

Regulatory Compliance: Targeting Solutions for Your Client's Greatest Challenges

Jason C. Roberts, Esq., AIFA®
Chief Executive Officer
Pension Resource Institute, LLC



Information and materials developed by Pension Resource Institute, LLC (PRI). PRI does not provide legal advice, and makes no representations that the materials are suitable for any purpose other than education.

Regulatory Enforcement and Rulemaking

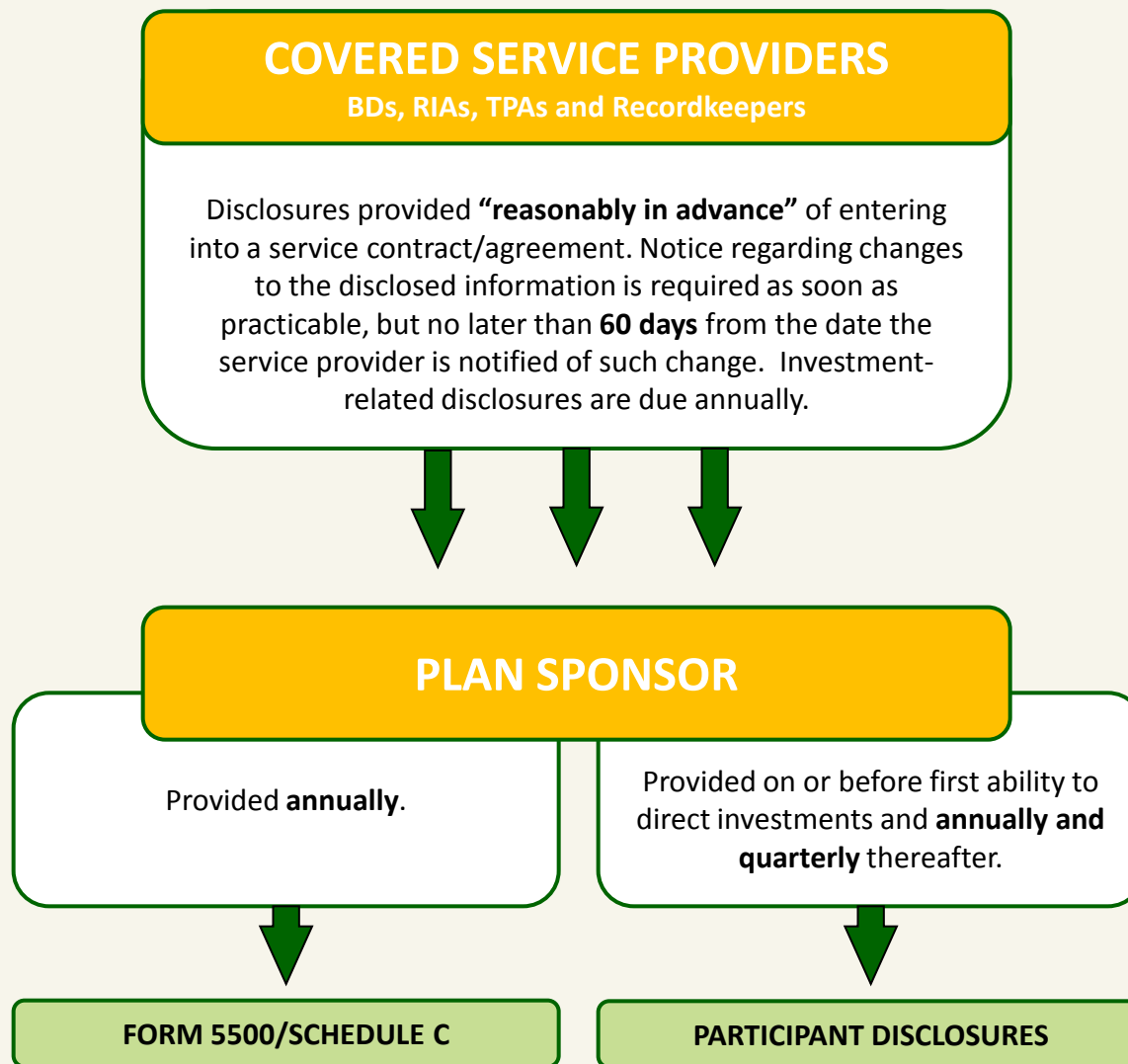
Regulatory Initiatives

- Department of Labor (DOL) increases investigation and enforcement
- DOL and SEC cooperation through Consultant Adviser Project (CAP)
- IRS positioned to enhance plan audits
- ERISA litigation is moving down-market
- New regulations and exemptions will highlight prohibited arrangements

Proposed & Final Regulations

- Final rule for fee disclosure under ERISA 408(b)(2)
- Final rule for participant advice
- Final participant disclosure regulations under 404a-5
- Proposed expansion of the definition of fiduciary under ERISA 3(21) [withdrawn]
- Proposed changes to suitability re qualified default investment alternatives (QDIAs)
- Proposed rulemaking regarding summary disclosure under 408(b)(2)

ERISA Disclosures



Observations in the marketplace:

- Plan-level fee disclosures provide a roadmap for regulators and would-be plaintiffs;
- Participant-level disclosures create bottom-up pressure on fees and services from plan participants;
- Products and compensation arrangements are increasingly complex;
- Allocation of roles and responsibilities are unclear; and
- Cutbacks in sponsor personnel require more efficient protocols.

Plan Sponsor Challenges

Towers Watson 2011 Survey:

- Most employers expect to devote more time addressing retirement plan governance over the next two years;
- Respondents expect the top governance challenges organizations face in the next two years to be retirement benefit costs (77%) and regulatory complexity (73%);
- Only one in four plan sponsors (26%) conduct regular compliance reviews -
 - The most common reasons for a review are anticipated new risks and a pending IRS or DOL audit; and
- About half (51%) of respondents use a single committee for all retirement plan governance.

Impact of New Regulations

Projected Impact on Financial Advisors:

- Increased enforcement and litigation;
- Disclosures create a roadmap for regulators and potential plaintiffs;
- Unless an exemption applies, potentially conflicted advisers will have to limit investment-related functions to monitoring and education, and plan sponsors will be on notice of such limitations;
- Bottom-up pressure on fees and services from participants;
- Increasing reliance on financial advisors to demonstrate value beyond investment-related support (e.g., fiduciary governance, committee education, etc.); and

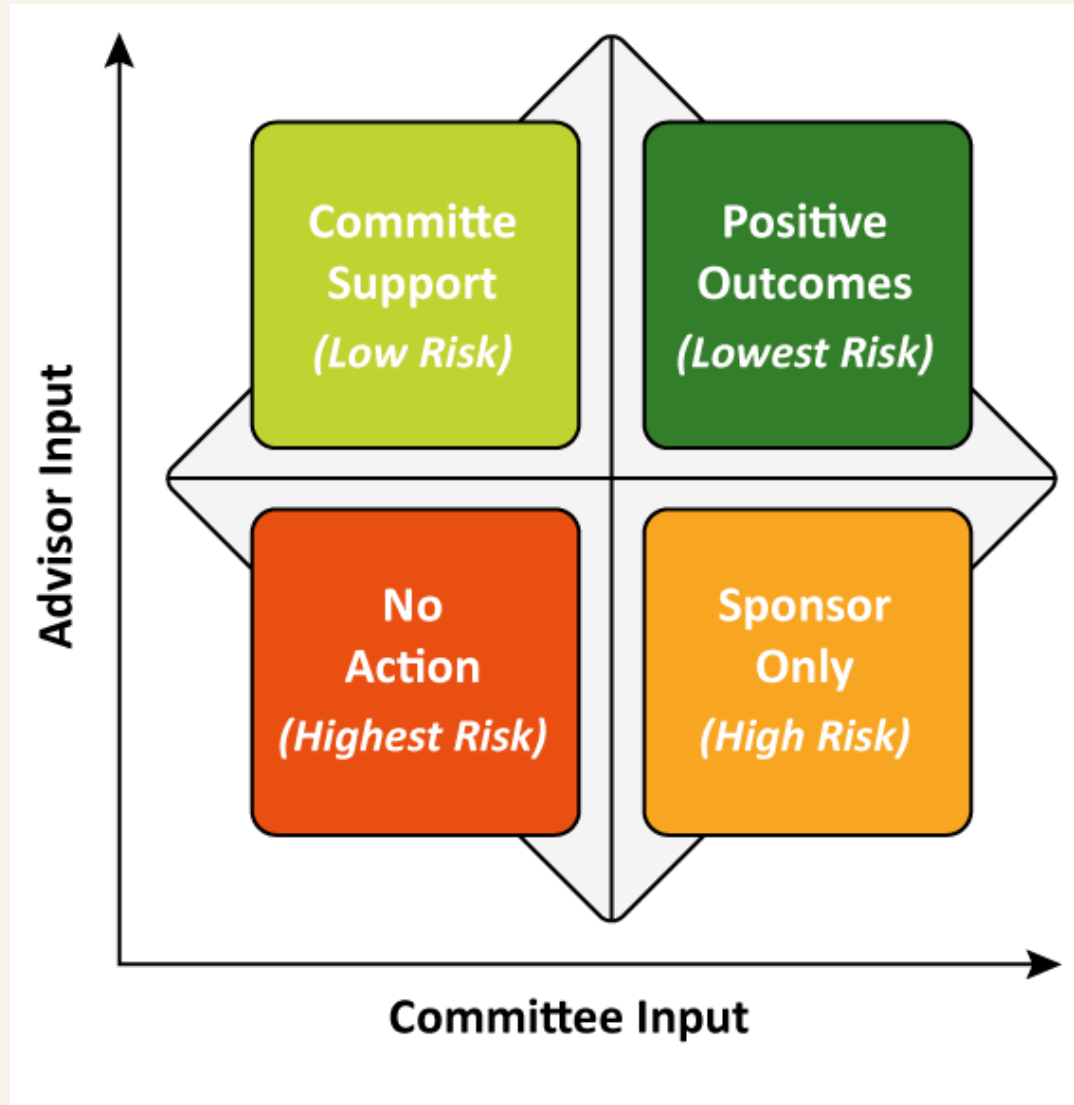
Potential Role of the Plan Advisor

	Investment Selection	Service Provider Selection	Administration and Reporting
Non-Fiduciary Only	Plan Sponsor w/ guidance from advisor.	Plan sponsor w/ guidance from advisor.	Plan sponsor w/ guidance from advisor.
3(21) Co-Fiduciary	Plans sponsor and advisor.	Plan sponsor w/ guidance from advisor.	Plan sponsor w/ guidance from advisor.
3(38) Investment Manager	Investment manager has sole discretion, but advisor can explain investment-related information and help select/monitor managers.	Plan sponsor w/ guidance from advisor.	Plan sponsor w/ guidance from advisor.

Value Added Non-Fiduciary Services

- Committee Support – assist in the formation of effective committees beyond investments via actionable education, process and documentation;
- Disclosure Management– assisting sponsors with selection and monitoring of service providers through education, process, benchmarking, and vendor coordination;
- Document Retention – introduction of audit ready approach to fiduciary file maintenance through education, process and mock investigations;
- Participant Inquiry Support – risk management through education and process; and
- Outcome-orientated Education – driving and reporting on participant successes through education, retirement income planning, monitoring, and reporting.

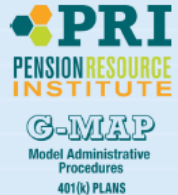
Needs Assessment / Role of Advisor



Fiduciary Governance Checklist

- Fiduciary Education
 - Do plan fiduciaries understand the nature and scope of responsibilities and potential liabilities?
- Committee Structure
 - Does the plan committee structure represent the desired allocation of responsibilities and liabilities?
- Policies and Procedures
 - Are there procedures to address the following fiduciary functions:
 - Selection and monitoring of service providers;
 - Selection and monitoring of plan investments; and
 - Administration and Reporting?
- Risk Management
 - Does the sponsor have a defined process for educating participants on plan fees and resolving inquiries?
 - Does the “fiduciary file” contain sufficient information to support the decisions made by plan fiduciaries?

Sample Process Mapping



Step 1: Educate Fiduciaries

ERISA imposes personal liability on anyone who makes certain decisions for the plan. These "fiduciaries" must: 1) consider relevant information (or that which they should know to be relevant) to; 2) make informed decisions; and 3) if they lack expertise, hire professional assistance.

Plan Committee (Voting)	
Responsibilities	Liabilities
follow plan documents	prohibited transactions
diversify investments	fiduciary breach
engage expertise	personal liability
make well-informed decisions	

G-MAP provides a committee framework design to manage risk and save time through prudent, efficient governance processes. Plan fiduciaries (voting members) make decisions and day-to-day support is provided by third-parties and internal personnel (non-voting members). Non-voting members work with the advisor to gather information, evaluate and make recommendations to the fiduciaries.

Step 3: Implement Process

Plan fiduciaries must follow a prudent process to:

- select/monitor/replace investments;
- select/monitor/replace service providers; and
- verify and deliver required notices/file reports.

The committee should evaluate each duty and the necessary to facilitate compliance with ERISA.

Step 2: Consider Needs & Assign Roles

The plan document governs fiduciary responsibilities. While at least one person, committee, etc. must be designated as the plan administrator, anyone who makes decisions over the plan will be considered a fiduciary.

G-MAP assigns fiduciary status to the voting committee members; administrative support may be provided by third-parties and non-voting members. Experienced ERISA counsel should review plan document to incorporate desired allocations.

Recommendations to Committee

Plan Advisor

Basis for Decision Filed

See G-MAP pp. 1.1, 1.2 and

Investments

Role of advisor will depend upon ability to render investment advice to ERISA plans. See G-MAP p. 1.3

Subcommittee members should be familiar with investment-related concepts, reports, etc. and may participate in preliminary evaluations.

Information reviewed (investments available, IPS, monitoring reports, etc.) is filed and recommendation sent to committee to approve/reject.

Administration

Advisor assists with process re information-gathering, reconciliation of notices/reports and calendaring/meetings.

Subcommittee member should be experienced in filing governmental reports (i.e., accounting, bookkeeping, etc.).

Information reviewed is filed and notices, reports, etc. are sent to committee to approve/reject.

Service Providers

Advisor assists with process re information-gathering, review of services, benchmarking, etc.

Subcommittee member should be familiar with proposal process (i.e., procurement, etc.) and may participate in preliminary evaluations.

Information reviewed (408(b)(2) disclosures, benchmarks, etc.) are filed and recommendation sent to committee to approve/reject.

Fiduciary File (Documents & Information Considered and Basis for Decision)



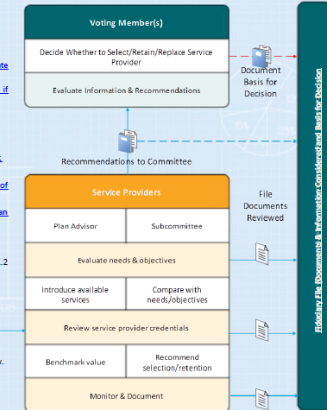
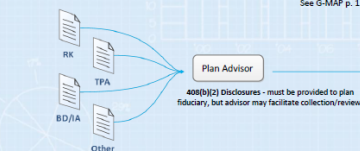
Fiduciaries are required to make informed decisions when engaging service providers that are paid from plan assets. It is a fiduciary breach to enter into an arrangement that is unnecessary or unreasonable. ERISA 408(b)(2) now requires all "covered" service providers to disclose information about the services provided and compensation received so fiduciaries can properly evaluate their value to the plan. G-MAP provides a framework for gathering/evaluating information and making recommendations to voting members to facilitate the selection/monitoring/replacement of service providers.

Step 4: Process 408(b)(2) Disclosures

- Determine covered service providers under 408(b)(2);
- Establish procedures to track receipt of disclosures & evaluate the completeness of the information; and
- Establish processes to request additional information, if necessary.

Step 5: Evaluate Needs, Services & Fees

- Examine the needs of the plan and participants and compare with available services;
- Consider experience/credentials of service providers and utilization of services;
- Benchmark the value of the services in light of the needs of the plan, experience of service provider and services offered to similar plans;
- Ensure that ERISA permits plan assets to be used to pay for each service and that plan document allows for any delegations (i.e., investment managers);
- File documentation relied upon and evidence of process for evaluation.



Fiduciaries are responsible to ensure that the plan is administered properly and that notices and reports are appropriately delivered. The G-MAP processes below are designed to facilitate these duties and documentation demonstrating compliance with ERISA. While the TPA and/or RK may assist in the preparation and delivery of these items, fiduciaries remain responsible to ensure they are filed timely accurately.

Step 6: Review Administrative Needs

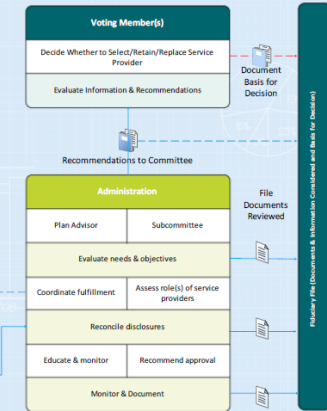
- Update plan documents to reflect new requirements;
- Evaluate timeliness/accuracy of contributions;
- Review distribution testing results; and
- Consider bonding and insurance needs.

Step 7: Coordinate Reporting

- Determine notice/filing requirements (i.e., 2016, 404(a), 2300, etc.);
- Calendar deadlines and establish milestones;
- Coordinate process for delivery of notices/reports and Committee review/approval;
- Reconcile fee-related information in proposed notice/report with 408(b)(2) disclosures;
- Deliver recommendation (to approve or reject) to Committee along with support; and
- Establish process for distribution and verify timing in accordance with ERISA.

Step 8: Prepare for Inquiries

- Prepare for situations in which inquiries will arise (i.e., above average fees, specialized services, etc.);
- Educate participants on plan benefits and fees;
- Identify documents required to be produced upon request;
- Implement response and escalation procedures; and
- Monitor utilization/satisfaction of services.



Committee Substructure and Sample Processes

INTAKE & EVALUATION

SUBCOMMITTEE: 1 INVESTMENT SELECTION & MONITORING

Fiduciaries are required to educate themselves in order to prudently select and monitor investments that are appropriate to make available for plan participants. Decisions must be well informed and documented, and fiduciaries must ensure certain investment-related information is communicated to plan participants.

EVALUATION

- How sophisticated are plan participants in terms of investment knowledge?
- What behaviors do participants exhibit regarding risk tolerance, rollovers, etc.?
- Do the asset classes offered allow participants to diversify appropriately?
- What are the criteria for selecting and monitoring investment options?
- Do investment options need to be added, removed and/or replaced?

OUTPUT

Documentation of information reviewed and decision to select/replace investments



SUBCOMMITTEE: 3 ADMINISTRATION & REPORTING

Fiduciaries are responsible to ensure that certain notices are provided and that forms are properly filed. The 408(b)(2) disclosures should contain the data required to be provided by fiduciaries to plan participants (e.g. under the new 404a-5 regulation) and to the DOL (in the Form 5500 and Schedule C, if applicable). While the plan's TPA or Recordkeeper may facilitate the delivery of this information, fiduciaries remain responsible to ensure the notices and disclosures are accurate and timely delivered.

EVALUATION

- What notices are required to be provided to plan participants at what frequency?
- What forms are required to be filed and what are the corresponding deadlines?
- What records will be relied upon for the required data?
- Who is responsible for reviewing, approving and distributing notices and filings?

OUTPUT

Notices and filings



SUBCOMMITTEE: 2 SERVICE PROVIDER SELECTION & MONITORING

Fiduciaries are required to make informed decisions when selecting and monitoring service providers, as it is a fiduciary breach to enter into an arrangement that is unreasonable. The new 408(b)(2) regulation requires all "covered" service providers to disclose information about their services and compensation to plan fiduciaries. If the fiduciaries do not have sufficient knowledge to evaluate the disclosures, they need to hire the expertise required to make a well informed decision to retain or replace service providers.

EVALUATION

- What are the needs of the plan/participants?
- Do participants utilize the services offered?
- Are the services necessary?
- What is the experience and background of the service provider?
- How is the service provider compensated?
- Are there any potential/actual conflicts of interest?
- Is the total amount of compensation received reasonable (vis-à-vis an appropriate benchmark)?

OUTPUT

Documentation of information reviewed and decision to select/retain service provider



EXAM READY FIDUCIARY FILE

Additional Resources

WEST

Jason C. Roberts
Manhattan Beach, CA
310 210 1679

jroberts@pension-resources.com

MIDWEST

Tom Clough
Kansas City, MO
913 236 9841

tclough@pension-resources.com

EAST

Amy Glynn
Boston, MA
617 834 0900

aglynn@pension-resources.com

www.pension-resources.com