

CENTER FOR DUE DILIGENCE

P.O. Box 8 • Western Springs, Illinois 60558
(630) 662-0284 • Fax (630) 662-0286

E-mail: CFDD@TheCFDD.com

Web: <http://www.TheCFDD.com>

Date: December 9, 2009

Subject: CROSS-SELLING: What Is Permissible Under ERISA

When an advisor has a “pre-existing” relationship with a retirement plan or a plan participant, the financial services that can be offered with regard to rollovers, without running afoul of ERISA, is still a murky area. Indeed, according to Marcia Wagner (Principal & Founder, The Wagner Law Group) “The uncertainty of where the line should be drawn between services that are permissible under ERISA, and those that would result in a violation of an advisor’s fiduciary duty, is a question on the minds of many people.”

Based on the DOL’s campaign to curb perceived abuses associated with cross-selling, determining the placement of this line is important. The DOL defines cross-selling as “using existing clients, participants and beneficiaries to market additional products or services.” The Department believes that cross-selling is particularly prone to abuse when it results in fees being received by advisors in connection with rollovers to IRAs.

Regarding rollovers being subject to ERISA’s fiduciary standards & prohibited transaction rules, the DOL’s infamous Advisory Opinion 2005-23A posed three questions. As noted by Ms. Wagner, “The Department dropped the hammer in the second part of their answer to question two by stating that advisors who are plan fiduciaries are still under fiduciary obligations with respect to rollover recommendations.”

Under the plan management rationale, the advisor would be subject to fiduciary duties just by responding to participant questions as to the advisability of taking a distribution or as to the manner of its investment. **The Department further notes that if the advisor exercises control over the plan assets so as to cause the participant to take a distribution and roll it into an IRA generating fees for the advisor, a prohibited transaction could result.**

Ms. Wagner further noted that the Department’s answer to question three left the door open as to the exact nature of the connection that could get an advisor into trouble.

Regarding the DOL’s Plan Management Theory, Ms. Wagner does not believe the DOL’s position is sound. She also questions the Department’s citing of the Varity Corp. v. Howe Supreme Court decision as support for their Plan Management Theory because it ignores the facts & circumstances of each situation.

While the legal underpinning of the DOL’s position may be shaky, **that does not diminish the agency’s ability to make life challenging for financial advisors who engage in conduct which the Department deems to be abusive.**

To view our latest Q&A on permissible rollover services and find out how advisors can protect themselves, go to: <http://www.thecfdd.com/askanexpert/ERISA>.

Ask an ERISA Expert questions should be emailed to: CFDD@TheCFDD.com. RIA practices and B-Ds seeking guidance on the implementation of rollover strategies may contact Ms. Wagner directly at: marcia@wagnerlawgroup.com. The Wagner Law group is a forward thinking ERISA law firm providing advice on pension, welfare benefits and executive compensation matters.

To view the DOL's Advisory Opinion 2005-23A, go directly to: <http://www.dol.gov/ebsa/regs/aos/ao2005-23a.html>.

RETIREMENT PLAN ADVISORS IN THE CROSSHAIRS

Experts in the CFDD's network who interface with enforcement arms of the government on a daily basis are adamant that in sharp contrast to the Federalist Papers, the government is intent on expanding their footprint. As part of that effort, **the low hanging fruit, including retirement plan advisors, are now in the crosshairs.**

Given that we expect an increase in enforcement activities, this newsletter will discuss some specific examples of challenges retirement plan advisors are faced with on a daily basis along with viable solutions.

While official guidance on avoiding conflicts will no doubt be forthcoming, advisors who provide "plan" level investment counsel and "individual" wealth management services should be cognizant of the need to manage risk. Plan sponsors must also manage their risk.

Given the lack of certainty, some retirement plan advisors in the CFDD's network, like **Jim Scheinberg** (Principal, North Pier Fiduciary Management), **Al Otto** (CEO, OneFiduciary Group) **Dorann Cafaro** (General Partner, Cafaro Greenleaf) and **Brian Hubbell** (Principal, Hubbell Consulting) purposely limit their services to the plan level.

To avoid the slippery slope, Brian Hubbell further recommends that plan sponsors **develop written guidelines on what service providers and their affiliates are allowed to communicate to plan participants in their "educational" activities.** While the guidelines demonstrate a "process," participant rollover behavior and trends should still be monitored.

PROVIDING PLAN & PARTICIPANT LEVEL SERVICES

As noted by **Jon Chambers** (VP, Schultz Collins Lawson Chambers), fiduciary status is a relatively bright line. If an advisor provides investment advice to or through a plan for compensation, they are by default a fiduciary. Unless an exception applies, they are also subject to the prohibited transaction rules that preclude self-dealing.

As one of the industry's most astute observers, Mr. Chambers further notes that the ERISA prohibited transaction rules are quite expansive. As a result, virtually **any advice that would impact the level of compensation earned by the advisor could violate the rules.**

For illustration purposes, let's assume a fiduciary advisor is earning 25bps at the plan level. Subsequently, a terminated participant asks a fiduciary advisor if they should initiate a rollover. The advisor explains that the participant could leave the money in the plan or take a rollover distribution. The advisor further explains that they could service the individual for a fee in excess of the 25 bps. IF the advisor recommends the distribution, the higher compensation would trigger a prohibited transaction.

In the example above, it doesn't matter if the advisor's rollover services include more valuable or personalized advice. As noted by Mr. Chambers, "The prohibited transaction rules are not mitigated by value." Similar conclusions would apply if the plan level fiduciary advisor was dually registered and earning commissions on the rollover transaction.

The aforementioned conundrum can be rectified in one of three ways:

- **Don't Advise The Plan In A Fiduciary Capacity**
- **Don't Impose Different Fees For Plan & Individual Advice**
- **Don't Advise On Taking The Rollover**

As a practical matter, many advisors are pursuing the third approach. When engaging participants who are interested in their services, they clearly state that they do provide rollover services, but further note the potential conflict between their ERISA fiduciary duty and the individual investor.

If the individual participant initiates the rollover on an independent basis and then approaches the advisor, the account could be serviced without conflict. To err on the side of caution, **fiduciary advisors would be wise to avoid marketing their advisory services to participants.** On the other hand, they could service the account on a post distribution basis. Maintaining a file of disclosure documents would also be smart.

In summary, **those who have ignored how ERISA fiduciary duties and prohibited transaction rules apply in these circumstances could be vulnerable for the very behavior they deemed to be in the best interest of their individual clients.** Looking at it another way, **those who are in compliance with state insurance laws, FINRA and the SEC may still be afoul of ERISA**

AFFILIATE CONFLICTS UNDER ERISA

Vince Morris (VP, Bukaty Companies), a long time contributor to the CFDD's network, noted that while most of the conflict issues were ironed out in his mind, he still had ERISA concerns about "affiliate" arrangements.

Specifically, what happens when a firm provides plan level fiduciary services and an affiliate provides rollover advice? Vince referenced a MAJOR full service provider and a B-D whose local offices provide educational seminars, answer questions and process rollover business.

He also referenced an advisory practice that consisted of two companies. The company had common ownership, but one focused exclusively on plan level fiduciary business and one focused exclusively on non-ERISA rollover business.

Finally, Vince inquired about an advisory practice that offered an a la carte menu of services. The advisor was initially hired to monitor the plan's funds as a fiduciary under 3(21) and subsequently asked to perform compliance services at a higher fee.

The CFDD's network does not provide legal services, but their response was unanimous. Assuming the full service provider was a plan level fiduciary, the B-D used their relationship to obtain individual advisory business and the rollover fees were higher, both vendors were in violation of ERISA's fiduciary standards and the prohibited transaction rules. They further noted that this is why so few financial services firms want to act as fiduciaries and why there has been so much debate over the prior administration's participant advice exemption.

The question about the additional compliance services was not, however, viewed as an ERISA violation because the advisor was "asked" to perform the additional services.

2010 CONFERENCE AGENDA: Developing Early

Multiple branches of the federal government have become deeply involved in the pension and benefits world. The confiscatory tentacles are expanding and the implications for retirement plan advisors will be profound on an economic and practical level. Left to their own devices, policymakers could go down a path that would make the nation less competitive, discourage self-reliance and further weaken the US as a global power.

Advisors are clearly in the bureaucratic crosshairs of enforcement, statutory and regulatory overreach. To learn how practitioners must evolve to survive, join Jerry Bramlett (President & CEO, NextStep Defined Contribution) and Marcia Wagner (Principal & Founder, The Wagner Law Group), two of the industry's most insightful minds, as they discuss: ***THE MARCH TOWARDS SOCIALISM: Impact On Advisors & The Retirement Industry.***

The movement from investment sales person to retirement plan consultant has been followed by litigation that is just now focusing on advisors. The new reality requires advisors to re-evaluate their verbal communications and advertising with a critical eye on what can and cannot be defended. In short, it is no longer safe to stretch claims beyond what can be factually proved.

David Witz (Managing Director, Fiduciary Risk Assessment & Plan Tools LLC) will moderate the session on ***How Not To Get Sued***. The session will focus on common mistakes advisors make to attract unwanted attention and the steps that can be taken to ward off plaintiff interest in the advisor as a defendant. Attendees will be schooled in ways to minimize risk as well as provide insight on methods of defense. The session will also discuss the differences between experts and expert witnesses as well as the deposition environment

The ERISA compliance strategies used by B-Ds and RIAs are all over the map. Some are pursuing a very conservative approach while others are tempting the regulators by pushing the limits. To assist in this area, Jason Roberts (Partner, Reish & Reicher) will share his empiric perspectives during the session on ***Cross-Selling Strategies & ERISA Compliance***.

One year of intense effort is required to develop and populate a large, content rich agenda. With over sixty different sessions, more than half of the CFDD's 2010 Advisor Conference agenda is already developed. If you would like to participate or have topic suggestions, please email them to: CFDD@TheCFDD.com.

CFDD 2010 ADVISOR CONFERENCE: The Fonz Lives

The CFDD's October 6-8 (Wednesday-Friday), 2010 Advisor Conference, ***NEW AGE MARKETING: What Worked In The Past Is No Longer Effective***, will return to the downtown Chicago Fairmont - Millennium Park Hotel, Chicago, Illinois.

Given the evolving decision making process, the retirement industry must adapt to the new environment to maintain and increase market share. **The CFDD's sole purpose centers on helping specialists grow their retirement plans business and professionalizing the advisor selection process.** Given our mission, the new ERISA Advisor Evaluator program for plan sponsors will play a key role in the consolidation of retirement plan advisory services.

While CFDD '09 was another homerun, **CFDD '10 is designed more intimately to facilitate enhanced learning and deeper networking.** Specific education tracks will be threaded throughout the event and more advisor roundtables will be included in the program, including spirited after hour meetings.

To bridge the conference's educational demands and create a relaxed atmosphere, **CFDD '10 will feature a lively 50's theme**, including a Fonz look-a-like contest, hula hoop/twist contests, an Elvis impersonator, professional entertainers and major photo-ops for sponsors. Consistent with our theme, the conference will feature authentic 50's Attire Awards and a Grand Prize Trip to Graceland for two.

The '57 Chevy may be no more than a ghost, but cats & chicks can still roll up t-shirt sleeves, don retro sunglasses, poodle skirts, pony tails, ducktails and network in a fun & outreach friendly environment.

The Chicago Fairmont can only accommodate sixty exhibition booths and while one-third are already committed; **all booth locations are equally traffic friendly**. To facilitate increased networking, **all food and beverage will be served in the exhibition area**.

As a bonus, **the 2010 exhibition package includes complimentary advertising on the CFDD's website and in our email newsletter with a value up to \$25,000**. The website is currently experiencing more than 300,000 page visits per month and our newsletter reaches a highly targeted audience of over 35,000 retirement plan professionals.

The CFDD already offers more value, unbiased content, CE credits and attracts more accomplished retirement plan advisors than any other industry event. To add even more value, **join exhibitors who register early and benefit from banner ad exposure on the CFDD's entire website and our email newsletter for up to one year without additional cost**.

Our limited 2010 booth space will sell out early. To secure your space now, benefit from a **15% early registration discount**, extended complimentary advertising and **exposure to the industry's most powerful database of retirement plan specialists**, exhibitors should click [HERE](#) to register early.

Rather than continue to offer selective group discounts to large organizations, we are donning our Robin Hood hats and making the discounts available to all individual registrants. **To benefit from the maximum discount, you must register before year-end**. To register early and save up to \$1,000, click [HERE](#)

For more information on the conference, visit: <http://www.thecfdd.com/CFDDconference2010>.

©Copyright 2009. All rights reserved. Center for Due Diligence. This release is published exclusively for the trade as general information and should not be viewed as a recommendation to buy or sell securities, other investments or to adopt any investment strategy. This material should also not be viewed as a forecast as CFDD opinions are influenced by marketplace dynamics and subject to change. The CFDD is not a law, advisory or investment firm. We do not give legal, tax, investment or any other type of advice. The CFDD does not warrant and is not responsible for the accuracy of content, errors or omissions. All investments involve risk. Reliance upon information in this material is at the sole discretion of the reader. The CFDD is an information & strategic resources firm serving retirement plan advisors. The CFDD also hosts the industry's largest conference for retirement plan advisors. The CFDD's October 6-8, 2010 Advisor Conference will be held at the downtown Chicago Fairmont Hotel. For more information about our publications, conferences and advertising opportunities, contact: CFDD, PO Box 8, Western Springs, IL 60558. We can be reached by phone at (630) 662-0284, by fax at (630) 662-0286 and by email at @TheCFDD. You may also visit our website for more information at: [://www.thecfdd](http://www.thecfdd).