Retirement Plan Fiduciary Review

Sponsors of qualified retirement plans must comply with a number of legally defined responsibilities under the Employee Retirement Income Security Act of 1974 (ERISA). In addition to being responsible for maintaining the plan on behalf of plan participants, plan sponsors must keep the plan in full compliance with applicable law. This document provides general educational information to plan fiduciaries regarding their roles and responsibilities.

Who *IS* a Plan Fiduciary?

Plan fiduciaries generally fall into one of the four following categories:

1. Anyone specifically named as a plan fiduciary in the plan document (this may include the plan sponsor and administrative committee or the plan trustee);
2. A person with discretionary control over the administration of the plan;
3. A person with discretionary control over the investment of plan assets; or
4. A person providing investment advice with respect to the plan's investment options, either for a fee or other compensation.

Who IS NOT a Plan Fiduciary?

Generally, you will not be considered a fiduciary if you do not provide investment advice and if you do not have any discretionary control over the plan or its investments. Non-fiduciary service providers typically include the following:

- Attorneys, accountants, actuaries and consultants;
- Persons performing in an administrative capacity as directed by the plan fiduciary or fiduciaries; and
- Recordkeepers, third-party administrators (TPAs) and other service providers.

Who Is a Co-Fiduciary?

Plan sponsors who select one or more persons to serve as a plan fiduciary in reality are appointing a *co-fiduciary*. Selecting a co-fiduciary may reduce but not eliminate fiduciary responsibility or liability for the plan sponsor. The plan sponsor remains a fiduciary regardless of the number of other plan fiduciaries it appoints.

ERISA imposes co-fiduciary liability to the plan sponsor in certain situations. For example, the plan sponsor may be held responsible for the acts or omissions of other co-fiduciaries. Let's say that the plan sponsor knows that another plan fiduciary is committing a fiduciary breach, and the plan sponsor knowingly participates in that act or omission. In this case, the plan sponsor may also be liable for that breach.

In addition, if the plan sponsor has knowledge of a breach by another plan fiduciary and fails to make reasonable efforts to remedy the breach, the plan sponsor could be held liable for that breach. Let's take the example of a plan sponsor who retains an advisor to provide the plan with fiduciary investment advice. The advisor would assume fiduciary responsibility if he or she makes investment recommendations for the plan, and you, the plan sponsor, would have co-fiduciary liability for approving and implementing the advisors recommendations.

The Key Roles and Responsibilities of a Plan Sponsor

ERISA guides a retirement-plan fiduciary's roles, responsibilities and liabilities.

Follow the prudent-man rule – You are not required to be an expert in every aspect of plan administration, but you are required to act with the care, prudence, skill and diligence that a knowledgeable person familiar with plan matters would use in a similar situation. Fiduciaries must act with good judgment and sound processes when handling the affairs of the plan. This may require hiring experts to aid in making decisions on behalf of the plan. Such experts may include trustees, attorneys, accountants and investment advisors. As noted above, the plan sponsor's fiduciary liability cannot be avoided simply by hiring an expert. Careful selection of the expert is necessary to comply with ERISA's prudent-man rule, and the performance of all persons retained must be monitored.

Loyalty – One of the most important fiduciary duties is that of loyalty to the plan participants and beneficiaries. ERISA requires that a plan fiduciary act solely in their best interests. This includes ensuring that plan expenses are reasonable based upon the services being provided to the plan. This does not mean selecting the lowest-cost plan, however. A prudent fiduciary will know what services are being provided to the plan for the expenses charged and will compare the cost of those services to the market.

Follow the plan document – Every plan subject to ERISA must maintain a formal plan document and its provisions must be followed. It must also be updated to comply with ERISA and the Internal Revenue Code (IRC).

Diversify the investment options – Fiduciaries must evaluate the investment options to be made available under the plan and offer options that have materially different risk and return characteristics and objectives and are properly diversified.

Monitor investments and service providers – The menu of investment options offered to participants, as well as the the plan's service providers, must be monitored on an ongoing basis and replaced as necessary.

Develop prudent fiduciary processes and procedures – Developing a process for managing and administering the plan and documenting compliance with that process may help limit your fiduciary liability. As a suggested best practice, these fiduciary procedures should include establishing and following an investment policy statement:

Breaches of Fiduciary Responsibility

As a fiduciary, you may be held personally liable if you breach your fiduciary duties under ERISA. Breaching a fiduciary duty may result in participant lawsuits, monetary penalties, or the intervention of the Department of Labor (DOL) in your plan. You may be in breach of your fiduciary duties if you:

- Fail to comply with the "exclusive benefit" rule by entering into self-dealing transactions, such as using plan assets for your own or your company's benefit;
- Fail to exercise your responsibilities to the plan in a prudent manner;
- Fail to diversify the menu of investment options offered under the plan;
- Fail to prudently select and monitor the plan's investment options and replace funds as necessary;

Civil and criminal penalties may be applied to fiduciaries who breach their responsibilities to the plan participants and beneficiaries.

Investment Policy Statement (IPS)

The Department of Labor (DOL) encourages plan fiduciaries to implement policies for the prudent selection and monitoring of investment options. Consolidating the selection and monitoring criteria and documenting compliance with written guidelines also may help protect plan fiduciaries from liability.

A central theme of the DOL's IPS guidance is that fiduciaries must discharge their duties prudently and that the exercise of prudence in this context requires a deliberative process and gathering all relevent information before a decision is made. The purpose of an IPS is to set forth the goals and objectives of the investment options to be made available to the plan participants. It should provide a framework of guidelines for monitoring and evaluating the plan's investment options, including a procedure for replacing any nonperforming fund. As a suggestive best practice, an effective IPS should include the following items:

- Statement regarding the investment objectives applicable to long-term retirement plan savings;
- Methodology for selecting a broad, diversified array of investment options that provide different levels of risk and historical returns;

- Criteria to be used for selecting investment options that will enable participants to select investment options that are appropriate for their savings goals;
- Performance standards that the selected funds will be expected to meet in order to be retained in the investment menu;
- Criteria to be used to evaluate the fees and expenses of each fund;
- Processes for monitoring and evaluating plan investments, including the frequency, content, and person(s) responsible for the review;
- Names and responsibilities of those plan fiduciaries charged with selecting and monitoring the plan's investments; and
- Compliance with ERISA Section 404(c), if applicable.

Organizing Your Fiduciary File

As a suggested best practice, you can improve compliance with your fiduciary duties under ERISA—as well as prepare for the possibility of a DOL audit of your retirement plan—by maintaining an up-to-date fiduciary file containing the following four sections.

Section I: Documents

- ☐ Plan Document and Amendments
  - IRS-approved plan document
  - IRS Favorable Determination Letter (or Prototype Opinion Letter if using prototype plan)
  - Appointment of plan trustees
  - Execution of Plan Trust Agreement
  - Coverage of all eligible employees
- ☐ Summary Plan Description, kept current and automatically distributed to all employees
- ☐ Investment Policy Statement (IPS)
- ☐ Form 5500 (six years)
- ☐ Contracts with Service Providers
  - In writing
  - Must not contain provisions that conflict with fiduciary standards of care
  - Must not authorize fees that are in excess of "reasonable compensation" based on the services provided
- ☐ Summary Plan Description
- ☐ Summary of Material Modifications, distributed to participants as required under ERISA
- ☐ Plan Loan, plus evidence showing that all loan repayments are being collected and deposited on a timely basis
- ☐ Nondiscrimination Testing Results
- ☐ Corporate Tax Return copies
- ☐ Corporate Board Resolutions
- ☐ Plan Committee Minutes
- ☐ RFP Results
- ☐ Committee Charter
- ☐ ERISA Fidelity Bond
- ☐ List of Plans Maintained by Related Entities (e.g., owner of family members' interest in other businesses)

Section II: Administrative

- ☐ Employee Census (records of dates of birth/hire/termination)
- ☐ Evidence of Employer Contributions (six years)
  - Compliance with plan document provisions, paying special attention to compensation and eligibility (e.g., documentation of hours, compensation, deferrals)
  - Loan information
  - 401(k) contribution remittance
- ☐ Evidence of Compliance With Legislatively Required Changes (e.g., GUST, EGTRRA, etc.)
  - 408(b)(2)—service providers have disclosed their fee and services in writing
- ☐ Distribution Documents
  - Plan adheres to definition of compensation set forth in the plan documents and sends verified amounts to service provider
  - For automatic enrollment feature, QDIA (qualified default investment alternative) was selected using prudent process consistent with ERISA; contributions are confirmed to be invested in default option
  - Minimum Required Distributions for the plan, completed for the year
  - ADP/ACP testing results reviewed, excess deferrals returned to highly compensated employees (HCEs) within 2½ months of plan year as necessary under plan terms
- ☐ Default Safe Harbor, Automatic Enrollment Notices
  - No less than 30 days nor more than 90 days prior to beginning of plan year
- ☐ Account Statements From Investment Manager, Recordkeeper or TPA
- ☐ Audit Results (DOL, IRS)
- ☐ Annual Plan Review Executive Summary
- ☐ Participant Complaints
- ☐ Significant Business Events (sale, purchase, merger, change of control) reviewed by TPA
- ☐ Fiduciary Liability Insurance Contracts
  - Plan sponsor errors and omissions (E&O) insurance, covering fiduciaries and other employees or third parties involved with the retirement plan
- ☐ Correspondence (DOL, IRS)
- ☐ Record of Distribution of Required Disclosures to Participants (date and to whom provided)

Section III: Participant Communication

- ☐ Plan Enrollment Material
  - Educational
  - Importance of saving for retirement
  - Basics of investing
- ☐ Documentation of All Communication Events
  - Meetings, emails, postings, etc.
  - Notification of investment option changes (at least 30 but not more than 60 days)
  - Transfer to new investment menu/mapping
  - Annual notification of QDIA (if applicable)
  - Education regarding availability of rollover options (advisory is nonfiduciary, outside of plan)

- ☐ Benefit Statements at least quarterly for participant-directed investments
- ☐ Annual investment chart with side-by-side comparison of the plan's investment menu options in terms of their performance and expense ratios.
- ☐ Website providing updated performance data for the plan's investment options on a quarterly basis and other relevant information.
- ☐ Fund prospectuses and other information must also be made available to participants upon request.

Section IV: Investments

- ☐ Documentation of Investment Activity
- ☐ Minutes From Investment Committee Meetings
- ☐ Current Fund Menu and Expenses

Compliance with ERISA Section 404(c)

The plan sponsor of a participant-directed plan is responsible for prudently selecting and monitoring the plan's menu of investment options for participants. Under ERISA Section 404(c), the plan sponsor and other fiduciaries will be protected against potential liability for any losses incurred by participants as a result of their investment allocation decisions. To receive this protection, a plan must satisfy various requirements relating to the investment menu as well as administrative requirements. Additional requirements must be met if company stock is offered as an investment option.

Under the investment menu requirements, a plan must offer a broad range of investment options. To satisfy these menu conditions, among other requirements, the plan menu must offer participants investments that:

- ☐ Allow them to diversify their accounts sufficiently to avoid large losses; and
- ☐ Include at least three investment alternatives that are diversified; offer materially different risk and reward profiles; that when used in combination tend to minimize portfolio risk; and allow the participant to design a portfolio with appropriate risk and return characteristics.

To meet plan administrative conditions, among other requirements, plan participants must have the ability to:

- ☐ Change investment options frequently enough to be appropriate in light of the volatility of the investments offered; and
- ☐ Provide instructions about their investments to an identified fiduciary who is under the obligation to follow those instructions (unless instructions are prohibited actions).

In order to comply with ERISA Section 404(c), the standard participant disclosures under the Department of Labor's 404a-5 regulations must also be furnished to participants on a timely basis.