

Participant-Directed Retirement Plan Lawsuits and Fiduciary Responsibility

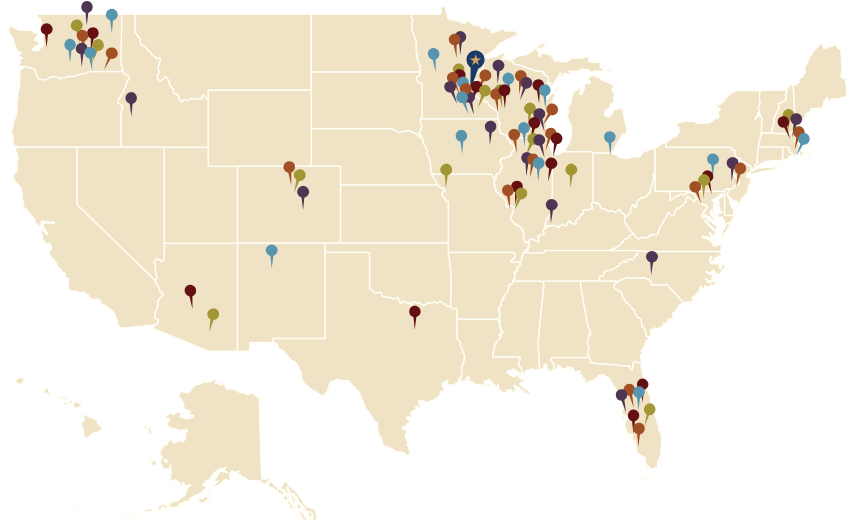
May 19, 2015



Housekeeping

- If you are experiencing technical difficulties, please dial:
800-422-3623.
- **Q&A session will be held at the end of the presentation.**
 - Your questions can be submitted via the **Questions Function at any time during the presentation.**
- The **PowerPoint presentation**, as well as the **webinar recording**, will be sent to you within the next 10 business days.
- Please complete our online survey.

About CliftonLarsonAllen

- A professional services firm with three distinct business lines
 - Wealth Advisory
 - Outsourcing
 - Audit, Tax, and Consulting
 - 3,600 employees
 - Offices coast to coast
- 
- Our Employee Benefits Group's 30 principals and 300 professionals audit more than 2,000 plans across the country and provide consulting services for hundreds more.

Investment advisory services are offered through CliftonLarsonAllen Wealth Advisors, LLC.

Speaker Introduction



- **Anita Baker, CPA, CEBS**

Managing Principal, Employee Benefit Plans, CliftonLarsonAllen, LLP

Anita Baker is the managing principal of the employee benefit plan practice where she focuses in providing assurance, tax, and consulting services to plan sponsors and third-party administrators. In her position, she is responsible for the CLA national employee benefit plan practice.



- **John Stiglich, CPA, CFP®, PFS, AIF®**

Principal, Retirement Plan Services, CliftonLarsonAllen Wealth Advisors, LLC

John is a principal with CliftonLarsonAllen Wealth Advisors LLC and is responsible for managing the firm's Employee Benefit Services Group. This group provides technical consulting, investment management and compliance services to a wide variety of employee benefit plans.

Agenda

- Current Definition of a Fiduciary
- Fiduciary Responsibilities
- Recent 401(k) Plan Lawsuits
- Mitigation of Fiduciary Risk
- Tools and Resources to assist a Plan Fiduciary

Definition of a Fiduciary

- The Employee Retirement Income Security Act (ERISA) sets standards of conduct for those who manage an employee benefit plan and its assets (called fiduciaries). They can include:
 - Internal administrative committee
 - Plan Administrator
 - Human Resource Director
 - Board of Directors
 - Third Party Administrator or Record Keeper
 - Investment Advisor
 - Anyone with discretion over the plan

Fiduciary Status

- Using discretion in administering and managing a plan or controlling the plan's assets makes that person a fiduciary to the extent of that discretion or control.
- Fiduciary status is based on the **functions performed for the plan**, not just a person's title.
- A plan must have at least one fiduciary named in the written plan, or through a process described in the plan, as having control over the plan's operation.

Fiduciary Status

- Attorneys, accountants, and actuaries generally are not fiduciaries when acting solely in their professional capacities.
- The key to determining whether an individual or an entity is a fiduciary is whether they are exercising discretion or control over the plan.

Fiduciary Status

- Employer Decisions are not fiduciary actions governed by ERISA
 - Establish a plan
 - Determine the benefit package
 - Determine certain features in a plan
 - Amend a plan
 - Implementing the decisions on behalf of the plan and carrying out these actions, likely creates fiduciary status

Significance of Fiduciary Status

- Fiduciary responsibilities include:
 - Acting solely in the interest of plan participants and their beneficiaries and with the exclusive purpose of providing benefits to them;
 - Carrying out their duties prudently;
 - Following the plan documents (unless inconsistent with ERISA);
 - Diversifying plan investments; and
 - Paying only reasonable plan expenses.

Significance of Fiduciary Status

- Duty to act prudently
 - Focuses on the **PROCESS** for making fiduciary decisions
 - Requires documentation of decision and basis for decisions in carrying out their fiduciary responsibility
 - Fiduciaries who do not follow the basic standards of conduct may be personally liable to restore any losses to the plan, or to restore any profits made through improper use of the plan's assets resulting from their actions. (An example would be Enron)

Prohibited Transactions

- Prohibited parties (called parties in interest)
 - Employer
 - Union
 - Plan fiduciaries
 - Service providers
 - Owners, officers, and relatives of parties in interest.

Prohibited Transactions

- A sale, exchange, or lease between the plan and party in interest;
- Lending money or other extension of credit between the plan and party in interest; and
- Furnishing goods, services, or facilities between the plan and party in interest.
- A party in interest using the plan's assets in their own interest or acting on both sides of a transaction involving a plan.
- Fiduciaries cannot receive any consideration for their personal account from any party doing business with the plan related to that business.

Prohibited Transaction Exemptions (ERISA Section 408(b)(2))

- Hiring a service provider as long as the services are necessary to operate the plan and the contract and compensation paid is reasonable
- Providing investment advice to participants regarding buying, selling or holding an investment as well as the receipt of related fees and other compensation by a fiduciary adviser
- Participant Loans
- Class and individual exemptions are available through the DOL exemption process

ERISA Fee Litigation

- 13 Class Action Lawsuits have been filed in the past 8 years
- Accused U.S. Companies of failing to act in the best interest of the participants
- Issues include:
 - Failure to monitor excessive fees
 - Favoring high cost mutual fund options over lower cost options
 - Using investment products managed by affiliated companies

Fiduciary Fee Litigation

- ***Tussey v. ABB* (8th Cir., March 19, 2014)**
 - » District court awarded \$35.2 million for breaches of fiduciary duty by ABB to 401(k) plans
 - » Appellate court Upheld \$13.4 million judgment against plan fiduciaries for failure to monitor and control recordkeeping costs
 - Consultant notified ABB that fees were excessive and might be subsidizing non plan costs (pursuant to a bundled arrangement)
 - ABB failed to calculate fees, assess whether they were reasonable, negotiate lower fees, or prevent the use of fees to subsidize costs unrelated to the plan

Fiduciary Fee Litigation

- » Tibble v. Edison International – pending before the U.S. Supreme Court; question relates to 6 year statute of limitations on ERISA claims.
- » A win for the plaintiffs could trigger a “rash” of lawsuits under a “continuance of prudence” standard. This would force plan fiduciaries to review prior plan decisions regularly.
- » District and Appellate courts have already decided in favor of the defendant.
- » Experts believe that the U.S. Supreme Court may be leaning toward the plaintiffs.

Other Fiduciary Fee Litigation

- » In August 2014, Fidelity Investments settled a suit filed by its employees for \$12 million.
- » In April 2015, Ameriprise Financial settled a suit filed by its employees for \$27.5 million.
- » In March 2015, Lockheed Martin Corp. settled a suit filed by its employees for \$62 million.
- » In April 2015, the Department of Labor filed a suit against City National Bank for \$4 million.
- » In February 2015, AEGON Companies, parent to Diversified Investors and Transamerica had a suit filed against it by its employees.

The Common Theme in Fiduciary Fee Litigation

- » The use of retail or similar share classes of mutual funds when the institutional share class was available.
- » Total or significant use of proprietary funds.
- » Charging excessive fees for recordkeeping/administrative services or benefitting from the revenue sharing from mutual funds in the plan
- » Directing revenue or services to related/affiliated entities.

Requirements of 408(b)(2) Regulations

- Service providers to qualified plans must disclose the amount of all direct and indirect fees that they receive including any revenue sharing with related entities.
- These regulations were effective July 1, 2012 and ongoing.

What typical costs are incurred by a Qualified Plan?

1. Custody and Trust Services
2. Recordkeeping/Technology Services
3. Broker Commissions/Investment Advisor Fees
4. Investment Expenses charged by the mutual fund or other plan investment
5. Plan compliance and Reporting Services(if bundled)

What is Revenue Sharing and where does it come from?

It is income included in the mutual fund's expense ratio that is paid to the recordkeeper and/or custodian and used to offset fees including broker's commissions or advisor's fees.

How are mutual funds constructed ?

1. Management fee – Paid to the mutual fund manager
2. 12(b)1 Fee – Typically paid to the broker for on-going service to the investor
3. Sub TA Fee – Paid to the recordkeeper for maintaining the participants' accounts
4. Daily Asset Charge – Additional fee added in order to cover recordkeeping fees
5. Fund Expense Ratio – Sum of the above items expressed as a percentage

Example of Costs Included in a Fund Option

09/30/2014

Plan Name: [REDACTED]
Plan ID: [REDACTED]

Investment Expenses and Indirect Compensation

The chart below shows the components of the investment expenses for the non-fixed interest funds available under your plan as well as the revenue paid to Voya Financial, Inc. (Voya) from the funds in support of the recordkeeping and administrative services we provide in connection with your plan. The revenue received by Voya from the fund is paid by the fund itself or a related party (e.g. the fund's investment manager) and is not an additional expense above the fund fees. Voya uses this revenue to maintain the investment, administrative and technological platforms and other supporting services used by your plan. Part of this revenue may also be used to compensate your advisor. Amounts shown below are based on charges in effect as of the date above and are subject to change.

Please refer to the Appendix for a description of the services provided in connection with the following fees paid by the Funds to Voya:

		Expenses Paid										Recordkeeping Revenue to Voya						
		Fund Expenses						Voya Contract Charges				Total						
Fund No.	Fund Name	(A) Management Fee	(B) Trail Fee	(C) 12b-1 Expense	(D) Gross Fund Expense Ratio (Net of (C))	(E) Volatility Adjustment	(F) Net Fund Expense Ratio	Prospectus Date	(G) Daily Asset Charge	(H) Voya Admin Fee	Total Daily Asset Charge (G+H)	(J) Total Investment Expense Ratio (from column I)	Total Daily Asset Charge (from column I)	(L) Sub-TA Expense Ratio (from column I)	12b-1 Fee	(N) Service Fee	(O) Total Revenue to Voya (K+L+M+N)	
003	Voya Money Market Portfolio I	0.25%	0.00%	0.09%	0.34%	0.00%	0.34%	05/01/2014	0.65%	0.65%	1.30%	1.64%	1.30%	0.17%	0.00%	0.00%	1.47%	
004	Voya Intermediate Bond Port I	0.40%	0.00%	0.11%	0.51%	0.00%	0.51%	05/01/2014	0.65%	0.45%	1.10%	1.61%	1.10%	0.17%	0.00%	0.00%	1.27%	
1008	Columbia Mid Cap Value Fund A	0.65%	0.25%	0.26%	1.17%	0.00%	1.17%	06/25/2014	0.65%	0.30%	0.95%	2.12%	0.95%	0.25%	0.25%	0.00%	1.45%	
1016	Voya Global Real Estate Fund A	0.71%	0.25%	0.28%	1.24%	0.00%	1.24%	05/01/2014	0.65%	0.00%	0.65%	1.89%	0.65%	0.40%	0.25%	0.00%	1.30%	
1026	Oppenheimer International Bond Fnd A	0.50%	0.25%	0.25%	1.00%	0.00%	1.00%	03/31/2014	0.65%	0.30%	0.95%	1.95%	0.95%	0.00%	0.25%	0.25%	1.45%	
1169	Voya Solution 2055 Portfolio Adv	0.14%	0.50%	0.90%	1.54%	-0.16%	1.39%	05/01/2014	0.65%	0.00%	0.65%	2.04%	0.65%	0.32%	0.25%	0.25%	1.47%	
1205	AllianceGI NFJ Dividend Value Fd Inst	0.70%	0.00%	0.01%	0.71%	0.00%	0.71%	12/19/2013	0.65%	0.60%	1.25%	1.96%	1.25%	0.10%	0.00%	0.00%	1.35%	
1217	VY Columbia Sm Cap Val II Pt I	0.75%	0.00%	0.13%	0.88%	-0.02%	0.86%	05/01/2014	0.65%	0.35%	1.00%	1.66%	1.00%	0.31%	0.00%	0.00%	1.31%	
1290	Voya Growth and Income Port S	0.50%	0.25%	0.09%	0.84%	0.00%	0.84%	05/01/2014	0.65%	0.00%	0.65%	1.49%	0.65%	0.30%	0.25%	0.00%	1.20%	
2025	Columbia Acorn Fund Z	0.64%	0.00%	0.15%	0.79%	0.00%	0.79%	07/11/2014	0.65%	0.55%	1.20%	1.99%	1.20%	0.35%	0.00%	0.00%	1.55%	
2028	Columbia Small/Mid Cap Value Fund K	0.71%	0.00%	0.39%	1.10%	0.00%	1.10%	11/30/2013	0.65%	0.35%	1.00%	2.10%	1.00%	0.35%	0.00%	0.00%	1.35%	
2877	Lord Abbett Val Opportunities Fnd A	0.71%	0.35%	0.22%	1.28%	0.00%	1.28%	04/30/2014	0.65%	0.30%	0.95%	2.23%	0.95%	0.15%	0.25%	0.00%	1.35%	
305	Lord Abbett Developing Growth Fnd P	0.51%	0.45%	0.25%	1.21%	0.00%	1.21%	12/31/2013	0.65%	0.00%	0.65%	1.86%	0.65%	0.25%	0.45%	0.00%	1.35%	
356	Franklin Mutual Global Disc Fund R	0.74%	0.50%	0.24%	1.48%	0.00%	1.48%	05/01/2014	0.65%	0.05%	0.70%	2.18%	0.70%	0.15%	0.50%	0.00%	1.35%	
430	VY Baron Growth Port I	0.85%	0.00%	0.15%	1.00%	0.00%	1.00%	05/01/2014	0.65%	0.35%	1.00%	2.00%	1.00%	0.31%	0.00%	0.00%	1.31%	
434	VY AmCen Sm-Mid Cp Val Port I	0.98%	0.00%	0.17%	1.15%	-0.22%	0.93%	05/01/2014	0.65%	0.35%	1.00%	1.93%	1.00%	0.31%	0.00%	0.00%	1.31%	
457	CRM Mid Cap Value Fund Inv	0.70%	0.00%	0.33%	1.03%	0.00%	1.03%	12/31/2013	0.65%	0.30%	0.95%	1.98%	0.95%	0.40%	0.00%	0.00%	1.35%	
484	American Funds Income Fnd R3	0.23%	0.50%	0.21%	0.94%	0.00%	0.94%	10/01/2013	0.65%	0.00%	0.65%	1.59%	0.65%	0.15%	0.50%	0.00%	1.30%	
487	American Funds Growth Fnd R3	0.28%	0.50%	0.20%	0.98%	0.00%	0.98%	02/28/2014	0.65%	0.00%	0.65%	1.63%	0.65%	0.15%	0.50%	0.00%	1.30%	
496	American Funds EuroPacific R3	0.42%	0.50%	0.22%	1.14%	0.00%	1.14%	06/01/2014	0.65%	0.00%	0.65%	1.79%	0.65%	0.15%	0.50%	0.00%	1.30%	
628	Voya Money Mkt Fnd A (Holding Acct)	0.40%	0.00%	0.27%	0.67%	0.00%	0.67%	07/31/2014	0.00%	0.00%	0.00%	0.67%	0.00%	0.17%	0.00%	0.00%	0.17%	
741	Voya Fixed Account	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	0.49%	0.49%	
745	Voya Solution 2015 Portfolio Adv	0.14%	0.50%	0.73%	1.37%	-0.14%	1.23%	05/01/2014	0.65%	0.00%	0.65%	1.88%	0.65%	0.32%	0.25%	0.25%	1.47%	
749	Voya Solution 2025 Portfolio Adv	0.14%	0.50%	0.81%	1.45%	-0.15%	1.30%	05/01/2014	0.65%	0.00%	0.65%	1.95%	0.65%	0.32%	0.25%	0.25%	1.47%	
760	Voya Solution 2035 Portfolio Adv	0.14%	0.50%	0.86%	1.50%	-0.13%	1.37%	05/01/2014	0.65%	0.00%	0.65%	2.02%	0.65%	0.30%	0.25%	0.25%	1.47%	
763	Voya Solution 2045 Portfolio Adv	0.14%	0.50%	0.88%	1.52%	-0.13%	1.39%	05/01/2014	0.65%	0.00%	0.65%	2.04%	0.65%	0.32%	0.25%	0.25%	1.47%	

How do different share classes affect the expenses and revenue share of a mutual fund?

“Build-a-Bear” Concept – Each share class of a mutual fund will have a different fund expense ratio comprised of a different revenue share amount. Also, different share classes have different investment minimums.

What is the difference between “open architecture” and a “bundled” solution?

- Open Architecture generally has no proprietary funds and the fees of each service as previously discussed are listed separately along with the amount of any anticipated revenue sharing income.
- Bundled solutions generally include proprietary funds of the service provider and all recordkeeping fees, custody fees and broker compensation are included in the mutual fund expense ratios. The “free recordkeeping” theory!



How do you benchmark your plan costs?

What is the definition of “reasonable” as it pertains to plan fees?

- There is no definite answer or formula
- The plan fiduciary does not have to pick the lowest cost provider, the plan fiduciary just has to be able to document the value the plan receives for the fees that are being paid.

What should be considered in determining the “value” of fees?

1. The service level of the plan recordkeeper
2. The service level of the broker or advisor to the plan
3. The complexities of the plan design
4. Any special features or tools available to plan participants
5. The capacity in which the advisor is serving the plan, broker vs. 3(21) fiduciary vs. 3(38) fiduciary

How do you determine whether the fees charged to the plan are reasonable?

1. Obtain the fee disclosures from each service provider to the plan and make a judgment call
2. Solicit proposals from reputable service providers and compare to your plan's current fees
3. Obtain a fee benchmark report from your current provider, if available, or please contact CLA for this free service.
4. Obtain an independent fee benchmark report
5. To this point, the DOL has not defined what is reasonable.

What if the Plan Fiduciary doesn't do anything in order to determine if the fees are reasonable?

1. The service providers fees could be determined to be “unreasonable” and a “prohibited transaction”(PT).
2. If a “PT” the service provider contracts would be considered void and the fees paid would need to be refunded to the plan for all years in effect.
3. An excise tax will be assessed on the value of each “PT” for each year.
4. If the plan has over 100 participants, the independent auditor may refuse to issue an opinion on the financial statements.

Sample Benchmark/Diagnostic Report

- <http://claconnect.com/Private-Client/Wealth-Advisory/Employee-Benefit-Plans/Retirement-Plan-Sponsors-Trustees-Responsible-for-Reasonableness-of-401k-Plan-Fees.aspx#.VUg0znYo4y8>



Anita Baker, CPA, CEBS

Managing Principal, Employee Benefit Plans

602-604-3563

anita.baker@CLAconnect.com

John Stiglich, CPA, CFP®, PFS, AIF®

Principal, Retirement Plan Services

815-272-9812

John.stiglich@CLAconnect.com

Disclosures

Investment Advisory Services offered through CliftonLarsonAllen Wealth Advisors, LLC, an SEC Registered Investment Advisor.

Securities offered through ValMark Securities, Inc., member FINRA/SIPC -130 Springside Drive, Suite 300, Akron, OH 44333-2431 (1-800-765-5201)
ValMark Securities Inc. is a separate entity from all CliftonLarsonAllen companies