



# THE Pension Digest

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**Collin W. Fritz and  
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*“The Pension Specialists”*



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## Complying with the DOL's New “IRA” Fiduciary Definition and the New Prohibited Transaction Exemptions.

On April 7, 2016, the Department of Labor (DOL) issued over 800 pages of new rules and guidance for IRAs and pension plans. The DOL changed the definition of who is a fiduciary for purposes of applying the prohibited transaction rules found in the tax and labor provisions of ERISA. These new rules are effective as of April 10, 2017. There are interim rules applying for April 10, 2017 to January 1, 2018.

If your institution is an IRA custodian which limits the IRA investments to the institution's own time deposits and savings accounts, then your institution will be able to comply with the DOL's new fiduciary and prohibited transaction rules with minimal difficulty. Some of the DOL's new IRA rules (e.g. rollovers) are going to cause minor aggravations, but they should not substantially change your institution's liability risks or your current business model. Next month we will write another article discussing the impact of these new rules for those institutions allowing IRA funds to be invested in non-deposit investments.

IRA plan agreement forms and related disclosure statements will need to be revised to set forth the new definition of fiduciary and those provisions needed to

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## Storm Disaster Areas Have Extended IRA Contribution Deadlines - Both Annual and Rollover Contributions Impacted

The IRS and commentators such as CWF communicate fairly often the standard tax filing deadline (generally April 15th) unless modified due to the Emancipation Day holiday or the Patriots Day holiday. The deadline for 2015 was April 18, 2016, except for those residing in Massachusetts and Maine which had deadline of April 19, 2016. This deadline applies to all taxpayers. The tax filing deadline is also the deadline for making traditional IRA and Roth IRA contributions for the prior tax year.

The IRS has the authority under Tax Code section 7508A to grant tax relief to taxpayers who reside in a disaster area. When a disaster is found to have occurred, the IRS will suspend applicable tax deadlines and furnish a new deadline. A person will find applicable IRS guidance at [www.irs.gov](http://www.irs.gov). Input “disaster” into the main search box.

Many times these special deadlines are not communicated well since only a limited number of taxpayers are affected. The special deadlines will allow qualifying individuals to make annual IRA contributions and rollover contributions they otherwise would be ineligible to make.

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## IRS Form 5329- Understanding the Requirement to File

The 2015 Form 5329 is set forth on the adjacent pages. The title of this form is, "Additional Taxes on Qualified Plans (including IRAs) and Other Tax-Favored Accounts."

Form 5329 is a two page form. The individual taxpayer has the duty to prepare this form. An IRA or HSA custodian does not prepare this form.

The title of Form 5329 gives the impression that it is to be filed if there are additional taxes owing. **The fact is, most often it must be filed even when a person does not owe an additional tax such as when a person makes an excess IRA or HSA contribution, but corrects it within the appropriate time deadline.**

As with other IRS forms, the instructions for Form 5329 are not written as clearly as they should be. The IRS requires the individual to report that he or she has made an excess contribution by completing Form 5329. However, in a number of places, the IRS discusses the tax rule - if a person withdraws some or all of his/her

excess contribution for 2015 by the due date of the tax return, as adjusted for earnings or losses and a deduction was not claimed, then the contribution is treated as not having been made. The discussion of the tax rule does not mean the indi-

vidual does not need to complete Form 5329 to inform the IRS that he or she made an excess contribution.

Note that there are nine sections to this form. Four sections apply to IRAs, three sections apply to Coverdell ESA and ABLE

accounts and two apply to HSAs. In general, there is a 10% tax for certain early distributions, a 50% tax for failing to take a required distribution from an IRA and a 6% excise tax for an excess contribution. The 6% tax and the 50% tax apply on an

<b>Form 5329</b> Department of the Treasury Internal Revenue Service (99)		<b>Additional Taxes on Qualified Plans (Including IRAs) and Other Tax-Favored Accounts</b> ▶ Attach to Form 1040 or Form 1040NR. ▶ Information about Form 5329 and its separate instructions is at <a href="http://www.irs.gov/form5329">www.irs.gov/form5329</a> .		OMB No. 1545-0074 <b>2015</b> Attachment Sequence No. 29
Name of individual subject to additional tax. If married filing jointly, see instructions.			Your social security number	
Home address (number and street), or P.O. box if mail is not delivered to your home			Apt. no.	
City, town or post office, state, and ZIP code. If you have a foreign address, also complete the spaces below (see instructions).			If this is an amended return, check here <input type="checkbox"/>	
Foreign country name		Foreign province/state/country		Foreign postal code
If you <b>only</b> owe the additional 10% tax on early distributions, you may be able to report this tax directly on Form 1040, line 59, or Form 1040NR, line 57, without filing Form 5329. See the instructions for Form 1040, line 59, or for Form 1040NR, line 57.				
<b>Part I Additional Tax on Early Distributions.</b> Complete this part if you took a taxable distribution before you reached age 59½ from a qualified retirement plan (including an IRA) or modified endowment contract (unless you are reporting this tax directly on Form 1040 or Form 1040NR—see above). You may also have to complete this part to indicate that you qualify for an exception to the additional tax on early distributions or for certain Roth IRA distributions (see instructions).				
1	Early distributions included in income. For Roth IRA distributions, see instructions . . . . .	1		
2	Early distributions included on line 1 that are not subject to the additional tax (see instructions). Enter the appropriate exception number from the instructions: . . . . .	2		
3	Amount subject to additional tax. Subtract line 2 from line 1 . . . . .	3		
4	<b>Additional tax.</b> Enter 10% (.10) of line 3. Include this amount on Form 1040, line 59, or Form 1040NR, line 57. <b>Caution:</b> If any part of the amount on line 3 was a distribution from a SIMPLE IRA, you may have to include 25% of that amount on line 4 instead of 10% (see instructions).	4		
<b>Part II Additional Tax on Certain Distributions From Education Accounts and ABLE Accounts.</b> Complete this part if you included an amount in income, on Form 1040 or Form 1040NR, line 21, from a Coverdell education savings account (ESA), a qualified tuition program (QTP), or an ABLE account.				
5	Distributions included in income from a Coverdell ESA, a QTP, or an ABLE account . . . . .	5		
6	Distributions included on line 5 that are not subject to the additional tax (see instructions) . . . . .	6		
7	Amount subject to additional tax. Subtract line 6 from line 5 . . . . .	7		
8	<b>Additional tax.</b> Enter 10% (.10) of line 7. Include this amount on Form 1040, line 59, or Form 1040NR, line 57	8		
<b>Part III Additional Tax on Excess Contributions to Traditional IRAs.</b> Complete this part if you contributed more to your traditional IRAs for 2015 than is allowable or you had an amount on line 17 of your 2014 Form 5329.				
9	Enter your excess contributions from line 16 of your 2014 Form 5329 (see instructions). If zero, go to line 15	9		
10	If your traditional IRA contributions for 2015 are less than your maximum allowable contribution, see instructions. Otherwise, enter -0-	10		
11	2015 traditional IRA distributions included in income (see instructions) .	11		
12	2015 distributions of prior year excess contributions (see instructions) .	12		
13	Add lines 10, 11, and 12 . . . . .	13		
14	Prior year excess contributions. Subtract line 13 from line 9. If zero or less, enter -0- . . . . .	14		
15	Excess contributions for 2015 (see instructions) . . . . .	15		
16	Total excess contributions. Add lines 14 and 15 . . . . .	16		
17	<b>Additional tax.</b> Enter 6% (.06) of the <b>smaller</b> of line 16 or the value of your traditional IRAs on December 31, 2015 (including 2015 contributions made in 2016). Include this amount on Form 1040, line 59, or Form 1040NR, line 57 .	17		
<b>Part IV Additional Tax on Excess Contributions to Roth IRAs.</b> Complete this part if you contributed more to your Roth IRAs for 2015 than is allowable or you had an amount on line 25 of your 2014 Form 5329.				
18	Enter your excess contributions from line 24 of your 2014 Form 5329 (see instructions). If zero, go to line 23	18		
19	If your Roth IRA contributions for 2015 are less than your maximum allowable contribution, see instructions. Otherwise, enter -0- . . . . .	19		
20	2015 distributions from your Roth IRAs (see instructions) . . . . .	20		
21	Add lines 19 and 20 . . . . .	21		
22	Prior year excess contributions. Subtract line 21 from line 18. If zero or less, enter -0- . . . . .	22		
23	Excess contributions for 2015 (see instructions) . . . . .	23		
24	Total excess contributions. Add lines 22 and 23 . . . . .	24		
25	<b>Additional tax.</b> Enter 6% (.06) of the <b>smaller</b> of line 24 or the value of your Roth IRAs on December 31, 2015 (including 2015 contributions made in 2016). Include this amount on Form 1040, line 59, or Form 1040NR, line 57	25		

For Privacy Act and Paperwork Reduction Act Notice, see your tax return instructions.

Cat. No. 13329Q

Form 5329 (2015)

annual basis. If a person makes an excess contribution in 2014 and it is not corrected in 2014 or 2015, then the 6% tax is owed for both 2014 and 2015. Similarly, if a person fails to take his 2014 RMD in either 2014 or 2015, then the 50% tax is owed for both years.

Individuals will make excess IRA contributions and excess HSA contributions. An excess contribution is one not permitted by the IRA rules or the HSA rules. An annual contribution may be an excess contribution. A nonqualifying rollover contribution is an excess contribution. An impermissible transfer contribution may be an excess contribution.

The purpose of this article is to discuss the reporting duties of the individual and the IRA/HSA custodian when an excess IRA or HSA contribution has been made. It is true that a person who corrects his or her excess contribution by withdrawing it as adjusted for earnings or losses will have minimal adverse tax consequences. However, IRS procedures require that the individual complete the applicable section of Form 5329 to indicate that he or she made an excess contribution and it was either corrected with no tax penalty owing

or it was not correct and the tax penalty is owed. The individual is not allowed to adopt the approach, "I corrected the excess contribution by withdrawing it so I am able to skip preparing and filing the Form 5329." The rules require an individual

who has made an excess IRA or HSA contribution (or the employer made it) to complete the applicable section of Form 5329. In preparing the Form 5498 or Form 5498-SA, the IRA custodian or HSA custodian must report ALL contributions made by (or

on behalf of) the individual. There is no netting of contributions. Note that the IRS has no procedure for the IRA/HSA custodian to indicate on the Form 5498 or Form 5498-SA that the individual has made an excess contribution. This approach is con-

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<b>Part V Additional Tax on Excess Contributions to Coverdell ESAs.</b> Complete this part if the contributions to your Coverdell ESAs for 2015 were more than is allowable or you had an amount on line 33 of your 2014 Form 5329.			
26	Enter the excess contributions from line 32 of your 2014 Form 5329 (see instructions). If zero, go to line 31	26	
27	If the contributions to your Coverdell ESAs for 2015 were less than the maximum allowable contribution, see instructions. Otherwise, enter -0-	27	
28	2015 distributions from your Coverdell ESAs (see instructions)	28	
29	Add lines 27 and 28	29	
30	Prior year excess contributions. Subtract line 29 from line 26. If zero or less, enter -0-	30	
31	Excess contributions for 2015 (see instructions)	31	
32	Total excess contributions. Add lines 30 and 31	32	
33	<b>Additional tax.</b> Enter 6% (.06) of the <b>smaller</b> of line 32 or the value of your Coverdell ESAs on December 31, 2015 (including 2015 contributions made in 2016). Include this amount on Form 1040, line 59, or Form 1040NR, line 57	33	
<b>Part VI Additional Tax on Excess Contributions to Archer MSAs.</b> Complete this part if you or your employer contributed more to your Archer MSAs for 2015 than is allowable or you had an amount on line 41 of your 2014 Form 5329.			
34	Enter the excess contributions from line 40 of your 2014 Form 5329 (see instructions). If zero, go to line 39	34	
35	If the contributions to your Archer MSAs for 2015 are less than the maximum allowable contribution, see instructions. Otherwise, enter -0-	35	
36	2015 distributions from your Archer MSAs from Form 8853, line 8	36	
37	Add lines 35 and 36	37	
38	Prior year excess contributions. Subtract line 37 from line 34. If zero or less, enter -0-	38	
39	Excess contributions for 2015 (see instructions)	39	
40	Total excess contributions. Add lines 38 and 39	40	
41	<b>Additional tax.</b> Enter 6% (.06) of the <b>smaller</b> of line 40 or the value of your Archer MSAs on December 31, 2015 (including 2015 contributions made in 2016). Include this amount on Form 1040, line 59, or Form 1040NR, line 57	41	
<b>Part VII Additional Tax on Excess Contributions to Health Savings Accounts (HSAs).</b> Complete this part if you, someone on your behalf, or your employer contributed more to your HSAs for 2015 than is allowable or you had an amount on line 49 of your 2014 Form 5329.			
42	Enter the excess contributions from line 48 of your 2014 Form 5329. If zero, go to line 47	42	
43	If the contributions to your HSAs for 2015 are less than the maximum allowable contribution, see instructions. Otherwise, enter -0-	43	
44	2015 distributions from your HSAs from Form 8889, line 16	44	
45	Add lines 43 and 44	45	
46	Prior year excess contributions. Subtract line 45 from line 42. If zero or less, enter -0-	46	
47	Excess contributions for 2015 (see instructions)	47	
48	Total excess contributions. Add lines 46 and 47	48	
49	<b>Additional tax.</b> Enter 6% (.06) of the <b>smaller</b> of line 48 or the value of your HSAs on December 31, 2015 (including 2015 contributions made in 2016). Include this amount on Form 1040, line 59, or Form 1040NR, line 57	49	
<b>Part VIII Additional Tax on Excess Contributions to an ABL Account.</b> Complete this part if contributions to your ABL account for 2015 were more than is allowable.			
50	Excess contributions for 2015 (see instructions)	50	
51	<b>Additional tax.</b> Enter 6% (.06) of the <b>smaller</b> of line 50 or the value of your ABL account on December 31, 2015. Include this amount on Form 1040, line 59, or Form 1040NR, line 57	51	
<b>Part IX Additional Tax on Excess Accumulation in Qualified Retirement Plans (Including IRAs).</b> Complete this part if you did not receive the minimum required distribution from your qualified retirement plan.			
52	Minimum required distribution for 2015 (see instructions)	52	
53	Amount actually distributed to you in 2015	53	
54	Subtract line 53 from line 52. If zero or less, enter -0-	54	
55	<b>Additional tax.</b> Enter 50% (.50) of line 54. Include this amount on Form 1040, line 59, or Form 1040NR, line 57	55	
<b>Sign Here Only If You Are Filing This Form by Itself and Not With Your Tax Return</b> Under penalties of perjury, I declare that I have examined this form, including accompanying attachments, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge. Your signature _____ Date _____			
<b>Paid Preparer Use Only</b>	Print/Type preparer's name	Preparer's signature	Date
	Firm's name	Firm's EIN	Check <input type="checkbox"/> if self-employed
	Firm's address	Phone no.	PTIN

Form **5329** (2015)

sistent with the IRS' administrative approach that the general duty to determine if an excess contribution has been made belongs to the IRA accountholder or HSA owner and is not the duty of the IRA/HSA custodian.

Who must file the 2015 Form 5329?

1. Any person who made an excess 2015 IRA, HSA, Archer MSA, Coverdell ESA, or ABLE contribution.
2. Any person who had made an excess 2014 IRA contribution, HSA contribution, Archer MSA, Coverdell ESA, or ABLE accounts and also owed the penalty tax for 2014.
3. Any person who failed to take/receive his or her 2015 RMD.
4. Any person who received a taxable distribution from a Coverdell ESA, QTPs or ABLE accounts.
5. Various early (pre-age 59½) distribution situations. These are not discussed this article which focuses on excess contributions.

Note that Part VII of Form 5329- Additional Tax on Excess Contributions to HSAs is to be completed if a

person (or the person's employer) made an excess HSA contribution for 2015 or the person owed the 6% excise excess contribution tax for 2014.

The individual must also report his or her withdrawal of the excess contribution on Form 8889 (HSAs). In Part II on line 14a the total amount of HSA distributions is shown. A distribution used to pay a qualified medical expense is tax-free. A distribution not used to pay a qualified medical expense must be included in income (and taxes paid) and a 20% penalty tax is owed if the individual is not age 65 or disabled. The withdrawal of an excess contribution does not belong to either such category.

So, line 14b is completed to show the withdrawal of all 2015 excess contributions plus earnings. The remaining amount is then either "qualified" or non-qualified.

In summary, an HSA owner must complete Form 5329 to show that he or she (or the employer) made an excess HSA contribution. This is true even if the individual corrected the excess by withdrawing it.

<p>Form <b>8889</b></p> <p>Department of the Treasury Internal Revenue Service</p>	<p><b>Health Savings Accounts (HSAs)</b></p> <p>► Information about Form 8889 and its separate instructions is available at <a href="http://www.irs.gov/form8889">www.irs.gov/form8889</a>.</p> <p>► Attach to Form 1040 or Form 1040NR.</p>	<p>OMB No. 1545-0074</p> <p style="font-size: 2em; font-weight: bold;">2015</p> <p>Attachment Sequence No. <b>53</b></p>
<p>Caution: If line 2 is more than line 15, you may have to pay an additional tax (see instructions).</p>		
<p><b>Part II HSA Distributions.</b> If you are filing jointly and both you and your spouse each have separate HSAs, complete a separate Part II for each spouse.</p>		
<p><b>14a</b> Total distributions you received in 2015 from all HSAs (see instructions) . . . . .</p> <p style="padding-left: 20px;"><b>b</b> Distributions included on line 14a that you rolled over to another HSA. Also include any excess contributions (and the earnings on those excess contributions) included on line 14a that were withdrawn by the due date of your return (see instructions) . . . . .</p> <p style="padding-left: 20px;"><b>c</b> Subtract line 14b from line 14a . . . . .</p> <p><b>15</b> Qualified medical expenses paid using HSA distributions (see instructions) . . . . .</p> <p><b>16</b> <b>Taxable HSA distributions.</b> Subtract line 15 from line 14c. If zero or less, enter -0-. Also, include this amount in the total on Form 1040, line 21, or Form 1040NR, line 21. On the dotted line next to line 21, enter "HSA" and the amount . . . . .</p> <p><b>17a</b> If any of the distributions included on line 16 meet any of the <b>Exceptions to the Additional 20% Tax</b> (see instructions), check here . . . . . <input type="checkbox"/></p> <p style="padding-left: 20px;"><b>b</b> <b>Additional 20% tax</b> (see instructions). Enter 20% (.20) of the distributions included on line 16 that are subject to the additional 20% tax. Also include this amount in the total on Form 1040, line 62, or Form 1040NR, line 60. Check box c on Form 1040, line 62, or box b on Form 1040NR, line 60. Enter "HSA" and the amount on the line next to the box . . . . .</p>	<p><b>14a</b></p> <p><b>14b</b></p> <p><b>14c</b></p> <p><b>15</b></p> <p><b>16</b></p> <p><b>17b</b></p>	
<p>For Paperwork Reduction Act Notice, see your tax return instructions.</p> <p style="text-align: right;">Cat. No. 37621P <span style="float: right;">Form <b>8889</b> (2015)</span></p>		



**Complying with DOL,  
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comply with the best interest contract exemption. An IRA amendment will need to be furnished. The deadline to furnish such an amendment is January 1, 2018. Many institutions will choose to furnish their comprehensive IRA amendment by January 31, 2017 and maybe sooner.

The DOL had a number of goals when it decided to change the definition of fiduciary and also various prohibited transaction exemptions. The DOL had concluded that some IRA custodians and trustees were engaged in benefitting themselves to too large a degree rather than the IRA owner or the plan participant. Transactions are to be made which are in the best interest of the individual.

The general tax rule is that an IRA custodian/trustee is not allowed to receive compensation from a third party as a result of its serving as the IRA custodian. The receipt of such compensation is generally a prohibited transaction unless an exemption would apply to the situation. For example, there is a exemption which allows the IRA custodian to limit the IRA investments it offers to its own savings and time deposits. There is an exemption allowing an IRA custodian to charge reasonable fees for "ancillary" services.

The DOL has created a new exemption called the Best Interest Contract Exemption (BICE). It is designed to allow an IRA custodian to provide investment advice in the best interest of the individual, while allowing the IRA custodian to receive certain types of compensation and fees from the individual and third parties. An IRA custodian qualifies to use this new exemption only if certain conditions as discussed below are met. These rules are long and complicated with many special rules.

In general, the IRA custodian (and its employees) must enter into an enforceable contract with the IRA owner wherein both the IRA custodian and any adviser must acknowledge being a fiduciary. This enforceable contract must be signed prior to or at the same time the first recommended investment is made. The contract may be signed in writing or electronically. Such contract cannot include provisions limiting the liability of the IRA custodian or its employees, requiring forfeiture of class action lawsuits, mandatory use of arbitration and liquidated damage provisions. These contract provisions may be set forth in standard account opening forms or documents.

The IRA custodian must affirmatively state in the contract that it has established and that it and its advisers will follow the Impartial Conduct Standards as discussed below and comply with various disclosure and recordkeeping requirements. The requirements differ for IRA owners with existing contracts and those without an existing contract.

IRA owners without an existing contract must:

1. Provide investment advice that at the time of the recommendation is in the IRA owner's best interest;
2. Such advice must reflect the care, skill, prudence, and diligence that a prudent person acting in a like capacity and familiar with the current situation would use after considering the investment objectives, risk tolerance, financial circumstances, and needs of the individual without regard to the needs or desires of any other person or party, including the IRA custodian or any adviser of the IRA custodian.
3. The recommended transaction will not cause the payment of any unreasonable compensation to the IRA custodian, any affiliate or any adviser for services.
4. Statements must not be materially misleading at the time they are made regarding the recommended transaction, fees and compensation, material conflicts of interest and any other information relevant to making the investment decision.

The IRS custodian is entitled to receive fees or compensation on account of this BICE only if it has complied with the recordkeeping requirements and it previously notified the DOL of its intention to use the BICE.

IRA owners without an existing contract must meet the same requirements, but they are not required to sign the new and revised contract. Such owners will be deemed to have consented to the new contract terms if they are furnished an amendment and given the opportunity to terminate the contract. They have 30 days to terminate the contract. If the contract is not so terminated, the amended or revised contract becomes effective.

The old five part test to be a fiduciary has been repealed and replaced with a new test. Now an "investment advice fiduciary" is a person (or entity) who renders investment advice for a fee or other compensation

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with respect to an IRA or a pension plan. A person can render investment advice in three different ways:

1. Acknowledge or represent that he or she is acting as a fiduciary when he or she provides the investment advice;
2. Provides the investment advice to the individual after considering the particular investment needs of the individual pursuant to a joint agreement or understanding (may be written or verbal) ; or
3. Provides the investment advice to a specific individual after considering the advisability of a particular investment or management decision with respect to the IRA assets.

Investment advice will be found to exist if the IRA custodian furnishes one of the following four communications:

1. A "recommendation" related to any distribution, rollover or transfer from an IRA or plan including consideration of whether it should be done, in what amount and to what destination.
2. A "recommendation" how to invest the IRA assets after decision has been made to take a distribution, or do a rollover or transfer.
3. A "recommendation" how to invest the IRA assets in general - what assets should be acquired, retained, disposed, exchanged, etc .
4. A "recommendation" how to invest/manage the IRA assets, considering recommendations on investment policies/strategies, portfolio composition, the possible selection of hiring a third person to provide investment advice, management services or to have brokerage versus advisory arrangements.

An IRA custodian which does not make an investment recommendation should not have concerns arising from the investment advice rules. That is, the individual makes his or her investment decision without the receipt of any investment advice recommendation.

The final regulation defines a "recommendation" as a communication that based on its content and context would reasonably be understood that the recipient should act or refrain from taking a particular course of action. The more the communication is individually tailored the more likely it will viewed as a recommendation. Furnishing investment educational materials is not a "recommendation."

There are at least two situations where not all of the standard conditions must be met to qualify for the Best Interest Contract exemption. In these two situations fewer and different conditions must be met. Many IRA custodians will want to use or both of these special situations.

The first situation is where a bank employee who is an adviser or the bank itself may receive compensation pursuant to a Bank Networking Arrangement related to providing investment advice to an IRA owner as long as the advice complies with the Impartial Conduct Standards. The IRA custodian must affirmatively state that it and its advisers will in actuality follow the following standards:

1. Provide investment advice that at the time of the recommendation is in the IRA owner's best interest;
2. Such advice reflects the care, skill, prudence, and diligence that a prudent person acting in a like capacity and familiar with the current situation would use after considering the investment objectives, risk tolerance, financial circumstances, and needs of the individual without regard to the needs or desires of any other person or party, including the IRA custodian or any adviser of the IRA custodian.
3. The recommended transaction will not cause the payment of any unreasonable compensation to the IRA custodian, any affiliate or any adviser for services.
4. Statements must not be materially misleading at the time they are made regarding the recommended transaction, fees and compensation, material conflicts of interest and any other information relevant to making the investment decision.

The second situation is where the IRA custodian qualifies as a level fee fiduciary. A "level fee" is a fee or compensation associated with advisory or investment management services that is provided on the basis of a fixed percentage of the value of the IRA assets or a set fee that does not vary based on a particular investment. A fee or compensation which is transaction-based is not a level fee. This "level fee" must be disclosed in advance of any transaction.

The IRA custodian and its advisers must also comply with the Impartial Conduct Rules as discussed above.

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The IRA custodian must acknowledge or represent that he or she is acting as a fiduciary prior to when he or she provides the investment advice. If there is a recommendation by the IRA custodian that the individual should roll over funds from an ERISA plan to an IRA, then the IRA custodian must document the specific reasons why the recommendation was considered to be in the best interest of the individual. An explanation is to be made as to what options existed for the individual the possibility of leaving the funds in the plan, discussion of the amount of fees and other costs and who pays them under the plan versus the IRA and discussion of the investment option available under the plan versus the IRA.

If there is a recommendation by the IRA custodian that the individual should roll over funds from one IRA to another IRA or to switch from a commission-based fee account to a level fee arrangement, the IRA custodian must document in writing why the new arrangement is in the best interest of the individual, including specifying the services that will be provided for the fee.

The reason for these less strict conditions when the IRA custodian is a level fee fiduciary is that neither the IRA custodian or its adviser would be exercising discretion in a manner that varies fee income or compensation. However, the DOL sees a conflict of interest when the IRA custodian or its adviser recommends a plan participant roll money out of a plan into a fee based IRA account that will have on-going fees, level or not.

The DOL issued its new fiduciary rules and conflict of interest rules on April 8, 2016. These rules are complex. It will take time to determine the many ramifications of these new rules. These rules go into effect on April 10, 2017. If the Republicans would retain control of the House of Representatives and the U.S. Senate and Donald Trump would be elected President, it might well be these new DOL rules would never go into effect as they would be repealed.

Storm Disaster,  
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Set forth below are "current" disaster areas:

Location of Disaster	When Disaster Occurred	Extended Tax Deadline
1. Mississippi	Dec. 2015	May 16, 2016
2. Missouri	Dec. 2015	May 16, 2106
3. Arkansas	Dec. 2015	May 16, 2016
4. Louisiana	March 2016	July 15, 2016
5. Texas	March 2016	July 15, 2016
6. Mississippi	March 2016	July 15, 2016
7. Texas/Houston	April 2016	Sept. 1, 2016

The IRS will list those counties within a state to which the IRS is granting special automatic relief. In general a person must reside in such a county but there are numerous exceptions.

These exceptions and a more comprehensive discussion of tax relief arising due to a disaster may be found at [www.pension-specialists.com/disaster0516.pdf](http://www.pension-specialists.com/disaster0516.pdf). For example, a covered person living in Missouri who failed to take her 2015 RMD would have had until May 16, 2016 to take it before the 50% tax would be owed.

## SIMPLE-IRA Email Guidance

**Q-1.** My co-worker that proofs my work is wanting me to get written confirmation from you that a person is eligible to contribute to a SIMPLE-IRA after they reach 70<sup>1/2</sup>. Also they are wanting written proof of what the maximum contribution limits are for a SIMPLE for the 2015 and 2016 tax years. Any help you can give me on this will be greatly appreciated!

**A-1.** The 70<sup>1/2</sup> question. See the IRS excerpt. The law defines which employees must be allowed to participate in an employer's SIMPLE-IRA plan. There is no discussion that a person is ineligible to participate and ineligible to make electives deferral contributions because he/she attains age 70<sup>1/2</sup>. Pension laws are written to comply with the age discrimination laws. Note the law does permit union employees to be excluded if pension benefits were negotiated with respect to the labor agreement. The 70<sup>1/2</sup> age contribution restriction only applies to annual traditional IRA contributions.

The maximum contribution limit question. There is no maximum limit as explained below and this causes prob-

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Email Q&A,  
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lems in designing the computer software. An employee who makes elective deferral is subject to the \$12,500 (under age 50) limit and \$15,500 limit (if age 50 or older). The employer will either make a matching contribution of 1, 2 or 3% of compensation (no limit on this compensation) or a non-elective contribution of 2% of compensation (limited to code section 415 limit of \$265,000 for 2015 and 2016).

There is a maximum contribution limit if the employer makes the 2% non-elective contribution. For a person under age 50, the limit for 2015 and 2016 is \$17,800 (\$12,500 + \$5,300 (\$265,000 x .02)). For a person age 50 or older, the limit is \$20,800 (\$15,500 + \$5,300 (\$265,000 x .02)).

There is no limit if the employer makes the matching contribution. For example, Jane Doe, age 52 has compensation of \$1,000,000 and the employer matching contribution is 3% and Jane defers \$15,500. Her total contribution is \$45,500 (\$15,500 + \$30,000 (\$1,000,000 x .03)). The compensation limit of \$265,000 does not apply.

The IRA custodian does not have the duty to keep separate these 3 types of

## IRS Issues 2017 Indexed Amounts for HSAs

The HSA contribution limits for 2017 will be the same as the 2016 limits for family HDHP coverage, but will increase by \$50 for single HDHP coverage. The Treasury Department and Internal Revenue Service issued new guidance on the maximum contribution levels for Health Savings Accounts (HSAs) and out-of-pocket spending and deductible limits for High Deductible Health Plans (HDHPs) that must be used in conjunction with HSAs. The 2017 limits are set forth in Revenue Procedure 2016-28. These limits have changed only minimally because changes in the Consumer Price Index were very small for the relevant period under the statutory formula.

### High Deductible Health Plans

#### Maximum Contribution Limits Under Age 55

	<u>2016</u>	<u>2017</u>
Single HDHP	\$3,350	\$3,400
Family HDHP	\$6,750	\$6,750

#### Maximum Contribution Limits Age 55 & Older

	<u>2016</u>	<u>2017</u>
Single HDHP	\$4,350	\$4,400
Family HDHP	\$7,750	\$7,750

#### HSA Catch-Up Contributions

	<u>2016</u>	<u>2017</u>
Age 55 and Older	\$1,000	\$1,000

	<b>Minimum Annual Deductible</b>		<b>Maximum Annual Out-of-Pocket Expenses</b>	
	<u>2016</u>	<u>2017</u>	<u>2016</u>	<u>2017</u>
Single Coverage	\$1,300	\$1,300	\$6,550	\$6,550
Family Coverage	\$2,600	\$2,600	\$13,100	\$13,100

SIMPLE-IRA contributions for Form 5498 reporting purposes.

Excerpt from Instructions for Form 5305-SIMPLE

#### Employee Eligibility Requirements (Article I)

Each year for which this SIMPLE IRA plan is effective, you must permit salary reduction contributions to be made by all of your employees who are reasonably expected to receive at least

\$5,000 in compensation from you during the year, and who received at least \$5,000 in compensation from you in any 2 preceding years. However, you can expand the group of employees who are eligible to participate in the SIMPLE IRA plan by completing the options provided in Article I, items 1a and 1b. To choose full eligibility, check the box in Article I, item 1a. Alternatively, to choose limited eligibility, check the box in Article I, item 1b, and then insert "\$5,000" or a lower compensation amount

(including zero) and "2" or a lower number of years of service in the blanks in (i) and (ii) of Article I, item 1b.

In addition, you can exclude from participation those employees covered under a collective bargaining agreement for which retirement benefits were the subject of good faith bargaining.