Fiduciary Responsibility Series:

Disclosures to participants — the responsibility to inform and educate

As a fiduciary, you're required to disclose certain information about the plan to your participants and beneficiaries, as well as educate them about the plan's saving and retirement investment opportunities. Some of this information is mandated by ERISA and/or the Internal Revenue Code. And some relies on your judgment concerning what your participants need to know in order to make informed retirement planning decisions. All of it becomes a critical part of a communication and education program designed to make your employees aware of their options, so that they may make appropriate decisions, and are encouraged to actively participate in the plan.

Because participant disclosures are so vitally important to fulfilling your fiduciary responsibilities, be sure to watch for these potential mistakes:

- Failing to disclose plan changes to participants and/or provide statutory notices
- Failing to provide adequate investment education to empower participants to make informed decisions
- Failing to provide proper fee disclosure, particularly in light of the recent fee disclosure rules

In addition to watching out for these potential mistakes, you can also seek advice from your legal counsel to help you meet your fiduciary responsibilities.

Mistake #1: Failing to disclose plan changes/and or provide statutory notices

Under the fiduciary reporting and disclosure provisions of the Employee Retirement Income Security Act of 1974 (ERISA), you must keep your participants and beneficiaries apprised of your plan's provisions – and any changes – by providing them with certain documents and notices. Failure to furnish these documents could subject your plan's fiduciaries to liability and penalties under ERISA, as amended.

Some notices are required annually while others are specific to elements in your plan. These disclosures fall broadly into three categories:

1) Plan terms and changes. A Summary Plan Description (SPD) explaining the plan's material provisions in simple language must be furnished to participants (and beneficiaries) within 90 days after becoming a participant or beneficiary. You are also required to disclose the plan's terms to participants through an updated SPD every five years. Further, if you modify any of the plan's material provisions, you must also provide either a revised SPD or a separate Summary of Material Modifications (SMM) within 210 days of the end of the plan year in which the plan was amended.

2) Plan finances. You must provide participants with a Summary Annual Report (SAR), which summarizes the financial information in the plan's annual report (Form 5500). The SAR must be provided to participants by the end of the ninth month following the end of your plan year, taking into account extensions for the ERISA 5500 filing. For instance, if your ERISA 5500 filing, with extensions, is required by October 15, then you must provide the SAR to participants and beneficiaries receiving benefits by December 15 of that same year.

In the first issue of the **Fiduciary Responsibility Series**[1] we introduced ten "common fiduciary mistakes" — obstacles to fiduciary responsibility that may have damaging consequences. In this and other installments, we take a deeper look at these fiduciary missteps, grouped in four categories:

Plan documents: Plan document failures and failing to understand and follow restrictions in the plan's funding vehicles

Disclosures to participants: Failing to disclose plan changes to participants and providing inadequate investment education and fee disclosure (this issue)

Investments: Improper selection and improper monitoring of plan investment alternatives

Fiduciary governance: Selection of plan fiduciaries; improper delegation of fiduciary functions; undue reliance on an "expert;" fidelity bonds and fiduciary liability insurance

3) Statutory notices. You must provide initial Qualified Default Investment Alternative (QDIA) and auto-enroll notices (if applicable to your plan). Detail on QDIA notices is provided below with other investment disclosure and notice requirements. Initial auto-enroll notices must be provided at least 30 days prior to plan participation or, with respect to certain automatic enrollment plans, no later than an employee's date of hire or as soon as practicable before his/her first automatic contribution to the plan. Annual auto-enroll notices are required 30 to 90 days prior to the beginning of each plan year (see below for QDIA time frame). Finally, if you offer a 403(b) elective deferral plan, although this is not an ERISA fiduciary requirement, you should provide a universal availability notice that lets employees know the plan is available to them and describes eligibility requirements and contribution limits. There is no guidance expressed in the final 403(b) regulations governing the content for or timing of issuing the universal availability notice to participants, but you might want to provide it to new employees upon hire and to existing employees at least once a year.

Avoiding ERISA disclosure requirement failures

Being aware of your required participant disclosures is certainly a first step, but you must also implement processes for creating and disseminating this information in a timely manner and for documenting that you've done so. That's where a trusted plan provider with a robust offering of communication, education and notification services can be of tremendous help.

Plan sponsors who choose to distribute disclosures electronically, are given a safe harbor under DOL regulations to do so if participants have regular access to their employer's electronic system or website in the course of their job. Distributing disclosures electronically outside the workplace generally requires a written consent from the participant. Note that the DOL has solicited comments on whether to expand or modify electronic disclosure provisions.

Mistake #2: Failing to provide adequate investment education

Providing a quality communications and education program is vitally important, even though it goes beyond your fiduciary responsibility of offering education around fee disclosures. To motivate employees to join the plan and help participants become fully engaged in keeping their retirement savings on track, you must show them how the plan works, the benefits of participating, how to enroll (at least every 12 months) and information on how to invest their money.

Again, some of this information will come in the form of required disclosures, while the rest will depend on the support you provide through your communication, education and advice program. Note that the more continuous and relevant your communication to participants is, the more likely they are to remain engaged with the plan and focused on retirement readiness.

Investment disclosure and notice requirements

The increased attention being given to fee transparency due to disclosure regulations presents plan sponsors with a valuable opportunity to help participants make more educated decisions about their retirement plans. And it's clear that the spirit of the disclosure requirements puts the best interests of participants at the forefront of a sponsor's concerns. Importantly, failure to provide some of these disclosures could result in a breach of fiduciary duty. Further, it could expose your plan fiduciaries to both professional and personal liability if a participant can show losses related to your failure to disclose required information. Your required participant investment disclosures include:

QDIA notices. In order to limit fiduciary liability when offering a Qualified Default Investment Alternative, you must provide both initial and annual notices detailing the circumstances in which default investments will be made on participants' behalf, their right to direct the investment, a description of the QDIA, transfer rights to other plan investment options and where to get information on the plan's other investment options.

Failure to provide these disclosures could result in a breach of fiduciary duty.

- Initial – Provide this notice to new hires at least 30 days before a participant's date of plan eligibility or first investment in a QDIA. Alternatively, you could provide the notice on or before the date of the participant's plan eligibility, if he/she can make a permissible withdrawal under a plan that is an auto-enrollment plan.
- Annual – Provide this notice to all eligible employees 30 days before the beginning of each plan year.

Investment option changes. Many plan sponsors are simplifying their plan investment menus, consolidating vendors, and considering the addition of lifetime income options. These types of changes can help make your plan run more efficiently and be easier for employees to understand. You are also required to give your participants advance notice (at least 30 days) of any changes to the plan's investment lineup and/or any blackout periods that may limit their ability to execute transactions in their accounts.

Quarterly benefit statements. These must include all transaction activity within participant accounts (e.g., deferrals, fees, withdrawals, etc.) as well as the allocation of their account balance and future deferrals by asset class and other relevant information.

Annual vesting disclosure. You must let your participants know the vesting schedule of any employer contributions and what percentage of their workplace savings plan is currently vested.

Investment education

At a minimum, it is a best practice to provide your participants with educational materials that help them understand the investments available through your plan, including the risks, transfer policies and liquidity restrictions, as well as objectives and fees. Ongoing, another best practice would be to provide educational materials and tools that help them learn basic investment concepts such as risk and return as well as the importance of asset allocation and diversification. Whether you provide this education through newsletters, fact sheets, seminars, or electronic and print publications, remember the end goal is to help your employees take control of their investment decisions.

Are your plan fees reasonable?

Although plan sponsors have always been obligated to monitor the reasonableness of plan fees, under the DOL's recent 408(b)(2) disclosure requirements, you face challenges to ensure that you're not spending more than you should. Here are some ways to make sure you pay a fair and competitive price for the retirement plan services you receive:

- Develop a prudent process and use best practices to organize and evaluate fee information. Make a comprehensive list of your service providers and break out the services that you pay for, including administrative, individual (participant transactions) and investment fees (investment management).
- Examine how much you are paying the provider, both in total and by individual fee. Consider the merits of an "all-in" or total fee, which combines all administrative and investment fees into one figure. To compare your fees to other providers, consult benchmarking resources, RFPs and third party data.
- Assess the value received for the money you pay. Consider your plan outcomes, such as retirement readiness, based on your organization's values and priorities, understanding that "cheaper" isn't always better.
- Use procedural prudence when selecting a new and/or evaluating an existing service provider. Thoroughly review and document your process, regularly monitor the reasonableness of fees and review the total cost as well as individual fee components.
- For access to a detailed white paper on assessing the reasonableness of fees in 403(b) retirement plans, visit our Fee Disclosure Center at **www.tiaa-cref.org/plansponsors**.

Keep in mind that it makes good sense to provide information that is appropriate to the different life stages of your participant population. How people think about their finances changes at every stage of their financial journey. The more you know about your participants, the easier it will be to provide the personalized, objective guidance they need to achieve financial well-being. Remember to document the communications you've provided, the results of any campaigns, and attendance at any group meetings or individual appointments.

Mistake #3: Failure to comply with participant fee disclosure requirements under ERISA 404a-5.

For a comprehensive discussion of plan sponsor requirements under the fee disclosure rules — and for access to articles, calendars and tools designed to make compliance easier — visit the TIAA-CREF Fee Disclosure Center at **www.tiaa-cref.org/plansponsors.**

In general terms, the rules are designed to help participants make more informed investment decisions when managing their account and planning their financial goals for retirement. They also require that you provide your participants with sufficient information about the plan and its investment options on an annual basis. Specifically, you must distribute the following:

Plan-related disclosure – information about your plan structure (i.e., investment options including brokerage windows), administrative fees and individual transaction expenses.

Investment-related disclosure – information about your plan's investment options, including historical performance information, benchmark performance and expense information in a comparative chart that makes it easy for participants to compare their choices.

The plan and investment information must be provided on or before the date an employee or beneficiary can direct an investment under the plan. Note too that participants must receive information each quarter that describes any fees that were charged directly to their accounts. If any items listed in the disclosure are changed, participants must receive written notification at least 30 days in advance.

Additionally, you must make available an investment website to provide supplemental investment information. Again, more information, guidance and tools about these important regulations can be found in our Fee Disclosure Center at **www.tiaa-cref.org/plansponsors.**

The next issue of our Fiduciary Responsibility Series addresses fiduciary mistakes related to investments.

Explore further

For more on this topic and on how fiduciaries can address the challenges they face, visit our **Fiduciary Responsibility Series** site.[1]

[1] Direct link - **www.tiaa-cref.org/public/plansponsors/news/views-and-commentary/fiduciary-responsibility-series**

TIAA CREF Financial Services

C15974

200520_249403
A13640 (04/14)