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## Investment Suggestions: Interesting Angles on the DOL's Fiduciary Rule #14

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This is fourteenth article about interesting observations "hidden" in the fiduciary regulation and the exemptions.

When the new fiduciary regulation applies on April 10, 2017, anyone who makes investment recommendations or investment "suggestions" to retirement plans will be a fiduciary adviser. As a result, the adviser must engage in a prudent process for developing those recommendations. However, that is not a dramatic change for many advisers, since they already serve as fiduciaries and use prudent process.

But, the same rules will apply to many advisers to IRAs. As a result, advisers to IRAs will also need to use prudent processes to develop their investment recommendations.

What does that process look like? The DOL explains:

*"Thus the prudence standard, as incorporated in the Best Interest standard, is an objective standard of care that requires investment advice fiduciaries to investigate and evaluate investments, make recommendations, and exercise sound judgment in the same way that knowledgeable and impartial professionals would. "[T]his is not a search for subjective good faith - a pure heart and an empty head are not enough." Whether or not the fiduciary is actually familiar with the sound investment principles necessary to make particular recommendations, the fiduciary must adhere to an objective professional standard. Additionally, fiduciaries are held to a particularly stringent standard of prudence when they have a conflict of interest."*

In other words, fiduciary advisers are held to the standard by a hypothetical person who is knowledgeable about retirement investing. First and foremost, that means that the adviser must engage in a prudent process to formulate the recommendations to the investor. That includes an investigation of the needs, circumstances and objectives of the investor. A prudent process also includes application of generally accepted investment theories, such as modern portfolio theory. Courts have said that a prudent fiduciary would utilize prevailing investment industry practices in selecting investments (which could include consideration of costs and quality).

As good risk management, advisers should retain documentation of their process for developing their recommendations for at least six years.

*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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