



Summer 2022

Fiduciary File™

Plan fiduciaries should be ready to address these “hot topics” this Summer:

- (1) Be prepared to take advantage of new IRS pre-examination pilot program
 - a. IRS pilot program launched June 2022 gives employers 90 days’ advance notice that plan will be audited
 - b. Employers have 90-day window to review plan document and operation and correct errors under EPCRS (SCP or VCP)
 - c. Errors corrected within the 90-day grace period subject to far lower VCP fees, rather than normal audit CAP penalties
 - d. Employers that receive a pre-examination letter should promptly contact ERISA counsel to take advantage of the correction window
- (2) Understand collective investment trusts (“CITs”) – the next generation QDIA
 - a. ERISA imposes higher standard of fiduciary scrutiny for default investment funds
 - b. “Qualified” default investment funds consist of target date funds, balanced funds, managed accounts, and customized options
 - c. 2013 DOL guidance encourages fiduciaries to consider customized options
 - d. CITs are unregistered investment vehicles maintained by a bank or trust company that pool money from qualified retirement plans for investment purposes
 - i. Available only to tax-qualified retirement plans
 - ii. Permit customized fee structures and investment strategies
 - iii. Increasingly common investments under defined contribution plans of all sizes
 - e. Fiduciaries should engage their investment consultants to evaluate CIT solutions
- (3) IRS guidance for late pre-approved plan restatements
 - a. Pre-approved plans must be updated every six years (Cycle 3 restatement deadline is July 31, 2022)
 - b. Failure to timely adopt restatement results in loss of pre-approved status and inability to rely on sponsor’s IRS compliance letter
 - c. Employer – not pre-approved sponsor -- becomes responsible for timely plan amendments
 - a. Late restatements often can be self-corrected through EPCRS
- (4) Consider strategies to manage unique fiduciary risks when markets are turbulent
 - a. ERISA’s prudence standard is contextual; market volatility is part of the context
 - b. Understand who is responsible for investment management:
 - i. For consultants who have 3(38) responsibility – fiduciaries should evaluate consultant’s investment reports and compliance with IPS
 - ii. For 3(21) consultants – fiduciaries should consider calling a special meeting to evaluate fund performance, volatility, and cash-equivalent funds
 - c. Document special attention to the volatility in investment reports and meeting minutes
- (5) ERISA litigation roundup – good (and bad) news for fiduciaries
 - a. Colgate-Palmolive and Alight face new cyber-theft lawsuit
 - i. *Disberry v. Empl. Rels. Comm. of Colgate-Palmolive* (S.D.N.Y. filed 7/7/22)
 - ii. Plan fiduciaries allegedly had inadequate procedures to prevent imposter’s theft of participant’s \$750,000 account
 - b. Fee litigation brings a mixed bag of results
 - i. *Smith v. CommonSpirit Health* (6th Cir. 2022) – appellate court throws out challenge to actively-managed funds
 - ii. *West v. BOKF* (N.D. Okla 7/5/22) – Bank of Oklahoma must defend its use of proprietary funds in its own plan



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