

Taking Charge

Avoiding a fiduciary trap.

The popular thinking about 401(k) investments seems to be that, if fiduciaries offer a well-selected lineup of mutual funds, their Employee Retirement Income Security Act (ERISA) obligations are satisfied. However, that is changing and, if fiduciaries aren't paying attention, they could fall into a trap for the unwary.

The "trap" is that the fiduciary also must pay attention to how the participants actually are using the investments.

That raises two key questions: Are fiduciaries legally responsible for the prudence of participant investments? If they are responsible, what steps can fiduciaries take to fulfill that responsibility?

In answer to the first question, fiduciaries are responsible for the prudence of participant investment decisions. The decision of the Enron court on September 30, 2003, made it clear that, if a plan does not comply with the 20 to 25 conditions of 404(c), the fiduciaries (for example, the committee members) are responsible for the prudence of the participant investment decisions. To put that in context, our experience is that very few plans actually comply with 404(c). As a result, the fiduciaries of most plans are personally responsible for the prudence of the investment decisions made by participants.

Even if a plan complies with the 404(c) requirements, fiduciaries should evaluate whether it is prudent to continue to offer the current investment education services if they aren't working, or should the fiduciaries insist that their advisers and providers offer workable solutions? Those questions have not been answered in court cases or Department of Labor (DoL) guidance. However, in Interpretive Bulletin 96-1, the DoL stated its position that fiduciaries must monitor the plan's investment educators. Logically, one of the factors to be monitored would be whether the investment education was working.