

THE
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Discretionary Management, Rollovers and BICE: Interesting Angles on the DOL's Fiduciary Rule #33

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This is 33rd 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.

Most broker-dealers and RIA firms are familiar with the provisions of the Best Interest Contract Exemption (BICE) and with the fact that, as a general rule, BICE applies only to non-discretionary investment advice. But, that isn't the end of the story. There are some situations in which discretionary management can be used for recommendations that are covered by BICE. For example, if a representative of a broker dealer or an RIA prudently recommends a distribution and IRA rollover (satisfying the Level Fee Fiduciary conditions), the IRA may be invested using discretionary investment manager.

(Note, though, that the discretionary investment management must be provided by a "pure" Level Fee Fiduciary. That means that neither the adviser, the supervisory entity (e.g., the broker dealer or RIA firm), or any affiliated or related party can receive any compensation in addition to the level fee. Those prohibited additional forms of compensation would include, for example, investment management fees for proprietary investments, 12b-1 fees, or revenue sharing.)

The Department of Labor specifically addressed the issue of discretionary investment management for recommended rollovers in its recently issued FAQs — Frequently Asked Questions. Question and Answer 7 stated the following:

Q7. Is the BIC Exemption available for recommendations to roll over assets to an IRA to be managed on a going-forward basis by a discretionary investment manager?

*Yes. As noted above, the BIC Exemption does not provide relief for a recommended transaction if the adviser has or exercises any discretionary authority or discretionary control with respect to the transaction. However, **it does provide relief for investment advice to roll over a plan account into an IRA, even if the adviser or financial institution will subsequently serve as a discretionary investment manager with respect to the IRA, as long as the adviser does not have or exercise any discretionary authority or discretionary control with respect to the decision to roll over assets of the plan to an IRA, and the other applicable conditions of the exemption are satisfied.***

The moral of this story is that the DOL's fiduciary rule and exemptions are complex. As a result, the guidance should be studied closely, and it is not enough to rely on newspaper articles and speeches to make decisions. In our discussions with broker dealers, RIAs and individual advisers, we have found that there are a number of misconceptions about the rules, including that some people believe that BICE can never be used for discretionary investment management. Obviously, the DOL language quoted in this article debunks that perception.

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

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