)(1)(B) or (C) to a Plan, from an IRA to another IRA, or from one type of account to another (e.g., from a commission-based account to a fee-based account) is in the Best Interest of the Retirement Investor.
V(d) *Retrospective Review*.
(1) The Financial Institution conducts a retrospective review, at least annually, that is reasonably designed to assist the Financial Institution in detecting and preventing violations of, and achieving compliance with, the Impartial Conduct Standards and the policies and procedures governing compliance with the exemption.
(2) The methodology and results of the retrospective review are reduced to a written report that is provided to the Financial Institution's chief executive officer (or equivalent officer) and chief compliance officer (or equivalent officer).
(3) The Financial Institution's chief executive officer (or equivalent officer) certifies, annually, that:
(A) The officer has reviewed the report of the retrospective review;
(B) The Financial Institution has in place policies and procedures prudently designed to achieve compliance with the conditions of this exemption; and
(C) The Financial Institution has in place a prudent process to modify such policies and procedures as business, regulatory and legislative changes and events dictate, and to test the effectiveness of such policies and procedures on a periodic basis, the timing and extent of which is reasonably designed to ensure continuing compliance with the conditions of this exemption.
(4) The review, report and certification are completed no later than six months following the end of the period covered by the review.
(5) The Financial Institution retains the report, certification, and supporting data for a period of six years and makes the report, certification, and supporting data available to the Department, within 10 business days of request.

Procedures

The rollover recommendation is informed by the optimum balance of:

- *Retirement Investor*'s personal priorities, needs and preferences
- Available solutions, risks, and costs
- Compromises when there is no clear choice

The goal of the retrospective review is to assess the compliance and effectiveness of practices in use.

Rollover Process

The rollover recommendation may be produced by either a human or automated process. The first step is to assemble all the relevant factors that are to be evaluated to set priorities.

The standard relevant factors are listed in the Checklist section. These factors include those applicable to Impartial Conduct Standards, namely:

- A best interest standard
- A reasonable compensation standard
- A requirement to make no misleading statements about investment transactions and other relevant matters.

The Checklist consists of five major categories:

1. Account Management
2. Investment Management
3. Fees & Expenses
4. Retirement Features
5. Other Needs/Preferences

The second step is to identify available alternatives for the *Retirement Investor* and score each alternative based on the previously set priorities. This will lead to either a single rollover recommendation, multiple recommendations in the case of tied scores or no recommendation at all.

Retirement Investor Priorities

The *Retirement Investor* is presented with the relevant factors (See *Best Interest Factors* in *Standard Impartial Conduct Standards Checklist*). *Retirement Investor* is asked to rank them as to the personal importance of each. The factors consist of personal goals, concerns, and preferences. Ranks may be in categories such as Essential, Important, Unimportant, Undesirable, Exclusionary, or Unknown.

Partial Example of Retirement Investor Ranking of Factors

Account Management	
Essential	Service and support that makes it easy for me to use
Important	Phone servicing capabilities
Important	Website to access account
Unimportant	Mobile app to access account
Important	Concern about tax considerations regarding Roth accounts
Unknown	Ability to make changes in the future
Exclusionary	Other features in the current plan that you want in the recommended alternative

Screening for Reasonable Alternatives

The *Financial Institution* determines what the applicable alternatives are. Applicable alternatives are typically Remaining in existing plan, Rollover into another plan, One or more IRA rollover choices, or Roth rollovers.

Applicable alternatives are limited to those that meet the standard for *Reasonableness of Compensation*. The standard specifically covers compensation received as a result of investment advice to roll over assets from a Plan to an IRA. *Reasonableness of Compensation* will depend on the particular facts and circumstances at the time of the recommendation. No single factor is dispositive in determining whether compensation is reasonable; the essential question is whether the charges are reasonable in relation to what the *Retirement Investor* receives. Such a determination requires an estimate of compensation (See *Reasonableness Factors* in *Standard Impartial Conduct Standards Checklist*)

Partial Example of Financial Institution Determination of Reasonableness of Compensation

	Previous Employer Plan	**Current Employer Plan**	**IRA Option 1**	**IRA Option 2**	**IRA Option 3**	**IRA Option 4**
Services and quality thereof	20%	10%	20%	10%	20%	10%
Investment Professional skill level	50%	50%	50%	50%	50%	50%
Profit	50%	50%	50%	50%	50%	50%
Economies of Scale	-20%	-10%	-5%	-5%	-5%	-5%
Benefits to *Retirement Investor*	20%	20%	40%	20%	10%	10%
Net Adjustment to Cost	120%	120%	155%	125%	125%	115%

	Previous Employer Plan	Current Employer Plan	IRA Option 1	IRA Option 2	IRA Option 3	IRA Option 4
Unadjusted Cost*	$1,450	$2,000	$3,500	$3,500	$3,500	$3,500
Cost Adjustment	$1,740	$2,400	$5,425	$4,375	$4,375	$4,025
Maximum Reasonable Compensation	$3,190	$4,400	$8,925	$7,875	$7,875	$7,525
PV of Estimated Compensation allocated to rollover	$2,200	$0	$7,800	$6,500	$8,500	$9,000
Compensation is Reasonable	☑	☑	☑	☑	☒	☒

* See *Cost Factors* in *Standard Impartial Conduct Standards Checklist*.

Selection of Alternatives

The availability and quality of each factor is then determined for each applicable alternative. A quality of Excellent, Good, Fair, Poor, or Unknown can be assigned to each factor.

Partial Example of Financial Institution Determination of Available Alternatives

Account Management	**Previous Employer Plan**	**Current Employer Plan**	**IRA Option 1**	**IRA Option 2**
Service and support that makes it easy for me to use	Excellent	Poor	Good	Excellent
Phone servicing capabilities	Good	Fair	Poor	Good
Website to access account	Excellent	N/A	Excellent	Good
Mobile app to access account	N/A	N/A	Excellent	Good
Concern about tax considerations regarding Roth accounts	N/A	Good	Excellent	Good
Ability to make changes in the future	Excellent	Good	Poor	Excellent
Other features in the current plan that you want in the recommended alternative	Excellent	Poor	Good	Unknown

Scoring of Alternatives

Each alternative is scored based on the *Retirement Investor*'s assigned rank in comparison to its availability and quality.

This comparison can yield a clear preference for one alternative, in which case this alternative is recommended. There may also be no clear winner, in which case, more than one alternative is recommended to the *Retirement Investor*, accompanied by the strengths and weaknesses of each.

The answers previously provided by the *Retirement Investor* and *Financial Institution* are translated into numeric values to facilitate the comparison.

Partial Example of Scoring of Alternatives

Account Management	**Importance to Retirement Investor**	**Previous Employer Plan**	**Current Employer Plan**	**IRA Option 1**	**IRA Option 2**
Service and support that makes it easy for me to use	Essential 4	Excellent 4*4=16	Poor 4*1=4	Good 4*3=12	Excellent 4*4=16
Phone servicing capabilities	Important 3	Good 3*3=9	Fair 3*2=6	Poor 3*1=3	Good 3*2=6
Website to access account	Important 3	Excellent 3*4=12	N/A 0	Excellent 3*4=12	Good 3*3=9
Mobile app to access account	Unimportant 2	N/A 0	N/A 0	Excellent 2*4=8	Good 2*2=4
Concern about tax considerations regarding Roth accounts	Important 3	N/A 0	Good 3*2=6	Excellent 3*4=12	Good 3*2=6
Ability to make changes in the future	Unknown ?	Excellent 0	Good 0	Poor 0	Excellent 0
Other features in the current plan that you want in the recommended alternative	Exclusionary 99	Excellent 99+4=103	Poor 99+2=101	Good 99+3=102	Unknown 0
Overall Account Management Score		128	117	**149**	41

Recommendations

The results of the scoring are used to determine which of the available alternatives are in the *Retirement Investor*'s best interest. While a numerical score, such as the one shown in the example above is the most definitive method, it may not be optimal and need not be exclusive. This is particularly important when other non-standard factors are introduced. These include the physical or mental health of the *Retirement Investor*, abbreviated life expectancy, predisposition for or against a specific alternative, conflicting recommendations, etc. In these cases, the scoring can be used as a point of departure when considering other factors.

A record of the factors, comparisons, recommendations and strengths and weaknesses are retained for the retrospective review.

Annual Review Process

The goal of the annual retrospective review is to establish whether the *Financial Institution*'s rollover practices are in compliance with *Impartial Conduct Standards*. This section describes how each of the three components (Best Interest, Reasonable Compensation, Absence of False/Misleading Statements) are evaluated. The descriptions assume that practices are similar to the ones described in earlier sections.

Assessment of Best Interest

Adherence to practices similar to ones described earlier relies on the method of enforcement that should be reviewed.

Annual results are then examined in a number of ways to determine if anomalies exist. The sample report, *Retrospective Summary*, is used in this determination. This report presents a year-to-year comparison of the mix of activities. The relation of certain activities also can reveal anomalies. For example, the ratio of recommendations to remain in a plan to rollover recommendations can reveal a bias to recommending remaining in a plan.

Assessment of Reasonable Compensation

Reasonable compensation consists of both direct and indirect and is best determined by comparing annual adjusted rollover costs to compensation allocated to rollovers that has been received or is expected. This data is obtained by summing the results of the reasonableness test of individual cases.

For purposes of reasonableness, lost compensation from out of plan transfers may be used to offset compensation from an IRA.

It is necessary to consider reasonableness on two perspectives:

- *Financial Institution* as a whole
- Each *Investment Professional*

Assessment of False/Misleading Statements

The *Disclosure Factors* provide a framework for meeting the False/Misleading prohibition of the *Impartial Conduct Standards*.

The completeness of disclosures is verified annually against *Disclosure Factors* to ensure that any changes that have occurred are included or excluded as needed. Changes include new issues that arise, issues that are no longer applicable as well as issues that were not previously considered material but have become so.

The accuracy of disclosures requires a judgement to be made that the content is not only correct but also not excessive and not too abbreviated.

The timely delivery of disclosures is assessed from the procedures and controls used to assure effectiveness.

A review of complaints from Retirement Investors is another source for determining if disclosures are adequate.

Standard Impartial Conduct Standards Checklist

Best Interest Factors

Account Management	
	Service and support that makes it easy for me to use
	Phone servicing capabilities
	Website to access account
	Mobile app to access account
	Concern about tax considerations regarding Roth accounts
	Ability to make changes in the future
	Other features in the current plan that you want in the recommended alternative
Investment Management	
	Employer oversight of the plan and its investments
	Ability to select from short pre-determined list of investment choices
	Personalized professional advice
	Ongoing monitoring
	Principal Guarantee
	Significant assets outside of the plan that must be considered
	Are there specific investment risk and return characteristics and guidelines
Fees & Expenses	
	Total costs of the recommendation is lower than the current
	Total costs of the recommendation is within 10% of the current
	Total costs of the recommendation is within 50% of the current
	Total costs of the recommendation is comparable to other alternatives
Retirement Features	
	Lifetime Income
	Income Guarantee
	Concern about tax considerations regarding Required Minimum Distributions
	Frequency of income payments
	Direct deposit of income payments
Other Needs/Preferences	
	Remain in current plan with under $5,000
	Protection from creditors or elder care
	Other needs or preferences

Compensation Factors

Reasonableness Factors

Reasonableness Per Gartenberg Standard	(Suggested Premium %)
Services and quality thereof	
	More than 90% of Best Interest Rollover Factors (20%)
	75% - 90% of Best Interest Rollover Factors (10%)
	Less than 75% of Best Interest Rollover Factors (0%)
	Superior service quality (20%)
	Average service quality (10%)
	Sub-par service quality (0)
***Investment Professional* skill level**	
	Series 6 only (0%)
	Series 7 or above only (5%)
	Insurance only (0%)
	RIA or IAR (10%)
	Two of the above (20%)
	Three of the above (30%)
	Five or more years of experience (20%)
Cost and Profit	
	Estimated cost of developing recommendation (See Cost Factors)
	Target profit margin (Cost + 50%)
Economies of Scale	
	Retirement Investor assets
	Plan assets
	@ $100,000 (0%)
	@ $1 million (-5%)
	@ $10 million (-10%)
	@ $100 million (-20%)
	@ $1 billion (-30%)
	@ $10 billion and above (-40%)
Benefits to *Retirement Investor*	
	Lifetime income guarantee (40%)
	Appreciation potential (10%)
	Capital preservation (10%)

Reasonableness Per DoL Proposal	(Suggested Premium %)
Market price of service(s) provided and/or the underlying asset(s)	
	At or below comparable benchmark (10%)
	At or below competitive bids (15%)
Scope of monitoring	
	Monthly reviews (20%)
	Quarterly reviews (15%)
	Annual reviews (10%)
Complexity of product	
	Mutual fund (0%)
	Managed account (20%)
	Insured product (20%)
	Alternative investment (30%)
Risks associated with the security or strategy	
	Low volatility (20%)
	Moderate volatility (10%)
	High volatility (0%)

Financial Institution Revenue

Immediate Compensation	
	Cash Fees
	Commissions
	Referral Compensation
	Mark-ups, Mark-downs
	Other immediate compensation
PV of Lost Deferred Compensation	
	Potential revenue from existing plan
	Potential revenue from alternative(s)
PV of Deferred Compensation Gained	
	Expected revenue from recommended alternative
	Expected revenue from alternative selected by Retirement Investor
Assumptions	
	Discount rate used for present value calculations (7%)
	Duration of retirement

Investment Professional Income

Immediate Compensation	
	Salary
	Net Commissions
	Net Referral Compensation
	Bonus/Incentive
	Other immediate compensation
PV of Lost Deferred Compensation	
	Potential net income from existing plan
	Potential net income from alternative(s)
PV of Deferred Compensation Gained	
	Expected net income from recommended alternative
	Expected net income from alternative selected by Retirement Investor
Assumptions	
	Discount rate used for present value calculations (7%)
	Duration of retirement

Cost Factors

Direct Labor	
	Salary
	Time spent
	Investment Professional hourly rate ($194.77)
	Legal hourly rate ($138.41)
	Clerical hourly rate ($64.11)
Transaction Cost	
	Execution of asset transfer
	Trading costs
Overhead Costs	
	Expenses
	Facilities
	IT
	Management/Compliance
	Other overhead

Disclosures Factors

Specified Explicitly	
	Use of plain English
	Description of services provided
	Fiduciary Acknowledgement
	Conflicts of Interest
By Inference	
	Procedure to ensure timely delivery of disclosure
	Available alternatives and relationship with all parties connected with each
	Incentives paid to *Investment Professional*

Standard Reports

Best Interest Summary

Best Interest Assessment				
(*Financial Institution* & Period Covered)	This Year	Last Year	Change	% Change
Number of Specific Recommendations:				
Made				
To Remain				
Rollover to (A)				
Rollover to (B)				
Rollover to (C)				
Adopted				
Altered by *Retirement Investor*				
Rationale for Specific Recommendation				
Account Management				
Investment Management				
Fees & Expenses				
Other Needs/Preferences				
Number of Non-Specific Recommendations				
Number of *Investment Professionals* that Made Recommendations				

Investment Professional Highlights

(*Financial Institution* & Period Covered)	$ Volume	Number of Specific Recommendations	% to Remain	% to Rollover	Number of Non-Specific
Top 10 -$ Volume					
…					
Top 10 -Specific					
…					
Top 10 -Remain					
…					
Top 10 -Rollover					
…					
Top 10 -Non-Specific					
…					
Top 5% of Investment Professionals by rollover dollar volume					
Bottom 95% of Investment Professionals by rollover dollar volume					