

Plan documents — the cornerstone of compliance

Operating your plan in accordance with the terms of your written plan, and in concert with the terms of your plan's funding vehicles, is one of your most significant fiduciary responsibilities. Yet given the level of understanding and oversight needed to manage these responsibilities, mistakes are common. Honoring your plan's terms carefully and avoiding conflicts with the plan's funding vehicle contracts will help you avoid common mistakes – and potential plan document and operational failures.

Mistake #1: Plan document and operational failures

To avoid plan document and operational failures, you must commit to plan document compliance. That means keeping your plan terms properly updated in writing and understanding the terms of your written plan so you can administer your plan according to these terms.

403(b) written plan requirement

Final 403(b) regulations require that almost all 403(b) plans be administered according to a written plan as of December 31, 2009. Prior to that, the written plan requirement had been in place since 1974 for all 403(b) and 401(a) plans subject to the requirements of ERISA, but did not apply to non-ERISA 403(b) plans.

To comply with this requirement, you must have in writing all of your plan's material terms for eligibility, benefits, contribution limits and a list of annuity contracts and mutual funds offered as plan investment vehicles. A collection of existing documents can serve as the Plan Document and there is no need to create a separate document. Plans that do not put these terms in writing risk "plan document failure." Essentially, that means the plan has failed to satisfy all the requirements of section 403(b) and all plan contributions could be treated as fully and immediately taxable.

Operating according to plan terms

Even if your written plan meets all applicable regulatory requirements, if you don't operate the plan according to these written terms, your plan will still be out of regulatory compliance. For example, a voluntary

matching plan can satisfy matching test requirements by using either current or prior year testing methods, or by satisfying one of the design-based safe harbors. But, you can only satisfy these requirements using the method that is specified in your plan documents. Similarly, if your plan puts limits on the availability of distributions, you should not be making distributions outside of those parameters. In short, your plan provisions and your administrative practices must be carefully aligned.

Operating the plan — as written — is a fiduciary obligation of the plan administrator, so be sure to understand your plan's terms thoroughly. It's important that a specific individual is responsible and accountable for operating the plan in accordance with its terms. This dedicated oversight will help you administer your plan in compliance and ensure there is an individual accountable for keeping abreast of changing regulations that might impact your plan's terms and operations.

For those plan sponsors that may have not operated according to their plan documents, there is still a way to correct these mistakes through the IRS' Employee Plans Compliance Resolution System (EPCRS). A December 2012 revision to EPCRS programs contained important updates for non-profit institutions that addressed final 403(b) regulations. The update expanded the correction program to include 403(b) plan document and plan operational failures beginning January 1, 2009. With this update, 403(b) plan sponsors are now able to correct operational failures that occur after 2008 in order to follow the terms of their 403(b) plan documents.



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 (this issue)

Disclosures to participants: Failing to disclose plan changes to participants and providing inadequate investment education and fee disclosure

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

Mistake # 2: Failure to understand and follow restrictions in the plan's funding vehicles

While the written plan may be the “engine” that runs a plan, the funding vehicles are its fuel. Both of these plan components, therefore, must work together in harmony rather than in conflict. In fact, the written plan must coordinate compliance between a plan sponsor and the funding vehicle providers.

This is definitely an area for vigilance in order to avoid fiduciary mistakes. The final 403(b) regulations do not require plan sponsors to satisfy the written plan requirement through the use of a single document. Rather, plans are allowed to incorporate other documents, such as annuity contracts and custodial agreements, into their written plan by reference.

Thus it becomes vitally important for plan sponsors to know and understand the terms and restrictions of each funding vehicle contract – and how those terms work in the context of plan operations. Beware of any conflicts between a funding vehicle contract and the written plan document.

Resolving conflicts

In the event of a conflict between the written plan and the provisions of any annuity contracts or custodial agreements, according to the final 403(b) regulations, the written plan will be in control. Such a conflict could cause an operational failure of your plan and potential loss of your 403(b) status, since the issuer of the contract is bound by the terms of the contract it issues and not the terms of the plan. For this reason, you must resolve any conflicts between the terms of your written plan and the terms of any contracts related to your 403(b) funding vehicles before an error is made.

This is especially true for plans with multiple vendors. Take extra precaution to ensure that your written plan accurately reflects the provisions of all 403(b) contracts and custodial accounts used to fund your plan.

Due diligence: your annual plan review

One of the best ways to ensure that your plan's written terms, administrative practices and funding vehicles all work in sync is to review your plan documents and funding vehicle terms at least annually. This practice will keep you familiar with the nuances of your plan and help you anticipate updates that may be warranted. It may also serve as a reminder to coordinate responsibilities with your funding vehicle providers. Finally, the annual review offers another measure of due diligence to keep your plan operationally compliant and help you fulfill your fiduciary responsibilities. And if you do make changes to your written plan, make sure you promptly notify the plan vendors to ensure they are properly administering the benefits under the contracts and accounts.

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



Annuity contracts

The relationship between plan participants and the insurance company that issues the annuity contract is generally governed by the terms of an annuity contract or certificate that is filed with state insurance departments. Therefore, the issuer is legally bound by the applicable terms of the annuity contract in spite of any conflicts between the plan and the contract.

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

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