Retirement Plans

- Retirement plans subject to ERISA
  - Section 403(b) and 401(k) defined contribution plans
  - Defined benefit pension plans
  - Subject to Employee Retirement Income Security Act of 1974, as amended ("ERISA") fiduciary provisions

- Voluntary section 403(b) plans not subject to ERISA
  - Voluntary salary deferral plan only. No employer contributions. Limited employer involvement and decision-making.
  - Plan is not subject to ERISA if safe harbor requirements are met
Identifying Fiduciaries

- Named fiduciary in plan document
- Functional fiduciaries under ERISA – anyone who:
  - Exercises discretionary authority or control over plan management
  - Exercises any authority or control over plan assets
  - Renders investment advice on a regular basis for a fee
  - Has any discretionary authority or control over plan administration

Identifying Fiduciaries

- ERISA defines fiduciary in functional terms of control and authority over the plan. Examples of fiduciary functions:
  - Appointing other fiduciaries
  - Selecting and monitoring TPA
  - Interpreting plan provisions
  - Deciding claims for benefits and appeals
  - Determining QDRO status
- Does not include those performing ministerial tasks or (generally) professional service providers
Identifying Fiduciaries

• Consider fiduciary status of:
  - Organization’s board?
  - Legal counsel, accountants, benefits consultants or others hired to give advice about the plans?
  - Third party administrators: TIAA-CREF?
  - Employees involved in plan administrative functions, such as calculating benefits, determining eligibility, preparing communications or government reports?
  - Employees involved in decision making for plan?

Limitations on Fiduciary Status

• “To the extent” of fiduciary functions

• Delegation. A fiduciary can generally avoid fiduciary liability by properly delegating a fiduciary function.
  - Board may create a plan committee and delegate fiduciary responsibility to committee for plan administration and/or investments
  - Fiduciary retains responsibility for prudent selection, retention and monitoring of the delegate
  - Delegate reports back to fiduciary.

• Settlor/employer vs. fiduciary functions
Limitations on Fiduciary Status

- Fiduciaries can wear two hats
  - Settlor (Business) Decisions
    - Establishment, amendment or termination of plans
    - Decisions as to the amount of any discretionary contributions
    - Decisions as to plan design
  - Fiduciary Decisions
    - Interpretation of plan terms
    - Investment of plan assets
    - Selection of service providers
    - Claims and appeals
    - Oversee compliance with ERISA reporting and disclosure requirements

Fiduciary Duties
Fiduciary Duties

• Duty of loyalty
  - Solely in the interest of the plan participants and beneficiaries
  - For the exclusive purpose of paying benefits and reasonable plan administration expenses

• Duty of care
  - In a prudent manner – Prudent expert standard

• Duty to diversify plan assets

• Duty to follow plan documents
  - To the extent not inconsistent with ERISA

Fiduciary Duties

• Duty of loyalty
  - Cannot lie or intentionally mislead plan participants
  - Cannot act in a way that is intended to benefit a third party to the detriment of plan participants
  - Plan assets can be used to pay reasonable plan administrative expenses if plan document permits
    • Limited to plan administrative expenses and not expenses related to settlor functions
    • May charge participant accounts and/or forfeiture accounts
    • Expenses must be reasonable in light of services provided
Fiduciary Duties

• Duty of loyalty
  - Types of expenses payable from plan assets:
    • Nondiscrimination testing
    • Form 5500 preparation and audit fees
    • Investment-related fees
    • Employee communication fees
    • Certain legal and professional expenses
    • Fiduciary training fees
    • Recordkeeping fees
  - Must be reasonable in light of services provided

Fiduciary Duties

• Duty of care
  - Fiduciary must discharge duties with the care, skill, prudence and
diligence that a prudent man acting in a like capacity and familiar
with such matters would use in the conduct of a like character
with like aims
    • Prudent expert standard- if you don’t have the expertise, you have a
duty to seek expert advice
    • Prudence is a procedural standard
      - No crystal ball required
      - Must be able to show investigation, deliberation and rational
decision making
Fiduciary Duties

- Duty of diversification
  - Must diversify plan investments to minimize risk of large losses unless clearly prudent not to do so

- Duty to follow plan documents
  - Review and understand terms of plan documents
  - Update documents on regular basis
    - Understand who is authorized to approve plan amendments. Bring amendments to the Board? Has Board delegated authority to a committee or individual to approve certain amendments?

Liability for Breach of Fiduciary Duty

- A fiduciary who breaches his fiduciary duties is personally liable to make good to the plan any losses resulting from the breach
  - Claims may be brought by the Department of Labor, plan participants, other fiduciaries
  - Six-year statute of limitations on claims
  - Equitable remedies and DOL can impose 20% civil penalty of the amount recovered in court or through a Department of Labor settlement
  - Criminal liability for willful violations of fiduciary responsibility

- Co-Fiduciary liability
  - Knowing participation in another fiduciary’s breach
  - Having knowledge of another fiduciary’s breach and not taking steps to remedy the breach
Liability for Breach of Fiduciary Duty

- Protection against risk of liability
  - Proper delegation of fiduciary duties
  - Fiduciary insurance policy
    - Covers plan fiduciaries against liability in case they breach fiduciary duty or commit negligent errors or omissions in their activities
    - “ERISA Rider”
  - Indemnification by organization
    - General indemnification of employees, officers and board members
  - Limited protection under ERISA section 404(c) for participant-directed investments

Plan Investments
ERISA Section 404(c)

- Participant should be responsible for his or her own investment decisions in defined contribution plans
- ERISA 404(c) is **not** a complete defense
  - Fiduciaries still have to provide a prudent “menu” of investment options
    - Initial selection and subsequent monitoring of investment performance and fees
  - If a prudent menu is provided, fiduciaries are protected from losses resulting from a participant’s investment decisions
    - Prudent expert standard. Hire investment expertise, if necessary.

ERISA Section 404(c)

- Must provide a broad range of investment alternatives
  - At least three diversified alternatives
  - Allow each participant a reasonable opportunity to materially affect risk and return in his or her account. Minimize risk of large losses.
- Participants must have reasonable opportunity to provide investment instructions that must be followed
  - Permit investment instructions at least quarterly
- Must provide information about investment alternatives, including description of investment alternatives, procedures for giving investment instructions, and description of fees and expenses
  - Explain that the plan is intended to satisfy ERISA Section 404(c), thereby insulating fiduciaries from liability
    - Statement set forth in summary plan description for plan
Defined Contribution Plan Fees

- Trillions of dollars are invested in 401(k)/403(b) plans
  - Lots of opportunity to earn significant fees
- Types of fees
  - Investment fees
  - Record keeping and administrative fees
- Understand Fee Arrangements
  - “Hard” dollar fee arrangements
    - Flat rate per participant - fees do not change as plan assets grow
  - Revenue sharing (“soft” dollar) arrangements
    - Investment vehicles share portion of investment-related fees with the plan’s record keeper and other service providers
    - Doesn’t mean that record keeping is free
    - Higher expense ratios, lower investment returns
    - Fees increase as plan assets grow

Breach of Fiduciary Claims

- Duty of care claims:
  - Plan has selected and/or retained historically underperforming investments
    - Failure to monitor and/or consider alternatives
    - Tibble v. Edison – U.S. Supreme Court confirms DOL position that there is an ongoing fiduciary duty to monitor
  - Plan is paying excessive and unreasonable fees for investment options and recordkeeping
    - Failure by fiduciaries to understand fee structure, to review alternatives, and to negotiate fees, including negotiation for institutional share class instead of more expensive retail class
    - Failure by fiduciaries to solicit competitive bids
  - In both cases, need to show procedural prudence to defend
Selecting and Monitoring Service Providers

- The selection of a service provider is a fiduciary function
- Fiduciary should consider the following in selecting a service provider:
  - Information about the firm
  - Quality of the firm
  - Firm’s business practices
  - Fee structure. Reasonableness of fees charged
  - References
  - Consider RFP process for significant service providers
Selecting and Monitoring Service Providers

- A fiduciary is obligated to monitor service providers and such monitoring is a fiduciary function.
- A fiduciary should check that:
  - Service provider is complying with the terms of the plan and contract.
  - Service provider continues to charge reasonable fees.
  - Service provider is acting in accordance with its established role, *i.e.* fiduciary or recordkeeper.

Plan Governance
Develop a Plan Governance System

- Develop a process or system intended to assure compliance with law and adherence to the terms of the plan documents, which will reduce risk of fiduciary liability
- Consider every plan related activity
- Look to terms of plan documents, Internal Revenue Code and ERISA requirements
- Focus on these questions:
  - What needs to be done for proper plan administration?
  - Who is best qualified to perform these functions?
  - How can we monitor and improve performance?

Develop a Plan Governance System

- Identify necessary tasks for proper plan administration and compliance with terms of plan and applicable law
  - Examples: Managing plan loans, approving hardship withdrawals, identifying eligible employee, updating plan documents, selecting and monitoring plan investments
- Determine appropriate responsible party. TIAA? Individuals in Human Resources Department? Third parties?
- Delegate responsibilities
- On-going monitoring of performance
- Document plan governance procedures and delegations
Correcting Plan Errors

Common Plan Errors

• Plan qualification failures threaten tax-qualified status of plan:
  - Plan Document Failure
  - Operational Failure
  - Demographic Failure
  - Employer Eligibility Failure

• Fiduciary violation – Failure to remit salary deferral contributions timely

• Failure to file Form 5500
Correction Programs

- Tax qualification failures via IRS procedure (the Employee Plans Compliance Resolution System “EPCRS”)
  - Self-Correction Program (“SCP”)
  - Voluntary Correction Program (“VCP”)
  - Audit Closing Agreement Program (“Audit CAP”)
- Correction of prohibited transactions under the DOL Voluntary Fiduciary Correction Program (“VFCP”)
- Department of Labor Delinquent Filer Voluntary Compliance (“DFVC”) Program

IRS Correction Principles under EPCRS

- Encourage plan sponsors to voluntarily make corrections, and maintain tax-qualified status of plan
- IRS requires full correction of all taxable years
- General principle is to restore the plan to where it would have been had the failure not occurred
- Revenue Procedure provides acceptable correction methods, including limited retroactive plan amendments and exceptions to full correction
IRS Correction under EPCRS

- Examples of common errors to correct under EPCRS
  - Erroneously included ineligible employees
  - Erroneously excluded eligible employees
  - Excessive contribution failures
  - Overpayment errors
  - Failure to implement salary deferral election
  - Failure to make minimum required distributions

Self-Correction under EPCRS

- Generally for insignificant failures & significant failures corrected within two years
- No disclosure to IRS, no fee, no sanction
- Limited to operational failures
- Make correction in accordance with guidance, notify affected participants and document correction
- Must have established practices & procedures to ensure ongoing compliance
- Self-correction is not available if the plan is under audit
Self-Correction Under EPCRS

- Factors to consider in determining insignificant versus significant errors:
  - Percentage of assets/contributions involved
  - Number of years involved
  - Percentage of participants impacted
  - Correction within reasonable period after discovery
  - Reason for the failure

Correction Under VCP

- Plan document, demographic and operational failures
- Requires correction in accordance with guidance, filing with IRS and payment of user fee
- Single submission for multiple failures permissible
- VCP fee for large plan with over 10,000 participants is $15,000. VCP for small plans with 20 or fewer participants if $500
- Legal fees
- Reduced fees for certain failures, such as interim amendments
Correction Under VCP

- IRS works with plan to find acceptable correction
- Common VCP filings
  - Correction of failure to distribute Minimum Required Distributions - Waiver of excise tax
  - Correction of failure to amend plan by required deadline
  - Correction of failure to adopt written 403(b) plan document
- Anonymous submission is possible
- Compliance statement at end of process shows that IRS approves correction method

Audit CAP

- Settlement to close negative IRS Audit or determination letter application
- IRS imposes a sanction. Factors used in determining sanction:
  - Practice in place to identify and prevent plan failures
  - Steps taken to correct
  - Reason for failures
  - Cost of VCP had the plan filed prior to audit
- Make correction, enter into Closing Agreement with IRS and pay sanction
Delinquent Remittance of Employee Contributions

- Department of Labor priority issue
- Employee contributions become assets of the plan when it is deferred from paychecks or contributed by the participant
- Time period between deferral from paycheck and submission to the plan is technically a loan from the plan to the employer
- Extension of credit from the plan to the employer may be a prohibited transaction

Participant Contributions Defined

- Amounts withheld from participant’s wages for contribution to the plan
- Amounts paid by a plan participant
- Includes:
  - Pre-tax elective deferrals
  - Roth elective deferrals
  - After-tax contributions
  - Loan repayments
  - Rollovers
Delinquent Participant Contributions – General Rule

- Employers contribute or repay participant contributions as soon as reasonably segregated from general assets, but in no instance beyond the 15th day of the month following the month of withholding.
- Ten day safe harbor for small plans, DOL rejected its use by large plans. DOL generally requires no more than 3 – 5 day period.

Reporting of Late Contributions

- Plan must report delinquent contributions to the plan on Form 5500
  - Specific question on the form
  - Plan must report and correct late contributions, in addition to filing under VFCP
- Excise tax applies via Form 5330. Excise tax does not apply to 403(b) plans.
Correction under DOL VFCP Program

- The DOL’s Voluntary Fiduciary Correction Program (VFCP) is available to correct prohibited transactions, including delinquent contributions
- Self-correction is not available for fiduciary violations
- No filing fee
- Make corrective contributions, adjusted for earnings. Use of VFCP program permits usage of DOL calculator rather than plan earnings.
- Receive “no action” letter from DOL at end of process

Delinquent Form 5500 Filer Program

- Department of Labor also offers a Delinquent Filer Voluntary Compliance (“DFVC”) Program to encourage voluntary submission of delinquent Form 5500
- DFVC penalties for small plans (fewer than 100 participants) reduced to $10 per day, capped at $750 per filing or $1,500 per plan (or $750 per plan for small plans sponsored by tax-exempt organizations). Penalties for large plans (100+ participants) is reduced to $10 per day, capped at $2,000 per filing or $4,000 per plan.
- Waives more costly DOL & IRS penalties
- Requires full correction of all years
- File under DFVC electronically. Submit delinquent forms and calculate and pay penalty.
Best Practices for Plan Administrators

• Review and become familiar with plan documents
• Administer plan in accordance with plan documents, Code and ERISA requirements
• Keep plan documents current: Amend for all required and discretionary changes
• If compliance issues arise, correct under IRS or DOL correction programs
• Review organization’s indemnification for fiduciaries and fiduciary insurance
**Best Practices for Plan Administrators**

- Develop a plan governance system -- review current delegations of responsibility, make additional delegations and document accordingly
- Undertake diligent selection and monitoring of plan service providers and fees
- Review service provider agreements
- Prudent selection and monitoring of plan investment options offered on fund line-up
- Review and negotiate plan investment fees

**Best Practices for Plan Administrators**

- Document fiduciary decisions, such as benefit claims and interpretations of plan provisions
- Hire expertise when necessary
- Provide fiduciary training to plan fiduciaries. Periodic review of fiduciary responsibilities and provide additional training as appropriate
Final Note

- Remember that ERISA does not require the best possible results, but it does require a diligent and prudent process and procedures in administering retirement plans

- Questions?

Additional Information

The questions below were posed during the webinar and the answers were provided by Michele Golkow, the webinar presenter, following the webinar.

1. What is the timing rule for salary deferral remittances?

   We say a 10 day rule for small plans, meaning calendar days, but the safe harbor limit is actually 7 business days. There is no safe harbor rule for larger plans, so it’s not clear whether the 3-day period is business or calendar days.

2. How long must a plan sponsor retain retirement plan records?

   Regarding record retention, there is no statute of limitations for the payment of benefits under a plan, so plans must keep records to calculate benefits and determine vesting and distribution rights indefinitely. However, there is a 6 year statute of limitations for IRS purposes and for breach of fiduciary duty claims.