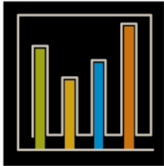


Tom Kmak

February 28, 2019

Brent J. Fields, Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549–1090

RE: Rollover Recommendations Under Proposed *Regulation Best Interest* [File No. S7–07–18] and *Interpretation Regarding Standard of Conduct for Investment Advisers* [File No. S7–09–18]

Fiduciary Benchmarks, Inc. thanks the Securities and Exchange Commission ("Commission") for its considerable efforts in proposing its "best interest" regulatory package. We further thank the Commissioners and staff for their time and attention spent in our October meetings, during which we voiced our concerns about the importance of distribution and rollover decisions from employer-sponsored retirement plans, and the need for comprehensive standards to ensure that rollover recommendations from investment professionals are consistent with the best interests of individual customers.

To further our discussions, we urge the Commission to adopt, as an over-arching standard of care for brokers and registered investment advisers alike, a requirement to engage in the type of analysis already outlined in FINRA Regulatory Notice 13-45 as well as the vacated Department of Labor ("DOL") Fiduciary Rule and Best Interest Contract Exemption ("BIC Exemption")[1]. Quite simply, we believe the Marginal Benefit of "getting this right" for an investor is absolutely worth the Marginal Cost.

Fiduciary Benchmarks is uniquely qualified to opine on these matters as we specialize in decision support systems regarding retirement plans. We have been providing independent benchmarking services to thousands of plans for almost 10 years under U.S. Patent #8,510,198. More recently, we have devoted substantial research and resources to the development of IRA rollover analysis tools. Therefore, the Marginal Benefit/Marginal Cost analysis below will leverage our expertise in designing these systems using real-life data that we have accumulated as well as data from reliable third-party sources. Note that all legal references were reviewed by our ERISA counsel, Drinker Biddle.

1. The Marginal Benefit of Making a Recommendation regarding Rollovers - Economics

After a lifetime of work and saving, the importance of distribution and rollover decisions from retirement plans cannot be overstated:

[1] Both the DOL Fiduciary Rule (its revised definition of "Fiduciary" as to investment advice), 29 CFR §2510.3-21 (Apr. 8, 2016) and the BIC Exemption, Prohibited Transaction Class Exemption 2016-01 (Apr. 8, 2016) were vacated *in toto* by the U.S. Court of Appeals for the Fifth Circuit in *Chamber of Commerce of the United States of America, et al. v. U.S. Dept. of Labor.*

- Per https://smartasset.com/retirement/average-401k-balance-by-age, the average balance of someone age 60 – 69 is $170,000.
- Per https://www.ici.org/policy/retirement/plan/401k/faqs_401k, EBRI notes that the average 401(k) balance for someone in their sixties with more than 30 years of service is $287,000.
- Per https://www.cnbc.com/2018/08/16/the-number-of-401k-plan-millionaires-hits-new-high.html, the number of participants at Fidelity with balances greater than $1 million in the second quarter of 2018 is 168,000.

The DOL understood the importance of this decision and thus subjected rollover recommendations to a fiduciary standard. Per the DOL's preamble to the Fiduciary Rule:

- *"The consequences are growing as baby boomers retire and move money 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. These rollovers are expected to approach $2.4 trillion cumulatively from 2016 through 2020. Because advice on rollovers is usually one-time and not "on a regular basis," it is often not covered by the 1975 standard, even though rollovers commonly involve the most important financial decisions that investors make in their lifetime.* ***An ERISA plan investor who rolls her retirement savings into an IRA could lose 6 to 12 and possibly as much as 23 percent of the value of her savings over 30 years of retirement by accepting advice from a conflicted financial adviser."*** (Emphasis added)

In a footnote, the DOL sets forth the basis for the 6%, 12% and 23% "loss of value" figures cited. They refer to annual losses to a retiree's spending power, explained as follows:

- (A)n ERISA plan investor who rolls $200,000 into an IRA, earns a 6 percent nominal rate of return with 2.3 percent inflation, and aims to spend down her savings in 30 years, would be able to consume **$11,034 per year for the 30-year period**. A similar investor whose assets underperform by 0.5, 1, or 2 percentage points per year would only be able to consume **$10,359, $9,705, or $8,466, respectively, in each of the 30 years**.[2] The 0.5 and 1 percentage point figures represent estimates of the underperformance of retail mutual funds sold by potentially conflicted brokers. (Emphasis added)

On a total "account balance" basis, another DOL publication observes that, over a 35-year period, a 1% difference in fees (from 0.5% to 1.5%) for a portfolio that returns 7% annually would reduce the ending account balance by 28%.[3]

The DOL's logic on this is solid. Retirees have no practical ability to recoup lost spending power by returning to work and setting aside additional retirement savings, so they are particularly vulnerable to the adverse consequences of poor advice and high expenses.

[2] These three annual figures correspond with the 6%, 12% and 23% "loss of value" figures cited previously.

[3] *See* U.S. Department of Labor, "A Look at 401(k) Plan Fees" (updated Aug. 2013), pp. 1-2, *available at* https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/a-look-at-401k-plan-fees.pdf.

Thus, there can be no question that the Marginal Benefit of getting this "right" can be worth thousands of dollars per year to a retiree. In fact, the differences shown above could be the equivalent of an additional check from Social Security. With the revocation of the Fiduciary Rule, the ensuing vacuum can and should be filled by the SEC Best Interest rule.

2. The Marginal Cost of Making a Recommendation regarding Rollovers – Legal Issues

Before assessing the Marginal Cost of making a Recommendation regarding Rollovers, it is helpful to look at the legal guidance regarding this issue as this legal guidance "sets the table" for what a prudent process would look like for such a recommendation.

a) The need for a best interest standard that requires mitigation of conflicts:

- DOL's Fiduciary Rule provided that recommendations "with respect to rollovers, distributions, or transfers from a plan" would be held to a fiduciary standard. This was a significant change from its prior fiduciary advice regulation issued in 1975 which, since the Fifth Circuit's decision to vacate the Rule, has now been reinstated.
- FINRA Notice 13-45 states that a firm may recommend that an investor sell his plan assets and rollover the cash proceeds into an IRA. Recommendations to sell securities in the plan or to purchase securities for a newly- opened IRA are subject to Rule 2111 and a "suitability" standard.[4]
- We presume that a "best interest" standard of care must be more robust than a "suitability" standard. And, while FINRA rules apply only to broker-dealers, we presume further that the Commission does not intend to impose a less exacting duty on registered investment advisers than on broker-dealers.
- Notice 13-45, in fact, explains - as part of its discussion of "Conflicts of Interest" – that firms and their registered representatives that recommend an investor roll over plan assets to an IRA may earn commissions or other fees as a result. In contrast, a recommendation that an investor leave his plan assets with his old employer or roll the assets to a plan sponsored by a new employer likely results in little or no compensation for a firm or a registered representative. This conflict is not limited to the broker-dealer distribution channel. An investment adviser who recommends an investor roll over plan assets into an IRA may earn an asset-based fee as a result, but no compensation if assets are retained in the plan. **Thus, a financial adviser has an economic incentive to encourage an investor to roll plan assets into an IRA that he will represent as either a broker-dealer or an investment adviser representative.** (Emphasis added)

[4] In a footnote to this passage, FINRA states that: "Many plans allow for in-kind distributions, which permits securities held in the plan by a participant to be transferred to a new qualified account. Certain holdings, however, such as institutional mutual funds that are available only to plan participants, may not be transferrable; such assets must be sold if an investor seeks to roll over to an IRA." As a practical matter, almost all plans distribute cash, rather than investments (with the possible exception for company stock). As a result, even participants in small plans that have retail pricing will need to reinvest when they roll over to an IRA. The reinvestment will be at retail prices, meaning that they will likely incur an initial commission, as well as an ongoing 12b-1 fee."

- Clearly, this passage describes a conflict of interest involving financial incentives – of the type proposed Regulation BI is concerned. Among certain other "Conflict of Interest Obligations," it requires the following: "The broker or dealer establishes, maintains, and enforces written policies and procedures reasonably designed **to identify and disclose and mitigate, or eliminate, material conflicts of interest arising from financial incentives associated with such recommendations.** (Emphasis added)

b) The need to consider the individual's circumstances:

- The DOL's preamble commentary in the BIC Exemption stated that: Advisers and Financial Institutions should consider the Retirement Investor's individual needs and circumstances, as described in FINRA Regulatory Notice 13-45.
- Under FINRA 13-45, if Rule 2111 is triggered, a registered representative must have a reasonable basis to believe that the recommendation is suitable for the customer based on information about the options obtained through reasonable diligence**, and considering factors such as tax implications, legal ramifications, and differences in services, fees and expenses between the retirement savings alternatives.** (Emphasis added)
- As a general proposition, the overall fees and expenses borne by an investor in a rollover IRA will usually be higher than those in an employer-sponsored plan, owing primarily to higher investment expenses and higher advisory service fees.[5] Thus, a rollover IRA will only be consistent with an investor's "best interest" if the additional fees and expenses are justifiable in light of other factors that favor the IRA – for example, the prospect of individualized services that provide material value to the investor or products that provide material value based on the investor's needs, *e.g.*, insured guarantees of lifetime income. **In turn, this requires the advisor to understand the investor's profile, meaning his or her risk tolerance, financial circumstances, needs and goals.**

c) The need to be diligent in the gathering of relevant data related to Rollovers:

- The DOL's BIC Exemption would have required an advisor to make and document a "best interest" finding as to any plan-to-IRA rollover recommendation, taking into account (at least): 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. (Emphasis added)[6]

[5] For example, data from the Investment Company Institute indicates that average expense ratios for mutual funds held in IRAs are higher than those held in 401(k) accounts, by approximately 16 bps for equity funds, 12 bps for bond funds, and 11 bps for "hybrid" funds. And, this data only takes into account annual fund expense ratios, not front-end loads (that may be up to 5%), which are often imposed in IRAs but almost always waived for 401(k)s. *See* Duvall, James, "IRA Investors Are Concentrated in Lower-Cost Mutual Funds" (Aug. 8, 2018), *available at* https://www.ici.org/viewpoints/view_18_ira_expenses_fees.

[6] Specifically, this requirement was imposed under the BIC Exemption with respect to plan-to-IRA recommendations by "level fee fiduciaries" whose only financial conflict would have related to the rollover recommendation itself (and not its subsequent compensation from the IRA). But, the DOL clarified in later guidance that "the documented factors and considerations are integral to a prudent analysis of whether a rollover is appropriate, regardless of whether the fiduciary is a "level fee" fiduciary or a fiduciary complying with the full BIC Exemption." U.S. Department of Labor, Conflict of Interest FAQs (Part I – Exemptions) (Oct. 27, 2016), Q&A #13, FN 3.

- Further, fees and expenses are not the only relevant factor. As compared to some plans, the range of investments available in an IRA could be a significant advantage, depending on their quality and the investor's personal needs. Then again, compared to a plan with a brokerage window or similar feature, the range of options available in an IRA may be no advantage at all.
- In addition to the three factors noted above (fees and expenses, services and investments), Notice 13-45 identifies four additional considerations that are often relevant to rollover decisions – namely: (4) penalty-free withdrawals (from plans), (5) protection from creditors and legal judgments, (6) required minimum distributions and (7) employer stock – although it acknowledges that other factors may also be relevant.
- Likewise, some plans offer advice services (or even account management services) and others do not…the need for which will depend on the investor's financial sophistication and other highly personal factors.

In summary, the legal principles set out by FINRA 13-45, promoted by the revoked Fiduciary Rule, and anticipated as part of the Best Interest Rule should contain these fundamental process principles:

a) The need for a best interest standard that requires mitigation of conflicts.
b) The need to consider the individual's circumstances.
c) The need to be diligent in the gathering of relevant data related to Rollovers.

3. Marginal Cost of Making a Recommendation Regarding Rollovers – Data Issues

To analyze properly whether a rollover IRA would be consistent with an investor's best interest, the process outlined above would basically require the following data to be gathered:

1. The needs of the individual investor.
2. The relevant information about the IRA.
3. The relevant information about the old plan and the new plan.
    - NOTE: the "new" plan analysis is required in those situations where a Rollover Recommendation is being made for someone NOT retiring – thus the need to analyze the "old plan" and the "new plan."

First, the information about the needs of the individual investor is already part of the account opening process and the "Know Your Customer" rules. The marginal cost of this is no greater than opening any account for a customer with the exception that additional questions regarding the investor's desire for services that may differ from a plan to an IRA (e.g. the desire to take a loan and not incur a taxable event – a transaction that may be available in a qualified plan but is never allowed in an IRA).

Second, Advisors will have information about the fees and expenses, services and investments offered under the IRA at their fingertips. Again, the marginal cost of this is no greater than opening any account for a customer.

Third, there are several options for obtaining the necessary data for the old plan and the new plan:

1. Form 5500 data
2. Benchmarking data
3. Actual Plan Data

With respect to Form 5500 data, there are numerous items to note:

- First, most employer-sponsored plans have less than 100 participants, and these small plans are not required to include an accountant's report with their Form 5500 filings. This is very important because the accountant's report is where the plan's investments are described.
- Second, while the Form 5500 for plans with more than 100 participants will list the investment holdings, they may not include specific information about such matters as share classes and expense ratios. Further, reporting of fees and other compensation paid to plan providers is not required to be presented in a comprehensive or easily-understood manner. Third, the Form 5500 information is "dated." Plan sponsors have 7 1/2 months, which is routinely extended to 9 1/2 months, to file them after each plan year. This means that an analysis in September of any year could be using data that is 18 months old. Given the increasing number of fund changes being made due to industry litigation, it would not be prudent to say data that is 18 months old is accurate.
- Third, and probably most important, the Form 5500 for small AND large plans does not include detailed descriptions of services provided to participants. For large plans subject to the "full" Form 5500 filing requirements, the identity of service providers, and certain information about their total compensation may be required to be disclosed, but even in these cases the large plan filings are not adequately specific to determine the precise services furnished, or their cost to an individual participant.
- In summary, using Form 5500 data that is incomplete and possibly inaccurate (because it is dated) may not be prudent given the importance of the Marginal Benefit of "getting this right."

With respect to Benchmarking Data, Fiduciary Benchmarks is the industry's leading benchmarking firm and has data on approximately 200,000 plans. That data includes the investment lineups for these plans which represents every market segment - plans with less than a million in assets to plans with billions in assets. The data also includes administrative and advice fees. This data is accurate, up-to-date and available at a moment's notice. Despite those advantages, however, Fiduciary Benchmarks is NOT advocating that Benchmark Groups formed from this data be used for Rollover Recommendations. The reason being is that large disparities can exist within plans of a benchmark group as shown in the example below.

- For plans with $5 million in total assets and an average balance of approximately $70,000, the difference in total annual expenses consisting of investment, administration and advice fees ranges from:
    - **0.47%** on the low end, to
    - **2.18%** on the high end, with
    - a median of approximately **1.48%**
- So, within just this one benchmark group, the total plan expenses can differ by as much as 1.71%. In addition, range variances of 1% are not uncommon. In fact, the data above shows that the difference between the "low end" and the "median" expense ratio is greater than 1%.
- Returning to the example cited by the DOL in the Fiduciary Rule preamble, a 1% difference in annual expenses may very well translate to a difference of 12% in annual purchasing power for a retiree. If a rollover recommendation were made on the basis of an expense-level assumption that was incorrect by 1%, any purported determination that the rollover was in the investor's best interest would likely be affected by an error of the same (12% annual) magnitude.

- For brevity, we will not cite fee information from multiple market segments. But it should be noted that fee and expense levels for employer-sponsored plans differ significantly at every plan size. For example, very large plans may have switched to passively managed collective investment trusts or they may not charge anything for advice for managed accounts. Thus, total expenses for even large plans can vary considerably.
- As the above data demonstrates, general industry data or other estimates (even for plans WITHIN a benchmark group) will be far less reliable than plan-specific information.

With respect to Actual Plan Data, note the following:

- All ERISA-covered 401(k), 403(b) and other individual account plans are required to provide participants with a 404a-5 Disclosures. This disclosure includes a comparative chart of the investment options available, including names, categories, performance data, benchmarks and expense ratios. It also includes information about brokerage windows, participant-level investment managers (i.e. "Advice") and descriptions of general administrative expenses and "individual" expenses that may be charged to plan accounts. Changes to this information are required to be furnished promptly. **Most importantly, these disclosures are almost always available online as well, and copies can certainly be requested from the plan's sponsor.**
- Even non-ERISA plans, such as public school 403(b) plans and the federal Thrift Savings Plan, routinely provide similar disclosure and informational materials that plan participants can easily access and provide to advisors.
- Thus, in nearly every case, participants will have ready access to them, and an advisor can easily request that the participant bring a copy to an initial meeting. It is disingenuous to claim that this information is "difficult" to locate if there is a legal requirement that these disclosures be made available to participants AND if you know where such data resides – at the Recordkeeper for the old and new plan (almost all of which have 800 numbers and participant websites).
- In sum, the process should (with very rare exceptions) require an advisor[7] to collect plan-specific data on fees and expenses, services, and investments, and compare them to those of the rollover IRA, in determining whether the rollover IRA would be in the investor's best interest.

4. Marginal Cost of Making a Recommendation Regarding Rollovers – Economics

As noted above, the proper process to make a Rollover Recommendation would consist of the following steps:

1. The needs of the individual investor.
2. The relevant information about the IRA.
3. The relevant information about the old plan and the new plan.

The table below outlines the Marginal Cost range for each step of the above process. To be conservative, the compensation of the advisor is assumed to be at the 75th percentile which is $162,680 per year. The

[7] For simplicity, we use the term "advisor" to refer to both registered representatives of broker-dealer firms and investment adviser representatives of registered investment adviser firms.

paragraphs that follow explain the time components of each step of the process from a Maximum and Minimum standpoint.

Step	Process Component	Minutes (Maximum)	Minutes (Minimum)
1	Investor Profile	15	5
2	IRA Data	5	2
3a	Old Plan Data: Request 404(a)(5) Disclosure	5	0
3b	Old Plan Data: Enter Data from Disclosure	30	0
4a	New Plan Data: Request 404(a)(5) Disclosure	5	0
4b	New Plan Data: Enter Data from Disclosure	30	0
5	Explain Results to Investor	15	15
		105	22
	Number of Hours	1.75	0.37
	Advisor Hourly Rate (75th Percentile)	$ 78.21	$ 78.21
	Marginal Cost of Analysis	$ 136.87	$ 28.68

Step 1: Investors Profile:

- MAXIMUM: There are systems available in the marketplace that can accomplish this in 15 minutes.
- MINIMUM: If the investor is already a customer of the advisor, then only the rollover-related questions would need to be asked which reduces the time to 5 minutes.

Step 2: IRA Data:

- MAXIMUM: There are systems available in the marketplace that can select the proper IRA (from a stable of possible IRAs) in 5 minutes.
- MINIMUM: If the advisor is familiar with the system, this task would be reduced to just a few clicks of a browser-based system reducing the time to 2 minutes.

Step 3a: Old Plan Data: Request 404(a)(5) Disclosure

- MAXIMUM: There are systems available in the marketplace that provide the 800 number for the Recordkeeper for almost any plan. The advisor can call the 800 number with the investor and obtain the form via the Recordkeeper's website. NOTE: The Department of Labor could make this process even simpler by mandating that such disclosures be prominently displayed on the home page.
- MINIMUM: Many advisors work with participants of retirement plans in the hope that some of them will become Wealth Clients. If they obtained the 404(a)(5) disclosure at the beginning of the year for a Recommendation, they would not need to request the form again for the remainder of the quarter, or possibly the entire year.

Step 3b: Old Plan Data: Enter Data from Disclosure

- MAXIMUM: There are systems available in the marketplace where this task can be delegated for a nominal amount of money (e.g. $15). Those systems could allow the advisor (or their staff) to enter the data in no more than 30 minutes.
- MINIMUM: Same answer as 3a above - ff the Advisor obtained the 404(a)(5) disclosure at the beginning of the year, they would not need to enter this data for the remainder of the quarter and possibly the year. If this is the case, no incremental time is required for the entry of the Old Plan Data.
- ***NOTE: while the effort of this step of the process is not unduly burdensome, there could be a delay of a day or so to receive/enter the 404(a)(5) data. This would thus require an additional meeting or phone call with the Investor. We believe this "get it right philosophy" will be appreciated by almost all Investors.***

Step 4a: New Plan Data: Request 404(a)(5) Disclosure

- MAXIMUM: Same rationale as for Step 3a.
- MINIMUM: Same rationale as for Step 3a.
- **NOTE: For a Retiree, this step is not needed.**

Step 4b: New Plan Data: Request 404(a)(5) Disclosure

- MAXIMUM: Same rationale as for Step 3b.
- MINIMUM: Same rationale as for Step 3b
- **NOTE: For a Retiree, this step is not needed.**

Step 5: Explain Results to Investor

- MAXIMUM: There are systems available in the marketplace that provide short summaries (some even only 1 page in length) that provide the relative services and fees available from the Old Plan, the New Plan and the Proposed IRA.
- MINIMUM: Same number - the explanation always needs to be covered with the investor.

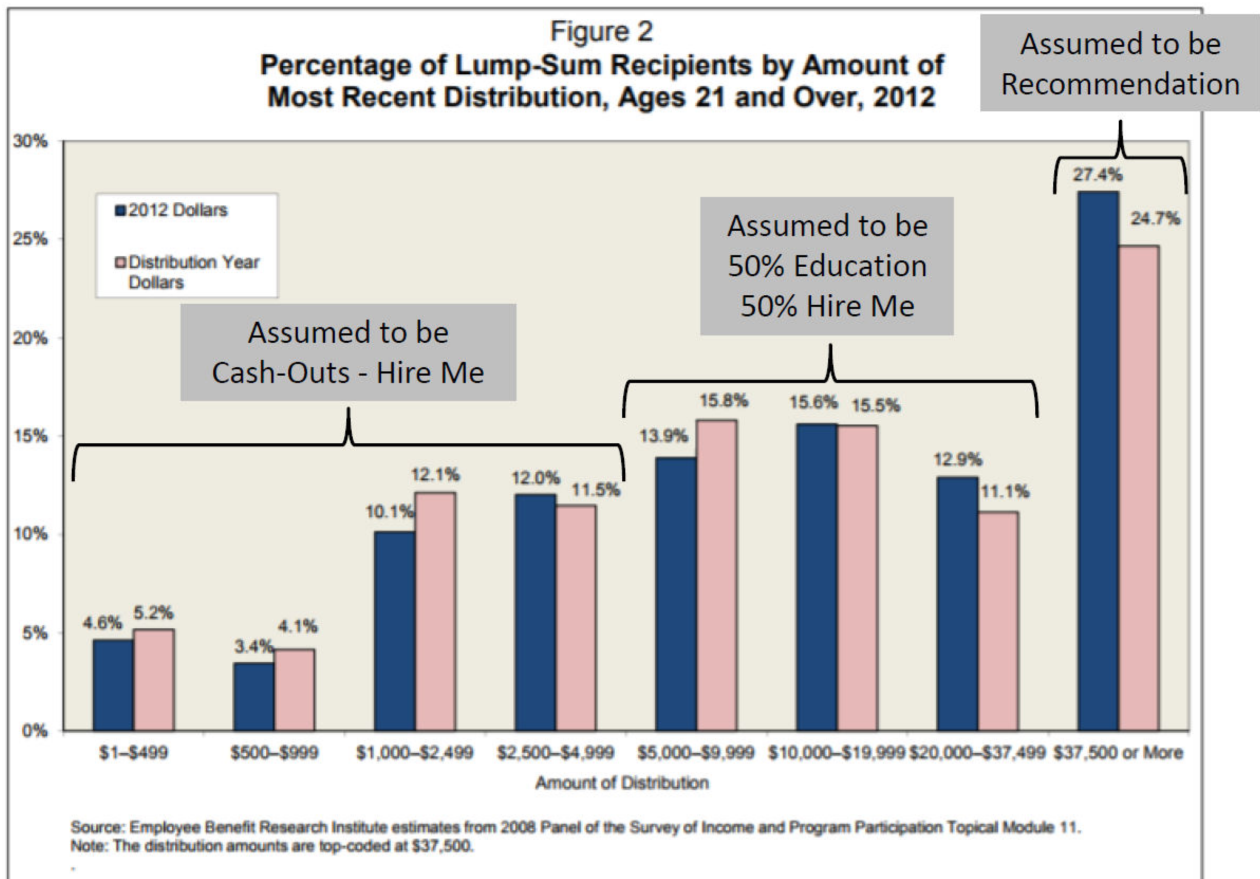
In summary, it is most reasonable to ask an advisor to spend as little as 20 minutes or as much as 2 hours to prepare an accurate analysis for what could be the single largest financial decision these investors will ever face. The next section will address how often an advisor would have to make such a recommendation.

5. The Marginal Cost of Making a Recommendation Regarding Rollovers – Volume

Fiduciary Benchmarks notes that the marketplace is handling Rollovers in 4 ways (shown in order of least difficult to most difficult):

1. ***Unsolicited Request***: a participant has a cash-out and wishes to simply place this money in an existing IRA.
2. ***Hire Me***: a participant has decided they wish to use a certain advisor (presumably due to an existing relationship) and wants the advisor to explain what services they can provide for the rollover.
3. ***Education***: many financial institutions offer Education services that guide an investor through a series of questions to guide the investor to the rollover option that is best for them.
4. ***Recommendation***: this is the process described in the prior paragraph.

The chart from EBRI below can be useful in determining the volume of each type of rollover situation (note that while the data is 2012 data, it is still likely representative of distributions today due to employee turnover in these plans).



Other data points that substantiate this volume of Rollover Recommendations:

- EBRI estimates 14.8 million DC plan participants change jobs each year.
- Retirement Clearinghouse estimates 41% will cash out their savings.
- There are 300,000 Advisors in the U.S. per Cerulli Associates.
- There are also approximately another 16,000 phone reps of 401(k) Recordkeepers.
- Given the above chart from EBRI, if ALL distributions over $37,500 were assumed to justify a Recommendation, the number of Recommendations could be estimated as follows:
  - 14.8 million times 27.4% divided by 316,000 = 12.8 per advisor per year
- Even if we assume ALL distributions over $5,000 would necessitate a Recommendation, the volume of Recommendations looks as follows:
  - 14.8 million times 69.9% divided by 316,000 = 32.7 per advisor per year
- Note that if we use the Retirement Clearinghouse estimates on cash-outs, the volume of Recommendations looks as follows:
  - 14.8 million times 59.0% divided by 316,000 = 27.6 per advisor per year

The above results show the volume of Rollover Recommendations can be expected to average 1 to 3 per month, per advisor. Also note that investors do not generally "shop around" across multiple IRA providers. Rather, they overwhelmingly use institutions and individual advisors that already provide services to their plans, or with whom they otherwise have existing relationships. This reinforces the 1 to 3 per month average.

In addition, we are familiar with two very large advisory firms that process over 100,000 rollovers per year. If you divide the number of rollovers by the number of Advisors, the number of Rollovers per year is nearly the same – about 14 per year. This is also in line with the estimate of 1 to 3 Rollover Recommendations per month.

To be sure, the volume of rollover opportunities will vary from advisor to advisor – not all advisors are "average." But, even an advisor that performs four plan-to-IRA rollover evaluations per month would only be expected to spend eight or less total hours per month doing so.

In short, we have demonstrated the following:

1. The Marginal Benefit of "getting this right" can be SUBSTANTIAL.
2. The Marginal Cost of "getting this right" is 1 to 2 hours per Recommendation.
3. The Volume of Rollover Recommendations will average 1 to 3 per month.

6. Final thoughts: Use Alternative Data Only as a Last Resort

With respect to IRA rollovers, FAQ #14 guidance issued by the DOL on 10/27/16 addressed what advisors and firms would have been expected to do to comply with the BIC Exemption where the 404a-5 Disclosures could not be obtained:

- *"The documentation (of why rollover advice is in a plan participant's best interest) must consider 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 because 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.*

We will not repeat our viewpoints – which the DOL apparently shares – as to why use of so-called "alternative data" will be less reliable than plan-specific data. But, we do wish to endorse the DOL's viewpoint and approach. Stated simply, before relying on alternative data, **an advisor must make a diligent and good faith effort to collect plan-specific data – i.e., the 404a-5 Disclosures.**

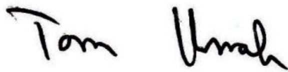
In some cases, it may be true that 404a-5 Disclosures cannot be obtained for one reason or another. For example, no such disclosures are mandated for less-common "pooled" (non-participant directed) plans. Likewise, some non-ERISA plans, such as those sponsored by small government employers, may not provide ready access to these types of information. And in those cases, Fiduciary Benchmarks does not believe that the investor should necessarily be deprived of professional advice.

That stated, advisors in such cases should be compelled to observe the limitations and additional steps described by the DOL. Reliance on other items such as Form 5500 data should not be a surrogate that is employed to avoid requesting documents and the associated short delays so the advisor can make a quick IRA sale. Use of the 404a-5 Disclosures should be employed wherever possible, and it will be possible in the vast majority of cases. In essence, the DOL's recommendation that this form be generated and made available for situations like Rollover Recommendations was appropriate.

In summary, we endorse the process set forth in the DOL's Fiduciary Rule and BIC Exemption, including adherence to the guidelines set forth in Notice 13-45, as providing an appropriate framework for the Commission's requirements relating to IRA rollover recommendations. We are convinced the Marginal Benefit of "getting this right" is clearly worth the Marginal Cost. And, we believe our suggestions represent sound policy for the nation and will be particularly protective of investors who lack financial sophistication.

Again, we sincerely thank the Commission for its time and attention. And, we invite the Commission to contact us to discuss these matters further should it wish to do so.

Sincerely,



Tom Kmak
Founder and Chief Executive Officer
Fiduciary Benchmarks, Inc.