

The Fiduciary Rule: What's Next (Part 1)?: Interesting Angles on the DOL's Fiduciary Rule #85

Drinker Biddle®

Article By

[Fred Reish](#)

[Drinker Biddle & Reath LLP](#)

[FredReish.com](#)

- [Litigation / Trial Practice](#)
- [Labor & Employment](#)
- [5th Circuit \(incl. bankruptcy\)](#)

Tuesday, April 3, 2018

This is my 85th 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.

By now, it's common knowledge that the 5th Circuit Court of Appeals has thrown out the fiduciary rule. That includes the regulation expanding the definition of fiduciary advice and the related prohibited transaction exemptions, for example, the Best Interest Contract Exemption (BICE). At the same time, the SEC is working on a new "best interest" standard of care, and the DOL is working on amending the fiduciary regulation and related exemptions.

That raises the critical questions . . . where are we now and where are we going?

Let's start by looking at the issues that the DOL and SEC need to address. Subsequent posts will cover each of these points in more detail.

1. Who is a fiduciary?

This is the threshold question. The 5th Circuit's opinion said that a fiduciary relationship is one of "trust and confidence" which, in the Court's opinion, was not typical of arrangements with brokers. Instead, the Court focused on the "mutuality"

and “regular basis” parts of the old fiduciary definition (which is discussed in the next Angles, #86).

While not certain, it is possible that the Department of Labor will propose a new regulation, which expands on the old definition and which focuses on the elements of trust and confidence, as well as other criteria.

Meanwhile, the SEC has an entirely different approach. The DOL approach is “functional,” that is, it is based on conduct—if you act in a way that satisfies the fiduciary definition, you are a fiduciary regardless of your registration as a representative of a broker-dealer or RIA. By contrast, the SEC has, at least in the past, regarded representatives of RIAs and broker-dealers as providing different levels of advisory services (e.g., primary versus incidental) and, as a result, as being subject to different standards of care. A critical question for the SEC is whether RIAs and broker-dealers will have the same standard of care.

2. What is the fiduciary standard of care?

The fiduciary standard of care for advice to plans and participants is the prudent man rule and the duty of loyalty. That is based on the ERISA statute and cannot be changed by regulation. (But, of course, this assumes that an advisor is a fiduciary.)

The FINRA “standard of care” for broker-dealers is suitability.

RIAs are fiduciaries under a Supreme Court decision. However, there isn’t any formal definition of that standard of care. The SEC staff has taken the position that the suitability standard applies and that investment advisors must disclose all material information to their clients to permit them to make informed decisions about transactions and their advisory relationship. In addition, from time to time, the SEC applies a “reasonable basis” standard to RIAs.

(Out of fairness to both broker-dealers and RIAs, the requirements are greater than those described. However, this is a short article, so I am using general descriptions.)

3. How will conflicts of interest be treated under the new rules?

This is the area of greatest differences among the regulators.

Tax-qualified, ERISA-governed retirement plans are subject to the prohibited transaction rules in ERISA and the Internal Revenue Code. (Those rules are virtually identical in both statutes.) However, only the Code applies to IRAs.

Under both ERISA and the Code, financial conflicts of interest are prohibited. Generally speaking, the conflicts relate to compensation paid to financial institutions, individual advisors or any affiliates. In other words, it’s prohibited for fiduciary advisors and their firms to receive conflicted compensation. However, the DOL has the authority to issue exceptions (called “exemptions”) to the prohibited transaction rules. The most helpful exemption—the Best Interest Contract Exemption (BICE)—was thrown out by the 5th Circuit. As a result, in many cases conflicted

compensation for fiduciary advice will be prohibited—if the 5th Circuit decision is the final word. However, it's likely that the DOL will issue new exemptions—with conditions.

Both the SEC and FINRA generally rely on disclosures to mitigate conflicts. In other words, if adequately disclosed, it is permissible to have financial conflicts of interest for SEC and FINRA regulated advisors.

That describes the general lay of the land. My next few posts will deal with each of those three points.

We live in interesting times.

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 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 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/fiduciary-rule-what-s-next-part-1-interesting-angles-dol-s-fiduciary-rule-85>