There has been a great deal of discussion over the past several years surrounding the fiduciary responsibilities of retirement plan sponsors. Each year, the standard for fiduciary conduct appears to increase the accountability of the individuals responsible for the management of a plan.

Plan sponsors and fiduciaries have become very concerned about their fiduciary obligations and the risks associated with their employee benefit plan responsibilities. They want to understand how they can meet their responsibilities and mitigate any fiduciary risk for their organizations and for individual fiduciaries.

Most plan sponsors understand that plan fiduciaries have a responsibility to act in the best interest of the plan and plan participants. These same plan sponsors may struggle to define who is a fiduciary to their plan. Additionally, plan sponsors are generally unaware that being a fiduciary can put their personal assets at risk. This is a substantial potential liability for fiduciaries who may not fully grasp their responsibilities nor the implications of their actions or inactions surrounding the plan.
Fiduciary Risk Mitigation
Fiduciary risk mitigation should be an important concept for all plan sponsors and fiduciaries. Business objectives of strategic fiduciary risk mitigation for plan sponsors are to:

- Protect the financial viability of an organization
- Protect the financial viability of an individual fiduciary
- Understand the consequences (both organizational and individual) of a fiduciary breach
- Take appropriate action to mitigate these risks.

Fiduciary risk mitigation is designed to create processes and procedures that protect the plan sponsor and individual fiduciaries. By not implementing these processes and procedures, plan sponsors have not only increased the financial risk for their organization, they have also increased the financial liability of individuals who are fiduciaries to the plan(s).

**ERISA Overview**

The Employee Retirement Income Security Act (ERISA) establishes Standards of Conduct for those who manage an employee benefit plan and its assets (called fiduciaries). Many of the actions involved in operating a plan make a person or entity performing the function a fiduciary. It is important to understand that a fiduciary is determined by action, not by title. A fiduciary is any individual or entity that exercises discretion or control over a plan.

Plan fiduciaries have the following Standards of Conduct:

- Act solely in the interest of plan participants and their beneficiaries and with the exclusive purpose of providing benefits to them
- Carry out duties prudently
- Follow plan documents
- Diversify plan investments
- Pay only reasonable plan expenses.

These standards are the basis for all actions and activities undertaken by plan fiduciaries. Fiduciaries cannot be conflicted in their responsibilities. Their sole interest as a fiduciary is to the plan, its participants and beneficiaries. Further, fiduciaries must act prudently and must follow the Prudent Expert rule, which states that a fiduciary must act as an expert would act in a similar circumstance. Absent that expertise, a fiduciary may hire someone who has this expertise. Many plan sponsors and fiduciaries choose to hire consultants and advisors to assist them with providing expert advice to a plan.

Fiduciaries are required to follow the basic Standards of Conduct listed above. If these standards are breached, a plan sponsor may be held liable and the individual fiduciary may also be held personally liable. Additionally, not only are fiduciaries liable for their actions, they could also be liable for the actions of their co-fiduciaries.

**Consequences of a Fiduciary Breach**

A number of current lawsuits focus on a breach of fiduciary responsibility by retirement plan sponsors. Most of these lawsuits have focused on the Standard of Conduct surrounding “pay only reasonable plan expenses.” The plaintiffs in these suits claim that fiduciaries were not monitoring plan expenses and, therefore, excessive plan fees were being paid by plan participants. Some of the more newsworthy lawsuits and their corresponding settlements include:

- EES of Edison International won a federal court ruling that Edison did “substantial harm” by failing to negotiate lower plan fees with the vendor for the 401(k) retirement plan.¹
- Bechtel made an agreement in October 2010 to an $18.5 million settlement for excessive fees. The plaintiffs had claimed that Bechtel violated its fiduciary responsibilities because the plan sponsor did not use the size of its 401(k) plan to negotiate lower plan expenses.²
- Caterpillar reached a $16.5 million settlement for excessive fees.³
- General Dynamics reached a $15.1 million settlement for excessive fees.⁴
These cases show that there is significant potential liability for a breach of fiduciary responsibility. Additionally, in *LaRue v. DeWolff, Boberg & Associates, Inc.*, the U.S. Supreme Court recently affirmed that individual participants may now sue plan fiduciaries. This ruling is a vast contrast to the historical practice of courts allowing only classes of individuals or individuals representing the plan as a whole to bring suit against a fiduciary. These potential liabilities and the fact that individual participants may drive these lawsuits increase the need for plan sponsors to work to mitigate their fiduciary risks.

As noted above, individual fiduciaries also may be found personally liable for a fiduciary breach. This personal liability can extend to a breach made by a co-fiduciary if that fiduciary knew or should have known of his or her co-fiduciary’s violation. Remember, plan fiduciaries can pass off some of their fiduciary responsibilities to co-fiduciaries; however, they still have a duty to be sure that those co-fiduciaries are complying with the responsibilities charged to them.

**Fiduciary Risks Articulated**

A great deal has been written about the common issues confronting retirement plan fiduciaries. In the defined contribution plan world, the following are among the most common risk areas that plan sponsors face:

- No investment policy statement (IPS), or not reviewing the IPS to ensure it is still consistent with investment decisions
- Not having appropriate plan governance (plan committees and investment committees)
- Not having regular committee meetings and not documenting those meetings
- Not taking action when issues are discovered and funds need replacing
- Not making timely plan contributions
- Not understanding the costs of the plan, the revenues collected on behalf of the plan and the implications this has for participants
- Not regularly reviewing the service agreements with the vendors and not understanding the provisions of their contracts with these vendors
- Not following the plan document provisions.

While this is not a comprehensive list of issues, it is representative of fiduciary breaches that are common to retirement plans. As noted earlier, plans are being sued because they are not monitoring plan expenses and participants are not paying reasonable fees. By addressing these common pitfalls, a plan sponsor will be much better armed should the Department of Labor (DOL), Internal Revenue Service (IRS) or a participant question compliance with fiduciary duties.

**Best Practices for Fiduciary Risk Mitigation**

How does a plan sponsor mitigate these risks? There are a number of best practices that may reduce the liability of both plan sponsors and individual fiduciaries.

- **Get help.** Fiduciaries have a requirement to act as a prudent expert. If you are not an expert, get expert assistance. Dedicated retirement plan advisors can guide fiduciaries through this process. Look for these characteristics in your advisors:
  - Specialization. Look for advisors who specialize in working with retirement plan sponsors and fiduciaries.
  - Experience. Advisors who have been engaged in their practice for several years
  - Expertise. Retirement plan experience focusing on compliance and fiduciary responsibilities
  - Accept fiduciary responsibility. Look for advisors who will accept fiduciary responsibility for their actions on behalf of your plan.
  - Vendor knowledge. Advisors need to understand vendor relationships and use that knowledge to help optimize a plan sponsor’s experience.

**takeaways >>**

- The objectives of mitigating fiduciary risk include financial protection of an organization and individual fiduciaries and understanding the consequences of a fiduciary breach.
- A *fiduciary* is determined by action, not by title.
- Although plan fiduciaries can pass off some responsibilities to co-fiduciaries, they still must be sure that co-fiduciaries are complying with the responsibilities charged to them.
- Plans are being sued because they are not monitoring plan expenses and participants are not paying reasonable fees.
- Fiduciaries have a requirement to act as a prudent expert, which may necessitate getting expert assistance.
fiduciary risk mitigation

Steven P. Kjar, CEBS, CIMA, is a vice president at Lockton Financial Advisors, LLC, and Lockton Investment Advisors, LLC, in San Francisco, California. He has more than 29 years of retirement services experience with defined contribution, defined benefit and nonqualified deferred compensation plans. Kjar previously was a regional vice president for Diversified Investment Advisors and MFS Retirement Services. He earned a B.A. degree in economics and business administration at Coe College and completed a graduate-level program at the Haas School of Business at the University of California, Berkeley.

Jessica Skinner, J.D., is the compliance attorney for Lockton Financial Advisors, LLC, and Lockton Investment Advisors, LLC. She previously practiced securities law for a boutique securities law firm specializing in investment advisor and broker dealer compliance, as well as corporate governance. Skinner earned a B.A. degree in history from Drury University, Springfield, Missouri and a J.D. degree from the University of Tulsa College of Law.

• Form a retirement plan committee. Give the committee responsibility for the plan and the ability to take action on behalf of the plan.
  — Have regular committee meetings.
  — Document all meetings, discussions and decisions.
• Write an IPS. An IPS provides the documentation and the process a plan committee will use to select, monitor and replace funds.
• Understand the plan’s contracts, services, expenses and revenues.
  — Read contracts with vendors. Understand the services provided to the plan, how much these services cost and who bears the cost.
  — Benchmark fees and negotiate to ensure they are appropriate.
  — Understand that many investments pay revenue to the recordkeeper. Know the revenues accrued for the plan and how these revenues compare to plan expenses. Excess revenues should be accounted for and utilized for the benefit of the plan and plan participants.
• Know the plan.
  — Administer the plan according to the plan document.
  — Make contributions on a timely basis.
  — Make sure the staff understands the plan.
  — If the plan does not meet its objectives, work with the plan’s attorney to get the plan amended.
• Are you a fiduciary?
  — Make sure you know what it takes to be a fiduciary to the plan.
  — Make sure you know your co-fiduciaries. Remember, you are responsible for their actions and could be liable for their breaches.
  — Ensure that your plan is following a documented process.
  — Obtain the appropriate fiduciary insurance and ERISA bonds.

Simply put, fiduciary risk mitigation is the application of best practices in the administration of the plan. Implementing these best practices will reduce the liability of the plan sponsor and individual fiduciaries while, at the same time, creating a more efficient and effective plan for participants.

Endnotes