WOMEN BUSINESS LEADERS FORUM

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ASPPA
Making Retirement Plans Work
Part of the American Retirement Association

HOW THE TPA BIZ HAS CHANGED …OR HAS IT?

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FERENCZY
BENEFITS LAW CENTER
Your ERISA Edge

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

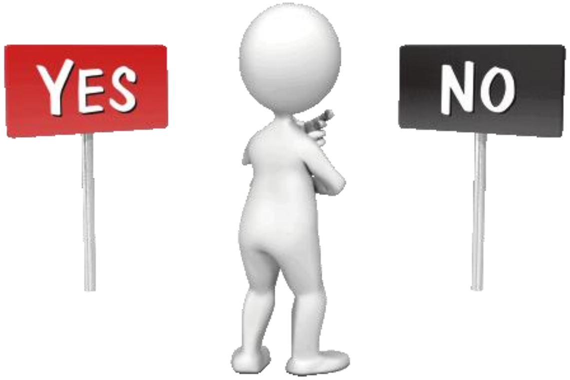
Where We Are*

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- If the fiduciary rule is repealed in its entirety, what changes, and what should we do?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

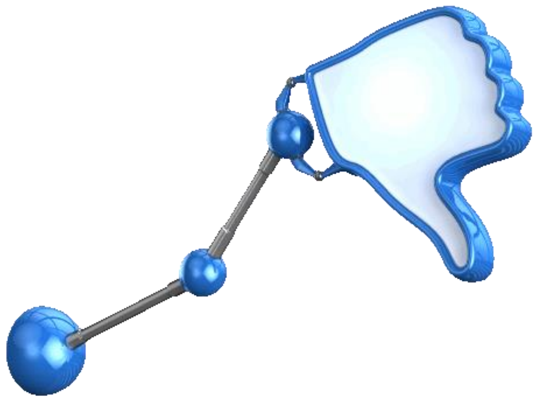
- <u>#1 issue</u>: If you recommend an investment advisor to give advice regarding plan investments, and you receive any compensation in connection with that recommendation, that is a fiduciary recommendation and you are a fiduciary
- Aw, heck.

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?

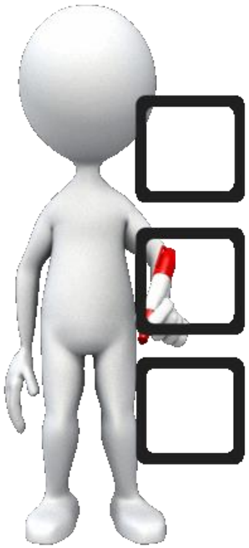
- *Option #1 variation*: Couch your recommendation: "I think Joe is a great advisor, but I'm not giving you advice and I'm certainly not getting paid!"
  - Per DOL rules, your intent is not probative
    - It is an objective analysis: would a reasonable person think you were suggesting that s/he engage 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?

- <u>#3 issue</u>: 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

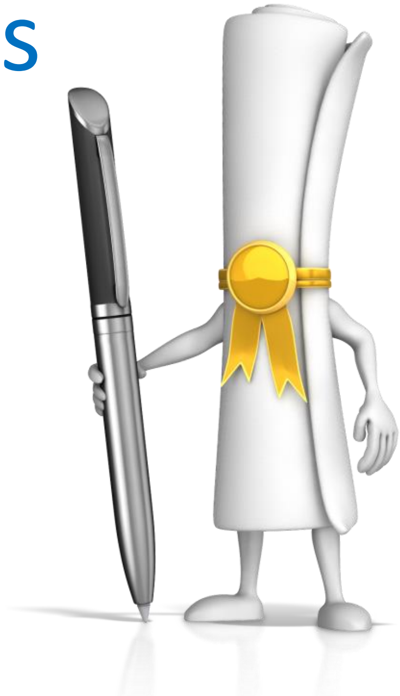
Practical Suggestions

- 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

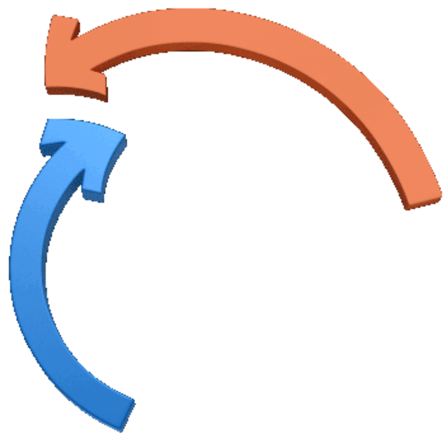
- Relationships can stay the same
  - You can recommend advisors, they can recommend you, all is good in the world
- But will they?

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?

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