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Are 401(k) advisers the next DOL targets?

Large regional firms and their specialist advisers seem to be in the regulator's cross hairs

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By **Fred Barstein**

The Chicago office of the Department of Labor seems to be targeting 401(k) plan advisers and, if one firm's experience is a guide, the office appears to be targeting large regional firms rather than less experienced advisers.

Specialized retirement plan advisers should take note: This local initiative will likely become a trend, and plan advisers can take steps to prepare for that eventuality.

A large regional firm, Sheridan Road, which is based in Chicago and had over $12 billion in defined contribution assets under management as of 2017, is one firm that just went through a DOL audit. Though there were no fines issued, the time and legal fees involved in the 2-year-plus investigation proved expensive.

"The DOL was looking to get their arms around how retirement advisory practices operate," Jim O'Shaughnessy, managing partner at Sheridan Road, told me.

The scope of the audit included:

• Whether the adviser was acting in a fiduciary or nonfiduciary capacity;

• What services were provided and how the adviser was paid;

• The supervision provided by the broker-dealer and registered investment adviser;

• Communications to plan sponsors, including fee disclosure; and

• All service agreements.

Although determining whether an adviser provided fiduciary or nonfiduciary services and whether the adviser was paid out of plan assets

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are old topics, they served as bread crumbs leading to other potential issues that have developed as a result of the **DOL fiduciary rule** and the overall evolution of plan advisory practices.

According to Sheridan Road's attorney, Tom Clark from the Wagner Law Group, "408(b)(2) provides the DOL with greater disclosure and litigation provides new theories." (408(b)(2) refers to fee-disclosure regulation issued by the DOL in 2012.)

"The amount of information being asked [by the DOL] about fees has increased exponentially," Mr. Clark noted. "Questions about revenue sharing and 12b-1 fees are relatively new."

The timing of the Chicago DOL office's audit of Sheridan Road, around Thanksgiving 2015, coincided with the ramp-up of questions about the pending DOL fiduciary rule. Questions about how advisers are being paid as compared with the services provided will continue no matter what ultimately happens with the DOL rule, the best-interest contract exemption and excessive-fee court cases.

Though experienced plan advisers like Sheridan Road are better prepared to provide good answers to the DOL because of prudent, documented practices, these larger firms might continue to be targets because they manage more plans, possibly resulting in more fines — the same reasoning behind **litigation involving mega 401(k) plans**, which could result in larger judgments or settlements.

As plan sponsors begin to pay more attention to their DC plans and their adviser, it is more than likely that the DOL won't be far behind. Advisers should prepare, according to Mr. Clark, by being proactive and answering questions like:

• Do all clients have a signed service agreement?

• Are you providing all agreed-upon services?

• How are you being paid and what kind of fiduciary are you?

• Were all fee disclosures made?

Though litigation **has not really hit smaller plans**, the theories espoused in excessive-fee lawsuits might be used by the DOL to generate more fines by targeting plan advisers. It behooves 401(k) advisers to pay attention.

Fred Barstein is the founder and CEO of The Retirement Advisor University and The Plan Sponsor University. He is also a contributing editor for InvestmentNews' *Retirement Plan Adviser newsletter.*

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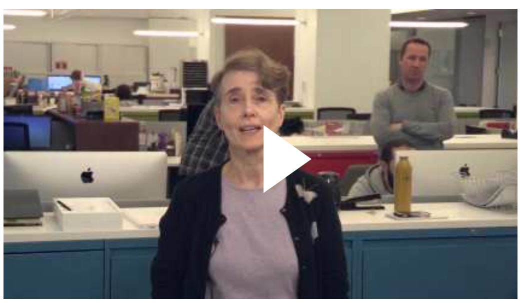

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