

BEST INTEREST CONTRACT EXEMPTION (BICE) CHECKLIST OF POPULAR PROVISIONS AND PROTECTIONS

October 16, 2016

Introduction

The Best Interest Contract Exemption from the DoL Fiduciary Rule requires that certain provisions be included and that others may not. The requirements depend on particular circumstances. In addition to the BICE requirements and prohibitions, other related provisions may be included for the protection of the parties involved.

This Checklist contains a summary of these requirements, prohibitions and protections as they are being interpreted and implemented. The Checklist does not represent a legal opinion but presents a compendium of the best practices.

The Checklist does not specify the circumstance when each provision or protection applies, but expects the user to make that determination. Please refer to the briefing paper [The Work Behind BICE Paperwork](#) for details on applicability to various circumstances.

Using the Checklist

The **Status** is intended to record the following conditions and may include a date and initials:

- Done
- WIP... Work in progress
- Pend... Pending review
- N/A... Not applicable

The **Provision** shows the BICE reference and section title for ease of access.

The **Test** specifies the requirement that must be met under applicable circumstances.

The **Protection** contains the best practices for meeting the provision when this is available.



Checklist

Status	Provision	Test	Protection
	II(a) Contract and Assent for IRA and Other Plans Not Covered by ERISA	Is there an enforceable written contract on the part of the Financial Institution?	Develop and use separate and discrete contract for BICE and do not amend existing agreements to avoid likely conflicting terms..
		Does the contract cover advice rendered prior to the execution of the contract?	
	II(b) Fiduciary Declaration	Is there an affirmative statement made regarding fiduciary status?	Ensure that fiduciary statement is not contradicted elsewhere.
	II(c)(1) Best Interest	Does contract specify that adviser/firm will act in client's best interest, without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party?	Describe steps taken to discover what is in the retirement investor's best interest and how these are applied to each recommendation.
			Describe all the factors considered in selecting the investment or product that is recommended.
	II(c)(2) Reasonable Compensation	Does the contract specify that no recommended transaction will cause(d) the Financial Institution, Adviser or their Affiliates or Related Entities to receive, directly or indirectly, compensation for their services that is in excess of reasonable compensation?	Define standard by which reasonableness is determined. Gartenberg is the accepted standard (See 2011 Supreme Court decision in Jones v. Harris Associates)
			Describe the process for making the determination. See briefing paper Assessing Compensation Reasonableness .



Status	Provision	Test	Protection
	II(c)(3) Misleading Statements	Does the contract specify that no statements by the Financial Institution and its Advisers to the Retirement Investor about the recommended transaction, fees and compensation, Material Conflicts of Interest, and any other matters relevant to a Retirement Investor's investment decisions, were or will be materially misleading at the time they are or were made?	Examine collateral material and digital media for potential misleading statements, ensuring that the services provided are well defined and those that are not provided but may be assumed are specifically excluded.
	II(d) Warranties	Does the contract state that the Financial Institution has adopted and is in compliance with written policies and procedures reasonably and prudently designed to ensure that its Advisers adhere to the Impartial Conduct Standards set forth in Section II(c)?	Describe method used to comply with Section II(c).
		Does the contract state that the Financial Institution has specifically identified and documented its Material Conflicts of Interest; adopted measures reasonably and prudently designed to prevent Material Conflicts of Interest from causing violations of the Impartial Conduct Standards set forth in Section II(c); and designated a person or persons, identified by name, title or function, responsible for addressing Material Conflicts of Interest and monitoring their Advisers' adherence to the Impartial Conduct Standards?	Examine all arrangements (written or verbal) with product providers and obtain a written statement that none of these arrangements will be considered in any recommendations made to Retirement Investors.
	II(d) Warranties ...continued	Does the contract state that the Financial Institution or (to the best of its knowledge) any Affiliate or Related Entity does not use or rely upon quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation or other actions or incentives that are intended or would reasonably be expected to cause Advisers to make recommendations that are not in	Place all such payments received into a blind pool and make payments from the pool on the basis of neutral factors such as total level of production, the quality of services or number or type of clients serviced.



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		the Best Interest of the Retirement Investor, excluding differential compensation based on neutral factors?	
	II(e) Disclosures	Have the required disclosures been included with the contract?	Ensure that disclosures are accurate and up to date.
	II(f) Ineligible Contractual Provisions	Does contract contain exculpatory provisions disclaiming or otherwise limiting liability of the Adviser or Financial Institution for a violation of the contract's terms?	Examine and amend existing contracts that include Retirement Investors.
		Does contract contain a provision under which the 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, or in an individual or class claim agrees to an amount representing liquidated damages for breach of the contract?	Examine and amend existing contracts that include Retirement Investors.
		Does contract contain agreements to arbitrate or mediate individual claims in venues that are distant or that otherwise unreasonably limit the ability of the Retirement Investors to assert the claims safeguarded by this exemption?	Examine and amend existing contracts that include Retirement Investors.
	II(g) Contract and Assent for ERISA Plans	Prior to or at the same time as the execution of the recommended transaction, will the Financial Institution provide the Retirement Investor with a written statement of the Financial Institution's and its Advisers' fiduciary status, in accordance with Section II(b)?	
		Will the Financial Institution and the Adviser operate in compliance with the Impartial Conduct Standards of	



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		Section II(c)?	
		Has the Financial Institution adopted policies and procedures incorporating the requirements and prohibitions set forth in Section II(d)(1)-(3), and is the Financial Institution and Adviser in compliance with those requirements and prohibitions?	
		Will the Financial Institution provide the disclosures required by Section II(e)?	
		Has the Financial Institution and Adviser in any contract, instrument, or communication: purported to disclaim any responsibility or liability for any responsibility, obligation, or duty under Title I of ERISA to the extent the disclaimer would be prohibited by ERISA section 410; purported to waive or qualified the right of the Retirement Investor to bring or participate in a class action or other representative action in court in a dispute with the Adviser or Financial Institution, or required arbitration or mediation of individual claims in locations that are distant or that otherwise unreasonably limit the ability of the Retirement Investors to assert the claims safeguarded by this exemption?	
	II(h) Exclusions for Level Fee Fiduciaries	In the case of a recommendation to roll over from an ERISA Plan to an IRA, will the Financial Institution document the specific reason or reasons why the recommendation was considered to be in the Best Interest of the Retirement Investor?	This documentation must include consideration of the Retirement Investor's alternatives to a rollover, including leaving the money in his or her current employer's Plan, if permitted, and must take into account the fees and expenses associated with both the Plan and the IRA; whether the



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			employer pays for some or all of the plan's administrative expenses; and the different levels of services and investments available under each option.
		In the case of a recommendation to rollover from another IRA or to switch from a commission-based account to a level fee arrangement, will the Level Fee Fiduciary document the reasons that the arrangement is considered to be in the Best Interest of the Retirement Investor, including, specifically, the services that will be provided for the fee?	
	IV Proprietary Products and Third Party Payments	Does the Financial Institution, at the time of the transaction restrict Advisers' investment recommendations, in whole or part, to Proprietary Products or to investments that generate Third Party Payments, rely on this exemption subject to all the applicable conditions of the exemption.	Meet the requirements of Section IV(a).