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Don't Be an April 401k Fool

By *Neil Anderson*

KPAs, prepare to keep an eye on your plan sponsor and to speak up if necessary.

401(k) industry insiders expect the DoL to release its new fiduciary regs any day yesterday. ERISA industry insiders are warning 401(k) plan advisors (KPAs) that they expect a broadening of fiduciary status to nearly all KPAs, so all KPAs need to pay close attention to everything plan sponsor clients are doing, even outside of 401(k)s.

Advisors who "see wrongdoing taking place," **Brad Campbell** of **Drinker Biddle & Reath**, tells **401kWire**, "they're going to have some action." Campbell led the DoL's EBSA under the second Bush administration and knows the minds of regulators.

"You have to at least bring it up," says Campbell. "Depending on the severity of the situation, that may enough."

This duty, says Campbell, extends even to fiduciaries who aren't responsible for the particular area in question. An example could be an advisor acting as a 3(21) investment fiduciary by making recommendations for inclusion in a plan lineup.

Both little things and big things can trip plan sponsors and their KPAs up. Though major fraud in or around a 401(k) is "frankly going to be difficult to detect," Campbell says, "the bigger risk is where you have plan sponsor clients, plan fiduciaries, who really refuse to take the job seriously."

Marcia Wagner of the **Wagner Law Group** agrees that "it's the mundane stuff that'll kill you." ERISA experts recommend that KPAs try giving plan sponsor clients a kind of compliance checklist. Such a checklist is "both a value-add [to the sponsor] and helps make the advisor's job easier," Campbell says.

"It also lets you assess their reaction" to compliance concerns, Campbell says.

Wagner offers KPAs a two-page checklist to go through with plan sponsors. Items include confirming that the plan

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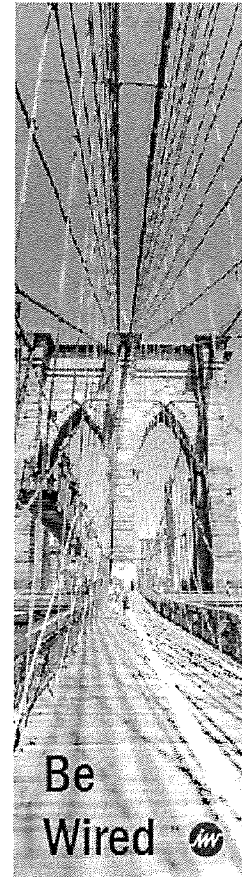
document is up-to-date and in sync with the summary plan description, that benchmarking is being done, that appropriate insurance is in place, that audited financial statements are included in the form 5500 (if the plan has more than 100 participants), that the sponsor is aware of 408(b)(2) and 404(a)(5) disclosure requirements, and more.



One nightmare scenario that the checklist tries to avert is when plan documentation isn't updated with critical information like the plan sponsor's address.

"The initial adoption is fine, but amendments have to be done every year," and they end up getting sent to the wrong place, Wagner says. Pretty soon, "you end up with a disqualified plan."

"This is a big flipping deal. Make sure your plan document is up to date. This is especially a problem with prototypes," Wagner says. "If you haven't amended it in five years, it's probably out of date."

Each KPA "has got to be a mini ERISA lawyer, or at least aligned with a decent ERISA lawyer," Wagner says. "My industry, the ERISA law industry, has done a hostile takeover of the financial services industry."

Another thing that KPAs should watch out for, Campbell says, is the use of interesting investment options, something that's very widespread in the IRA space.

"If you have, say, a fiduciary ... who wants to get into really unusual investments, illiquid investments, say through a brokerage window, that's kind of a warning flag, not that it's wrong," Campbell says. "It's a sign that it's someone you're going to have to pay attention to. You're going to have a lot more compliance challenges, there's a greater likelihood of being investigated, of having major losses."

And never fear, turning on your compliance radar isn't just about protecting against things going wrong. **Jim Williams**, founder of the broker-dealer Financial Telesis, says that asking prospects about the "12 to 15 things every firm should minimum in order to be compliant" is "an opportunity for an advisor to identify weaknesses" and present solutions. You get to say "Here's how we can help you!"

* * *

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