

# FINRA Regulatory Notice 13-45: Guidance on Distributions and Rollovers: Interesting Angles on the DOL's Fiduciary Rule #39

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This is 39<sup>th</sup> 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 and related developments in the securities laws.

Even though the DOL fiduciary rule is being delayed, other regulators have indicated their interests in protecting participants from inappropriate recommendations to take plan distributions and roll over to IRAs.

FINRA, which oversees broker-dealers, addressed rollover recommendations to participants in Regulatory Notice 13-45. In describing the purpose of the notice, FINRA said:

*"FINRA is issuing this Notice to remind firms of their responsibilities when (1) recommending a rollover or transfer of assets in an employer-sponsored retirement plan to an Individual Retirement Account (IRA) or (2) marketing IRAs and associated services."*

FINRA noted that:

*“A broker-dealer’s recommendation that an investor roll over retirement plan assets to an IRA typically involves securities recommendations subject to FINRA rules. . . . Any recommendation to sell, purchase or hold securities must be suitable for the customer and the information that investors receive must be fair, balanced and not misleading.”*

FINRA went on to say that:

*“A recommendation concerning the type of retirement account in which a customer should hold his retirement investments typically involves a recommended securities transaction, and thus is subject to Rule 2111. For example, a firm may recommend that an investor sell his plan assets and roll over the cash proceeds into an IRA. Recommendations to sell securities in the plan or to purchase securities for a newly opened IRA are subject to Rule 2111.”*

In essence, FINRA concludes that a recommendation to take a rollover includes a recommendation to liquidate\* the investments in a participant’s 401(k) account. . . and that the liquidation recommendation is a “recommended securities transaction” and “thus is subject to Rule 2111.” The guidance then goes on to say:

*“If Rule 2111 is triggered, a registered representative must have a reasonable basis to believe that the recommendation is suitable for the customer, based on information about the options obtained through reasonable diligence, and taking into account factors such as tax implications, legal ramifications, and **differences in services, fees and expenses between the retirement savings alternatives.**” (Emphasis added.)*

Earlier in the Notice FINRA also describes the need for an adviser to compare investments, services and expenses in the plan and the recommended IRA before making a recommendation.

That is strikingly similar to the Best Interest Contract Exemption (BICE) requirement that fiduciary advisers must do a comparative analysis of the investments, services and expenses in the Plan and the proposed IRA before recommending a rollover.

The regulators appear to be harmonizing around the type of analysis and investigation required to make a suitable or prudent recommendation.

\*In a footnote, FINRA observes that it is possible that a plan could permit distributions in kind, rather than requiring liquidation of the plan’s designated investment alternatives. As a practical matter, I have not worked with any 401(k) plans that distribute in kind. I assume that my experience is typical and that few, if any, 401(k) plans permit distributions of their mutual fund shares.

*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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