

THE
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FINRA Regulatory Notice: Interesting Angles on the DOL's Fiduciary Rule #10

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This is tenth article about interesting observations “hidden” in the fiduciary regulation and the exemptions.

When the new fiduciary advice regulation is applicable on April 10, 2017, a recommendation to a participant to take a distribution and rollover to an IRA will be a fiduciary act. It doesn't matter if the adviser has a pre-existing relationship with the plan or the participant, or not.

Some RIA firms and broker-dealers focused on a similar issue when FINRA issued its Regulatory Notice 13-45 in late 2013. As that notice explained, distribution recommendations are investment recommendations (and thus, in the case of FINRA, are subject to the suitability standard), but distribution education is not an investment recommendation. To avoid the additional compliance work (and possibly prohibited transactions), many RIA firms and broker-dealers adopted a distributions education approach using 13-45 as the model. While the DOL agrees that distribution education is not a fiduciary recommendation, it does not agree that 13-45 is a safe harbor:

“In response to the comments suggesting that the Department adopt FINRA Notice 13-45 as a safe harbor for communications on benefits distributions, the FINRA notice did not purport to define a line between education and advice. The final rule [i.e., the fiduciary advice regulation] seeks to ensure that all investment advice to retirement investors adheres to fiduciary norms, particularly including advice as critically important as recommendations on how to manage a lifetime of savings held in a retirement plan and on whether to roll over plan accounts. Following FINRA and SEC guidance on best practices is a good way for advisers to look at for the interests of their customers, but it does not give them a pass from ERISA fiduciary status.”

As a word to the wise, RIAs and broker-dealers should revisit their 13-45 distribution education materials, and revise them to be consistent with the DOL's approach.

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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