Advisor Retirement Plan Update

QUARTER 2 2014

Current Trends

According to a recent survey by Brightworks Partners, the growth of RIAs are changing the landscape in the 401(k) market. Five years ago, RIAs accounted for just 8% of active 401K) advisors. Now, they are the largest set within the 401(k) advisor field with a total of 20% of all plans. They are just slightly larger than the wirehouse (18%), insurance (17%) and the independent broker-dealer channels (15%). Consistent with the growth of RIAs in the 401(k) fields, the move to fee based compensation continues also. Last year 54% of advisors described their compensation as mainly fee based. In 2005, only 24% of advisors indicated they were fee based.

The market is changing in other ways as well, from the discussions regarding the definition of fiduciary (see next page) to the current budget proposals to the focus on retirement readiness. One of the current budget proposals includes an idea that would be harmful to retirement plans—that a participant would lose their deductions for contributions to a retirement plan if that participant has more than a certain amount of money in their account (approximately $3.4 million currently). This proposal is basically punishing those individuals that have been good savers. Some say that there is also a current discussion that would help the industry, by requiring participant statements to outline what a participant's current account balance will bring them at retirement. Only time will tell what will be adopted and we'll keep you up to date.

NOBLE DAVIS CONSULTING, INC

PEACE *of* MIND

The Definition of a Fiduciary

For several years now, the Department of Labor has been issuing proposed legislation to change the definition of the word *fiduciary* under ERISA. The discussions have actually been going on since 2012 when the DOL's Employee Benefits Security Agency (EBSA) proposed a new rule that would broaden the current definition of fiduciary. Under the proposed rules, the definition would be broadened to include "any person who provides investment advice to plans for a fee or other compensation." Currently, the regulation eliminates investment advisors from being a fiduciary under most cases.

Because of these proposed changes, investment advisors and brokers are upset because anyone who is an investment advisor under Investment Advisors Act of 1940 will be a fiduciary if he or she provides investment advice for a fee. Another change would be that the advice would not need to be given over a period of time—one single instance of advice would make that advisor.

The DOL is proposing this rule because the department cannot currently take action against advisors who have provided bad advice because they were not considered fiduciaries. Others argue that the proposed rule amounts to over-regulation and will lead to increased investment costs for middle class families. The DOL has advised that the rule will be re-proposed in August 2014.

So, what is the definition of a fiduciary and what are the responsibilities involved? According to the DOL's definition, many of the actions involved in operating a plan make the person or entity performing them a fiduciary. Using discretion in administering and managing a plan or controlling the plan's assets makes that person a fiduciary to the extent of that discretion or control. Thus, fiduciary status is based on the *functions performed for the plan*, not just a person's title.

The responsibilities of being a fiduciary includes the following:

- Acting solely in the interest of plan participants and their beneficiaries and with the exclusive purpose of providing benefits to them;
- Carrying out their duties prudently;
- Following the plan documents (unless inconsistent with ERISA);
- Diversifying plan investments; and
- Paying only reasonable plan expenses.

With these fiduciary responsibilities, there is also potential liability. Fiduciaries who do not follow the basic standards of conduct may be personally liable to restore any losses to the plan, or to restore any profits made through improper use of the plan's assets resulting from their actions.

However, fiduciaries can limit their liability in certain situations. One way fiduciaries can demonstrate that they have carried out their responsibilities properly is by documenting the processes used to carry out their fiduciary responsibilities.

We'll keep you up to date as we receive more information on this topic.