How Retirement Plan Providers Can Deal With The Fiduciary Rule Change

By Ary Rosenbaum, Esq.

At its prime, Blockbuster Video had 9,000 stores and was actually bought by Viacom in 1994 for $8.4 billion. Then some things called DVDs, Netflix, Redbox, and digital delivery caused Blockbuster to go out of business. Blockbuster couldn't change with the changing times. Change can be an opportunity as long as it's taken advantage of. As a retirement plan provider, the Department of Labor's (DOL's) new fiduciary rule is an opportunity. Take advantage of the new rule or the rule will take advantage of your business. This article is about how retirement plan providers can take advantage of the new fiduciary rule.

Leveling the playing field

Due to the wording of the old fiduciary rule that was developed in 1974, there was an inherent unfairness that there were two groups of people that could be called a retirement plan financial advisor and only one of these groups was an actual fiduciary of the retirement plans they handle. So registered investment advisors RIAs) were fiduciaries and stockbrokers were not. The reason is because stockbrokers are considered not to offer advice on securities. Stockbrokers who serve as 401(k) financial advisors only have to show that the investments offered to plan sponsors are suitable. Like Hebrew National hotdogs, RIAs have to answer to a higher authority. RIAs have to act solely in the interest of plan participants when it comes to the advice they offer plan sponsors on investment options for the Plan. The DOL had wanted to change the fiduciary definition for years because they saw a conflict of interest with many stockbrokers who were pushing certain investment because of higher commissions for themselves and/or selling proprietary investment product. So the DOL unveiled a new rule this year that puts RIAs and stockbrokers on the same footing by making them fiduciaries for the plans they work on. The other change is that stockbrokers now have a higher duty than the old suitability standard; they must offer investment options that are in the best interest of the plan sponsors and plan participants. The new fiduciary definition will be implemented shortly and it's going to have a major change on the retirement plan business. So if you're a plan provider, it's going to be a change that you need to take advantage of.

If you're an RIA

If you're an RIA, you've been fighting for the fiduciary rule for years because you believed that stockbrokers should have the same duty that you've always had. As Lt. Uhura said in Star Trek III; The Search for Spock (the most underrated Star Trek movie of all time by the way): "Be careful what you wish for, you may get it." Call me crazy, but having stockbrokers becoming fiduciaries for their retirement plans that they work for is actually a negative for RIAs. Why? One of the competitive advantages that RIAs always had over stockbrokers was the fact that they had that higher duty of care as a plan fiduciary. The new fiduciary rule takes that advantage away and in my opinion, it waters down the definition of fiduciary when stockbrokers can still collect different commissions and still can sell proprietary products as long

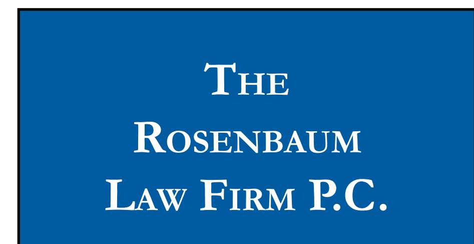
as it's in their client's best interest. So an RIA charges a level fee and doesn't have their own proprietary product and competes with a broker who can have varying levels of compensation and can sell their own product, but they are both called fiduciaries under the new rule. I've been stating that with these exemptions, stockbrokers are treated as fiduciary light because some of their non-fiduciary parts are still preserved under the new rule. How does an RIA compete against brokers when they are now both fiduciaries? It's going to be hard and trying to state that stockbrokers are fiduciary light isn't going to resonate with plan sponsors when most didn't know that brokers weren't fiduciaries in the first place under the current rule. You can't educate plan sponsors on the differences between fiduciaries when they were never educated as to what a fiduciary was in the first place. In my opinion, what RIAs need to let plan sponsors know that despite it all, they always have the plan sponsor's back because they charge a level fee and they don't sell any proprietary products. No matter what investment options they suggest to plan sponsors, they charge the same fee and brokers can't say that. Another huge competitive advantage would be to offer ERISA §3(38) fiduciary services because despite the fiduciary rule change, brokers can't serve as ERISA §3(38) fiduciaries because the only ones who can serve in that capacity are RIAs, banks, and insurance companies. Brokers' only chance to offer ERISA §3(38) fiduciary services is by partnering up with someone who can serve in that capacity.

If you're a broker

Unless you own your own broker-dealer, you're essentially at the mercy of someone with a higher pay grade. What course of action you're going to take is going to be based on the guidance issued by your broker-dealer. What's the course of action? Your broker-dealer may allow any broker with a retirement plan on the books to serve as a fiduciary for their plan sponsor clients. From a liability concern standpoint, I think that's not going to happen. I think more likely, someone in the office is going to be designated as the go-to person for all retirement plan concerns and that person will serve as a fiduciary to the brokerage office's plan sponsor clients. Another option is that the broker-dealer may opt to bringing in an RIA to serve as the plan fiduciary while the broker would work on the plan in a non-fiduciary function to eliminate the liability that goes with being a fiduciary. The nuclear option for a broker-dealer is to decide that they don't want the fiduciary tag and decide to leave the retirement plan business. The nuclear option isn't likely for the big players, but I believe that smaller broker-dealers may decide to exit the retirement plan business

If you're a TPA

If you're a TPA, the fact that brokers will now be fiduciaries will have absolutely no effect on your business. However, when opportunity knocks, open the door. With brokers becoming fiduciaries under the new rule and increased understanding by plan sponsor on what that will mean, I think it's just another reason for TPAs to consider whether they want to offer ERISA §3(16) service as a named plan administrator. While many TPAs may balk at the increased liability (for the added fee), I think any good TPA will realize that it will not likely increase their liability if they have good procedures and practices already in place. Even if a TPA doesn't want the headache of being a 3(16) administrator, they can certainly bring in a provider that can offer it. There are companies willing to take on that service as an independent ERISA §3(16) administrator including my affiliated company, Austin 3(16) Fiduciaries. The TPA business is very competitive and if the 3(16) area of business is increasing and you don't have a solution for that, you may lose business as a result to the providers that offer a solution (on their own or through another provider). If you are interested in running your own 3(16) service, please feel free to contact me to get started.



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