FINRA Talks a Good Game, Part II

By Kerry Pechter *Fri, Jan 3, 2014*

FINRA Regulatory Notice 13-45, on the heels of the FINRA Conflict of Interest report, may be its way of telling the DoL that FINRA can make the suitability standard work, and that broker-dealers don't need a DoL fiduciary standard.

FINRA, the self-regulatory body for broker-dealers, has put its members on alert about not giving conflicted advice to people who are between jobs and aren't sure whether to keep their money in an employer-sponsored plan or roll it over to an IRA.

The purpose of Regulatory Notice 13-45, FINRA said, "is to remind firms of their responsibilities when (1) recommending a rollover or transfer of assets in an employer-sponsored retirement plan to an Individual Retirement Account or (2) marketing IRAs and associated services."

The notice, issued in late December, added that "The recommendation and marketing of IRA rollover will be an examination priority for FINRA in 2014."

The regulators are evidently worried about 401(k) advisors encouraging people to move tax-deferred retirement savings out of the highly regulated institutional world of 401(k) plans to the less-restrictive retail world of IRAs.

The notice comes only two months after the release of FINRA's Report on Conflicts of Interest, which surprised broker-dealers with its sudden focus on the ever-present potential conflict between their imperative to gather assets and their pledge not to recommend actions unsuitable for clients.

The notice also comes at a time when the broker-dealer world awaits the next version of the Department of Labor's proposal to raise the standard of conduct to "fiduciary" from "suitability" for advisors who work with ERISA-regulated retirement plans.

Part of the problem is that some advisers and broker-dealer reps sell 401(k) plans and/or offer advice to participants as well as to retail investors. Indeed, some advisors rely on their work with 401(k) participants as a way to meet future retail clients. At retirement or when they change jobs and opt for a rollover, participants can become retail clients.

At the same time, the Department of Labor is clearly worried that 401(k) plans, like college football and basketball programs, can become tantamount to farm systems where accounts gain weight and experience before transferring to the pros, i.e., brokerage IRAs. Broker-dealers and their clients may see such a transition as a liberation of the money from ERISA restrictions, but the DoL sees it as a corruption of public policy because it could expose tax-deferred savings to higher volatility and expenses.

FINRA may feel caught between the government and the broker-dealers. In October, and again at the end of the December, it has put broker-dealers on notice not to allow advisors to violate the suitability standard when exploiting the IRA loophole, through which money moves from the employer-sponsored space to the retail space.

These notices might be FINRA’s way of telling the DoL that FINRA can make the suitability standard work, and that broker-dealers don’t need a DoL fiduciary standard to keep them from abusing the rollover process.