This Is This: 401(k) Plan Providers' Road And Role In 2025

By Ary Rosenbaum, Esq.

When I was at law school in Washington D.C., I discovered Hollywood Video which was a thousand times better than Blockbuster because it had a better selection and the rental price was less. I'd spend my free time watching movies with my TV/VCR combo (you young folks might have to Google what that looks like). One of my favorite movies of all time that I discovered through that was the 1978 Michael Cimino-directed classic, The Deer Hunter. As Michael, Robert DeNiro has a line that I love: "This is this. This ain't somethin' else. This is this." As 401(k) plan providers, the beauty of this business is that it's always changing and we need to always know what's going on. This is what the article is all about because this is this.

I don't have a crystal ball on the Trump administration.

The second Trump administration will be like the first. It's like a box of chocolate, you will never know what you're going to get. Eventually, we will get a new head of the Employee Benefit Security Administration (EBSA) for the Department of Labor (DOL). That obviously will help in deciding what route the Trump administration will take. For the past 20 years, EBSA has tried to promulgate a framework to change the definition of fiduciary. For those that may not be aware of history, the Employee Retirement Income Security Act (ERISA) was signed into law in 1974 with an effective date of January 1, 1976. The definition of fiduciary has not been officially changed since. The definition of fiduciary in ERISA predates 401(k) plans, participant direction in 401(k) plans, revenue sharing, mutual funds in 401(k) plans, 12-b-1 fees, and Saturday Night Fever (not in that order). For the past 20 years, administration after administration has failed to implement a new fiduciary rule. The Barrack Obama administration tried and the implementation date got in the way of Donald Trump taking office for the first time. The Joe Biden administration stab at changing the fiduciary rule was delayed by court battles and will eventually be withdrawn with the new administration. While one would assume that the Trump administration will try again, Trump has issued a lot of Executive Orders on regulations that might make it difficult for the DOL to develop and promulgate new fiduciary rule regulations. Trump has drafted several executive orders to dramatically curb the power of federal agencies like the DOL by ordering a thorough review of all government regulations to decide which should be on the chopping block. So if regulations are placed on the chopping block, it's safe to assume that it's going to be difficult for any Federal agency to issue new regulations. Just my two cents.

The inevitability of crypto in 401(k) plans

I remember when I first started in 1998 and the paralegal I learned from, was showing the verbiage of new comparability allocations. In those days, the Internal Revenue Service (IRS) frowned on them. In the same way, they frowned on cash balance plans, Needless to say, cross-tested plans and cash balance plans, eventually were approved by law. So many times, someone develops an idea that the IRS and the Department of Labor (DOL) are against, and then all it needs is pressure and time (obligatory Shawshank Redemption reference). Eventually, the IRS and DOL come around, which is probably what a couple of providers thought about when they offered a crypto window into the 401(k) plans. They say timing is everything and I think these providers started developing this idea when Bitcoin was $69,000 and brought it to the market when it crashed to about $23,000 when they released their products. So it was a bad time and the DOL under the Biden administration issued warnings that they may audit 401(k) plans that offer Crypto, as well as the providers that offered it. Of course, hunger

for Bitcoin grew when it went north of $100,000. The upswing in Bitcoin was not coincidentally at the same time that spot Bitcoin Exchange Traded Funds (ETFs) were finally approved by the Securities and Exchange Commission. One of the knocks against Bitcoin in 401(k) plans is the need for the plan's trust to have a digital wallet, which can be hacked. ETFs can easily sit in a 401(k) trust account without any of these hacking issues. The increase in Bitcoin's value, the rise of spot ETFs, and a Trump administration that is the most supportive Crypto administration in history will make Bitcoin and perhaps Ethereum digital currency that could be allowed for 401(k) investments by participants shortly. Providers who allow access to Bitcoin ETFs or Crypto "flavors" in managed accounts or Collective Investment Trust, will do well. I think the biggest roadblock against Crypto in 401(k) plans isn't the government, it's financial advisors who believe they don't have the education to make informed investment advice on crypto, which will eventually change. Cautious advisors are smart since they are fiduciaries to a 401(k) plan and don't want to offer an asset that can crash and burn a 401(k) participant's account balance rather quickly if there are no safeguards.

The death of the annual 401(k) conferences

Quite some time ago, there seemed to be so many annual 401(k) industry events. The joke I had that wasn't a joke is that they always seemed to be the same 2 or 3 ERISA attorneys being invited. It wasn't a joke because it was reality and I wasn't one of those 2 or 3. One of the major reasons that I started That 401(k) Conference was from an experience at one of these annual events. A friend told me that the exhibitor space rental for his firm was $100,000 and another provider with a table told me their table was $10,000. I figured since I wasn't being invited to speak and didn't want any pay-to-play speaking gigs at other events, I developed my regional event. That 401(k) Conference was successful for those first two years in 2018 and 2019. Then my eyes got "big" and thought of a national event. Since I follow Eric Bischoff's mantra of thinking things differently, I decided Disney World might be a great idea since advisors could bring their families and have them enjoy these events. With discount rooms on Disney property and discount park tickets, I thought it would be a huge hit. My grandmother always said that things never go to plan, and there is that expression is your plan, and God laughs. So planning an event at Disney World the week a pandemic begins in the United States isn't a great idea. The event closed on a Wednesday and the parks closed for months on Sunday. That is the first and last time I run a national 401(k) conference. With COVID shutting down other annual events and a two-year phaseout of a return to normal, I predicted the end of many of these annual conferences. I even cut back my regional events from 9 in 2019 to about 2 to 3 in the last couple of years. If people like working from home as we have all been accustomed to since COVID (for me, I was ahead of the times when I started my practice in 2010), they are not going to leave the house for 2 to 3 days for all of these annual conferences. In addition, a competitive 401(k) fee landscape, tightening of margins, and huge provider mergers, have dried up a lot of that sponsorship money. There was going to be that one big event that would survive and it gets bigger and bigger because it has the greatest audience when it's the spokespeople of the industry. This may not last forever, but anyone wanting to do a national conference will have to go the Bischoff route and do things differently, rather than try to copy what the American Retirement Association does with their events. Good luck to anyone who will try, I'd be more than willing to help, it's just I'll never do an annual event on my own, again.

Consolidation can be a good thing

When I started my practice in 2010, I looked at what ERISA attorneys were doing at law firms and TPAs and I wanted to do things differently. I offered fees that were flat and not billable by the hour, I offered an attorney-client relationship that TPA attorneys could not, and I helped other providers out by answering questions and producing free content they could use. What I couldn't do was compete with free-plan documents that large providers produced. There are things larger providers can do better than me because of size, client base, and technology. But most of the time, they can't, especially when it comes to fixing their errors. While certain plan providers are getting bigger and bigger, history shows that bigger isn't better. Better becomes focusing more on plans that have the largest return on investments, stop working on smaller plans, and not being as nimble in an environment that changes every minute. This is this and this can be a good thing for you as a plan provider.

Always be ahead of the curve

The paralegal who taught me so much said that were plan providers who had a tough time dealing with the Tax Reform Act of 1986. Years later, some providers left the business because of fee disclosure. There will be a lot of providers cashing out, rather than dealing with SECURE 2.0. I have been in this business for 27 years this September, you only survive if you are ahead of the curve and the changes in this business.

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