

Rollovers under DOL's Final Rule: Interesting Angles on DOL's Fiduciary Rule #42

Drinker Biddle®

Article By

[Fred Reish](#)

[Drinker Biddle & Reath LLP](#)

[FredReish.com](#)

- [Labor & Employment](#)
- [All Federal](#)

Thursday, April 13, 2017

Rollovers under the DOL's Final Rule

This is my 42nd 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.

On April 7, 2017 the DOL issued its final regulation on the extension of the applicability date for the fiduciary definition and the related exemptions. This article discusses the impact of those changes on fiduciary status for recommendations to plan participants to take distributions and roll over to IRAs.

In its guidance, the DOL extended the applicability date of the new fiduciary definition from April 10 to June 9, but did not otherwise modify the definition. Since the fiduciary rule defined a recommendation to take a plan distribution as fiduciary advice, any recommendation to take a distribution and rollover to an IRA on or after June 9 will be a fiduciary act. As a result, an adviser will need to engage in a prudent process to develop and make such a recommendation. (For purposes of this rule, an "adviser" includes a representative of an RIA or a broker-dealer, an insurance agent or broker, or any other person who makes such a recommendation and receives compensation, directly or indirectly, as a result. An advisory fee from the IRA or a commission from an annuity or mutual fund are examples of compensation.)

However, more is involved than just the fiduciary rule. A recommendation to rollover is also a prohibited transaction, since the adviser will typically make more money if the participant rolls over than if the participant leaves the money in that plan. Because of the prohibited transaction, the adviser will need an exemption. Under the latest changes to the rules, advisers will probably use a process called “transition BIC,” which is a reference to a transition rule under the Best Interest Contract Exemption. (This process applies only from June 9 to December 31, unless it is extended. But it is likely that, at the least, these requirements will be part of any future exemption.). Transition BIC requires only that the adviser comply with the “Impartial Conduct Standards” (ICS).

The ICS requires that advisers adhere to the best interest standard of care, receive no more than reasonable compensation, and make no materially misleading statements. For this article, let’s focus on the best interest standard. Generally stated it is a combination of the ERISA prudent man rule and duty of loyalty.

So, an adviser must satisfy both ERISA’s prudent man rule (for the recommendation) and the BIC best interest rule (for the exemption). Since the two standards of care are virtually identical, I have combined them for this discussion.

But, that begs the question of, what is a prudent and best interest process?

Specifically, it is that the adviser must act “with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; . . .”

So, what would a prudent, knowledgeable and loyal person, who is making a recommendation about retirement investing (the “aims” of the “enterprise”), do? The first step is to gather the information needed to make an informed decision. Then that information needs to be evaluated in light of the participant’s needs and circumstances of the participant . . .with a duty of loyalty to the participant.

The only clear guidance from the DOL about what information needs to be gathered and evaluated is found in Q14 in the DOL’s Conflict of Interest FAQs (Part I-Exemptions).

The first part of the FAQ discusses the information needed if the adviser is a “Level Fee Fiduciary.” Basically, the information includes the investments, expenses and services in the plan and the proposed IRA.

But at the end of the FAQ, the DOL explains that those considerations must be evaluated even if the adviser is using regular BIC (as opposed to the Level Fee Fiduciary provision).

Accordingly, any fiduciary seeking to meet the best interest standard (in order to satisfy transition BIC) would engage in a prudent analysis of this information before recommending that an investor roll over plan assets to an IRA, regardless of whether the fiduciary was a “level fee” fiduciary or a fiduciary complying with BIC.

In other words, any adviser making a distribution and rollover recommendation on or

after June 9, 2017 must have a process for gathering and evaluating information about the investments, expenses and services in the participant's plan and in the proposed IRA, and about the participant's needs and circumstances.

This subject is more complicated than can be covered adequately in a short article, but this is a start for understanding the new rules for distributions and rollovers.

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](#)

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 25-[Reasonable Compensation Versus Neutral Factors: Interesting Angles on the DOL's Fiduciary Rule #25](#)
- 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 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/rollovers-under-dol-s-final-rule-interesting-angles-dol-s-fiduciary-rule-42>