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## What About Rollovers that Aren't Recommended?: Interesting Angles on the DOL's Fiduciary Rule #28

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This is my twenty-eighth article about interesting observations concerning the Department of Labor's fiduciary rule and exemptions. These articles also cover the DOL's FAQs interpreting the regulation and exemptions.

Under the DOL's fiduciary regulation, the recommendation of a plan distribution and IRA rollover will be fiduciary advice, subject to the best interest standard of care and the prohibited transaction rules. But, what if a participant takes a distribution and rolls over into an IRA with an adviser . . . without a recommendation by the adviser?

As background, there are three ways that a participant can make a decision to take a distribution and roll over into an IRA. The first is "unsolicited." In other words, the participant made the decision without any input from an adviser or recordkeeper. The second is "educated." Distribution education involves providing a participant with information about the participant's alternatives and the important considerations for selecting among the alternatives. The information must be unbiased and substantially complete. It cannot provide guidance to a participant to make a particular decision. The third way is "recommendation." In the case of a recommendation, the adviser must engage in a prudent process to evaluate the relevant factors and to reach a reasoned recommendation in the best interest of the participant.

Without much fanfare, the DOL explained the "unsolicited" alternative in Q4 of the FAQs. The question posed by the DOL was: "Is compliance with the BIC exemption required as a condition of executing a transaction, such as a rollover, at the direction of a client in the absence of an investment recommendation?"

The DOL answered: "No. In the absence of an investment recommendation, the rule does not treat individuals or firms as investment advice fiduciaries merely because they execute transactions at the customer's direction."

But, the DOL goes on to admonish: "If, however, the firm or adviser does make a recommendation concerning a rollover or investment transaction and receives compensation in connection with or as a result of that recommendation, it would be a fiduciary and would need to rely on an exemption."

In other words, fiduciary status is tied to a recommendation by an adviser. Absent an adviser recommendation, a decision made by a participant is not regulated by the fiduciary and prohibited transaction rules.

*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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