

# B.O.S.S.™ Workshops

*(Business Owner Strategy Sessions)*

## Retirement Plan Update: *Dealing with the Dreaded Disclosures*

Speaker: Clint Edgington, CFA  
January 19

***Special thanks to our Sponsors:***



CPAs / ADVISORS

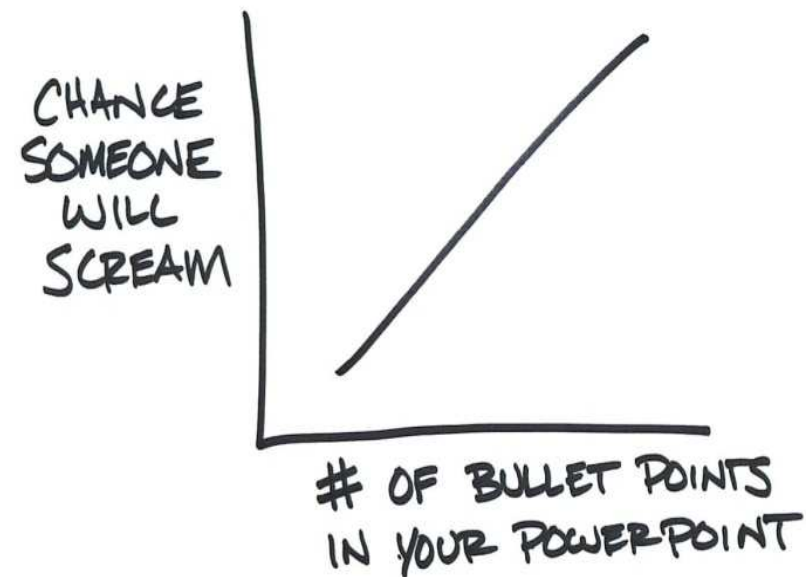


FINDLEY DAVIES  
*consultants in human resources*



# 401(k) Disclosure and Expense Summary

1. Why you should care
2. New Rules
3. Status of New Rules
4. What to do now
5. What we do



*These points are very abbreviated and aren't intended to constitute legal, tax, or financial advice. We recommend reviewing with experienced ERISA counsel.*

[BEHAVIORGAP.COM](http://BEHAVIORGAP.COM)



# 1. Why you should care:

## *A Primer on Fiduciary Duty*

- If you have any responsibility for a company 401(k) plan as an employee, you are likely a ***fiduciary***.
- Under ERISA, the fundamental duties of investment fiduciaries are:
  - Loyalty: Operate in sole interest of plan and participants
  - Prudence: Care, skill, prudence, and diligence that a prudent man familiar with such circumstances (*Process + Expertise*)
  - Diversify
  - Adhere to plan documents
- Fiduciaries are held to high standards, courts/DOL have said;

*The fiduciary obligations of the trustees [and other ERISA fiduciaries] to the participants and beneficiaries of the plan are . . . the highest known to the law<sup>1</sup>*

*A pure heart and empty head are not enough<sup>3</sup>*

*Duty “is not that of a prudent layperson, but rather that of a prudent fiduciary with experience dealing with a similar enterprise<sup>4</sup>*



# 1. Why you should care:

## *Liability has Increased*

- The good
  - Recruit and Retain: 2<sup>nd</sup> most important employee benefit
  - Dignified retirement for employees and yourself
- The Bad
  - Enron collapse (2001)
  - Revocation of the broker-dealer exemption (March 2007)
  - LaRue v. DeWolff Supreme Court case (October 2007)
- The Ugly
  - ERISA litigation has increased at a rate of 25%/year over the past four years.
  - Fiduciaries are personally liable
  - Fidelity Bond only protects plan assets, not fiduciaries
- Requires Plan Sponsor to be proactive



# 1. Why you should care: *From free to fee*

- Most employees think
  - 401(k) is free (71%) AND
  - fees are very important in their decision making<sup>7</sup>



## 2. New Rules:

### *“Disclosures from Vendors to the Plan (408(b)(2))”*

- Who must provide?
  - Vendor that contracts with plan and expects \$1,000 or more
- Who must receive?
  - Plan fiduciary
- What must be disclosed?
  - Description of services, whether provided as a fiduciary or not, compensation (direct & indirect)
  - Bundled services will have to estimate
- What if they aren't provided?
  - Your responsibility! Must request in writing to vendor that they provide. If not received in 90 days must report to DOL.



## 2. New Rules: *Disclosures from Employer to Employee* (404(a))

- Who must provide?
  - Plan Administrator will be responsible, may rely on information from vendors
- Who must receive?
  - All eligible employees and beneficiaries (if death or QDRO)
- What must be disclosed?
  - Initially
    - Expenses
      1. Investment expense: Chart (see Model) & website address that includes more in depth information
      2. Administrative expenses (explanation, whether they'll be charged against individual accounts, not reflected in expenses of investments, \$/\$1000, how they'll be allocated to accounts)
      3. Individual expenses (explanation of expenses not charged on planwide basis, not reflected in expenses of investments, \$/\$1000)
    - Practicalities (how to give investment instructions, limitations on instructions, descriptions of rights, identity of investments, etc.)
  - Quarterly
    - Administrative expenses actually charged and description (\$/%) (i.e. legal, recordkeeping)
    - Individual expenses actually charged and description (\$/%) (i.e. loan fees, brokerage commissions)
  - Annually
    - All information in Initial disclosure



# 3. Status of New Rules

- *Disclosures from Vendors to the Plan* (408(b)(2))
  - 4/1/2012 current effective date
    - Final rule release not expected until end of January (has been pushed back several times)
    - Industry lobbying groups have requested extension to deal with getting systems together
  - Best Guess: Summer or Late 2012
- *Disclosures from Employer to Employee* (404(a)(5))
  - Will go into effect on the later of...
    - 60 days after first day of plan year beginning after 11/1/2011, OR
    - 60 days after effective date of Plan level fee disclosure final regs (i.e. 4/1/2012)
  - For a calendar year plan, as it stands now
    - *Initial disclosure due 5/31/2012*
    - *Quarterly disclosure due 8/14/2012*



## 4. What to do now

- *Clean up your Plan*
  - Know who is a fiduciary for your plan (by name) and for what duties
  - Calculate your all-in cost of the plan, by service provider, as a total \$ figure and as a %
    - Don't just ask your current broker.
  - Have an investment policy statement.
    - Keep it simple.
    - Follow it.



## 4. What to do Now

### *Know who is a fiduciary*

- Fiduciary responsibilities can be shared but not abdicated.
- If you are not an expert re: investments, you have a duty to hire one.  
*DOL :“Unless they possess the necessary expertise to evaluate such factors, fiduciaries would need to obtain the advice of a qualified, independent expert”<sup>5</sup>*
- If you hire an independent expert, you may get the benefit of the doubt if sued.  
*Although reliance on an adviser will not immunize a trustee’s [or other fiduciary’s] actions, it is a factor to be weighed in determining whether a trustee breached his or her duty.”<sup>6</sup>*
  - Registered Investment Advisor, Bank, or Insurance Agent can act as co-fiduciary for the investment portion (3(21)). A safe harbor has been carved out where they are assumed to be a “prudent expert” if they accept fiduciary duty in writing.
  - Broker, or anyone else who does not take the fiduciary duty does not receive the benefit of that safe harbor. Your due diligence must prove them to be a “prudent expert”.
  - Fiduciary Warrantees: Typically stingy in what they cover, read the fine print.



## 4. What to do Now

### *Know your costs*

- *Examine your cost structure ( this is a difficult task)*

- *Convert all costs into a % or \$*

*Investment expenses: Enrollment kits (will be a %)*

*+Asset based charge: Enrollment kits and contract (will be a %)*

*+Administrative fees: Third Party Administrator invoices (will be \$)*

*+Recordkeeper/custodian charge:*

- *Other fees: Investment Provider contract*

- *Hint: If the plan “may” be charging a certain expense, it probably is.*

- *Hint: If there is a provider that you can’t find how they’re being compensated, you’re missing something.*

- *Include low cost investment vehicles as an option on menu*
- *If expensive, or if it’s been longer than 3 years, take to bid*



## 4. What to do Now

### *Investment Policy Statement*

- *Investment Policy Statement*
  - *KISS*
  - *Areas it should address;*
    - Who is involved*
    - When it was implemented*
    - Purpose of plan*
    - 404(c) compliant* (*protection from individual participant decisions*)
    - Criteria for investments upon inclusion*
    - Criteria for investment monitoring*
    - Participant Education*

*Your provider should be able to provide samples or help you with it.*



# 5. What we do

*We construct and improve plans with:*

Cost  
Transparency

- Straightforward and explicit

Fiduciary Duty

- We are always a fiduciary

Unique  
Solutions

- No two plans are the same, no solutions are either

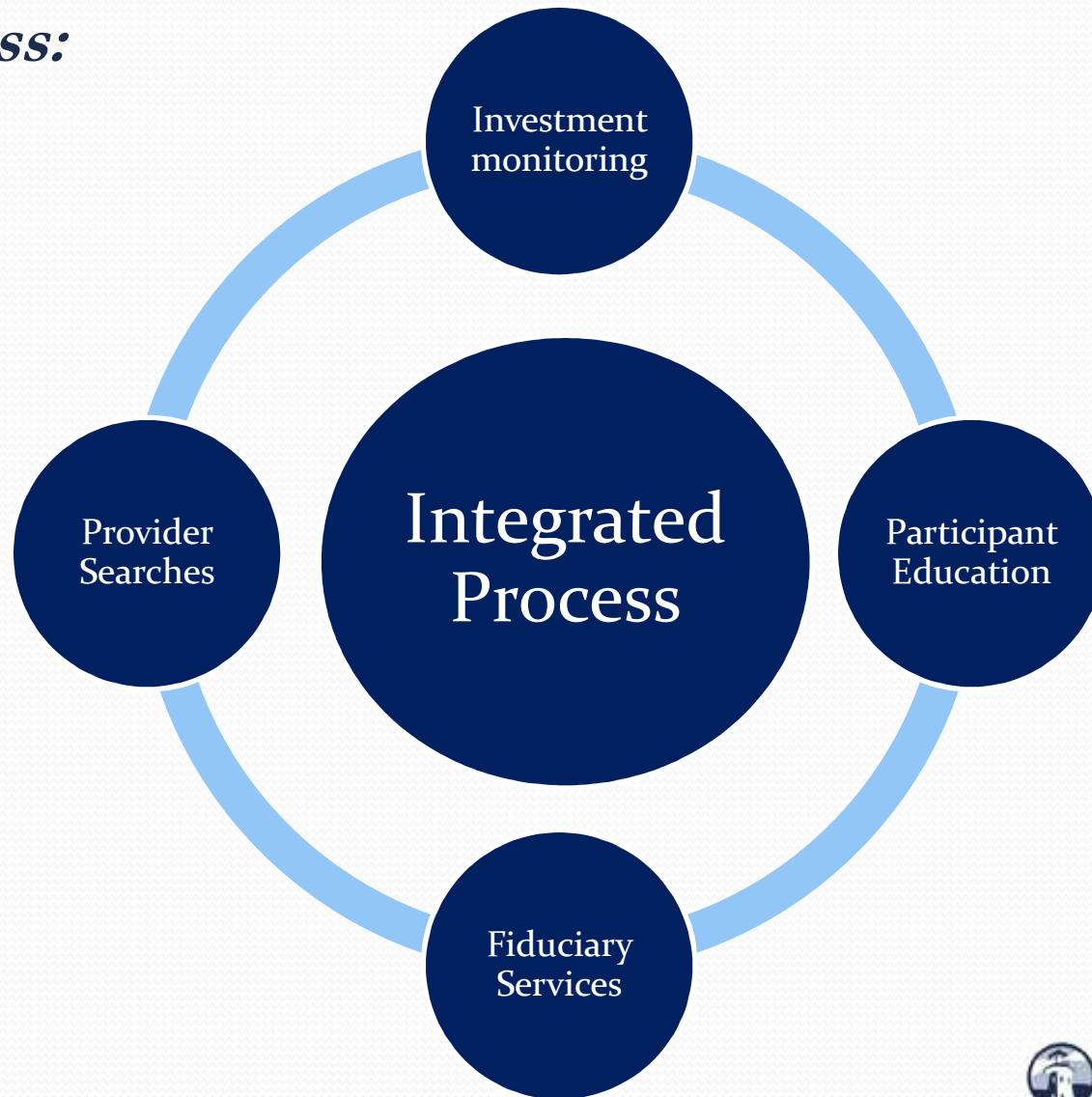
World-class  
Partners

- Every partner involved is a specialist



# 5. What we do

*Our Process:*



# Sources

1. *Donovan v. Bierwirth*, 680 F.2d 263, 272 (2d Cir. 1982).
2. ERISA section 404(a)(1)(B).
3. *Donovan v. Cunningham*, 716 F.2d 1455, 1467 (5th Cir. 1983).
4. *Marshall v. Snyder*, 572 F.2d 894 (2d Cir. 1978).
5. DOL Reg. § 2509.95-1(c)(6).
6. 17 F.3d 393 (9th Cir. 1994).
7. AARP: “401(k) participants’ awareness and understanding of fees”, February 2011

