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## Interesting Angles on DOL's Fiduciary Rule #1

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While you have probably read articles that summarize the **DOL's** final fiduciary rule and exemptions—and perhaps even articles that discuss specific aspects of the rules, there are a number of interesting observations “hidden” in the preambles to the regulation and exemptions.

In many cases, those comments are so focused on limited issues or complex that they are beyond the scope of the initial articles, speeches and webcasts. As a result, I will be writing several articles about those “nuggets.” This is the first of those articles.

In the preamble to the **Best Interest Contract Exemption (BICE)**, the DOL noted that a fiduciary adviser and his or her financial institution (e.g., RIA firm or broker-dealer) could contractually limit the duty to monitor. But then the DOL went on to say:

*“Further, when determining the extent of the monitoring to be provided, as disclosed in the contract pursuant to Section II(e) of the exemption, such Financial Institutions should carefully consider whether certain investments can be prudently recommended to the individual Retirement Investor, in the first place, without a mechanism in place for the ongoing monitoring of the investment. This is particularly a concern with respect to investments that possess unusual complexity and risk, and that are likely to require further guidance to protect the investor’s interests. Without an accompanying agreement to monitor certain recommended investments, or at least a recommendation that the Retirement Investor arrange for ongoing monitoring, the Adviser may be unable to satisfy the exemption’s Best Interest obligation with respect to such investments. Similarly, the added cost of monitoring such investments should be considered by the Adviser and Financial Institution in determining whether the recommended investments are in the Retirement Investor’s Best Interest.”*

In other words, if an adviser isn't going to have a duty to monitor the investments, don't recommend investments that retirement investors lack the capacity to properly monitor.

It's not clear where that line will ultimately be drawn – for example, does it refer to the particular investor or the average investor? As a result, some caution is warranted.

*The views expressed in this article are the views of Fred Reish, and do not necessarily reflect the views of Drinker Biddle & Reath.*

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