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KPAs and the Fiduciary Reg: Three Warnings and Three Wins

By Neil Anderson

It's here! The highly-anticipated, highly-controversial, final, revised fiduciary regulation from the DoL was released on Monday. 401(k) plan advisors (KPAs), pay attention.

When you include the exemptions, the exemption amendments, the regulatory impact analysis, and the final rule itself, the reg clocks in at a mind-numbing 1,418 pages in total. A key advisor the President Obama is pitching the reg as "a major milestone in the president's efforts to put in place [the] strongest consumer protections in history."

For KPAs trying to get a grip on the new reg, here are three things that may make you smile and three things you may want to worry about.

Win #1: rollovers. The final reg, says NAPA chief **Brian Graff**, is more friendly than last year's proposal was to level-fee KPAs who also work with rollovers.

"[The DoL] agreed with us that 401(k) advisors should not be precluded from working with participants on rollovers," Graff tells **401kWire**.

Win #2: Best-interest contract exemptions for small plans. "The availability the BIC is a fairly big deal," **Jason Roberts**, ERISA legal eagle and president the Pension Resource Institute (PRI), tells **401kWire**.

"That was an important change to make," agrees Graff.

Win #3: specific funds and education. Graff says that, in the final reg, the DoL reversed from last year's proposal, allowing advisors to mention specific funds when providing education so long as they have no financial interest in which funds the participants end up choosing.

Warning #1: rollover logic. If you're recommending a rollover, even if your fees are levelized, Wagner says, you "need understanding and documentation as to why you're recommending a rollover."

"You have to have a rationale ... more than just a brokerage account intake form," Wagner says.

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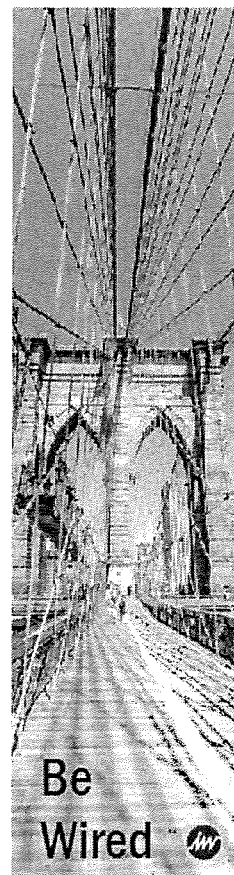
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Warning #2: fiduciary creep, but faster. For the four decades of ERISA, Roberts points out, the "lynchpin" test of fiduciary status under ERISA has been, "Am I providing advice or recommendations concerning the advisability of investing in securities or property." The DoL just expanded that.

In the proposal from a year ago, the DoL would've added "third-party fiduciaries and rollovers" to the test above. The new version, Roberts says, instead talks about "recommendations on investment policies or strategies, portfolio composition, and selection of investment account arrangements." He worries that means that an RIA steering you into two different account options, with different levels of service and thus different flat fees, will be considered to making a fiduciary act. That's a "much more expansive" fiduciary test than in the past.

Warning #3: fee pressure. "These rules are now finalized," Wagner says. "They are the law of the land ... and an intended consequence of these rules is that focus on fees ... is going to increase."

So, KPAs, brace yourselves for more downward pressure on prices. And stay tuned for more fiduciary reg implications as industry insiders dig their way through and ponder this big new reg. ■

Correction: A prior version of this story included an inaccurate fourth warning about the BICE and small plans.

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