

# ....One More Thing For Plan Providers

By Ary Rosenbaum, Esq.

When Steve Jobs would lead an Apple press conference, he would always end it with “one more thing,” which was an important announcement of a new Apple product. It was his trademark and it was quite memorable. To echo that, here are some things that you should consider as a retirement plan provider as we near 2020.

## Consolidation isn't as big of a concern if you think about it

It seems every week when I read 401khelpcenter.com, there seems to be another third-party administrator (TPA) purchase by one of those large companies that have been buying some high quality and well known TPAs around the country. The same can be said about some well known registered investment advisory firms that have been gobbled up over the last couple of years. Consolidation in the business was inevitable. It's thanks to fee transparency, fee compression, as well as some medium-sized plan providers that just wanted to cash out. If you're a plan provider and haven't been bought out, don't panic. There is enough of a marketplace out there for you to maneuver without having too much concern with the plan provider conglomerates out there. There might be some benefit if some of your top competitors get bought out because it means less competition and

more opportunity to differentiate yourself among the bigger competition. No matter who or what the competition is, it's imperative that you stand out so that plan sponsors can hire you. I think a great way to help your business is to look at the competition and see if you can be doing something that they're not. When I started my law practice, I looked at what other law firms and trying to develop ways on how I could be dif-

ferently and better than the competition.

## The MEP discussion is a little overblown

There has been a lot of discussion concerning multiple employer plans (MEPs) and for good reason. The Department of Labor (DOL) released some long-awaited regulations and legislation that would open up the marketplace for Open MEPs passed the House of Representatives. However, while people love talking about MEPs, not much has been done to move the needle. The DOL regulation on MEPs did very little in reversing the DOL's advisory opinion back in 2012 that pretty much ended Open MEPs. The new regulations just reiterated the underpinning of that 2002 advisory opinion that there must be a commonality between adopting employers of a MEP for the MEP to be treated as a single plan for 5500 purposes. While the SECURE act would allow for pooled employer plans that would be treated Open MEPs, the Senate hasn't passed the law as of yet. Even if the DOL

or Congress waived its magic wand and allow Open MEPs, I still think Open MEPs is an overrated solution. I say that as someone who has developed Open MEPs on my own and for clients. On paper, MEPs are an excellent solution for small employers to delegate most of their fiduciary li-



ferent and stand out and one thing I did was offer my fees on a flat fee basis, which has been a tremendous difference maker for me for the last 9 years. There are so many ways you can compete against the larger providers, all you have to do is put your thinking cap and figure out what you can do dif-

ability to a MEP plan sponsor and get a more affordable 401(k) plan solution by adding their assets in what essentially is a cooperative 401(k) plan arrangement. The reason I think the solution is overblown is that most 401(k) MEPs fail for one big reason: they don't get large enough to justify any cost savings. There is nothing worse than having a MEP with only a few hundred employees and the need to pay for a \$10,000 plan audit. While MEPs do offer a great opportunity for adopting employers to shed almost all of their liability, the cost savings aren't there most of the time. MEPs are a big part of my business, but I have to level with you: they aren't attractive to everyone and when you want to develop a MEP, it takes a lot of time. It takes a lot of time because no matter how much you think your MEP is wonderful, potential adopting employers aren't knocking down your door. Selling a MEP to adopting employers is a slow process.

#### **That DOL E-Disclosure is great, except for one problem**

The DOL released regulations that will finally land plan administrators in the 200s by finally putting in a safe harbor that will allow them to disseminate required notices electronically instead of forcing them to hand out or mail them. While the paper industry won't like it, the retirement plan industry will be saving a lot of trees and saving a ton of money. Electronic delivery is a lot cheaper than mail delivery. The hope is that the savings incurred by the retirement plan industry will allow for savings for plan sponsors in administrative costs. Hopefully, plan providers will pass the savings on with reduced administrative expenses. So much of what we did in life now is electronically and without paper, so it's great that the DOL got on the e-disclosure bandwagon while still allowing plan participants to have the opportunities delivered in paper form. DOL notices are a big deal because participants should have the information, they need to make important



plan decisions. The only drawback I see with e-disclosures is that disseminating paper notices in the mail kept plan providers sharp because of the headaches they'd suffer if they didn't abide by ERISA. I think e-disclosure might make some plan providers a little lazy in getting those notices out or identifying when notices bounce back because of an incorrect email. Sometimes, technology makes us lazy and my concern is that it will make some plan providers lazy and any penalties that will result in failed notices that will cost plan sponsors dearly for something that would have been avoided had the DOL not adopted the e-disclosure regulations. I'm sure most plan providers will put technology out there that will allow them to avoid any problems that might develop as a result of e-disclosure.

#### **The DOL fiduciary rule and the unknown**

They always say that if at first, you don't succeed, try, try, again. The DOL has taken that to heart as they are trying to reshape the fiduciary rule for the third time. The current definition is the same one that has been in place since ERISA was signed into law in 1974. 1974 was the time of bad fashion, pension plans, and no such thing as 401(k) plans. What will be in the next version of the DOL's proposal to change the fiduciary rule? Maybe it will mimic what the SEC has proposed (which would nice to have one standard), maybe it won't. I

think regardless of what is proposed, someone is going to be unhappy.

#### **The automatic rollover and missing participant issue**

For so long, everyone paid very little attention to automatic rollovers and whatever provider that the TPA was pushing the rollovers to. Well, that's about to change as the DOL has indicated that automatic rollovers and especially, missing participants are something that they're going to focus on. I was closing out a 401(k) plan that was under DOL review. The DOL agent was asking questions about how the automatic provider was

selected and what the fees are, these were things that I didn't have a quick answer for. Also, you're going to have to be more proactive in locating missing participants. Doing nothing until the plan terminates isn't something you'll be allowed to do anymore. You're going to have to make sure that plan sponsors follow a missing participant process to locate them and get these plan assets out of the plan. When the DOL tells us that they're going to focus on an issue, we owe it to ourselves as plan providers to listen.

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