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RETIREMENT PLAN FINANCIAL SERVICE PROVIDERS ARE IN THE DEPARTMENT OF LABOR'S CROSS-HAIRS UNDER RECENT ENFORCEMENT INITIATIVE

Once upon a time, most retirement plan investment advisors, broker-dealers, and consultants were largely an afterthought in the mind of the Department of Labor (“DOL”). The agency concentrated nearly all of its employee benefit enforcement resources on plan sponsors, plan administrators, and plan trustees. Absent some glaring conflict of interest or other fiduciary breach that pinged DOL’s radar during an investigation, a plan’s service providers had little reason to worry about an intensive probe into their own activities or compliance with ERISA. Those days have come to an end.

Within the last five years, DOL has begun targeting investment advisors and broker-dealers for investigation as part of a new “Consultant/Advisor Project” (the “CAP Project”). The CAP Project is a national enforcement initiative designed to uncover the receipt of improper or undisclosed compensation by employee benefit consultants and investment advisors.

So far, the CAP Project has flown somewhat under the radar, even though it has already cost service providers of all sizes tens of millions in penalties and fees, if not more. We have seen investigations virtually bankrupt some service providers, particularly those who were not careful to structure their operations in such a way as to be fully compliant with the highly complex statutes and regulations governing service provider compensation in plans subject to ERISA.

DOL appears to be taking an extremely broad view of ERISA’s prohibited transaction rules in the course of its CAP Project investigations. From what we have seen, DOL also construes the fiduciary regulations much more broadly than many in the industry do. It is safe to say there is often a significant difference of opinion between DOL and many service providers (especially investment advisors such as RIAs and broker-dealers, but also other financial consultants) over who is an ERISA fiduciary.

Rest assured, the target of a DOL audit is not a position in which you want to find yourself. The intent of this Alert is to get the word out. Registered investment advisors, broker-dealers, consultants, and other plan fiduciaries would be well advised to review their operations with experienced ERISA counsel in order to ensure that they are not running afoul of any ERISA statutes or regulations.

While this brief Alert is not intended to provide a detailed explanation on the rules governing service provider compensation, we would highlight a number of critical points:

- The primary purpose of CAP Project investigations is to determine whether the receipt of compensation by a retirement plan’s financial advisor or consultant, *even if disclosed*, violates ERISA because the service provider used its position with the plan to generate additional fees for itself or its affiliates. While this may sound straightforward, many advisors and consultants do not fully understand that the rules governing their compensation when dealing with ERISA plans often differs markedly from the rules governing their compensation when dealing with individual clients outside a retirement plan context.

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- While the financial penalties that can be imposed following a CAP Project investigation are substantial, the worst damage may be to the reputation of the individual or entity. The investigation itself is likely to involve the service provider's clients, and you can take it to the bank that DOL will publicize any penalties it secures in an effort to make an example of the offender.
- When DOL launches an investigation under the CAP Project, it rarely confines it to the suspicions that first triggered the probe. In other words, once the investigation begins, everything is fair game.
- Last summer, service providers working with ERISA plans were required for the first time to send out a much more comprehensive summary of the compensation that they (and, in some cases, their affiliates) receive in connection with their work with the plan. These disclosures inevitably will enhance DOL's ability to target investment advisors and consultants.

Registered investment advisors, broker-dealers, and consultants may wish to review their operations to ensure that they are fully compliant with ERISA and all DOL guidance related thereto, particularly in light of stepped-up DOL enforcement activity. An ounce of prevention in this area can be worth many pounds of cure.

If you have any questions regarding the CAP Project or DOL's enforcement activity in general, please feel free to contact Eric Namee at enamee@hinklaw.com or (316) 267-2000, or Brad Schlozman at bschlozman@hinklaw.com or (316) 267-2000.

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