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## The Fiduciary Rule and Recordkeeper Services: Interesting Angles on the DOL's Fiduciary Rule #70

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This is 70<sup>th</sup> 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.

Almost all of my Angles articles have been about the impact of the fiduciary rule on advisors—representatives of broker-dealers and RIAs. However, the fiduciary rule also affects recordkeepers and the services that they offer to plans and advisors. In that regard, most of the work that we are doing for recordkeepers falls into three categories:

- Acceptance of fiduciary responsibility by recordkeepers for "financial wellness" of participants.
- Providing investment services and support for advisors, without becoming a fiduciary.
- Providing investment services and support for plan sponsors, without becoming a fiduciary.

The next few Angles articles will discuss these issues in detail. This article is just to introduce the topics.

### **Financial Wellness**

Financial wellness combines a focus on benefit adequacy with basic budgeting and financial management. Typically, it covers advice on plan participation, amounts to defer, repayment of indebtedness, budgeting and management of regular expenses, basic savings, investment advice and management of participants' accounts, roll-ins to plans, and rollovers from plans. The objective is to help employees with financial decision-making for the short, intermediate and long terms. Where the recommendations constitute fiduciary advice under ERISA and the Best Interest Contract Exemption, the recordkeepers are accepting fiduciary status.

### **Investment Assistance to Advisors**

The fiduciary rule includes an exception for investment services provided to "independent fiduciaries with financial expertise," or "IFFEs." Those fiduciaries include broker-dealers, RIAs, banks and trust companies, and insurance companies. In turn, where those financial institutions are willing to serve as fiduciaries with their advisors, recordkeepers can provide investment recommendations to the advisors without becoming fiduciaries. That is because the financial institution and the advisors are considered to be independent and knowledgeable fiduciaries who can evaluate the recordkeeper recommendations on behalf of their plan, participant and IRA clients.

### **Investment Assistance to Plan Sponsors**

While recordkeepers have great flexibility to provide investment advice to advisors (who qualify as IFFEs) without becoming fiduciaries, the same is not true for advice to plan sponsors. (The IFFE provision also applies to some larger plans.)

However, there are some exceptions of general application for providing investment information to plan

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sponsors. The most useable exception is for responding to requests for proposals (RFPs) and requests for information (RFIs). But, even that exception is limited. The investment list provided by the recordkeeper can only be based on the size of the employer or the size of the plan, or both. For existing plans, it could be based on the current investment line-up.

## **A Prediction About Future Directions**

As a prediction, recordkeepers will increasingly take advantage of the IFFE carve-out. That means that they will be providing suggested investment line-ups to qualifying IFFE advisors. The advisor will then need to evaluate the line-up and decide whether to present it to the plan sponsor. If an advisor then gives that investment line-up to the plan sponsor, the law will treat it as the advisor's fiduciary recommendation (and, therefore, not as a recommendation by the recordkeeper).

That is the only meaningful exception for individualized non-fiduciary investment recommendations by recordkeepers. The RFP/RFI exception will also help, but it provides, by definition, a generic list of investments.

*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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