2012, The Year That Retirement Plan Sponsors Need To Make "Contact"

By Ary Rosenbaum, Esq.

A "perfect storm" is an expression that describes an event where a rare combination of circumstances will aggravate a situation drastically. The term is also used to describe an actual phenomenon that results in an event of unusual magnitude.

As 2011 comes to a close, there will be a seismic change in the retirement plan industry. Fee disclosure to plan sponsors by their plan providers and fee disclosure to plan participants in 2012 will change how the retirement plan industry will operate. It will for the first time require plan providers and plan sponsors to disclose actual plan expenses whether they are paid directly or indirectly. In addition, there are other changes as well. By New Years, the Department of Labor (DOL) will finally implement regulations allowing for 401(k) advice to be provided to participants by plan providers. In addition, the DOL is still insistent on changing the definition of retirement plan fiduciary, which will affect the role of many retirement plan advisors. So with all these changes, you have a Perfect Storm for retirement plan sponsors.

Unfortunately like Captain Billy Tyne and the crew of the Andrea Gail, retirement plan sponsors aren't prepared for the Perfect Storm. Unlike a nor'easter, these changes will bring a lot of good to the retirement plan industry. However, if plan sponsors don't understand the changes and get prepared for it, they can certainly capsize and risk their plan to unwanted liability.

There has been a general apathy among retirement plan sponsors since they are unaware of the significance of sponsoring a retirement plan. Plan sponsors are generally unaware of their responsibilities that come with being a plan fiduciary. As plan fiduciaries, they are liable for any breaches of fiduciary duty. Too many plan sponsors assume they take on no liability role for hiring incompetent plan providers or by making their plan's investments to be under a participant's direction or not understanding as to how much their plan costs. Despite the assumption, they are

wrong because the liability buck always stops with the plan sponsor and other plan fiduciaries such as the individual trustees.

Too many plan sponsors swear they pay nothing for administration while their plan is laden with high expenses. Too many plan sponsors don't have a financial advisor on their plan and/or they don't have an investment policy statement which is used to determine what investment options are offered under the plan. Too many plan sponsors rely on plan providers that are incompetent and put the plan at risk for disqualification or sanction from the Internal Revenue Service. Many plan sponsors who were unaware of their role, unfortunately became aware of it after it was too late. Plan sponsors have been sued for administrative errors, high plan expenses, and poor investment selection. Plan sponsors have even been sued for what class of shares of the specific mutual funds in the plan is offered. When there is a down stock market, plan participants need someone with deep pockets to blame and that is always going to be their employer. With great power comes great responsibility and it is incumbent on 401(K) plan sponsors to understand that responsibility.

Plan sponsors need to find quality plan providers like an ERISA attorney, a third party administrator (TPA), and a financial advisor to help guide them through this turbulent period that will require them to be more vigilant in their duties and more diligent in reviewing their plan providers. They always say that you are only as good as your team, so a plan sponsor is wise to surround themselves with the best team that they can find and afford. Being stuck with incompetent providers puts the plan sponsor at a risk because no matter what, the buck stops with the plan sponsor and the other plan fiduciaries such as the individual trustees.

They need to be aware that with fee disclosures being provided to them by their plan providers, that they will have significant responsibility in determining whether the plan expenses that they are currently paying are reasonable. The only way to determine whether fees are reasonable is

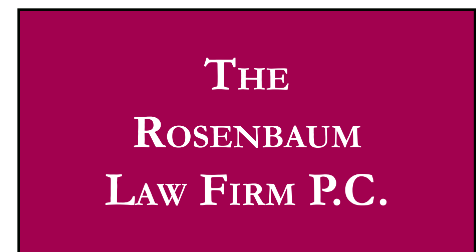
to comparison shop the plan to other retirement plan providers. Simply taking the fee disclosures that they receive from their plan providers and putting it in the back of the drawer is not enough, plan sponsors have to read the disclosures, understand the services they get, and find out whether the price they are paying is reasonable for the services being offered. Plan sponsors should make sure plan fees are reasonable just based on the fact that in mid-2012, plan participants will get a disclosure of plan expenses as well. The last thing a plan sponsor needs is having their employees find out that the fees they are paying are excessive.

The new 401(k) advice regulations that are effective on December 27, 2011 are something that plan sponsors should take advantage of. The advice regulations end an interesting dilemma that most plan sponsors were unaware of. Until this regulation was implemented, plan providers such as financial advisors and mutual fund companies serving as TPAs were barred from providing financial advice to participants because the DOL believed it was a conflict of interest. Plan providers were only allowed to provide investment education, which was general information about the plan investment options, plan features, as well as educating plan participants on basic financial concepts. The reason why plan sponsors should either require their plan providers to offer investment advice or seek the services of a third party to do it is rather simple; it's all about liability protection. They should make sure that all their plan participants have the opportunity to get investment education and advice because it will help plan participants make better informed investment decisions, which has the power of increasing retirement savings and decreasing the plan sponsor's liability because happy plan participants rarely sue.

One of the interesting developments with the new financial advice regulations is the fact that any financial advisor that will offer advice will be called fiduciary advisors. Why so interesting? Well, the DOL has been trying to change the definition of retirement plan fiduciary for years. While the DOL tried to implement the rule change in 2011, much scorn from Wall Street and Congress had the DOL shelve the change. However, the DOL has stated they will try to change that again. Why should plan sponsors care? Well there are two groups of people who call themselves retirement plan financial advisors: registered investment advisors (RIAs) and stock brokers. Under the current rules, RIAs owe a fiduciary duty to the plans they work on and brokers do not. RIAs must put the needs of the plan in front of their own while brokers can sell financial products and services to the plan that benefits them more than the plan. The DOL's change of the fiduciary definition would end that difference as brokers would become fiduciaries and would have to offer investments and services that do not benefit themselves at the expense of the Plan. If the DOL makes this change in 2012, brokers that work\ on retirement plans have three options: 1) become plan fiduciaries; 2) partner up with RIAs who will serve as fiduciaries while the brokers would serve in a non-fiduciary function; or 3) leave the retirement plan business altogether. Plan sponsors need to understand if their financial advisor is a plan fiduciary or not and if their financial advisor is a broker what the broker's plans are if the DOL gets their way with the change of the fiduciary definition in 2012.

Plan sponsors who have neglected their plans for years will have to wake up from their self induced coma to understand that the changes that will be undergoing in the retirement plan industry are positive developments, but add a level of responsibility to them. Financial disclosure regulations will reveal plan expenses which are good, but adds more work to the plan sponsor because they have to make sure that their plan providers comply or they will be accused of committing a prohibited transaction. The new financial advice rules can be a positive development for the plan sponsors that will offer it, but may add pressure to those that don't. A proposed change to the fiduciary definition will create a level playing field for all retirement plan financial advisors, but plan sponsors need to be aware of the role that their financial advisor currently has with the plan. They say that one person's gold is another person's trash. Positive change in the retirement plan industry can create opportunity for plan sponsors to improve their plans, but can increase the liability for the plan sponsors who don't act. Every retirement plan sponsor needs to contact their plan providers and find out if their plan providers are ready for these changes and whether they can assist the plan sponsors get thorough these changes. If the plan providers aren't up to the task, plan sponsors have the fiduciary duty to find the plan providers that are up to the task.

Taking care of a retirement plan is like taking care of a car. Like a car owner, plan sponsors need to provide constant maintenance or their retirement plan will end up like a jalopy and costing them more in liability in the long run.



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