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Exclusive Interview: Marcia Wagner Expands On Retirement Plan Financial Planning White Paper

by Christopher Carosa, CTFA December 10https://fiduciarynews.com/2024/12/exclusive-interview-marcia-wagner-expands-on-retirement-plan-financial-planning-white-paper/

Y*ou will probably recognize Marcia S. Wagner as a long-time source in many FiduciaryNews.com articles. She is the founder of The Wagner Law Group, one of the nation's largest and most highly regarded law firms specializing in ERISA, employee benefits and executive compensation, and has practiced employee benefits law for over 37 years. An authority on qualified and non-qualified plans, fiduciary issues, deferred compensation, and welfare benefit arrangements, Wagner has deep experience in plan design and drafting, compliance, tax planning and consultation on all aspects of ERISA and the Internal Revenue Code. She also serves as an expert witness in ERISA litigation.*

Wagner has recently been appointed as Advisory Committee to the Policy Board of Directors for the American Benefits Council, as well as a Member to the Board of Governors of the American College of Employee Benefits Counsel. She has written hundreds of articles and 27 books. A highly sought after lecturer, she is widely quoted in financial journals and has been a guest on Fox, CNN, Bloomberg, and NBC.

***FN*: Marcia, it's great to have the opportunity to speak to you in this format. You've been a well-respected long-time source for articles in FiduciaryNews.com. Before we begin in earnest, take a moment and give us a sense of what it is like to have grown your firm in an era when ERISA law questions seemed to have been gushing forth non-stop.**
Wagner: When I began The Wagner Law Group more than 25 years ago, I probably did not anticipate how expansive that it would become, certainly on the welfare plan side. Seeing the firm expand since its inception has certainly been challenging, but it also has been very exciting and intellectually stimulating as new and frequently unanticipated issues arise, such as the recent forfeiture allocation issue. Fortunately, I have been able to recruit some of the best and highly recognized ERISA attorneys to work at the firm, and that has obviously eased the burden of responding to the expanded range of issues that have arisen, and will continue to arise, under ERISA.

***FN*: What changes do you expect to see coming out of the Department of Labor regarding ERISA and retirement plan issues once the new Trump administration comes in?**
Wagner: With respect to retirement policy, while there are certainly differences in philosophy between Biden and Trump, there is also more bipartisan agreement between the parties on retirement plan issues, as evidenced by the enactment of the

SECURE Act under Trump's first administration and SECURE 2.0 under the Biden Administration, with the possibility of a SECURE 3.0 under the second Trump Administration. There are some obvious areas of change. There is very little likelihood that the DOL's Retirement Security Rule will survive, and the DOL's position on ESG will likely be modified, although many practitioners believe that the differences between administration positions on these issues are too nuanced to make much difference to plan fiduciaries. The parties may have a different take on the adequate consideration regulations presently at OMB, but since those proposed regulations have not yet been released, the difference in positions would be speculative. There will be an encouragement of adding private equity components to 401k plans, although it is unlikely that the same encouragement will be extended to cryptocurrency, although cryptocurrency has become more mainstream since the initial DOL guidance. Also, there will likely be fewer regulations issued by the DOL, because President Trump and Elon Musk believe in general that the economy is regulated. The budget allocation to DOL will also be important because the Employee Benefits Security Administration is thinly staffed as is. Further reduction in the workforce will also reduce enforcement activity.

***FN*: Here's a question many professional fiduciaries always ask about the "coming thing" regarding ERISA plans. Thinking outside the box for a moment, what might be the types of new and unexpected things we could see blossoming in retirement plans over the next several years?**
Wagner: With respect to new developments in 2025, it is important to remember that some new entries have generated little or no interest, such as the combined defined benefit/defined contribution plan, the starter 401k plan, or the simple cafeteria plan. The idea of a federal IRA, similar in concept to state IRAs, will be floated as an issue, but I do not know how much traction that policy shift has. There could be an equalization of contribution rates between tax-qualified defined contribution plans, such as 401k plans and individual retirement accounts, to equalize treatment between individuals who have access to tax-qualified plans and those that do not. I do not think that the tax benefits of deferrals to 401k plans will be reduced as a means of paying for tax cuts. For reasons related to the employee welfare benefit plan side rather than the employee pension benefit side, the ERISA preemption definition could be amended, although any such change would be strongly opposed by business, who prefers operating under uniform rules. Such change could have an indirect effect upon retirement plans, depending upon how narrowly the amendment was drafted.

***FN*: This past summer, you authored a white paper on "offering employees access to financial advisors without fiduciary risk." Why is this an important benefit plan sponsors should consider for plan participants?**
Wagner: The program described in the white paper is an important one for plan participants, because of their concerns about managing their financial affairs, particularly upon retirement, and their well-documented lack of financial literacy. While Wealthramp is compensated by referral fees for operating the program, it does not have the same skin in the game as the investment advisor who will be operating with the plan participant. There may or may not be a retirement crisis in the United States, but the decumulation side of savings is a difficult task even for experts, and plan participants will benefit from participation in the plan. Whether a plan sponsor should be interested in offering this type of program to plan participants is a function of the plan sponsor's view of its responsibility to plan participants. The increased focus by plan sponsors on the decumulation phase of tax-qualified defined contribution plans indicates that more employers are expanding their sense of responsibility to their employees, but there is no legal obligation to do so.

***FN*: The white paper specifically addresses an online platform called the "Matching Platform" offered by the investment adviser Wealthramp. How has the legal analysis been reviewed or endorsed by external legal experts to ensure it correctly interprets the new fiduciary definition and its implications for both Wealthramp and employers?**
Wagner: The white paper was prepared before the two District Courts decisions invalidating the Retirement Security Rule presently pending before the Fifth Circuit and Trump's election. There is widespread consensus that the Retirement Security Rule will not survive under the Trump Administration. Wealthramp would remain subject to prohibited transaction class exemption 2020-02, which was enacted under the first Trump Administration, but that prohibited transaction class exemption would only apply to Wealthramp if it were a fiduciary under the 5-part test. Since in many instances, it may only deal with a plan participant on a one-time basis, the regular basis component of the 5-part test would not be satisfied. Even if in some instances the regular basis prong would be satisfied, Wealthramp is not making any recommendations with respect to money or other property. Since the white paper assumed that the Retirement Security Rule would be the governing law applicable to Wealthramp, the white paper did not address the issue of the possible application of the 5-part test. Therefore, while the legal review was detailed, complete and accurate, to the extent it discussed the legal implications of the Retirement Security Rule, those provisions of the white paper are likely moot.

***FN*: Describe the theory behind the idea that Wealthramp can ensure the privacy and security of employees' data when they use the Matching Platform, especially since employers might not have direct oversight?**
Wagner: The same policies and procedures that Wealthramp applies to all of its clients will apply to the Matching Platform.

***FN*: The white paper provides an overview of the assumptions regarding the criteria and processes the Matching Platform uses for screening and vetting financial advisors. Could you elaborate on why these assumptions are critical? How does this process align with ERISA's fiduciary standards?**

Wagner: Without regard to whether Wealthramp is an ERISA fiduciary, the parties that it seeks to match with plan participants will be ERISA fiduciaries, so Wealthramp wants to ensure that the recommended parties have the requisite knowledge of ERISA's fiduciary requirements. A party in interest under ERISA, and is not examining their policies and procedures in the same manner that the DOL would do under audit. However, it is not a government agency, and is not auditing the conduct of the recommended party.

***FN*: The white paper mentions referral fees. How does Wealthramp's receipt of these fees potentially influence the recommendations made by the platform, and how does it comply with the impartial conduct standards under PTE 2020-02?**
Wagner: To the extent that Wealthramp believes that it is a fiduciary under the pre-retirement Security Rule, it will develop policies and procedures designed to mitigate such conflict, for example, providing for a uniform referral fee.

***FN*: Beyond PTE 2020-02, what other compliance measures has Wealthramp implemented or plans to implement to ensure it remains in good standing as an investment advice fiduciary under the new definition?**
Wagner: See question 5. The Retirement Income Security Rule will no longer be applicable, and we are not aware of the steps that Wealthramp is taking to comply with pre-Retirement Security law, beyond possible compliance with PTCE 2020-02.

***FN*: What guidelines or support does Wealthramp provide to employers to communicate the benefits and limitations of the Matching Platform to their employees effectively, ensuring no fiduciary duty is implied?**
Wagner: When Wealthramp meets with plan sponsors to discuss the Matching Program, they describe in detail the manner in which the program operates, and an explanation of why the plan sponsors have no ERISA fiduciary responsibility under the program. I do not know if Wealthramp provides sample employee communications to plan sponsors to provide to plan participants.

***FN*: Even though the white paper states there is no fiduciary risk for employers, are there any scenarios where an employer might inadvertently assume some level of fiduciary responsibility or liability, especially if they heavily promote the use of the Matching Platform?**
Wagner: I do not underestimate the ability of the plaintiff's bar to come up with novel and clever arguments, but for the reasons set forth in the white paper I do not believe that they can construct a viable theory. The degree to which the Matching Platform is recommended by a plan sponsor should not be a relevant factor. If it is permissible to offer the program to plan participants, the degree to which it is recommended should not be a relevant consideration. If a participant sought to characterize the plan sponsor as a fiduciary, it might try to proceed under one of the alternative definitions of fiduciary under Section 3(21) of ERISA, such as arguing that the plan sponsor has authority over the disposition of plan assets, but recommending a program to plan participants should not be characterized as having authority over the disposition of plan assets, since the plan participant is the decision maker. Taking it a step further, even if a plan sponsor is not a plan fiduciary and in theory could be subject to non-fiduciary liability, that type of claim shouldn't be viable where the plan sponsor receives no revenue from the transaction.

***FN*: Others might be tempted to see this white paper as a general template for offering financial advice to employees through the retirement plan. In what ways is this view correct and in what ways could it be incorrect to take this view?**
Wagner: The Matching Platform has the effect of providing financial advice to plan participants through retirement plans, but the financial advice is not intended to be limited to financial advice with respect to the management of plan assets. The Program is more than a better version of a plan offering managed accounts to plan participants.

***FN*: Are there any additional comments you'd like to leave our readers?**
Wagner: With a new Administration and new Congress, there will be stress put on—and perhaps reduction of—certain large tax expenditures, such as the full deductions for employer contributions and the tax-qualified plan system.

***FN*: Wow! That's a lot to chew on. This is certainly a novel and leading-edge idea. It will no doubt catch the attention of many since there appears to be great interest in seeing personalized advice offered through company retirement plans. As usual, you're on that leading edge, paving the way. Thanks for taking the time to share your insights, and we look forward to hearing more from you in the future.**

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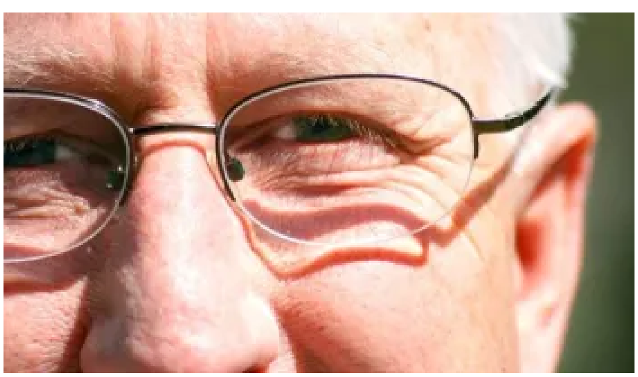

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