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Tips for Plan Sponsors

Recent lawsuits against retirement plan sponsors reveal the truth about who is accountable and for what.

Uncertainty about Your Fiduciary Practices is Dangerous

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Lessons from Lawsuits against Plan Sponsors

In 401(k) plans, employers provide an opportunity for employees to save their own pre-tax dollars in individual accounts. The accounts offer a way for employees to place a portion of their current income in investment options selected by trusted executives, who work for their employer, with the hope of earning, over time, a return sufficient to support themselves and their families in retirement.

Accordingly, the return on employees' investment is critical. While reductions in 401(k) accounts' returns may result from market fluctuations, a consistent force reducing 401(k) accounts' earnings is the administrative fees and expenses assessed against account balances.

A record number of lawsuits against plan sponsors charge that the fees in their 401(k) plans are ***unreasonable****.*

401(k) Plan Fees: The Trap for all Plan Sponsors

Poor net returns on investments, perceptions that fees and expenses are too high, issues arising from corporate mergers, acquisitions, and spin-offs all inspire ERISA related lawsuits.

The desire to avoid, or at least lessen the damage from a lawsuit, is a natural inclination for any business. Yet as plan participants become more knowledgeable of investments, and plaintiff lawyers organize their practices to support plan participants' interests, plan sponsors find themselves in the line of fire.

Allegations of excessive fees and undisclosed and illegal revenue sharing schemes lead the complaints. The following list was compiled from dozens of currently active lawsuits against plan sponsors of all sizes alleging their breach of fiduciary duty:

- Charged fees and expenses to the Plan that are unreasonable.
- Caused the Plan to enter into agreements with third parties which caused the Plan to pay fees that are unreasonable.
- Failed to monitor the fees and expenses paid by the Plan.
- Failed to inform themselves of, and to understand, the various methods by which vendors in the 401(k) industry collect payments and other revenues from 401(k) plans.
- Failed to establish, implement, and follow procedures to prudently determine whether the fees paid by the Plan were reasonable.
- Failed to disclose that hidden and excessive fees are being assessed against assets of the Plan.
- Appointed as fiduciaries persons who failed to monitor and oversee the performance of the Plan's fiduciaries.
- The defendants are responsible for the payment of excessive fees and should be charged for any transactions and payments for which they cannot account.

As the above list of allegations suggests, the chief duty of retirement plan officials, or "fiduciaries", is to use a *quality management system* ("QMS") to manage their plans. Yet many fiduciaries do not know what practices define such a system. While ERISA is quite clear that a *prudent process* not *investment outcomes* is the key to fiduciary safety, many investment committees lack the ability to prove their prudence. This is the prevalent condition found in the lawsuits currently on file against fiduciaries and their employers.

3 Steps Plan Sponsors Should Take to Ensure their Safety

For fiduciaries that are unsure of the status of their QMS, a test of it in a courtroom could yield unhappy surprises. The outcome can be especially difficult where the **reasonableness of the fees their employees pay** for pension programs like 401(k) plans are untested.

It is amazing that an apparently large number of retirement plan sponsors rely on their vendors of investment products, recordkeeping, custody, and trust services to counsel them on such critical fiduciary issues as fee disclosure. Times are changing. Reliance on vendors for fiduciary counsel never was a "best practice" for plan sponsors. In today's world, it is downright dangerous.

The Department of Labor intends on unleashing its new Regulation 408(b)(2) on January 1, 2009. The regulation focuses on fee and conflicts of interest disclosures. The penalty to plan sponsors that fail to comply with it results in a prohibited transaction with excise tax consequences. Service providers that do not disclose their fees and conflicts of interest properly will be forced to give back revenue received from the affected clients. The new regulation will turn the 401(k) world upside down!

The U.S. Congress is working on five new bills that might be tougher than the DOL's regulation. As if Regulation 408(b)(2) and pending federal legislation were not enough, the Supreme Court's ruling this year in the LaRue vs. DeWolff case puts added pressure on fiduciaries to be sure that they can prove prudence in their conduct. It goes without saying that retirement plan sponsors need to get ready for a new era of accountability.

In light of the rapid pace of changing events, there are three steps that plan sponsors should take in order to minimize their risk and achieve recognition as "excellent fiduciaries."

Step One: Get Prepared
Commission a Review of Your Plan's Fees and its Quality Management System

An easy way to learn about your firm's ability to withstand an adversarial inspection is to obtain an *Investment Steward Practices Rating*, or the **ISP Rating**™. It is an independent assessment of the practices used to manage your company's investment fiduciary tasks. Among many other things, it evaluates the fees and expenses charged by your Plan's vendors and reveals the **reasonableness** of each cost.

Roland|Criss developed the **ISP Rating**™ using the practices contained in the Quality Management System for retirement plan sponsors, which is the Standard being used by the Department of Labor in its 401(k) audits. The Standard is a widely respected benchmark of excellence. It is substantiated by ERISA, the Uniform Prudent Investor Act, the Pension Protection Act, and industry best practices. In order to ensure impeccable results, Roland|Criss uses the ISO 19011 assessment procedure in its ISP Ratings™.

Your organization should have an independent review of its 401(k) plan's fees and expenses now, before the impact of the new fee disclosure regulation hits. You will feel better and be safer.

Step Two: Get Protected
Fix What's Needed....Now

With the new federal regulation mentioned above due to be effective on January 1, 2009, now is the time to fix any gaps that might exist in your firm's **Quality Management System**. If it does not have a QMS, do not delay in acquiring it. In order to meet ERISA's requirements, Roland|Criss' QMS is based on a *process approach*. It helps plan sponsors meet a regulatory or litigation test. It improves 401(k) plan performance.

When plan sponsors use a process approach, it means that they manage the practices that make up their organization; the interaction between the practices; and the inputs and outputs that glue the practices together. Since the process approach is central to the audit methodology now being used at the Department of Labor, you should be sure that your firm's practices can pass a Quality Management System test.

The practice areas contained in the fiduciary Quality Management System include the following:

1. Investment governance
2. Roles and responsibilities of fiduciaries
3. Self-dealing prevention
4. Service agreements and conflicts
5. Protection of assets
6. Investment time horizon
7. Risk level definition
8. Modeled return for investments
9. Asset classes consistency
10. Asset class implementation
11. Detailed investment policy
12. Socially responsible investing
13. Proof of investing prudence
14. Regulatory safe harbors
15. Investment vehicles selection
16. Due diligence for vendor selection
17. Performance comparisons
18. Reviews of investment managers
19. Best execution and soft dollars
20. Investment and services fee disclosure
21. Asset placement
22. Fiduciary responsibility training

Step Three: Get Certified

Certification of a plan sponsor's fiduciary practices is available through Roland|Criss. It is the national manager of certification assessments for CEFEX. The CEFEX registration committee evaluates the degree to which plan sponsors adhere to the practices in the Quality Management System discussed in this briefing. Advantages of certification include the following:

- ✓ Instills trust in plan participants;
- ✓ Provides evidence of prudent conduct and adherence to uniform fiduciary standards;
- ✓ Proves conformity with fee disclosure and conflicts of interest Regulation 408(b)(2);
- ✓ ISO audit methodology ensures uniformity;
- ✓ Establishes a base for continuous process improvements; and
- ✓ Eliminates confusion over investment providers' claims about their fiduciary status.

CONCLUSION

With more ERISA triggered lawsuits being filed, getting prepared now makes sense. Your company should authorize an independent review of its fiduciary Quality Management System. It can lower corporate exposure, improve the personal protection of your 401(k) plan's officials, and alleviate litigation expense while boosting performance in your retirement plan. To start your preparation now, contact a national Roland|Criss representative at 1-800-440-3457. You may visit us online at www.rolandcriss.com.

Roland|Criss is the nation's leading provider of risk management solutions to retirement plan sponsors. It is also the manager of certification assessments of investment advisors, investment managers, and recordkeepers for CEFEX and ASPPA. Roland|Criss does not sell investment products or manage retirement plan assets. It does not offer recordkeeping, administration, or custodian services to pension plans. It specializes in assessments and certifications of plan sponsors and service providers' practices against a defined standard of excellence.

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