BROKER'S WORLD: Merrill Lynch Deferred Comp Rules Face Challenge

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By Annie Gasparro
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NEW YORK (Dow Jones)--In the job market for brokers, a firm's deferred-compensation program is an anchor holding employees in one place. At Bank of America Corp.'s (BAC) Merrill Lynch, some brokers may be giving it a tug.

Employment contracts generally require a broker to stick around for several years before they get vesting rights to the money piling up in their tax-deferred accounts. The vesting terms for several Merrill Lynch deferred-compensation programs, however, gives brokers rights to that money if they leave with "good reason," according to attorneys.

Lawyer Michael Taaffe, of the firm Shumaker, Loop & Kendrick, believes Bank of America's purchase of Merrill Lynch is just such a reason. Many Merrill brokers had several hundred thousand dollars tied up in deferred-compensation programs at the time of the acquisition, and Taaffe recently won more than $1 million in an arbitration case over the issue.

Taaffe's next case goes to trial in April 2011 with several more to follow in the fall of 2011 and spring of 2012. His office said they "will be filing several dozen more in the

coming month, and it usually takes about a year to 18 months to go through FINRA to a final arbitration hearing."

Some other attorneys believe the cases won't all turn out like the first one, saying the acquisition is not sufficient grounds to claim the money. Issues of more direct impact to the advisers' day-to-day business probably is required, they say. Taafe disagrees, and contends that the implications are huge for Merrill Lynch.

How huge? "Three thousand advisers left since the acquisition was announced in September 2008," Taaffe said, citing data he received from the Financial Industry Regulatory Authority.

Bank of America Merrill Lynch appears to have somewhat recognized the issue. When the acquisition occurred, the company offered brokers with $500,000 or more in annual production a retention bonus that was tied to staying with the firm seven more years. In the contract was a waiver to invoking the "good reason" clause to get to deferred compensation, according to attorneys.

The recent successful case against the company, involving two brokers who have left without signing those retention contracts, sparked Taaffe's zeal. Brokers Willard L. Rumley and Albert A. Montague, who left in December, won $1.12 million in arbitration from their deferred compensation that they had left behind. They claimed to have good reason to leave because of the acquisition announcement by Bank of America, given that they had worked at Bank of America before joining Merrill Lynch, and claimed returning to a bank would damage their business. They left in December 2008 for Morgan Stanley (MS).

A Merrill spokesman said the firm does not think the ruling will have much impact on other cases, "given that the basis of the decision wasn't detailed." Finra rulings rarely spell out the arbitrators' reasons. Additionally, Finra arbitration panels decide on a case-by-case basis and do not take previous panel's rulings into consideration. There's no such thing as precedent, let alone class-action arbitration.

Securities lawyer Brian Hamburger, who represents advisers, said that's the biggest problem with Finra's system.

"Here comes this potential game-changing decision, and what can the industry do with it: nothing," Hamburger said.

Taaffe also argues that the firm pushed brokers to sign the retention packages too quickly after the acquisition, and didn't give them enough time or enough information to make a well-founded decision on whether to stay. Advisers were required to take or leave the retention package before they knew what the following year's compensation grid would be, he said.

"They had about a month to sign the retention agreements, and there was a lot of pressure to sign them, in order to get new leads or the clients of other brokers who were leaving," Taaffe said.

A Bank of America spokesman said the firm did not require any advisers to accept the retention package. It was entirely voluntary, he said.

Mindy Diamond, a recruiter with Diamond Consulting, moved many advisers out of Merrill Lynch in the wake of the acquisition.

"The number-one reason for not moving is not being able to take their deferred compensation with them," Diamond said. "They don't call it golden handcuffs for nothing."

She said many advisers tell her they'd love to move, but they just can't give up the deferred compensation. Moreover, "all contracts don't go out the window just because you have an acquisition," she added.

One Merrill Lynch adviser who was there for the acquisition two years ago said the issue of access to deferred compensation is especially important to people who signed hiring contracts before the 2008 financial crisis. Back then, these packages included more deferred compensation and company stock, as opposed to cash, than they do today. "If that means staying here for seven or eight more years, that's what they're going to do," he said.

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