

## Potential Prohibited Transactions: Interesting Angles on the DOL's Fiduciary Rule #12

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

The DOL has long taken the position that the recommendation of a discretionary investment manager is a fiduciary act. (At least one court has adopted that position – in a case involving investments with Madoff.)

While I am not aware of any guidance or litigation about potential prohibited transactions because of payments to persons who recommend investment managers (e.g., solicitor's fees), from a legal perspective, if the person making the referral is a fiduciary and that person receives a fee, it may be a prohibited transaction under ERISA and the Internal Revenue Code.

To further complicate matters, when the new fiduciary rule becomes applicable on April 10, 2017, the definition of “fiduciary” will cover someone who makes referrals to both discretionary investment managers and non-discretionary investment advisers for plans, participants and IRAs. More specifically, the fiduciary definition includes:

*“A **recommendation as to the** management of securities or other investment property, including, among other things, recommendations on investment policies or strategies, portfolio composition, **selection of other***

**persons to provide investment advice or investment management services . . .”** [Emphasis added.]

In other words, a person who recommends a fiduciary adviser (which could include financial advisers, insurance agents and investment advisers under the new definition) will be a fiduciary for that purpose, if a fee is paid for the referral; and the payment of that fee could be (or, perhaps, probably will be) a prohibited transaction.

This is a significant change. Advisers who pay fees for referrals should consider its impact.

*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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