

**From:** neal@trustedfiduciary.com  
**Sent:** Monday, July 10, 2017 3:00 PM  
**To:** FiduciaryRuleExamination - EBSA  
**Subject:** Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemption

Hello

Although actively seeking ideas and criticisms from the public at large is quite exemplary, I hope that this not a forum for the Department of Labor to discover ways to ease the burden of compliance to the rule. This is not the role of the Department of Labor nor any agency engaged in enforcement.

In fact, I'd like to remind all at the Employee Benefits Security Administration (EBSA) of their noble mission statement:

***"The mission of the Employee Benefits Security Administration is to assure the security of the retirement, health and other workplace related benefits of America's workers and their families. We will accomplish this mission by developing effective regulations; assisting and educating workers, plan sponsors, fiduciaries and service providers; and vigorously enforcing the law."***

Re: <https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/mission-statement>

Once a Fiduciary Relationship is acknowledged, then Trust Law must be instructional and applied to Fiduciary/ERISA Law. This is correctly stated in Tibble ET AL vs Edison International ET AL:

***ERISA's fiduciary duty is "derived from the common law of trusts," Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc., 472 U. S. 559, 570, which provides that a trustee has a continuing duty—separate and apart from the duty to exercise prudence in selecting investments at the outset—to monitor, and remove imprudent, trust investments." P.1-2 (Syllabus)***

Conveniently forgotten and missing is how Trust Law is also recognized and instructional when oversight and monitoring is put in perspective. In this instance, it was a criticism of the Ninth Court for *not* considering using Trust Law instructionally while considering fiduciary duties

***"The Ninth Circuit did not recognize that under trust law a fiduciary is required to conduct a regular review of its investment with the nature and timing of the review contingent on the circumstances." (P.7, Opinion of the Court)"***

***"In determining the contours of an ERISA fiduciary's duty, courts often must look to the law of trusts. We are aware of no reason why the Ninth Circuit should not do so here." (p.7, Opinion of the Court)***

Once a Fiduciary relationship has been established it cannot be dismantled by any application, disclaimer, or disclosure (like the Best Interest Contract Exemption). The DOL, ERISA, and our courts can *ONLY* evidence behaviors and methodologies as a litmus test for breaches of Fiduciary Duty.

If the DOL/EBSA acquiesces to the Financial Services Industry and its proxies by easing the burden of compliance in applying "the rule" then its very existence becomes hypocritical because it creates a potential conflict of interest and its duty of loyalty should be questioned. Is the DOL/EBSA a proxy for the Financial Industry or should its purpose be fulfilled, per the mission statement, " to assure the security of the retirement, health and other workplace related benefits of America's workers and their families."

Many have have criticized the DOL's clarification with a rationale that wrecks of self-interest. Claiming that complying to this rule will reduce access to investments and increase costs is completely unsubstantiated, hollow, and self-serving. Does this have anything to do with being loyal to clients and prudent in decision making or more to do with the current compensation models of the industry and it's increased exposure to litigation?

This forum should not be a battlefield to substantiate a middle ground. Don't create amendments and exemptions that will create interpretations and precedence for interpretations. Unsubstantiated arguments and legal innuendos should not dismantle and fog the purpose of this regulation nor should it reduce the mission of the DOL/EBSA to nothing more than "hot air."

Regards,

Neal Shikes

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