BAM
RETIREMENT SOLUTIONS

Share Class and Legal Risk in Retirement Plans
Joe Goldberg, Director of Retirement Plan Services

There aren't many investment rules that are set in stone. Most of them come with exceptions, caveats and qualifications. But more than six decades of academic evidence, plus my own experience through years of volatile markets, make the bottom line abundantly clear: *Thou shalt not time the market*.

If you are a small business owner, a partner in a professional services firm or a physician with your own practice, you likely have enough on your plate without having to worry whether or not you are meeting your fiduciary responsibility to the employees in your retirement plan. Let's face it. Running a business is complicated, and the last thing you need is to spend time and energy trying to determine if some element of the way your plan is administered (something you are doing or not doing) could potentially get you sued.

To be clear, the lawsuits that have so far resulted in large penalties for plan sponsors involved companies with thousands of employees. The risk to you, today, is relatively low. However, given the way our legal system works, once there is case law for a certain type of violation, it becomes far less expensive to pursue cases matching those that have already set a precedent.

In general, recent lawsuits resulting in sizable penalties have had to do with plan fiduciaries not meeting their obligation to monitor the funds offered in their plan and to ensure that they are utilizing the lowest-cost share "class" available for a plan of their size. It's important to understand that these cases didn't hinge on whether or not the plan was offering the cheapest possible fund in an asset class, but rather on whether or not the exact same fund offered by the exact same fund company had another share class with lower expenses.

A retirement plan (or investor) becomes eligible for different share classes depending on the amount of money that plan or investor has in the fund (the more money, the lower-expense share class should be accessible). Alternatively, a broker/advisor with a 401(k) record-keeper could recommend higher-cost share classes that have a revenue component built into the fund to cover all or a portion of their fees. This is extremely common and often causes plan sponsors to fail to adequately consider fees, because when they are wrapped into fund expenses they are out of sight, out of thought and out of mind. A major challenge for plan fiduciaries of any size retirement plan is staying on top of when new share classes become available and when they qualify for lower-cost share classes.

An even more prevalent area that we see retirement plan sponsors tend not to meet their fiduciary obligation involves the index funds they offer. Index funds track a stock index, buying precisely the same equities in the precisely the same proportions as that index. As a result, their returns should match the return of the index, less low fees. It's not unheard of for S&P 500 index funds with expense rations as high as 0.72 percent to show up on some 401(k) platforms. Similar, if not nearly identical, funds are available (even to the small plan market) with expense ratios as low as 0.05 percent. To further complicate matters, the asset threshold for plan sponsors to access funds with fees in the range of 0.05 percent has been lowering.

So what's the takeaway? If you have a day job, and it isn't tracking and monitoring these funds, you should consider delegating that responsibility to someone who prudently watches not only what is going on in your plan, but also in the industry overall. The most important decision you make for your retirement plan won't be selecting the funds with the absolute, lowest-possible fees. It will more likely involve finding the right advisor, one who partners with you as a fellow plan fiduciary, makes it their full-time job to select the funds offered in your plan, monitors the funds and their fees and, perhaps most importantly, provides your participants with what they need to make smart decisions and prevent expensive investment errors.

Here are some questions to help you determine if you might benefit from working with a new retirement plan advisor:

1. Is my current advisor the investment fiduciary to my plan, or am I the one signing off on all the investment options offered through it?
2. Do I know that someone is working on behalf of my plan participants (my employees), ensuring at all times that they have access to the lowest-cost share class possible for the funds offered by my plan?
3. Does my current advisor actually help my plan participants make investment decisions and make themselves available for support and guidance?

The recent attention to fees has done a good job of bringing some of the market into line. And offering appropriate funds with reasonable fees is a legal requirement. But what truly moves the needle and makes an impact on the retirement readiness of your plan participants is an advisor or advisory firm that will work hard to guide your participants in saving more, choosing the right investments for their situation and, over time, be there to help them avoid making emotional mistakes driven by fear. The best and cheapest funds in the world, while an advantage, won't make up for a lack of support and good counsel centered on your participants' best interests.

About Joe Goldberg, Director of Retirement Plan Services

Joe Goldberg is the director of retirement plan services for the BAM ALLIANCE. Joe also serves as a wealth advisor for Buckingham, helping businesses enhance their retirement plans by improving investment options, employee education and overall participation.

Prior to joining the BAM ALLIANCE, Joe was an account executive for a sports marketing firm in New York. Joe is an Accredited Investment Fiduciary® and a Chartered Retirement Plan Specialist.

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