WINIECKI WEALTH MANAGEMENT

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401(k) Fiduciary Newsletter

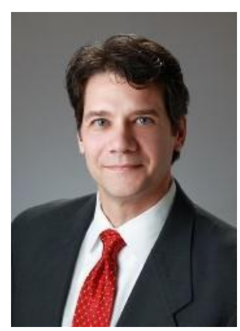
for Business Owners, Human Resource Directors, CFO's, Plan Fiduciaries and Administrators

New 1,000-Page 401(k) Fiduciary Rule
Protection with Complexity and Loopholes

The Department of Labor recently passed its new rule related to 401(k) plans, significantly changing the industry. The rule's complexity allows plan sponsors will continue to rely on advisory firms for (often conflicted) advice and that litigation will increase.

Complex in itself, here is the DOL's New Rule "Fact Sheet"

This summary discussion should not be used as a legal summary of the new rule.



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I. Earning Commissions and Selling Proprietary Products Should End (but they won't)

The new rule took pains not to ban commissions and the selling of proprietary products. That said, the new requirements to do either are so onerous that these practices *should* fall by the wayside, but they probably won't. (Think TIAA-CREF and how its 401(k) business would continue if it does not sell its own product).

Firms can charge commissions and sell proprietary products if certain requirements are met, including: (1) acknowledging the advisor's fiduciary status, (2) adhering to basic standards of impartial conduct including acting in the customer's best interests and avoiding misleading statements, (3) receiving no more than reasonable compensation.

Firms must also have policies that mitigate the damage of conflicts of interest, must disclose information about those conflicts and may not incentivize advisors to make recommendations not in their clients' best interests.

Earning commissions or selling proprietary product requires advisors to adhere to rigorous requirements, although advisors who charge a "level fee" can avoid some of those requirements.

Going forward, selling proprietary product will continue even though advisors should have zero incentive to do so. If a proprietary product has a poor investment result, an argument can always be made that the plan fiduciaries should not have allowed such a product to be included in the plan.

TAKEAWAY: With many options available, there are few reasons to use a proprietary product in a 401(k) plan, and plan fiduciaries should consider prohibiting their use.

Additionally, giving level-fee advisors less stringent requirements underscores the problem of paying different compensation for different products. Plan sponsors should consider avoiding revenue sharing funds and opt for level, transparent fees.

II. Education is not Covered Advice

While designating and monitoring an investment education provider is itself an exercise of fiduciary authority, the new rule does not apply to general investment education. Advisors can continue to educate plan participants regarding general investment topics. The more an advisor knows about a participant's specific situation, though, the more likely that "education" will be tailored to that individual and be deemed advice. Providing individual investment advice is a fiduciary act that can expose both the advisor and the plan fiduciaries to personal liability.

TAKEAWAY: Make sure your advisor understands the difference between education and advice and your advisor documents that no personal advice is provided to individual plan participants.

III. Offering a Platform of Investments is not Advice

Recordkeepers or third-party administrators can provide a platform of investment alternatives (funds) without being subject to the new rule if the provider (1) ignores the individualized needs of the plan and (2) states in writing they are not providing impartial investment advice or acting as a fiduciary.

TAKEAWAY: Selecting funds from a platform of funds provided by a service provider is a fiduciary act. In that case, the plan fiduciaries are 100% responsible for selecting those funds – the service provider is not responsible at all. Unless the plan sponsor is in the 401(k) business, this is a problematic situation.

IV. Unintended Consequences?

With the apparent restriction on selling proprietary products to retirement plans, new funds will have a hard time starting up. Advisors should be reluctant to select funds with no track record in a 401(k) line-up. To reduce the risk of higher-priced, actively-managed funds underperforming, we may see a mass migration to index funds. Stay tuned.