# How an Employer can detect if their Retirement Plan Provider is Breaking Bad

## By Ary Rosenbaum, Esq.

I am the last to know anything, so I binge watched the television series Breaking Bad months after the series had concluded its run on the American Movie Classics cable channel.  Needles to say, I was mesmerized on how a nice and dying chemistry teacher named Walter White became a heartless methamphetamine drug lord. The show haunted me like no other show did. It's the modern day version of Michael Corleone, someone who is so good that turns so bad. When it comes to retirement plan providers, it is my belief that the bad providers didn't start that way; they simply broke bad like Walter White. There are ways for plan sponsors to avoid having plan providers break bad when they are still clients of these providers, this article give you some insight.

**Why Plan Sponsors should care if their providers break bad**

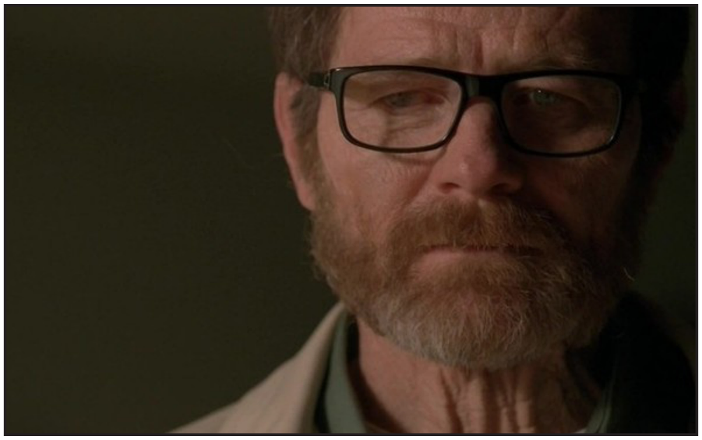
When Walter White decided to dabble in the methamphetamine business, he did because he wanted to provide for his family after he died from lung cancer. Being an illicit drug manufacturer has some severe risks to life and liberty and Walt's family paid a huge price for his transgressions. When it comes to hiring a retirement plan provider that breaks bad, it's the plan sponsor who is holding the bag of responsibility. As plan fiduciaries, plan sponsors and plan trustees pay a high price for hiring bad providers. A plan fiduciary has to exercise their duties prudently and hiring a bad provider isn't exercising it diligently or prudently. Simply blaming a plan provider that is breaking bad isn't going to cut it because as plan fiduciaries, the plan sponsor is ultimately responsible for the retirement plan assets of their employees. I know several clients that had their retirement plan assets with a financial advisor by the name of Bernie Madoff. Simply shifting blame to Madoff's Ponzi scheme may elicit sympathy, but it didn't absolve the plan sponsors from making the plan whole.

**Missing reports, disclosures, and other paperwork**

I once had a client that was contacted by the Department of Labor (DOL) regarding two former employees who claimed that they were denied a pension benefit. While the client's business closed down years earlier, the actuary/third party administrator (TPA) convinced the client to keep the plan operating (so they could still collect a fee). The actuary died early in the investigation and the concern by the DOL was that the owner was embezzling money because the actuary had directed the owner (who was entitled to receive a distribution) to write a check from the plan to another one of the owner's failing business (the actuary reasoned it was the owner's money anyway). The DOL thought it was embezzlement and the owner had a tough time proving otherwise since for 25 years, the actuary never produced an actuarial valuation report that could have shown the owner's benefit. Retirement plan providers are supposed to provider certain disclosures, notices, and reports. A plan provider that fails to provide a required notice or disclosure is possible evidence that they are breaking bad. Plan sponsors are supposed to receive fee disclosures from their plan providers and if they don't, they are the ones who will bear the brunt from the DOL and could possibly have that contractual relationship they have with the plan provider deemed a prohibited transaction if the plan sponsor neglects to fix that problem. The problem obviously is that most plan sponsors are unaware of where their duties end and when the duties of their plan providers start, so this article may give you a heads up on the fact that you need to make sure you get all the necessary information from these providers to do your job. While there always be a notice that one of your providers forgets, make sure that you get the essential documents from your plan providers: annual valuation reports, quarterly reports (if plan is daily valued), a completed Form 5500 ready for your filing, fee disclosure notices, and plan documents/ amendments (when updates required by the Internal Revenue Service). Getting the right documents, reports, and notices will make you gain confidence that the retirement plan providers are not breaking bad.

**Having the required providers and making sure there is a system of checks and balances in place among providers**

Bernie Madoff was able to sustain his Ponzi scheme for so long because not only was he the advisor on his investment fund, his affiliated company was also the plan custodian. If you are the advisor and custodian on the very same investment, it's quite easy to show people that you have assets in your custody that aren't really there. Madoff's scheme would have unraveled a lot quicker if there was a third party custodian like Schwab, TD/Ameritrade, or Fidelity. Make sure your plan assets are at a custodian with a name you know. When it comes to bank robbery, I assume it's easier to knock off a bank where no one is looking rather than the Federal Reserve. Thieves and embezzlers flourish when there is no oversight and there is no eye in the sky looking at what plan providers are doing. On the occasions where I have seen plan providers break bad, many times it's when there is a lack of oversight by the plan sponsor and the other plan providers. My client who was betrayed by that actuary for that 25 year period had no financial advisor with a sophistication in retirement plans that could have tipped her off that she needed an annual valuation report that could properly determine the benefits under the plan and any funding issue it may have. Retirement plan sponsors need to make sure that they have the right team of plan providers, plan providers with the sophistication to do their job and the right level to make sure that they know whether the other providers are doing their job. I would also suggest that plan sponsors seek out the guidance of an independent ERISA attorney (cough, cough) or independent retirement plan consultant to make an independent review of the plan every year or so to properly make sure that no plan providers are breaking bad.  As far as using a TPA that is a producing TPA (with its own affiliated investment advisory service), I would quote Walter White when he was confronted by his brother in law an DEA agent Hank: "Your best course would be to tread lightly." I have been noted in the past about my concern with producing TPAs (having worked for one) and if you consider using them, make sure you have an independent ERISA attorney to check their work. I am not suggesting the majority or plurality of them are crooked, just that having a plan provider wearing too many hats in the retirement plan games needs extra supervision and diligence by the



plan sponsor who might think that using a producing TPA needs less. You are only good as your team and having a team of an independent TPA, financial advisor, and ERISA attorney will do a heck of a job making sure that none of them break bad.

**A change in leadership or staff at your plan providers**

I worked at a TPA that was taken over by a financial advisory company with the hopes of going public within 3 years (that was 8 years ago and they still haven't gone public). I remarked to one of the employees that whenever another company buys your place of employment, change happens. Of course this employee was a rat and got me in a heap of trouble for just mentioning a fact of business. When there is a change of leadership or personnel in any type of business, change is going to happen. They say that change is good and some times it isn't. I remember a local TPA that was sold off to a recordkeeping software developer who decided to get into the TPA business. I knew this was a bad idea, but they ended up being the official TPA of the San Francisco 49ers, so that was nice. They ended up running some of the most talented administrators and actuaries I knew out and service suffered.  There is employee and business turnover in the retirement plan business all the time. It doesn't mean that the provider undergoing the organic or non-organic change is breaking bad, it just begs for extra supervision and review.

**Have the right level of ERISA bond coverage and fiduciary liability insurance**

You can control your own behavior; you can't control someone else's. So even with all the supervision from you and your other providers, that can't prevent a plan provider intent on breaking bad. Since you are responsible for the transgressions of your plan providers and their breaking bad is out of your control, it's best to make sure that the risk involved with being a plan sponsor is fully insured. Make sure that your plan has the correct level of ERISA bond coverage especially if your plan's assets have increased in size. Also make sure that you have the necessary fiduciary liability insurance, so you won't be out of pocket if a plan participant sues you. Litigation expenses are enormous even if you win a case brought against you, so having the right amount of fiduciary liability insurance is a great away to insure the risk that a plan provider has broken bad.

**Make sure your plan providers are properly insured**

It's not enough that you have the proper insurance, it's also important that your plan providers are properly insured. Even if they don't break bad and are just negligent in their duties, making sure they have proper insurance can a long way in protecting you if you need to seek damages from your plan providers for their negligent work or when they have broken bad. There is nothing worse finding out that the bad provider has closed shop because they are insolvent and there is no big pockets like an insurance company to seek redress from. Making sure your plan provider is properly insured is strong protection against them breaking bad.



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