

THE  
NATIONAL LAW REVIEW

---

## Reasonable Compensation Versus Neutral Factors: Interesting Angles on the DOL's Fiduciary Rule #25

---

Tuesday, October 25, 2016

This is my twenty-fifth article covering interesting observations about the fiduciary rule and exemptions.

In my last post, I wrote about the **Best Interest Contract Exemption (BICE)** and the requirements for “neutral factors” and “differential compensation” between “reasonably designed investment categories.” As I pointed out, the purpose of neutral factors is to determine the relationship of compensation between different categories of investments and services. In other words, neutral factors don't establish a dollar amount of compensation, but instead they are used for determining the relative compensation between different reasonably designed investment categories. Think of it as evaluating degree of difficulty in terms of work, complexity, value, etc.

But that begs the question, if neutral factors are used to establish the ratio of compensation, how is the compensation determined?

The best way to approach that question is to look at a single reasonably designed investment category. Within an investment category, the compensation of an adviser must be both reasonable and level. Stated slightly differently, the compensation of the adviser cannot exceed a reasonable amount (based on the services rendered) and the adviser's compensation must be level regardless of which products are recommended . . . and regardless of the payments made to the adviser's supervisory entity (e.g., broker-dealer or any affiliate or related party). For example, if the compensation paid to the individual adviser is 1% per year for providing non-discretionary investment advice on a portfolio of mutual funds, that compensation needs to be tested for reasonableness and needs to be level regardless of which mutual funds are recommended and regardless of the payments, if any, to the adviser's broker-dealer (or any affiliated or related party).

“Level” is fairly easy to grasp. In my example, a level fee is 1% regardless of which mutual funds are recommended. “Reasonable” is a bit more difficult. As explained in prior posts, the DOL says that reasonable compensation is based on market data—in an open, transparent and competitive market. The easiest way to obtain that information is through a benchmarking service. It is important, though, to review the reasonableness of compensation at least every two or three years. The experience of advisers in the 401(k) world is that, as the marketplace has matured, the level of reasonable compensation has become lower and lower.

Also, advisers should be aware that, when a prohibited transaction exemption—such as BICE—is being used, the burden of proof is on the person claiming the exemption, that is, the adviser. So, you need to have information in your file that supports the reasonableness of your compensation.

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.*

Part 1- [Interesting Angles on DOL's Fiduciary Rule #1](#)

Part 2 - [Best Interest Standard of Care: Interesting Angles on the DOL's Fiduciary Rule #2](#)

Drinker Biddle®

Article By [Drinker Biddle & Reath LLP](#)  
[Fred Reish](#)[FredReish.com](#)

[Financial Institutions & Banking](#)  
[Labor & Employment](#)  
[All Federal](#)

- Part 3 - [Hidden Preamble Observations: Interesting Angles on the DOL's Fiduciary Rule #3](#)
- Part 4 - [TV Stock Tips and Fiduciary Advice: Interesting Angles on DOL's Fiduciary #4](#)
- Part 5 - [Level Fee Fiduciary Exemption: Interesting Angles on DOL's Fiduciary Rule #5](#)
- Part 6 - [Fiduciary Regulation And The Exemptions: Interesting Angles on the DOL's Fiduciary Rule #6](#)
- Part 7 - [Fiduciary Regulations And The Exemptions : Interesting Angles on the DOL's Fiduciary Rule #7](#)
- Part 8 - [Designated Investment Alternatives: Interesting Angles on the DOL's Fiduciary Rule #8](#)
- Part 9 - [Best Interest Standard and the Prudent Man Rule: Interesting Angles on the DOL's Fiduciary Rule #9](#)
- Part 10 - [FINRA Regulatory Notice: Interesting Angles on the DOL's Fiduciary Rule #10](#)
- Part 11-[ERISA and the Internal Revenue Code: Interesting Angles on the DOL's Fiduciary Rule #11](#)
- Part 12- [Potential Prohibited Transactions: Interesting Angles on the DOL's Fiduciary Rule #12](#)
- Part 13-[Investment Policies: Interesting Angles on the DOL's Fiduciary Rule #13](#)
- Part 14- [Investment Suggestions: Interesting Angles on the DOL's Fiduciary Rule #14](#)
- Part 15- [Best Interest Contract Exemption: Interesting Angles on the DOL's Fiduciary Rule #15](#)
- Part 16 - [Adviser Recommendations: Interesting Angles on DOL's Fiduciary Rule #16](#)
- Part 17 - [Level Fee Fiduciary: Interesting Angles on DOL's Fiduciary Rule #17](#)
- Part 18- [Best Interest Contract Exemption and IRA Advisor Compensation: Interesting Angles on the DOL's Fiduciary Rule #18](#)
- Part 19- [Interesting Angles on the DOL's Fiduciary Rule #19: Advisors' Use of "Hire Me" Practices.](#)
- Part 20- [Three Parts of "Best Interest Standard of Care": Interesting Angles on the DOL's Fiduciary Rule #20](#)
- Part 21- [Retirement Plan Documentation and Prudent Recommendation: Interesting Angles on the DOL's Fiduciary Rule #21](#)
- Part 22-[Banks and Prohibited Transactions: Interesting Angles on the DOL's Fiduciary Rule #22](#)
- Part 23-[Prohibited Transactions: IRA and RIA Qualified Money: Interesting Angles on the DOL's Fiduciary Rule #23](#)
- Part 24 - [Differential Compensation Based on Neutral Factors: Interesting Angles on DOL's Fiduciary Rule #24](#)
- Part 26- [Interesting Angles on the DOL's Fiduciary Rule #26- Reasonable Compensation for IRAs: When and How Long?](#)
- Part 27 - [Definition of Compensation: Interesting Angles on DOL's Fiduciary Rule #27](#)
- Part 28 - [What About Rollovers that Aren't Recommended?: Interesting Angles on the DOL's Fiduciary Rule #28](#)
- Part 29- [Capturing Rollovers: What Information is Needed?: Interesting Angles on the DOL's Fiduciary Rule #29](#)
- Part 30- [Three Kinds of Level Fee Fiduciaries . . . and What's A "Level Fee?": Interesting Angles on the DOL's Fiduciary Rule #30](#)
- Part 31 - ["Un-levelizing" Level Fee Fiduciaries: Interesting Angles on the DOL's Fiduciary Rule #31](#)
- Part 32 - [What "Level Fee Fiduciary" Means for Rollover Advice: Interesting Angles on the DOL's Fiduciary Rule #32](#)
- Part 33- [Discretionary Management, Rollovers and BICE: Interesting Angles on the DOL's Fiduciary Rule #33](#)
- Part 34- [Seminar Can Be Fiduciary Act: Interesting Angles on DOL's Fiduciary Rule #34](#)
- Part 35- [Presidential Memorandum on Fiduciary Rule: Interesting Angles on the DOL's Fiduciary Rule #35](#)
- Part 36 -[Retirement Advice and the SEC: Interesting Angles on the DOL's Fiduciary Rule #36](#)

- Part 37 - [SEC Retirement-Targeted Examinations: Interesting Angles on the DOL's Fiduciary Rule #37](#)
- Part 38- [SEC Examinations of RIAs and Broker-Dealers under the ReTIRE Initiative: Interesting Angles on the DOL's Fiduciary Rule #38](#)
- Part 39- [FINRA Regulatory Notice 13-45: Guidance on Distributions and Rollovers: Interesting Angles on the DOL's Fiduciary Rule #39](#)
- Part 40 - [New Rule, Old Rule - What Should Advisers Do Now?: Interesting Angles on the DOL's Fiduciary Rule #40](#)
- Part 41 - [While We Wait: The Current Fiduciary Rule and Annuities: Interesting Angles on DOL's Fiduciary Rule #41](#)
- Part 42 - [Rollovers under DOL's Final Rule: Interesting Angles on DOL's Fiduciary Rule #42](#)
- Part 43 - [BICE Transition: More Than the Eye Can See - Interesting Angles on DOL's Fiduciary Rule #43](#)
- Part 44 - [Basic Structure of Fiduciary Package \(June 9\): Interesting Angles on DOL's Fiduciary Rule #44](#)
- Part 45 - [DOL Fiduciary "Package": Basics on the Prohibited Transaction Exemptions: Interesting Angles on the DOL's Fiduciary Rule #45](#)
- Part 46 - [How Does an Adviser Know How to Satisfy the Best Interest Standard?: Interesting Angles on the DOL's Fiduciary Rule #46](#)
- Part 47- ["Real" Requirements of Fiduciary Rule: Interesting Angles on DOL's Fiduciary Rule #47](#)
- Part 48- [The Last Word: The Fiduciary Rule Applies on June 9- Interesting Angles on the DOL's Fiduciary Rule #48](#)
- Part 49- [The Requirement to Disclose Fiduciary Status: Interesting Angles on the DOL's Fiduciary Rule #49](#)
- Part 50- [Fourth Impartial Conduct Standard: Interesting Angles on DOL's Fiduciary Rule #50](#)
- Part 51- [Recommendations to Transfer IRAs: Interesting Angles on the DOL's Fiduciary Rule #51](#)
- Part 52 - [The Fiduciary Rule and Exemptions: How Long Will Our Transition Be?: Interesting Angles on the DOL's Fiduciary Rule #52](#)
- Part 53 - [Fiduciary Rule and Discretionary Investment Management: Interesting Angles on DOL's Fiduciary Rule #53](#)
- Part 54 - [The DOL's RFI and Possible changes to BICE: Interesting Angles on the DOL's Fiduciary Rule #54](#)
- Part 55- [DOL's RFI and Recommendation of Annuities- Interesting Angles on DOL's Fiduciary Rule #55](#)
- Part 56- [Recommendations of Contributions as Fiduciary Advice: Interesting Angles on the DOL's Fiduciary Rule #56](#)
- Part 57- [Relief from 408\(b\)\(2\) Requirement on Change Notice: Interesting Angles on the DOL's Fiduciary Rule #57](#)
- Part 58- [Recommendations to Contribute to a Plan or IRA- Interesting Angles on the DOL's Fiduciary Rule #58](#)
- Part 59- [What Plans and Arrangements Are Covered by the Fiduciary Rule: Interesting Angles on the DOL's Fiduciary Rule #59](#)
- Part 60- [What the Tibble Decision Means to Advisers: Interesting Angles on the DOL's Fiduciary Rule #60](#)
- Part 61- [The Fiduciary Rule, Distributions and Rollovers: Interesting Angles on the DOL's Fiduciary Rule #61](#)
- Part 62 - [Is It Possible To Be An Advisor Without Being A Fiduciary? - Interesting Angles on the DOL's Fiduciary Rule #62](#)
- Part 63- [Policies and Procedures: The Fourth BICE Requirement - Interesting Angles on the DOL's Fiduciary Rule #63](#)
- Part 64 - [What Does the Best Interest Standard of Care Require?-Interesting Angles on the DOL's Fiduciary Rule #64](#)
- Part 65- [Unexpected Consequences of Fiduciary Rule - Interesting Angles on the DOL's Fiduciary Rule #65](#)

- Part 66- [Concerns About 408\(b\)\(2\) Disclosures: Interesting Angles on the DOL's Fiduciary Rule #66](#)
- Part 67- [From the DOL to the SEC - Interesting Angles on the DOL's Fiduciary Rule #67](#)
- Part 68-[Recommendations of Distributions - Interesting Angles on the DOL's Fiduciary Rule #68](#)
- Part 69- [Compensation Risks for Broker-Dealers and RIAs: Interesting Angles on the DOL's Fiduciary Rule #69](#)
- Part 70-[The Fiduciary Rule and Recordkeeper Services: Interesting Angles on the DOL's Fiduciary Rule #70](#)
- Part 71- [Recordkeepers and Financial Wellness Programs: Interesting Angles on the DOL's Fiduciary Rule #71](#)
- Part 72-[The "Wholesaler" Exception: Interesting Angles on the DOL's Fiduciary Rule #72](#)
- Part 73- [Recordkeeper Investment Support for Plan Sponsors: Interesting Angles on the DOL's Fiduciary Rule #73](#)
- Part 74 -[One More Fiduciary Issue for Recordkeepers: Interesting Angles on the DOL's Fiduciary Rule #74](#)
- Part 75 - [The Fiduciary Rule: Mistaken Beliefs-Interesting Angles on the DOL's Fiduciary Rule #75](#)
- Part 76 - [Discretionary Management of IRAs: Prohibited Transaction Issues for RIAs- Interesting Angles on the DOL's Fiduciary Rule #76](#)
- Part 77 - [The Fiduciary Rule: Mistaken Beliefs \(#2\): Interesting Angles on the DOL's Fiduciary Rule #77](#)
- Part 78 - [The Fiduciary Rule: Mistaken Beliefs \(#3\): Interesting Angles on the DOL's Fiduciary Rule #78](#)
- Part 79 - [The Fiduciary Rule: Mistaken Beliefs \(#4\)- Interesting Angles on the DOL's Fiduciary Rule #79](#)
- Part 80 - [Enforceable During Transition?: Interesting Angles on the DOL's Fiduciary Rule #80](#)
- Part 81 - [The Fiduciary Rule Prohibits Commissions... or Not \(Myth #6\): Interesting Angles on the DOL's Fiduciary Rule #81](#)
- Part 82 - [Undisclosed \(and Disclosed\) 12b-1 Fees: The Different Views of the SEC and DOL - Interesting Angles on the DOL's Fiduciary Rule #82](#)
- Part 83 - [Part 2 of Undisclosed \(and Disclosed\) 12b-1 Fees: Interesting Angles on the DOL's Fiduciary Rule #83](#)
- Part 84- [What Does the 5th Circuit Decision Mean for Rollover Recommendations?: Interesting Angles on the DOL's Fiduciary Rule #84](#)
- Part 85 -[The Fiduciary Rule: What's Next \(Part 1\)? : Interesting Angles on the DOL's Fiduciary Rule #85](#)
- Part 86- [The Fiduciary Rule: What's Next \(Part 2\)?: Interesting Angles on the DOL's Fiduciary Rule #86](#)
- Part 87 - [The Fiduciary Rule: What's Next \(Part 3\)?: Interesting Angles on the DOL's Fiduciary Rule #87](#)
- Part 88 -[The Fiduciary Rule: What's Next \(Part 4\)? : Interesting Angles on the DOL's Fiduciary Rule #88](#)
- Part 89 - [The 5th Circuit Decision, Prohibited Transactions, and New Non-Enforcement Policies: Interesting Angles on the DOL's Fiduciary Rule #89](#)
- Part 90 - [Parallels Between the SEC Regulation Best Interest and the DOL Best Interest Contract Exemption \(Part 1\): Interesting Angles on the DOL's Fiduciary Rule #90](#)
- Part 91- [Parallels Between the SEC Regulation Best Interest and the DOL Best Interest Contract Exemption \(Part 2\): Interesting Angles on the DOL's Fiduciary Rule #91](#)
- Part 92 - [SEC Proposed Reg BI and Recommendations of Rollovers \(Part 1\): Interesting Angles on the DOL's Fiduciary Rule #92](#)
- Part 93 - [SEC Proposed Reg BI and Recommendations of Rollovers \(Part 2\): Interesting Angles on the DOL's Fiduciary Rule #93](#)
- Part 94 - [SEC Proposed Reg BI and Recommendations of Rollovers \(Part 3\) : Interesting Angles on the DOL's Fiduciary Rule #94](#)
- Part 95 - [Regulation Best Interest Recommendations by Broker-Dealers: Part 1- Interesting Angles on the DOL's](#)

[Fiduciary Rule #95](#)

Part 96 - [Regulation Best Interest Recommendations by Broker-Dealers: Part 2- Interesting Angles on the DOL's Fiduciary Rule #96](#)

Part 97 - [Regulation Best Interest Recommendations by Broker-Dealers: Part 3 - Interesting Angles on the DOL's Fiduciary Rule #97](#)

Part 98 - [Regulation Best Interest: Consideration of Cost and Compensation- Interesting Angles on the DOL's Fiduciary Rule #98](#)

Part 99 - [Investment Advisers and the SEC's Interpretation of Their Duties: Interesting Angles on the DOL's Fiduciary Rule #99](#)

Part 100 - [Investment Advisers and the SEC's Interpretation of Their Duties: Part II- Interesting Angles on the DOL's Fiduciary Rule #100](#)

© 2019 Drinker Biddle & Reath LLP. All Rights Reserved

**Source URL:** <https://www.natlawreview.com/article/reasonable-compensation-versus-neutral-factors-interesting-angles-dol-s-fiduciary>