

THE NATIONAL LAW REVIEW

One More Fiduciary Issue for Recordkeepers: Interesting Angles on the DOL's Fiduciary Rule #74

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This is 74th 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 my last four posts, Angles 70 through 73, I discussed issues and opportunities for recordkeepers under the new fiduciary rule and the transition Best Interest Contract Exemption. This post covers a carve-out to the fiduciary definition that probably will not work—or, at least, won't work effectively—for recordkeepers.

That carve-out to the fiduciary definition is one that allows recordkeepers to provide lists of the investments available on their platforms that satisfy certain criteria specified by the plan sponsor, for example, performance, expense ratios, volatility, etc. Specifically, that provision says that a recordkeeper does not become a fiduciary by:

Identifying investment alternatives that meet objective criteria specified by the plan fiduciary (e.g., stated parameters concerning expense ratios, size of fund, type of asset, or credit quality), provided that the person identifying the investment alternatives discloses in writing whether the person has a financial interest in any of the identified investment alternatives, and if so the precise nature of such interest; . . .”.

At first blush, that raises a practical question of whether plan sponsors who aren't working with advisors have the ability to select appropriate criteria. Fortunately, the DOL permits recordkeepers to provide information to plan sponsors about generally accepted criteria. So, that hurdle can be cleared.

Similarly, in a FAQ, the DOL permits recordkeepers to use the criteria in an investment policy statement and provide the plan sponsor with the list that those criteria produce, without the recordkeeper becoming a fiduciary for that purpose.

In that regard, the FAQ states:

The recordkeeper would not be treated as making a recommendation for purposes of the Rule if it provided a list of all of the investment alternatives available on the platform that meet the requirements of the plan's investment policy statement.

The recordkeeper must apply the criteria to all of the investments that are available on its platform and then report the results. As you might imagine, that could, depending on the criteria selected by the plan sponsor, be a list of just a few funds or a list of hundreds of funds.

Unfortunately, if the recordkeeper further winnows the list of investments produced by the application of the generally accepted criteria or the IPS criteria, the recordkeeper could become an investment fiduciary. In that regard, the DOL has said:

However, if the recordkeeper exercises discretion in narrowing the response to a selective list of investment alternatives, in the Department's view, the communication could constitute an investment recommendation for purposes of the Rule if a reasonable person would view the communication as a

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recommendation that the fiduciary choose investments from the selective menu screened by the recordkeeper.

My view is that this carve-out may not be particularly helpful . . . because recordkeepers cannot provide selective lists without running the risk of becoming fiduciaries. As a result, recordkeepers that do not want to be fiduciaries are likely to provide investment line-ups to advisors through wholesalers (see [Angles #72](#)) and through responses to RFPs and RFIs as described in [Angles #73](#).

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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