IncomeConductor® Due Diligence Report

Compliance with the DOL
Fiduciary Regulation

Written By:
Jason C. Roberts & Steven Sokolic

Complimentary Guide

www.IncomeConductor.com

INCOMECONDUCTOR

About WealthConductor LLC

WealthConductor LLC ("WC") was founded in 2017 by advisors experienced in the retirement marketplace. We understand the challenges financial professionals face and what they need to succeed. WC's revolutionary retirement income platform, IncomeConductor®, provides a complete suite of support to financial advisors who want to re-define their value proposition as retirement income professionals and provide a time-tested income distribution strategy to their clients that is completely customized to their individual needs and goals. We partner with our IncomeConductor® community of advisors to continuously enhance our technology and supporting program to help them succeed in the income distribution market.

The IncomeConductor® program is the next generation of retirement income planning and provides the advisor with training, case consultation, sales & marketing support, and a revolutionary technology platform. The program is built around a time-segmented strategy in which a clients' retirement assets are allocated to different segments that can be closely aligned with a specific set of current and future income goals, allowing the advisor to implement using a variety of products and investments that best suit the clients' needs. IncomeConductor provides administrative support for the full retirement income planning process, allowing the advisor to create customized client plans, track the plan via an open architecture data aggregator, manage the plan incorporating point-in-time modifications, and generate compliant client reports along the way. IncomeConductor® also provides a unique firm- and home office-level compliance access that supports supervision of client plans.

For more information about the IncomeConductor® program, please visit www.IncomeConductor.com or call 860-969-3672.

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About the Authors:

This report was developed in consultation with **Jason C. Roberts** and **Steven Sokolic** of Retirement Law Group and is designed to serve as a foundation from which financial institutions may conduct appropriate, additional due diligence based upon their particular products, services and risks.

Jason C. Roberts is the founder and CEO of the Pension Resource Institute (PRI), specializing in delivering strategic consulting, training and technology-based solutions to retirement plan sponsors, service providers and investment companies. Integrating securities and ERISA compliance, PRI's RetirementAdvantage provides broker-dealers and investment advisors a turnkey platform designed to manage risk, enhance value and increase profitability.

Jason is also a founder and shareholder of Retirement Law Group (RLG), a law firm specializing in ERISA- and investment-related matters.

Prior to founding PRI and RLG, he was a partner and co-chair of the Financial Services Group at a leading ERISA law firm and the head of the Investment Fiduciary practice for a prominent securities industry legal defense firm.

Jason has published numerous articles focusing on ERISA, securities compliance and fiduciary best practices and is a frequent speaker at retirement plan and financial industry conferences. He is also a contributing author and faculty member for the Practicing Law Institute. Jason has been repeatedly recognized as one of the "100 Most Influential in Defined Contribution" by the 401(k) Wire and a "Rising Star" by SuperLawyers Magazine. In 2015, he was selected by InvestmentNews as one of the "Top 40 Advisors and Associated Professionals under 40" in the financial planning industry.

Jason received his B.S.B.A. in Finance & Banking from the University of Missouri and his J.D. from UCLA Law School.

Steve Sokolic is of counsel to RLG. He has been practicing law for over 30 years. After graduating from George Washington University Law School with High Honors, Steve began his legal career with the United States Department of Justice, Tax Division, in Washington, D.C. He returned to his hometown of Philadelphia, Pennsylvania, and continued his government service in the Office of the District Counsel, Internal Revenue Service. During this time, Steve earned a Master of Laws (in Taxation) degree from Georgetown University.

After completing government service, Steve entered the private practice of law. He has represented both privately-held family businesses and public companies. His experience in employee benefits includes executive compensation planning and all types of tax-advantaged compensation and fringe benefit plans. At RLG, Steve represents clients undergoing Internal Revenue Service audits and Department of Labor investigations and those needing to correct retirement plan mistakes and violations prior to the commencement of an audit. Steve also advises broker-dealers, investment advisors, record-keepers and TPAs on all aspects of ERISA law.

I. Introduction

Sweeping reforms have changed the regulatory landscape for retirement plans and their service providers. Indeed, the Department of Labor (DOL) has issued more regulations in the past ten years than it had since the Employee Retirement Income Security Act ("ERISA") was signed into law in 1974. Enforcement has also increased significantly in the past few years – particularly aimed at broker-dealers and RIAs. In addition, recently-released regulations ("Fiduciary Regulations") defining fiduciary investment advice substantially broadened the communications that are considered fiduciary advice and extended the new definition to individual retirement accounts and their owners ("IRAs").

Under the new Fiduciary Regulations, even a one-time recommendation to a plan sponsor, participant or IRA (collectively, "Retirement Investors") could be considered fiduciary investment advice. Recommendations concerning distributions from employer-sponsored retirement plans and IRAs will also be considered fiduciary acts and must be made prudently and in the best interest of the Retirement Investor.

One of the more challenging proclamations set forth in the final rule, which was not discussed in the proposal, relates to recommendations concerning the "selection of investment account arrangements." The preamble to the Final Rule specifically provides that "a recommendation to transition from a commissionable account to a fee-based account would constitute a recommendation on the management of assets covered by the rule, and compensation received as a result of that recommendation could be a prohibited transaction for which an exemption would be required."[i]

Consequently, many supervising firms are reevaluating the way their registered and/or investment advisory representatives interact with ERISA-covered clients and IRA owners – particularly with respect to how and to what degree advisors communicate investment-related information to such clients. In today's regulatory environment, it is critical to define the advisor's status as a fiduciary or non-fiduciary and to ensure the firm has policies and procedures that maintain such status. In addition, the Fiduciary Regulations assure that more advisor communications will be considered fiduciary recommendations and could lead to increased prohibited transaction ("PT") exposure under ERISA Section 406(b) and/or the Internal Revenue Code ("Code") Section 4975.

Today, defined contribution plans (specifically the 401(k) plan) and individual retirement accounts are the predominant retirement savings vehicles in the United States. These plans are primarily retirement asset accumulation vehicles. As a result, IRA rollovers and retirement income or "decumulation" strategies have assumed much greater importance to increase the likelihood that clients will have sufficient funds to support them through retirement.

It would, however, result in a PT if the advisor, Financial Institution or any Affiliate stands to receive additional compensation as a result of a recommendation to roll over a plan account into an IRA.[ii] Under these circumstances, the recommendation must be made in accordance with the requirements of the Best Interest Contract Exemption ("BICE").

At a minimum, the BICE requires the Financial Institution to: i) acknowledge its fiduciary status in writing; ii) comply with the Impartial Conduct Standards ("ICS"); and iii) document the reasons why the recommendation was considered to be in the best interest of the Retirement Investor.[iii]

The ICS require that "Advisers and Financial Institutions provide investment advice in the Retirement Investor's Best Interest, not recommend transactions that they anticipate will result in more than reasonable compensation, and not make misleading statements to the Retirement Investor about recommended transactions."[iv] A Financial Institution and advisor will act in the Best Interest of a Retirement Investor when they provide investment advice "that reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, 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."[v]

In cases where the advisor, Financial Institution or an Affiliate stands to receive variable or third-party payments in connection with advice or recommendations made to a non-ERISA plan or IRA client, additional disclosures, reporting and contractual warranties are required to comply with the BICE. These warranties are expected to provide the basis for a breach of contract claim – the regulation's primary enforcement mechanism. Because the BICE prohibits Financial Institutions from limiting the Retirement Investor's ability to participate in class action litigation, many firms are concerned about the risk that plaintiffs may allege that they have common claims that are typical of a class of similarly situated investors and, thus, seek to pursue their claims as part of a class.

This Due Diligence Report describes how the combination of these rules creates risk for supervising firms and describes how a particular retirement plan resource, IncomeConductor®, facilitates compliance through enhanced information-gathering and planning and streamlines supervision by incorporating unique reporting capabilities while preserving the flexibility to reflect varying client preferences.

II. Executive Summary

The Fiduciary Regulations define who is an investment advice fiduciary for purposes of ERISA and the Code's excise taxes applicable to most retirement plans and Individual Retirement Accounts.[vi] The Fiduciary Regulations significantly broaden the type of communications that may be considered recommendations and the categories of recommendations that may be considered fiduciary investment advice. Most importantly, recommendations regarding the management of investments and whether to take a rollover or distribution from a plan or IRA will now be considered fiduciary advice.

IncomeConductor® assists the advisor and Financial Institution with demonstrating compliance with the BICE and ICS set forth in the Fiduciary Regulations in, among others, the following respects:

- Detailed information gathering provides the foundation for the required "prudent process" and alignment of the recommendations with the best interest of the Retirement Investor (e.g., by objectively capturing the "investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor");
- Notes retained can be used to document the basis for the recommendations made with respect to each time horizon or segment of the plan;
- Account aggregation features allow the advisor to incorporate outside investments and savings;
- Investments that pay variable or third-party compensation can be isolated or "quarantined" such that they can retain their status as "Pre-Existing Transactions" and not subject to the new requirements;
- Once the plan has been approved by the supervisor and/or Retirement Investor, the receipt of variable compensation from segment-to-segment will be the result of the implementation of the plan and, therefore, made pursuant to a prudent process;
- When the full BICE requires the firm to include warranties in its written agreement with the Retirement Investor, the uniqueness of each plan will help mitigate the risk of class certification based upon the commonality or typicality among similarly situated plaintiffs; and
- The value of comprehensive retirement income planning itself will help support the reasonableness of the total compensation received by the advisor and Financial Institution.

III. Fiduciary Legal & Regulatory Risks

A. STANDARD OF CARE

1. Broker-Dealers versus Registered Investment Advisers

Currently, Broker-Dealers and their registered representatives are governed by a suitability standard; they must have reasonable grounds for believing that the recommendation to buy or sell a security is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his/her other security holdings and as to his/her financial situation and needs. RIAs and their investment adviser representatives, on the other hand, are subject to a fiduciary standard with respect to their clients. The fiduciary standard consists of a duty of loyalty and care and requires advisor representatives to put their clients' interests above their own. The advisor must act in the best interest of his/her client or disclose when it is not doing so. The advisor must do his/her best to make sure investment advice is made using accurate and complete information. Acting as a fiduciary requires avoiding conflicts of interest and disclosing any potential conflicts to placing the client's interests first.

2. ERISA Investment Fiduciaries

ERISA Fiduciary-Covered Investment Advice to a Retirement Plan participant or IRA owner is subject to the ERISA Fiduciary Standard. ERISA-covered investment advice is advice given for compensation and is:

1. A recommendation as to the advisability of acquiring, holding, disposing of, or exchanging securities or other investment property, or a recommendation as to how securities or other investment property should be invested after the securities or other investment property is rolled over, transferred, or distributed from the plan or IRA; or

2. A recommendation as to the management of securities or other investment property, including, among other things, recommendations on investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, selection of investment account arrangements (e.g., brokerage versus advisory) or recommendations with respect to rollovers, transfers, or distributions from a plan or IRA, including whether, in what amount, in what form, and to what destination such a rollover, transfer, or distribution should be made.

Among other requirements, ERISA investment fiduciaries are required to act prudently. Prudent advice is advice that reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

An advisor may satisfy the prudence requirement in rendering advice by giving "appropriate consideration" to the facts and circumstances that, given the scope of his/her duties, he/she knows or should know are relevant to the particular investment or investment course of action involved, including the role the advice plays in the plan's (or IRA's) investment portfolio. The advisor gives "appropriate consideration" in formulating a particular recommendation by determining that the particular investment is reasonably designed, as part of the portfolio, to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain and such factors as:

- the composition of the portfolio with regard to diversification;
- the liquidity of the portfolio; and
- the projected return of the portfolio.

The duty of prudence is an objective standard that requires advisors to investigate and evaluate investments, make recommendations, and exercise sound judgment in the same way that knowledgeable and impartial professionals would.

ERISA fiduciaries are held to the highest standard of care under the law; in addition to the duty of prudence, fiduciaries owe their clients a duty of undivided loyalty and must act for the exclusive benefit of their clients.

B. PROHIBITED TRANSACTIONS & NEW EXEMPTIONS

Consistent with the duties of loyalty and exclusive benefit, fiduciaries are prohibited from engaging in certain transactions regardless of their motive or the outcome. For example, an advisor may not recommend an investment that would generate additional compensation for the advisor or his/her affiliates or receive compensation from third-parties in connection with transactions involving the ERISA plan or IRA assets.[vii]

These rigid prohibitions create a number of challenges for broker-dealers that rely upon third-party payments (e.g., commissions, 12b-1 fees, etc.) or even for fee-based investment advisors to the extent they can affect their compensation by recommending IRA rollovers, investment strategies[viii] or investment account types. Penalties for breach of fiduciary duty or engaging in a prohibited transaction are significant and include, among other remedies, personal liability to restore losses to the plan, excise taxes, disgorgement, etc.

1. Best Interest Contract Exemption (“BICE”)

The BICE is the Prohibited Transaction Exemption (“PTE”) that will be necessary to continue to serve the needs of Retirement Investors in cases where the advisor’s recommendations could lead to additional or third-party compensation received by the advisor, his/her supervising firm, any affiliates and/or related entities. Provided that the conditions of the exemption are satisfied, the BICE provides relief for the receipt of 12b-1 fees, revenue sharing payments, marketing payments, marketing fees, administrative fees, sub-TA fees, sub-accounting fees, and other third-party payments from investment providers received in connection with fiduciary advice or recommendations delivered to Retirement Investors.[ix]

As discussed above, one of the foundational conditions of the BICE requires the advisor and Financial Institution to adopt and abide by “Impartial Conduct Standards.” This means the advisor and the firm must:

- Give prudent advice that is based on the investment objectives, risk tolerance, financial circumstances, and needs of the client without regard to financial or other interests of the advisor, his/her firm, or other related parties;
- Charge no more than reasonable compensation; and
- Make no misleading statements about investment transactions, compensation, and conflicts of interest.

a. Level Fee Fiduciary BICE

If the only fee or compensation received by the advisor, Financial Institution and any Affiliate, "in connection with the advisory or investment management services is a 'Level Fee' that is disclosed in advance to the Retirement Investor," then a streamlined version of the BICE can be relied upon for recommendations relating to: i) distributions from retirement plans or IRAs; or ii) migrating from a brokerage to an advisory account.[x] A Level Fee is defined in the exemption as a fee or compensation that is provided on the basis of a fixed percentage of the value of the assets or a set fee that does not vary with the particular investment recommended, rather than a commission or other transaction-based fee.

It is important to note that the definition of Level Fee explicitly excludes receipt by the advisor, Financial Institution or any Affiliate of commissions or other transaction-based payments. Accordingly, "if either the Financial Institution or the Adviser or their Affiliates receive any other remunerations (e.g., commissions, 12b-1 fees or revenue sharing) beyond the Level Fee in connection with investment management or advisory services with respect to the plan or IRA, the Financial Institution and Adviser will not be able to rely on these streamlined conditions…"[xi]

This streamlined Level Fee Fiduciary BICE does not require the advisor or the Financial Institution to comply with the more onerous requirements (e.g., written agreements, warranties, disclosures, notices and recordkeeping) of the BICE. It does require, however, the advisor to, among other things, document the basis for his/her recommendation as being in the Retirement Investor's best interest when recommending an IRA rollover.

b. BICE Requirements Generally

If the advisor or Financial Institution is ineligible for the streamlined Level Fee Fiduciary BICE, then the full conditions of the BICE must be satisfied, including among other things:

- **Acknowledgment of Fiduciary Status –** must be disclosed in writing, prior to or at the time of execution of the recommended transaction, to ERISA plans and participants and included in the written agreement for non-ERISA plans and IRAs.

- **Impartial Conduct Standards ("ICS") –** the Financial Institution must affirmatively state that it and its advisors will adhere to, and must, in fact, comply with, the Impartial Conduct Standards described above and will incorporate into the written agreement for non-ERISA plans and IRAs.

- **Anti-Conflict Polices & Procedures –** the Financial Institution must adopt and comply with written policies and procedures reasonably and prudently designed to ensure that its advisors adhere to the ICS and to prevent material conflicts of interest from causing violations of the ICS (e.g., conflicts relating to incentives, quotas, bonuses, etc.) and that such policies must be incorporated into warranties in the agreement with a non-ERISA plan or IRA.

- **Pre-Transaction Disclosures –** Prior to or simultaneous with the execution of the recommended transaction, the Financial Institution must disclose: i) the best interest standard owed to the Retirement Investor; ii) any material conflicts of interest; iii) the right to obtain copies of the Financial Institution's written description of its Anti-Conflict

Policies and Procedures; iv) all costs, fees and compensation; and v) a link to the Financial Institution's website with the required disclosures.

- **Web Disclosures –** The Financial Institution must maintain a public website, updated at least quarterly, with the following information: i) a discussion of its business model and material conflicts associated with the same; ii) a schedule of typical account or contract fees and service charges; iii) a model contract (for non-ERISA plans and IRAs) and required acknowledgment of fiduciary status; iv) a written description of the Anti-Conflict Policies and Procedures; v) a list of all parties from which the Financial Institution will receive third-party payments in connection with investments recommended to Retirement Investors (including a statement relating to how such arrangements impact compensation paid to the advisor as well as any benefits the Financial Institution provides to the product providers in exchange for such payments); and vi) a description of the Financial Institution's compensation arrangements with advisors (including any cash or non-cash incentives for recommending any particular products or investments as well as retention or recruitment payments or incentive programs) and a payout or compensation grid.

c. Written Agreement for Non-ERISA Plans & IRAs

One of the most concerning aspects of the BICE relates to the requirement to enter into written agreements with non-ERISA plans and IRA clients, which include specific disclosures and warranties that could lead to class action litigation based upon breach of contract claims. Among other requirements, the agreement must be binding on the Financial Institution, acknowledge fiduciary status and warrant that it will comply with the above-referenced requirements of the BICE.

While individual claims may still be resolved through arbitration, the BICE specifically provides that the Financial Institution may not limit the Retirement Investor's ability to participate in class action litigation or require that arbitration be held in a distant venue or otherwise unreasonably limit the ability to assert claims under the exemption.

2. Pre-Existing Transaction Exemption

The Pre-Existing Transaction Exemption ("PET") permits continued receipt of compensation based on investment transactions that occurred prior to the Applicability Date (currently, April 10, 2017) as well as receipt of compensation for recommendations to continue to adhere to a previously-established systematic purchase program. The PET exemption also explicitly covers compensation received as a result of a recommendation to hold an investment that was entered into prior to the Applicability Date.

There are a couple of specific applications for the PET exemption: i) to cover situations whereby the advisor or Financial Institution would not have been considered a fiduciary at the time the arrangement was entered into with the Retirement Investor; and/or ii) where the arrangement was entered into in reliance upon an existing prohibited transaction exemption that will be amended by the Fiduciary Regulations (e.g., 84-24 and 86-128).

Provided the following conditions are met, the PET exemption will provide relief from prohibited transactions under ERISA and the sanctions imposed by the Code:[xii]

1. The otherwise prohibited compensation must be received pursuant to an "agreement, arrangement or understanding that was entered into prior to the Applicability Date and that has not expired or come up for renewal post-Applicability Date";
2. The purchase, exchange, holding or sale of the securities or other investment property must not have been a non-exempt prohibited transaction under ERISA section 406 or Code section 4975 on the date it occurred;

3. The compensation is not received in connection with the investment of additional amounts in the previously acquired investment vehicle (unless, as discussed below, the investment occurs as a result of a recommendation to "exchange investments within a mutual fund family or variable annuity contract pursuant to an exchange privilege or rebalancing program that was established before the Applicability Date and so long as the advisor, Financial Institution, Affiliates or Related Entities do not receive more compensation – either as a fixed dollar amount or a percentage of assets – than they were entitled to receive prior to the Applicability Date)";

4. The compensation received, directly or indirectly, by all of the above-referenced entities does not exceed that which is "reasonable"; and

5. Any advice provided after the Applicability Date must be prudent based upon the "investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor" and "without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity or other party." [xiii]

If the above-referenced conditions are met, the PET exemption will cover the receipt of otherwise prohibited compensation (e.g., 12b-1 fees) in connection with additional investments or contributions only to the extent they are made pursuant to "exchange privileges or rebalancing programs" established prior to the Applicability Date.

According to the DOL, the "primary purpose of the exemption for pre-existing investments is to preserve compensation for services already rendered and to permit orderly transition from past arrangements, not to exempt future advice and investments from the important protections of the [Fiduciary Regulations]."[xiv] Specifically, the DOL provides that the exclusion of investments of additional assets in the previously acquired vehicle from the PET exemption is "intended to preclude, for example, advice on additional contributions to a variable annuity product purchased prior to the Applicability Date, or recommending additional investments in a particular mutual fund or asset pool."[xv] Such additional recommendations would need to be made under the full BICE.

C. PENALTIES FOR NON-COMPLIANCE

Remedies for violating the conditions of the BICE will depend upon the type of Retirement Investor; however, all claims will expose the Financial Institution to excise taxes under Sec. 4975 of the Code. For ERISA plans and participants, federal courts will have exclusive jurisdiction. The Financial Institution and advisor will have the burden of proof to demonstrate that the advice was prudent, in the best interest of the client and made without regard to their own interests and that the required policies and procedures were followed.

For non-ERISA plans and IRAs, where a written agreement is required, the Financial Institution will be exposed to breach of contract claims (e.g., for failing to adhere to the ICS or follow the required policies and procedures) filed in state court.

IV. IncomeConductor® Overview of Features & Reports

IncomeConductor® has four primary components: Plan; Invest; Track; and Replan and Report.

A. PLAN:

The Plan phase involves collecting necessary information relating to: Demographics; General Plan Info; Solve Type; and Income Details and provides the ability to Preview the plan with the inputs and assumptions applied across each of the time horizon segments.

1. Demographics

The advisor begins by collecting detailed demographic information via IncomeConductorTM Confidential Questionnaire.[xvi] Section I captures Personal Data, including employment date, family data, and legal data (i.e., existence of will and trusts) that may impact the income plan. Section II confirms Retirement Goals and Objectives, including the client's preferences relating to legacy and principal preservation, desired monthly income, family obligations, lump sum expenditures and receipts and current financial profile (i.e., taxable and qualified accounts, other sources of income, etc.). Section III relates to the client's Investment Profile and contains questions to determine the client's historical preferences in terms of risk profile, preference of investments, etc. Insurance Information is gathered in Section IV to determine the client's current and desired needs relating to annuities, life insurance and long-term care. Current and future income potential of Real Estate is incorporated in Section V, and an optional, detailed Monthly Income/Expense worksheet is included in Section VI to further refine the client's monthly standard of living expenses and provide a better idea of desired monthly income in retirement.

2. General Plan Information

General Plan Information includes the client's "Plan Start Date" upon which the plan will start generating income to the client. The "Plan Source" feature allows the advisor to utilize a standard, firm-approved template with pre-loaded attributes (i.e., inflation, RORs, segment lengths, etc.), a custom plan where the advisor and client can set each attribute, or plans imported from other software. The "Plan Length" can be configured to establish the number of years the plan will distribute income to the client (e.g., plan lengths of 2 years to 100 years).

3. Solve Type & Legacy

This feature provides the ability to create the plan using a "Monthly Income Goal" or a "Total Investment Amount" or both. The advisor may choose any end plan value. The standard plans preload ROR for time horizons so that the advisor can use the standard RORs to develop custom plans that incorporate both Monthly Income Goals and Total Investment Amount.

4. Income Details

Based upon what Solve Type is used, the advisor may choose to enter a simple lump sum investment amount (e.g., based upon an accumulated balance) or a gross income goal or to compute the investment amount or income goal based upon years until the plan start date. Assumptions used to calculate a future value investment amount (i.e., current investment value, annual contribution, annual contribution growth percentage, and rate of return assumption) are reported separately in the client's Proposal report.

Inflation can be handled at the overall Plan Level or at the Segment Level, or the total income goal may be built as a budget with different inflation rates assigned to separate budget line items. Advisors and clients may also choose to include other income sources (i.e., Social Security, pension, part-time work, etc.) as part of their total income goals, also allowing the advisor and client to designate specific growth percentages and time periods to these other income sources in order to determine what will be needed from the investments.

5. Cash Flow Illustration

The Cash Flow portion of the plan phase allows the advisor to specify the number and length of each segment in the plan, adjust the monthly income goals (e.g., if not determined by a specific expense budget), adjust the inflation rate associated with each segment, and input notes in relation to each segment in the plan (e.g., product implementation, reasons for income adjustments, etc.). Advisors may also add or remove years to the plan at this stage.

6. Preview

Once the above information and assumptions are input, the plan can be previewed to show the allocation percentage, planned investment, target net rate of return and ROR during distribution for each segment along with projected annual balances for the lifetime of the plan.
For custom plans, targeted RORs during distribution may be assigned by segment, and rates of return on invested assets may be assigned within certain ranges based on the amount of time those assets are invested for growth prior to liquidation for income distribution (e.g., the segment's time horizon).

The plan will then be saved as a Draft and receive a unique version number. Notes explaining any assumptions or client preferences that were factored into the plan, including the implementation strategy regarding the order of liquidation of any existing investment, are entered into a Notes section by the advisor and can be reviewed by the advisor and/or supervisor. The plan will then be saved to a "Proposed" status and a client proposal report is generated for client review.

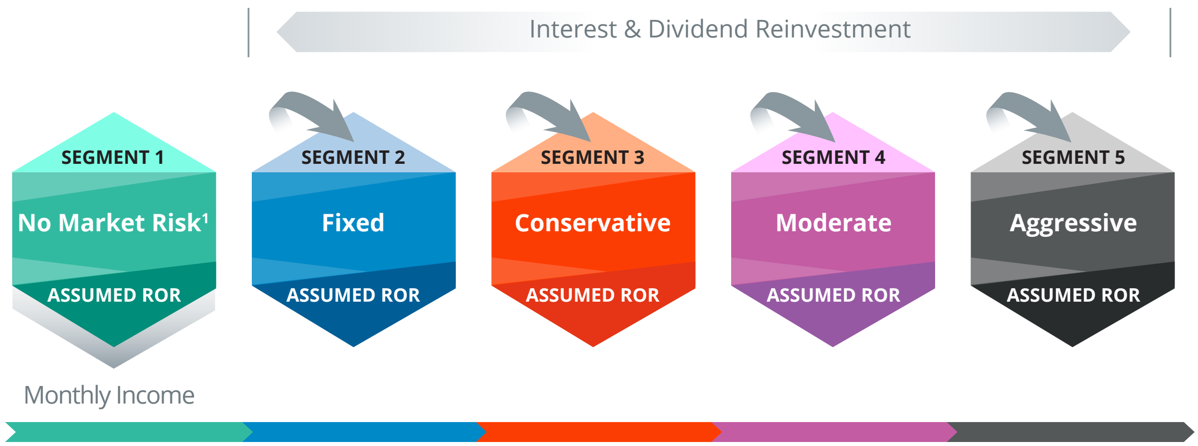
7. Proposal & Approval

Because the standard plan is meant to serve as a guide, illustrating the strategy but not intended to represent the specific client's goals and objectives, it cannot be submitted for approval. The system will not allow the advisor to connect any investments to the plan. Only custom plans can be submitted for approval, connected to the data aggregator and implemented. The advisor will, however, generate a proposal of the custom plan to review with the client prior to submitting the plan for approval.

For purposes of this Report, we will assume that the financial institution will implement policies and procedures that require a supervisor to approve the final proposal before presenting it to the client for acceptance; however, IncomeConductorTM can be configured to only require the client's acceptance to move the plan from "Proposed" to "Approved" status.
Once the plan is approved, the "Download Plan" feature allows the advisor to generate a final plan report, which includes "Disclosures & Disclaimers," "Explanation of Roles & Responsibilities,"[xvii] "Plan

Outcome-Oriented Investing

Time-Segmented Methodology



Assumptions,"[xviii] "Cash Flow by Segment," "Income & Expense Detail" (including Social Security, Mortgage and Healthcare assumptions), "Hypothetical Illustrations" (including showing impact of percentage loss scenarios) and "Plan Summary"[xix] and "Acknowledgments"[xx] to be signed by both the client and advisor. The report format can be customized by the supervising firm upon request to include firm-specific disclosures, disclaimers and acknowledgements, for example, the fiduciary acknowledgment, the link to required Web Disclosures, etc. described above in Section III(B)(1)(b).

B. INVEST:

The Invest phase allows the plan to incorporate existing accounts held by the client or to enter a new investment for each of the segments. If a new investment is to be used for a particular segment, the advisor can select from his/her firm-approved investments by time horizon and product sponsor. IncomeConductor® also allows any of the accounts linked through the data aggregator to be classified as "Pre-Existing Transactions." Again, the Notes/Recommendations field can be used to capture the basis for the advisor's recommendations.

Once the investment is selected, the "Product Type" field allows the advisor to indicate whether the investment will generate a commission or a fee and the amount. Once the investment has been implemented for new investments, or for existing accounts, the advisor can link the investment with a particular financial institution to aggregate the data to automatically track and report.

C. TRACK:

The Track phase provides a dashboard from which to monitor the plan's assumptions versus actual in terms of plan ROR, "current asset value," "assumed end of segment value" and "assumed current value." If the plan needs to be adjusted, the advisor can make recommendations, including:

- Modifying income level
- Modifying segment length;
- Modifying segment assumption;
- Modifying investment amount; or
- Making no changes at this time.

This feature requires the advisor to enter confirming notes, even if no changes are recommended.

The Track phase also allows for client reports to be previewed and downloaded. In addition to providing the comparative information described above, any "Notes and Recommendations" made by the advisor will be included in the tracking report; the Acknowledgment section requires the client to either confirm that the Plan Assumptions continue to accurately reflect his/her preferences, that the plan is progressing in line with his/her expectations and that he/she approves the advisor to move forward with implementation (including any recommendations contained in the Notes and Recommendations section) or confirm that his/her Plan Assumptions have changed and the advisor needs to create a new plan. The Acknowledgements page of the report requires new signatures from both the advisor and client.

D. REPLAN & REPORT:

IncomeConductor® has "Re-Plan" functionality that can incorporate modifications to income goals or segment lengths as the plan progresses and the client's needs change over time. IncomeConductor® will automatically calculate the impact of any modifications on future segments and end-of-plan values, and a new spreadsheet must be generated and approved.

Once the proposed modifications are approved, IncomeConductor® will create a new plan reflecting these point-in-time adjustments and save a copy of the original plan (along with notes reflecting the basis for any recommendations to modify the plan) to preserve the integrity of the overall planning process. The new plan will require client approval and is available for supervisory review.

If the change in the plan is just a product change that doesn't impact the structure of the plan itself, it doesn't require a new plan. IncomeConductor® does, however, require the advisor to provide notes documenting the reason for the change to submit to the client and/or supervisor for approval.

Lastly, the "Report" function of IncomeConductor® allows the advisor to run the above-referenced Plan Status reports for all approved plans by client as well as a number of "Advisor Reports" (e.g., Company AUM; Strategy AUM; AUM by Age Band; etc.). The Report section also serves as a repository of all downloaded client reports, including all notes associated with the report, that may be easily searched and sorted to facilitate reviews by the advisor and his/her supervisor.

V. How IncomeConductor® Helps Satisfy the Fiduciary Standard

When it comes to demonstrating compliance with the requirements imposed by ERISA, the Code and Fiduciary Regulations, there are three primary considerations for fiduciaries: 1) documentation that the advice was based upon an objective, prudent process that considered relevant information about the needs of the client; 2) verification that all conflicts of interests were eliminated or that the conditions of a PTE were satisfied; and 3) monitoring the performance of the recommended investment(s) or investment strategy to verify that the recommendations remain aligned with the client's objectives.

A. PRUDENT PROCESS

As discussed, a core tenant of the prudence standard requires the advisor to give "appropriate consideration" to facts and circumstances that he/she knows or should know to be relevant. According to the DOL, "appropriate consideration" includes a "determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio … to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or the investment course of action…."[xxi]

IncomeConductor® provides a mechanism to capture much more information about the client's needs than the typical new account form, client profile or risk tolerance questionnaire. It provides the ability to segment the client's time horizons, allowing the advisor to document how each recommendation furthers the purpose of generating retirement income at appropriate levels of risk and return within each discrete time horizon segment and in connection with the plan generally. The income goals are the foundation for determining the composition of the portfolio and will be a guide for evaluating the risk of loss and opportunity for gain required to satisfy the prudent advice rule.

The Financial Institution, by limiting available investments that may be recommended within each time horizon segment, approving plans prior to implementation and implementing supervisory policies and procedures, can use IncomeConductor® not only as a way to scale the delivery of prudent advice to Retirement Investors, but the notes and recommendations associated with each plan can be readily produced, if necessary, to defend a claim that the advisor failed to act prudently.

Additionally, while it is well established that an advisor is only held to a fiduciary standard of care "to the extent" he provides investment advice or exercises discretion relating to the covered assets (under ERISA or the Code)[xxii] for the reasons discussed above, he/she cannot turn a blind eye to other investments held by the Retirement Investor. In order to deliver prudent advice, the advisor needs to understand how the client's current investments, some or all of which may have been recommended by other advisors and/or are held at other financial institutions (as well as current and anticipated liabilities), will be factored in to the overall retirement income plan.

IncomeConductor® allows for these investments to be pulled into the plan solely for consideration and reporting and doesn't require the advisor to recommend the Retirement Investor sell or transfer legacy investments to his/her Financial Institution. This feature, while facilitating the delivery of prudent advice and diversification, allows the advisor and Financial Institution flexibility to determine whether or not to take on any fiduciary responsibility for legacy investments, or in the case of investments previously recommended by the advisor, to operate under the Pre-Existing Transaction Exemption.

IncomeConductor® can also mitigate risks when advising on IRA rollovers. As discussed above, advisors and Financial Institutions will be held to a fiduciary standard of care when making recommendations to Retirement Investors concerning the advisability of distributing assets from an employer-sponsored plan to an IRA. If the advisor, Financial Institution or an Affiliate stands to receive additional compensation, the advisor must, at a minimum, document how he/she determined the IRA rollover to be in the Retirement Investor's best interest and may not receive fees in excess of what would be considered reasonable.

The specific income goals will facilitate the substantiation of any recommendation to take a distribution or rollover from a plan as part of the retirement income strategy. Those goals will drive the recommendation on the level of distributions required each year during retirement. That, in turn, may determine whether the current employer plan permits the degree of flexibility needed for withdrawals to satisfy the client's specific income goals or whether the plan provides sufficient investment flexibility to satisfy those goals.

The reasonableness of the advisor's compensation (including that received by the Financial Institution and any Affiliate(s)) is determined by the value of the services provided that align with the needs of the Retirement Investor. The value of retirement income planning generally will help support the additional compensation received as a result of the IRA rollover as this service is not one typically offered through employer-sponsored retirement plans. The advisor can use IncomeConductor® to demonstrate the enhanced nature, scope and/or frequency of services he/she can provide in the IRA (vs. the current employer plan) and further support the recommendation as being in the best interest of the Retirement Investor.

B. DOCUMENTING COMPLIANCE WITH THE BICE

As discussed above in Section III, if the advisor, Financial Institution or any Affiliate stands to receive additional compensation, including third-party payments, based upon a fiduciary recommendation, a PTE will be necessary. Most PTEs, including the BICE, are conditioned upon compliance with specific procedural safeguards and full and complete disclosure of material conflicts of interest. In the case of non-ERISA plans and IRAs, the BICE requires certain warranties be made in a contract between the Financial Institution and the Retirement Investor. A completed and approved IncomeConductor® plan will greatly assist with delivering the required disclosures and documenting the best interest standard.

For example, if the proposed plan involves the movement of assets from a commission account to a fee-based account or vice versa, the Fiduciary Regulations require the advisor determine and document why the change in account type is in the best interest of the client. This analysis is assisted by the specific income goals that require the shifting of assets over the period of the plan to accomplish the rate of return goals. This analysis can be documented in the notes portion of IncomeConductor® and reviewed by a supervisor to ensure the recommended transaction complies with the Financial Institution's Impartial Conduct Standards and Anti-Conflict Policies and Procedures.

For non-ERISA plans and IRAs, the full conditions of the BICE require "Transaction Disclosures" be delivered prior to or at the same time as the execution of the recommended transaction in a single written document. Among other things, the Transaction Disclosure must: i) state the best interest standard of care owed by the advisor and Financial Institution and describe any material conflicts of interest; ii) inform the Retirement Investor that he/she has the right to obtain copies of the Financial Institution's written description of its required policies and procedures as well as disclosure of costs, fees and other compensation, including third party payments; and iii) provide a link to the Financial Institution's BICE website.

As discussed above in Section IV, the Financial Institution may configure the Disclosures & Disclaimers and Acknowledgments generated by IncomeConductor® to include the product- or firm-specific required disclosures, including the foregoing. If there are any material changes to the information disclosed, the advisor can supplement the plan, download and deliver the updated report to the Retirement Investor as necessary.

C. SUBSTANTIATING INVESTMENT MONITORING RESPONSIBILITIES

Unless expressly disclaimed, the Fiduciary Regulations obligate the advisor to monitor investment recommendations and recommend changes when prudent. The obligation to monitor may be disclaimed only when the disclaimer itself is prudent, taking into account the nature and risks of the recommendation(s).

A critical component of the Fiduciary Standard is the ongoing monitoring of the advisor's recommendations. IncomeConductor® provides a consolidated dashboard from which the advisor, client and supervisor can track the plan's progress against the client's goals. Reports can be run to assist in determining whether changes in the plan are appropriate.

IncomeConductor® provides the ability to reassess the risk tolerance of the client and to capture new recommendations to modify the plan based upon plan performance, changes in the economy, tax laws and client's needs and objectives. Any changes to the plan are captured along with the basis for the advisor's recommended changes and the client's acceptance. Having all relevant information residing in a single supervisory-friendly platform will facilitate monitoring and exception reporting.

VI. Conclusion

The Fiduciary Regulations significantly broaden the definition of fiduciary advice, including recommendations regarding the management of securities, IRA rollovers and other distributions from a plan or IRA. As discussed above, IncomeConductor® allows advisors and their supervising firms to gather, from one place, a wealth of information to substantiate their compliance and verify that the recommendations were made prudently and in the Retirement Investor's best interest.

The ability to configure the written plans to incorporate firm-specific information, including links to Web and Transaction Disclosures, will serve to streamline reporting requirements and facilitate document retention. Lastly, the process itself (by applying the needs of each client to his/her specific goals) will produce advice that is uniquely designed for the Retirement Investor and will help to mitigate the risk of class action litigation where a degree of commonality and typicality of claims is a prerequisite to class certification.

PLANNING

Standard and custom plans

Proposal and approved plan reports – initial and modified

Compliant process

IMPLEMENTING

Connects to accounts regardless of location

Can aggregate multiple accounts into each segment

Supports multiple investment products

TRACKING AND MANAGING

Automated segment and plan valuation • Analytics on segment & plan performance

Business intelligence for modifying plan • Client Review reports

Ability to create a modified plan that continues to track plan from that point in time

[i] See preamble to Final Rule at:
https://www.federalregister.gov/articles/2016/04/08/2016-07924/definition-of-the-term-fiduciary-conflict-of-interest-rule-retirement-investment-advice#p-181).

[ii] According to the DOL, "there is a clear and substantial conflict of interest when an Adviser recommends that a participant roll money out of a plan into a fee-based account that will generate ongoing fees for the Adviser that he would not otherwise receive, even if the fees going-forward do not vary with the assets recommended or invested." See Preamble to BICE at
https://www.federalregister.gov/articles/2016/04/08/2016-07925/best-interest-contract-exemption#p-100.

[iii] See BICE at Section II(h); see also, Preamble to BICE at:
https://www.federalregister.gov/articles/2016/04/08/2016-07925/best-interest-contract-exemption#p-104.

[iv] See BICE at Section II(c); see also Preamble to BICE at: https://www.federalregister.gov/articles/2016/04/08/2016-07925/best-interest-contract-exemption#p-253.

[v] See Id.

[vi] The Fiduciary Regulations are effective April 10, 2017. See, ERISA Regulation, section 2510.3-21, as amended at 81 F.R. 20946 (April 8, 2016).

[vii] See ERISA 406(b) and IRC 4975.

[viii] The DOL refers to FINRA guidance for the proposition that the term "strategy" should be interpreted broadly and "would cover a recommended investment strategy regardless of whether the recommendation results in a securities transaction or even references a specific security." See preamble to Final Rule at: https://www.federalregister.gov/articles/2016/04/08/2016-07924/definition-of-the-term-fiduciary-conflict-of-interest-rule-retirement-investment-advice#p-183.

[ix] However, there may be other less onerous relief provided under existing PTEs for advice provided plan participants and IRAs (i.e., 408(g)) and amendments to PTEs for ERISA plans and IRAs (e.g., 86-128 and 84-24).

[x] See e.g., https://www.federalregister.gov/articles/2016/04/08/2016-07925/best-interest-contract-exemption#p-99.

[xi] See BICE Sec. II(h); see also, Preamble to BICE at: https://www.federalregister.gov/articles/2016/04/08/2016-07925/best-interest-contract-exemption#p-106.

[xii] Specifically, the PET exemption provides relief from the restrictions of ERISA section 406(a)(1)(A), (D) and 406(b) and the sanctions imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A), (D), (E) and (F). See preamble to BICE at: https://www.federalregister.gov/articles/2016/04/08/2016-07925/best-interest-contract-exemption#h-19.

[xiii] See BICE at: https://www.federalregister.gov/articles/2016/04/08/2016-07925/best-interest-contract-exemption#p-927; see also, preamble to BICE at: https://www.federalregister.gov/articles/2016/04/08/2016-07925/best-interest-contract-exemption#p-666.

[xiv] See Id. at: https://www.federalregister.gov/articles/2016/04/08/2016-07925/best-interest-contract-exemption#p-677.

[xv] See Id.

[xvi] See IncomeConductor® Confidential Questionnaire,
https://www.3dadvisor.com/ic-dd-footnotes.

[xvii] See IncomeConductor® Approved Plan report, Roles & Responsibilities,
https://www.3dadvisor.com/ic-dd-footnotes.

[xviii]See IncomeConductor® Approved Plan report, Plan Assumptions, https://www.3dadvisor.com/ic-dd-footnotes.

[xix]See IncomeConductor® Approved Plan report, Hypothetical Illustrations and Plan Summary, https://www.3dadvisor.com/ic-dd-footnotes.

[xx]See IncomeConductor® Approved Plan report, Acknowledgements, https://www.3dadvisor.com/ic-dd-footnotes.

[xxi]29 C.F.R. §2550.404a-1(b)(2)(A)

[xxii]See e.g., Moench v. Robertson , 62 F.3d 553 (3d Cir. 1995), reh'g and suggestion for reh'g denied, cert. denied, 516 U.S. 1115 (1996) (holding fiduciary status is not an "all or nothing" concept and the court must ask whether party is a fiduciary with respect to the particular activity in question); see also, Walling v. Brady, 917 F. Supp. 313 (D. Del. 1996), rev'd on other grounds, 125 F.3d 114 (3d Cir. 1997) (the court must determine whether one acts as a fiduciary with respect to the particular activity in question).

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INCOMECONDUCTOR

IncomeConductor® Due Diligence Report

Compliance with the DOL Fiduciary Regulation

Complimentary Guide

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