Surviving DOL Service Provider Investigations, Part II

DOL Investigations of Service Providers:
Broker-Dealers, RIAs, and Recordkeepers

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Background

- The DOL has increased its number of service provider investigations.

- The DOL has targeted RIAs for a number of years.

- The DOL has begun targeting broker-dealers, recordkeepers and TPAs for investigation.
Background

- The investigations appear to be part of the DOL’s ongoing Fiduciary Service Provider Compensation Project.

  - Purpose is to focus on “the receipt of improper or undisclosed compensation by employee benefit plan consultants and investment advisers.”

  - Project is intended to ensure that plan fiduciaries and participants receive comprehensive disclosure about service provider compensation and conflicts of interest.

  - EBSA will also conduct criminal investigations of potential fraud, kickback, and embezzlement involving advisers to plans and participants.
Document Request:

- As part of the investigations, the DOL typically requests a large quantity of documents.

- DOL requests:

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  5. Documents that identify, list, or schedule the company’s benefit plan clients, including, without limitation, the following information: the name, employer identification number and address of the plan sponsor; the name of the plan; the plan number; the dates of service to such plan; the name(s) of the plan trustee(s), investment manager(s) and custodian(s).
Document Request:

- DOL requests (cont.):

  8. Documents constituting or describing an agreement, arrangement or understanding between the company (or an affiliate) and an employee benefit plan client (or such client’s sponsor) that either of the following activities by the company (or an affiliate) would serve as the primary basis for investment decisions regarding investment of the assets of the plan:

    a. rendering advice to the plan as to the value of securities or other property, and/or

    b. making recommendations to the plan as to the advisability of investing in, purchasing or selling securities or other property.
Document Request:

- DOL requests (cont.):

  12. Documents that describe, list, or schedule any fees charged by the company or an affiliate to manage the assets of, or provide investment advice or other services to, employee benefit plan clients.

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  14. For each of the twenty employee benefit plan clients that generated the greatest aggregate annual fees or compensation (based on the calendar year) for the company and its affiliates, the number of occasions in 2007, 2008, 2009, and 2010 (to date) in which the company provided the services described in document request #8, above, to the plan.

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Document Request:

- DOL requests (cont.):

  27. **Documents sufficient to identify all compensation received, directly or indirectly, by the company from mutual funds or mutual fund families whose products or services the company has identified for, recommended to, offered to, or utilized in connection with services provided to, any ERISA plan client.**

  28. **Documents sufficient to identify all compensation received, directly or indirectly, by the company from record keepers or other service providers whose products or services the company has identified for, recommended to, offered to, or utilized in connection with services provided to, any ERISA plan client.**
Recommendations

- Experience in handling investigations is important:
  - First, negotiate the timing of responding.
  - Second, negotiate the volume of materials to be provided.
  - Third, “pre-audit” the materials to see what they are likely to show.
  - Fourth, consider requesting administrative subpoena.
Questions from First Webinar

- Are there different levels of review/examination/investigation by DOL?
- Does DOL issue formal orders of investigation like SEC, or otherwise?
- How do trial attorneys at Solicitor's Office coordinate with investigators at EBSA?
Questions from First Webinar

- Could you please provide additional tips on negotiating with the DOL without triggering the 20% 502(l) penalty for settlements?
Questions from First Webinar

- An RIA provides advice on selection and monitoring of the mutual fund investment options, for which it charges a fee. Half the plan assets are in the mutual funds and the other half are in SDBAs. The RIA does not charge a fee at the plan level on the assets in the SDBAs.

  Can the RIA manage a participant’s SDBA assets and charge a fee for that service?
Questions from First Webinar

- If a payroll company that provides overall payroll services to a company that includes the processing of employee deferrals receives float income, is that a prohibited transaction?

- Does it matter if an affiliated b/d or RIA is also a service provider to the plan?
Questions from First Webinar

- If 12b-1s are disclosed and are in addition to an advisory fee, do they have to be offset, or could they simply be part of the overall authorized compensation arrangement?
Questions from First Webinar

- Under what circumstances could a record keeper be considered a fiduciary?
Questions from First Webinar

- If an RIA is an acknowledged fiduciary to a plan and charges a fee for its services and also provides model portfolios for an additional fee to those participants who invest in them, is this a prohibited transaction?
Could an investment advisor have multiple level fees for different bucket levels of investments? For example, participants have the option of investing in either (i) a managed stock account or (ii) a managed bond account. But the two different accounts have different level fees.

So, for example, the managed stock account charges a fee equal to 1% of the amount of the account, while the bond account charges only 0.35% of the amount of the account. Is that permissible?

If so, can the RIA recommend that participants allocate a certain percentage of his/her account in a particular account?
Most assistance in helping terminated participants with rollovers includes a conversation about investment options for the rollover funds. Is this okay? What specific documentation do you recommend to be on file?
Questions from First Webinar

➢ What type of demographic information for a plan should be analyzed when an RIA is selecting Target Date Funds?
Questions from First Webinar

- A number of mutual fund recordkeepers allow money market fund options on menus which pay zero advisor compensation because of the low interest rate environment (no 12(b)1 fees available to be paid).

- If all other funds pay a level fee to the advisor, does the lack of compensation from the MMF constitute "variable compensation"?
Questions from First Webinar

- You mentioned that a fiduciary act is not limited to recommending an investment. You gave an example of recommending Asset Allocations. Can you expound on this? Are you referring to advisors building asset allocation models at the plan level or advising participants?
Questions from First Webinar

- In current investigations, is the DOL asking about compliance with the 408(b)(2) & 404a-5 regulations?
Questions from First Webinar

- My firm charges a flat advisory fee to 401k plans. It is either paid by the plan sponsor directly to us, or debited proportionally from plan assets. Our fee is fully documented to plan participants. We receive no other compensation. As part of our service, we will talk with individual plan participants and make recommendations to them—at no additional cost. Dalbar states that we must have the 408(g) audit. Is this correct?
Questions from First Webinar

- Is a 408(b)(2) notice required annually or just when fee arrangement changes?
New Questions