REGULATORY/ LEGISLATIVE UPDATE

# Death of a Salesman

## Will the fiduciary rule make 'selling' impossible?

BY BRIAN H. GRAFF

There were four days of hearings on the Department of Labor's proposed fiduciary rule and I kept on waiting… and watching… and waiting. But it never came up. And that surprised me.

You see, I was fully expecting someone to ask these two questions: "What about individuals who actually want to be salespeople?" and "How are they supposed to function in a world where everyone is a fiduciary?"

Here's the problem. Under the proposed rule, if I make an individualized recommendation to an investor client with respect to an investment held in an IRA or 401(k) plan, that will be considered "investment advice" subjecting me to a fiduciary standard. There is no meaningful distinction between "selling" and "recommending." In other words, if I "suggest" or "sell" one of the products I represent, that will be considered a "recommendation" subjecting me to the rule.

But what if I only represent one investment product or one company's investment products? How is that going to work?

For example, assume you are a captive insurance agent. As such, your job is to "sell" the investments of the insurance company you represent. When people with money in an IRA come through your door, your job is to suggest that they purchase one of the annuities offered by the insurance company whose name is on your door. Under the proposed rule, unless the agent takes the form of a potted plant, any suggestion regarding one of the insurance company's products will be considered a "recommendation," making the agent a fiduciary.

> "Many Americans still hold the perspective, both legally and politically, that in this country you should be able to sell your own stuff, whether it's cars or annuities."

According to the DOL, this means that the agent must "act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, without regard to the financial or other interests of the Adviser [or] Financial Institution."

The fundamental question is: How is an agent supposed to satisfy that standard when the agent only represents one insurance company's products? Arguably, that is a theoretical impossibility. Practically speaking it is highly questionable how you could ever legally defend compliance with the standard as a captive insurance agent representing only proprietary products. Ultimately, one can suspect that given the fear of potential liability, compliance departments and the companies they represent will move away from this distribution model, instead working through either an entirely independent distribution channel or perhaps by allowing captive agents to offer multiple insurance company products, with protections built in to protect the agent from potential conflicts.

By the way, this is not just an insurance agent/insurance company issue. Any investment manufacturer (*e.g.*, a mutual fund company) using their own employees to direct sell investments can face the same issue.

The implications for the IRA industry are enormous. While many IRA providers do make available other non-proprietary investments, does it mean that employees of the investment manufacturers will not be able to "recommend" proprietary products? (It is also relevant for SEP and SIMPLE plans, which are often direct sold with a menu of solely or substantially all proprietary investment products.)

Many of you (especially those who are not captive insurance agents) may simply ask, "So what? Aren't these the folks that DOL is going

**Continued on page 47 »**

Feb. 23, 2015. That comment letter provided a number of suggestions regarding how the new information could be collected by the IRS in a more efficient and less burdensome manner. The letter also urged the IRS to delay the new data collection until no earlier than the 2016 plan year to reduce the unnecessary and costly burden caused by rushing to add the new questions on such short notice.

The next step in the process was an IRS filing made with the OMB on May 8, 2015. In that submission to OMB, the IRS indicated the new proposed questions would be included in the 2015 plan year Form 5500 without any changes from the draft published in the Federal Register. ASPPA GAC's thoughtful comments and suggested improvements were disregarded entirely.

As a result, ASPPA GAC filed a follow-up comment letter with OMB on June 8, 2015. That letter took issue with the IRS supporting statement filed with OMB, which ASPPA GAC believed significantly underestimated the additional costs of plan administration resulting from the new questions. These added costs were magnified unnecessarily by the rush to get the new questions added for 2015.

A follow up face-to-face meeting with OMB, IRS and Treasury Department officials was held on July 14, 2015, to affirm the points made in the comment letters. In addition, meetings have been held on Capitol Hill to explain to members of Congress and their staff the unnecessary costs caused by the manner in which the new questions have been rolled out. ASPPA GAC found much empathy for our concerns, and members of Congress are expected to weigh in on the issue.

Unfortunately, as this edition of *Plan Consultant* went to print, it was not clear what the ultimate result of these lobbying efforts will be. ASPPA GAC will continue in our efforts to educate the regulators and members of Congress with the hope of ameliorating the potential adverse impact of implementing these changes for the 2015 plan year. This is sure to be a topic of discussion at the ASPPA Annual Conference later this month and in future editions of *Plan Consultant*. PC

*Craig P. Hoffman, APM, is General Counsel for the American Retirement Association.*

**» Death of a Salesman**
***(continued from page 8)***

after in the first place? Wouldn't the investment world be better off without salespeople anyway?" There are certainly many people in the government, and in the retirement plan industry as well, who think along these lines. However, I for one do not subscribe to the view that all "salespeople" are bad actors. I believe salespeople serve an important role in the marketplace. That said, regardless of what your view is from a policy standpoint, I believe this issue is the single biggest threat to the viability of the proposed fiduciary rule going forward from a legal and political standpoint.

Unless the proposed rule is substantially changed to make it more practical for direct sellers, it is expected that lawsuits will be filed arguing that it represents an unreasonable restraint of trade. Many Americans still hold the perspective, both legally and politically, that in this country you should be able to sell your own stuff, whether it's cars or annuities.

> "...it is highly questionable how you could ever legally defend compliance with the standard as a captive insurance agent representing only proprietary products."

Without seeing the final DOL rule and how it handles this issue, it is impossible at this point to predict the outcome of such a lawsuit. Furthermore, if the DOL does not provide some reasonable level of accommodation for direct sellers, it's also possible that Democrats in Congress feeling sufficient political heat will rebel against the final rule and respond legislatively.

So pay attention to this aspect of the fiduciary saga. Even if it's not currently getting as much media attention as other aspects of the rule, it is definitely a major issue. In the meantime, wither Willy Loman? PC

*Brian H. Graff, Esq., APM, is the Executive Director of ASPPA and CEO of the American Retirement Association.*