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Empowering Participants – Plan Distributions and the Plan Sponsor

A white paper

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Introduction

As the first wave of baby boomers are retiring in a defined contribution world, plan sponsors are becoming more aware of the need for their retirees to receive helpful and reliable information about their distribution options. Those participants need to make informed decisions about how and where to invest their money in retirement—so that it lasts for their lifetimes. Government policymakers, industry thought-leaders and academics share that concern. The focus is on helping participants receive the information they need to make decisions that are right for them, based on their individual circumstances and goals.

Empower shares these concerns and has hired us to review its retirement call center procedures and provide a report on those practices. This is the report of our findings.

Our conclusion is that the Empower retirement call center procedures for educating participants about their options, and explaining the key factors for making decisions, meet the expectations of the governmental regulators and meets or exceeds industry practices. Our reasoning is explained later in this White Paper.

You are encouraged to discuss rolling money from one account to another with your financial advisor/planner, considering any potential fees and/or limitation of investment options.

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The law and Drinker Biddle's analysis contained in this White Paper are general in nature and do not constitute a legal opinion or legal advice that may be relied upon by third parties. Readers should consult their own legal counsel for information on how these issues apply to their individual circumstances. Further, the law and analysis in this White Paper are current as of June 2015. Changes may have occurred in the law since the paper was drafted. As a result, readers may want to consult with their legal advisors to determine if there have been any relevant developments since then.



Demographics: Baby Boomers Retiring in a Defined Contribution World

Millions of baby boomers are approaching retirement. Many will be faced with the biggest financial decisions of their lives—how to manage their investments and withdrawals so that their retirement money lasts for their lifetimes . . . 20 or 30 years, or more. This paper:

- Summarizes the issues that 401(k), 401(a), 403(b) and 457(b) participants face as they make decisions about retirement distributions and rollovers;
- Reports on recent government activity in that area - including the Financial Industry Regulatory Authority (FINRA, which regulates broker-dealers and provider call centers); the Securities and Exchange Commission (SEC); the Department of Labor (DOL); and the Government Accountability Office (GAO); and
- Evaluates the call center practices of Empower in light of governmental statements and concerns about distributions, and concludes that those practices address the concerns expressed by those agencies in a meaningful manner.

It is well-known that many employers have shifted away from defined benefit pension plans, which pay their benefits as annuities, to 401(k) and other 401(a) defined contribution plans, as well as 403(b) and 457(b) plans. Baby boomers are the first “401(k) generation” to retire in this defined contribution environment. As a result, boomers will need to invest and withdraw their retirement savings so that it lasts for their lifetimes. That is no easy task. It involves unknown life expectancy, investment risks, prudent withdrawal rates . . . just to list a few of the issues. As a first step in that journey, retirees need to decide whether to leave their money in their plans or to take distributions from the plans and, if so, whether to roll their retirement money into IRAs. The dollar figures are staggering. According to Cerulli Associates, \$2 trillion is projected to be rolled to IRAs during the 5-year period from 2014 to 2018.

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Government regulators and policymakers—particularly FINRA, the SEC, DOL and GAO—are concerned about this outflow from employer-sponsored, fiduciary-governed retirement plans to IRAs. They want to make sure that participants are getting the information they need to make informed decisions; they want to make sure the information is materially complete and free from bias; and they want to make sure that potential conflicts of interest are manageable and do not result in retirees unnecessarily paying high fees, which could erode their retirement benefits and leave them with less money in their later years. However, they also recognize that personal circumstances vary among participants . . . there is not a “one-size-fits-all” answer. As a result, their focus is on ensuring that participants receive the information and education that enables them to make the decision that is right for them, based on their individual circumstances and objectives.

These are not just policy goals for regulators and retirees. They are also important considerations for plan sponsors.

Empower understands that this is an important issue for its plan sponsor clients. Because of this, Empower has engaged Drinker Biddle & Reath to review its practices and procedures for educating participants about their distribution options, and to outline their findings in this paper.

Background

ERISA, the federal law that governs most private sector retirement plans, imposes duties of prudence and loyalty on plan fiduciaries. Under ERISA, plan sponsors—acting through their officers or committee members—have a fiduciary duty to prudently select and monitor their plans’ service providers, including the recordkeeper/provider, and the services they offer.

Employers who sponsor non-ERISA plans, such as governmental entities with 401(a), 403(b) and 457(b) plans, as well as church plan sponsors, are also subject to fiduciary standards . . . but under state law instead of ERISA. While these plans are not subject to ERISA, their fiduciaries also must be prudent in their decisions and oversee their vendors and providers. Many states have enacted specific statutes that impose requirements of fiduciary conduct for governmental plans.¹

Likewise, all states impose conduct standards for trustees and other fiduciaries as a general matter.² These state laws, as well as ERISA itself, apply the same fundamental principles. In short, while there are some differences in the details of the various laws, sponsors of governmental and church plans should act prudently and exclusively for the benefit of participants, just as they would if they were subject to ERISA.

The general concern among regulators is that participants do not always understand, and are not consistently receiving clear, complete and unbiased information about, their distribution alternatives when they leave their jobs.

Generally, when participants do leave their jobs, they have four choices:

- Leave their money in the employer’s plan;
- Transfer their money to a successor employer’s plan;
- Roll their savings into an IRA; or
- Take a taxable distribution.

Policymakers recognize that most plans provide low-cost and high-quality investments. However, rollover IRAs are in the retail market, and may have higher costs and fees than plan investments (although this is not always the case), and advisers and providers for IRAs may have conflicts of interest that can affect the information given to retirees.

A few years ago, the GAO examined the practices of recordkeepers for explaining distributions and rollovers—even having investigators pose as participants and call vendors to discuss distribution options. The GAO report³, issued in early 2013, expressed several concerns.

To begin, the GAO noted that many participants did not have a good understanding of the distribution options available to them or of fundamental financial concepts generally. However, while participants were in need of information and education, the materials and assistance offered by some vendors was confusing or too generic to be helpful. Further, the report found that some vendors’ call centers were encouraging participants to roll over to the vendor’s IRAs, rather than educating the participants about their options—and about the considerations they should take into account in making decisions.

When carrying out their duties to prudently select and monitor their plans’ providers, plan sponsors often focus on the vendor’s performance and capabilities in the operation of the plan, and this is understandable. However, providers also give participants information about their distribution options. As a result, sponsors should make sure that their providers are giving participants the information the participants need to make informed decisions based on their individual goals and preferences. Participants need help in understanding their options and making informed decisions—if the communications are not clear, complete and unbiased, plan sponsors should require that their providers improve those practices.

Recent Developments

If retirees make poor investment and withdrawal decisions, or select products with fees that are excessive in light of the value provided, they will have less retirement income or even run out of money during retirement. If retirees make informed decisions about investments and withdrawals, their financial security in retirement will be greatly improved. Because of this, policymakers want to ensure that participants are receiving the information needed to make sound decisions about distributions and rollovers.

Policymakers want to ensure that the information participants receive about their distribution options is clear, complete and unbiased. This means they need to be presented with the material considerations for each option, in a fair and balanced manner. FINRA guidance lists seven non-exclusive factors that should be taken into account for each option (e.g., in their current plan, in the IRAs they are considering, or in the plan of a successor employer): (1) the investment options that are available; (2) the fees and expenses; (3) the services that are available; (4) the availability of penalty-free withdrawals; (5) protection from creditors and legal judgments; (6) required minimum distributions; and (7) if applicable, the treatment of employer stock.⁴

According to the DOL Advisory Council, additional factors could also include the availability of loans, ERISA protections and the participant's health.⁵

Because of the attention being given to plan distributions and the quality of the information being given to participants, it is a good practice—and good risk management—for fiduciaries to know what is being said to their participants and to ensure that the participants are properly educated about their options and about the considerations for selecting the alternative that is best for them.

Here are some more specifics on policymakers' concerns and goals:

- **Ensuring clear information.** The GAO Report expressed concern that participants may not understand their distribution options and the relevant considerations.⁶ To remedy this problem, the information and education provided to participants needs to strike an appropriate balance. On one hand, the information needs to include adequate detail to help participants weigh the relevant advantages and disadvantages of their options. On the other hand, it needs to be sufficiently succinct, to-the-point, and not overly-technical, so that participants will review the information and make informed decisions based on the education. The GAO Report, in particular, explains the need for clear and concise information.⁷ Providers can help by training and supervising their call center personnel to take their time when assisting participants, to speak clearly and plainly, and to avoid using industry jargon. This policy goal applies not only to information and education provided by call centers, but also to written educational materials given to participants.
- **Ensuring comprehensive information.** To help them make sound choices, participants need to be furnished with information and education on all of their available distribution options, and not just IRA rollovers. This includes an explanation of the key considerations for each option, including the seven factors described in the FINRA guidance. This also means that call center representatives should tell each caller that their personal financial situation and goals are important in making a distribution decision. Both FINRA⁸ and the GAO⁹ have expressed this concern. Providers can help achieve this goal through appropriate policies, training and call center supervision.

- **Avoiding biased information.** Naturally, service providers have an interest in retaining relationships with the participants they serve, either through their current employer-sponsored plan or through an IRA rollover. While that may be viewed as a potential conflict of interest, it can be mitigated by clear, complete and accurate communications. At the same time, providers offer valuable services to participants who lack the financial or investment knowledge to make sound decisions. The providers can help participants retain their money in tax-favored vehicles . . . either by leaving it in the plan or rolling to an IRA. The key is for call centers to provide unbiased education and information to the participants, so that the potential conflict of interest is properly managed and mitigated. That can be accomplished through internal policies and procedures, unbiased communications, and proper training and supervision. Policymakers want to make sure that any

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conflict of interest is properly managed—meaning that call center representatives should present the distribution options and relevant considerations in a fair, balanced and unbiased manner. This is a concern that FINRA¹⁰, the GAO¹¹ and SEC¹² have all expressed. Providers can support that objective by making sure that call center representatives are properly trained and supervised and by having, and supervising, policies that require that unbiased information and explanations be given to participants.

Empower's Program: A Summary of Our Findings

Based on our review, we conclude that the Empower participant call center, including the call center training and supervisory procedures, addresses the concerns of policymakers for communications to participants regarding their distribution alternatives. This helps participants make informed decisions about those alternatives. Our review covered Empower's written policies, communications with participants, training of call center personnel, and supervision of those personnel. Based on that review, our conclusions were based on these findings:

- Empower has developed and implemented written policies and procedures to help ensure that the information provided to participants is clear, comprehensive and unbiased.
- Participants receive a written description of their distribution options and of important considerations for making informed decisions about the option that is right for them.
- Empower has developed and implemented a comprehensive training program on distribution options and IRA rollovers for its call center representatives. All call center representatives must complete this training.
- To help ensure that the representatives are applying what they learned, and providing clear, comprehensive and unbiased information about distributions, calls are subject to supervisory review on a random basis. The review process involves a supervisor "auditing" the performance of call center personnel by listening to calls, and then "grading" the representative's performance based on specific criteria and evaluation forms. If a problem is identified, it is discussed in person with the representative to prevent reoccurrence.

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Empower's Program: A Summary of Our Findings, continued

The training materials and evaluation process developed by Empower are designed to ensure that communications are not unclear, incomplete or misleading. For example, there is a focus on ensuring that the information is materially complete and accurate. This requires a discussion of the four distribution options available to participants and key considerations for evaluating those options. Representatives are also evaluated on their ability to speak clearly, to avoid any inappropriate tone, and to avoid using industry jargon.

- Empower representatives are also evaluated on how well they listen to and understand the caller's description of his or her financial situation, and on how effectively they ask questions. This includes questions to clarify facts and make sure the representative understands what the caller is stating, and questions to identify possible needs and factors the caller might not have considered. This information is used to help the caller with evaluating available options, including a discussion of the need to compare fees.
- Empower's representatives are not permitted to make recommendations about specific products or investment strategies. Empower maintains written supervisory procedures to ensure this does not occur. Compliance with this restriction is implemented in Empower's training and supervisory procedures.
- A governing theme of Empower's call center training and supervisory procedures is that callers should never be "pushed" into an IRA. All callers must be provided with clear and accurate explanations of their non-IRA rollover options, and the key considerations that a participant should weigh before deciding which distribution option is right for his or her circumstances. Representatives are trained and monitored to avoid making product recommendations.

- In addition, the combination of Empower's policies and procedures, including its call center incentive compensation policy, are well-designed to ensure that its representatives are providing education on all distribution options, and not encouraging IRA rollovers due to financial incentives. Specifically, Empower's call center representatives have an individual bonus structure that awards them both for IRA rollovers to Empower, and for participants who elect to stay in their current employer plans on the Empower platform. This is consistent with the general understanding that continued retirement savings in tax-deferred vehicles is prudent except where the money is needed to pay living expenses. For each category, representatives' bonus compensation is determined according to whether they meet, exceed or do not meet their IRA and "stay-in-plan" target goals. However, in dollar terms, each representative's target goals are weighted slightly heavier to "stay-in-plans" than they are to IRA rollovers – in practical terms, this means that representatives should have no incentive to favor IRA rollovers. And, perhaps even more importantly, eligibility to receive any bonus is conditioned upon the representative maintaining a high level of call quality. Because any biased interaction would cause the call to become a "fail call" under Empower's supervisory procedures, this should also help ensure that call center representatives are not incentivized to push participants into IRAs where doing so might be inconsistent with their best interests, as this could result in the representative losing all the bonus compensation he or she would have otherwise received.

Educating Plan Participants on Their Distribution Options: Plan Sponsor Considerations and the Empower Program

This paper explores the demographic issues, legal standards and policy goals surrounding plan distributions and IRA rollovers. It also explores Empower's practices and procedures in this regard. The paper is organized as follows:

- First, we summarize some of the practical challenges facing retirees.
- Second, we discuss the current and evolving state of the law as to distributions and rollovers. We also address the responsibilities and best practices for plan sponsors.
- Third, we discuss the specific concerns and goals of the policymakers.
- Fourth, we discuss Empower's practices and procedures, and how they help to address the relevant concerns and policy goals, followed by our concluding thoughts.

Practical Challenges for Retirees

Americans are now living longer than previous generations. That is particularly true for older Americans whose life expectancies are increasing rapidly. As a result, many are enjoying longer retirements in better health. While this is welcome news, longer life expectancies are straining the U.S. retirement system at all levels—not only the Social Security program and defined benefit programs, but also employer-sponsored defined contribution plans, as well as workers' personal savings. The longer retirees live, the more expensive it is to “purchase” a sustainable level of retirement income.

While longevity is an important variable, it is not the only consideration—asset allocation, investment returns, the effect of investment fees and expenses, the rate of withdrawals, and the effects of inflation are all important parts of the retirement savings equation. To help achieve a sustainable level of retirement income, all of these factors need to be taken into account.

From the perspective of American workers, the shift away from traditional defined benefit pension plans—that pay lifetime annuities—to 401(k) plans and other defined contribution arrangements, represents a transfer of risk. This is not to suggest that defined contribution plans are inadequate vehicles for retirement savings. Rather, the issue is that 401(k), 403(b), 457(b) and other account-based plans now have a more significant role in providing retirement income than policymakers originally intended. A study on participant concerns about retirement security

indicates that 73% of workers covered by an employer-provided retirement plan have only a defined contribution plan, and no pension.¹³ So, for millions of American workers, 401(k) and other defined contribution plans do not provide merely “supplemental” retirement benefits. Quite the contrary—these workers are relying on their defined contribution plan savings to provide a substantial part of their income in retirement.

Retirees need to make sound decisions about plan distributions (including rollovers), as well as investments and withdrawals, that are in their individual best interests. Policymakers want to ensure that retirees are provided with the information and education they need to do so. And, much of the information and education that participants receive is from their plan providers—when participants call to discuss their distribution and rollover options. To help make the right decisions, participants need to get the “full picture” on all of their options.

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all of their options.**

Distributions and Rollovers: Legal and Fiduciary Considerations

The DOL has enforcement and interpretive authority over Title I of ERISA, which includes the statute's fiduciary and prohibited transaction provisions. As fiduciaries, plan sponsors (and their committees) are obligated under ERISA to prudently select and monitor the service providers for their plans. So, plan sponsors must periodically review their provider/recordkeeper, in terms of the provider's overall performance and capabilities—to verify that the provider is carrying out its responsibilities effectively, and continues to be a suitable choice for the plan. In doing so, call center and distribution services should be taken into account.

Plan sponsors should recognize that their provider is only able to communicate with participants and provide distribution services because the plan sponsor gave the provider access to its employees. Plan sponsors, as fiduciaries, need to monitor the quality of these services because of their importance to participant outcomes. The focus for fulfilling these oversight responsibilities should be on the information and education being provided to the participants.

Plan sponsors should review written educational or IRA marketing materials that providers give to the participants. They should also take steps to understand their providers' practices—specifically what participants are being told when they call to discuss their distribution options. Doing so is at least a fiduciary best practice—and probably a fiduciary duty, and will help ensure the well-being of their retiring workers. However, plan sponsors

should be reluctant to require particular outcomes or impose restrictions on their providers. Our view of the policymaker's objectives is that participants should be given accurate, unbiased and materially complete information . . . so that participants can make informed decisions about the option that best suits their personal needs in retirement.

Under current DOL guidance, advising participants as to distributions and IRA rollovers is not “investment advice,” and thus is not a fiduciary act unless the person providing the assistance is already a plan officer or fiduciary. While most plan providers/recordkeepers are not plan fiduciaries, plan sponsors are . . . by definition. As a result, plan sponsors and their officials should not make recommendations to participants about distributions . . . or, if they do, they should recognize their fiduciary status for that purpose and take into account the needs of the participants and explain all of the options and the important considerations for selecting among those options.

As policymakers have recognized, participants are in need of information and education about their distribution options. Thus, a plan sponsor's focus should be on ensuring that participants receive help that is clear, complete and unbiased.

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As fiduciaries, plan sponsors should be careful when communicating with participants about distribution and rollover issues. As noted above, “a plan officer or someone who is already a plan fiduciary” may be held to a fiduciary standard of conduct even when answering participant questions about whether they should take distributions or leave their money in the plan. This concern is heightened by the fact that, in many cases, plan sponsors would not have enough information about a participant's personal and financial situation to know which option would be in his or her best interests.

Also, while sponsors of governmental or non-ERISA church plans are not directly subject to ERISA or DOL guidance, state law fiduciary standards apply the same general principles as ERISA, and indeed, a state court may look to DOL guidance or ERISA court decisions to resolve issues arising under governmental or church plans.

Regulators' Roles and Policy Goals

When providing information and educational services to participants about their distribution options, providers are subject to regulation and oversight from a number of sources. Because of the crucial and wide-sweeping policy goals that are implicated, the scope of interest for the agencies that are taking an active role and voicing their concerns is growing broader.

Financial Industry Regulatory Authority

FINRA is the self-regulatory organization for U.S. broker-dealer firms. It has responsibility for writing, interpreting and enforcing rules, and examining firms for compliance with these rules, among other duties. This includes the rules for registered representatives of broker-dealers who act as call center representatives (and who assist plan participants with distribution decisions). Thus, among all regulators, FINRA arguably has the most significant and direct role in overseeing and establishing policy for call center activities.

FINRA's 2015 Regulatory Examination and Priorities Letter emphasizes the need for robust policies and supervisory controls for representatives, including where the representatives are permitted to provide information and education only, but not specific securities recommendations or investment advice. The 2015 Letter confirms FINRA's goal of ensuring that distribution and IRA rollover services are clear, comprehensive and unbiased:

*Part of FINRA's focus will be on IRAs.... Rollovers from employer plans—such as 401(k) plans—play an important role in funding these IRAs. FINRA has stated that...**it would be false and misleading to imply that a retiree's only choice, or only sound choice, is to rollover plan assets to an IRA.***
[Emphasis added.]

This goal is also reflected in FINRA Regulatory Notice 13-45, which addresses the responsibilities of broker-dealers and their registered representatives with respect to IRA rollovers.

FINRA's position is that an IRA recommendation would generally constitute a recommendation as to securities (for example, a recommendation to take a distribution from a defined contribution plan is, in effect, a recommendation to sell the investments in the participant's account). According to FINRA, such a recommendation would require a suitability analysis (that is, the representative would need to gather and evaluate information about the participant necessary to

determine if the distribution and rollover recommendation was suitable for the participant). However, Notice 13-45 provides an alternative. Instead of making a recommendation, a call center representative could provide distribution education about the four options available to the participant and the considerations for deciding among those options . . . so long as the education was accurate, unbiased and materially complete. To quote directly from that guidance:

*A broker-dealer's recommendation that an investor roll over retirement plan assets to an IRA typically involves securities recommendations subject to FINRA rules... Any **recommendation to sell, purchase or hold securities must be suitable** for the customer and the **information that investors receive must be fair, balanced and not misleading.***

....

*Conflicts also may exist for firms and their associated persons that are responsible for **educating plan participants** about their choices....Firms must supervise these activities to reasonably ensure that conflicts of interest do not impair the judgment of a registered representative or another associated person about **what is in the customer's interest and that they neither confuse investors nor interfere with important educational efforts.*** (Emphasis added)

In sum, FINRA recognizes the need for clear, comprehensive and unbiased distribution services.

Other Agencies

The SEC, DOL and GAO have expressed similar concerns to those of FINRA. To briefly summarize:

- The SEC's 2015 Examination Priorities Letter identifies the protection of retirement investors as a major enforcement theme, particularly with respect to any "improper or misleading" practice pertaining to plan-to-IRA rollovers.

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The Empower Program

We have reviewed Empower's written policies and procedures, training program, supervision and monitoring policy, and written educational and marketing materials, as they relate to distribution services for Empower's client plans.

At a high level, Empower has developed and implemented policies and procedures designed to ensure that information provided to participants is clear, comprehensive and free from bias. It has also developed and implemented a comprehensive training program on distribution options, including rollovers, which all call center representatives are required to complete. To help ensure that call center representatives are applying the training they received, and avoiding any biased, unclear or incomplete information, Empower subjects calls to review on a random basis, in accordance with its supervisory control policy.

Empower's review process involves a supervisor listening to calls, and then grading the representative's performance based on specific criteria and evaluation forms. The representative's overall performance is evaluated on a number of subjective and objective criteria. Any problems are discussed in person with the representative to help avoid reoccurrence, and whether further training may be needed is determined on a case-by-case basis.

Here are our conclusions:

1. Empower's Policies and Procedures Encourage

Clear Communications. Much of a representative's "score" is based on how effectively he or she creates a comfortable environment for the caller, to help facilitate open and honest communications. Demeanor, the use of clear language, and the avoidance of any confusing industry jargon are all taken into account. This should encourage clear communications, in accordance with the concerns expressed in the GAO Report.

Likewise, when a plan participant terminates his or her employment and receives a distribution packet, enclosed is a document titled "What to Do with Your 401(k) Account." This enclosure begins with a clear and concise explanation of the four distribution options, which are free from confusing industry jargon and are otherwise written using clear, common-sense language.

2. Empower's Policies and Procedures Encourage

Comprehensive Communications. Empower's training program begins with a broad overview of the regulatory guidance and policy concerns, and the overall goal of the training, which is to ensure that the representatives understand how to educate participants on all four of their options and the most important benefits and risks of each.

The training then proceeds with a more in-depth discussion of the fundamental issues, including the tax considerations of the available options, the different

types of rollovers (direct vs. indirect, IRA vs. another employer plan) and what forms of benefits are eligible to be rolled over. It likewise addresses the key factors and considerations that retirees need to take into account. There are seven factors specifically noted, but the training also points out that other considerations may apply. The seven factors set forth in the training are the exact same factors that FINRA lists in Regulatory Notice 13-45 as those that should be considered by retirees (for each of their distribution options):

- (1) investment options available;
- (2) fees and expenses;
- (3) services available;
- (4) penalty-free withdrawals;
- (5) protection from creditors and legal judgments;
- (6) required minimum distributions; and
- (7) employer stock (in many cases, this last factor may not be applicable).

Each of these factors, and how they may differ between a participant's current employer plan and a rollover IRA (or another employer plan, if any), is specifically addressed in the training.

When evaluating a representative's call performance, a key area of focus is making sure that all four distribution options (to the extent available) are appropriately covered. Also, once the caller identifies his or her stated needs, the representative is graded upon asking the right

follow-up questions to help understand all the issues, as well as asking the right types of “probing” questions to identify any additional needs or considerations the caller might not have thought of.

Likewise, the educational enclosure mentioned above (“What to Do with Your 401(k) Account”) features a bulleted list of the advantages and disadvantages of each, which reflect the seven factors enumerated by FINRA, as well as other factors that may be important to participants.

- 3. Empower’s Policies and Procedures Encourage Unbiased Communications.** A major focal point of Empower’s training program is the need to “present participants with all their options in a fair and balanced manner.” And, its supervisory procedures emphasize the need to avoid bias—Empower representatives are prohibited from making specific recommendations, and in fact, doing so will cause the call to be deemed a “fail” call. Likewise, in the educational enclosure described above, the advantages and disadvantages of all four options are not presented in such a way as to favor one over the others. Rollover IRAs, for instance, are not described first or otherwise highlighted, and in our opinion, the explanation of their potential advantages is not unfairly inflated (nor are their potential disadvantages unfairly downplayed). This should help avoid any implications that a participant’s only choice, or only “sound” choice, would be a rollover IRA, as well as to encourage “fair, balanced and not misleading” communications, in accordance with FINRA’s concerns.

- 4. Empower’s Policies and Procedures Discourage Aggressive IRA Sales.** Closely related to the need for unbiased communications is the need to avoid aggressive or improper IRA marketing interactions, in accordance with regulators’ concerns. And, part of this equation is managing any financial conflicts of interest that might incentivize call center representatives to “push” IRAs where they might not be in the participant’s best interests. In addition to the points noted previously, Empower’s training program specifically addresses the potential “conflict of interest” concern, and reminds call center representatives that their role is to educate participants, not to sell IRAs. With

respect to call supervision, representatives are graded on their acknowledgement and understanding of any objections the caller may have to a particular option, and any aggressive sales interaction automatically triggers a “fail” call.

- 5. Empower’s Policies and Procedures Discourage Participant Misunderstandings that They Are Receiving Advice from Fiduciaries.** To help avoid any impression that its call center representatives are providing investment advice as ERISA fiduciaries (which could be more likely to unduly influence participant decisions), Empower has developed further training and scripts. For example, any discussion as to investments is to be prefaced with a scripted statement that the representative cannot give advice, and can only provide information the caller can use to make his or her own investment decisions.
- 6. Empower’s Policies and Procedures Discourage Participant Misunderstandings About “Free” IRAs.** In accordance with FINRA’s concerns on this matter, participants who request information on Empower IRAs are provided with a packet of materials that includes clear, easy-to-read fee schedules, and comprehensive disclosures as to the investment options available. The different fee schedules for varying levels of support services are set forth, and the schedule does not state that the IRA is “free”—that is, even where no administrative fee, set-up fee, etc. are charged, the disclosure explains that Empower IRA services are paid for through fees charged by the mutual funds the participant selects. And, all proprietary mutual fund expense ratios are described in a comparative chart.

Conclusion

Based on our review, and for the reasons set forth above, our conclusion is that the Empower retirement call center procedures for educating participants about their options, and explaining the key factors for making decisions, meet the expectations of the governmental regulators and meet or exceed industry practices.

Regulators' Roles and Policy Goals, continued

- The GAO report cites the need for communications that are neither too general nor too technical for retirees to understand, the need to avoid “biased information and aggressive marketing of IRAs” (including the need to ensure that advisors’ financial incentives do not result in retirees being pushed into IRAs if it would not be in the retiree’s best interests), and the need to avoid misleading communications, such as the marketing of purportedly “free” IRAs (which are actually paid for through mutual fund fees).
- The DOL is also concerned about distribution and rollover recommendations. In mid-April 2015, the DOL proposed that anyone who recommends a rollover would become a fiduciary and would be obligated to put the interests of the participant ahead of their own interest. However, the DOL specifically excluded distribution education from that requirement. It appears that the DOL wants to encourage plan sponsors and providers to give participants the information and education needed for participants to make informed decisions based on their personal circumstances.

In sum, while FINRA is the principal regulator of broker-dealer call centers, numerous other agencies recognize the need for clear, comprehensive and unbiased distribution services, and are taking action to help ensure it is provided.

1. For example, and by reference to the authors’ home states, Subsections (a), (b) and (c) of Article XVI, §17 of the California Constitution contain the provisions governing the fiduciary duties for the administration of public pension and retirement systems, and various state benefit funds in Illinois are governed by the Illinois Pension Code, at 40 ILCS §5.
2. See, e.g., Uniform Trust Code, §8, at http://www.uniformlaws.org/shared/docs/trust_code/utc_final_rev2010.pdf (some substantive version adopted in 25 states).
3. See generally GAO, “401(k) Plans - Labor and IRS Could Improve the Rollover Process for Participants,” (Publicly-released on April 3, 2013), at <http://www.gao.gov/assets/660/652881.pdf>.
4. FINRA, Regulatory Notice 13-45, “Rollovers to Individual Retirement Accounts - FINRA Reminds Firms of Their Responsibilities Concerning IRA Rollovers,” (Dec. 2013).
5. Advisory Council on Employee Welfare and Pension Benefit Plans, “Report to the Honorable Thomas E. Perez, United States Secretary of Labor - Issues and Considerations Surrounding Facilitating Lifetime Plan Participation,” (Nov. 2014), p. 7.
6. GAO, supra note i, “What GAO Found,” (introductory page).
7. Id., noting that the information provided by certain vendors was either “too generic and without detail,” or “too long and technical, leaving participants overwhelmed and confused.”
8. See generally, FINRA, supra note iv.
9. See GAO, supra note i (“GAO found that service providers’ call center representatives encouraged rolling 401(k) plan savings into an IRA even with only minimal knowledge of a caller’s financial situation.”).
10. FINRA’s 2015 Regulatory Examination and Priorities letter states that: “Part of FINRA’s focus will be on IRAs.... Rollovers from employer plans—such as 401(k) plans—play an important role in funding these IRAs. FINRA has stated that...it would be false and misleading to imply that a retiree’s only choice, or only sound choice, is to rollover plan assets to an IRA...”
11. See GAO, supra note i, at 22 (“Plan participants are often subject to biased information

and aggressive marketing of IRAs when seeking assistance and information regarding what to do with their 401(k) plan savings...the opportunity for service providers to sell participants their own retail investment products and services, such as IRAs, may create an incentive for service providers to steer participants toward the purchase of such products and services even when they may not serve the participants’ best interests.”).

12. The SEC’s 2015 Examination Priorities letter states that: “We will assess whether registrants are using improper or misleading practices when recommending the movement of retirement assets from employer-sponsored defined contribution plans into other investments and accounts, especially when they pose greater risks and/or charge higher fees.”
13. Nyce, Steve, “Insider: American Workers Seek More Security In Retirement and Health Plans,” Towers Watson, Vol. 2 No. 22 (Feb. 2012).
14. See ERISA Adv. Op. 2005-23A.

Disclosures

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