

Hutcheson's tumble offers lessons

ERISA has teeth, outsourcing takes work are just two

By **Darla Mercado** | August 11, 2013 - 12:01 am EST

Some harsh lessons are in order for financial advisers and plan sponsors after the sentencing of famed 401(k) fiduciary advocate Matthew D. Hutcheson.

Mr. Hutcheson, well known for speaking before Congress on the merits of fiduciary duty, will serve more than 17 years in prison after making off with \$5.3 million in retirement assets from a pair of multiple-employer-plan clients. He is expected to make these clients whole.

Mr. Hutcheson was sentenced in the U.S. District Court in Idaho on July 31, more than a year after being charged with 17 counts of wire fraud.

The plans' money largely went toward personal uses, including home improvements and the purchase of all-terrain vehicles, and an ownership interest in a golf course and lodge at the Tamarack Resort in Idaho, prosecutors said.

Some 250 individuals were affected by the scheme, according to the U.S. Attorney's Office.

The toughest lesson for retirement plan advisers and their plan-sponsor clients is that the Employee Retirement Income Security Act of 1974 — the body of regulation that governs retirement plans and the fiduciaries who work with them — is more than a mere civil statute.

"People don't realize that they can go to jail for ERISA crimes," said Marcia Wagner, managing director of The Wagner Law Group.

"This is a real issue," she said. "You don't just pay [a fine] and get out of it."

Indeed, though ERISA includes civil violations for actions such as failure to operate a plan for the exclusive benefit of the participants or usage of the plan's assets to benefit parties

that are related to the plan, such as the plan administrator and plan sponsor, the Labor Department's Employee Benefits Security Administration handles criminal investigations, too.

Such investigations, which typically involve theft or embezzlement from a retirement plan and other types of severe violations, are prosecuted by the U.S. Attorney's Office, which was the case in Mr. Hutcheson's situation.

A call to Mr. Hutcheson's attorney, Ryan P. Henson, was not returned.

Ms. Wagner noted that plan sponsors in dire financial straits should take heed of her warning. She predicted an uptick in cases concerning elective-deferral fraud, wherein plan sponsors pilfer money that's deferred by workers for their retirement savings.

"Don't go criminal, even if you need the money for big purposes, like floating payroll," Ms. Wagner warned.

Another issue for plan sponsors and advisers to worry about is the idea of offloading fiduciary duties to another entity. Employers today are more interested in obtaining fiduciary advice and administration services, and they're willing to outsource those capabilities to advisers and other experts.

"There is a critical and glaring gap in the industry," said Edward M. Lynch Jr., founder of Fiduciary Plan Governance LLC, a governance consulting firm. "There's this shifting of fiduciary functions to supposedly independent experts, and there is the absence of a process for independently auditing, validating and certifying them."

Fiduciary plan administration is a particularly touchy area in light of the Hutcheson case because plan sponsors are effectively outsourcing hands-on responsibilities to other parties. These fiduciaries — plan administrators under section 3(16) of ERISA — oversee selection and monitoring of service providers, making participant disclosures and handling regulatory filings.

"It's like if you were to hand the keys of your house to someone to handle your repairs," said Skip Schweiss, president of TD Ameritrade Trust Co. "You better darn sure have the greatest level of trust in that person, or else you'll come home one day and find that your TV is gone."

Indeed, Mr. Hutcheson acted as an ERISA 3(16) plan administrator to the plans that were swindled, and had full discretion over administrative, management and other fiduciary duties.

Though a handful of providers will take on some fiduciary duties, very few are willing to take full discretion over all aspects of the plans, said Jason C. Roberts, chief executive of Pension

Resource Institute LLC.

Further, the plan sponsor has a fiduciary duty to vet and select those providers, even if he or she is able to find someone else to assume all of the fiduciary responsibilities.

"If your plan sponsor wants to outsource as much as they can, do they have the sophistication to document doing that prudently?" Mr. Roberts asked.

In one sense, the case bodes well for financial advisers. Plan sponsors may realize they need an adviser to track all of the parties to the plan, request duplicates of statements to check flow activity and ensure that any bonds to protect the plan in the event of wrongdoing are adequate.

"This kind of stuff says, "Hey, those of you interacting in relationships with service providers should think of having a consultant or adviser to document it," Mr. Roberts said.