Kidder Benefits Consultants, Inc.
5700 Westown Parkway, Suite 100
West Des Moines, IA 50266
www.askkidder.com
phone 515.254.1178
toll free 800.300.3086

March 2016
National Edition
Volume 10 Issue 1

Consulting Offices:
Omaha, Nebraska
Albuquerque, New Mexico
Gainesville, Florida

Regional Consulting and Administrative Office:
Tucson, Arizona

Ask Kidder.

Are you ready for the new fiduciary rule?

There is great interest (and some apprehension) about the Department of Labor's (DOL) new fiduciary definition, which continues to move forward and is unlikely to be derailed by Congress or anyone else. On January 28th, the DOL submitted its final proposed rule to the Office of Management and Budget (OMB). The OMB has up to 90 days to review the rule before it can be published.

The DOL wants to publish the rule this spring, so it will be in place – and protected – before the Presidential election. While Congress can vote to reject the new rule, President Obama has said he will veto such action, should it occur. He believes that formalizing the requirement for financial advisors and brokers to provide non-conflicted advice will help protect participants' retirement assets. The new President may think differently, so for the DOL, timing is everything.

While the final version has not been made public, the proposed rule modifies the definition of fiduciary and includes the "Best Interest Contract" (BIC) prohibited transaction exemption, as outlined in our September 2015 Ask Kidder newsletter.

As a result, plan sponsors using an advisor or broker will need to have a service provider that accepts investment fiduciary responsibility with them on their plans. The investment professional will need to accept or share investment fiduciary responsibility OR work with another party/service provider that will accept the responsibility. Otherwise, a prohibited transaction will exist in the plan, subjecting the plan sponsor and the investment professional to potential liability.

The implementation date for this new regulation will likely be in late 2016 or early 2017. The DOL has been asked to extend the implementation dates, because IRAs will also be covered by the new fiduciary rule and it will take longer for IRA service providers to comply. In any event, the time to prepare is now.

What is the U.S. Supreme Court saying about plan sponsors and their fiduciary responsibilities?

Last year's unanimous ruling in Tibble vs. Edison International revealed the Supreme Court's thinking on the fiduciary responsibilities of plan sponsors. Tibble represented the participants of Edison International's 401(k) plan. They believed the plan sponsor and plan fiduciaries had not properly monitored plan investments and their costs. The plan invested in "retail" mutual funds, which were more expensive than "wholesale" versions of the very same funds – even though the plan was large enough to access the lower cost funds. The case was heard by the Supreme Court to determine how far back damages could be calculated.

In making its decision, the court focused on the duty of trustees and plan fiduciaries to manage assets in a prudent fashion and continually monitor the funds. In other words, even if an investment was a prudent choice originally, plan fiduciaries must continue to monitor it in case it becomes imprudent later. The case hinged not as much on fees as it did on having a documented fiduciary decision-making process and making prudent changes when necessary. The Supreme Court did not express a view on what fiduciaries must actually do to satisfy their duty to monitor.

The Tibble case is important to plan sponsors, because the Supreme Court is saying that the fiduciary process is required for all plans. The plan sponsor and plan fiduciaries cannot set up an investment line-up, then fail to monitor it on an ongoing basis.

Monitoring is a broad term. Beyond the performance and cost of the funds, the fiduciary process can also include the appropriateness of plan design, proper and compliant administration of the plan, how the investments relate to participant demographics, and the level of education participants require.

In the past few years, plan participants have filed many lawsuits against large, well-known company retirement plans. Most of these suits focused on the same issues as Tibble. Significant financial settlements resulted when the fiduciary process was not documented or consistently applied. In addition, the DOL has targeted audits for both large and small plans, where they typically ask for fiduciary decision-making documentation.

Fiduciary governance is not rocket science. Plan fiduciaries must remember that retirement plan assets belong to the participants. When dealing with participants' assets, they have a duty to be prudent and act in the best interests of the participants. If the plan sponsor or plan fiduciaries do not have the knowledge or resources to do so, they are required to engage professionals with the appropriate knowledge and expertise. Kidder is well positioned to assist plan sponsors and financial professionals with their fiduciary responsibilities. Call us with any questions.

Five years running – Kidder awarded CEFEX designation for TPA and Plan Fiduciary services

Since 2012, Kidder Benefits has been awarded a Centre for Fiduciary Excellence (CEFEX) designation for TPA services. Now, this designation has been expanded to include Plan Fiduciary services. Kidder is one of a handful of firms nationally with a CEFEX designation for both TPA and Plan Fiduciary services. To these designations, Kidder undergoes an annual independent audit and assessment of best practices in its systems, processes, managment and structure.