# Overcoming Fiduciary Fears:

## Understanding the Real Risks of Liability for Small Plan Sponsors

**Prepared by the Wagner Law Group**

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**IMPORTANT INFORMATION**

The Wagner Law Group has prepared this white paper, which is intended for employers sponsoring retirement plans that are subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), as well as service providers who work with plan sponsors. Future legislative or regulatory developments may significantly impact the matters discussed in this paper. This white paper is intended for general informational purposes only, and it does not constitute legal, tax or investment advice on the part of The Wagner Law Group or its affiliates.

## EXECUTIVE SUMMARY


Overcoming Fiduciary Fears

Employers sponsoring micro- and small-sized defined contribution plans (Small Plan Sponsors) should have a healthy respect for ERISA. But in no event should Small Plan Sponsors feel excessively fearful of ERISA's fiduciary requirements.

Limited Relevance Of Publicized Fiduciary Risks

Small Plan Sponsors should not be overly concerned with certain fiduciary risks that have been heavily publicized by the media in recent years.

- *401(k) Class Action Lawsuits*. These lawsuits typically involve claims that the plan sponsor breached its fiduciary duty by failing to monitor and prevent the excessive compensation paid to the plan's providers. However, these lawsuits typically involve large, institutional employers. In light of a Small Plan Sponsor's limited purchasing power, as a practical matter, Small Plan Sponsors would have little exposure to legal claims that they should have negotiated fee discounts from their providers.
- *DOL Enforcement Activity*. The U.S. Department of Labor (DOL) continues to release ongoing announcements about its enforcement activities and monetary sanctions on plan sponsors. But many of the DOL's 401(k) investigations focus on employers that improperly delay or fail to deposit their employees' payroll contributions in their respective plans. Small Plan Sponsors can alleviate much of their "DOL audit risk" anxiety by depositing their payroll contributions not later than the 7th business day following the withholding date in accordance with the DOL's safe harbor rule.
- *New Regulatory Disclosure Regime*. As part of the DOL's new disclosure regime, both plan sponsor-level and participant-level fee disclosure requirements were rolled out to plan sponsors in 2012. But Small Plan Sponsors should keep in mind that the compliance burden effectively falls on the plan's service providers. So long as the Small Plan Sponsor works with reputable providers, with reasonable effort, it should have little difficulty confirming that its disclosure-related responsibilities have been satisfied.

Real Risks Of Fiduciary Liability For Small Plan Sponsors

Both the DOL and the Internal Revenue Service (IRS) have identified certain key compliance issues as enforcement priorities in their investigations and examinations of Small Plan Sponsors. Using these findings, we have developed a list of "Top 10" Compliance Issues for Small Plan Sponsors as provided in the attached Appendix A.

Successfully Mitigating Small Plan Sponsor's Fiduciary Risks

By focusing on these key compliance issues, Small Plan Sponsors can get a better appreciation of their real risks of fiduciary liability. Due to the technical nature of the compliance requirements for plans, it is critical for Small Plan Sponsors to work with reputable service providers (*e.g.*, recordkeeping platform, TPA, financial advisor) with the appropriate level of expertise. By ensuring that they are working with qualified providers, Small Plan Sponsors can readily minimize the fiduciary risks that are associated with the operation of their plans.

## I. Introduction – Overcoming Fiduciary Fears

Plan sponsors should be aware of the responsibilities that they have as fiduciaries under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). In fact, all plan sponsors, including employers sponsoring micro- and small-sized defined contribution plans ("Small Plan Sponsors"), should have a healthy respect for ERISA. But in no event should Small Plan Sponsors feel excessively fearful of ERISA's fiduciary requirements. Undue fear may inappropriately deter a small employer from establishing a plan. It may even cause Small Plan Sponsors to question their commitment to maintaining a plan for their employees.

Plan fiduciaries are only subject to liability under ERISA if they actually breach one of their fiduciary duties, and the good news is that Small Plan Sponsors can successfully navigate these requirements by working with qualified service providers for their plans. In this white paper, we will clarify how Small Plan Sponsors should not be overly concerned with certain fiduciary risks that have been heavily publicized by the media. We will identify the real risks of fiduciary liability for Small Plan Sponsors, and explain how Small Plan Sponsors can minimize their potential exposure to these risks by focusing on certain key compliance issues with the assistance of their respective plans' providers; please note these compliance issues are not within the purview of responsibility of a typical 3(21) investment advice fiduciary and/or 3(38) investment manager, which deal with investment matters.

## II. Limited Relevance of Publicized Fiduciary Risks

It appears that a number of Small Plan Sponsors have become disheartened or paralyzed in fear by certain fiduciary risks that have been heavily publicized by the media. For example, 401(k) class action lawsuits have made, and continue to make, the headlines in newspapers and journals.[1] The U.S. Department of Labor (the "DOL") continues to release ongoing announcements concerning its substantial monetary sanctions for plan sponsors.[2] A new regulatory disclosure regime under ERISA was also rolled out recently, requiring comprehensive fee disclosures to be provided for the first time to both plan sponsors as well as individual participants.[3] While these news stories and reports may have been well-publicized in the retirement market space, they have limited relevance to Small Plan Sponsors as further explained below. In fact, these stories and reports may be potentially confusing to Small Plan Sponsors, casting a distorted view of the fiduciary risks that apply to fiduciaries of micro- and small-sized plans.

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[1] See, *e.g.*, Tussey v. ABB, Inc. (W.D. Mo. March 31, 2012), a district court decision in which participants were awarded over $50 million in total, including both restorative payments and legal costs. See, also, Bilewicz v. FMR LLC (Case No. 13-10636), a putative class action filed against Fidelity on March 19, 2013.

[2] The DOL regularly releases fact sheets to the public with the monetary results for its enforcement activities under ERISA.

[3] Plan sponsor-level fee disclosures under ERISA Section 408(b)(2) became effective as of July 1, 2012. Participant-level fee disclosures under ERISA Section 404(a) became effective as of August 30, 2012 for calendar year plans.

### A. 401(k) Class Action Lawsuits

The 401(k) class action lawsuits filed in recent years typically involve claims made by participants that the plan sponsor breached its fiduciary duties by failing to monitor and prevent the excessive compensation paid to the plan's investment and service providers. There have been a significant number of class action lawsuits involving sizable settlements from employers sponsoring 401(k) plans. For example, Caterpillar, Inc. agreed to pay a settlement in the amount of $16.5 million in its capacity as plan sponsor to its participants.[4] Similarly, Wal-Mart Stores, Inc. agreed to pay a settlement in the amount of $13.5 million to its plan participants.[5] In one of the few cases where the parties where unable to reach a settlement, Tussey v. ABB, Inc., the district court formally issued a decision against the plan sponsor, ruling that it had breached several fiduciary duties. With the addition of a separate award for attorneys' fees and legal costs, the total amount awarded by the district court was roughly $50 million.[6]

Small Plan Sponsors may be somewhat dismayed by the size of the settlement amounts and monetary awards in these cases. However, they should draw comfort from the fact that these types of lawsuits typically involve large, institutional employers. For example, the factual records for Tussey v. ABB, Inc. indicate that the plans sponsored by ABB, Inc. held over $1 billion in total plan assets. This fact formed a critical basis for the district court's ruling that ABB, Inc. had breached its fiduciary duties under ERISA, specifically holding that it had failed to use its "purchasing power due to its large size" to negotiate fee discounts from its provider.

Because investment and service fees are customarily quoted in the form of an asset-based fee formula, larger plans may be susceptible to overpaying for services. For example, if a new plan client were triple the size of the average plan client, the new plan would pay three times the average amount (assuming the same asset-based fee formula is used for all plans). Due to the economies of scale, the provider's costs for servicing the new plan may be substantially less than the amount calculated under the asset-based fee formula. Thus, as highlighted in this illustration, the sponsor of a large plan would have a fiduciary duty to proactively bargain for a lower, reasonable fee in accordance with the requirements of ERISA.

This fiduciary issue, as illustrated in the scenario described above, would not arise in the case of Small Plan Sponsors. With respect to small-sized plan with assets of less than $10 million, the Small Plan Sponsor may have very little bargaining power with the plan's providers. Moreover, in the case of a micro-sized plan with assets of less than $1 million, the Small Plan Sponsor may not have any ability whatsoever to negotiate a discount from a provider's standard fee. Thus, in light of a Small Plan Sponsor's limited purchasing power, as a practical matter, Small Plan Sponsors would have little exposure to legal claims that they should have negotiated fee discounts from their providers. It should also be noted that it is unlikely that a plaintiffs bar attorney would ever agree to proceed with a class action lawsuit against a Small Plan Sponsor, given the relatively small amounts that theoretically could be awarded by a court in the event it ruled against the Small Plan Sponsor.

[4] Martin v. Caterpillar, Inc. (C.D. Ill.) (approving settlement on Oct. 28, 2010).
[5] Braden v. Wal-Mart Stores, Inc. (W.D. Mo.) (approving settlement on Mar. 19, 2012).
[6] The participants were awarded $36.9 million in monetary damages.

### B. DOL Enforcement Activity

The U.S. Department of Labor (the "DOL") regularly updates the public about its enforcement activities through fact sheets it releases from time to time. The DOL collected roughly $1.27 billion from plan sponsors through its investigations and voluntary compliance efforts in 2012. Although the amount collected by the DOL is a staggering figure, Small Plan Sponsors should keep in mind that the DOL has oversight responsibility for millions of benefit plans covered by ERISA, covering roughly 141 million employees with combined assets of over $7 trillion.[7]

Although the DOL does not publish details on the areas of focus for its enforcement activities, many of the DOL's 401(k) investigations focus on employers that improperly delay or fail to deposit their employees' payroll contributions to their respective plans.[8] These fiduciary violations frequently arise when the employer is having financial problems. Because of the prevalence of these types of fiduciary violations, the DOL maintains two national enforcement initiatives focusing on this compliance issue.[9] Payroll contribution-related failures are also the most common type of fiduciary violation addressed through the DOL's Voluntary Fiduciary Correction Program ("VFC Program"), an amnesty program that gives plan sponsors the ability to voluntarily correct a wide range of fiduciary errors. Since the inception of the VFC Program in 2000, close to 90% of all the applications that have ever been filed by plan sponsors to correct their fiduciary violations have involved delinquent payroll contribution violations.[10]

Small Plan Sponsors can alleviate much of their "DOL audit risk" anxiety by ensuring that their employees' payroll contributions are deposited with their respective plans on a timely basis. The DOL has established a valuable safe harbor rule for Small Plan Sponsors with fewer than 100 participants (as of the beginning of the plan year). Under this safe harbor rule, payroll contributions simply need to be deposited with the plan not later than the 7th business day following the day on which such amount was withheld.[11] If a Small Plan Sponsor is unable to satisfy this safe harbor rule, the general timing rule would apply, meaning that the payroll contributions would need to be deposited as of the earliest date on which such contributions can be "reasonably segregated" from the employer's general assets.[12]

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[7] *EBSA Achieves Over $1.2 Billion in Total Monetary Results in Fiscal Year 2012*, U.S. Department of Labor, Employee Benefit Security Administration Fact Sheet (May 2013). Data as of March 31, 2013.
[8] *Employee Contributions,* U.S. Department of Labor, Employee Benefit Security Administration Fact Sheet (April 2013).
[9] The DOL's *Employee Contributions Project* focuses on correcting the untimely remittance or failure to forward payroll contributions through its civil investigative powers. The *Contributory Plans Criminal Project* focuses on an employer's criminal misuse of such funds.
[10] Preamble to the final regulation at 29 CFR 2510.3-102 (Definition of "Plan Assets" - Participant Contributions), 75 FR 2076 (Jan. 14, 2010).
[11] For example, if a participant were to defer an amount from his or her paycheck on Friday, June 7th, the Small Plan Sponsor would need to ensure the amount is actually deposited with the plan by Tuesday, June 18th. Section 2510.3-102(a)(2) of the DOL regulations. Under this rule, in general, "small employer" is one with under 100 eligible employees.
[12] Section 2510.3-102(a)(1) of the DOL regulations. In no event may the "earliest date" be later than the 15th business day of the month following the month in which the amount was withheld.

### C. New Regulatory Disclosure Regime

There was a significant amount of media coverage concerning the DOL's rollout of its new disclosure rules in the 401(k) marketplace. Upfront fee disclosures from covered service providers to plan sponsors became mandatory under ERISA Section 408(b)(2) (the "408(b)(2) Disclosure Rules") on July 1, 2012. Participant-level disclosures under Section 404a-5 of the DOL regulations (the "Participant Disclosure Rules"), which are designed to ensure that participants receive all relevant information concerning the plan's investment menu and administrative fees, became mandatory on August 30, 2012 for calendar year plans. Given the fact that these requirements directly impacted service providers to plans, plan sponsor clients also received multiple communications concerning the new disclosure rules from recordkeeping platforms, third party administrators ("TPAs") and financial advisors.

Even though Small Plan Sponsors have a duty to ensure that the required disclosures under the 408(b)(2) Disclosure Rules and the Participant Disclosure Rules are provided, they should keep in mind that the compliance burden effectively falls on the plan's service providers, although there is, of course, reasonable effort required by the Plan Sponsors. Under the 408(b)(2) Disclosure Rules, the mandatory disclosure must be prepared and delivered by the plan's covered service providers. For purposes of the Participant Disclosure Rules, it is customarily the recordkeeping platform or the TPA who prepares and arranges for the delivery of the required quarterly and annual disclosures to participants. Thus, a Small Plan Sponsor merely needs to confirm that the proper disclosures are being provided by the relevant provider. So long as Small Plan Sponsors work with reputable, qualified providers, they should have little difficulty confirming that their fiduciary responsibilities under the 408(b)(2) Disclosure Rules and the Participant Disclosure Rules are being satisfied.

## III. Real Risks of Fiduciary Liability for Small Plan Sponsors

Although Small Plan Sponsors should not be excessively fearful of the fiduciary risks that have been heavily publicized by the media as discussed above, they should have a healthy respect for ERISA and its fiduciary requirements. Both the DOL and the Internal Revenue Service (the "IRS"), the chief regulators for defined contribution plans, and the employers who sponsor them, have identified certain key compliance issues as enforcement priorities in their investigations and examinations of Small Plan Sponsors. Using these findings, we have developed two separate lists of "top 5" DOL and IRS compliance issues, respectively, for Small Plan Sponsors.

### A. DOL Compliance Issues

Small Plan Sponsors should be especially mindful of the following "top five" DOL compliance issues:

1) Timely Remittance of Payroll Contributions
2) Providing Participant-Level Disclosures on Quarterly and Annual Basis
3) Timely Filing of Annual Form 5500 Return

4) Providing Diversified and Broad Range of Investment Menu Choices
5) Obtaining ERISA Bond Coverage

We have highlighted these five particular issues based on our experience and in light of the recent enforcement initiatives implemented by the DOL. It should also be noted that all five of these compliance issues are directly addressed in the DOL's *Investigation Guidelines*, as set forth in its Enforcement Manual.[13]

*Timely Remittance of Payroll Contributions*. ERISA has strict rules that require plan sponsors to remit payroll contributions to their respective plans on a timely basis. As discussed above, this compliance issue is being specifically targeted by the DOL in its ongoing investigations of plan sponsors. Small Plan Sponsors should resist the temptation to delay the scheduled deposits of payroll contributions to their plans for any reason. Under the DOL's safe harbor rule for Small Plan Sponsors with fewer than 100 participants, payroll contributions should be deposited with the plan not later than the 7th business day following the day on which such amounts were withheld.[14] By taking advantage of this safe harbor, Small Plan Sponsors can wholly eliminate their fiduciary risk with respect to this issue. If a Small Plan Sponsor has any operational issues or concerns relating to this compliance issue, it should consult the plan's recordkeeper or TPA for assistance and suggestions on how to ensure its compliance with the safe harbor rule.

*Providing Participant-Level Disclosures on Quarterly and Annual Basis*. Small Plan Sponsors have a duty to ensure that the mandatory disclosures under the Participant Disclosure Rules are properly provided to participants. However, as discussed above, Small Plan Sponsors customarily rely on the plan's recordkeeper or TPA to provide the required quarterly and annual disclosures. Thus, Small Plan Sponsors should ensure that they work with qualified service providers with the proper expertise in preparing and delivering these required disclosures to participants. By working with a qualified recordkeeper or TPA, Small Plan Sponsors can readily minimize the fiduciary risks that are associated with this fiduciary disclosure requirement.

*Timely Filing of Annual Form 5500 Return*. The Form 5500, *Annual Return/Report of Employee Benefit Plan*, is the annual information return that must be filed by plan sponsors with the DOL. The DOL has an information sharing arrangement with the IRS, and the Form 5500 is often the starting place for both DOL investigations and IRS examinations of Small Plan Sponsors. The annual filing is due at the end the seventh month following the close of the plan year, and a 2 ½ month extension is available by filing a Form 5558. Thus, for calendar year plans, the extended filing deadline would be October 15th. The penalties for failing to file the Form 5500 can be severe. For each day the filing is late or incomplete, the DOL may impose a penalty of up to $1,100 per day and the IRS may impose a separate penalty of $25 per day up to a maximum of $15,000. Although the plan sponsor is ultimately responsible for signing and filing the Form 5500, it is customary for the plan sponsor to rely on the plan's TPA to prepare and complete the annual filing. By working with a qualified TPA with the appropriate expertise, Small Plan Sponsors can successfully mitigate the fiduciary risks that are associated with this fiduciary filing requirement.

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[13] *Fiduciary Investigations Program*, Chapter 48, EBSA Enforcement Manual.
[14] Section 2510.3-102(a)(2) of the DOL regulations.

*Providing Diversified and Broad Range of Investment Menu Choices*. ERISA imposes a "duty to diversify" on plan sponsors in their capacity as investment fiduciaries for their respective plans.[15] This duty requires the fiduciary to diversify the plan's investments so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so. In the context of 401(k) plans and other plans with participant-directed investments, the plan sponsor is responsible for the plan menu and the plan's participants are responsible for their individual allocation decisions. Accordingly, the plan sponsor has a duty to maintain an investment menu that includes a diversified and broad range of investment menu choices.[16] Small Plan Sponsors customarily engage financial advisors to help them select and monitor their respective plan's investments options. Therefore, it is important for Small Plan Sponsors to work with financial advisors with specialized experience in advising retirement plan clients. The plan's menu should cover all relevant asset categories and give participants the ability to minimize the risk of large losses through diversification. A financial advisor with the appropriate expertise should be able to help Small Plan Sponsors comply with this fiduciary requirement, fully mitigating the risks associated with it.

*Obtaining ERISA Bond Coverage*. Under Section 412 of ERISA, the plan sponsor is required to purchase and maintain an ERISA bond on behalf of the plan. Generally, the sponsor and any other person who "handles" plan funds must be bonded. The ERISA bond must cover at least 10% of the amount handled by the bonded individual, but the coverage level does not need to exceed $500,000 (unless the plan invests in employer securities). This compliance issue is routinely included in the DOL's investigation procedures. Although this fiduciary requirement is not subject to regulatory oversight by the IRS, the failure to maintain a proper ERISA bond was cited as one of the two most common compliance failures in a recent IRS examination project for small defined contribution plans with less than $250,000 in assets.[17] Fortunately, ERISA bond coverage for Small Plan Sponsors is generally inexpensive, and the required coverage can be obtained easily through an insurance broker. If a Small Plan Sponsor is unable to find an appropriate insurance broker on its own, it can always ask its TPA or another provider for a broker recommendation.

## B. IRS Compliance Issues

The IRS is responsible for ensuring that tax-qualified retirement plans in form and in operation are in compliance with the Internal Revenue Code of 1986, as amended (the "Code"). Small Plan Sponsors should pay particular attention to IRS compliance matters given the fact that they have a general fiduciary duty to operate their plans in compliance with all applicable law. Like the DOL, the IRS has also instituted national enforcement initiatives focusing on retirement plan sponsors. Specifically, the IRS is conducting a series of examination projects known as the "Learn, Educate, Self-Correct and Enforce" or LESE Projects. Retirement plans are selected for LESE Project examinations through the random sampling of 5500 returns. The

[15] ERISA Section 404(a)(1)(C).

[16] ERISA Section 404(c) requires a "broad range of investment alternatives" and certain other operational requirements relating to the ability of participants to make informed and timely investment allocation decisions. If the applicable requirements are met, no plan fiduciary can be held responsible for the participant's individual allocation decisions.

[17] The IRS has been randomly examining and auditing different groups of retirement plans with common characteristics for purposes of its "Learn, Educate, Self-Correct and Enforce" or LESE Projects

IRS recently published the results of a LESE Project that specifically focused on the audits of micro-sized plans with assets of less than $250,000.

Based on these published results, we believe Small Plan Sponsors should be especially mindful of the following "top five" IRS compliance issues identified as the most common compliance failures detected through its LESE Project audits:

1) Timely Amending Plan Document to Comply with Current Law
2) Performing Minimum Coverage, ADP/ACP and Top-Heavy Testing
3) Allocating Plan Contributions in Compliance with Plan Document
4) Reporting Distributions on Form 1099-R
5) Reporting Defaulted Plan Loans as Taxable Distributions

*Timely Amending Plan Document to Comply with Current Law*. Both ERISA and the Code require a plan sponsor to establish and maintain a written plan document that complies with current law. Thus, whenever ERISA, the Code or existing IRS guidance is revised to reflect changes in the law, the plan document must also be amended on a timely basis. However, according to the IRS LESE Project results, one of the two most common issues detected on audit was the failure to timely amend the plan document to reflect changes in the law. Because of the technical nature of plan documents, Small Plan Sponsors customarily rely on a TPA or legal counsel to help them comply with this qualification requirement. From a risk mitigation perspective, Small Plan Sponsors simply need to work with plan document professionals who have the proper expertise to ensure that their plan documents are properly amended in compliance with this important IRS requirement.

*Performing Minimum Coverage, ADP/ACP and Top-Heavy Testing*. Tax-qualified plans by design are supposed to encourage workers, especially lower-income employees, save for their retirement. In order to ensure that plans do not disproportionately favor highly-compensated employees ("HCEs"), the Code imposes certain numerical tests that plans must pass in order to demonstrate that they are not "discriminatory" in favor of HCEs. The relevant tests for a 401(k) plan include the "Minimum Coverage Test," the "ADP/ACP Test" and the "Top-Heavy Test." Due to the technical nature of these tests and the availability of safe harbor exemptions based on plan design, it is critical for Small Plan Sponsors to work with TPAs who are able to perform these tests skillfully. Small Plan Sponsors can readily protect themselves by confirming the qualifications of their TPAs and by confirming that all of the relevant tests are being performed.

*Allocating Plan Contributions in Compliance with Plan Document*. All plan contributions, such as profit-sharing and matching contributions, must be allocated to participant accounts in accordance with the terms of the plan document. Thus, these terms will dictate who will be eligible for the contribution. They will also determine how the allocation amounts will be computed, which are often linked to a participant's "eligible" compensation. Small Plan Sponsors typically rely on TPAs to calculate the allocation amounts for all eligible participants. To avoid any compliance failures, Small Plan Sponsors can safeguard themselves by working with qualified TPAs with experience in interpreting plan documents and in administering plan contributions.

*Reporting Distributions on Form 1099-R*. All distributions from a tax-qualified plan, including taxable and rollover distributions, must be reported on Form 1099-R. Although this is not a burdensome requirement, as discussed above, this compliance issue has been identified by the IRS as a frequent audit issue for micro-sized plans. Small Plan Sponsors can ensure that this compliance failure does not occur simply by confirming that the plan's TPA is handling this IRS reporting requirement.

*Reporting Defaulted Plan Loans as Taxable Distributions*. If a participant loan is not repaid to the plan in accordance with its terms, the loan is in default and it must generally be treated as a taxable distribution from the plan. The plan's terms will generally specify how the plan handles a default, and it may provide that a loan does not become a taxable distribution until the end of the calendar quarter following the quarter in which the repayment was missed.[18] TPAs are routinely engaged to administer a plan's participant loans, and their services customarily include reporting any defaulted plan loans as taxable distributions. Small Plan Sponsors can ensure that defaulted plan loans are properly processed by confirming that this service is in fact being provided by the plan's TPA on an ongoing basis.

## IV. Conclusion – Successfully Mitigating Small Plan Sponsor's Fiduciary Risks

Many of the fiduciary risks that have been heavily publicized by the media in recent years have limited relevance for Small Plan Sponsors. Small Plan Sponsors can gain a deeper appreciation of their real risks of fiduciary liability by focusing on our list of "Top 10" Compliance Issues for Small Plan Sponsors (as provided in the attached Appendix A). This list can also be used as an effective tool to help Small Plan Sponsors spot-check and confirm that their service providers are doing their jobs properly. Due to the technical nature of the compliance requirements for plans under ERISA and the Code, it is critical for Small Plan Sponsors to work with reputable service providers (*e.g.*, recordkeeping platform, TPA, financial advisor) with the appropriate level of expertise. By working with reputable providers, Small Plan Sponsors can readily minimize the real fiduciary risks that are associated with the operation of their plans.

[18] For example, if loan repayments were missed starting from January 15th, the loan would be treated as a taxable distribution at the end of June. Section 1.72(p)-1, Q&A-10(a) of the Treasury regulations.

Appendix A

## "Top 10" Compliance Issues for Small Plan Sponsors

| | Compliance Requirement | Third Party Providing Assistance |
|---|---|---|
| **Top 5 DOL Issues** | 1. Timely Remittance of Payroll Contributions | TPA or Recordkeeper |
| | 2. Providing Participant-Level Disclosures on Quarterly and Annual Basis | TPA or Recordkeeper |
| | 3. Timely Filing of Annual Form 5500 Return | TPA |
| | 4. Providing Diversified and Broad Range of Investment Menu Choices | Financial Advisor, Recordkeeper |
| | 5. Obtaining ERISA Bond Coverage | Insurance Broker |
| **Top 5 IRS Issues** *(most common errors in small plan exams)* | 6. Timely Amending Plan Document to Comply with Current Law | TPA or Legal Counsel |
| | 7. Performing Minimum Coverage, ADP/ACP and Top-Heavy Testing | TPA |
| | 8. Allocating Plan Contributions in Compliance with Plan Document | TPA |
| | 9. Reporting Distributions on Form 1099-R | TPA |
| | 10. Reporting Defaulted Plan Loans as Taxable Distributions | TPA |

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