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The Requirement to Disclose Fiduciary Status: Interesting Angles on the DOL's Fiduciary Rule #49

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This is our 49th 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.

When the new fiduciary rule applies on June 9, it will convert most non-fiduciary advisers into fiduciaries.

While there is not a disclosure requirement for new fiduciary advisers to IRAs, there is for these newly minted fiduciary advisers to plans. But it's not part of the new regulation. Instead the requirement is found in the 408(b)(2) regulation which was effective in 2012.

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As background, that regulation required that service providers to ERISA-governed retirement plans, including advisers, make written disclosures to plan fiduciaries of their services, compensation and "status." The status requirement was that service providers disclose if they were fiduciaries under ERISA and/or the securities laws (*e.g.*, RIAs). The regulation describes the status disclosure as follows:

> *If applicable, a statement that the covered service provider, an affiliate, or a subcontractor will provide, or reasonably expects to provide, services pursuant to the contract or arrangement directly to the covered plan…as a fiduciary…; and, if applicable, a statement that the covered service provider, an affiliate, or a subcontractor will provide, or reasonably expects to provide, services pursuant to the contract or arrangement directly to the covered plan as an investment adviser registered under either the Investment Advisers Act of 1940 or any State law.*

(The reference to "subcontractor" includes representatives of broker dealers who are independent contractors.)

For the most part, broker-dealers, and insurance agents and brokers, have taken the position that they were not fiduciaries and therefore did not make the fiduciary disclosure. And, if they were not in fact fiduciaries, those disclosures worked from July 1, 2012 until June 9, 2017, when the new definition will make them fiduciaries.

Technically, that last sentence is not absolutely correct. Let me explain. First, the new regulation requires that, to be considered a fiduciary, the adviser (and the supervisory entity) must make an investment recommendation. And, until the first investment recommendation is made, the adviser and entity are not fiduciaries. However, the definition of investment recommendation is so broad that it may be best to treat June 9 as the day they became fiduciaries. For example, a recommendation is a "suggestion" that the plan fiduciaries select, hold or remove investments; that the fiduciaries use a fiduciary adviser to give advice on investments or to help participants with investments; that the fiduciaries include certain specified policies in the IPS; and so on.

In other words, under the new rules it's hard for an adviser to work with a plan without being a fiduciary.

So, accepting that virtually all advisers to plans become fiduciaries on June 9, what does that mean for disclosure of fiduciary status?

The 408(b)(2) regulation generally provides that, after the initial notice is provided, no subsequent disclosures are required until there is a change in the information initially provided. But, of course, where the first notice was silent about fiduciary status, the transition to fiduciary status is a change. Here's what the regulation says about

changes:

> *A covered service provider must disclose a change to the information…as soon as practicable, but not later than 60 days from the date on which the covered service provider is informed of such change, unless such disclosure is precluded due to extraordinary circumstances beyond the covered service provider's control, in which case the information must be disclosed as soon as practicable.*

In other words, the service provider (*e.g.*, the broker dealer and adviser) must make a written disclosure of the change to fiduciary status to the "responsible plan fiduciary" within "60 days from the date on which the [broker dealer/adviser] is informed of such change." Unfortunately, there isn't any guidance on when a service provider is "informed" of the change to fiduciary status under these circumstances. For example, was it the day that it was finally determined that the fiduciary regulation would be applicable on June 9? Or, will it be on June 9? Or, will it be the first day that the adviser makes the first post-June 9 recommendation?

In the absence of clear guidance, a conservative approach may be advisable. So, my suggestion is that the change notice be sent in June. That's not my conclusion about the outer limit; instead, it's a conservative position.

The consequence of the failure to make 408(b)(2) disclosures is that compensation paid the broker-dealer and the adviser is prohibited.

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

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 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 RIA**s:** 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

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