BROKERAGE FIRM DEPARTURES – THE REASONS TO EXPECT 2016 TO BE A RECORD YEAR AND HOW TO BEST PREPARE

Each year hundreds of financial advisers leave their firms to move to another firm or to start a new firm. However, an anniversary that is occurring in 2016 is causing some to predict that a record number of financial advisers will be looking for new opportunities this year. What is the anniversary? Many of the retention packages that financial advisers accepted during the financial crisis are set to expire this year. Specifically, it has been reported that the retention packages offered to financial advisers in connection with the Merrill Lynch – Bank of America combination are included in the group set to expire. This is happening at a time that Merrill Lynch's recent change in compensation reportedly may result in a reduction in pay to the lower producing financial advisers at the firm.

Transition compensation and retention packages offered by a brokerage firm usually involve several components: a significant payment to the financial adviser, a note given by the financial adviser in the amount of the payment that is forgiven by the firm if the financial adviser stays for a set number of years (often 8) and a prohibition against a departing financial adviser from soliciting clients if any portion of the note remains due.

If the note has been fully paid when the financial adviser departs or if the firms involved are members of The Protocol for Financial adviser Recruiting (the

2004 agreement which allows for certain uncontested transfers between member firms) and the departure occurred in a proper way, there is rarely litigation. However, if the note remains due or if there are irregularities in connection with the departure (e.g. missing records, defamatory comments, clients of other financial advisers being solicited), there is often litigation to enforce the non-solicitation provision and other restrictive covenants. FINRA reported that in 2015 of the almost 1,100 industry arbitration claims filed, almost half related to firms seeking to enforce a promissory note.

It is not unusual for a departing financial adviser to take 80% of their clients to the new firm and, with such a significant amount of business at stake, regardless of your position is the equation, the firm losing the financial adviser or the firm hiring the financial adviser, it is critical that the financial adviser and firm both receive proper guidance from experienced counsel in advance of the departure regarding what is appropriate behavior. A small investment in advice regarding such areas as proper departure behavior, the contours, procedures and limitation of the Protocol, any specific or unique limitations in the applicable agreement, relevant state law, and past conduct by the local arbitrators and judges can often result in significant long term business savings.

Taking a few basic preventative steps can make the critical difference.

For the firm hiring the financial adviser:

- Review the terms of any agreements in place;
- Verify that the recruit understands, and follows, the particular requirements Protocol if it is applicable;
- Discuss what records, if any, can be copied and taken;
- Review the proper business-like way to resign; and
- Discuss what can be appropriately said to clients and when it can be said.

For the firm that lost the financial adviser:

- Review the terms of any agreements in place;
- Verify the sufficiency of your own procedures that are in place to protect confidential material;
- Have a plan to maintain and protect client relationships; and
- Review what your financial advisers should say to clients when trying to maintain relationships and, more importantly, what is inappropriate to say.

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