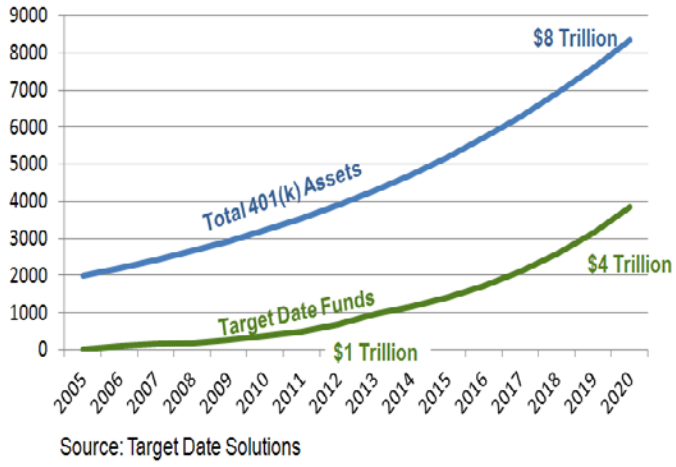
Chapter 9

The Future

Looking ahead, target date funds are projected to quadruple in the next 5-6 years, reaching $4 trillion, which will equal about one-half of all 401(k) assets. In other words, TDFs will become increasingly important.



Sometime in the future there will be a market correction of the magnitude of a 2008 or even a 1929. Unless risk controls are tightened, especially near the target date, fiduciaries will be sued as a result of losses. It remains to be seen whether the litigation will impact fund companies or fiduciaries, or both. Mutual fund companies do not stand as fiduciaries relative to the pension plans that invest in them.

TDFs will be quite different after this cleansing. It will take "the stick" to stir things up because "the carrot" is not working.

Legal Guidance

Regulators are reactive. They adhere to the age-old premise "follow the money." The target hit list for the DOL will always focus on those areas that are most used, have the highest inflows (possibly outflows as well), and are getting the most publicity and attention. They are the "low hanging fruit." Since a regulator's annual budget is influenced by its success in prosecuting, fining or otherwise "catching" a perpetuator of risk to participants and their beneficiaries, any regulator will follow the easy-to-catch.

Similarly, client advocates (swarms of class action lawyers) will advocate for the higher numbers. Remember contingency fees. Watch for advertisements and articles warning of some practice or other that could generate litigation.

The poor sap, the financially unsophisticated participant, will take some of this media-driven advice to heart and maybe remember it when his or her 401(k) is inadequately funded or, even worse, unable to withstand the next 2008.

Where does that place TDFs? Increased use, popularity, sales touting, asset flow, media hype, and the FIRST complaint (regardless of where it originates) will open the proverbial floodgates of litigation. It really doesn't matter much whether the practices of any given TDF displays proclivities of riskiness to participants. Visibility and deep pockets will be the primary litigation attraction.

Ethical Perspective

The carrot and stick analogy brings us back to Plato's moral in the Ring of Gyges; however, Plato's most famous student points to the underlying cause of ethical and fiduciary failure. Aristotle held that one becomes ethical through habituation and that the law affects our habits. He wrote:

"*For legislators [lawmakers] make the citizens good by forming habits in them, and this is the wish of every legislator, and those who do not effect it miss their mark, and it is in this that a good constitution differs from a bad one.*" Book II, 1103.b4

If Aristotle were to evaluate the laws, and enforcement of laws, governing fiduciaries and those who provide services to fiduciaries, he would likely conclude that our legislators have missed their mark.