ARE YOU MEETING YOUR FIDUCIARY RESPONSIBILITIES?

RETIREMENT REPORT

News and updates for plan sponsors and fiduciaries of defined contribution plans

In this issue:

Fiduciary liability insurance

Plan sponsors are often concerned with the prudence and process of obtaining insurance covering Employee Retirement Income Security Act (ERISA) retirement plan fiduciaries. While fiduciary insurance is an important aspect in mitigating the financial impact of fiduciary litigation, there are a number of additional, important activities that are prudent for fiduciaries to embrace.

ERISA fiduciaries are well advised to follow a comprehensive strategy to optimize fiduciary risk mitigation. Other important risk mitigation steps include identifying who the plan's named fiduciary is, delegating fiduciary responsibilities to co-fiduciaries (e.g., steering committee) as appropriate and allowable, implementing a sound fiduciary structure (via committee charter with ancillary paperwork), consistently practicing procedural prudence as defined by ERISA for all fiduciary-level plan decision-making, hiring experts as needed to fulfill ERISA's prudent expert requirement, documenting all fiduciary decision-making processes and results, and auditing administrative procedures periodically to ensure compliance with ERISA and the plan document (this last step is a source of many unintentional fiduciary breaches). Ask your plan consultant to provide a more complete explanation of this important topic.

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Returning to the specific topic of fiduciary insurance, please note that typically, most corporate-level liability insurance policies like directors and officers liability insurance (D&O) and employee benefit liability coverage do not address ERISA fiduciary breaches. If ERISA-specific language is not included in a liability policy, ERISA breaches are most likely not covered. Comprehensive fiduciary insurance is relatively affordable and typically does cover all plan fiduciaries. ERISA fiduciary coverage can be obtained as an addendum to an existing liability policy, or as a separate policy, depending upon the issuer.

Not all fiduciary liability policies are created equal, and some issuers are more astute about this coverage than others. It is prudent to confirm that the issuer you are considering to provide coverage has experience and expertise in providing ERISA fiduciary coverage. A few areas to focus on, other than what would normally be considered in reviewing any insurance policy, are:

- Does the policy specifically cover ERISA fiduciary breaches?
- Does it cover the appropriate individuals?
- Does the policy contain carve-out language that eviscerates the effectiveness of the policy?

Do review all language contained in the contract, especially in areas of coverage exclusions and limitations, provisions for legal representation in event of a claim, and specific and aggregate dollar limits of coverage.

Another important area of concern in terms of policy language is the application for coverage. As with most insurance contracts, the signed application for coverage is considered part of the contract. We have noticed many applications that ask the fiduciaries to affirm that there has never been a fiduciary breach associated with the plan. In our opinion, this is an affirmation that is not practicable to assert, as many unintentional fiduciary breaches (by far the most frequent category of breaches) may not be identified upon occurrence or until years after occurrence. The affirmation can and may be used to nullify the insurance protection at time of a claim. It would be prudent to have the issuer insert, "to the best of my knowledge" language to this question. We believe that this is typically not an intentional attempt by the issuer to avoid a claim, but is often due to the issuer's naivety concerning ERISA law.

To summarize, here are some steps you might follow in evaluating ERISA fiduciary insurance:

1. Check any existing corporate liability policies to determine if they cover ERISA fiduciaries (it may be more efficient to ask your broker to show you where in a policy it identifies that ERISA fiduciaries are covered).
2. If the policy does not cover ERISA fiduciaries, ask your broker to provide you with a quote for ERISA fiduciary insurance from a company that has expertise and experience in this area.
3. Keep in mind the specific provision areas of focus identified above (paragraphs four and five).
4. The amount of coverage is a judgement call. To our knowledge, there has not been an award that has approached 10 percent of plan assets, but it is theoretically conceivable that one could. Most successful litigation to date (other than those involving company stock litigation) is based on unreasonableness of fees, and fees are a relatively small percentage of total plan assets. Lawsuits can, and often do, contemplate a prolonged period of time based on when a breach originated and when it is corrected.
5. Designating a beneficiary will depend on whether there is a committee charter in place, which we highly recommend for most plans. If there is a formally executed committee charter delegating fiduciary responsibility from a plan's named fiduciary (e.g., the company) to a committee, and the committee members are indemnified by the company, the beneficiary is most commonly the company. If committee members have not been indemnified, then the committee members themselves (along with any other fiduciary members) should be named as beneficiaries as they would be held personally liable for fiduciary breaches in areas they are responsible for.

Please speak with your plan consultant if you have questions or would like more information on this important fiduciary topic.

Locating missing participants

At one time or another, all plan sponsors will likely be in the position of having to locate missing participants. This may be related to delivery of regulatory required communications, distribution of assets, or communication of fund changes to active and/or terminated participants. If the delivery of necessary communications is encumbered because a participant cannot be located, there exists a fiduciary requirement to perform a "reasonable search" for this "missing" participant. There are various search methods that would be considered as reasonable good faith efforts, including:

- Certified mail (with a return receipt) to the last known address;
- Checking records of other benefit plans (i.e., employer provided health plan); and
- Using a commercial participant-locating service (such as www.unclaimedretirementbenefits.com). (Historically the Department of Labor required use of either the Internal Revenue Service or Social Security Administration letter forwarding programs, but both of those programs have been discontinued within the past few years).

In the event your plan allows cash-out distributions on terminated participants with account balances under $1,000, or rollovers to an individual retirement accounts (IRAs) for balances between $1,000 and $5,000, be sure to check the provisions described in the plan document. Typically a rollover to an IRA on behalf of these participants can be accomplished for participants deemed to be missing. For more information on this topic, please contact your plan consultant.

What constitutes proper documentation of retirement plan committee meetings?

With most retirement plans, the fiduciary responsibility of selecting and monitoring the plan's menu of investments is designated to a retirement plan investment committee. This committee usually includes financial officers and human resources officers of the employer. The committee meets periodically (anywhere from annually to quarterly) to consider agenda items including investment due diligence, fees and services of plan providers, status of plan goals, etc.

From a fiduciary perspective it is just as important to properly document these meetings as it is to hold the meetings. Proper documentation serves as proof that the committee's responsibilities are being prudently executed. Often plans question the degree of documentation necessary. Below are a few suggestions of what the retirement plan investment committee meeting minutes should include:

- A listing of all parties present with identification of roles (committee member, guest, advisor, provider representative, attorney, accountant);
- A description of all issues considered at the meeting: fund performance of investments offered, participant communication/education initiatives, plan demographic and provisional review, investment policy statement review, market summary and other topics as appropriate to achieving and maintaining a successful plan;
- Documentation of all materials reviewed during the meeting;
- Documentation of all decisions made and the analysis and logic supporting each decision; and
- Identification of any topics to be continued in subsequent meetings.

Pass or fail? Corrective actions to remedy your test results

Each year you receive a "pass" or "fail" from your service provider regarding required non-discrimination testing: the actual deferral percentage test (ADP) and the actual contribution percentage (ACP) test. The ADP/ACP tests govern the amounts of deferrals and/or matching contributions that highly compensated employees (HCEs) are allowed to make or receive in relation to those of non-highly compensated employees (NHCEs).

If you received a "fail," do not panic. As long as an IRS-prescribed corrective action is undertaken, the plan's health is not in jeopardy. Correction can be made by either:

1. Refunds of excess contributions (plus earnings thereon) to HCEs
2. By employer qualified non-elective contributions (QNECs) or qualified matching contributions (QMACs) to NHCEs under the plan, or
3. By recharacterizing excess contributions. The most common corrective method is the refund of excess contributions to HCEs following IRS procedures.

Refunds must be distributed within two and a half months , or six months in the event the plan has an eligible automatic contribution arrangements (EACA) design, following the end of the plan's test year (March 15 for calendar year plans) in order to avoid an excise tax. Contact your plan consultant for more information.

Are you monitoring your forfeiture account?

Qualified plans have a requirement to not carry forward any unallocated assets from year to year. Unfortunately, this rule is frequently neglected by plan sponsors, much to their chagrin when the failure is discovered on audit by the IRS or Department of Labor (DOL). Thus, it is important to remember that forfeitures must be allocated on an annual basis. The process is typically determined per the provisions in your plan document, or by plan procedures. Forfeitures should not be held over from year to year; if they remain accidentally unallocated, complications can result. On audit it is not uncommon for the regulatory agencies to require a plan sponsor to retroactively determine who should have received allocations on a year-by-year basis. Once those retroactive allocations have been made, the regulatory agencies typically require the plan sponsor come out of corporate pocket for earnings on all retroactively allocated amounts. This is not only a monetary burden, but an administrative burden as well due to the fact that fiduciaries must find participants who may have terminated, because they were due these allocations (and earnings) as well as participants who remain active. For questions on this topic, contact your plan consultant

MARKET NOTES: FOR THE MONTH ENDED MARCH 2016

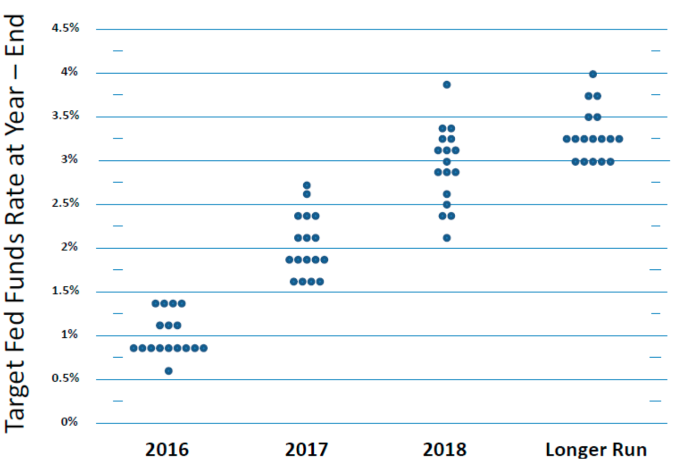
The month of March brought strong returns for global stocks, as the Federal Open Market Committee (FOMC) scaled back its expectations for rate increases in 2016, adding to the appeal of riskier assets. Emerging market equities (up 13.2 percent) led the way for the period, followed by domestic real estate investment trusts (REITs) (up 10.4 percent) and emerging market bonds (up 9.1 percent). Taxable bonds rose broadly for the month, as all but the shortest end of the yield curve edged downward. Municipal bonds stood alone in negative territory for the month, but remain positive year to date.

FOMC maintains dovish stance

The March FOMC meeting came and went without an increase in short term rates beyond the current 0.25–0.50 percent target range. In fact, new projections released by the committee members suggest only two quarter-point rate increases in 2016, down from the four indicated by the FOMC back in December 2015.

FOMC Estimates of Fed Funds Rate by Committee Member

As of March 2016



Note: Each shaded circle indicates the value (rounded to the nearest 1/8 percentage point) of an individual participant's judgment of the midpoint of the appropriate target range for the federal funds rate or the appropriate target level for the federal funds rate at the end of the specified calendar year or over the longer run. Source: March 15-16, 2016 Minutes of the Federal Open Market Committee

	March 2016
Russell 1000 (U.S. Large Cap Stocks)	7.0%
Russell 2000 (U.S. Small Cap Stocks)	8.0%
MSCI EAFE (Developed International Stocks)	6.5%
MSCI Emerging Markets (Emerging Markets Stocks)	13.2%
Bloomberg Commodity Index	3.8%
S&P Global REIT Index (Real Estate Investment Trusts)	9.5%
Barclays U.S. Aggregate (Broad Domestic Bond Market)	0.9%
Barclays Muni 5 Yr (Tax Exempt Fixed Income)	-0.4%
JP Morgan GBI Global ex U.S. Hedged (International Fixed Income)	0.7%
JP Morgan GBI EM Diversified (Emerging Markets Fixed Income)	9.1%

Source: Morningstar Direct

The adjustment in expectations is another indication that the FOMC is most comfortable erring on the side of accommodation over the course of normalizing interest rate policy. This is good news for capital markets in general, as a major concern with respect to normalizing rates has been that the Fed might move rates too high, too quickly.

For some time, guidance communicated by Chair Janet Yellen has been that the Fed is taking a data-dependent approach to monetary policy. This allows for a "wait and see" approach for evaluating changes in economic and financial circumstances.

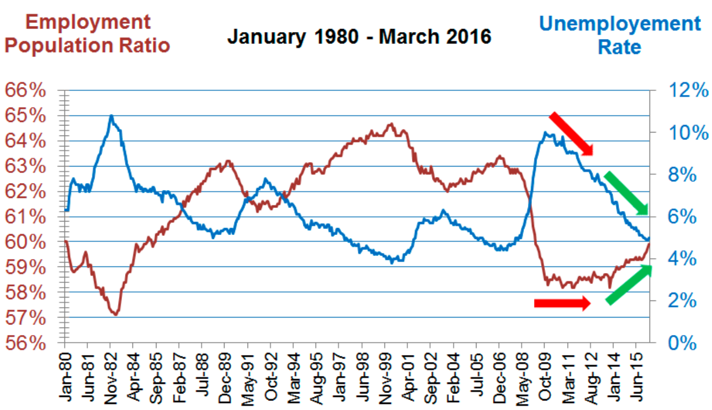
As a reminder, the Fed has a dual mandate of maximum employment and stable prices. Until recently, the data has generally indicated continued slow economic growth with slack remaining in the labor markets and subdued inflation results. But arguably, employment and inflation were beginning to appear healthy enough for another rate increase at the time of the March meeting.

Employment has shown signs of strengthening over the past several months, including 396,000 people joining the labor force in

March and gains in the total net jobs and employment population ratio (EPR) *(Source: Bureau of Labor Statistics)*.

The EPR is the proportion of the working age labor force that is currently employed. It's an important measure to monitor, as (unlike the unemployment rate) it takes into account those who have decided to no longer look for work.

The chart below illustrates a historical tendency for a consistent, inverse pattern between the unemployment rate and the EPR. The pattern indicates that normally, as unemployment decreases, the amount of employed increases. The red arrows point out a disruption in that tendency, as the unemployment rate continued in decline while the EPR remained flat. The disconnect between the two measures likely resulted from unemployed workers leaving the labor force (i.e., no longer looking for work), putting downward pressure on both the EPR and the unemployment rate. The more recent inflow of new workers entering or re-entering the labor market and finding jobs has allowed the trajectory of EPR to return to a normal pattern.



Source: Bureau of Labor Statistics

With respect to inflation, core Personal Consumption Expenditures (PCE), the Fed's preferred measure, was up 1.7 percent for the 12 months through January and again through February. Although still below the Fed's 2 percent target for price stability, they are the highest year-over-year readings since February 2013. With inflation beginning to show more life, the Fed will need to closely balance its dovish policy for supporting the economic recovery against the potential for inflation to overshoot the target and stifle the recovery.

Beyond the dual mandate

Despite progress with inflation and employment, there are still concerns that remain. The strong dollar and depressed commodity prices have been beneficial for imports and energy consumption, but have put a drag on sectors like manufacturing, agriculture and mining. And despite the solid job gains and low gasoline prices, consumer spending has ticked up only modestly, indicating that households have been putting away the cash difference into savings rather than spending it elsewhere.

The effect of struggling economies outside the U.S. also seem to be playing a meaningful role in the FOMC's policy rate decisions. The committee indicated as much in September 2015 by holding off on an initial policy rate increase despite Yellen pronouncing the domestic economy ready for higher rates.

Outside the U.S., China likely remains the main source of concern for the FOMC as it has continued to struggle with slowing growth, capital outflows and a declining currency. China has voiced opposition to the U.S. raising interest rates. One concern for China is that a rate hike by the Fed would make dollar-denominated yields more appealing to foreign investors, further adding to capital outflows.

China is the world's second largest economy, and the health of its growth not only affects the U.S. but countries around the globe. Therefore, in weighing policy decisions, the committee may be considering not only the delicate balance within the U.S., but also the ripple effect that policy rate decisions will have on China and other countries.

Improvements in the domestic economy are evident, particularly with respect to the Fed's dual mandate of employment and inflation. However, as global economies have become more intertwined and share more risks, the points at which the Fed's dual mandate start and stop have become less clear.

As always, please contact your RSM US Wealth Management advisor with any questions or comments.

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Avery has been in the finance industry since 2002, with experience in financial planning, advisory services and investment research. Dan joined RSM from Culp, Elliott & Carpenter, PLLC (CEC), a tax and estate planning law firm in Charlotte, where he launched a financial advisory practice. Before CEC, Dan was a financial planner with Plante Moran Financial Advisors a prominent Registered Investment Advisor firm found mainly in the Midwest.

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