Top 10 Fiduciary Mistakes: Know Your Fiduciary Limits

Sharon Severson
April 28, 2010
Agenda

- Who is a Fiduciary?
- The Fiduciary Standards of ERISA
- Mitigating Fiduciary Risk
- Top Ten Fiduciary Mistakes

Sharon Severson, CPC, QPA, ERPA
Director, Retirement Plan Products
800.356-2644, Extension 6245
sharon.severson@cunamutual.com
Who is a fiduciary?
Fiduciary - Defined

- Generally anyone with discretionary authority or control over a plan or the plan’s investments

- 3 ways to acquire fiduciary status
  1. “Named fiduciary” in plan document
  2. Being named a fiduciary pursuant to a procedure
  3. Functional fiduciary

- Shifting investment responsibilities
  - Total shift to an investment manager
  - Partial shift to participants through ERISA 404(c) compliance
Fiduciary Mistake #1

Not Knowing You Are a Fiduciary
Co-fiduciary - Defined

- A sponsor can never delegate all fiduciary responsibility
- A sponsor may shift some of its responsibility by hiring a "co-fiduciary"
- Lacking investment expertise, a fiduciary will want to hire someone with professional knowledge
- Avoid hiring co-fiduciaries who may have a "conflict of interest"
The Fiduciary Standards of ERISA
Core Standards of Conduct for Fiduciaries

1. Act solely in the interest of plan participants and beneficiaries. Avoid self-dealing and conflicts of interest
2. Pay only necessary and reasonable expenses for administration of the plan
3. Perform duties with care, skill, prudence and diligence of a person knowledgeable in this field
4. Minimize the risk of large investment losses by offering a diversified menu of investment options
5. Adhere to terms of the documents governing the plan and ensure that these documents comply with ERISA
Fiduciary Mistake #2

Not Knowing Your Responsibilities
Exclusive Benefit Rule

ERISA requires that a fiduciary discharge its duties “solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits … and defraying reasonable expenses of administering the plan.”

- Avoid conflicts of interest rather than disclose and manage them
Pay Only Necessary and Reasonable Fees

- Learn how much the plan and participants are actually paying in fees and expenses and compare against benchmarks
  - Direct Fees - Invoiced directly to plan and/or sponsor
  - Indirect Fees – Revenue sharing
- Participant Fees – Disclosure rules
- Plan Sponsor – Disclosure rules
Fiduciary Mistake #3

Not Monitoring Service Providers Regularly
Prudent Man Rule

ERISA requires that a fiduciary discharge his duties “with the care, skill, prudence and diligence under the circumstances that a prudent man acting in a like capacity and familiar with such matters would use.”
Investment Diversification Rule

ERISA requires fiduciaries to “diversify the investments of the plan so as to minimize the risk of large losses unless… it is clearly imprudent to do so.”

- Plan committees are typically assigned to handle the administration and investments of the plan
- Plan sponsor is responsible for overall selection of a “broad range” of diversified investments
Adhere to Terms of Plan

- ERISA requires that a fiduciary discharge its duties “in accordance with the documents governing the plan insofar as such documents are consistent with [ERISA]”
- Plan administration involves interpreting plan terms
  - Making discretionary decisions regarding claims and appeals
  - Selecting service providers to administer the plan
  - Making sure the plan is operated in accordance with its terms
Fiduciary Mistake #5

Setting Your Responsibilities on “Auto Pilot”
Mitigating Fiduciary Risk
Fiduciary Mistake #6

Not Establishing Framework for Committees
Investment Committee Guidelines

- Hold regular committee meetings
- Maintain well-drafted investment policy that includes:
  - Criteria for investment selection
  - Definitions for investment styles/strategies included
  - Key attributes viewed as necessary, including acceptable fees and long term investment performance relative to benchmarks and peers
- Provides documentation to outsiders of disciplined process and sound basis for decision-making
- Construct an investment lineup that is appropriate to the skill level of plan participants
Fiduciary Mistake #4

Not Having an Investment Policy Statement
Employer’s Role in Participant’s Retirement Security

- Resurgence of Employer’s role in accumulation stage of 401(k) Plan
  - Automatic enrollment and escalation provisions in 401(k) plans
  - Option to purchase annuity contracts to provide secure retirement income stream

- Success of plan based on participation rates vs adequate retirement income
  - Develop and evaluate retirement income solutions for 401(k) plans
  - Address increased longevity risk
  - Clarify employee and plan sponsor roles in meeting retirement challenges
Provide Education To Your Plan Participants

- 401(k) plans may be the only retirement “plan” for many participants
- Sponsor should address the adequacy of each individual’s retirement goals in pursuit of an “outcome based approach” to retirement
- Annual review of the plan’s participants’ readiness for retirement
- Education vs advice
Fiduciary Mistake #7

Not Providing Education for Plan Participants
Timely Deposit of Employee Contributions

- ERISA guidelines require that employee contributions and loan payments be transferred to the plan as soon as practicable from the sponsor’s general assets but no later than the 15th business day of the month following withholding from employees’ paycheck (*general rule*).

- DOL recently finalized regulations establishing a *safe harbor* for small employers (fewer than 100 participants at beginning of PY) to timely deposit employee contributions and participant loan payments – no later than the 7th business day following the date the employees would have received the contributions (payday).
DOL Investigations

Recent events indicate the number of DOL investigations will increase

- Recession will cause participants to complain about their plans
- Participants having difficulty obtaining routine documents
- Late contributions of employee deferrals
- DOL 2010 budget calls for an increase of approximately 75 investigators
- Increased fee disclosure in Form 5500 – Schedule C

Agreement between DOL and SEC to exchange information on matters of mutual interest may shed light on additional issues
Fiduciary Mistake #8

Not Knowing You’re Legally and Personally Liable
Maintenance of Plan Documentation

- Plan provisions and legal documents
- Compensation used to calculate benefits
- Contributions made to a retirement plan
- Proof of benefit distributions
ERISA Fidelity Bonds vs Fiduciary Liability Insurance

- Bond required by ERISA is a fidelity bond
  - Every person who “handles funds or other property of such plan” must be bonded
  - Amount required is 10% of the plan assets at the beginning of year unless the plan holds company stock
  - Provides protection against loss by reason of acts of fraud or dishonesty on the part of plan officials

- Fiduciary liability insurance is designed to cover claims and losses arising out of claimed breaches of fiduciary duty
Fiduciary Mistake #9

Not Insuring Your Plan Fiduciaries
Managing Risk in 2010

- Increase the amount of participant communication about investments and overall fees of their plans
- Review plan governance structure (committees, fiduciary liability, processes and procedures)
- Benchmark plan administration and procedures
- Conduct a compliance review
- Review investments and associated fees
Fiduciary Mistake #10

Not Getting Outside Expertise When Needed
Questions?
Upcoming Learning Opportunities from Retirement Plan Services

Plan Administrator Webinar:
“Mid-Year Investment & Economic Update”
Wednesday, July 14, 2010
10:00 A.M. & 2:00 P.M. CST
REGISTER

Plan Participant Webinars:
“Three Transitions to Retirement”
Session 1: Tuesday, May 25, 2010 12:00 P.M. CST
Financial Transitions: - A profound shift in your investing strategy.

Session 2: Tuesday, May 27, 2010 12:00 P.M. CST
Lifestyle & Emotional Transitions – Planning beyond the money.
REGISTER
If you have questions, please contact your Retirement Plan Consultant or the Retirement Service Center at 1.800.999.8786, option 1

Thank you!!