From Plan Advisor Magazine: September 19, 2013

PANC 2013: FIDUCIARY FITNESS

By Jill Cornfield

"While we as advisers understand a lot of pieces of the puzzle, the plan sponsor doesn't," Keith Gredys, CEO and president of Kidder Benefits Consultants Inc., told attendees at the PLANADVISER National Conference in Orlando, Florida.

L to R: Keith J. Gredys, CEO and President, Kidder Benefits Consultants Inc.
Paul Mahan, Vice President of Retirement Consulting Services, Commonwealth Financial Network | James Lauder, CEO, Global Index Advisors, Co-Portfolio Manager, Wells Fargo Advantage Dow Jones Target Date Funds | Jake Downing, Attorney, Seyfarth Shaw LLP
David C. Kaleda, Principal, Groom Law Group Chartered

Panelists discussed the different types of fiduciary and fiduciary services that advisers provide, as well as fiduciary liability concerns and prevention. "We throw these terms around a lot, but there are some differences," said David Kaleda, a principal with Groom Law Group Chartered. "A 3(21) fiduciary is a fiduciary because he or she exercises discretion over plan assets or the investments of the plan, or provides investment advice for a fee."

The 3(38) fiduciary, on the other hand, is either a registered investment adviser (RIA) under federal and state law, or an insurance company or a bank, Kaleda said. "Those are minimum requirements. That entity or person also agrees to be a fiduciary with respect to the plan."

Legally, the difference between the two lies stems from section 402 of the Employee Retirement Income Security Act (ERISA), which allows a named fiduciary to delegate investment authority to a 3(38) manager. "Plan sponsors can push off most of their responsibility," Kaleda explained. "There is still a monitoring liability, but they won't be held responsible for any investments."

A 3(21) fiduciary can be helpful, but the scope doesn't give all the fiduciary delegation, and leaves someone else liable for investment decisions. Yet the responsibilities of a 3(21) fiduciary are just as serious as those of a 3(38), said Jake Downing, an attorney with Seyfarth Shaw LLP, even though the 3(38) status carries more responsibility. "You're telling the plan fiduciary your advice with respect to that plan's decisions about investments," he said. "The advice must be treated with necessary prudence." I would always approach it as if you're fully responsible for that investment," Downing said.

The ERISA Standard

Also consider some federal and state laws. "Remember that ERISA is one regime," Kaleda said, "but you are registered under state and federal securities laws. There are different standards under the Securities Exchange Act versus the Advisers Act of 1940, and those regimes are very different from ERISA." Obligations for an RIA are closer to those under ERISA, according to Kaleda. "ERISA is the common standard, but on steroids," he said. "It's a much higher standard."

The biggest difference is that an adviser can disclose conflicts, which can then be effectively negated, Kaleda said. "In ERISA, there are a lot of exemptions, but none simply allow for disclosure. Some further action is always called for."

Advisers can position themselves in several ways. At Commonwealth Financial Network, they manage qualified retirement plans as a functional fiduciary or as a registered representative working on a commission basis, according to Paul Mahan, vice president of retirement consulting services at Commonwealth. Some of the firm's advisers work within the parameters of a 3(21) fiduciary, Mahan said, and a few act as 3(38) managers.

"There should be more rigor around being a 3(21)," Mahan said. "Some of our advisers are challenged by their clients, especially in the small-market segment. You're able to give advice at the plan level and participant level. But the challenge comes if the plan sponsor does not act on that advice, because their resources are constrained or the are working on other benefits, other tasks. Our advisers can feel their liability is becoming more pronounced when they give advice as a 3(21) but the client does not act on it."

TDFs on the Rise

Target-date funds (TDFs) are attracting ever-growing amounts of plan money—"Half the money is probably going in to target dates now," Gredys said—bringing with them greater fund responsibility.

What we are seeing from the DOL [Department of Labor] is heightened scrutiny about how people choose TDFs," said James Lauder, chief executive of Global Index Advisor and co-portfolio manager at Wells Fargo Advantage. The funds can be trickier, and there is more to them than with mutual funds." The DOL released some tips, Lauder said, but they may not reduce fiduciary burden.

"Some of the points are very valid," Lauder said, such as the recommendation to have a documented process and the need to understand the consequences of the fund's glide path.

"Procedural prudence is key," Kaleda said. "People who lose the fee cases can't document that they looked at things like institutional share classes. They may have dismissed them for good reasons, but there's no record. If you don't write it down, it's really hard to prove what happened three, four, six years ago."

"Litigation is based almost entirely on lack of process," Downing added.

One trend could be custom-built TDFs, according to Downing, who has one client rolling out all TDFs used in the plan that are based on the risk characteristics of the plan population. Glide paths and fund beliefs were considered closely in a very robust process.

"There is some expense but they shouldn't have much risk associated with those TDFs," Downing said, "because they worked with their advisers, based on their populations and made them unique to their organizations. It seems pretty bullet-proof."

# # #

About Kidder:

Kidder Benefits Consultants is nationally recognized for its expertise in pension consulting and administration. The firm is experienced in all types of plans – including 401(k), Defined Benefit, Cash Balance and ESOPs – and provides IRS and Department of Labor resolution services and fiduciary governance on behalf of plan sponsors. Kidder currently serves nearly 1,100 qualified plans and more than 25,000 participants from its headquarters in West Des Moines, Iowa, as well as regional offices in Omaha, NE, Albuquerque, NM, and Tucson, AZ. For additional information, visit www.askkidder.com.

For more information, contact:
Keith Gredys, CEO & President
515-254-1178
kgredys@askkidder.com