Fiduciary Corner

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Reducing Fiduciary Risk

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"Operating the plan for the exclusive benefit of employees and retirees" is paramount and "plan sponsors cannot go through the motions".

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Beginning with the *Tibble v. Edison International* lawsuit filed in 2007, 401(k) Plan Sponsors have witnessed a steady stream of litigation focusing on fiduciary responsibilities in general and excess fees, in particular. In reviewing the litigation, there are several common themes that sponsors should focus on in order to keep their plan out of the cross hairs.

Jerome Schlichter is the managing partner of Schlichter, Bogard & Denton, the St. Louis based law firm that has filed many of the high profile 401(k) related lawsuits currently working their way through the system. Schlichter believes that an employer's duties in sponsoring a 401(k) Plan are simple. In a February 2016 article(1), Mr. Schlichter reminded plan sponsors that "operating the plan for the exclusive benefit of employees and retirees" is paramount and "plan sponsors cannot go through the motions".

In this article, we will focus on five areas of 401(k) plan management that plan sponsors should periodically review to ensure consistency in the decision-making process and documentation of the decisions.

Investment Policy Statement Review (IPS) - while there is no requirement to adopt an Investment Policy Statement (IPS), it is vitally important to implement a specific process for the initial selection of investment options, the ongoing monitoring of the investment options offered to participants and the process of replacing underperforming investment options. If you have adopted an IPS, your ongoing fiduciary responsibilities should include an annual review of the contents of the IPS. This review should ensure that the written processes are being adhered to in your decision-making processes. The basis of several law suits, including *Tussey v. ABB,* include allegations of not following the due diligence process written in the Investment Policy Statement, when making changes to the investment line-up.

Pay Attention to Mutual Fund Share Classes - virtually every investment fund in the industry offers multiple share classes of their mutual funds. The mutual fund industry has developed the share class system as a way to provide varying amounts of compensation to distribution partners. The differences in share classes result in a wide range of different fees being paid by plan participants for the same investment.

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All fiduciaries need to review and understand those differences, including the amount of the share class expenses that is being paid to brokers and recordkeepers. As Jerome Schlichter also mentioned in the February article, "And large plans or even medium-size plans should not be paying retail fees - period."

Plan Investment Funds on Cruise Control - once the decision is made to offer an investment option on your 401 (k) line-up, it is imperative to conduct ongoing analysis on a periodic basis. Allowing a fund to linger on the line-up without written due diligence can create additional liability. In May of 2015, the Supreme Court found that there is a continuing duty to monitor and remove imprudent investment options. The Supreme Court also returned the case back to the lower courts in order to provide additional guidance on the level and frequency of the due diligence. All plan fiduciaries should adopt a specific, written process for initial fund selection, ongoing monitoring of the line-up and replacement of non-performing funds.

Service Providers on Cruise Control - in addition to monitoring the investment line-up, it is vital that plan sponsors benchmark the services and fees being paid for plan administration, in order for the plan fiduciaries to determine if the fees paid for the services are "reasonable". Utilizing an independent service to benchmark the provider or conducting a formal Request for Information or Request for Proposal every 3 to 5 years will ensure that the 401(k) Committee can determine if the services and fees are reasonable. In a lawsuit filed by Oracle employees against the company in January 2016, the plaintiffs allege that failing to periodically conduct a request for proposal for recordkeeping services is a breach of the company's fiduciary duty.

Cross Subsidization of Plans - plan sponsors need to cognizant of the appearance of tying 401(k) plan services to services being provided to the company for either other benefit plans or banking services. In the *Tussey v. ABB* case, the plaintiffs discovered that some services to ABB plans were being provided at a loss while the 401(k) plan, with employee assets, was being operated at a significant profit. Also, in a case settled in 2015, Lockheed Martin was alleged to receive favorable terms for other banking services in exchange for hiring State Street as the 401(k) plan recordkeeper. Both of these examples were viewed a significant "Conflicts of Interest".

As you can see there has been a rash of litigation cases around 401(k) plans over the past few years. This article is intended to provide Plan Sponsors the opportunity to take pause and assess their own processes and procedures. Plan Sponsors can learn from these cases so if you need additional details on the cases or need any assistance, please feel free to contact either Jim Sotell or Scott Fremer at Comperio Retirement Consulting.

1. How (Not) To Get Sued By 401(k) Tort Terror Jerry Schlichter - Posted By: John Sullivan February 19, 2016

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