

Adviser Recommendations: Interesting Angles on DOL's Fiduciary Rule #16

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

Beginning April 10, 2017, the recommendation of almost any investment or insurance product to a plan, a participant or an IRA owner will be a fiduciary act. (While individualized recommendations are already fiduciary acts, the definition of advice will be extended to include a “suggestion” that the advice recipient engage in, or refrain from, a particular course of action. In other words, the definition of fiduciary advice is being greatly expanded, and enforcement mechanisms are being added.) Also, a fiduciary recommendation includes a referral to a fiduciary investment adviser or manager. Since almost all advisers to plans, participants and IRA owners will be fiduciaries, that means that virtually any referral to an adviser will be a fiduciary act (where some compensation is associated with the referral).

But what if an adviser recommends himself? Not a problem!

The DOL has created the concept of “hire me” and explained that touting one’s own advisory services (as opposed to products or strategies) is not a fiduciary act. In the preamble to the fiduciary advice regulation the DOL said:

“It was not the intent of the Department, however, that one could become a fiduciary merely by engaging in the normal activity of marketing oneself or an affiliate as a potential fiduciary to be selected by a plan fiduciary or

IRA owner, without making an investment recommendation covered by (a) (1)(i) or (ii).”

“Accordingly, a person or firm can tout the quality of his, her, or its own advisory or investment management services or those of any other person known by the investor to be, or fairly identified by the adviser as, an affiliate, without triggering fiduciary obligations.”

Advisers should be careful in using this approach. While it’s not fiduciary advice to explain one’s services and fees, if the discussion also includes the recommendation of a particular investment or strategy (or a rollover), that’s fiduciary advice.

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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