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Sent: Thursday, June 30, 2011 10:06 AM

To: EBSA, E-ORI - EBSA

Subject: Public Hearing on Definition of Fiduciary

Greetings,

I'm not sure if the commentary period is shut – I suspect it is – but I hope that some of the practices that are listed below make your radar screen. The full article from where this excerpt was pulled is attached to this e-mail.

Regards,

Marshall

Undisclosed Practices of Many Who Claim to be Fiduciaries:

- Investment houses offer free assistance to advisors for the development of high quality marketing materials that are specific and customized for each advisory firm (videos, hard copy materials, etc.).
- Investment houses “sponsor” access to fiduciary evaluation services provided by known third parties (the advisor gives the name of a prospect to the investment house, who then coordinates the processing of the reports by the fiduciary service, delivering the finished product to the advisor free of charge so that they can demonstrate their unbiased acumen).
- Advisory firms require recordkeeping vendors to pay hundreds of thousands of dollars a year (in return for these payments, which the advisory firms claim is needed for their due diligence work, the advisors working for the advisory firm are allowed or encouraged to use that recordkeeper’s services).
- Brokerage firms receive additional payment each year from certain mutual fund companies (this payment isn’t disclosed to plan sponsors or participants and is only disclosed by the fund family within the statement of additional information).

- Brokerage firms have special revenue sharing arrangements with particular fund families (usage of those special funds/fund families dramatically increases revenue sharing available to underwrite their bid and the recordkeeping costs of the plan).
- Insurance brokers who work in the health and welfare and retirement space receive significant overrides from insurance companies that offer products on the health and welfare and retirement sides (the overrides are additional commissions that reward brokers/agents for utilizing the insurance company on both sides of the employee benefit world but are not reported on the required disclosures).

Regards,

Marshall

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Fiduciary Politics

By Marshall Cobb

A great deal of time and money has recently gone to the fiduciary debate. Are you or aren't you? Are you a 3(21) or a 3(38)?

The entire debate reminds me of another painful, seemingly never-ending topic: campaign finance reform. On one side are those in office who do the accepting of contributions. Their side of the argument is captured in [comments recently given](#) by a Massachusetts state official, "I have accepted and will continue to accept lawful contributions that pose no conflict of interest. No contribution has or ever will affect my decision making."

We'd all like to believe it's possible to serve in a public office and accept money from private interests without any impact on our decision-making or, quite frankly, our ethics. The reality, and the other side of the campaign finance reform debate, is that many elected officials [do take money that directly impacts their decisions](#). In many cases, it also ends with the [incarceration of the lawmaker](#).

Are we going to solve this debate today? Not likely. Will new rules emerge at some point to attempt to address the issue? Absolutely. Will those involved spend considerable time and money working around these new rules to attain the same goals via a different route? Absolutely. When will it stop? When we elect incorruptible politicians. I would bet against this outcome.

Returning to the fiduciary debate: we are currently undergoing a rebranding and realignment in the retirement industry thanks to the much anticipated [disclosure regulations](#) from [the Department of Labor](#). The regs are designed to bring clarity to the process by identifying, at long last, who is getting paid what (and by whom)?

While I applaud the effort, it's become apparent that the industry has already reconfigured its mechanisms such that two outcomes will occur: 1) the influences and related payments will take place in a format that the new disclosure rules didn't anticipate and won't capture, and 2) the disclosure of outside influence and payments will be front-and-center for the recipient, but will be accompanied with the statement that all involved should rest assured that the acceptance of these payments had no influence on the decisions that were made on behalf of the plan.

These two outcomes will likely both occur in some combination in retirement plan sales involving large brokerage or advisory firms (just as donations will continue to pour in to politicians). These brokerage and advisory firms will, ironically enough, also tout their unwavering commitment as fiduciaries to the plan.

I don't believe anything can be done about the second outcome for retirement plans or politics. If you believe that someone who represents you can accept large amounts of money and assistance from a third, interested party yet remain unbiased in their decision making then... well... I would say you are an optimist.

I know I can't take cash and prizes from investment houses and vendors without its impacting my decisions. If someone gives me something, I'm going to feel obliged to give them something in return. I suspect that's why the gift is being made in the first place. There will be others within the industry who, like politicians, will attest that the contributions have no affect on them or their decisions.

What is more worrisome to me are the new wrinkles and outside-the-lines thinking that allow significant dollars to change hands with little, if any, disclosure to plan sponsors and participants. Here is a snippet of some of the many angles that are currently being worked by players within the retirement industry:

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As I mentioned, I'm not particularly perturbed by those that take money or gifts but then turn around and share the details with the assurance that it does not affect their objectivity. This is the way the world has worked and will continue to work. The DOL's efforts will indeed make much of the previously fuzzy financial details public knowledge.

What does worry me is that many shops are touting their expertise and their better, different, elevated fiduciary status while actively engaged in the practices detailed above. I don't engage in these practices, so I can't tell you the stage of the sales process where these practices are disclosed (if they are indeed ever disclosed). I do know that they are taking place. I've received the offers from the investment houses, and I've learned of the practices of the brokerage and advisory firms from my past life as a vendor and, most recently, from brokerage and advisory shops that have attempted to purchase Cobb Retirement Solutions.

If these practices bother you, there's a very easy way that we can begin to affect at least a little reform on the retirement industry: ask your broker/advisor to address these issues and their potential

involvement. In writing. If they aren't participating in these practices, then it will take less than five minutes to know the results.

It may come to pass that the DOL will one day also include a requirement for the disclosure of these rather murky practices. If it does, you should expect that the industry will adapt and shift to other methods. We'll still be here, and our answer to all of this will still be no.

Marshall J. Cobb, CRSP, is president and founder of Cobb Retirement Solutions, LLC., an independent, fee-only firm offering qualified plan analysis and oversight exclusively to corporations and organizations. Cobb's first-hand knowledge as a veteran representative of retirement plan vendors beginning in 1990 gives him a unique perspective as he advises his clients. Cobb runs his office -- based in Houston, Texas -- with employees and clients across the country.