

# ROLLOVER GUIDE

## For “Level Fee” Advisors under the New Department of Labor Fiduciary Rule

When the U.S. Department of Labor’s (DOL) new fiduciary rule becomes applicable on June 9, 2017, Loring Ward and the advisors with whom we work will become subject to new requirements in order to continue receiving fee-based compensation for investment advice on retirement assets. **This guide explains the steps that advisors should take in connection with a rollover from a 401(k) plan to an IRA in order to comply with the new federal rule.**

**IMPORTANT NOTE:** This guide is intended for “level fee” advisors whose fee is based on a fixed percentage of the value of the assets or a set fee that does not vary with the particular investment recommended. The DOL has issued guidance stating that any fiduciary seeking to meet the “best interest” standard (including advisors complying with the “full” BICE) would engage in a “prudent analysis” of the **same documented factors and considerations** that are required under the Level Fee BICE before making a rollover recommendation. Advisors who are associated with a broker-dealer or who receive commissions or other transaction-based fees may find the checklist contained in this guide helpful, but must consult with the broker-dealer on complying with the new fiduciary rule.

The period from June 9 through January 1, 2018 is known as the rule’s “transition period,” during which the bulk of the original rule’s requirements will not apply. Furthermore, the DOL has stated that during the transition period it “will not pursue claims against fiduciaries who are working diligently and in good faith to comply with the fiduciary duty rule and exemptions, or treat those fiduciaries as being in violation of the fiduciary duty rule and exemptions.” The IRS issued a similar non-enforcement policy with respect to IRAs.

The DOL expects to further review the rule during the transition period (including the solicitation of public input), and further changes may very well be effected before the January 1, 2018 full compliance date.

Updated FAQs from the DOL can be found here (<https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-transition-period.pdf>)

## BACKGROUND

The 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. Fiduciaries are prohibited from receiving compensation that varies based on investment advice given, such as commissions and transaction-based fees. However, to allow for the continued payment of these and other variable forms of compensation, the DOL created an exemption from that prohibition called the Best Interest Contract Exemption (BICE).

Because fiduciary advisors who receive only a level fee (e.g., a fee based on a fixed percent of the value of assets) 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 created a streamlined procedure for such “level fee” advisors called the **Level Fee BICE**.

Level fee advisors usually do not have a conflict in recommending investments because the advisor’s interests generally align with his or her client’s interests. 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 into 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.

**IMPORTANT NOTE:** This guide only applies to recommendations a level fee advisor makes to roll over assets to an IRA. Your compliance with the Level Fee BICE does not relieve you of any steps necessary to ensure that a recommendation regarding how to invest rolled over assets is appropriate.

## LEVEL FEE BICE OBLIGATIONS DURING THE TRANSITION PERIOD

### Make Rollover Recommendations in Your Client’s “Best Interest”

When making a rollover recommendation, you must follow certain “impartial conduct standards” that consist of the following requirements:

- Your recommendation must be in the “best interest” of the client. This does not mean that there is only one “best” recommendation for your client’s situation. This means that you must provide advice that reflects the **care, skill, prudence and diligence** that a prudent person acting under similar circumstances would use. Also, the advice should be provided based on the investment objectives, needs and risk tolerance of the client, and it should be rendered without regard to your financial interests
- 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
- You may not make any statements about the recommendation, fees, or other relevant matters that are **materially misleading** at the time you make them

### Document Reasons for Rollover

Though not required during the transition period, it is best practice to **document** the specific reason(s) why your recommendation to roll over assets from a retirement plan (or IRA) to an IRA was in the best interest of the client. You should maintain the required documentation for at least six years, electronically or on paper.

***Do I have to recommend the lowest-fee investment? Is it okay if the client pays more in the IRA than in their 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 you must ensure that the fees are reasonable for the investments 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. You should consider documenting the client’s need and/or desire for services available through the IRA, particularly when the client will pay more in the IRA.

***How can I compare the investments my client has in his current 401(k) plan?***

Most individuals receive an annual disclosure from their 401(k) plan that describes the investments and fees in the plan. Your client may request a copy of this “404a-5” disclosure from the plan administrator, and it may be available online. Your client also probably receives a quarterly statement.

***What if I am unable to obtain the required information about an existing plan?***

Advisors must make “diligent and prudent efforts” to obtain information about the existing plan. If you are unable to obtain the information, and your client is unwilling to provide the information even after you have disclosed its significance, 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 plans of the same type and similar size. When relying on such alternative data, you should explain the data’s limitations and document why you determined that the benchmark or other data were reasonable.

**A checklist to help you maintain documentation when making rollover recommendations is provided on the next page.**

## LEVEL FEE ADVISOR CHECKLIST: DOCUMENTATION BEST PRACTICES FOR ROLLOVERS

In connection with each rollover to an IRA that you advise, consider documenting the following:

### 1. Documentation for rollovers from a 401(k) plan or other work-based retirement plan to an IRA

- Client’s alternatives to a rollover.** For example, does your client’s current plan allow him or her to leave the assets in the plan?
- Fees and expenses for both the current plan versus IRA**
  - Investment-related expenses of the 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 the 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 the client:

#### Plan or IRA Features

- Range of investment options available under the current plan versus IRA
- Client satisfaction with low-cost institutional funds (if available in current plan)
- Services offered under the current plan versus IRA
  - Does the 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 59 ½)
- Availability of plan loan from the current plan
- Different levels of protection from creditors and judgments between plan 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)
- Whether the current plan is invested in employer stock (tax consequences of rollover versus diversification risk)

**2. Documentation for rollovers from another IRA to an IRA that you advise**

- Services that will be provided for your fee (e.g. investment analysis, asset allocation, risk tolerance analysis, financial planning, rebalancing, etc.)**
- Any other items listed above that may be relevant to a determination that your recommendation was in your client’s best interest (e.g., investment options, fees, expenses)**

## OPTIONAL EXPLANATORY FAQs FOR CLIENTS

**Note:** These Q&As are not required, but may be helpful to explain your fiduciary status to your client.

**Q: What does it mean that you are acting as a fiduciary?**

**A:** As a fiduciary, I am obligated to act impartially and provide advice that is in your best interest. I must act with prudence, care and loyalty when making investment advice recommendations to you, and I must avoid making misleading statements to you.

**Q: Does the fiduciary requirement to act in a client’s “best interest” mean an advisor must recommend the lowest-cost option?**

**A:** Not necessarily. Although fees and other expenses are an important factor in determining whether a recommendation to roll over retirement assets is in a client’s best interest, they are not the only factor. An advisor’s determination that a recommendation is in the best interest of a client involves the consideration of a range of factors, including (1) whether fees are reasonable, (2) available services (for example, personalized investment advice), (3) the range of investment options, and (4) the client’s needs and goals. As a result, in some cases, the “best” option may not be the lowest-cost option.

**Q: How can I, the client, help ensure that recommendations are in my best interest?**

**A:** As a fiduciary, I must consider your financial needs and goals. That means the more information I have about your needs and goals, the better I can serve you. In addition, the more information you can provide me about the investments and features of the plan or IRA in which you are currently invested, the better I am able to help you determine if a rollover is in your best interest.



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