

Retirement Report

*News and updates for Plan Sponsors and
Fiduciaries of Defined Contribution Plans*

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Fiduciary Responsibility in Today's Financial Climate

During the current financial market turmoil many plan fiduciaries seem unsure of the depth of their responsibilities to the plan and its participants. In reality, a considered response should incorporate three ingredients: a review of investments offered, proactive employee communications, and adherence to a prudent process of managing investment decisions.

In reviewing investment options, the fiduciary is well served to confirm to what extent investments presently offered to participants include exposure to distressed obligations and/or failing institutions and insurers. Most retirement plan vendors have already produced marketing materials which address this issue and can be distributed to participants. Obtaining this type of documentation from your vendor will support your due diligence efforts and can be used as part of prudent employee communication. Additionally, you should be prepared to address participant questions (see the article below, "Communicating with Employees in Down Markets"). Today's financial climate presents an excellent opportunity to remind participants about the importance of diversification, rebalancing, dollar cost averaging and emphasizing the long-term nature of retirement savings.

With regard to managing investment decisions, a fiduciary demonstrates prudence by the documented process they follow for making decisions for the selection, removal and replacement of investment options. Documentation of the process and outcomes is paramount. When the process is followed properly it can serve as a substantial defensive tool against potential liability. Now is also a good time to review the protections of being in compliance with ERISA Sections 404(a) and 404(c), both which can shield fiduciaries from liability for participant investment decisions. In summary, following a prudent process, including the ingredients described above, during such a difficult time can provide meaningful advantages to plan fiduciaries and participants alike. Remember, your plan consultant is here to assist you every step of the way; please don't hesitate to call us at 800.322.9773 or email twgservices.com with your questions or concerns.

Communicating with Employees in Down Markets

Without doubt, many of your plan participants are concerned about their investments; it is understandable that human reaction to dramatic market drops is to reduce or liquidate one's exposure. But it is this type of behavior that you want to discourage among your plan participants! Commonly asked questions include "How should I invest my money?", "Is there anything that's safe?", "Why should I continue to save when I keep losing money?" and "Is my money insured by the government?"

As a plan fiduciary, you have a responsibility to the plan and its participants, regardless of market ups and downs. Most importantly, you should not instill panic in your employees, but remind them to stay the course and avoid bad behavior such as market timing. Missing out on just a handful of the best-performing days in the market may leave investors at a significant performance disadvantage compared to investors who remain fully invested for the long term. Although unnerving at times, some of the sharpest market declines were followed by steep rebounds. Remind participants to review their portfolio, stay diversified and rebalance regularly (putting all their money in cash is *not* the solution to this market crisis). Meeting with a financial professional is another good step toward creating a healthy financial picture. The bottom line is that your participants should stay invested (and focused) for the long-term.

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LaRue Withdraws Claim

You may recall the Supreme Court's groundbreaking *LaRue* decision from February of this year. As a reminder, in *LaRue*, the Supreme Court unanimously held that an individual may bring an action based on a breach of fiduciary duty under ERISA *as an individual*, and not on behalf of the plan as a whole. Precedent stated that ERISA only authorized claims affecting the entire plan rather than allowing for individual recovery. The Supreme Court read ERISA to allow a fiduciary breach claim where the breach impairs the value of a participant's individual account. In late October the U.S. District Court for the District of South Carolina signed an order stating that LaRue "decided that it is not financially feasible to continue to pursue this claim." As a result LaRue withdrew his claim and the District Court's order dismissed the case "with prejudice," which means that a case based upon the same facts and allegations cannot be re-filed.

It is also important to note that the *LaRue* withdrawal does not change the landmark Supreme Court ruling. Please remember that though the ruling may result in an increase in lawsuits (and a brief spate of thus far adjudicated lawsuits did follow the *LaRue* ruling), the ruling does not increase the responsibilities or liability exposure of fiduciaries. Ultimately a plaintiff must still prove any fiduciary breach to prevail. If anything, the Supreme Court decision makes the fiduciary's attention to detail all the more important. The most effective way to avoid a lawsuit is to continue to meet your fiduciary responsibilities. Your continued partnership with your consultant allows us to assist you in that endeavor! If you have any questions regarding the *LaRue* decision or its impact to plan fiduciaries please contact your plan consultant or email twgservices.com.

Year-end Discrimination Testing – Start Planning Now!

The end of the year is fast approaching, and if your retirement plan has a December 31st plan year-end, you should start compiling your employee census data now. Be on the lookout for a package from your vendor with specific instructions on how to complete the employee census data. If you have a safe harbor plan, you may be exempt from some discrimination testing. Check with your vendor if you are unsure about your plan requirements. You can also contact your plan consultant or twgservices.com. Remember, to ensure a timely calculation of any refunds you should submit your census data soon after the end of December!

Survey Says: If You Match, They Will Save

According to a new report by Charles Schwab, from 2004 to 2007 employees at companies with retirement plans serviced by Schwab were most likely to choose the plan's "match ceiling" (the amount of salary employees need to defer into their plan in order to receive the maximum employer matching contribution) as their deferral level in order to maximize the employer contributions they can receive. The link causes sponsors to consider carefully their match formulas to help employees boost savings, according to the report. Considering two formulas – a 100% match up to 3% of an employee's compensation and a 50% match up to 6% of an employee's compensation – the second formula would encourage an employee to defer an additional 3% into the plan to receive the maximum employer match, while the maximum cost of the match to the employer remains the same, Schwab points out. "Employers who are focused on increasing their employees' savings rates should consider adjusting their match formula, because we know that the employer match amount is one of the most important factors in driving an employee's savings rate," said Dean Kohmann, vice president of Charles Schwab retirement plan services, in a press release. The most common employer match formula according to Schwab data is 50% of an employee's deferred salary up to 6% of compensation.

Communication Corner: 2009 Plan Limits

This month's sample participant communication memo outlines the 2009 plan dollar limit changes. Email twgservices.com for a copy you can print and distribute to employees.

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