"Pickup" Lines

As indicated in the reprint below [our highlights], it is critical that Plan Sponsors understand the sources of and payments to those who provide services to their retirement plans. Without this knowledge, it is impossible to hold a full understanding of the inherent *conflicts of interest* that exist within most providers' programs. Restrictive platforms evolving from self-serving selling agreements, proprietary products, TPA affiliations, sales incentive programs, commissions, and a host of other negative influences behind the operational and investment makeup of one's plan are onerous conditions pulling directly against what should be and *is* the goal of Trent Capital…i.e. the *maximization of your employees' retirement assets*. Offering AIF [Accredited Investment Fiduciary] status, we will sign on as a Co-Fiduciary along side the Plan Sponsors. If you haven't asked your present provider if they will do so, their answer may provide very telling evidence as to *"in whose interest do they always act?"*

THE PRIMARY FIDUCIARY for the ABC 401(k) Plan is walking down the sidewalk. He notices a $100 bill lying on the ground. The bill has a note attached: This belongs to the ABC Plan."

Does the fiduciary have a duty to pick up the $100 bill and put it back into the plan? Most of us probably would say "yes." It doesn't require a great deal of effort or expense, and therefore, it is a cost-effective use of the fiduciary's time in behalf of the plan. So, all in all, we should all agree the fiduciary has the duty to pick up the money and return it to the plan.

In many ways, "revenue-sharing" is similar to that $100 bill. The providers and advisers for a plan may be receiving money from the investments, which the 401(K) community commonly refers to as revenue-sharing . (Buy the way , the DOL refers to it as "indirect payments", the securities industry give it a variety of names, including 12b-1 fees, finders'-fees, shareholder serving-fees, and sub-transfer agency fees; plaintiffs' attorneys often call it "secret and excessive payments.")

Revenue sharing is similar to the $100 bill because it is money that can, in some cases, be collected for the participants in a 401(k) plan with little cost of additional effort. However, by its very nature, revenue-sharing is not out in the open. Typically, the investments themselves, or the investment managers, pay money to brokers, investment advisers, consultants, record keepers, and third party administrators. The amount of the payments, is usually, but not always, based upon the amount of the investment. The practice is pervasive - virtually every 401(k) plan that I work with has some revenue-sharing. That's just another way of saying that the participants are being charged for some of all of the cost of the plan including the investments and the services to the plan.

Why do ERISA and the DOL care about revenue-sharing? There are two important reasons. The first is that it is impossible to evaluate the reasonableness of payments to plan providers without knowing the full amounts that they are receiving, both directly and indirectly. The second is that fiduciaries must be aware of, and consider the impact of, conflicts of interest. If your providers or advisers are receiving more compensation, including the indirect payments, when they promote one investment over another, there is a conflict of interest.

While fiduciaries have a duty to understand revenue-sharing, there is no corresponding duty imposed on non -fiduciary service providers to provide that information. In effect, the law creates curious circumstance where the people with the least knowledge about a subject (i.e. Plan Sponsor) have the legal responsibility to evaluate it, while the people who are most knowledgeable about the same subject 9ie. 401(k) providers0 have no legal duty to disclose it. However, the DOL has revised the Schedule C to form 5500 for plan years beginning in 2009. The new schedule is designed to report information about indirect payments so that 401(k) providers will give that information to fiduciaries, at least to plans with 100 or more participants. The DOL also is working on a new proposed regulation under ERISA section 408(b)(2) that will require greater disclosure for all plan when a plan buys an investment or service. That point of sale disclosure will probably be effective in 2009.

The moral of the story is that some Plan Sponsors and Fiduciaries are not picking up the $100 bills, not because to bad intentions, but because of a lack of understanding of industry practices. The key is to work with knowledgeable advisors - and have them prepare full-blown reports on fees, expenses, and revenue-sharing - at least every three to four years.

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