

MEMORANDUM

To: File Nos. S7-07-18, S7-08-18, S7-09-18

From: Eric Diamond, Senior Advisor to Chairman Jay Clayton

Re: Standards of Conduct for Investment Professionals

Date: October 26, 2018

On October 22, 2018, Eric Diamond (Senior Advisor to Chairman Clayton) met with the following representatives of Fiduciary Benchmarks:

- Tom Kmak, CEO of Fiduciary Benchmarks
- Fred Reish, Partner, Drinker Biddle & Reath LLP
- Jim Lundy, Partner, Drinker Biddle & Reath LLP

The meeting participants discussed, among other things, the SEC's proposed rules and interpretation relating to standards of conduct for investment professionals. At the meeting, the Fiduciary Benchmarks representatives distributed the attached document.



Fiduciary Benchmarks

Independent | Comprehensive | Informative

Rollover/Distribution Thoughts

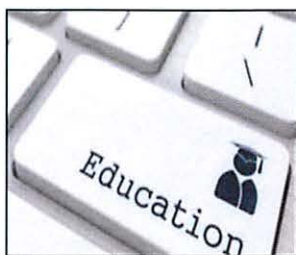
October 2018



- 1. There are 4 different types of Distribution/Rollover Services*
- 2. Fee Differences can be substantial – thus use real data*
- 3. Recommendation can be done quickly and easily*
- 4. FINRA 13-45 & DOL Fiduciary Rule are a solid regulatory approach*



Recommendation - this is where the Advisor wishes to really help the participant understand the alternatives on an apples-to-apples basis consistent with FINRA 13-45 and the revoked Fiduciary Rule.



Education - this is where the Advisor provides education of the same factors that exist in the Recommendation. In this case, however, the participant is left to sort through the issues on their own.



Hire Me - this is where the participant has already made a decision to rollover their balance from a plan to an IRA. An example would be a participant wishing to rollover a small balance in a plan to an IRA with large balances that is already managed by their Advisor.

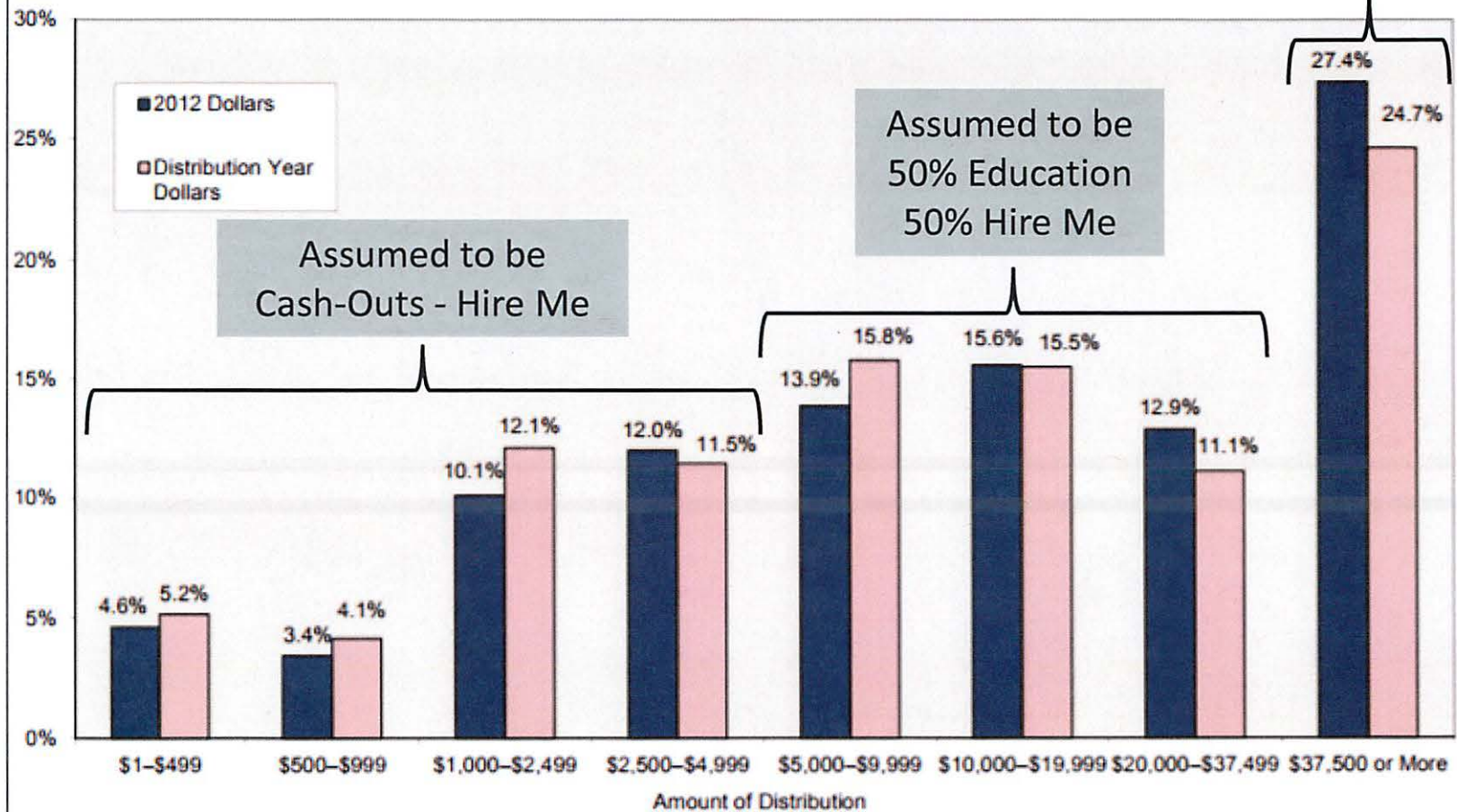


Cash Outs

Unsolicited Request - this is where the participant has assets that CANNOT remain in the qualified plan because of the cash-out rules for the plan (e.g. \$1,000 or \$5,000). While similar to Hire Me, FBI tracks separately for reporting, management and regulatory purposes.



Figure 2
Percentage of Lump-Sum Recipients by Amount of Most Recent Distribution, Ages 21 and Over, 2012

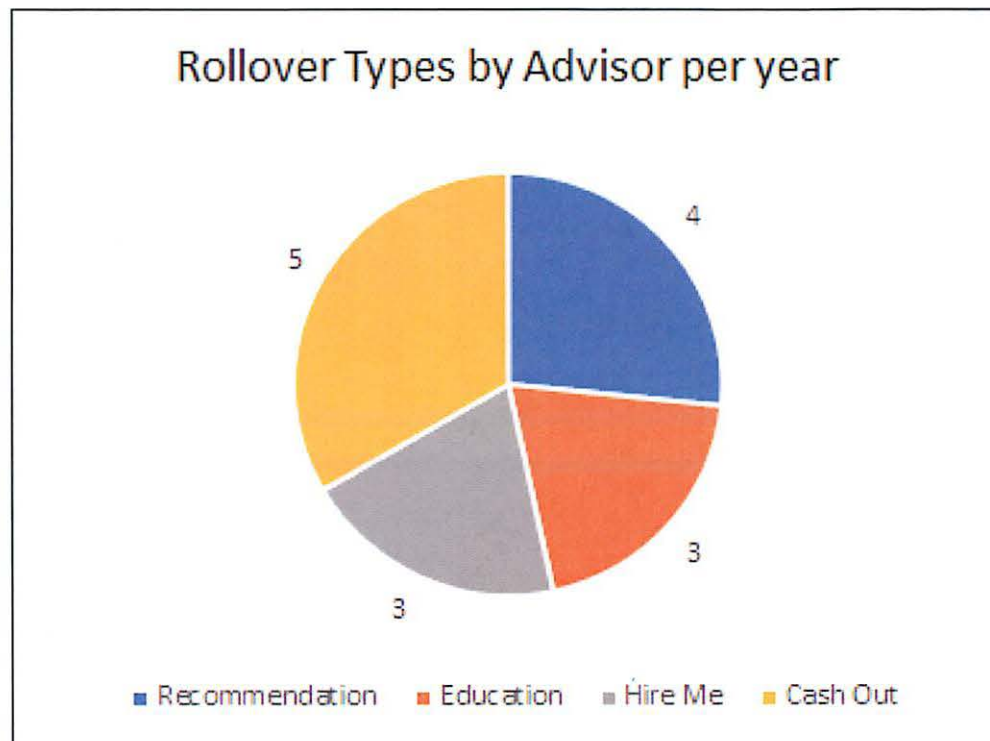


Source: Employee Benefit Research Institute estimates from 2008 Panel of the Survey of Income and Program Participation Topical Module 11.
Note: The distribution amounts are top-coded at \$37,500.



- Based on Multiple Data Points from BDs that process hundreds of thousands of rollovers per year, the average advisor will encounter about 15 Rollover Opportunities per year
- Combining this data point with the prior page provides a distribution of rollover types as shown below

Type of Rollover	Percent	Per Year
Recommendation	27%	4
Education	22%	3
Hire Me	21%	3
Cash Out	30%	5





Acknowledgment Regarding Participant's Unsolicited Distribution and Rollover Decision with "Hire Me" Discussions

Howard Clark ("Participant") has decided to take a lump sum distribution from participant's qualified retirement plan (the "Plan") and to roll the distribution into an Individual Retirement Account or Annuity (IRA).

ACKNOWLEDGMENT BY PARTICIPANT:

The decision to take a distribution and to roll over to an IRA was my decision. I acknowledge that I made the decision to take a distribution from my qualified retirement plan and roll it over into an IRA without discussions with the Adviser. Adviser was not requested to and did not provide education or information about distributions or rollovers, and did not recommend: (i) whether to take a distribution; (ii) the form of distribution; or (iii) whether to roll over the distribution to an IRA. I understand that I could possibly leave my money in the plan (if the plan permits); transfer it to the plan of successor employer (if I were to work for a new employer with a plan that permitted transfers); take a taxable distribution; and/or roll over to an IRA. I also understand that fees, investments, and services vary among those alternatives, and that the fees and expenses in a plan may be less than in an IRA.

While I independently made the decision to take a distribution and roll it to an IRA, I did ask Adviser to explain the services that Adviser provides for IRA investments. Adviser described the investment advisory and management services offered by the advisory firm, the fees charged for those services, and the qualifications of Adviser and the firm. However, Adviser did not recommend that I take a distribution from my retirement plan or that I roll over to an IRA.

Participant: _____

Print Name: Howard Clark

Advisor: _____

Print Name: Tom Kmak4

Date: _____

Acknowledgment Regarding Participant's Unsolicited Distribution and Rollover Decision

Howard Clark ("Participant") has decided to take a lump sum distribution from participant's qualified retirement plan (the "Plan") and to roll the distribution into an Individual Retirement Account or Annuity (IRA).

ACKNOWLEDGMENT BY PARTICIPANT:

The decision to take a distribution and to roll over to an IRA was my decision. I acknowledge that I made the decision to take a distribution from my qualified retirement plan and roll it over into an IRA without discussions with the Adviser. Adviser was not requested to and did not provide education or information about distributions or rollovers, and did not recommend: (i) whether to take a distribution; (ii) the form of distribution; or (iii) whether to roll over the distribution to an IRA. I understand that I could possibly leave my money in the plan (if the plan permits); transfer it to the plan of successor employer (if I were to work for a new employer with a plan that permitted transfers); take a taxable distribution; and/or roll over to an IRA. I also understand that fees, investments, and services vary among those alternatives, and that the fees and expenses in a plan may be less than in an IRA.

Participant: _____

Print Name: Howard Clark

Advisor: _____

Print Name: Tom Kmak4

Date: _____



Step 2 – Impact of Taking Cash Now



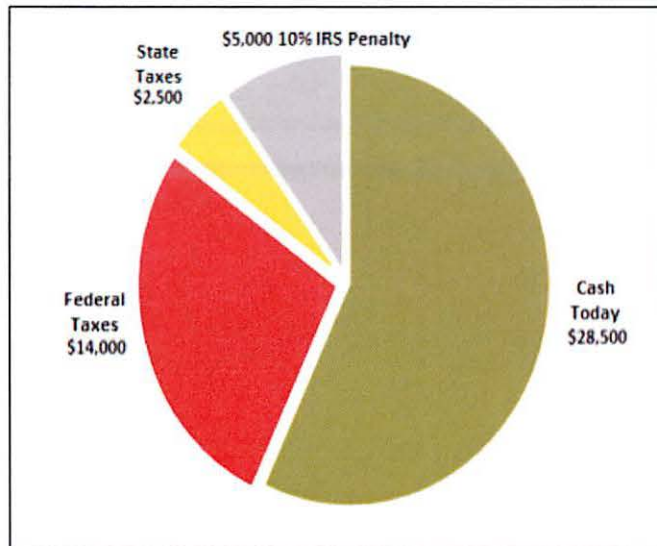
Cash Now

Sometimes people need to take early withdrawals from their retirement accounts for living expenses, but it is important to see what you might be giving up if you do so. Take a look at the examples below, which reflect your account balance, income, federal and state tax brackets and age, but not your specific account investments. If you don't need any cash now, you can go to Step 3.

Taking \$50,000 in Cash Now



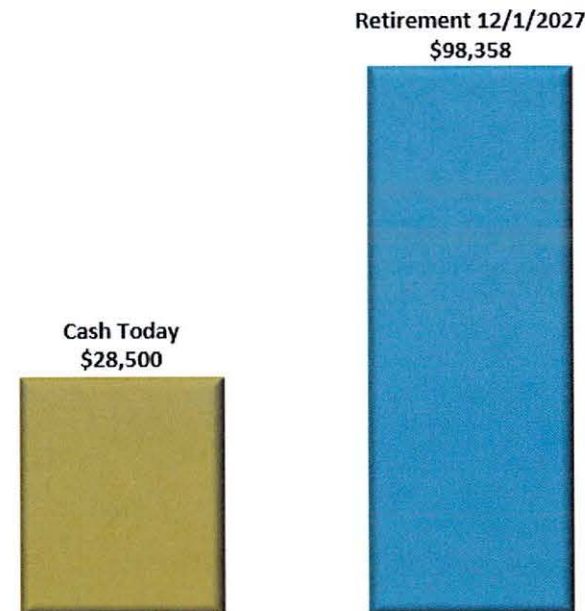
If you were to take \$50,000 of your retirement account as cash right now, the chart below estimates that you would only receive about \$28,500 because of taxes and penalties.



Value of \$50,000 Rollover at Retirement



*If, however, you chose to rollover the \$50,000, and your account earned 7% per year until you reach your normal retirement date of 12/1/2027, you would have \$98,358 at retirement versus the \$28,500 you would receive in cash today.



*Note that this example assumes an annual compounded earnings rate of 7%, which is consistent (historically) with returns in an account invested mostly in equities.



Rollover Analysis: Summary



Fiduciary Benchmarks

Independent | Comprehensive | Informative

DISCLAIMER: A recommendation about your distribution options, including a rollover recommendation, is fiduciary advice and XYZ Consulting, when making a recommendation, has a duty to evaluate your options and make a prudent and suitable recommendation on your behalf. To help you with this decision, XYZ Consulting has hired Fiduciary Benchmarks - a leading benchmarking service for defined contribution plans and IRAs. Below, Fiduciary Benchmarks presents the key characteristics of the various options available for your rollover **BASED ON YOUR DATA AND PREFERENCES**. This information will help XYZ Consulting make a prudent and suitable recommendation on your behalf, and help you make an informed decision about that recommendation.

Rollover Decision Drivers:		Your Data and Preferences:	Option 1 XYZ Consulting	Option 2 OREGON CHERRY GROWERS, INC. 401(K) PROFIT SHARING PLAN																											
	<ul style="list-style-type: none"> ✓ Financial Planning Needed: ✓ Contact Method: ✓ Assets Consolidated: ✓ Roth Option: ✓ Tax Optimization Algorithm: ✓ Concern Outlive Assets: 	Broad financial planning Face to face Somewhat important Somewhat important Somewhat important Very worried	<ul style="list-style-type: none"> • Broad financial planning • Phone/email/web conference • Yes - except new 401(k)s • Roth Conversion Available • Yes, offered • Lump sum/installments/annuities 	<ul style="list-style-type: none"> • Retirement planning • Primarily web, phone & print • Assets not consolidated • Roth conversion not available • No, not offered • Lump sum 																											
	<ul style="list-style-type: none"> ✓ Investing Help Needed: ✓ Preferred Advisor: ✓ Investment Flexibility: 	A lot (delegator) Financial advisor Really important	<ul style="list-style-type: none"> • General advisor service team • Advisor - First choice • Individual issues (cash, bonds, stocks) • ETFs, Mutual Funds • Unit investment trusts and/or SMAs • Alternative asset classes • Annuities 	<ul style="list-style-type: none"> • Online & 800# support • Prior employer not preferred • Plan investment line-up 																											
	<ul style="list-style-type: none"> ✓ Cash Now: ✓ Pre-59 1/2 Withdrawals: ✓ Loans Later: ✓ Bankruptcy Protection: 	No Somewhat important Not important Not important	<ul style="list-style-type: none"> • Taxes and penalty may apply • No 10% tax for college expenses • Pay 10% tax if retire 55+ • Loans not available by law • Same as the plan for your state 	<ul style="list-style-type: none"> • Taxes and penalty may apply • Pay 10% tax for college expenses • No 10% tax if retire 55+ • No loans • More protection 																											
	<ul style="list-style-type: none"> ✓ Fee Preference: 	Level fee	<table border="1"> <thead> <tr> <th>Account Fees:</th> <th>% year</th> <th>\$ month</th> </tr> </thead> <tbody> <tr> <td>investment fees:</td> <td>0.27%</td> <td>\$250</td> </tr> <tr> <td>admin fees:</td> <td>0.00%</td> <td>\$4</td> </tr> <tr> <td>advice fees - ongoing:</td> <td>0.59%</td> <td>\$542</td> </tr> <tr> <td>total fees:</td> <td>0.87%</td> <td>\$796</td> </tr> </tbody> </table>	Account Fees:	% year	\$ month	investment fees:	0.27%	\$250	admin fees:	0.00%	\$4	advice fees - ongoing:	0.59%	\$542	total fees:	0.87%	\$796	<table border="1"> <thead> <tr> <th>Account Fees:</th> <th>% year</th> <th>\$ month</th> </tr> </thead> <tbody> <tr> <td>investment fees:</td> <td>0.81%</td> <td>\$743</td> </tr> <tr> <td>admin fees:</td> <td>0.05%</td> <td>\$46</td> </tr> <tr> <td>total fees:</td> <td>0.86%</td> <td>\$788</td> </tr> </tbody> </table>	Account Fees:	% year	\$ month	investment fees:	0.81%	\$743	admin fees:	0.05%	\$46	total fees:	0.86%	\$788
Account Fees:	% year	\$ month																													
investment fees:	0.27%	\$250																													
admin fees:	0.00%	\$4																													
advice fees - ongoing:	0.59%	\$542																													
total fees:	0.87%	\$796																													
Account Fees:	% year	\$ month																													
investment fees:	0.81%	\$743																													
admin fees:	0.05%	\$46																													
total fees:	0.86%	\$788																													
Recommendation:			<input checked="" type="checkbox"/> Rollover to IRA	-																											

 Recommending Advisor: (Date)

 Reviewed and Approved by Investor: (Date)

XYZ Consulting and Tom Kmok4 make the recommendation above after taking into account the participant's alternatives to a rollover, including leaving the money in the plan if permitted. The evaluation of the participant's alternatives took into account, among other things, the fees and expenses associated with both the plan and the IRA; whether the employer pays for some or all of the plan's administrative expenses; and the different levels of services and investments available under each option. Specifically, the reasons why the recommendation is in the best interest of the participant are:
 - Investor Help Needed - A lot (delegator), Investment Flexibility - Really important, Financial Planning Needed - Broad financial planning, Roth Option - Somewhat important, and Concern Over Outliving Assets - Very worried.

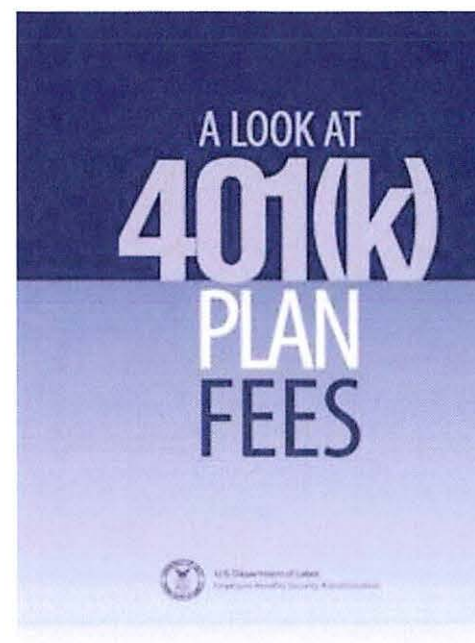


1. *There are 4 different types of Distribution/Rollover Services*
2. *Fee Differences can be substantial – thus use real data*
3. *Recommendation can be done quickly and easily*
4. *FINRA 13-45 & DOL Fiduciary Rule are a solid regulatory approach*



Range of Fees for \$5mm Plan, Avg Balance \$70k

		Low	Medium	High
Fixed Income	50%	0.30%	0.45%	0.67%
Large Cap Value	10%	0.41%	0.57%	0.79%
Large Cap Growth	10%	0.39%	0.61%	0.89%
Large Cap Index	10%	0.06%	0.10%	0.21%
Mid Cap Value	5%	0.48%	0.69%	0.90%
Small Cap Value	5%	0.62%	0.82%	1.09%
Foreign/International	10%	0.46%	0.65%	0.91%
Investment Fee		0.34%	0.49%	0.72%
Advice Fee		0.00%	0.63%	0.78%
Recordkeeping Fee		0.14%	0.36%	0.69%
Total Fee		0.47%	1.48%	2.18%



“The 1 percent difference in fees and expenses would reduce your account balance at retirement by 28 percent.”

Above example does not include TPA fees or Advisor fees, which could exacerbate the difference in fees.

In addition, for a participant approaching retirement, the 50% allocation to Fixed Income could have these differences:

- *Stable Value or General Account earning 3.00%*
- *Money Market Fund earning 0.75%*



1. *There are 4 different types of Distribution/Rollover Services*
2. *Fee Differences can be substantial – thus use real data*
3. *Recommendation can be done quickly and easily*
4. *FINRA 13-45 & DOL Fiduciary Rule are a solid regulatory approach*



Recommendation

- Old Qualified Plan – Participant Statement, **404(a)(5) Statement, 9 questions**
- New Qualified Plan – Participant Statement, **404(a)(5) Statement, 9 questions**
- IRA – Can be customized for type of customer with one click



Education

- Old Qualified Plan – Benchmarking data based on plan size with one click
- New Qualified Plan – Benchmarking data based on plan size with one click
- IRA – Can be customized for type of customer with one click



Hire Me

- No data is necessary



Unsolicited Request

- No data is necessary

Cash Outs



Your Retirement Account Statement

Account Snapshot
 Your Balance: \$5
 Your Quarterly Return: 2.72%
 Your YTD Return: 2.31%

Message Center
 Review Your Retirement Statement on Your Mobile Device

Your Account Summary
 Reporting Period: 12/31/2016
 Ending Balance: \$10,218.18
 Vesting Balance: \$10,218.18

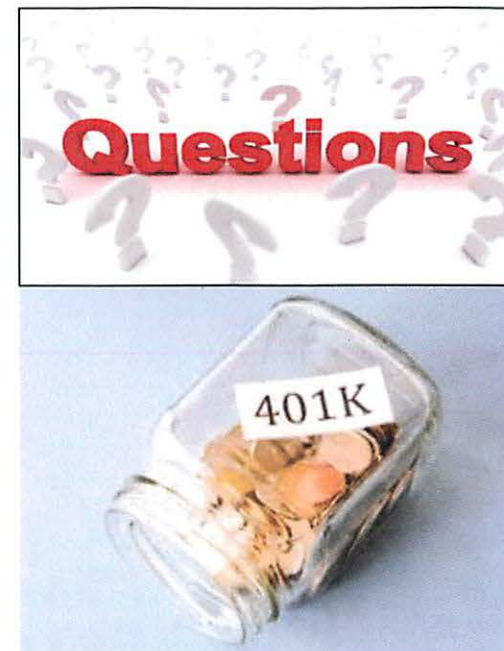
Your Projected Income of Retirement
 Total Projected Income: \$2,911

Your Investment Allocation Summary
 Asset Categories: Bond (33%), Equity (67%)

PARTICIPANT FEE DISCLOSURE STATEMENT
 Corporation 401(k) Savings Plan ("Plan")
 April 30, 2016

This Disclosure Statement is provided by your employer to explain the costs associated with participating in the Plan. It is for informational purposes and is intended to help you make informed decisions about your investments. Unless specifically noted below, all information in this statement is provided as of the above date.

Name Type of Option	Average Annual Total Return as of 03/31/16				Total Annual Operating Expenses			Shareholder - Type Charges and Investment Restrictions
	1yr	3yr	5yr	Since Inception	Net Expense Ratio	Class Expense Ratio	Class per \$1,000	
State Street Cash Services US Government Fund - Class LI Money Market - Target	0.00%	N/A	N/A	0.00%	0.75%	\$7.30	0.75%	\$7.30
Benchmark - BSMAX USD LERV94 Class A	0.33%	0.37%	1.61%	0.31%	N/A	N/A	N/A	N/A
Fidelity Total Return Fund - Class A International Bond	-0.50%	3.26%	3.36%	0.11%	0.85%	\$8.50	0.85%	\$8.50
Benchmark - BSMAX USD ASB Bond 20 USD	1.96%	2.78%	4.66%	0.94%	N/A	N/A	N/A	N/A
Capgemini Global Strategic Income Fund - Class A Multi-Sector Bond	3.18%	3.33%	4.71%	7.08%	1.01%	\$10.10	1.04%	\$10.40
Benchmark - BSMAX USD Government 20 USD	1.77%	3.03%	3.37%	N/A	N/A	N/A	N/A	N/A
Fidelity High Yield Bond - Class A High Yield Bond	4.74%	3.93%	5.47%	5.20%	1.00%	\$10.00	1.00%	\$10.00
Benchmark - BSMAX USD HY Medium 20 USD	0.96%	4.71%	6.89%	N/A	N/A	N/A	N/A	N/A
American Century One Choice In Retirement Portfolio - Class A Target Date	1.02%	1.27%	4.30%	3.11%	1.04%	\$10.40	1.04%	\$10.40
Benchmark - BSMAX USD American Century	0.94%	4.72%	5.07%	0.97%	N/A	N/A	N/A	N/A
American Century One Choice 2020 Portfolio - Class A Target Date	1.60%	1.92%	N/A	4.41%	1.04%	\$10.40	1.04%	\$10.40
Benchmark - BSMAX USD American Century	-0.90%	0.46%	0.70%	4.89%	N/A	N/A	N/A	N/A
American Century One Choice 2025 Portfolio - Class A Target Date	2.00%	1.98%	1.54%	6.07%	1.04%	\$10.40	1.04%	\$10.40
Benchmark - BSMAX USD American Century	1.48%	0.04%	0.69%	7.30%	N/A	N/A	N/A	N/A



Participant Statement:

- Rollover Amount
- Roth or Pre-Tax
- **Renew: Each Time**

404(a)(5) Statement:

- Investment fees
- Advice Fees
- Admin Fees
- **Renew: Calendar Year**

Every Recordkeeper that FBI has surveyed has the 404(a)(5) information immediately available via the Recordkeeper's internet web site.

Plan Questions:

- Reviewed 500+ Provisions
- 9 questions
 - NOT on 404(a)(5)
 - NOT on Part Statement
 - NOT on Form 5500
 - Tested with Major RKs
 - **Renew: Calendar Year**

These provisions seldom change and should be answered 1 time per year.



1. *There are 4 different types of Distribution/Rollover Services*
2. *Fee Differences can be substantial – thus use real data*
3. *Recommendation can be done quickly and easily*
4. *FINRA 13-45 & DOL Fiduciary Rule are a solid regulatory approach*



Regulatory Notice

13-45

Rollovers to Individual Retirement Accounts

FINRA Reminds Firms of Their Responsibilities Concerning IRA Rollovers

Summary

FINRA is issuing this *Notice* to remind firms of their responsibilities when (1) recommending a rollover or transfer of assets in an employer-sponsored retirement plan to an Individual Retirement Account (IRA) or (2) marketing IRAs and associated services. Reviewing firm practices in this area will be an examination priority for FINRA in 2014.

Questions concerning this *Notice* should be directed to:

- ▶ Thomas M. Selman, Executive Vice President, Regulatory Policy, at (202) 728-6977 or tom.selman@finra.org; or
- ▶ Angela C. Goelzer, Vice President, at (202) 728-8120 or angela.goelzer@finra.org.

Background and Discussion

Saving for retirement is a top financial concern for Americans and many are confused about their retirement savings options.¹ Because broker-dealers often advise customers regarding retirement plans, this *Notice* addresses these interactions. In particular, the *Notice* addresses firms' recommendations to participants in employer-sponsored 401(k) retirement plans who terminate their employment and must determine how to invest their plan assets.² FINRA reminds firms of their responsibilities when they recommend that such an investor roll over or transfer plan assets to an IRA.³

A plan participant leaving an employer typically has four options (and may engage in a combination of these options):

- ▶ leave the money in his former employer's plan, if permitted;
- ▶ roll over the assets to his new employer's plan, if one is available and rollovers are permitted;⁴
- ▶ roll over to an IRA; or
- ▶ cash out the account value.⁵



December 2013

Notice Type

- ▶ Guidance

Suggested Routing

- ▶ Compliance
- ▶ Legal
- ▶ Registered Representatives
- ▶ Senior Management

Key Topics

- ▶ Communications with the Public
- ▶ 401(k) Plans
- ▶ Individual Retirement Accounts
- ▶ Suitability
- ▶ Supervision
- ▶ Training

Referenced Rules & Notices

- ▶ FINRA Rule 2010
- ▶ FINRA Rule 2111
- ▶ FINRA Rule 2210
- ▶ NASD Rule 3010
- ▶ NASD Rule 3012
- ▶ Regulatory Notice 13-23

“A broker-dealer’s recommendation that an investor roll over retirement plan assets to an IRA typically involves securities recommendations subject to FINRA rules. A firm’s marketing of its IRA services also is subject to FINRA rules.⁷ Any recommendation to sell, purchase or hold securities must be suitable for the customer and the information that investors receive must be fair, balanced and not misleading.⁸ This *Notice* provides guidance on these activities and is intended to help firms ensure that they have policies and procedures in place that are reasonably designed to achieve compliance with FINRA rules.”



These rollovers, which will be one-time and not “on a regular basis” and thus not covered by the 1975 standard, will be the most important financial decisions that many consumers make in their lifetime. An ERISA plan investor who rolls her retirement savings into an IRA could lose 12 to 24 percent of the value of her savings over 30 years of retirement by accepting advice from a conflicted financial advisor. Timely regulatory action to redress advisers’ conflicts is warranted to avert such losses.



Q14. Can an adviser and financial institution rely on the level fee provisions of the BIC Exemption for investment advice to roll over from an existing plan to an IRA if the adviser does not have reliable information about the existing plan's expenses and features?

As described in Q13, in the case of investment advice to roll over assets from an ERISA plan to an IRA, the streamlined level fee provisions of the BIC Exemption require advisers and financial institutions to document the reasons why the advice was considered to be in the best interest of the retirement investor. The documentation must take into account the fees and expenses associated with both the existing plan and the IRA; whether the employer pays for some or all of the existing plan's administrative expenses; and the different levels of services and investments available under each option.

To satisfy this requirement, the adviser and financial institution must make diligent and prudent efforts to obtain information on the existing plan. In general, such information should be readily available as a result of DOL regulations mandating plan disclosure of salient information to the plan's participants (see 29 CFR 2550.404a-5). If, despite prudent efforts, the financial institution is unable to obtain the necessary information or if the investor is unwilling to provide the information, even after fair disclosure of its significance, the financial institution could rely on alternative data sources, such as the most recent Form 5500 or reliable benchmarks on typical fees and expenses for the type and size of plan at issue. If the financial institution relies on such alternative data, it should explain the data's limitations and the written documentation should also include an explanation of how the financial institution determined that the benchmark or other data were reasonable.

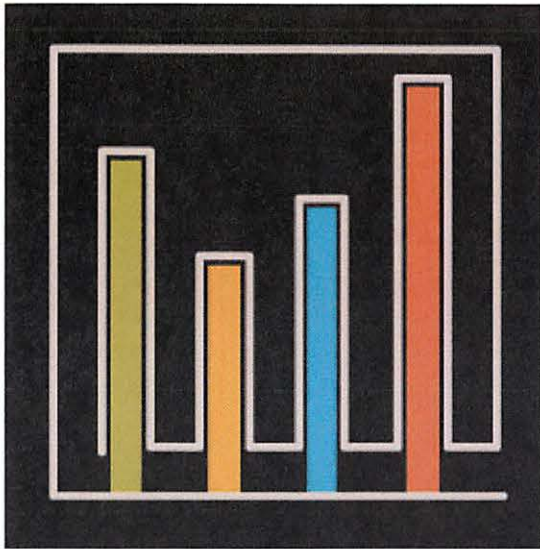
Although the documentation requirement is only specifically recited in the level fee provisions of the BIC Exemption, the documented factors and considerations are integral to a prudent analysis of whether a rollover is appropriate. Accordingly, any fiduciary seeking to meet the best interest standard as set out in the exemption would engage in a prudent analysis of these factors and considerations before recommending that an investor roll over plan assets to an IRA or other investment, regardless of whether the fiduciary was a "level fee" fiduciary or a fiduciary complying with the full BIC Exemption.



Q26. I participated in a 401(k) plan at an old job. Can I get investment advice on what to do with my account in the 401(k) at my old employer?

A. Yes. Deciding how to handle your 401(k) account and whether to leave the account in your old employer's plan, take a distribution and purchase an annuity or roll it over into another plan or IRA is one of the most important financial decisions that you can make. Your financial adviser is acting as a fiduciary and must act in your best interest if she provides advice about taking money out of the plan and rolling it into another plan or IRA, or about leaving your money in the plan, even if there is no specific recommendation on how to invest the assets.

If your financial adviser recommends that you roll over a 401(k) plan account to an IRA that will result in compensation to him or her, special protections apply. Your financial adviser must consider your alternatives to the rollover, including leaving the money in your 401(k) account at your old employer. Your financial adviser should ask you for information on the fees and expenses charged by your 401(k) plan in order to compare it to fees that will be charged for your IRA.



Fiduciary Benchmarks

Independent | Comprehensive | Informative

This material has been prepared solely for informational and educational purposes. It is not intended to provide, and should not be relied upon for, investment, accounting, legal or tax advice.

www.fiduciarybenchmarks.com

5335 Meadows Road, Suite 210 | Lake Oswego, OR 97035 | 866.516.4909