THE EMPLOYEE BENEFIT
Forum
current issues in retirement benefit planning

qualified PLANS LLC

Inform, but Don't Alarm

SITUATION: The recent turmoil in the financial markets has many of our employees concerned about their 401(k) plan investments, and it has the company concerned about possible fiduciary liability for the performance of the plan's investment choices.

QUESTION: What should we as a plan sponsor and fiduciary be doing in response to market uncertainties?

ANSWER: You may want to take two actions. Temporarily increase your routine investment monitoring, and to reassure employees, keep them reasonably up to date on their investments and what you are doing.

DISCUSSION: Plan sponsors are not responsible for guaranteeing that retirement savings plan participants will always experience positive returns on their account investments. However, pension law (ERISA) and the U.S. Department of Labor do hold plan fiduciaries, including plan sponsors, responsible for the prudent selection of plan investment options.

So, even if you normally review your plan's investment options at another time of the year, take a look at them now in terms of both the current economic situation and potential long-term performance. We'd be happy to help.

You had reasons for choosing each investment your plan offers. Are those reasons still as solid as they were when you chose the investment? If not, you may want to put the investment on a watch list and more closely monitor it. Or you might consider replacing it. Adding new investments to give participants more choice is another possible action. Whether or not you make changes, document your review decisions and actions.

As for jittery plan participants, keep them informed without alarming them. Tell them what steps you are taking to look after their interests, and share pertinent information you receive from investment providers. Stress your investment advisors' professional expertise.

Reviewing basic investment principles with employees may help them feel more confident about their retirement investments. You might use printed materials, such as paycheck stuffers or newsletters, employee meetings, or educational seminars. Concepts to include in your review: retirement time horizons, diversification, asset allocation, and dollar-cost averaging.

Employees may also appreciate your reminding them of other resources available to them, such as online calculators and planning tools. Particularly with employees nearing retirement, encourage them to talk with a financial professional concerning their account investments and plans for retirement.

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2009 Cost-of-Living Adjustments

The annual inflation adjustments for plan limitations are in. For 2009, most of the limits have increased:

- Maximum annual additions to a defined contribution plan account from $46,000 to $49,000
- Maximum annual benefit from defined benefit pension plans from $185,000 to $195,000
- Maximum annual compensation used to determine qualified plan benefits or contributions from $230,000 to $245,000
- 401(k), 403(b), and 457 plan deferrals and catch-up contributions from $15,500/$5,000 to $16,500/$5,500
- SIMPLE deferrals and catch-up contributions from $10,500/$2,500 to $11,500/$2,500
- Dollar limit used in the definition of "highly compensated employee" from $105,000 to $110,000
- Compensation limit for determining whether officers are key employees for top-heavy plan purposes from $150,000 to $160,000
- Social Security taxable wage base from $102,000 to $106,800

Paying Expenses Out of Plan Assets

With the continued economic uncertainty, some companies are looking to cut business expenses by charging more of the cost of maintaining their retirement plans to the plans themselves. Before taking this tack, though, it's important for you to know what can and cannot be charged to a plan. Otherwise, you take a risk that the payment could be deemed a prohibited transaction.

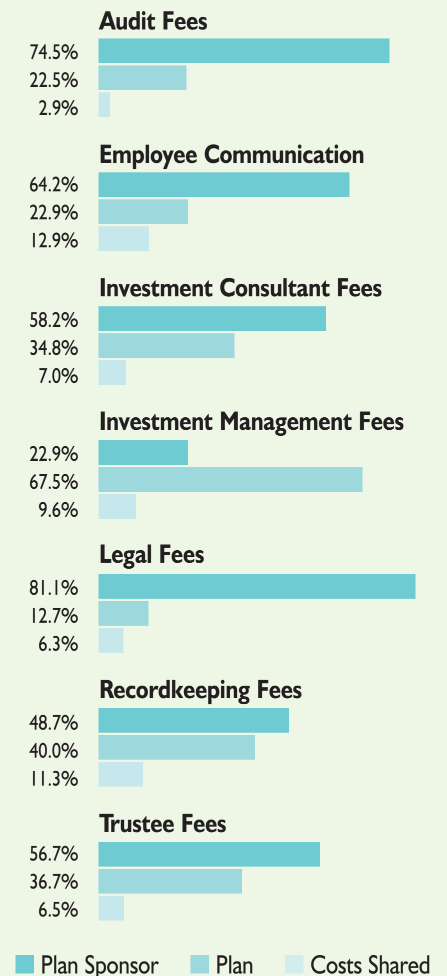
Plan fiduciaries, including plan sponsors, may use plan assets only to provide benefits to plan participants and beneficiaries and to pay reasonable expenses of administering the plan. However, sponsors sometimes confuse plan-related business expenses — which aren't payable from plan assets — with plan administration expenses.

Sponsors generally can use plan assets to pay these and other types of administration expenses incurred in operating the plan:

- Fees related to maintaining a plan's tax-qualified status, including drafting required amendments and performing required nondiscrimination testing
- Trustee fees
- Recordkeeping expenses
- Certain investment management fees and expenses
- Employee communication expenses for participant disclosure statements
- Costs of computing participant benefits
- Fees for enrollment/election changes
- Fees for participant investment changes/elections
- Expenses for participant loan administration
- Costs of administering qualified domestic relations orders
- Certain legal fees

Other plan-related expenses, including costs related to designing and establishing a plan and certain plan termination fees, are business expenses that should not be paid from plan assets.

Who Pays?



Source: *51st Annual Survey of Profit Sharing and 401(k) Plans*, reflecting 2007 plan experience, *www.psca.org*, 2008

Give Your Plan a Check-up

Once a 401(k) plan is in place, it's easy to sit back and take an "I'm done," hands-off attitude toward the plan. But to ensure that your plan will continue to operate effectively, you should periodically review its provisions and features. Here are some questions that may help you with that check-up.

Do you offer employer matching contributions? Countless studies show that plans that offer employer matching contributions have higher participation rates than plans that don't. According to the *51st Annual Survey of Profit Sharing and 401(k) Plans* (reflecting 2007 plan experience), recently released by the Profit Sharing/401(k) Council of America (PSCA), the most popular fixed match is 50 cents for every dollar an employee contributes. Regularly weigh the size of your plan match against the level of employee participation.

Have you evaluated your plan's investment choices lately? As pointed out in our page one article, to meet your fiduciary duties as a plan sponsor, you must carefully evaluate the continuing suitability of your plan's current investment choices and whether those choices offer enough variety. To help protect against fiduciary liability with respect to investing the plan contributions of employees who do not give directions for investing their accounts, make sure you've chosen a qualified default investment alternative (QDIA) for those contributions. Generally, QDIAs include lifecycle/target-date funds, balanced funds, and professionally managed accounts.

What is your plan's rollover policy? Plans generally must give participants who are receiving an eligible distribution the option to roll the distribution directly to another employer-sponsored retirement plan or an IRA. However, if the amount of all eligible rollover distributions for the year is reasonably expected to be less than $200, the plan doesn't have to offer the direct rollover option. A plan can also specify that any eligible rollover distribution of less than $500 must be rolled over in total if the rollover option is chosen. Beginning in 2008, employees can make direct rollovers to Roth IRAs. A rollover to a Roth IRA is a taxable event. Note that, while not required, most 401(k) plans (98.2% in the PSCA survey) also accept rollovers from other qualified plans. Accepting such rollovers may make your plan more competitive with other employers' plans. Your plan should have procedures in place to handle all permitted rollovers.

What about required minimum distributions? Make sure that all required minimum distributions (RMDs) are being made. Distributions must be made to retired employees who are over age 70½ and *current* employees over age 70½ who own 5% or more of the company. A plan can provide, however, that the rule applicable to 5% owners applies to all current employees. RMDs also must be paid to beneficiaries of deceased employees. The timing of such distributions may vary depending upon the participant's age and whether the beneficiary is the participant's surviving spouse. Be sure you are following the terms of your plan.

Are plan loans being administered properly? Verify that plan loan balances don't exceed the law's maximum amount, that all loans are on schedule to be repaid within five years (except loans to finance the purchase of a principal residence), and that any other plan-specific limits are being met.

What if you find you have made a mistake operating your plan? You may be able to quickly and cost-effectively correct the error through the IRS's Employee Plans Compliance Resolution System (EPCRS). EPCRS lets plan sponsors correct failures to satisfy plan qualification requirements and avoid possible disqualification of the plan. A recent EPCRS update* expanded the list of errors for which correction guidance is provided.

* Rev. Proc. 2008-50, 8/14/2008

The general information in this publication is not intended to be nor should it be treated as tax, legal, or accounting advice. Additional issues could exist that would affect the tax treatment of a specific transaction and, therefore, taxpayers should seek advice from an independent tax advisor based on their particular circumstances before acting on any information presented. This information is not intended to be nor can it be used by any taxpayer for the purpose of avoiding tax penalties.

RECENT DEVELOPMENTS
In Benefit Plans

HEART Act. Plan sponsors that have employees currently on leave for military service will want to be familiar with provisions of the Heroes Earnings Assistance and Relief Tax Act of 2008 (HEART) that take effect January 1, 2009. Under HEART, differential pay — payments to employees who are away on military service to compensate for some or all of the difference between the amount of their military pay and their usual wages — is treated as payment of wages and subject to withholding and must be treated as compensation for retirement plan purposes. HEART also includes a new tax credit for eligible small business employers that pay differential wages to qualifying employees after June 17, 2008, and before 2010. In addition, plan participants on active military duty for at least 30 days will be treated as having terminated employment with the plan sponsor for purposes of receiving distributions of salary deferrals from a 401(k), 403(b), or 457(b) eligible deferred compensation plan.

Working Longer. Analysis of new U.S. Census Bureau data by the Congressional Research Service (CRS) shows that both men and women are working longer. The CRS found that 52% of men and 41% of women ages 62 to 64 were working in March 2008, compared to 43% and 32% in 1995 and 42% and 28% in 1990. For those ages 65 to 69, 33% of men and 27% of women were employed in March 2008, versus 27% and 17% in 1995 and 26% and 17% in 1990. The report also said that some 37% of men and 35% of women aged 55 to 64 who received pension income in 2007 were employed in March 2008.

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