RETIREMENT MANAGEMENT SYSTEMS

The Rollover Advantage with Savings Plan Management

A Roadmap for Fiduciary Advisors Serving Plan Clients

A White Paper Prepared by The Wagner Law Group
On Behalf of
Retirement Management Systems, Inc. (RMS)

Executive Summary

Financial advisors that provide fiduciary services to plan clients are subject to certain limitations when trying to cross-sell their rollover services to plan participants. According to recent guidance from the U.S. Department of Labor, an advisor's rollover advice may be subject to the same prohibitions under ERISA that apply to fiduciary advice. If these prohibitions were to apply to rollover advice, the advisor would be prohibited from recommending any rollover investments that could increase the advisor's own compensation, including 12b-1 fees.

Fiduciary Advisor May Advise Plan Sponsor, But Not Participants. In our view, these prohibitions generally would not apply to advisors ("Fiduciary Advisors") providing fiduciary advice to plan sponsors directly, so long as they merely offer fiduciary advice to participants indirectly through a participant-level advice program ("Program"), such as the Savings Plan Management SM program sponsored by Retirement Management Systems, Inc. ("RMS"). In addition, the Fiduciary Advisors must observe certain principles and take the action steps described below. Advisors who provide any fiduciary advice directly to participants on their plan accounts would generally be prohibited from relying on these principles and action steps.

General Principles for Providing Rollover Advice. In accordance with relevant case law, Fiduciary Advisors can ensure that their rollover-related communications are not viewed as fiduciary communications subject to ERISA by observing the following general principles:

(1) Clarify that the financial advisor does not act with the authority of a plan officer when offering or providing rollover advice to participants,
(2) Ensure participants understand that rollover advice does not have a plan-related nature, and
(3) Deliver the rollover advice in a non-plan related context and setting.

Practical Action Steps. To further demonstrate that the Fiduciary Advisor's rollover-related communications are not fiduciary communications subject to ERISA, Fiduciary Advisors can take the following practical action steps:

- Obtain the appropriate confirmations and acknowledgements from the plan sponsor and the individual participants by using the *Confirmation Form for Plan Sponsor* and *Acknowledgement Form for Participant* (both available from RMS).
- Limit the promotion of any rollover services at plan meetings to stating that non-plan, rollover services are available through one-on-one meetings with participants.
- Never advise participants to take rollover distributions or recommend rollover investment strategies at a plan meeting.
- All actual rollover advice to participants should be provided at one-on-one meetings at a site that is removed from the location of any plan meeting.

By taking these action steps to clarify that the Fiduciary Advisor's rollover-related communications are clearly not fiduciary communications, the Fiduciary Advisor can offer rollover advice to plan participants appropriately and in compliance with the requirements of ERISA and the related prohibited transaction rules.

The Cross-Selling Problem for Fiduciary Advisors

Retirement plan clients typically have two basic investment needs. First, 401(k) plan sponsors need help selecting and monitoring the plan's menu of investment options. Second, plan participants need help determining their personal investment allocations for their 401(k) plan accounts. In many instances, both the plan sponsor and the participants seek individualized advice from investment professionals who hold themselves out as fiduciaries to the plan under the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

However, financial advisors who take on a fiduciary role with respect to their plan clients are generally subject to certain prohibitions under ERISA, restricting their ability to cross-sell their other services to plan participants. According to recent guidance from the U.S. Department of Labor (the "DOL"), ERISA generally restricts an external plan fiduciary's ability to advise participants on rollover distributions and how such rollover assets should be invested.[1]

Although the DOL has only issued limited guidance on this restriction, in our view, certain types of financial advisors who serve plans in a fiduciary capacity may also cross-sell their rollover services to plan participants. Specifically, the prohibitions against cross-selling do not apply to financial advisors ("Fiduciary Advisors") who provide fiduciary advice to plan sponsors <u>directly</u>, but who merely arrange for fiduciary advice to be provided to plan participants <u>indirectly</u> through a participant-level advice program, such as the Savings Plan Management SM program sponsored by Retirement Management Systems, Inc. ("RMS"). This paper describes how these Fiduciary Advisors can take certain practical steps to ensure they are offering rollover services to participants in a manner that is consistent with the requirements of ERISA.

ERISA Limitation on Cross-Selling of Rollover Services

Advisory Opinion 2005-23A (the "DOL Opinion") is currently the only formal guidance from the DOL that addresses whether financial advisors may cross-sell their rollover services to participants. Rollover advice by its nature concerns funds that are no longer part of the plan, and the DOL acknowledges that rollover advice is not "fiduciary" advice under ERISA for this reason. Nevertheless, the DOL Opinion appears to conclude that the same prohibited transaction rules that apply under ERISA to fiduciary advice should also apply to rollover advice <u>if the financial advisor already serves as a plan fiduciary</u>.

The prohibited transactions rules governing how fiduciary advice may be provided are a broad set of restrictions under ERISA which, among other requirements, prohibit a plan fiduciary from engaging in any type of self-dealing.[2] ERISA Section 406(b) specifically prohibits a fiduciary from providing any investment advice with respect to a plan that increases the compensation payable to itself.

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[1] DOL Advisory Opinion 2005-23A.

[2] See ERISA Section 406. Section 4975 of the Internal Revenue Code includes a mirror set of rules that impose excise taxes on prohibited transactions.

If a financial advisor's rollover advice were also subject to this same restriction for fiduciary advice, the financial advisor would be prohibited from recommending any rollover investments that could increase the advisor's own compensation. For example, if a financial advisor's rollover advice to a participant were subject to these restrictions, any 12b-1 fees earned by the financial advisor as a result of a participant's investing his or her rollover assets in a recommended mutual fund would result in a violation of ERISA and the prohibited transaction rules.

Given the potentially burdensome restriction placed on the rollover advice of a financial advisor that already serves as a plan fiduciary, it is critical to determine whether and how a financial advisor may provide fiduciary advice to a plan client and also offer rollover advice to the plan's participants. Fortunately, the DOL Opinion itself provides insights on how Fiduciary Advisors may offer such rollover services to participants.

The Three-Factor Test for Fiduciary Communications

The DOL Opinion is striking in that it limits the application of the prohibited transaction rules to the rollover advice of financial advisors serving in a plan fiduciary role only (and not to those serving in a non-fiduciary role). According to the DOL Opinion, a financial advisor serving as a plan fiduciary is akin to a "plan officer" exercising discretionary authority with respect to the management of the plan. The DOL does not fully explain its analysis. Instead, it makes a brief reference to a Supreme Court case, Varity Corp. v. Howe, to support its position.[3]

In this landmark case, an employer had argued that its misleading communication to plan participants were made in a non-fiduciary capacity and therefore exempt from ERISA. While the Supreme Court agreed that an employer's communication could be either fiduciary or non-fiduciary in nature based on the surrounding circumstances, it ultimately ruled that the particular statements in question were indeed a fiduciary communication. The court made its determination based on the following three factors:

(1) the plan-related authority of the speaker,
(2) the plan-related nature of the statements, and
(3) the plan-related context in which the statements were made.

The underlying logic of the DOL Opinion appears to be that, in the same way that an employer's statements may be considered a fiduciary communication, a financial advisor's rollover advice can also be viewed as a fiduciary communication subject to the requirements of ERISA. This logic is effectively a "two-way street" in that the Varity Corp. analysis can be used to determine the circumstances in which rollover advice should be viewed as a fiduciary communication and when it should not be viewed as such.

[3] 515 U.S. 489 (1996).

Applying the Three-Factor Test to Fiduciary Advisors

Financial professionals who provide fiduciary advice to plan clients may wish to consider relying on the three general principles from the Varity Corp. case as a general guide for determining how they might provide rollover advice without it being viewed as a fiduciary communication. However, financial advisors who provide any fiduciary advice directly to participants on their plan accounts would generally be prohibited from relying on these principles. When a financial advisor has been engaged by the plan sponsor to advise participants individually on the investment of their plan accounts on an ongoing basis, it would be reasonable for participants to assume that any advice provided by the advisor concerning their plan accounts, including rollover advice, is also a fiduciary communication.

On the other hand, Fiduciary Advisors who arrange for fiduciary investment advice to be provided to participants indirectly through a participant-level advice program ("Program") would be able to rely on the three-factor test developed in the Varity Corp. case (the "Three-Factor Test"). Accordingly, Fiduciary Advisors would be able to ensure their rollover advice is not viewed as a fiduciary communication by observing the following general principles:

(1) Clarify that the Fiduciary Advisor does not act with the authority of a plan officer when offering or providing rollover advice to participants,
(2) Ensure participants understand that rollover advice does not have a plan-related nature, and
(3) Deliver the rollover advice in a non-plan related context and setting.

When the plan sponsor formally appoints the Program's investment fiduciary (*e.g.*, RMS in the case of Savings Plan Management SM) to serve the individualized investment needs of the participants, it would be reasonable to expect participants to look to such investment fiduciary for all of their investment-related fiduciary communications. Conversely, participants should recognize that the Fiduciary Advisor's formal duties on behalf of the plan do not include providing any fiduciary advice to them with respect to their individual plan accounts. As a result, participants should broadly understand that their communications with the Fiduciary Advisor are not fiduciary in nature.

From the perspective of participants, the formal role of the Program's investment fiduciary in providing all relevant participant-level advice should help participants understand that they have a non-fiduciary relationship with the plan's Fiduciary Advisor. For this reason, it could be argued that this fact alone should be sufficient to demonstrate that a Fiduciary Advisor's rollover-related communications should not be viewed as a fiduciary communication under the Three-Factor Test discussed above. However, to ensure that each prong of the Three-Factor Test is clearly satisfied and to demonstrate that the Fiduciary Advisor's rollover advice to participants is clearly not a fiduciary communication, the Fiduciary Advisor should also observe the practical action steps described below.

1. Clarify Fiduciary Advisor Does Not Act With Plan Authority When Providing Rollover Advice

The Fiduciary Advisor should take action steps to clarify that the Fiduciary Advisor does not act with the authority of a plan officer or other plan fiduciary when offering rollover advice to participants. This clarification should be made to both the plan sponsor as well as the plan's participants.

The Fiduciary Advisor should ask the plan sponsor to confirm that the Fiduciary Advisor's formal responsibilities under the plan do not include providing rollover services to participants. The Fiduciary Advisor should also ask both the plan sponsor and any applicable participant to acknowledge that the plan sponsor has not encouraged the participant to engage the Fiduciary Advisor to provide any rollover services. They should also acknowledge that the participant-level advice for the participant's plan account has been made available through the Program, but that the Fiduciary Advisor has not provided any fiduciary investment advice directly to the participant.

The confirmations that should be provided by the plan sponsor are set forth in *Confirmation Form for Plan Sponsor* (available from RMS). This form should be signed by the plan sponsor before the Fiduciary Advisor offers any rollover services to any of the plan's participants. The necessary acknowledgements that should be made by the applicable participant are provided in *Acknowledgement Form for Participant* (available from RMS). The participant should sign this form at an initial one-on-one meeting with the Fiduciary Advisor as further described below.

2. Ensure Participants Understand Rollover Advice Does Not Have Plan-Related Nature

It is critical that participants understand that any rollover advice offered by the Fiduciary Advisor does not have a plan-related nature. Accordingly, the Fiduciary Advisor's action steps should include obtaining an acknowledgement from the participant that he or she understands that the rollover services being offered are separate from and unrelated to the services provided by the Fiduciary Advisor on behalf of the plan. The participant should also acknowledge that any fee for such rollover services would be payable individually by the participant or through the participant's IRA (and not by the plan or plan sponsor), further demonstrating that the rollover services are unrelated to the plan. The acknowledgements that should be provided by the participant have also been incorporated into the *Acknowledgement Form for Participant* form.

3. Deliver Rollover Advice in Non-Plan Related Context and Setting

Fiduciary Advisors should be mindful of the context and setting in which any rollover services are promoted as well as the context and setting in which any rollover advice is actually delivered. When promoting rollover services at a group meeting specifically designated for plan-related discussions, the Fiduciary Advisor should limit any promotional announcements to stating the following: (1) the Fiduciary Advisor also offers non-plan related personal services to individuals, including rollover services, and (2) the Fiduciary Advisor is available to meet with participants individually to discuss their non-plan investments and to discuss rollover strategies.

The Fiduciary Advisor should never advise participants to take rollover distributions or recommend rollover investment strategies at any plan meetings. As confirmation of this fact, the Fiduciary Advisor should obtain acknowledgements from both the plan sponsor and any participant interested in rollover advice that the Fiduciary Advisor has not promoted or otherwise endorsed the taking of a rollover distribution at any plan meeting for participants. The required acknowledgements are also incorporated into the *Confirmation Form for Plan Sponsor* and *Acknowledgement Form for Participant*.

The Fiduciary Advisor should never provide actual rollover advice to a participant at a plan meeting. In fact, to ensure that the rollover advice is not provided in any plan-related context or setting, the Fiduciary Advisor should not provide any rollover advice during or <u>after</u> a plan meeting is held. Instead, the Fiduciary Advisor should provide rollover services to participants at one-on-one meetings at a site that is removed from the location of any plan meeting. These action steps would serve to ensure that the context and setting of these rollover-related communications are wholly unrelated to the plan and any plan-related meetings.

Conclusion

Financial advisors that provide fiduciary services to their plan clients are subject to certain limitations when trying to cross-sell their rollover services to plan participants. If a financial advisor's rollover advice were subject to the same prohibitions under ERISA that apply to fiduciary advice, the financial advisor would be prohibited from recommending any rollover investments that could increase the advisor's own compensation, including but not limited to 12b-1 fees.

Fortunately, Fiduciary Advisors who merely arrange for investment advice to be provided to participants indirectly through a Program can ensure that their rollover-related communications are not viewed as fiduciary communications subject to ERISA by observing the following general principles:

(1) Clarify that the Fiduciary Advisor does not act with the authority of a plan officer when offering or providing rollover advice to participants,
(2) Ensure participants understand that rollover advice does not have a plan-related nature, and
(3) Deliver the rollover advice in a non-plan related context and setting.

Fiduciary Advisors can take advantage of the fact that they assist plan participants indirectly through the Program, making it easier for them to clarify that the Fiduciary Advisor's responsibilities do not include serving a fiduciary role with respect to the plan's participants. To further demonstrate that the Fiduciary Advisor's rollover-related communications are not fiduciary communications subject to ERISA, Fiduciary Advisors should obtain the appropriate confirmations and acknowledgements from the plan sponsor and the individual participants by using the *Confirmation Form for Plan Sponsor* and *Acknowledgement Form for Participant* forms. The Fiduciary Adviser should also limit the way in which it promotes any rollover services at plan meetings, and all rollover advice should be provided to participants at one-on-one meetings.

By taking these action steps to clarify that the Fiduciary Advisor's rollover-related communications are clearly not fiduciary communications, the Fiduciary Advisor can offer rollover advice to plan participants in compliance with the requirements of ERISA and the related prohibited transaction rules.

About Retirement Management Systems

Retirement Management Systems Inc. (RMS) is an innovator of participant and plan sponsor services. RMS provides advisory, fiduciary and administrative services to the defined contribution marketplace through independent financial advisors. Their advisor network provides the personal attention and insight that clients need to address their retirement planning concerns. RMS registered with the U.S. Securities and Exchange Commission in 2010 and manages approximately $800 million in retirement plan assets.

About The Wagner Law Group

The Wagner Law Group, A Professional Corporation, is a nationally recognized ERISA and employee benefits; estate planning; employment, labor and human resources practice. Established in 1996, The Wagner Law Group has 20 attorneys, five of whom are AV rated by Martindale-Hubbell as having very high to preeminent legal abilities and ethical standards. The firm has one of the largest ERISA groups in the country. The practice is national in scope with clients in more than 45 states and several foreign countries. In 2012 its principal, Marcia Wagner, was voted 21 of the 100 most influential people in the 401(k) industry by 401(k) Wire, an industry publication.