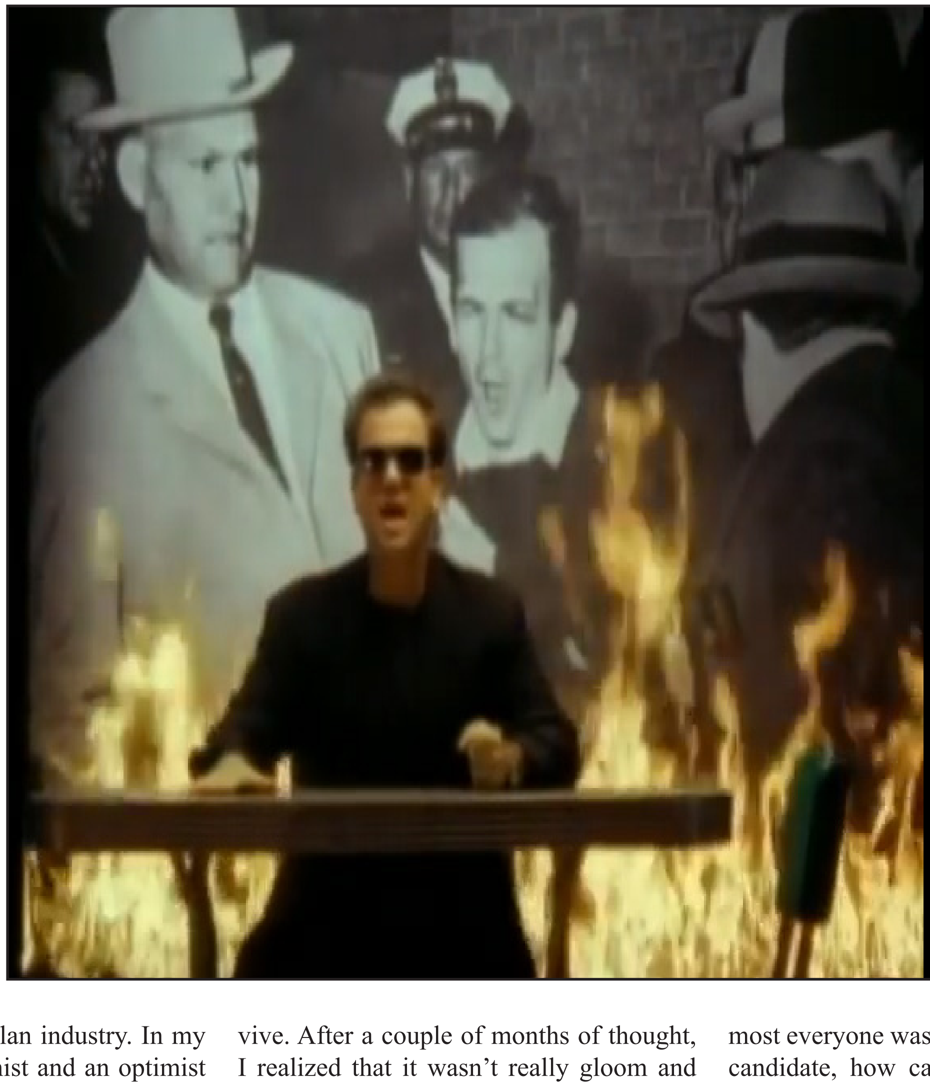
We Didn't Start The 401(k) Fire; It's Always Been Burning

By Ary Rosenbaum, Esq.

I live in Long Island, so I think by a local law, I have to be a Billy Joel fan. He's not up there with Aerosmith, The Eagles, and Fleetwood Mac for me, but he's up there. I know it's blasphemy to say it, but I always loved his song: "We Didn't Start The Fire". Billy isn't the greatest fan of one of his biggest hits because it really has no melody, but I like what the song stands for: history is littered with tumultuous times, it's always been going on. There has been much concern over the new Presidential administration and whether it may spell gloom and doom for the 401(k) industry. This article is all about the tumultuous times that the 401(k) industry is going through and why we'll overcome it because it's not the first time it happened.

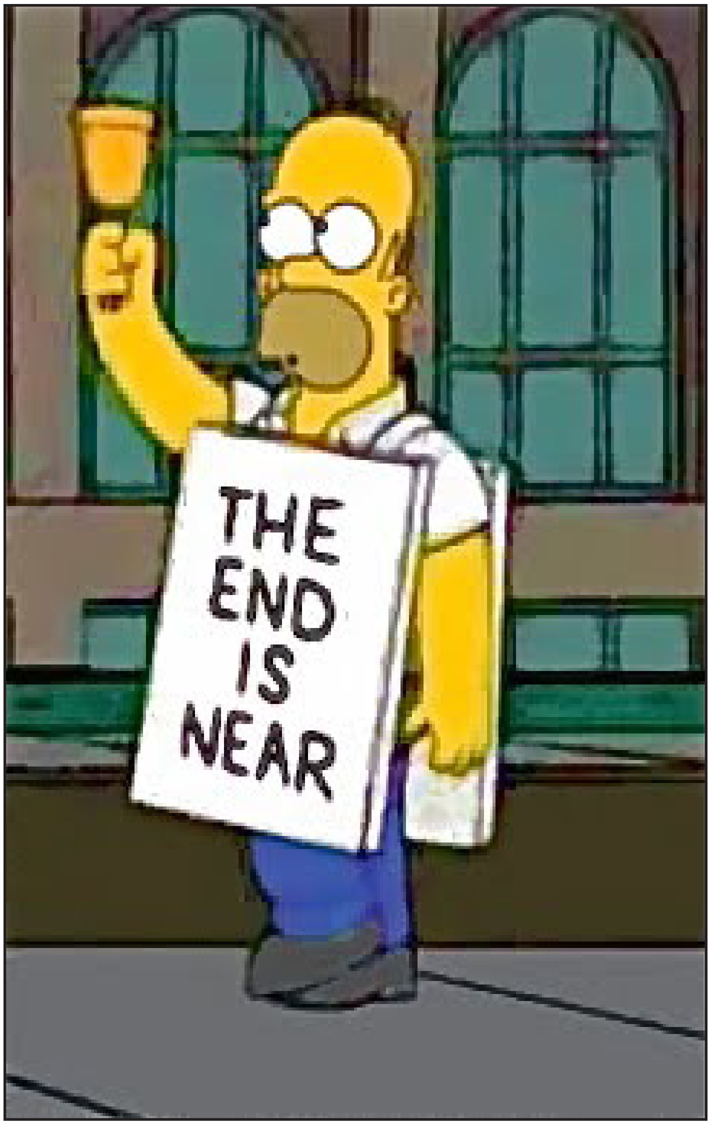


The Sky Isn't Falling

I was at an industry conference a few months back and there was a pessimistic feeling outlined by a main speaker and some other industry experts about the fears of what the Trump administration may do to the 401(k) plan industry. In my life, I've been a pessimist and an optimist and it's better to be an optimist. I've learned that things that I can't control can't paralyze me, I should concentrate on what I have control over. As providers in the retirement plan industry, we should heed that advice. We can't be concerned with what we can't control, but we should get more involved in the political process in making sure our voices can be heard. So many professionals such as attorneys, brokers, and realtors have major clout in lobbying the government; we should have the same amount of clout. Even if we don't have the clout, we need to realize that this industry will survive. After a couple of months of thought, I realized that it wasn't really gloom and doom being talked about at that convention. It was an attempt for a very well respected and connected man in the retirement plan industry to cajole ad rally the troops in the retirement plan industry to fight off any attempt to change the qualified plan rules that would negatively impact retirement plan savings. It's trying to get people off their seats and get involved either through a political action committee donation or lobbying Congress not to make changes.

You can't predict politics.

The 401(k) plan industry always needs to be focused on politics because all of the rules and regulations through ERISA and the Internal Revenue Code are set in Washington, so what happens there could impact everyone who is remotely involved in the 401(k) plan business. I used to be involved politically in college and I realize it then and I reiterate it now: you can't predict the future in politics. If I mentioned to anyone in early 2016 that Donald Trump would beat Hillary Clinton for President, most of you would have tried to have me committed. The idea that Trump could knock off Hillary was laughable since he was the Republican candidate that Team Hillary was hoping would win the nomination. So if almost everyone was wrong about Trump the candidate, how can anyone predict what course he'll take and how he'll impact retirement plan business? A big plank of Trump's campaign was to replace Obamacare and that didn't got the way Trump planned. With such slim Republican margins in the House and Senate, there isn't much movement that Trump can make in making any bold changes to the tax system and 401(k) plans. The tax system in the United States is dominated by special interests that want to hold onto deductions that cater to their interests. The reason you'll probably never have a flat tax is because it would abolish the mortgage deduction on a primary residence, the banking and real estate business will fight it tooth and nail. Any Congressman or Senator from a high income tax state such as New York and California would fight any attempt to eliminate the state tax deduction. Every charitable organization would fight any attempt to get rid of the charity deduction and any change that would affect retirement plan business would get a fight from us.



The future of the Fiduciary Rule

The rollout of the Fiduciary Rule and its delay will certainly have an impact on the 401(k) plan industry. There are many people who are ecstatic and many others who are dismayed by its delay. While you can't predict politics, I can predict that Trump won't be President for more than 8 years and I can predict that political change may lead to the final implementation of that rule or another fiduciary rule that is actually more restrictive for brokers to operate in the retirement plan space. 2018 is right around the corner and there is a chance that the Republicans will lose the Senate. Trump may be defeated for re-election in 2020 or he might have to backtrack on his opposition to the fiduciary rule if he needs to make a deal with a Democrat controlled Congress later down the line. The delay of the Fiduciary Rule isn't going to be forever, I believe that some form of a rule that will apply a fiduciary standard to brokers. How do I know? I think that's the way the industry has been heading for quite some time especially with the emphasis by plan participant litigation and the Department of Labor against plan sponsors taking their fiduciary responsibility more seriously. Plan sponsors are becoming more aware of what a fiduciary is, so I believe there is going to be a greater demand that brokers become fiduciaries. I also think that the broker-dealers who spent millions on legal fees and closed business lines to comply with the fiduciary rule will realize that they can't close the stable door after the horses have bolted. They can't turn back the clock and return their business to what was like before the new rule was proposed. So they may decide to comply to some fiduciary like standard. As long as more and more plan sponsors are aware of the role of plan fiduciaries, there is going to be an increased demand for fiduciary services and brokers will have to adapt or lose business.

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I don't believe that there is any gloom and doom in the 401(k) plan business. This business has gone through some tumultuous times in the past; we usually call it a tax hike. The Tax Reform Act of 1986 (TRA86) happened when I was a freshman in high school (I'm sorry if that makes you old) had a much more negative impact than anything that is happening today and the retirement plan business persevered. TRA86 added more compliance testing and actual cap on compensation being considered for qualified retirement plans. That certainly had a negative impact in how much highly compensated employees could stock away in their retirement plan. It survived OBRA '93 and another decrease in recognized compensation. When the Department of Labor implemented fee disclosure regulations, so many people in the industry thought plan sponsors would terminate their plans rather than deal with the headaches of dealing with it.. So what happened? Fee disclosure regulations didn't kill the 401(k) plan business, I think the business survived and thrived as a result. In my opinion, the only thing that would truly create doom in the 401(k) plan business is the privatization by the Federal Government of all private retirement plans. That's not something even the most progressive politicians would support. Based on their track record of Social Security, I don't think that's an option.

The sky isn't falling just yet, but we always need to be aware on what is happening in Washington because it impacts everything we do. As far as any political change, the retirement plan industry has gone through it before and survived.

THE ROSENBAUM LAW FIRM P.C.

The Rosenbaum Law Firm P.C.
734 Franklin Avenue, Suite 302
Garden City, New York 11530
(516) 594-1557

http://www.therosenbaumlawfirm.com
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