Bank Strategy Briefing

Ideas and analysis for community bank executives

The case of the accidental fiduciary

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On April 6, 2016, the U.S. Department of Labor issued a final rule requiring individuals who render investment advice to comply with new fiduciary requirements (the "Fiduciary Rule"). The upcoming implementation of the Fiduciary Rule, which goes into effect in part on June 9, 2017, has taken the industry by storm, leaving many bankers scratching their heads as to whether the Fiduciary Rule applies to their employees. This article will outline a few of the ways your bank employees may be deemed fiduciaries under the Fiduciary Rule when it comes to advising customers on investment strategies. The general take away of this update is that your bank must have appropriate policies and procedures in place to prevent a bank employee from becoming a fiduciary.

The Fiduciary Rule creates a fiduciary duty for any individual who gives advice that: (1) is a recommendation, meaning a communication that, based on its content, context, and presentation would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking an investment-related action, and (2) is either directly or indirectly related to a financial incentive in connection with the advice given. The following scenarios outline certain scenarios in which your bank employee can become a fiduciary.

Scenario One: You can probably picture in your head a bank that has a compensation program for all levels of bank employees for opening certain investment accounts. Here, it is important to recognize that certain incentive-based interactions with investment customers can create a fiduciary relationship under the new rule.

Scenario Two: Your bank has a relationship with an investment firm; the firm may lease space in your office or offer bank employees incentives through a customer referral program. Under such circumstances, a fiduciary relationship could be created by your bank employee if he or she gives an off-hand investment recommendation in conjunction with the referral to the investment firm.

We note that not all advice creates a fiduciary relationship. For example, bank employees can "furnish information and materials to describe the operation of an IRA plan or product investment alternatives." According to the Jan. 2017 "Conflict of Interest FAQs" published by the Department of Labor, this type of advice would NOT be considered a scenario where a fiduciary relationship is established because the purpose of the relationship is merely to educate a customer of his or her options, not to steer the customer in a direction that may or may not be in the customers best interest.

The concern in the industry is that employee interactions with customers may inadvertently cause the employees to be a fiduciary under the Fiduciary Rule. To steer clear of such situations, you should implement policies and procedures designed to address the limits of advice bank employees can give customers. Moreover, it is advisable to confirm that investment advisors or investment brokers that you work with are in compliance with the Fiduciary Rule.

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