FIDUCIARY GOVERNANCE: *CHALLENGES & OPPORTUNITIES*

BY: JASON C. ROBERTS & BONNIE TREICHEL[i]

Consistency, predictability and scale are three concepts that seem to be elusive when it comes to servicing retirement plans. With myriad changes to ERISA now in play, many advisors are challenged to deliver actionable solutions to the multitude of challenges facing their clients. On the other hand, those who have cracked the code are reaping significant benefits as they are able to market to a universal need among employers – time management.

By adopting repeatable processes across all aspects of fiduciary governance, you can help streamline decision-making for plan fiduciaries and lower risks to your clients and yourself. Moreover, if you position yourself as the "quarterback" for information gathering, analysis and coordination of services providers, you will be better positioned to increase client retention and prospecting opportunities as competitive pressures continue to mount.

Once the plan is operating efficiently, you can spend more time working on helping participants maximize their benefits. Because the areas in which sponsors now need the most support are not investment-related, they should not implicate additional fiduciary liability for you or your supervising firm. Consequently, you may be able to develop more profitable and rewarding relationships with plan participants through the delivery of outcome-orientated education.

FIDUCIARY RESPONSIBILITIES FOR PLAN SPONSORS

ERISA requires plan fiduciaries to consider relevant information (or that which they should know to be relevant) in order to make well-informed decisions respecting the management or administration of the plan. Where they lack the necessary expertise, they are required to hire knowledgeable professionals.

There are three primary areas of fiduciary responsibility for retirement plan sponsors:

1) selection/monitoring/replacement of investments;
2) selection/monitoring/replacement of service providers; and
3) administration and reporting.

Due primarily to the fact that the majority of retirement plans are distributed through financial services intermediaries, most plans have some degree of support when it comes to investments. Indeed, many operate with an investment committee and follow investment policy statements. With respect to the latter two categories, however, sponsors often lack defined processes (particularly in the micro- to mid-sized markets), and these are the areas now under a microscope.

Plan-level fee disclosures provide sponsors a roadmap from which fiduciaries are expected to make better informed decisions; and participant disclosures are creating bottom-up pressures from influential, highly compensated employees or long-time employees that have larger balances and pay more of the plan's expenses. The DOL has vowed to a rigorous enforcement agenda and is receiving more actionable intelligence through enhanced Schedule C reporting and "whistleblower" initiatives. Litigation also continues to expose gaps in process – particularly relating to the selection of plan service providers (e.g., failures to properly evaluate revenue sharing).

Controversy tends to lead to client attrition. Whether right or wrong, plan sponsors often believe that it's the advisors job to keep the plan on track. DOL investigations and litigation can be a significant drain on resources for employers and advisors who get called in to prepare responses and/or participate in interviews/depositions. Sound fiduciary governance and documentation can go a long way in preventing claims or expediting inquiries.

Educating sponsors on their fiduciary duties and the process required to demonstrate compliance can lessen the time advisors spend with clients on day-to-day administration. You can develop consistent and scalable approaches to fiduciary education by leveraging resources published by the DOL and third-parties.[ii]

DETERMINING THE APPROPRIATE COMMITTEE STRUCTURE

Once fiduciaries understand the nature of their respective duties, you can help establish a formal committee structure that reflects the strengths and weaknesses of its members.[iii] Where the person(s) delegated with the authority to make certain fiduciary decisions lack the requisite expertise, you can help align available resources with the goals of the committee – enlisting the expertise of third-parties where appropriate.

For the most part plan sponsors, large and small, are subject to the same legal and regulatory requirements under ERISA. Large and jumbo sponsors often have the luxury of dedicated personnel who focus solely on running the company's benefit plans. Typically, the farther you go "up market," the more sophisticated and elaborate plan committees become.

Many goals, however, can be accomplished with less complexity. In fact, smaller plans with fewer resources often benefit by a more streamlined approach, as the procedures are more likely to be followed when each committee member has a clear focus.

ERISA provides wide latitude in terms of allocating roles and responsibilities. All plans are required to designate at least one person(s), office, officer, committee, etc. to serve as the plan's "administrator" or named fiduciary. You can even enlist the support of rank and file personnel (e.g., bookkeepers, office managers, etc.) to facilitate some of the ministerial functions by designating them as non-voting members of the plan committee. At the end of the day, the committee should represent each of the three areas of fiduciary responsibilities, and experienced counsel should review the plan document to ensure it aligns with the desired allocation of roles, responsibilities and liabilities.

SELECTING THE RIGHT AMOUNT OF PROCESS

As is often the case, the best defense is a good offense. That said, it's a slam dunk case when a regulator or plaintiff can show that the fiduciaries failed to adhere to protocol. ERISA requires plan fiduciaries to follow the plan documents – note the "s" – meaning all documents governing the operation of the plan, including administrative and governance procedures.

While most large and jumbo plan sponsors employ sophisticated committee structures and adhere to bylaws, smaller plans may lack the resources, expertise or time to manage to such formal standards. You may want to consider a procedural framework that doesn't obligate the plan fiduciaries to perform activities beyond those which are required to demonstrate the required prudence.

Constructing process through a series of open-ended questions, for example, can help generate a fiduciary file organically. The documents referenced and information considered can be recorded along with the basis for the decision ultimately reached (e.g., to hiring/retaining/firing a service provider, approving the filing of required reports like the Form 5500 or approving the distribution of participant disclosures prepared by third-parties such as the TPA or recordkeeper).

CONCLUSION

Successful advisors are differentiating themselves by moving beyond investment committees and investment policies. By taking a more holistic approach, you can manage risk and save yourself and your clients valuable time and energy which can be redeployed in a way that helps participants.

By helping to construct a solid foundation for plan fiduciaries that places you in a central role, you can significantly reduce the gaps that lead to lost time and exposure for plan sponsors. You should consider leveraging the support of TPAs where appropriate and the features and functionality of the provider's platform. You may find that with the proper reports and a few clicks of the mouse, you can prepare information to streamline decision-making and documentation for plan fiduciaries.

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[i] Jason C. Roberts is the founder and CEO of the Pension Resource Institute, LLC (PRI) – a consulting firm integrating securities and ERISA compliance to deliver competitive and compliant solutions to the retirement plan marketplace – and is also the managing partner of Roberts Elliott, LLP – a law firm focusing on ERISA- and investment-related matters. Bonnie Treichel is an associate at Roberts Elliott, LLP and counsel to PRI.

[ii] See e.g., See PRI – Resource Guide – Fiduciary Education at www.pension-resources.com/resources; see also, DOL Meeting Your Fiduciary Responsibilities at www.dol.gov/ebsa/publications/fiduciaryresponsibility.html.

[iii] It is important to note that the appointment of committee members is a fiduciary function in and of itself and, therefore, must be undertaken prudently. We recommend that you clearly define your role in this regard as limited to education to help decision-makers consider who may be best suited to serve in a fiduciary capacity and leave the ultimate decisions to the plan sponsor.