ROLLOVERS UNDER THE FIDUCIARY RULE

A Guide for Advisors

DAVIS & HARMAN LLP

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Introduction

January 2017

On April 10, 2017, many key aspects of the U.S. Department of Labor's (DOL) final rule on the definition of "fiduciary" and related final exemptions will become applicable, including more stringent requirements for evaluating and documenting any rollover recommendations that you provide to clients. The following is a summary of the final DOL fiduciary regulation's impact on rollover recommendations, prepared by Michael L. Hadley, Partner, and Courtney Zinter, Associate, at Davis & Harman LLP.

Overview Of The Fiduciary Rule

The DOL's new fiduciary rule expands the scope of who is considered a fiduciary by reason of providing investment advice with respect to retirement assets, including IRAs. The rule accomplishes this by replacing the five-part test that has been used since 1975 to determine whether fiduciary investment advice has been provided. Under the old test, an advice-giver was only rendered an investment advice fiduciary for purposes of the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (Code) if, in part, the advice was provided on a regular basis pursuant to a mutual agreement, arrangement, or understanding that the advice would serve as a primary basis for the investment decisions made. The new fiduciary rule replaces that test with a much broader standard under which a person becomes an investment advice fiduciary simply by providing, for a direct or indirect fee, any "suggestion" regarding an employment-based retirement plan or IRA investment, or investment strategies, rollovers, or distributions with respect to such plan or IRA, if the suggestion is individualized or directed to a specific recipient or recipients.[1]

Under the new rule, a suggestion can be fiduciary advice even if there is no expectation that the advice recipient will rely on the suggestion, and even if the suggestion is not in writing or otherwise formalized. A suggestion is made "for a fee" if a fee is received from any source in connection with an advised transaction, such as (1) a commission that is not paid for the advice but is paid in connection with a transaction to which the advice relates or (2) compensation to be earned by an advisor's firm on proprietary investments in connection with the suggestion.

Although the new rule has an extensive reach, the regulation offers several examples of communications that do not fall within the new definition of fiduciary advice, including (1) factual information, (2) general communications, such as presentations at "widely attended" conferences and general marketing materials, (3) general investment education and distribution education, and (4) information on an investment product's features, given without a recommendation of the appropriateness of the investment.

Rollovers Under The Fiduciary Rule

As indicated above, a recommendation that an individual conduct a rollover from an employment-based retirement plan to an IRA, from an IRA to an employment-based retirement plan, or from one IRA to another, would result in fiduciary status for the advisor under the DOL's new rule if the advisor, his or her firm, or an affiliate would receive a fee in connection with the recommendation.

Under the 1975 five-part test described above, such rollover advice typically did not subject an advisor to fiduciary status. In fact, in 2005, the DOL released Advisory Opinion 2005-23A, which concluded that an advisor who is not otherwise a fiduciary to a plan would not be considered to have provided investment advice simply by recommending that a participant in a 401(k) or similar employment-based plan take a distribution of his or her account and roll that distribution into an IRA.[2] The DOL, however, has become increasingly concerned that the retirement savers' rollover decisions, which the DOL has characterized as often one of the "most important financial decisions that consumers make in their lifetime,"[3] are being influenced by advice that is not subject to fiduciary standards. The DOL is especially

concerned about workers' rollovers "from plans, where their employer has both the incentive and the fiduciary duty to facilitate sound investment choices, to IRAs, where both good and bad investment choices are more numerous and much advice is conflicted."[4] As a result, the final fiduciary regulation specifically subjects advisors to fiduciary status when making distribution and rollover recommendations.

Addressing Conflicts of Interest In Rollover Recommendations

One of the primary implications of fiduciary status for advisors is that fiduciary advisors are subject to the "prohibited transaction" rules contained in both ERISA and the Code, which require fiduciary advisors to avoid conflicts of interest. In general, the prohibited transaction rules prohibit a fiduciary advisor from receiving direct or indirect compensation that varies based on the advice given. For example, absent an exemption, fiduciary advice from a broker/dealer to purchase a stock in an IRA is a prohibited transaction if the purchase generates a commission for the broker/dealer. Similarly, fiduciary advice from an advisor to roll over money from either an employment-based retirement plan or an IRA held at another financial institution to an IRA with the advisor is a prohibited transaction if the rollover generates a commission or additional fees for the advisor.

It is important to note that, with respect to the second example in the paragraph above, the DOL's view is that a fiduciary advisor has a conflict of interest when making a recommendation to roll over retirement assets to an IRA (or plan) that the advisor advises, regardless of whether the advisor is paid by commission or receives a level fee, such as a fixed percentage of the value of assets under management. When faced with a prohibited transaction due to a conflict of interest in connection with an investment advice recommendation, a fiduciary advisor has two options: (1) avoid the conflict altogether, such as by not making the recommendation in the first place or by structuring compensation so that no conflict exists, or (2) comply with the conditions of an "exemption" from the prohibited transaction rules.

Both ERISA and the DOL provide a number of exemptions that are available in a variety of contexts and that require the person relying on the exemption to meet certain conditions designed by the government to mitigate many of the concerns associated with a particular situation. In connection with its release of the new fiduciary rule, the DOL introduced a new exemption called the Best Interest Contract Exemption (BICE), which allows for the continued payment of commissions, transaction-based fees, and other variable forms of compensation to fiduciary advisors as long as the conditions of the BICE are satisfied. Although the BICE has numerous conditions and iterations, one of the core conditions of the exemption is that investment advice regarding retirement assets must be provided in the best interest of the client.

What does it mean to provide investment advice in my client's "best interest"?

Providing advice in your client's best interest generally means that you must comply with the following "impartial conduct standards":

- You must provide advice that reflects the care, skill, prudence, and diligence that a prudent person acting under similar circumstances would use. This is called the duty of prudence.
- The advice should be provided based on the investment objectives, needs, and risk tolerance of the client and should be rendered without regard to your financial interests. This is called the duty of loyalty.
- Your compensation must be reasonable. This is based on a reasonable fee in the market in light of all the services you will provide to the client. (It does not mean the lowest possible fee.)
- You may not make any statements about the recommendation, fees, or other relevant matters that are materially misleading at the time you make them.

This summary is not a complete description of the DOL rule or its impact on rollovers. See Important Legal Information on the last page.

BICE Conditions for Rollover Recommendations: Commissioned Advisors vs. Level Fee Advisors

As noted above, both commissioned advisors and "level fee" advisors face a conflict of interest when making a rollover recommendation to a client or prospect that results in a new or increased fee to the advisor. In order to continue receiving the fees that result from a rollover recommendation, the DOL has specifically provided that the advisor and his or her financial institution may use the BICE. In general, commissioned advisors must comply with all of the conditions of the BICE, including the condition that an enforceable contract be entered into between the financial institution and the client on or before the execution of any recommended transaction involving an IRA. However, the DOL created a streamlined procedure for "level fee" advisors (the Level Fee BICE) because fiduciary advisors who receive only a level fee in connection with advisory or investment management services provided to a retirement plan or IRA raise fewer concerns with the DOL than those whose compensation varies based on the recommendation made.

The DOL's concept of a "level fee"-only advisor is important to understand because it is not intuitive. As defined in the BICE, a person is a "level fee" advisor if the only fee received by the advisor, his or her firm, and any affiliate of the firm is a "fee or compensation that is provided on the basis of a fixed percentage of the value of the assets or a set fee that does not vary with the particular investment recommended, rather than a commission or other transaction-based fee." In FAQs released by the DOL in October 2016,[6] the DOL clarified that a "level fee" does not include an advisor or firm that receives third-party payments (e.g., 12b-1 fees or revenue sharing payments) in connection with the assets recommended, even if those recommended assets generate the same level of third-party payments for each investment offered. Further, with respect to proprietary investments, the DOL said in the FAQs that the Level Fee BICE is not available for "commission or transaction-based compensation arrangements, or for compensation structures that are limited to the sale of proprietary products."[7] In short, the DOL intends for the concept of "level fee" advisors to be limited to advisors paid by the client through a level fee advisory account with an asset-based or other fee without any compensation from the products recommended.[8]

In the DOL's view, level fee advisors usually do not have a conflict in recommending investments because the advisor's compensation will not vary regardless of the investment recommended. Rather, a level fee advisor's interests generally align with his or her client's interests in that the advisor's fees generally increase when the client's account gains in value, but decrease when the client's account declines in value. The primary exception is when a level fee advisor recommends that a client roll over assets from a 401(k) or other employment-based retirement plan to an IRA advised by the advisor. The Level Fee BICE was designed for this situation and offers a much more streamlined set of rules than those that would apply to a commissioned advisor under the "full" BICE.

Am I required to recommend the lowest-fee investment? Is it okay if my client pays more in the IRA than in his or her 401(k)?

You do not have to recommend the lowest-cost investment. Fees are an important factor, but not the only factor. The key is that the fees are reasonable for the investment you are recommending.

It is acceptable for a client to pay more in the IRA if the client is receiving services from you that justify those fees. Many 401(k) plans offer a limited set of investments and no access to personalized investment advice. It is important that you document the client's need and/or desire for services available through the IRA, particularly when the client will pay more.

Rollovers to Discretionary/Managed Accounts

A frequent source of confusion is how the BICE applies to discretionary accounts in the context of a rollover. The reason for this confusion is that the "full" BICE is not available for advisors who have discretionary authority; that is, an advisor who has the authority not only to make recommendations but to exercise discretion with respect to a client's account, including a managed account. Thus, discretionary managers must have another solution to any conflicts within a managed account such as managing the account for a level fee. This does not mean, however, that the "full" BICE cannot be used to recommend a rollover into a discretionary or managed account. The DOL has made clear that either the "full" BICE or the Level Fee BICE can be used to recommend a rollover, even if the

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advisor is recommending that the rolled-over assets be placed in a managed account.[9] The key is that the rollover recommendation is just that—a recommendation—and the client ultimately makes the decision as to whether to take the advice. The client would need to consent to the rollover itself.

General Summary of BICE Requirements for Rollover Recommendations Involving an IRA

Commissioned Advisors Using the "Full" BICE

- Execution of a written contract with the IRA owner, under which the IRA owner may enforce the best interest standard, including through a class action suit
- Firm adopts policies and procedures to mitigate conflicts
- Acknowledge fiduciary status
- Make rollover recommendation in the client's best interest
- Make affirmative warranties
- Provide contractual, pre-transaction, and web-based disclosures
- Notify DOL of intent to rely on BICE and maintain records for six years

Level Fee Advisors Using the Level Fee BICE

- Acknowledge fiduciary status
- Make rollover recommendation in the client's best interest
- Document reasons for rollover

Note: Although all conditions listed above must be met in order for an advisor to rely on the "full" BICE or Level Fee BICE, as applicable, only the documentation requirement is discussed in detail in this document.

Documentation Requirements for Rollover Recommendations

When relying on the Level Fee BICE, the exemption requires an advisor to document the reason(s) why a recommendation to roll over assets from a retirement plan to an IRA was in the best interest of the client. Specifically, such documentation must:

1) include consideration of any alternatives the client had to conducting the rollover, such as leaving the money in his or her employment-based plan (if permitted under the plan);
2) take into account the fees and expenses associated with both the plan and the IRA;
3) take into account whether the employer pays for some or all of the plan's administrative expenses; and
4) take into account the different levels of services and investments available under each option.

When recommending a rollover from another IRA, a level fee advisor must document the reasons the arrangement is considered to be in the client's best interests, including the services that will be provided for the fee. Level fee advisors must retain the required documentation electronically or in paper.

Unlike the provisions of the Level Fee BICE, the "full" BICE does not specify what factors and considerations must be documented in order to meet the "full" BICE condition that a rollover recommendation be made in the client's best interest. However, in a set of FAQs released by the DOL, the DOL stated that the documented factors and considerations recited for the Level Fee BICE are "integral to a prudent analysis of whether a rollover is appropriate." As a result, any fiduciary would analyze such items before making a rollover recommendation, regardless of whether the fiduciary advisor is relying on the Level Fee BICE or the "full" BICE (i.e., regardless of whether the advisor receives a level fee or a commission or other transaction-based fee).

Obtaining the Required Information About a 401(k) or Other Employment-Based Plan

Most of the information about your clients' employment-based plans that must be considered and/or documented in connection with a rollover recommendation has already been provided to or is otherwise made available to your clients. Most plan participants receive an annual disclosure from their plan that describes the investments and fees in the plan. This is called the "404a-5" disclosure, named after the DOL regulation that governs it, and many 401(k) providers post this disclosure on the plan participant's online account for the 401(k) plan. Your client may request a copy of this "404a-5" disclosure from the plan administrator (typically the employer). Other plan documents to ask your client to gather are a recent quarterly statement and the Summary Plan Description (SPD).

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FINRA REGULATORY NOTICE 13-45

When documenting the required information described above under the Level Fee BICE in connection with a rollover recommendation, DOL guidance states that advisors should consider the client's needs and circumstances as described in FINRA Notice 13-45. Factors described in FINRA Notice 13-45 include:

1) the range of investment options available under the plan and IRA;
2) client satisfaction with low-cost institutional funds (if available in the plan);
3) services offered under the plan and IRA, such as educational materials, planning tools, and investment advice;
4) the potential for penalty-free withdrawals under the plan (ages 55 to 59½);
5) the availability of loans from the plan;
6) differences in the protection of plan versus IRA assets from creditors and judgments;
7) different required minimum distribution (RMD) rules (e.g., (a) RMDs are generally not required from a current work-based plan if a client is still working; and (b) Roth IRAs do not require RMDs before death but Roth 401(k) accounts do); and
8) whether the plan is invested in employer stock (weighing the tax consequences of a rollover versus diversification risk).

Ultimately, how does the new fiduciary rule change how I currently make rollover recommendations?

For many advisors, the DOL's new rule will not significantly affect how you currently evaluate and recommend rollovers. However, the rule turns what have typically been considered industry best practices or guidelines for advisors when making rollover recommendations into requirements, and the failure to meet these requirements could result in much more severe –and costly–consequences.

As described above, under the new rule, advisors must specifically consider and document certain information about the accounts from which and to which retirement assets would be rolled, and such documentation must be maintained if ever questioned. A failure to make and retain the required documentation would be considered a failure to meet the "impartial conduct standards" condition of the necessary exemption. Such a failure would result in a violation of the prohibited transaction rules and subject the financial institution to liability, including class actions.

Alternatives When Information on Employment-Based Plan is Unavailable

In FAQs released by the DOL, the DOL stated that advisors and financial institutions must make "diligent and prudent efforts to obtain information on the existing plan" in order to satisfy the documentation requirements for a rollover recommendation made in reliance on the Level Fee BICE. However, if, despite such efforts, the necessary information is unable to be obtained, or if the client is unwilling to provide the information (even after being informed of its significance), a financial institution may rely on alternative data sources. Those data sources may include the plan's most recent Form 5500 (which can be searched for on the DOL's website)[10] or "reliable benchmarks on typical fees and expenses for the type and size of plan at issue." In the event that such alternative data is relied on, written documentation should be maintained that explains the data's limitations and why the benchmark or other data was determined to be reasonable.

IMPORTANT NOTE

The information in this document focuses on how to comply with the "full" BICE or Level Fee BICE only in connection with a recommendation that a client roll over assets from one retirement account or plan to another. Compliance with the documentation requirements with respect to why the rollover itself was in a client's best interest does not relieve you from any steps necessary to ensure that your recommendation regarding how to invest the rolled-over assets is appropriate and in the client's best interest.

1. Note that advice to church and state and local governmental plans, executive nonqualified plans, non-IRA brokerage accounts, endowments, and 529 plans is not subject to the DOL final regulation. However, health savings accounts (HSAs) are covered and are treated in a manner similar to IRAs.
2. DOL A.O. 2005-23A (Dec. 7, 2005).
3. Department of Labor, Regulatory Impact Analysis for Final Rule and Exemptions: Regulating Advice Markets: Definition of the Term "Fiduciary," Conflicts of Interest—Retirement Investment Advice 4 (2016).
4. Id. at 3.
5. In addition to the BICE, the DOL introduced a new exemption for certain principal transactions and amended several existing exemptions in connection with the new fiduciary rule.
6. Conflict of Interest Exemptions FAQs, Part I, Department of Labor (Oct. 27, 2016), https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-rules-and-exemptions-part-1.pdf.
7. Id. at Q19.
8. DOL clarified in the FAQs that an advisor may use the Level Fee BICE for a client even if the advisor or his or her firm also offers commission accounts to other clients. Id. at Q15.
9. Id. at Q6.
10. Form 5500/5500-SF Filing Search, Department of Labor (last visited Dec. 1, 2016), https://www.efast.dol.gov/portal/app/disseminate. Note that some retirement plans, such as those sponsored by state and local governments, do not file a Form 5500.

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Rollovers from:
A PLAN TO AN IRA

A Checklist for Advisors

Under the DOL's new fiduciary rule, advisors are subject to more stringent documentation requirements when recommending whether a client should "roll over" retirement assets from one account to another. Use this checklist to help you (1) evaluate whether a recommendation to roll over assets from a client's work-based plan, such as a 401(k) plan, to an IRA that you advise is in your client's best interests, and (2) meet the DOL's documentation requirements with respect to any rollover recommendation that you make.

Although "level fee" advisors should specifically document the following items, the DOL has stated that all advisors required to act in the best interest of their clients should consider the following factors and considerations as part of a prudent rollover analysis, regardless of whether the advisor is a "level fee" advisor or receives variable compensation and is complying with the full Best Interest Contract Exemption (BICE). Of course, you'll want to consult with your firm regarding their documentation requirements for rollovers.

Documentation Required for Rollovers from a Work-Based Plan to an IRA

☐ **Alternatives to a rollover.** For example, does your client's current work-based plan allow him or her to leave the assets in the plan?

☐ **Comparison of fees and expenses for both the current plan and the proposed IRA.**

- Investment-related expenses of the current plan and IRA
- Administrative fees
- Current plan's fees for services
- IRA account set-up fees and custodial fees

☐ **Whether the employer pays some or all of the current plan's administrative expenses.** For example, is your client giving up a valuable subsidy by leaving the plan?

☐ **The levels of services and investments available under each option.**

☐ **Any additional information relevant to the client's individual needs and circumstances.** Each of the following factors should be considered and/or reviewed with your client:

Plan or IRA Features

☐ Range of investment options available under the current plan versus the proposed IRA

☐ Client satisfaction with low-cost institutional funds (if available in the current plan)

☐ Services offered under the current plan versus the IRA

- Does your client's current plan provide access to investment advice, planning tools, educational materials, etc.?
- Does the IRA offer access to full brokerage services, distribution planning, etc.?

Other Considerations

☐ Potential for penalty-free withdrawal from current plan (ages 55 to 59½)

☐ Availability of a plan loan from the current plan

☐ Different level of protection from creditors and judgments between plan assets and IRA assets

☐ Different required minimum distribution (RMD) rules (e.g., RMDs are generally not required from a current work-based plan if your client is still working; differences in Roth RMDs)

☐ Whether the current plan is invested in employer stock (tax consequences of rollover versus diversification risk)

Separate tools are available to help you gather and record this information.

What should I do if I cannot obtain the required information about my client's existing plan?

If you are unable to obtain the information after making "diligent and prudent efforts" and the client is unable or unwilling to provide the information to you, the DOL has stated that you may rely on alternative data sources, such as the plan's most recent Form 5500 or reliable benchmarks on typical fees and expenses for the type and size of plan at issue. If you rely on such alternative data, you should document the data's limitations and explain how you determined that the benchmark or other data was reasonable.

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Rollovers from:
AN IRA TO A PLAN

A Checklist for Advisors

Under the DOL's new fiduciary rule, advisors are subject to more stringent documentation requirements when recommending whether a client should "roll over" retirement assets from one account to another. Use this checklist to help you (1) evaluate whether a recommendation to roll over assets from an IRA at another financial institution to a work-based plan, such as a 401(k), that you advise is in your client's best interests, and (2) meet the DOL's documentation requirements for any rollover recommendation that you make.

All advisors should consider the following factors and considerations as part of a prudent analysis of whether a rollover recommendation is in their client's best interest, regardless of whether the advisor is a "level fee" advisor or receives variable compensation and is complying with the full Best Interest Contract Exemption (BICE). In the case of a recommendation to roll assets out of an IRA, "level fee" advisors should specifically document the reasons that the recommendation is in the client's best interest, as well any services that will be provided for the fee. Of course, you'll want to consult with your firm regarding their documentation requirements for rollovers.

Documentation for Rollovers from an IRA to a Plan

☐ **Whether the work-based plan accepts "roll-in" contributions.**

☐ **Comparison of fees and expenses for both the current IRA and the available work-based plan.**

- Investment-related expenses of the current IRA and plan
- Administrative fees
- Plan's fees for services
- IRA custodial fees

☐ **Whether the employer pays some or all of the plan's administrative expenses.** For example, would the client gain a valuable subsidy by rolling assets into the plan?

☐ **The levels of services and investments available under each.**

☐ **Any additional information relevant to the client's individual needs and circumstances.** Each of the following factors should be considered and/or reviewed with the client:

Plan or IRA Features

☐ Range of investment options available under the current IRA versus the plan

☐ Client desire for low-cost institutional funds (if available in plan)

☐ Services offered under the current IRA versus the plan

- Does the IRA offer access to full brokerage services, distribution planning, etc.?
- Does the work-based plan offer planning tools, educational materials, etc.?

Other Considerations

☐ Potential for earlier penalty-free withdrawal from the plan upon retirement (ages 55 to 59½)

☐ Availability of loans from the plan

☐ Different level of protection from creditors and judgments between plan assets and IRA assets

☐ Different required minimum distribution (RMD) rules (e.g., RMDs are generally not required from a current work-based plan if your client is still working; differences in Roth RMDs)

☐ Whether the plan would be invested (in part or in full) in employer stock (diversification risk and future tax consequences)

Separate tools are available to help you gather and record this information.

Additional factors to consider when evaluating whether to recommend that your client roll assets out of an IRA annuity:

☐ The current surrender fee your client would be charged, if any, and the contract's schedule of surrender fees (including whether surrender charges are rolling or non-rolling)

☐ Any loss protection or other insurance benefits the annuity may provide and the fees and expenses charged for such benefits

☐ Any minimum interest rate guarantees and the current interest rate on a fixed account, if any

☐ Available investment options

☐ Investment fees and expenses

☐ Annuitization/lifetime income options within the annuity

☐ Your client's reasons for purchasing the annuity and if those reasons still exist

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Rollovers from:
AN IRA TO AN IRA

A Checklist for Advisors

Under the DOL's new fiduciary rule, advisors are subject to more stringent documentation requirements when recommending whether a client should "roll over" retirement assets from one account to another. Use this checklist to help you (1) evaluate whether to recommend a rollover from an IRA held at another financial institution to an IRA that you advise and (2) meet the DOL's documentation requirements with respect to any rollover recommendation that you make.

All advisors required to act in the best interest of their clients should consider the following factors and considerations as part of a prudent rollover analysis, regardless of whether the advisor is a "level fee" advisor or receives variable compensation and is complying with the full Best Interest Contract Exemption (BICE). Of course, you'll want to consult with your firm regarding their documentation requirements for rollovers.

Documentation for Rollovers from one IRA to another IRA

☐ **Alternatives to a rollover.** For example, would it be prudent for your client to simply maintain and/or add to his or her existing IRA?

☐ **Comparison of fees and expenses for both the current IRA and the proposed IRA.**

- Investment-related expenses
- Administrative fees
- Fees for services
- Account set-up fees (for the proposed IRA) and custodial fees

☐ **The levels of services and investments available under each IRA.**

☐ **Any additional information relevant to the client's individual needs and circumstances.** Each of the following factors should be considered and/or reviewed with the client:

IRA Features

☐ Range of investment options available, including asset classes and share classes

☐ Services offered under the current IRA versus the proposed IRA

- Does the client's current IRA provide access to investment advice, planning tools, educational materials, etc.?
- Does either IRA offer access to full brokerage services, distribution planning, etc.?

Separate tools are available to help you gather and record this information.

Additional factors to consider when evaluating whether to recommend that your client roll assets out of an IRA annuity:

☐ The current surrender fee your client would be charged, if any, and the contract's schedule of surrender fees (including whether surrender charges are rolling or non-rolling)

☐ Any loss protection or other insurance benefits the annuity may provide and the fees and expenses charged for such benefits

☐ Any minimum interest rate guarantees and the current interest rate on a fixed account, if any

☐ Available investment options

☐ Investment fees and expenses

☐ Annuitization / lifetime income options within the annuity

☐ Your client's reasons for purchasing the annuity and if those reasons still exist

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A Checklist for Advisors

Under the DOL's new fiduciary rule, advisors are subject to more stringent documentation requirements when recommending whether a client should "roll over" retirement assets from one account to another. Use this checklist to help you (1) evaluate whether a recommendation to roll over assets from a client's work-based plan, such as a 401(k) plan, with a former employer (the "current plan") to a work-based plan with the client's present employer that you advise (the "proposed plan") is in your client's best interests, and (2) meet the DOL's documentation requirements with respect to any rollover recommendation that you make.

Although "level fee" advisors should specifically document the following items, the DOL has stated that all advisors required to act in the best interest of their clients should consider the following factors and considerations as part of a prudent rollover analysis, regardless of whether the advisor is a "level fee" advisor or receives variable compensation and is complying with the full Best Interest Contract Exemption (BICE). Of course, you'll want to consult with your firm regarding their documentation requirements for rollovers.

Documentation for Rollovers from a Plan to a Plan

☐ **Alternatives to a rollover.** For example, does your client's current work-based plan allow him or her to leave the assets in the plan?

☐ **Availability of a rollover.** Does the proposed plan accept "roll-in" contributions?

☐ **Comparison of fees and expenses for both the current plan and the proposed plan.**

- Investment-related expenses
- Administrative fees
- Fees for services
- Any other account fees or custodial fees

☐ **Whether the employer pays some or all of the current plan's or proposed plan's administrative expenses.** For example, is your client giving up (or gaining) a valuable subsidy by leaving the current plan?

☐ **The levels of services and investments available under each option.**

☐ **Any additional information relevant to the client's individual needs and circumstances.** Each of the following factors should be considered and/or reviewed with your client:

Plan Features

☐ Range of investment options available under the current plan versus the proposed plan

☐ Client satisfaction with and/or desire for low-cost institutional funds (if available in the current plan and/or the proposed plan)

☐ Services offered under the current plan versus the proposed plan

- Does either plan provide access to investment advice, planning tools, educational materials, etc.?
- Does either plan offer access to full brokerage services, distribution planning, etc.?

Separate tools are available to help you gather and record this information.

What should I do if I cannot obtain the required information about my client's existing plan?

If you are unable to obtain the information after making "diligent and prudent efforts" and the client is unable or unwilling to provide the information to you, the DOL has stated that you may rely on alternative data sources, such as the plan's most recent Form 5500 or reliable benchmarks on typical fees and expenses for the type and size of plan at issue. If you rely on such alternative data, you should document the data's limitations and explain how you determined that the benchmark or other data was reasonable.

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GATHERING THE INFORMATION REQUIRED IN MAKING A ROLLOVER RECOMMENDATION

When considering whether to recommend that a client "roll over" his or her retirement assets from one account to another, such as from a 401(k) plan to an individual retirement account (IRA) or vice versa, you must carefully and prudently evaluate your client's current situation, goals, and available options in order to determine whether a rollover is in your client's best interest. Prior to making a rollover recommendation under the Department of Labor's (DOL) fiduciary rule, you will need to evaluate and document certain information about your client's existing plan or account.

Use this guide to help you and your client locate the information required when considering a rollover. Suggestions on where to locate the information listed below are provided in the italicized text. A description of the materials listed is provided on the opposite side of this guide. Of course, you'll want to consult with your firm regarding their documentation requirements for rollovers.

Account name(s): _____ _____

DETERMINE ACCOUNT TYPE	GATHER LISTED INFORMATION	
OPTION 1 **An employer or work-based plan, such as a 401(k), 403(b), or defined benefit plan**	Whether the client may keep his or her money in the current plan (if the answer is no, then no additional information is needed about the plan)	*(summary plan description (SPD) or distribution materials)*
	The client's current investment allocation	*(quarterly statement)*
	Other investment options available, including a brokerage window	*(404a-5 disclosure)*
	Investment-related fees, administrative fees, and fees for any services	*(404a-5 disclosure or quarterly statement)*
	Whether the employer or the participants pay the plan's administrative expenses	*(404a-5 disclosure)*
	Whether plan loans are available	*(404a-5 disclosure or SPD)*
	Whether (and to what extent) the client's account is invested in employer stock	*(quarterly statement)*
	Access to individualized investment advice and other planning tools and services	*(404a-5 disclosure)*
	Distribution options available, such as systematic withdrawals or an in-plan annuity	*(SPD or distribution materials)*
OPTION 2 **An IRA invested in mutual funds, stocks, bonds, or other assets**	The client's current investments and the investment options available	*The information listed should be available in the annual or quarterly statements or an online description of the IRA provider's platform.*
	Investment expenses and transactional fees	
	Custodial or account maintenance fees, or any other administrative fees charged to the IRA	
	Access to individualized investment advice and other planning tools and services	
OPTION 3 **An IRA held in an annuity, such as a fixed annuity, variable annuity, or equity-indexed annuity**	Schedule of surrender fees, if any, and the current surrender fee the client would be charged	*The information listed should be available in the annuity contract, annual or quarterly statements, or the prospectus (if applicable).*
	Whether surrender fees are rolling or non-rolling	
	Description of any loss protection or other insurance benefits the annuity may provide	
	Fees and expenses paid for any loss protection or other insurance benefits	
	Any minimum interest rate guarantees on a fixed account and the current rate (if applicable)	
	The client's current subaccount investments and the subaccount investment options available (if applicable)	
	Subaccount investment fees and expenses (if applicable)	
	Annuitization / lifetime income options within the annuity	
	Access to individualized investment advice and other planning tools and services	

This summary is not a complete description of the DOL rule or its impact on rollovers. See Important Legal Information on the last page.

Description of Account Materials

404a-5 disclosure. The 404a-5 disclosure, named after the DOL regulation that governs it, is an annual disclosure that participant-directed individual account plans (e.g., a 401(k) plan) are required to provide to participants. The 404a-5 disclosure describes the investments and fees in the plan. Many 401(k) providers post this disclosure on the plan participant's online account for the plan. Your client may also request a copy of the disclosure from the plan administrator (typically the employer).

Distribution materials. Distribution materials consist of the packet of information that most participants receive when they retire or otherwise terminate their employment with their employer.

Quarterly statement. Participants of participant-directed individual account plans (e.g., a 401(k) plan) receive statements of the value of the investments in their account on a quarterly basis. (Note that annual statements are required for non-participant-directed individual account plans. Defined benefit plans must generally provide statements once every three years.)

Summary plan description (SPD). The SPD contains summary information about the plan's benefits and features and plan participants' rights under the plan. Plans must provide the SPD to participants within 90 days of becoming covered under the plan and to beneficiaries within 90 days of first receiving benefits from the plan. Plans must also periodically provide an updated SPD to participants and beneficiaries (every five years if changes are made or if the plan is amended, or every 10 years if no changes or amendments are made).

Notes

Important Legal Information

The Rollover Guide and accompanying forms (Kit) is general in nature, and intended for educational and informational purposes only. It should not be considered or relied upon as tax, actuarial, legal or investment advice or recommendations, or as a substitute for legal or tax counsel. The opinions and analysis contained in the Kit are those of Davis & Harman, LLP as of January 17, 2017, may change without notice, and are not updated to reflect subsequent developments. Davis & Harman LLP does not represent or guarantee that the Kit complies with the DOL fiduciary rule, ERISA, or any other law or regulation. Advisors should consult with their broker-dealer and/or registered investment advisor firm regarding any specific compliance requirements, including for the fiduciary rule and when making a rollover recommendation. Compliance with the fiduciary rule requires a fiduciary advisor to understand all of a client's needs and particular circumstances, which no single tool can capture.

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