DOES A TRULY INDEPENDENT 3(38) FIDUCIARY EXIST? By Nora Bethman, ERPA 10-16-11

I would like to get other industry professionals' opinions of this situation. The facts are as follows:

Registered Investment Advisor (RIA) selling financial products sets up affiliated company for retirement plan administration (a TPA.) RIA has exclusive contract with a national insurance company/financial firm providing investment platform and bundled services for 401(k) and other retirement plans to offer bundled services in a specific regional market. National company provides sales leads to RIA. RIA collects commissions and other perks (attendance at sales conventions, golf outings, bonuses, etc.) from national company. RIA's plan administration division provides plan administration services to the same 401(k) and other retirement plan for a separately billed fee. RIA also operates proprietary mutual funds and hedge funds. Some clients' retirement plan assets are invested in these funds.

In 2011, RIA enters into exclusive agreement with national company to provide, "truly independent ERISA 3(38) fiduciary service, to provide plan sponsors with relief from investment liability."

QUESTIONS: (1) Given the commissions, perks and interrelated arrangements with national company, is RIA "TRULY" independent as advertised?

(2) Is it possible to provide "unbiased financial advice" as advertised, at the same time as selling a proprietary financial vehicle and accepting commissions from a company for which financial advice is provided to its clients? Would the answer be the same if new client assets were not invested in proprietary or national company's investment products ?

(3) Should all of the commission arrangements, exclusive contracts, and other sales activities be disclosed to a potential client, even if not all of the products/services will be provided to that client?

(4) Would hiring this RIA, either separately, or as a part of the national company's packaged financial products/services, increase or decrease fiduciary investment liability for a plan sponsor?

(5) Would it make a difference if the RIA was an ERISA 3(38) fiduciary or an ERISA 3(21) fiduciary?

Thank you for your opinion.