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# Understanding the New DOL Fiduciary Rule: Estate v. Investment Advice?

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# The DOL Fiduciary Rule

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## Overview

1. The American College of Financial Services
2. Overview/Core Elements of the DOL Rule
3. Exceptions to the DOL Conflict of Interest Rule
4. Exemptions from Self-Dealing Conflicts
5. Impact of Rule on Attorneys
6. Understanding Retirement Income Best Practices
7. Overview of Compliance with New Rule
8. Concluding Thoughts & Takeaways



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The image features a central white rectangular area containing the text 'The American College'. This area is framed by two horizontal bars composed of several colored segments. The top bar includes segments of blue, orange, green, red, dark green, and red. The bottom bar includes segments of orange, red, blue, purple, grey, brown, and yellow.

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Learn what you need to navigate the New DOL Rule and prepare for what it means to be a fiduciary.

Program includes an ongoing webcast series for those looking to keep up-to-date on changes.



# Overview of The Rule

# ERISA and IRC Fiduciary Rule

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- Statutory definition of fiduciary advice very broad (advice for any fee)
- 1975 – DOL issued regulations narrowing scope
  - assuming advice was to ERISA plan/participant and met 5 criteria
    - fee, regular, individualized, mutual agreement, served as primary basis for decision



# What did the Standard Require?

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- Fiduciary held to best interest of client
  - obedience
  - loyalty
  - prudence
  - co-fiduciary breach
  - records/documentation
  - prohibited transactions
  - reasonable compensation

# The Road to Expansion

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- Part of greater overall financial security reform
  - ACA – expanded Medicare drug coverage for retirees
  - Development of the myRA in 2014
  - Social Security strategies changed in end of 2015
  - Social Security Disability reformed in end of 2015
  - Military retirement benefits reformed in end of 2015
- Timeline for DOL Rule:
  - October 2010 – DOL proposed rule
  - September 2011 – DOL withdraws rule after industry backlash
  - April 2015 – DOL re-proposes rule with changes
  - September 2015 – Public comment periods end
  - April 2016 – Final rule released
  - April 2017 – Compliance Date???????



# Reorganization Plan No. 4 1978

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# Expansions of Fiduciary Rule

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- One Standard – One Umbrella
- Investment advice for a fee (direct or indirect):
  - To any IRA, IRA owner, or
  - ERISA plan or plan participants
- Redefined investment advice as advice consisting of:
  - Recommendations as to acquiring, holding, disposing of, or exchanging investments
  - Recommendation of distributions or rollovers to participants and IRA owners (including whether to roll over, what amount, what form, and where)
  - Recommendations to fiduciary advisors
  - Recommendations of type of investment account (e.g. brokerage v. fee based)

# Three New Areas of Advice Giving

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- Rollover advice – even for fiduciaries in the past – this transaction was not covered by a legal fiduciary arrangement
- Distribution advice – retirement income planning is now on the table – this is a broad topic and the bounds/scope of it are not clearly defined yet
- Advice on what type of account to use – also a new consideration (Brokerage account v. Fee account)

# Core Elements of DOL Rulemaking

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- Prohibits “conflicted compensation”
  - Flat fee appears to be the go-to model
  - But what exactly is flat fee?
  - Is AUM a conflicted fee model?
- Requires a fiduciary level of care
  - Calls to action
  - Beyond pure investment allocation advice
- Defines Prohibited Transaction Exemptions (PTEs)
- Provides industry guidance



# **Exceptions to the DOL Conflict of Interest Rule**



# Exceptions from the Rule

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1. Investment Education
2. Engage Me (Hire Me)
3. Advice to certain sophisticated Fiduciaries - \$50+ million
4. Platform Information
5. General Communications
6. Advice to Financial Professionals





# **Exemptions from Self- Dealing Conflicts**



# Revamped PTEs

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- Prohibited Transaction Exemptions from Self-Dealing Conflicts:
  - Conflict Free?
  - Best Interest Contract Exemption (BICE)
  - Level-Fee Fiduciary (BICE Lite)
  - PTE 84-24
  - Other Class Exemptions

# Reminder on Fiduciary Status

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Remember that none of the PTEs absolve the advisor providing advice under the new definition of investment advice from acting as a fiduciary.

# Conflict Free?

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## Conflict Free Advice

- A. Investment Management v. Investment Advisor
- B. This is not a prohibited transaction – no need for a PTE or exemption (attorneys could be in a conflict free situation)
- C. Advice that is excluded
- D. If your fee is flat and does not change based on your advice
- E. Can you really create this model?
- F. Financial services does not embrace this today

# Level-Fee Exemption

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1. This is also being referred to as BIC Lite or Streamlined BICE
2. Available for fiduciaries who do not earn any variable compensation (Level fee – AUM/Hourly/Set Fee etc.)
3. Must Adhere to Impartial Conduct Standards
4. Must have a written statement that they are acting as a fiduciary
5. Must document reasons for a rollover (can cure rollover conflict here)
6. No written contract required, no web-based disclosure of firm business model and related conflicts

# BICE

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1. Best-Interest-Contract Exemption (BICE) is a new class exemption that protects advisors from prohibited transactions under ERISA
2. There are currently 4 variations of the BICE
  - 1.Full BICE (IRA and non-ERISA clients)
  - 2.Disclosure BICE – applies to ERISA Plans only
  - 3.Level-Fee BIC (already discussed)
  - 4.Transition BIC from April 10, 2017 until January 1, 2018
3. Full BICE would cover the other three – but has more work –firms will likely opt to less onerous versions if possible

# BICE (Cont.)

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## BICE Relief:

1. BICE does not provide any relief for discretionary advice from fiduciary advisors receiving variable compensation  
**Example:** Can you invest your client's assets without approval and receive a commission? No relief!
2. BIC is not required but only needed if you want to have variable compensation – commissions etc.
3. Covers mutual funds, rollovers, variable annuities, indexed annuities for variable compensation

# BICE Requirements

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1. Compliance with impartial conduct standards
2. Written contract – (can cover a variety of transactions)
  1. Must be entered into before or contemporaneously with recommended transaction
  2. Client needs to sign in writing or electronically
  3. For existing clients – must make delivery by January 1, 2018 – if client does not respond within 30 days, contract is effective
  4. Contract can provide for mandatory arbitration – cannot limit client's right to engage in class action lawsuits
  5. Contract cannot waive liability of firm or advisor, cannot waive right to punitive damages
3. Appointment of a BIC Officer – this is the person responsible for addressing conflicts of interest and monitoring the firm's advisors' adherence to the Impartial Conduct Standards – contract will note that this person has been appointed.



# BICE Requirements

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4. Written disclosure of compensation and conflicts of interest
5. Firm adopted compliance policies to mitigate conflicts (training and education of advisors)
6. Transaction disclosures of fiduciary standard and advisor's conflicts for each recommend investment or transaction
7. Web-based disclosure of business model and conflicts
8. Notice filed with DOL
9. Recordkeeping requirements
10. No more than reasonable compensation – this includes both what the individual advisor and financial institution can receive

# PTE 84-24

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- Original rule
  - PTE 84-24 allowed agents to receive commissions when selling annuities, insurance policies, and mutual funds
  - Compliance primarily required disclosure
- Revised rule
  - DOL amended and partially revoked PTE 84-24 for transactions occurring after April 10, 2017
  - Revised PTE 84-24—rule requires disclosure and adherence to the impartial conduct (best-interest) rule—far fewer requirements than BICE

# Revised PTE 84-24

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- Revised PTE 84-24 – includes IRAs, Archer Medical Savings Accounts, HSAs, and Coverdell education accounts
- Revoked protection to variable compensation for sale of mutual funds to IRAs and for not fixed rate annuity contracts
- Insurance agent can receive variable compensation for sale of insurance contract or fixed rate annuity contract to an IRA or plan
- Variable annuities and indexed annuities were deemed more complicated by DOL and require the BICE to sell with variable compensation
- Mutual funds can be sold to ERISA plans but not to IRAs under the new PTE 84-24 with variable compensation – BICE would need to be used for that transaction.

# PTE 84-24 Compliance Requirements

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- **Three General Conditions**
  1. Transaction must be in ordinary course of business
  2. Transaction must be arm's length
  3. Combined fees and compensation receive by advisor cannot be more than reasonable compensation
- **Advisor Must Adhere to Impartial Conduct Standards**
  - Advice in best interest of plan or IRA owner
  - Avoid making materially misleading statements
- **Record Keeping Requirement**
  - Must keep records of transaction for 6 years, accessible for audit and examination
  - Failure to keep records causes loss of PTE
- **Disclosure Requirements**
  - Prior to transaction advisor must disclose conflicts of interest, commissions, charges
  - This must be in writing and in a form that can be understood by the IRA owner



# Impact of Rule

# Who Could be Impacted?

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1. Impact on Estate Planning Attorneys
2. Impact on Employee Benefits Attorneys
3. Impact on Investment Management Attorneys
4. Impact on ERISA Litigation Attorneys
5. Impact on Financial Services Businesses
6. Impacts on IRAs, Investment Advice Industry, and Brokerage Firms

# Estate Planning Advice

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- “the provisions in the final rule defining investment advice make it clear that attorneys, accountants, and actuaries would not be treated as investment advice fiduciaries merely because they provide such professional assistance in connection with a particular investment transaction.”
- Normal legal advice Does Not Equal Investment Advice

# When Estate Planning Advice Goes Too Far

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The DOL went further to state that, “when these professionals act outside their normal roles and recommend specific investments in connection with particular investment transactions, or otherwise engage in the provision of fiduciary investment advice as defined under the final rule, . . . they [would] be subject to the fiduciary definition.”



# Estate Planning Attorneys

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## Impact on Estate Planning Attorneys:

EXAMPLE: Attorney is developing an estate plan and provides advice about how to set up beneficiary designations on the IRA. Has the attorney engaged in a DOL covered advice situation?

“the form or destination of a rollover, transfer, or distribution”

How about once the funds are distributed out of the IRA?

What about if an attorney recommends the purchase of a Medicaid qualified annuity from plan assets? What about Medicaid spenddown techniques?

# What is advice?

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“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[.]”

# What is NOT advice?

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- An attorney doesn't render investment advice if he merely limits the advice to explaining the tax or legal consequences of a transaction or document.

# Be careful with wording

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You should do a rollover from your 401(k) into an IRA = investment advice

This would be the tax implications of doing a rollover from a 401(k) to an IRA = likely not investment advice

# Required Minimum Distributions

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- Advice about RMDs will be problematic
- Do you think if an attorney advises a client of how to spend required minimum distributions after the client has the money out of the IRA or 401(k) they are covered by the rule?

# Required Minimum Distributions

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- Q4. An investment adviser who is also a licensed insurance agent approaches a client who will soon begin receiving minimum required distributions from the client's 401(k) plan accounts and IRAs. The adviser recommends that once the client receives these required minimum distributions they should be used to fund a permanent life insurance product. The investment adviser in his or her capacity as insurance agent will receive a commission on the sale of the permanent life insurance product. Is the recommendation of the permanent life insurance product investment advice covered by the Rule?  
(<https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-rules-and-exemptions-part-2.pdf>)

# Required Minimum Distributions

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- Yes. Because the minimum required distributions are compelled by the Code, the adviser has not recommended a distribution from a plan or IRA simply by explaining the tax requirements and telling the plan participant that the law requires those distributions. However, the adviser has made a recommendation as to how securities or other investment property of a plan or IRA should be invested after the funds are distributed from the plan or IRA within the meaning of paragraph (a)(1)(i) of the Rule.
- This creates a hard line to draw in the sand! When are assets still part of a covered plan?



**Understanding  
Retirement Income  
Best Practices**





# Retirement Income Process

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1. Evaluate the client's current situation
2. Identify and prioritize retirement goals
3. Estimate retirement income needs
4. Identify sources of income and assets available to generate retirement income
5. Make a preliminary calculation of the client's preparedness for retirement
6. Develop strategies for addressing a shortfall
7. Consider legal and tax issues that can derail plan
8. Consider retirement risks in developing solutions
9. Determine an appropriate strategy for converting assets into income
10. Integrate all considerations, present alternatives, and agree upon a plan

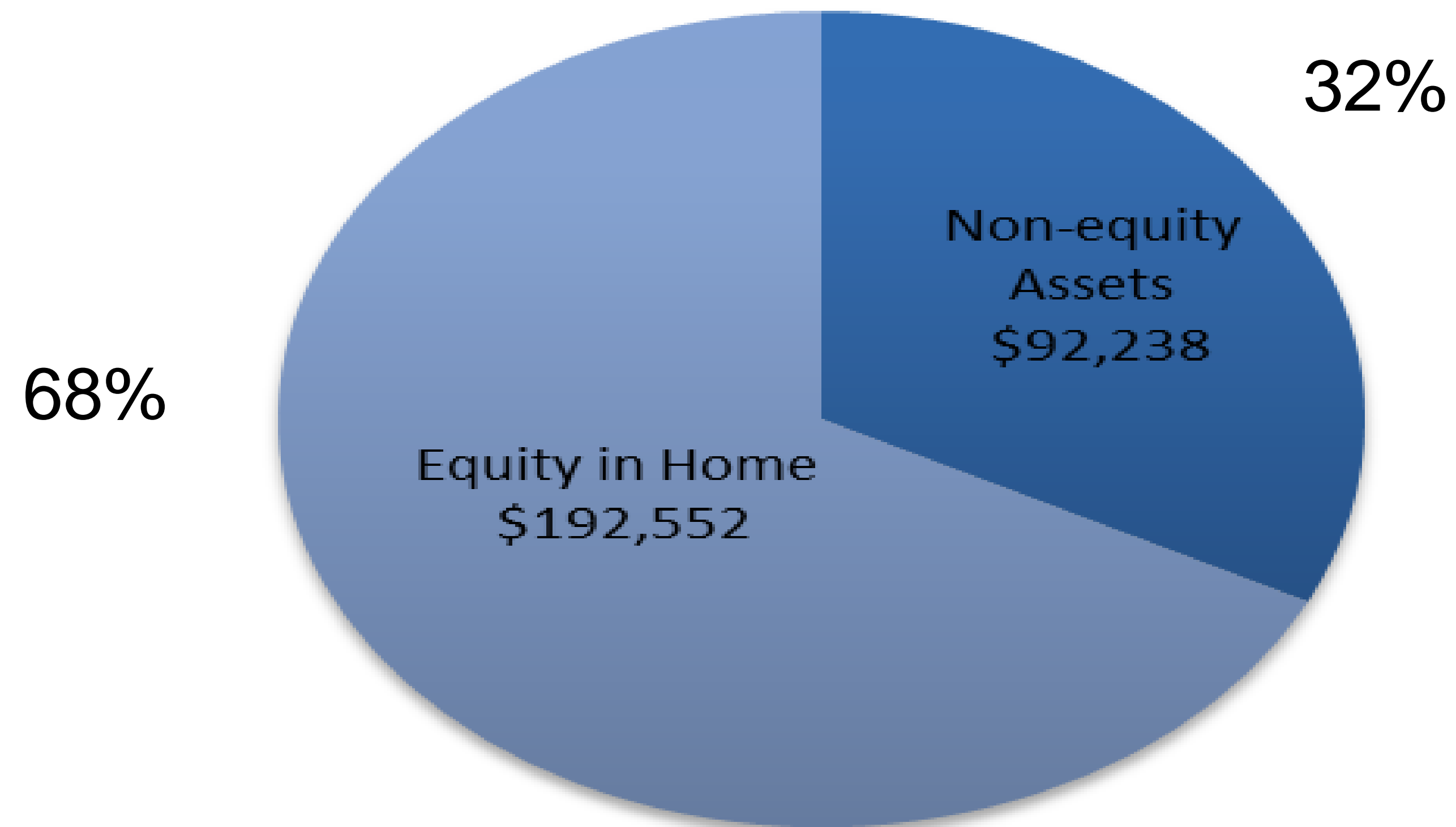
# Addressing Risks

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- A diversified portfolio
  - Inflation risk
  - Public policy risk
  - Liquidity
  - Unexpected expenses
  - Long-term care
  - Health care expenses
- Guaranteed income
  - Longevity risk
  - Frailty
  - Financial elder abuse
  - Market risk
  - Excess withdrawal risk
  - Timing risk
  - Loss of spouse

# Equity and Non-equity Assets for Average Married Couple

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Source: U.S. Census Bureau, Survey of Income and Program Participation, 2008 Panel, Wave 10

# Key Considerations and Issues

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- Which types of accounts to withdraw from first?
- How much can be withdrawn each year?
- What are the best options for generating guaranteed income?
- How to effectively utilize home equity?
- Best options under Medicare?

# Impact of Good Advice (Decisions)

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<u>Strategies</u>	<u>Increase in income*</u>
Social Security Claiming	9.0%
Dynamic Withdrawal Strategy	8.5%
Tax Efficiency	8.2%
Total Wealth Asset Allocation	6.1%
Annuity Allocation	3.8%
<u>Liability Relative Optimization</u>	<u>2.2%</u>
<b>Total</b>	<b>38%</b>



\*Blanchett, video discussing article “[Alpha, Beta and now Gamma](#)”

# What is Prudent Rollover Advice?

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1. Comprehensive planning?
2. Fees will be important
3. Access to money
4. Investment options
5. Distribution options
6. Estate planning issues
7. Required Minimum Distributions
8. Risk Management
9. Consolidation and Convenience
10. Tax Strategies

# Issues around Distribution Advice

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1. Can you make a prudent distribution decision without including the person's entire retirement income situation?
2. Do you need to include information and reviews of assets outside of the IRA or ERISA plans?
3. What about home equity?
4. Unintended fiduciaries—finance department of car dealer suggests IRA funds used to purchase a car. Is this covered DOL advice? Is it prohibited?



# **Overview of Compliance With Rule**





# Timeline Moving Forward

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Implement, train, educate and mold company practices to meet the new requirements:

Date 1 - April 10, 2017 Rule Compliance (end of grandfathering sales)

1. Must adhere to impartial conduct standards/act in best interest/reasonable compensation
2. Must provide notice about conflicts of interest and note fiduciary status
3. Must designate someone responsible to monitoring advisers actions and conflicts

Date 2 - Jan 1, 2018 All conditions must be met must be in full compliance with:

1. document, disclosures, contracts, policies and procedures

# How are Things Progressing?

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- New lawsuits
- Movement in Congress but nothing significant
- Companies moving forward with training and compliance
- New Flat Fee Indexed Annuities have been filed
- President Trump has jumped into the ring

# Lawsuits

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- Some of the lawsuits were consolidated
- Summary judgment hearings occurred in August
- Consolidated Texas suits – date set for Nov. 17<sup>th</sup>
- Stay - Could see a preliminary injunction to stay the rule from any of these hearings or we might not see one at all

# President Trump Memo

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- Feb. 3, 2017 – Trump signed a memo directing the Labor department “ to examine the [2016 rule] to determine whether it may adversely affect the ability of Americans to gain access to retirement information and financial advice.”
- The Memo calls for “an updated economic and legal analysis[.]”
- Memo also encourages the DOL to “publish for notice and comment a proposed rule rescinding or revising the Rule[.]”
- The memo misses a few important issues – the Best Interest Contract Exemption – also published on April 8, 2016 was a different rule -

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# DOL Initial Response To Memo

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- Feb. 3, 2017 – DOL – Acting Secretary of Labor issued a public statement that : The Department of Labor will now consider its legal options to delay the applicability date as we comply with the President’s memorandum.”

# DOL Response

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- On Thursday Feb 9, 2017, The DOL filed paperwork with the Office of Management and Budget (OMB)
  - One notice of proposed rulemaking the DOL seeks to delay rule's implementation by 180 days – with a 15 day comment period. (April 10<sup>th</sup> is approach quickly)
  - Second notice, agency seeks to start another round of public comment on the rule – unclear of timeline here
  - OMB usually takes 10-14 days to process
  - DOL will publish rule in federal register within a day of OMB
  - Expect to see something in week of Feb 20-24<sup>th</sup>, 2017

# Elsewhere in the world (Texas Courts)

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- District of Texas – Chief Judge Barbara M.G. Lynn
- Case: Chamber of Commerce v. Hugler
- Plaintiffs claiming DOL exceeded its authority making the rule
- Feb 8 – DOL asked court to postpone her ruling until March 10 –
- Court denied DOL and issued it's ruling later that day in an 81 page document.
- Court denied all challenges from the 9 plaintiffs



# Judge Lynn's Opinion and Order

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- None of DOL's actions abridged free speech
- DOL rulemaking was procedurally proper
- DOL did a reasonable cost-benefit analysis (interesting!)
- Rulemaking was reasonable exercise of the discretion Congress granted the DOL
- An exemption's condition that an agreement must not waive or limit an investor's right to bring or participate in a class action does not violate the Federal Arbitration Act's primary purpose, which is to "ensure that private arbitration agreements are enforced according to their terms."

# What is next?

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- Rule became effective on June 7, 2016 – so it is the law of the land – published in Federal Register
- DOL really can't pull it out without a notice-and-comment period – (15 days could be problematic – they probably should do 30 but time is limited)
- Someone who already get ready to comply could file suit against the next delay - could challenge that its arbitrary or contrary to public interest
- It seems unlikely a plaintiff would win – but its not impossible

# DOL Response

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- Expect a delay of the April rule now – 180 days
- What happens after that? It really is unknown
  - The rule could get scrapped completely
  - We could get a new definition of investment advice
  - We could get new exemptions
  - Or the enforcement mechanism could get removed – the best interest contract exemption (however, still not clear that the DOL has properly put in notice to change this piece) (Could create real confusion)
- Congress could ultimately step in and end the rule – there have been multiple proposals by the GOP but all have been stand alone bills that would be unlikely to make it through Senate.

# Uncertainty Remains King

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- All of this is important but – could a Judge just interpret investment advice to include distribution advice from a plan?
- They could – however, they would likely defer to the DOL – but without a clear rule in place we could get a confusing outcome
- The Rule has changed the world anyways – brought attention to Fiduciary standard – companies have changed business model – Merrill Lynch – left the commission world to fee planning – wont go back



# **Concluding Thoughts & Takeaways**



# What Remains Unanswered?

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- *Legal challenges? Could it be overturned in whole or in part at some point?*
- *What will the impact be on consumers?*
- *What is prudent advice and reasonable compensation?*
- *How far does retirement income/distribution advice go?*
- *Will this cause a boom or bust for the financial planning world?*
- *What other products fall into the BICE – can you make a variable or fixed indexed product where you don't need BICE?*
- *What about liability? Will this be a big burden?*
- *SEC Rule?*
- *Compensation models moving forward?*
- *Is BICE just the new compliance system for everyone moving forward?*

# Prudent Investment Advice

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- 8 Lawsuits in Federal Court Against Higher Education Institutions
- Duke, Emory, Johns Hopkins, MIT, NYU, UPenn, Vanderbilt, Yale
- Each lawsuit states that the retirement plan selected too many investment alternatives – too much choice – which is imprudent because it weakens the plan's purchasing power and the additional choices confuse participants
- Is it imprudent to give clients too many investment alternatives?

# Moving Forward

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1. Retirement and Estate Planning will continue to change
2. Be careful and specific with language
3. Don't overstep your expertise
4. Stay current!



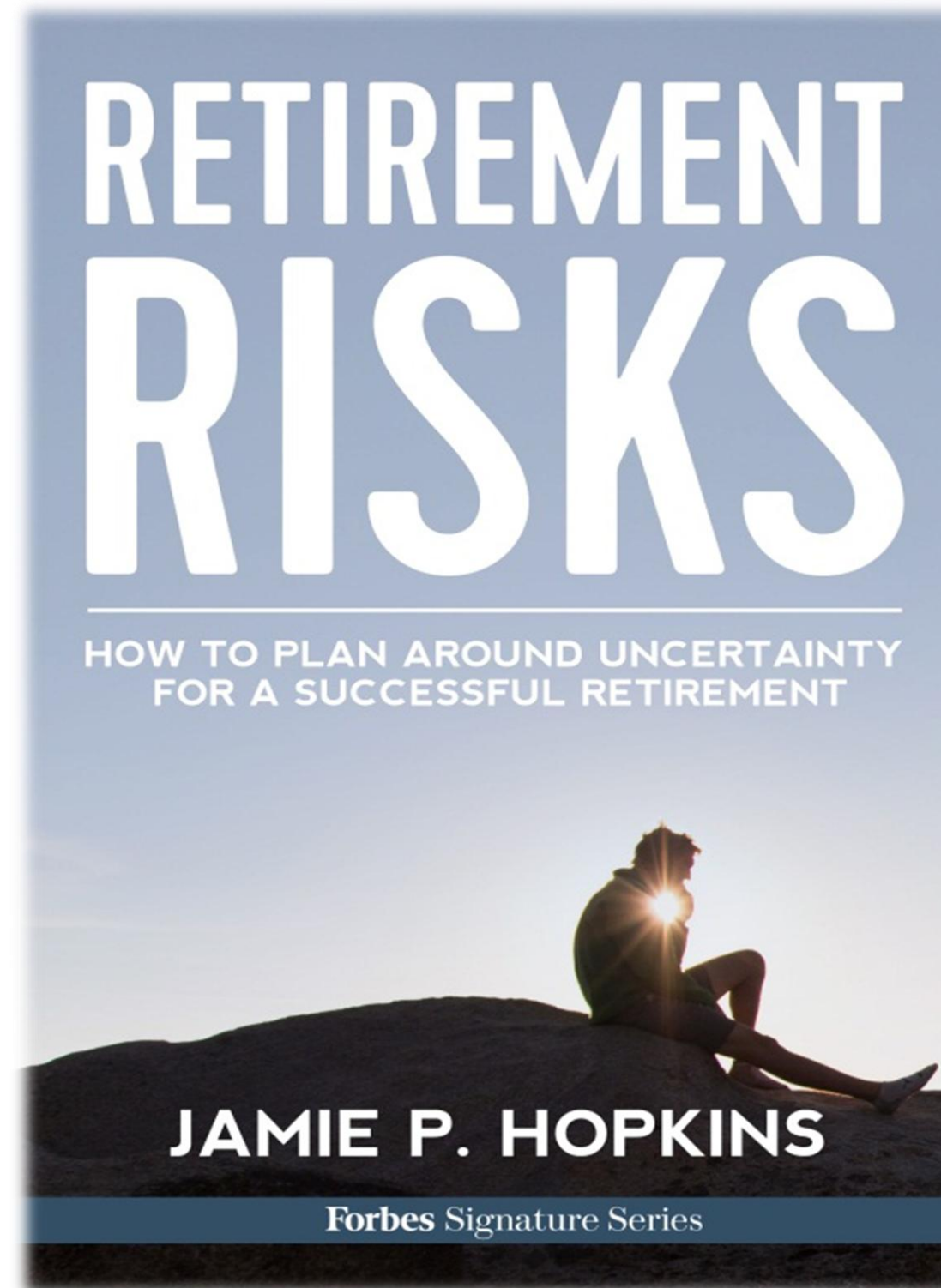
# Additional Information

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- The American College New York Life Center for Retirement Income
  - <http://retirement.theamericancollege.edu>
- The American College Granum Center for Financial Security
  - <http://granum.theamericancollege.edu>
- Retirement Income Certified Professional® (RICP®) designation
  - <https://ricp.theamericancollege.edu>
- The American College Blog
  - <http://knowledge.theamericancollege.edu/blog>
- Jamie Hopkins, Forbes contributor (Twitter – @jamiehopkins521)
  - <http://www.forbes.com/sites/jamiehopkins>

# Retirement eBook

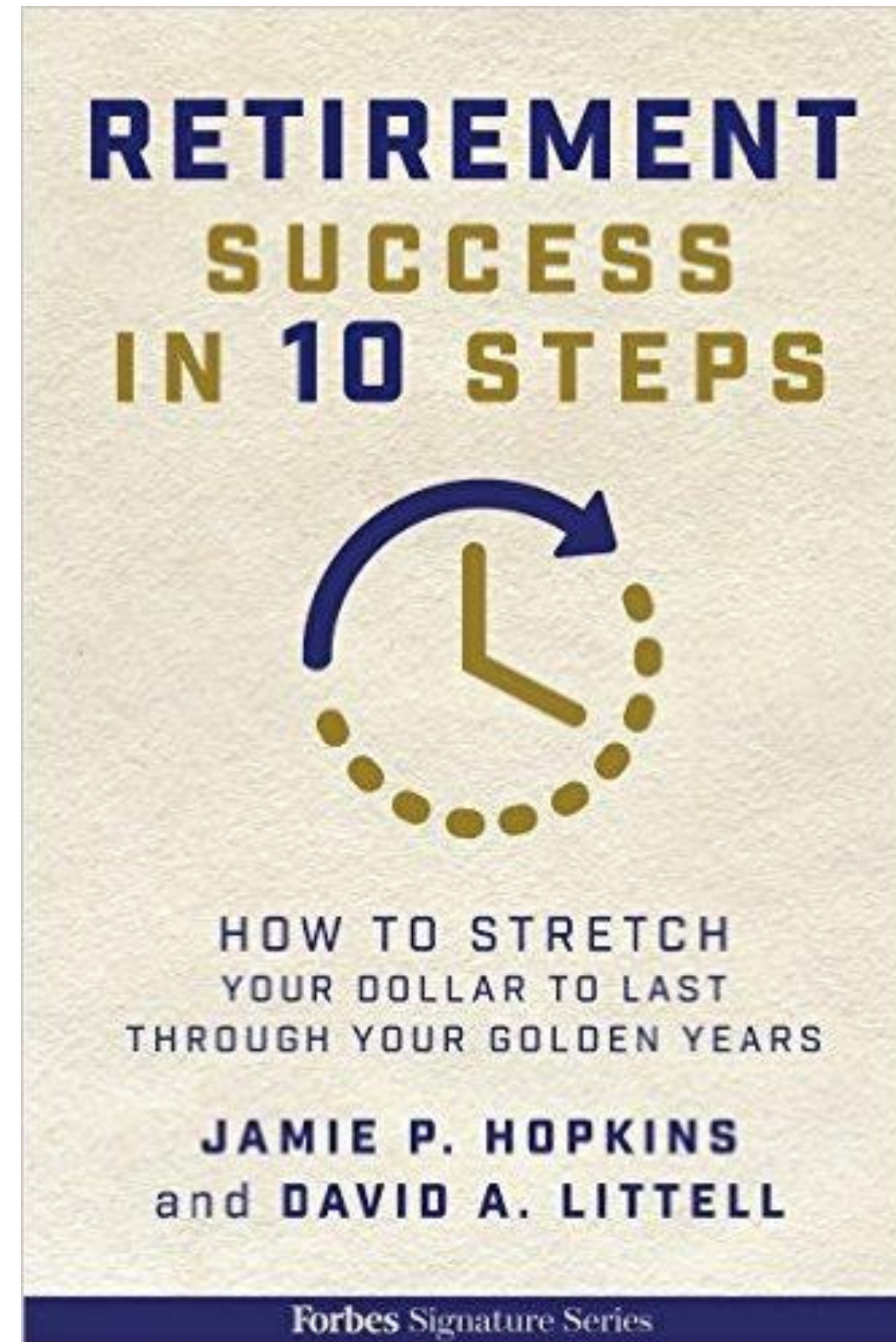
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[Retirement Risks: How To Plan Around Uncertainty For A Successful Retirement](#)

# Retirement Planning eBook

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[Retirement Success In 10 Steps: How To Stretch Your Dollar To Last Through Your Golden Years](#)

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