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ASPPA
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HOW THE TPA BIZ HAS CHANGED
...OR HAS IT?

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Agenda

• Introduction
• If the Fiduciary Rule Stays as Updated
• If the Fiduciary Rule Is Revoked or Substantially Modified
Introduction
TPA-Advisor Relations

• Current situation:
  – Very friendly détente after years of working at cross-purposes
  – Many, many TPAs consider financial advisors to be their main referral source ... in fact, maybe their main marketing source
  – Lots of cross-referral relationships

• Can be changed considerably by the fiduciary rules
Where We Are*

- Fiduciary Rules are set to go into effect as of June 9, 2017
- DOL is reviewing its findings to determine, per the President’s directive, if the proposed rule will:
  - Harm investors due to reduced access to retirement savings offerings, products, information, or advice?
  - Cause dislocations or disruptions in the retirement services industry that will affect investors?
  - Cause increased litigation or prices?

*As of 5/12/17 when this outline was finalized
Where We Are (cont’d.)

• If the DOL answers “yes” to any of those questions, it should determine whether to jettison the whole thing

• As of May 11, 2017, rumor is that Labor Secretary Acosta is making it a high priority to get rid of the rule
So?

• If the fiduciary rule stands, what changes, and what should we do?

• If the fiduciary rule is repealed in its entirety, what changes, and what should we do?

• Is there anything about the rule that we would like to retain, if at all possible?
If the Rule Remains in Place
How Does the Rule Affect TPAs?

• **#1 issue**: If you recommend an investment advisor to give advice regarding plan investments, and you receive any compensation in connection with that recommendation, that is a fiduciary recommendation and you are a fiduciary

• Aw, heck.
What Does That Mean?

• The actual advice must meet fiduciary standards
  – Be prudent
  – Be in the interests of participants and beneficiaries

• There is no time limit on fiduciary duties ... so how long are you a fiduciary if you make this one recommendation?
Can I Avoid This?

• Can I give the client 3 or 4 (or 9 or 10) names and say I like all these guys and avoid it being a recommendation?
  – Nope
  – The DOL has clarified that giving a selection of names is still a recommendation
Can I Avoid This?

• What constitutes compensation?
  – Any explicit fee or compensation for the recommendation, and any other fee or compensation received from any source in connection with or as a result of the recommendation
  – Could be anything, including: finder’s fee, commissions, revenue sharing payments, gifts and gratuities, expense reimbursements
  – “But for” rule – i.e., you wouldn’t have gotten that money, gift, referral, dinner, etc., but for the fact that you made the recommendation
What if I Embrace This?

• So, what if I accept that I am a fiduciary in regard to my investment advisor recommendation?
  – You must make that recommendation prudently (you would owe a duty as a fiduciary)
    • “Who cares? I’m recommending someone I think does good work!”
  – Does this change the nature of other work you do?
  – You take on co-fiduciary liability
Co-Fiduciary Liability

- Under ERISA, you become *equally* liable for a breach by another fiduciary if you know about the breach and do nothing to remediate it
  - E.g., what if you find out that the client is late depositing deferrals?
  - Doesn’t it turn you into something of a 3(16) fiduciary if you have liability anytime you know of another’s breach?
What to Do About Co-Fiduciary Liability?

• **Option #1**: Don’t give investment advisor recommendations, so you’re not a fiduciary and you have no co-fiduciary liability
  – Doesn’t help your client too much
  – Doesn’t do wonders for your relationship with investment advisors, either
What To Do About Co-Fiduciary Liability?

- **Option #1 variation**: Couch your recommendation: “I think Joe is a great advisor, but I’m not giving you advice and I’m certainly not getting paid!”
  
  – Per DOL rules, your intent is not probative
    
    - It is an objective analysis: would a reasonable person think you were suggesting that s/he engage in or refrain from conduct?
    
    - More individually tailored, the more likely it is advice
    
    - And, if you really are getting paid (e.g., cross referral), then it looks even more like a recommendation
What to Do About Co-Fiduciary Liability?

• **Option #2**: Act like a co-fiduciary
  – If you find out about a breach by another fiduciary, take action to remediate, such as:
    • Tell someone higher up the food chain
    • Tell the participants
    • Tell the DOL
    • Initiate a lawsuit on behalf of the plan
  – You cannot just quit and do nothing
What to Do About Co-Fiduciary Liability?

• **Option #3**: Stop being a fiduciary before the breach occurs
  – Day 1: “Dear Client, I am recommending Joe to be your investment advisor. This recommendation is a fiduciary act, and I believe this recommendation is prudent and in your participants’ best interest.”
  – Day 2: “Dear Client: I resign as your fiduciary, although I will continue to be your nonfiduciary TPA.”

• Does this work?
How Does the Rule Affect TPAs?

• **#2 issue**: If I recommend a financial institution as a recordkeeper/platform provider, is that a recommendation of an investment or investment advisor?
  
  – No. (DOL said so in second set of FAQs.)
  
  – Whew! (Normal relationships with financial institutions and platform providers remain the same.)
How Does the Rule Affect TPAs?

• **#3 issue**: If our TPA firm has an investment arm, can we recommend them or does that make the TPA firm a fiduciary?
  – Yes, you may recommend them
  – No, you’re not a fiduciary if you do
  – Why? “Hire me” exception. Only a recommendation to *someone else* to be an investment advisor can be fiduciary advice
How Does the Rule Affect TPAs?

• #4 issue: The fun part is over
  – Financial institutions that have been providing TPAs with incentives to use their products are probably prevented from doing so
    • No more trips
    • No more seminars
    • No more goodies
  – Some financial institutions are stopping direct payments to TPAs in favor of deposits to ERISA Accounts paid as directed by the Plan Administrator
Practical Suggestions

• Consider seriously if you will ever recommend someone to an investment advisor again
  – If you do, then you need to figure out what to do about:
    • Making sure your advice is prudently given (what do you know about the advisor?)
    • Consider how to handle co-fiduciary liability
      – Embrace or try to disclaim because you receive no $$$
      – Limit by time through resignation
    • Consider prompt resignation from fiduciary position
Practical Suggestions

• If you are never going to cross-refer *to* advisors, how do you get referrals *from* advisors?
  – Get referrals on the basis of your good work
  – Make an effort to have a comfortable “fit” with advisors – i.e., work well with the advisors
  – Put advisors together with your clients without making a recommendation
    • Is that possible?
Practical Suggestions

• Changes to Service Agreement?
  – If you are not going to give fiduciary recommendations, say so (it can only help)
  – If you are going to give fiduciary recommendations, define range of your duties and liability to the extent permitted under ERISA
If the Rule Is Revoked or Significantly Modified ...
The Good News

• Relationships can stay the same
  – You can recommend advisors, they can recommend you, all is good in the world

• But will they?
The Status Quo?

• Many financial institutions and broker-dealers have rethought the way they do business with their clients and with TPAs, and may not necessarily go back to the way it was before
  – Some folks have embraced the purpose of the fiduciary rules and may want to do business differently
    • E.g., payments to ERISA accounts rather than TPAs
    • E.g., payments only to those with investment licenses
The Rule Broadened Public Consciousness Regarding Plan Investments

• Even if the Rule goes away, people are more aware of the fiduciary vs. nonfiduciary controversy
Picture This

• You are a Plan Sponsor and a participant sues you for fiduciary breach, saying that the investments were bad...

  – And, the plaintiff’s lawyer asks you: “Why did you choose to hire a regular advisor who is not necessarily looking out for the participants instead of someone who is a fiduciary who owes a duty to the plan?”
You Have to Ask Yourself ...

• Even if recommending an investment advisor doesn’t make me a fiduciary, can I recommend a nonfiduciary advisor to my client in good conscience?
What About Your Compensation?

• If you are paid by the plan, you are supposed to disclose all your compensation.

• If you are not doing so, the higher awareness of DOL auditors, participants, plan sponsors, and (perhaps most concerning) plaintiffs’ lawyers makes this more dangerous.
Rollover Advice

• Before the Rule was issued, many plan investment advisors may not have realized the fiduciary and PT implications of giving rollover advice
  – BICE and BICE Lite provided a workaround
  – If the Rule is revoked in its entirety, those workarounds evaporate
  – The “old” ways of getting around this problem were not as satisfactory as BICE Lite was
Do TPAs Care About Rollover Advice Problems?

• “Not my circus, not my monkeys.”

• But:
  – TPAs commonly look at your clients holistically, and want to make sure their plan is operating as properly as possible
  – TPAs commonly want their partners in plan work to be above-board
  – If you are a 3(16) Administrator, you may not want to be on the sidelines of questionable behavior
Practical Recommendations

• Make sure that your service agreement disclaims any investment advice involvement

• Discuss with your client the concerns regarding using a nonfiduciary advisor, and make sure that they articulate (and keep in the file) a viable reason why they choose one
  – E.g., price
  – E.g., ????
Practical Recommendations

• Talk to your financial advisor referral sources about how they work around the PT issues involved in handling rollover work
  – Help them prepare to deal with questions from their clients or the government

• If you do 3(16) work, consider how to deal with the co-fiduciary considerations if the financial advisor gives rollover advice
Final Thoughts
Be Prepared

• Consider what you will do in either situation
• Make sure your service agreement reflects what you will do when the time comes that we know what is happening
• Be sure to tell your client servicing people so that they know how to behave
• Talk to your clients about why you cannot recommend an advisor (if you can’t)
Be Prepared

• Talk to your investment advisory referral sources
  – What are their broker-dealers requiring that is different, and how can you work together to meet the requirements that apply to you both?
  – How can you work together with clients to give the right impressions about your relationship with each other (and why it’s advantageous to the plan)?
Be Prepared

• Watch what happens in your firm
  – Make sure that your employees know what can and cannot be done and the ramifications of “misbehavior”
  – When you see inappropriate recommendations or other behaviors, take action to correct (and, if necessary, disavow)
Questions?
Contact Information

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