How ERISA Has Changed the Game for Nonprofits

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Many nonprofit boards of directors and audit committees over the last several years have been adjusting to new requirements and expectations of them under the Employee Retirement Income Security Act ("ERISA"). Since coming under ERISA jurisdiction in 2008, 403(b) retirement plans—predominantly present in the nonprofit sector—are now subject to a litany of compliance checks and balances. The majority of these new responsibilities reside with the executives leading nonprofit corporations, who have little time to spend on additional (and often times tedious administrative) duties. This article provides an overview of the biggest challenges ERISA has instigated for nonprofits, and how these organizations are reacting to managing their retirement plans effectively and efficiently in light of this shift.

403(B) RETIREMENT PLANS UNDER ERISA: A SEA CHANGE IN RESPONSIBILITY

While for-profit businesses with employee retirement plans have been acclimated to ERISA requirements for quite some time, nonprofit organizations have not been subject to ERISA compliance for their plans until fairly recently. It has been just over half a decade since this regulatory change went into effect for a multitude of nonprofit organizations that sponsor 403(b) retirement plans, and with it came a number of significant changes to this sector's retirement plan management landscape.

Namely, ERISA's jurisdiction over nonprofit 403(b) retirement plans has had the following implications for nonprofit leadership teams:

1. Fiduciary responsibility. Under ERISA, nonprofits are subject to fiduciary standards. This means that employers must act in the best interest of their plan participants and in a "prudent" manner related to the oversight of their retirement plan. ERISA outlines that this includes management of 403(b) vendors that provide investment management, plan administration, recordkeeping, and other services to the plan. ERISA also requires that

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plan fiduciaries follow the terms outlined in their governance documents. (Additional detail regarding specific facets of this fiduciary duty will be expounded upon a bit later in this article.)

2. Greater employer accountability and cost. Employers with 403(b) plans have new, expanded duties under ERISA, and they are also held to a new standard of accountability. Nonprofits with more than 100 employees must undergo a plan audit by an independent certified public accountant each year. Since many 403(b) plans have not previously been strictly regulated, these early audits can be more expensive than the typical plan audit due to the greater amount of information auditors must sort through and analyze during this process.

3. ERISA plan participant disclosures. Under ERISA, nonprofits must provide a summary of their retirement plan description to their participants. In addition, they must provide quarterly and annual investment and financial information to their participants to increase transparency about investment performance and oversight.

4. Reporting requirements. Nonprofits' retirement plans must comply with the annual 5500 reporting requirements under ERISA (which now include the audit referenced above).

At first glance, this list seems to translate to overwhelming new responsibility and burden for nonprofit leaders and their management committees. Much of it, however, can be easily outsourced to accredited professionals (specifically, items 2–4: the audit, participant disclosures, and 5500 reporting). The most confusing piece of this puzzle for nonprofit retirement plan sponsors has been item #1 on this list: fiduciary responsibility. This is the biggest challenge for nonprofits, particularly since best practices and tactical recommendations in this area historically have been nebulous or ill defined (including for the for-profit community).

Fortunately, there are tangible steps nonprofits can take to fulfill their fiduciary role in an efficient manner that limits their time commitment while maximizing their compliance and liability protection. Following, we will share several of the top approaches nonprofits have employed to comply with the critical ERISA mandate of fiduciary responsibility.

TACKLING THE FIDUCIARY CHALLENGE

The biggest change to which nonprofits must adapt under ERISA is their newfangled fiduciary responsibility. While many believe this relates directly to investment performance and monitoring, ERISA defines fiduciary responsibility much more broadly. For the ease of categorizing and discussing multiple responsibilities that fall underneath the "fiduciary" definition, we have broken them into four distinctive fiduciary disciplines (see Figure A, below).

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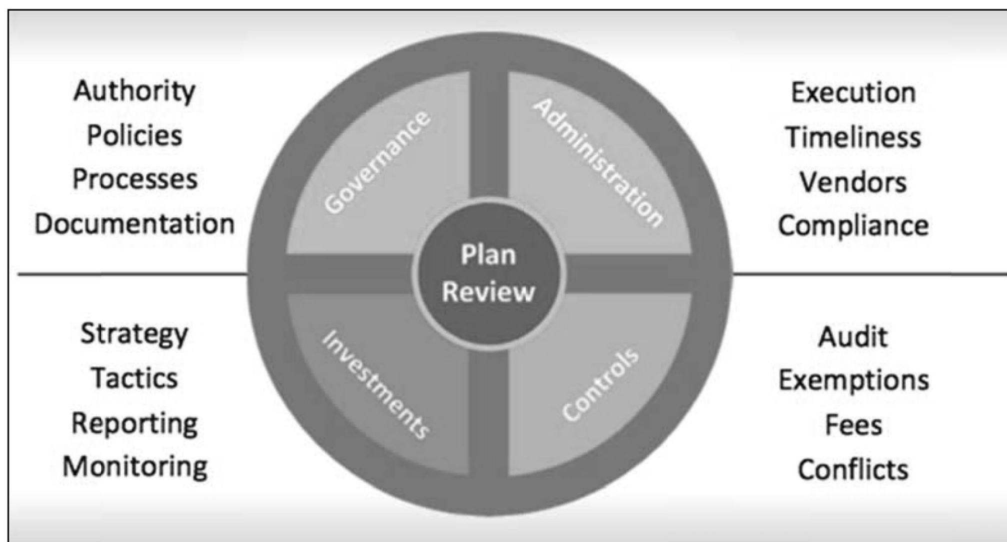
Fig. A. Four Fiduciary Disciplines Under ERISA



Below is a brief synopsis of each of these fiduciary disciplines:

1. Administration includes the tools and mechanisms used to carry out stewardship responsibilities prudently, not the least of which includes plan vendor oversight and assessment of those vendors' fees.

2. Controls are the ways in which an organization measures its practices and progress against a standard of stewardship, which includes the aforementioned annual audit.

3. Investments are often the most visible facet of fiduciary responsibility, as they reflect the asset performance of the plan's participants, as well as the process that is followed based on a plan's investment policy.

4. Governance refers to an organization's chain of command and its scope of responsibilities related to its retirement plan, as well as documentation related to its decision making related to the plan.

In 2011, the Investment Fiduciary Leadership Council (IFLC) published a Standard for fiduciary practices under ERISA. It defines the steps that are intended to guide retirement plan management leaders in the execution of the four major fiduciary disciplines, including 72 specific actions to be implemented across all four disciplines. The Standard is a useful resource for nonprofits seeking to establish a prudent fiduciary management system, and can be ordered at http://rolandcriss.com/publications/fiduciary-standards.

There are a few critical first steps that nonprofits can take to kick-start their fiduciary efforts under ERISA. Following is a brief highlight of those approaches, based on the Standard mentioned above.

TOP APPROACHES FOR ADAPTING TO FIDUCIARY RESPONSIBILITY UNDER ERISA

In short, ERISA has swooped down on nonprofit organizations somewhat unexpectedly, and has brought with it a number of significant changes—affecting the strategic management of 403(b) retirement plans, including the administration and reporting requirements of these entities. We have addressed the

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areas of change ERISA has instigated within nonprofits, so now we would like to discuss those approaches that have proven effective for nonprofits to overcome these new challenges related to their retirement plan management.

1. Comprehensive Plan Review

A comprehensive plan review that examines all four ERISA fiduciary disciplines is a beneficial starting point for nonprofit plan sponsors that have aligned their plans with ERISA. It assesses key compliance processes and mitigates risk by measuring organizations against current fiduciary standards and Department of Labor guidelines. Completed annually, this review can help nonprofit leaders and their committees gain confidence about their retirement plan effectiveness and oversight process in light of ERISA regulations. Critical to the success of this review is ensuring it is performed by a wholly independent third party that does not offer any investment or other services to the retirement plan. Vetting the proper credentials of these independent vendors (e.g., through the Fiduciary Supply Management Association, or other respected standards organizations) is highly recommended.

2. ERISA Fee Assessment

Plan sponsors admit to being challenged to understand ERISA's rule that requires them to determine if the fees the vendors charge to their plans are reasonable. A fee assessment is an unbiased opinion that analyzes the quality of vendor services against their fees, providing a clear quantitative score. The significance of a fee assessment is that it goes deeper than just a mere comparison of fees (or "fee benchmarking"), measuring the value the organization receives in return for the fees paid. By measuring true vendor value as opposed to solely examining cost, nonprofit plan sponsors can feel confident that they are gaining an evaluation of their service providers that is in line with ERISA expectations.

3. Plan Administrator

A clear trend of outsourcing the complex ERISA Plan Administrator role is gaining steam in the nonprofit arena because it reduces greatly the fiduciary risk of a nonprofit's directors and executives, preempts excessive vendors' fees, and curtails vendors' conflicts of interest. Also called an ERISA 3(16) Administrator, this fiduciary partner takes over many of the day-to-day tasks required of the plan management executive, so he (and his team) can focus on their primary area of business. The outsourced 3(16) helps to manage all of the other retirement plan vendors, as well as collect, organize, assess, and document necessary retirement plan data as required by ERISA. Again, independence and objectivity is critical for this role, so ensuring the vendor is a dedicated 3(16) provider (and does not provide other retirement plan services) will ensure this role truly lessens the fiduciary burden on key nonprofit leadership members.

THE BRIGHT SIDE OF ERISA FOR NONPROFITS

When revealing the laundry list of new duties required by nonprofit leaders to effectively manage their retirement plans under ERISA, it can appear that this new regulation is nothing but a burden for the industry. However, ERISA brings with it some positive factors for nonprofit executives, as well. First, ERISA (and, now the Fiduciary Standard) provides a clear outline for employer obligations related to 403(b) plans. Previously, under state law, it was unclear what employers' responsibilities were regarding the stewardship of their participants' assets. Second, employers gain more control over their plans under ERISA. Yes, it requires more of them, but they also have the opportunity to play a larger role in the design and administration of their plans, as well as increase the level of communication with

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their participants regarding their 403(b) funds. The bottom line: Although ERISA has been an adjustment for nonprofits sponsoring retirement plans, with the right vendors and fiduciary partners, it can be a benefit both to a plan's participants, and to the plan managers themselves.

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