Cross-selling poised to be next 401(k) 'battleground' issue

Advisers selling wealth management or financial wellness services should be careful, according to experts

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Cross-selling products and services to 401(k) plan participants — on the part of both record keepers and financial advisers — is shaping up to be among the most contentious issues in the retirement-plan market.

The issue comes down to the use of participants' data: Should service providers and advisers be able to use individuals' information, such as investment choices and proximity to retirement, to market and sell non-retirement-plan-related products to them?

"This is going to be the next battleground," said Philip Chao, principal and chief investment officer at Chao & Co. "This whole [data] ownership idea is critical."

The issue around investors' 401(k) information plays into broader discussions playing out globally about how technology companies such as Facebook collect and leverage user data. The European Union has clamped down on data protection with its General Data Protection Regulation.

Data has clearly become a more prominent part of the retirement industry, too, as both record keepers and asset managers tout the benefits of more personalized investing via managed accounts and personalized financial advice in a financial wellness context.

The tension around 401(k) data usage was exposed recently in a lawsuit claiming Vanderbilt University mismanaged its retirement plan. Vanderbilt settled the case, and agreed as part of that settlement to tell Fidelity Investments, the plan's record keeper, to refrain from using participants' information to cross-sell unrelated products and services. (That is, unless participants request Fidelity do so.)

Legal experts said they had never before seen a similar provision in settlements of other retirement-plan lawsuits.

In a separate lawsuit against Northwestern University, plaintiffs said record keeper TIAA had inappropriately used data such as contact information, asset size of account, employment status and age to market other products. That lawsuit was dismissed, but is being appealed.

Barbara Delaney, principal at StoneStreet Advisor Group, said several record keepers engage in this type of conduct, as a way to boost their revenue in the face of declining fees.

"It's becoming an issue," Ms. Delaney said. "They cut their margins so thin they feel like they have to sell other products."

David Levine, principal at Groom Law Group, said the central issue is whether data is a "plan asset," a term that's not defined under the Employee Retirement Income Security Act of 1974. Some parties clearly believe it is a material issue, given terms of the Vanderbilt settlement, said Mr. Levine.

The issue's implications go beyond record keepers — financial advisers upselling ancillary services such as wealth management and financial wellness to retirement-plan participants could find themselves in the crosshairs of plaintiffs, too, Mr. Levine said.

And it's not just ERISA that record keepers and advisers should be wary of — there are also state laws such as California's Consumer Privacy Act signed last year, as well as federal laws such as the Gramm-Leach-Bliley Act (which pertains to sharing and protection of consumers' private information), and even the Health Insurance Portability and Accountability Act, if advisers are doing work with health savings accounts.

"This goes to a much bigger type of discussion," Mr. Levine said. "There's a lot of data at the center of this industry."

To Mr. Chao, the central issue is about conflict — do companies have the right to use personal information to sell more product?

"We don't have an answer," he said. "This is still a fairly new area."