

The DOL Fiduciary Rule

Updates & Possible Unintended Consequences

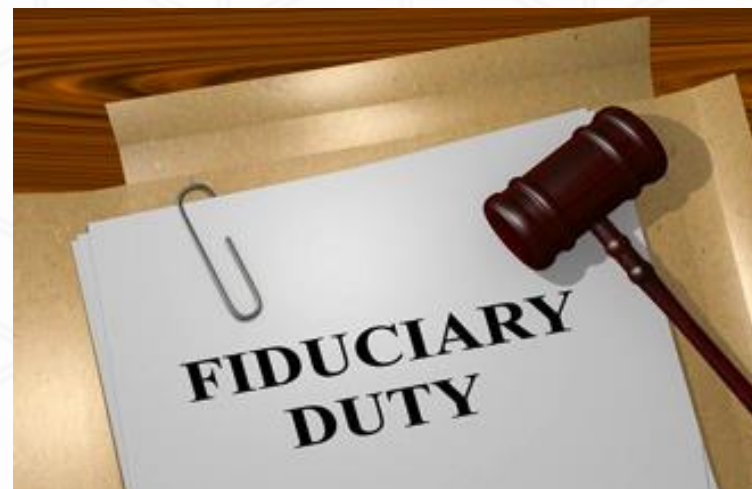
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Recap of Rule

Essentially anyone who provides investment advice for a retirement account in exchange for compensation—including brokers, advisers and insurance agents—must act as a fiduciary.

In other words, financial professionals who have acted as salespeople must now consider what's best for the customer's finances, rather than what's best for their own



Delays & Concerns

In February 2017, President Trump issued a memorandum that attempted to delay the rule's implementation by 180 days. This action included instructions for the DOL to carry out an “economic and legal analysis” on the rule's potential impact.



Delays & Concerns

Further delays in Implementation
SEC – Will it Enact its own Rule?

Advantages – SEC has administrative
arm in place to deal with this.

DOL would rely on lawyers and
courts

Possible Solution – SEC extends the
Investment Advisors Act of 1940 to all
providing paid advice

Requirement to disclose conflicts of
interest

Clients interest ahead of own



Delays & Concerns

Added Legal Expenses to Industry
Rule would allow class action
lawsuits against firms that violate
its provisions Commissioned Based
fees to be replaced by Fees charged
Fee Based Models
Assets Under Management Model –
fees by amount of assets managed
Jettison of customers with smaller
accounts
Loss of Low Cost Financial Planning



Unintended Consequences?

Does the new rule create conflicts inherent in many recommendations?

- Higher cost/potential higher commissioned products
- Higher returns
- What is the best/most suitable product for the client?

BICE – Friend or Foe?

Best Interest Contract Exception (BICE)

- The BICE allows firms to continue to use many current compensation and fee practices, but they need to disclose and mitigate conflicts of interest when providing investment advice to retirement clients

Questions:

- Is the request to sign a BICE actionable in and of itself?
- Will a BICE preclude claims asserting commission as the basis for the recommendation?



Effect on Particular Products

Will High Commission Products for rollover IRA's disappear

- Variable Annuities?
- REITS
- Reasonable fees ?

Bonds –

Issue “Level Pricing” –

- Fee based agents charge perhaps 1% on portfolio managed for stock based products
 - how to justify on bonds which perhaps have 3% to 6% return?
- With level pricing causes overcharging on bond products
- Option to Sell Bond Mutual funds or Bond ETF's

Structured Products

EG – FDIC insured CD Product – with stock market exposure with caps

Product protected initial investment through FDIC (to certain qualified investors)

Now the product has strict caps – 3% per quarter – so if stock market has good quarter – capped at 3%



5 Questions to Answer for Every Trade

- Is the recommendation consistent with the client's investment profile?
- Were the fees associated with the recommendation discussed with the client?
- Were other investment products and their costs discussed with the client?
- Was additional due diligence material used to make the recommendation?
- Is there any additional information pertinent to the recommendation?





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Ms. Anderson also regularly defends cases across the country concerning a variety of welfare benefits plans that were deemed to be abusive tax shelters by the IRS, and which resulted in subsequent fraud and other related claims against the designers and promoters of the plans for failing to predict the future tax treatment of the plans. She also regularly represents clients in complex business litigation, including matters involving real estate, partnership disputes, construction contracts, a variety of employment matters, and consumer class action defense.

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Michael Obert is a partner in the Phoenix office of Lewis Brisbois and a member of the Professional Liability Practice. Mr. Obert practices virtually all aspects of professional liability defense matters. In addition to financial professionals, Mr. Obert has represented insurance agents, real estate professionals, home owners associations and architects/engineers. Mr. Obert's practice also includes the other insurance defense claims and commercial litigation, including claims against debt collectors, bookkeepers and accountants, premises liability claims, products liability claims, contract claims, and automobile accidents.

Mr. Obert is a lead trial attorney with experience in numerous jury trials, evidentiary arbitrations, bench trials and other arbitrations. Two of Mr. Obert's litigated matters were recognized by the WI Law Journal in 2003 as among its "Significant Defense Verdicts."

Financial Professionals

In 2013, Mr. Obert successfully prevented a suit accusing a client of selling certain insurance products that were allegedly unsuitable from being sent to FINRA arbitration. After previously stipulating to dismiss claims in state court, the plaintiffs tried to reallege their claims in FINRA arbitration. Mr. Obert convinced the FINRA panel to dismiss the claims on the grounds that FINRA lacked jurisdiction and that the claims had already been released.

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