TPAs as Fiduciaries . . . of Their Own Plans

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As you probably know, the 5th U.S. Circuit Court of Appeals threw out the DOL's Fiduciary Rule. While the decision left no doubt, the consequences are not well understood.

To grasp the full impact of the court's decision, it's important to distinguish between non-discretionary investment advice and discretionary management and control. The DOL's fiduciary rule—and the 5th Circuit decision—only applied to non-discretionary investment advice. It does not affect other types of fiduciary activities; for example, discretionary investment management and discretionary administrative decisions.

That, in turn, brings us to fiduciary issues, and prohibited transactions, for plans sponsored by TPA firms. When a TPA firm, or its officers or owners, makes decisions about plan investments and services, it is acting in a discretionary fiduciary capacity. In that role, the firm's duty of loyalty is to the participants, not to the firm.

So, for example, if a TPA places its 401(k) plan with a recordkeeper that makes payments to the TPA firm, the payments attributable to the TPA's plan belong to the participants, not to the TPA firm. If the firm receives and retains those payments, it is a prohibited transaction.

Similarly, if the firm or one of its owners or officers, receives compensation (*e.g.*, commissions or fees) for its plan, it would also be a prohibited transaction. That money would belong to the plan and the participants, not to the firm or its officers or owners.

These are not academic issues. We have seen the DOL raise these issues in investigations of TPA plans. As a word to the wise, make sure that any payments to the TPA that are attributable to the plan, or its services or investments, are deposited into the plan and are not retained by the TPA firm or any of its officers or owners.

Moral of the Story

When it comes to a TPA's own plan, it's important to understand the discretionary fiduciary status of the firm and the prohibited transactions that could result from any payments. These issues can be easily resolved where the firm is obligated to deposit those payments into the plan, rather than retaining them.

National Law Review, Volume VIII, Number 183