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Level Fee Fiduciary Exemption: Interesting Angles on DOL's Fiduciary Rule #5

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This is my fifth article about interesting observations “hidden” in the preambles to the fiduciary regulation and the exemptions.

The **Best Interest Contract Exemption (BICE)** has a special exemption for “level fee fiduciaries” who recommend to plan participants that they take distributions and rollover to an IRA advised by the fiduciary adviser. (A level fee fiduciary is an adviser who receives only an advisory fee. That is, neither the adviser, nor his supervisory entity [nor any affiliate or related party] can receive any additional compensation, e.g., revenue sharing or management fees for affiliate products.)

There are several requirements, but perhaps the most difficult is the “best interest” documentation:

“In the case of a recommendation to roll over from an ERISA Plan to an IRA, the Financial Institution [e.g., the RIA firm] documents the specific reason or reasons why the recommendation was considered to be in the Best Interest of the Retirement Investor. This documentation must include consideration of the Retirement Investor’s alternatives to a rollover, including leaving the money in his or her current employer’s Plan, if permitted, and must take into account the fees and expenses associated with both the Plan and the IRA; whether the employer pays for some or all of the plan’s administrative expenses; and the different levels of services and investments available under each option; . . .”

Where the fiduciary adviser is already working with the plan, this requirement appears to be manageable. However, it will likely be difficult for an adviser who does not have a relationship with the plan.

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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