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Definition of the Term Fiduciary; Conflict of Interest Rule-Retirement Investment Advice

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General Comment

The real question is how does the DOL plan to enforce a principles based law, such as being a fiduciary on a retirement plan? Many, many 401k plans I encounter currently under ERISA's jurisdiction include 12b-1 fees that average 75 basis points. These commissions are above and beyond the mutual fund investment fees, plan administration fees, and recordkeeping fees. These 12b-1 fees generally go to brokers/registered reps. However, the brokers provide virtually no on-going services in exchange for these on-going fees. They don't provide annual recommendations to plan sponsors on the funds available in the plan and they do not provide individual advice to plan participants. Some of these brokers don't even have a simple educational meeting each year for participants. Yet, every fund in the plans has the same .75% 12b-1 fee and, therefore, every participant pays the fee. The sponsor and participants get almost nothing in return. How are all these small plan trustees and service providers meeting the current fiduciary obligation? I would argue that they are not, but DOL has no meaningful enforcement mechanism to ensure compliance with the current fiduciary law. I have heard of nothing that would make enforcement of the new law any better.

I don't envision any material change in the industry based on the proposed new law's application to IRAs. Any type of adviser will always be able to make a reasonable case for why a client should rollover a 401k style retirement plan account into an IRA with them. They can simply claim that the limited investment options in the plan are inferior to the almost unlimited investment choices with a broker or registered investment adviser. They will simply disclose that they will make money after the rollover and that the new options are better than the old ones. Who is going to be there to tell them if that is not appropriate for a particular client? And they can safely assume that those disclosures will never be examined by DOL/EBSA unless there is a formal complaint filed.

There is much talk in the media that registered reps believe that small clients, and some have even said mass-affluent clients, will not have access to advice if reps are not allowed to charge commissions on IRA. Apparently their feeling is that RIAs will not service such clients and the reps have no other way to earn money on a client's IRA than a commission. Why couldn't the reps or the RIAs simply charge an hourly or flat fee for services for such clients instead of a commission or percentage of assets under management? I know there are plenty of RIAs, including myself, that are willing to charge hourly fees. Why are registered reps unable or unwilling to do that? Is it because it is not as profitable for them to charge a one hour fee to a client to roll over a $20,000 IRA as it is to take a one-time 5% commission of that $20,000 rollover? However, they need not worry because it appears as though exemptions in the new rule will allow this very thing to continue. What regulator is going to be monitoring all these transactions and determining if the compensation was "reasonable" in light of a new fiduciary duty? Will it be determined over time through court precedent in unreasonable compensation lawsuits?

I feel that this new law will likely lead to the same practices I saw during my time as an SEC examiner of investment advisers, which is that the adviser could charge just about anything they could convince the client to pay as long as it was disclosed somewhere in a document. A document the client wasn't likely to read. A rule where a subjective judgment of fiduciary duty has to be made on a case-by-case basis and has no realistic enforcement mechanism is just a waste of paper.

At the least, the new law could require all compensation be clearly shown to the client on a one-page invoice prior to payment. This would allow the client to fully understand what they are paying, and just as importantly what the adviser is receiving, directly or indirectly, whether it is through a mutual fund load, trailing commission, revenue sharing, an hourly/flat fee, or a percentage of AUM.

Thank you.