

THE  
NATIONAL LAW REVIEW

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## Investment Policies: Interesting Angles on the DOL's Fiduciary Rule #13

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Tuesday, July 26, 2016

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

It is not clear under current rules whether “suggesting” investment policies is a fiduciary act. In that vein, it’s also not clear if providing a sample investment policy statement (IPS) is a fiduciary act. However, that is about to change.

When the new fiduciary regulation applies—on April 10, 2017, the recommendation of investment policies, strategies or portfolio composition will be fiduciary activities. As the DOL says in the preamble to the fiduciary regulation:

*Specifically, the final rule includes text that describes management of securities or other investment property, as including, among other things, recommendations on investment policies or strategies, portfolio composition, or recommendations on distributions, including rollovers, from a plan or IRA.*

And, a mere suggestion to use certain investment policies can result in fiduciary status. The DOL defines a fiduciary recommendation as:

*For purposes of this section, “recommendation” means a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action.*

So, what does this mean? First, if you don’t want to be a fiduciary for that purpose, the safest bet is to avoid suggestions of investment policies or providing a sample IPS. A reasonable question is . . . if you didn’t mean for your comments or the sample document to suggest the use of the policies or IPS, why did you bring it up?

On the other hand, if you are willing to be a fiduciary for this purpose, make sure that you are a fiduciary (that is, that the recommendations/IPS are prudent under the circumstances). Keep in mind that ERISA’s prudent process rule is based on generally accepted investment theories and prevailing investment industry standards. Your policy recommendations should be based on those concepts (absent an explicit instruction from the investor to the contrary).

If you have read to this point, you are probably thinking about these issues in the context of retirement plans. That’s valid, but only partially so. Beginning April 10, these rules also apply to IRAs. Do you suggest investment policies to IRA owners or supply an IPS? If so, the same concepts will apply.

Forewarned is forearmed.

*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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