

THE
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Recommendations of Distributions - Interesting Angles on the DOL's Fiduciary Rule #68

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Recommendations of Distributions: The SEC Joins the Fray

This is my 68th article about interesting observations concerning the Department of Labor's (DOL) fiduciary rule and exemptions. These articles also cover the DOL's FAQs interpreting the regulation and exemptions and related developments in the securities laws.

In 2013, FINRA put its stake in the ground on recommendations of distributions and rollovers when it issued Regulatory Notice 13-45. The DOL has, with the development of its fiduciary regulation over the past few years—which became applicable on June 9 of this year—taken a similar, but more demanding position. However, the DOL's guidance has more teeth than FINRA's, because it is backed by a standard of care—the prudent man rule and duty of loyalty—and by the prohibited transaction rules in ERISA and the Internal Revenue Code. Recently, the SEC has joined the fray with the issuance of its ReTIRE initiative and its examination priorities over the past few years.

The SEC has completed the first phase of its ReTIRE initiative. This Angles article reports on the observations from the first phase and the current examination priorities.

Needless to say, recommendations and rollovers are issues of concern to the SEC and are, in fact, being examined. RIAs and broker-dealers who do not have well-developed practices and documentation for recommending rollovers and distributions may be surprised when the SEC raises those issues and faults their practices. However, my belief is that compliance with the DOL's best interest standard of care (that is, the prudent man rule and the duty of loyalty) will satisfy the standard of care and conflicts of interest concerns of both the DOL and the SEC. As a result, broker-dealers and RIAs should focus on compliance with the DOL rules (especially in light of the SEC's examination positions). Additionally, broker-dealers and RIAs should seriously consider affirmatively disclosing the conflicts of interest inherent in recommending distributions and rollovers.

Here is some additional information about the SEC examinations and their observations:

- The SEC has conducted over 250 examinations under the ReTIRE initiative.
- Specific areas of concern have been uncovered during the examinations. Those include:
- Recommendations to investors/retirees of inappropriate share classes.
- Misleading marketing materials regarding offerings and rollovers.
- Lack of documentation to support the reasonableness of recommendations (including rollovers).
- Vague or omitted disclosures related to fees, conflicts and services of affiliates.
- Misleading touting of credentials.
- Supervision and compliance breakdowns.

We expect that the SEC's examinations will continue to focus on issues related to retirees and older investors,

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including distribution and rollover issues.

As an observation, in a recent SEC examination of a broker-dealer, the report specifically referenced practices which could violate FINRA Regulatory Notice 13-45. As a result, now is a good time for broker-dealers to review their practices, including advisor education, under 13-45, as well as the related policies, procedures and supervision.

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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