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What "Level Fee Fiduciary" Means for Rollover Advice: Interesting Angles on the DOL's Fiduciary Rule #32

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This is 32nd 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.

As explained in **article #30 in the Angles series**, in order to use the simplified, or BICE-lite, alternative for recommending that participants take distributions and roll over to IRAs with the adviser, the adviser must be a "Level Fee Fiduciary." The Best Interest Contract Exemption (BICE) defines "Level Fee Fiduciary" as:

> *A Financial Institution and Adviser are ''Level Fee Fiduciaries'' if the only fee received by the Financial Institution, the Adviser and any Affiliate in connection with advisory or investment management services to the Plan or IRA assets is a Level Fee that is disclosed in advance to the Retirement Investor. A ''Level Fee'' is a fee or compensation that is provided on the basis of a fixed percentage of the value of the assets or a set fee that does not vary with the particular investment recommended, rather than a commission or other transaction-based fee.*

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If the financial institution satisfies that definition, an adviser can use the BICE-lite, simplified process for recommending that participants rollover to IRAs. On the other hand, if the compensation does not satisfy that definition, then the adviser and the financial institution (e.g., broker-dealer) must satisfy all of the BICE conditions in order to recommend a rollover without committing a prohibited transaction.

The key words in the definition are: "only fee received." (For the remainder of this article, I use "adviser" to collectively refer to the adviser, the financial institution, and all affiliates and related parties.) Does that mean that, if the adviser receives other forms of compensation, such as 12b-1 fees, that the adviser cannot levelize his compensation (for purposes of rollover recommendations) by offsetting the 12b-1 fees on a dollar-for-dollar basis? At least one DOL speaker has said that it does. That is, a Department of Labor employee has said that, if any additional compensation is received—even if it is offset, the Level Fee Fiduciary, or BICE-lite, approach is not available.

On the other hand, the definition does permit "compensation that is provided on the basis of a fixed percentage." If the additional payments are offset against the advisory fee, then the only compensation received by the adviser is the stated level fee.

The preamble to the BIC exemption is worded slightly differently than the exemption:

> *It is important to note that the definition of Level Fee explicitly excludes receipt by the Adviser, Financial Institution or any Affiliate of commissions or other transaction-based payments. Accordingly, if either the Financial Institution or the Adviser or their Affiliates, receive any other remunerations (e.g., commissions, 12b– 1 fees or revenue sharing), beyond the Level Fee in connection with investment management or advisory services with respect to, the plan or IRA, the Financial Institution and Adviser will not be able to rely on these streamlined conditions in Section II(h).*

Interestingly, the preamble, in the first sentence, suggests that no other payments can be received, but in the next sentence suggests that payments cannot be on top of (or "beyond") the level fee (as opposed to offset against the level fee). The first sentence says that the definition "excludes receipt . . . of commissions or other transaction-based payments." That seems clear enough (unless you want to argue that an offset effectively trumps the receipt). The next sentence refers to the receipt of "any other remunerations (*e.g.*, commissions, 12b-1 fees, or revenue sharing), beyond the Level Fee . . .". While not entirely clear, a reasonable interpretation is that, if the additional payments are offset against the Level Fee on a dollar-for-dollar basis, the payment of those additional amounts is not "beyond the Level Fee." (A similar "levelizing" approach would be to pay over into the IRA any payments received from the investments.)

So, where does that leave us? For the belt-and-suspenders crowd—the very conservative advisers, the ultra-safe answer is to avoid all other payments or benefits. On the other hand, for those advisers who are willing to rely on a reasonable interpretation (or, in other words, to use a belt without suspenders), a possible approach is, in the case where additional payments are received, to offset those additional payments on a dollar-for-dollar basis (or to pay them over into the IRA). Keep in mind, though, this is a legal issue. As a result, advisers should not rely on general articles such as this one. Instead, you need to get individualized legal advice that applies to your particular circumstances and that quantifies the degree of risk, if any, that you are taking.

POST-SCRIPT: One oddity about the stricter interpretation (that is, that any payments cause the "forfeit" of BICE lite) is that, if full BICE compliance is required, there is no conflict of interest to disclose, since the DOL has separately said that the offset method works to eliminate conflicts of interest (i.e., prohibited transactions).

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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