Understanding Fiduciary Responsibilities in a 401(k) Plan
A Plan Sponsor’s Guide

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ERISA is a highly complex area of law. The information contained in this material is strictly educational in nature, is not exhaustive in scope and is not intended as legal advice. Clients are strongly encouraged to obtain legal advice from a qualified expert.
Fiduciary Responsibility

Introduction
The Employee Retirement Income Security Act of 1974 (ERISA), is designed to protect the retirement assets of workers who participate in an employer-sponsored qualified plan. ERISA sets the rules that plan fiduciaries must follow to ensure that workers’ and retirees’ plan assets are prudently managed.

Some ERISA rules have evolved over time. In 2012, for example, ERISA rules changed about fee disclosures and what must be disclosed to plan participants. In addition, ERISA clarified the rules about who is and who is not a fiduciary, and spelled out a fiduciary’s responsibilities in greater detail.

This guide outlines what plan sponsor employers should know and do in order to help ensure compliance with ERISA rules.

Purpose of the Fiduciary Rules
Certain individuals who help maintain a 401(k) or similar retirement plan are subject to strict standards of conduct imposed by ERISA. The purpose of these rules is to ensure that individuals with authority to manage retirement plans and the plan assets act in the best interests of plan participants and handle plan assets properly.

Plan sponsors who educate themselves, hire experts, and diligently follow processes and procedures designed to ensure that all of ERISA’s standards of conduct are met, will be in the best position to meet their fiduciary responsibilities.

What Is ERISA?
ERISA is a federal law that protects the interests of participants and beneficiaries in a wide range of employee benefit plans, including many retirement and healthcare plans that are sponsored by employers.

Under ERISA, plan sponsors are required to disclose certain information about the plan to participants and report certain plan information to the government. Plan sponsors also must meet minimum standards of conduct in managing plan assets and operations. ERISA contains civil enforcement provisions and penalties for noncompliance to help ensure that plan assets are protected and participants receive their benefits. The Employee Benefits Security Administration (EBSA), a division of the Department of Labor (DOL), is responsible for administering and enforcing ERISA.
Who Is a Fiduciary?

Under ERISA, an individual or entity that administers an employee benefit plan (such as a 401(k) plan) or manages plan assets is a fiduciary to that plan. The plan sponsor is always a fiduciary to the plan. Some fiduciaries are named in the plan documents while others are appointed or become subject to the fiduciary standards as a result of the functions they perform in connection with the plan. Not every fiduciary is responsible for every aspect of investment selection or plan administration.

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<th>Fiduciary</th>
<th>Roles &amp; Responsibilities</th>
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| Employer                   | Under ERISA 402(a), every plan must have at least one fiduciary, a person or an entity, named in the written plan (or named through a process identified in the plan).  
• Named Fiduciary—The plan sponsor is typically the named fiduciary. The named fiduciary may be identified by office (for example, chief financial officer, board of directors) or by name.  
• Delegation of Responsibilities—A plan sponsor may hire nonfiduciary service providers such as recordkeepers and third party administrators (TPAs) to help the plan sponsor meet its fiduciary responsibilities. The plan sponsor may also hire or appoint other fiduciaries to delegate responsibilities such as investment selection. If the plan sponsor properly delegates certain fiduciary responsibilities to other fiduciaries, the plan sponsor will not be liable for a breach of these responsibilities. |
| Trustee                    | Qualified retirement plan assets must be held in a trust or in a custodial account for the benefit of each participant, unless the plan is funded exclusively with insurance contracts. All trustees are considered by the DOL to be plan fiduciaries and are subject to fiduciary standards when handling the assets of plan participants.  
• Appointment—The trustee is appointed by the plan sponsor to assume legal title to the plan assets and typically to provide annual trust or account statements. The plan sponsor may choose to act as trustee for the plan or may appoint an outside entity such as a trust company as plan trustee. The responsibilities of the trustee will be described in a trust agreement, which may be incorporated into the plan document.  
• Directed vs. Discretionary Trustee—Many 401(k) plan trustees act as directed trustees, which means they disburse assets and accept and hold contributions only when specifically instructed by a plan fiduciary (typically the plan sponsor). Alternatively, a trustee may be engaged to assume a broader role, with discretionary authority to select plan investments or perform certain plan administration functions. The scope of services will be defined in the trust agreement. |
| Plan Administrator (ERISA 3(16)) | The plan administrator described in ERISA 3(16) is responsible for the day-to-day administrative decisions regarding a plan, such as interpreting plan documents and authorizing distributions. Many plan documents name the plan sponsor as the ERISA plan administrator. TPAs and recordkeepers are generally not considered ERISA 3(16) plan administrators because they perform services at the direction of the ERISA 3(16) fiduciary and do not have discretion as to how a plan is administered. |
Do You Want Investment Recommendations or Investment Decisions?

An ERISA 3(21) investment adviser may make recommendations that help a plan fiduciary make decisions about the plan’s investments. However, the ultimate investment decisions are made by the plan fiduciaries. Hiring an ERISA section 3(21) fiduciary may help to mitigate the potential liability of the other plan co-fiduciaries, as the advisor would provide the necessary investment expertise and process to assist in the required investment decision-making process.

An ERISA 3(38) “investment manager” for the plan goes beyond providing recommendations about investments and actually makes the investment decisions based on the plan’s goals (spelled out in the Investment Policy Statement or IPS). In hiring a 3(38) investment manager, plan fiduciaries remove themselves from the ongoing investment decision-making process. However, they cannot eliminate all of their fiduciary responsibility. Procedural prudence remains necessary for all fiduciary decision making. This includes the process for hiring not only an ERISA 3(21) fiduciary advisor, but potentially even more so for the process of hiring an ERISA 3(38) advisor.

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ERISA 3(21)
- Recommends
- Advises
- Guides
- Helps
- Acts as Co-Fiduciary

ERISA 3(38)
- Makes Investment Decisions
- Solely Responsible for Selection/Monitoring/Replacement of Investment Options
- Has Discretion
### Fiduciary Roles & Responsibilities

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<th>Fiduciary</th>
<th>Roles &amp; Responsibilities</th>
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<td>Investment Adviser (ERISA 3(21))</td>
<td>Some plan sponsors hire an investment adviser who will serve the plan as a fiduciary investment adviser under ERISA 3(21).</td>
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<td>• Plan Sponsor Appointment—The plan sponsor has fiduciary responsibility for the prudent selection of the investment adviser and an ongoing fiduciary obligation to evaluate and implement the guidance and recommendations of the investment adviser. <strong>The plan sponsor shares fiduciary responsibility for plan investment decisions with the investment adviser.</strong></td>
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<td>• Functional Fiduciary—Even if an adviser is not appointed as a fiduciary, the adviser can become subject to the ERISA fiduciary standards if he or she exercises discretionary control over the management of the plan or plan assets (such as the ability to modify the plan’s investment menu). Advisers who provide investment advice for a fee are considered ERISA 3(21) fiduciaries.</td>
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<td>An adviser is not required to be an ERISA fiduciary in order to provide investment support. An adviser who simply makes investment recommendations from a plan suitability perspective, while the plan sponsor has the option to accept or reject the recommendations, may not be considered an ERISA fiduciary, even though the adviser receives a fee in the form of commissions or 12b-1 fees.</td>
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<td>Investment Manager (ERISA 3(38))</td>
<td>Some plan sponsors hire an ERISA 3(38) “investment manager” to take full discretionary responsibility for selecting and monitoring plan investments. An ERISA investment manager is a plan fiduciary with respect to the investment-related services they provide.</td>
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<td>• Eligible Entities—Only a bank, insurance company, or registered investment adviser (RIA) can serve as an ERISA investment manager.</td>
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<td>• Plan Sponsor Responsibility—The selection of the investment manager by the plan sponsor is a fiduciary function. Both the plan fiduciary and the investment manager must agree, in writing, to the appointment. <strong>Once the investment manager is appointed, however, the investment manager is solely responsible for investment decisions, relieving the plan sponsor of liability related to investment selection and performance.</strong> The plan sponsor retains fiduciary responsibility for the prudent selection of the investment manager.</td>
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<td>Other Fiduciaries</td>
<td>Under ERISA, any person who uses discretion in administering or managing the plan or has control over plan assets is a fiduciary to the extent of that discretion or control. These individuals are sometimes referred to as “functional” or “deemed” fiduciaries.</td>
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**Who Is Not a Fiduciary?**

In addition to the named and appointed plan fiduciaries, there are other providers servicing a retirement plan. These service providers play an important role in ensuring that a plan operates smoothly and in compliance with the laws governing retirement plans, but they are generally not fiduciaries of the plan. Determining whether an individual is a plan fiduciary depends on whether they exercise discretion or control over the plan or its assets.

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<th>Non-Fiduciary Service Provider</th>
<th>Roles &amp; Responsibilities</th>
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<td>Recordkeepers and Third Party Administrators (TPAs)</td>
<td>Recordkeepers and TPAs perform ministerial actions and typically do not make decisions about plan assets or investments. They typically act at the direction of the plan sponsor (usually based on a service agreement) when performing their duties, such as data management, investment and transaction processing, compliance testing, plan document drafting, and Form 5500 preparation.</td>
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<td>Attorneys, Accountants and Consultants</td>
<td>Other professionals, such as attorneys and accountants, are often hired to advise plan sponsors. These individuals typically lack discretionary authority with respect to the plan, and thus are not subject to the ERISA fiduciary rules. For the same reason, consultants hired by the plan to perform certain functions such as asset valuations or assistance in service provider selection are also generally not plan fiduciaries.</td>
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<td>Certain Financial Advisors</td>
<td>Most plan sponsors engage an advisor to help them select and monitor investments. An advisor may or may not be a fiduciary, depending upon the scope of investment support services he or she will be providing to the plan and plan participants. A non-fiduciary advisor is sometimes referred to as a “registered representative” or “broker.” Many of the traditional activities of financial advisors are considered non-fiduciary functions. These activities can include:</td>
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<td>• Delivering generic investment education.</td>
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<td>• Providing enrollment support.</td>
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<td>• Helping with the move to a new recordkeeper.</td>
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<td>• Assisting with service provider searches.</td>
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<td>• Helping plan sponsors understand their fiduciary responsibility.</td>
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What Are a Plan Sponsor’s Fiduciary Responsibilities?

As a fiduciary, a plan sponsor’s responsibilities include:

• Acting solely in the best interests of the plan participants (and their beneficiaries)
  An ERISA fiduciary must act solely in the interests of the plan participants (and beneficiaries) and with the exclusive purpose of providing benefits to them. Fiduciaries are required to disclose conflicts of interest and are prohibited from engaging in self-dealing (actions that primarily serve the fiduciary’s interests).

• Carrying out duties prudently
  A fiduciary must carry out his or her duties with the care, skill, prudence and diligence that a prudent person familiar with the matter at hand would use. Fiduciaries must be able to demonstrate that all decisions with respect to the plan were made with prudence. Prudence consists of two elements: proper investigation and proper documentation. If a fiduciary does not have the expertise to handle his or her responsibilities, he or she must hire professionals who have that expertise.

• Diversifying investments
  The plan investment menu must be diversified to reduce the risk of large investment losses.

• Following the terms of the plan documents
  The plan documents serve as the foundation for plan operations. Interpretation of plan terms and operational oversight is a fiduciary function, and not following the terms of the plan documents can be a fiduciary breach.

• Paying only reasonable plan expenses
  The plan fiduciary must hire and monitor service providers and ensure that only reasonable fees are paid from plan assets for plan services and investments.

• Monitoring for prohibited transactions
  ERISA prohibits a fiduciary from allowing the plan to engage directly or indirectly in any “prohibited transaction” between it and a party-in-interest. An example of a prohibited transaction would be a direct or indirect loan between a plan and the plan’s investment manager.

• Responding to inquiries
  Plan sponsors must fully and accurately respond to all inquiries from a participant or beneficiary. Misleading communications, misrepresentations or omissions may constitute a breach of fiduciary duty.

• Being “bonded”
  Fiduciaries need to ensure that a fidelity bond, a type of insurance that covers the plan’s assets, is in force in accordance with ERISA.

Procedural due diligence (such as following a prudent decision-making process) is key to ERISA compliance. Different fiduciaries may reach different conclusions, but if they establish sound procedures and systems with checks and balances, they likely will have satisfied their fiduciary obligation. It is important for fiduciaries to document their decision-making processes relative to their responsibilities and actions.
What if I Don’t Meet My Fiduciary Responsibilities?

If a fiduciary does not follow the basic fiduciary standards of conduct, the DOL has authority to enforce the rules through civil and criminal actions. EBSA is the division of the DOL that is responsible for administering and enforcing ERISA regulations. Participants and other plan fiduciaries also have the right to initiate lawsuits to impose liability for breach of fiduciary duty.

Under ERISA, fiduciaries are personally liable for plan losses caused by a breach of their fiduciary responsibilities and may be required to restore plan losses (including interest), return ill-gotten gains, and/or pay the expenses relating to correction of inappropriate actions. Unless the fiduciary clearly limits the scope of his or her fiduciary role with respect to the plan, the fiduciary may also be responsible for actions of other plan fiduciaries (referred to as co-fiduciaries) as well. Fiduciaries may also be responsible for co-fiduciary breaches if they fail to take corrective actions once they become aware of a breach by the other fiduciary or if they knowingly participate in conduct underlying the breach.

ERISA requires that every plan fiduciary and every individual who handles plan assets be bonded (ERISA Section 412). The required fidelity bond protects the plan against losses that result from fraudulent or dishonest acts of those covered by the bond. A fidelity bond protects the plan. Many fiduciaries will also carry fiduciary liability insurance. Though not required by ERISA, fiduciary liability insurance protects the fiduciaries in the event they incur liability expenses related to a breach of their responsibilities to the plan.
Minimizing Fiduciary Risk

Consider a Committee Approach to Plan Management

One way to help ensure that plan sponsors fulfill fiduciary duties is to assign particular functions to an individual or subcommittee. A committee can help to formalize a prudent decision-making process and document the steps taken to follow the process. Plan sponsors can also engage the services of retirement plan professionals. Assembling the right support team both improves the effectiveness of the plan and mitigates fiduciary risk.

- **Plan administrative committee**—Some plan sponsors appoint a plan committee to oversee the operations of the retirement plan. Members of the committee are typically granted authority to make decisions regarding the administration of the plan and are considered fiduciaries. A plan administrative committee can manage the plan investments as well as plan operations, or plan sponsors can establish a separate investment committee.

- **Investment committee**—Given the potential risks surrounding the plan’s investments, some plan sponsors appoint a separate committee to focus solely on the plan’s investments. A formal investment committee assumes fiduciary responsibility for investment oversight and potentially broadens the expertise applied. The investment committee members are fiduciaries. They must focus on the best interests of participants, avoid conflicts of interest, act with the skills of a prudent expert and establish a due diligence process for selecting and monitoring investments and investment professionals. Although an investment committee may not be manageable for all small businesses, it may be a useful risk mitigation tool for mid-size and larger plans.

- **Investment expertise**—Many plan sponsors engage the expertise of an investment professional to assist them in meeting their fiduciary obligations regarding selecting and monitoring plan investments. The advisor will typically assist in selecting the initial menu of plan investments and will provide ongoing investment information and support that will enable the plan sponsor to adjust the investment menu as needed to satisfy the plan sponsor’s fiduciary responsibilities. The advisor may or may not be an ERISA fiduciary; each plan sponsor must evaluate the type of investment support needed and the reasonableness of the fees charged for those support services. Plan sponsors who want to be relieved of all investment-related fiduciary responsibilities may choose to hire an ERISA 3(38) “investment manager.” The decision to hire the particular investment manager is a fiduciary action subject to ERISA fiduciary standards, but investment decisions will be the fiduciary responsibility of the investment manager. Plan sponsors must evaluate the costs associated with that level of support as compared to ERISA 3(21) co-fiduciary support or non-fiduciary investment support. Advisors may also be called upon to help the plan sponsor hire and monitor third-party service providers.

- **Administrative and operational support**—Most plan sponsors engage the services of a third party administrator or recordkeeper to provide administrative support to the plan sponsor to deal with compliance testing, plan document support and filing of Form 5500, as well as handling the day-to-day activities of plan operations, such as the data and transaction processing. Selecting these administrative service providers is a fiduciary function. The due diligence process for assembling the best lineup of service providers typically involves looking at a number of providers, comparing the same variables with respect to each candidate and benchmarking whether the fees are reasonable for the services provided. This process should be documented in writing both when hiring service providers and when monitoring their performance on a scheduled (annual, semiannual or quarterly) basis.

- **Other support services**—An attorney may be hired to advise the plan sponsor, prepare and submit plan correction materials, assist with regulatory enforcement actions and draft plan documents. Accountants may be hired to conduct plan audits or perform various calculations regarding deductibility or annual contributions. Some plan sponsors hire consultants to help with service provider searches or to provide specialized expertise for a specific project, such as an IPS review.
Establish and Document Prudent Practices and Policies

According to the DOL, prudence focuses on the process for making fiduciary decisions rather than on the ultimate decision. Establishing and following sound procedures to ensure you are monitoring and evaluating the appropriate issues are keys to satisfying this fiduciary requirement.

- **Develop written operating policies and procedures**
  
  Plan sponsors should create operating policies and procedures for critical plan functions. Written policies will help guide the responsible individuals to consistently consider all important factors and make educated decisions. Examples of policies include:
  
  - Steps to follow each pay period to ensure timely deposits of employee contributions.
  - An Investment Policy Statement.
  - Actions and review processes to ensure all disclosures are delivered timely to participants.
  - Steps to follow when selecting and monitoring services providers.
  - Components of ERISA 404(c) compliance including participant education programs.
  - A participant concern escalation and resolution process.

- **Maintain written records of important activities and decisions**
  
  Plan sponsors should keep written records documenting compliance with their written policies and procedures. For example, meeting minutes should be drafted for all committee meetings. Other significant plan decisions approved by a board of directors or other governing authority (such as authorization for plan amendments) should also be documented. The meeting minutes should include:
  
  - The date, time and location of the meeting.
  - Names of persons who attended.
  - A summary of all material decisions made at the meeting.

A copy of the meeting agenda, minutes and copies of all reports and collateral material reviewed at the meeting should be filed with the plan document and other plan information.

- **Maintain your plan’s records**
  
  ERISA requires that plan administrators maintain all records necessary to document the accuracy of information contained in any ERISA-required report, such as Form 5500. The records must be sufficient to permit information to be verified, explained, clarified and checked for accuracy and completeness.

  According to the DOL rules, required documents include journals, checks, invoices, bank statements, contracts, agreements, claim records and payrolls. Plan documents, plan amendments, trust agreements, board resolutions, insurance contracts, investment policies and other plan administration forms should also be retained.

  ERISA requires that records be kept for a period of not less than six years after the filing date of the Form 5500 created from those records. It may be prudent, however, to retain plan records for eight years (to account for records applicable to the entire first plan year within this period). Other considerations, such as rules relating to benefit claims under ERISA or other statutes, may affect the period for which records must be kept.

  Plan administrators and plan sponsors should consult legal counsel when designing record retention guidelines.
Case Study: Procedure for Salary Deferral Deposits.

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<tr>
<th>The Fiduciary Responsibility</th>
<th>The Policy (Action Steps)</th>
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<tr>
<td>Timely deposits of employee salary deferrals into the plan.</td>
<td>To minimize the risk of late deposits, you may wish to establish procedures for how employee salary deferrals will be handled and monitored. The policy may contain some of the following elements.</td>
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<td>Failure to make timely deposits of employee salary deferrals is one of the most common fiduciary breaches, and it is one of the DOL’s top enforcement initiatives.</td>
<td>Define the roles and responsibilities of each party involved in making the deferral deposits (such as internal payroll processor, payroll service provider, trustee, recordkeeper) and determine how they will communicate with each other.</td>
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<td>DOL regulations require employee deferrals to be deposited into the plan as soon as administratively feasible after being deferred from compensation.</td>
<td>Determine the time frame for completing each deposit.</td>
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<td>That period is determined on a case-by-case basis, but it cannot be later than the 15th business day of the following month.</td>
<td>Create procedures for monitoring the process, identifying “breaks” in the chain of responsibility so that parties can correct any delays or deficiencies in the process or take the necessary steps to correct late deferral deposits.</td>
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<td>The DOL provides a seven-business-day safe harbor rule for depositing employee contributions to plans with fewer than 100 participants. Late deposits constitute a prohibited transaction.</td>
<td>Identify a process for documenting any late deposits and the related corrective action.</td>
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This chart illustrates a hypothetical policy/procedure that a plan sponsor can implement in order to address a fiduciary responsibility.
Secure Favorable Service Arrangements with Key Providers

Once you identify the appropriate members of your support team, make certain you have a clear understanding of the scope of services that each service provider will deliver. Review each service arrangement to ensure it provides you the depth of support and the performance standards that you need to fulfill your fiduciary obligations to your retirement plan. Following are some of the issues that you should consider addressing with each service provider.

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<th>Service Arrangements</th>
<th>Key Elements to Consider</th>
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| Roles and Responsibilities   | • Is the scope of services defined in the service agreement consistent with your discussions with the service provider? Are the services aligned with your needs?  
• Are there any limitations on the services that will be problematic?  
• Do you understand what your responsibilities are under the agreement (such as time frames for providing data or taking actions)? |
| Fiduciary Status             | • If a service provider is a fiduciary, they are required to acknowledge that status in writing.  
• Make certain you understand the scope of their fiduciary support (such as investment support only).  
• Ensure you have a clear understanding of your responsibilities versus the responsibilities that the other fiduciary will assume. |
| Performance Standards and Warranties | • Are there promised service standards for critical functions (such as timely processing of investment transactions or availability of web-based tools)?  
• What is your recourse under the service agreement if these standards are not met?  
• Does the service provider offer any warranty backing up their assurance that their services or products meet regulatory standards (for example, that the process used to select and monitor investments is considered prudent under ERISA)? |
| Liability Limitations        | • If the service provider makes an error, what are your rights?  
• Some service providers limit their liability to a dollar threshold or to correcting only certain types of errors. Ensure that you understand how the plan will be “made whole” if there are mistakes or delays. |
| Fees                         | • Ensure that all fees are reasonable and services are necessary for the administration of the plan.  
• Compare the fees being charged with fees assessed by other service providers for comparable services. |
ERISA Section 404(c) Protection

Section 404(c) of ERISA provides a set of requirements that a plan sponsor can choose to follow, at its option, to effectively transfer the potential liability associated with investment decision-making responsibilities to employees who participate in an ERISA retirement plan. The key requirements for compliance with ERISA Section 404(c) are the:

- Right of participants to choose from a “broad range” of investment options.
- Opportunity for participants to “exercise control” over their accounts.

According to the DOL, the “broad range” requirement is satisfied if three conditions are met:

- The first is “opportunity.” Participants should be offered a reasonable opportunity to affect the level of return and degree of risk to which their accounts are subject.
- The second is “choice.” Participants should be offered the opportunity to choose from at least three investment alternatives that are diversified and are materially different in terms of risk and return characteristics.
- The third is “diversification.” Participants should be offered the opportunity to diversify to reduce the risk of large losses. The investment options offered in the plan should span the risk/return spectrum. Each of these options, when combined with other alternatives, should tend to minimize overall portfolio risk through diversification.

The “exercise control” requirement can be satisfied if participants are provided the opportunity to transfer among their investment options at least quarterly.

In addition, in order for participants to make educated decisions on their investment options, the plan sponsor must provide sufficient information about the investments offered under the plan, including a statement to participants that the plan is designed to comply with ERISA 404(c) and that plan fiduciaries may be relieved of liability for any losses as a result of participant investment instructions.

Under ERISA 404(c), the plan sponsor must:

- Prudently select and monitor investment options.
- Provide appropriate investment choices and information enabling participants to make educated decisions. Such information includes, but is not limited to:
  - A description of each investment option, including investment objectives and risk and return characteristics.
  - Identification of any investment managers.
  - Procedures for participant investment instructions.
  - Restrictions on any voting or tender rights available to participants.
  - A description of any and all fees and expenses charged to participants under any investment option.
- Document that participants are being furnished all such information.

Blackouts

What Is a Blackout Period Under ERISA?

Blackouts are another area where fiduciary concerns can be raised. Applicable law defines an ERISA blackout period as a period of more than three consecutive business days during which participants in the plan are unable to direct or diversify assets credited to their retirement accounts or are unable to access them through a withdrawal or loan. Blackouts often result from changes in investment providers, recordkeepers or other significant plan changes. Blackouts provide the necessary time to transfer records and/or investments from one entity to another. ERISA provides for certain time frame and notice requirements governing blackout periods, and the appropriate plan fiduciaries must comply with them.
The Right Way to Invest

The Pension Protection Act of 2006 (PPA) extended the ERISA 404(c) fiduciary protection during blackout periods if the fiduciary satisfies ERISA requirements for authorizing and implementing the blackout (including the blackout notice requirements outlined below).

**Blackout Notice**

Plan administrators must notify employees at least 30 days and no more than 60 days before the start of a blackout period. This is to help ensure that participants understand the reason for and scope of the blackout period and what their options are prior to the start of the blackout. The notice must be in writing; however, it can be delivered electronically, provided special rules are satisfied.

The blackout notice should include:

- Reasons for the blackout.
- Description of the scope of the blackout, including the extent of any inability to direct or diversify account assets.
- The beginning date and duration of the blackout.
- A reminder that participants should evaluate their current choices in light of their inability to make changes due to the upcoming blackout.
- Contact information, in the event that participants have questions.

There are penalties for non-compliance. The DOL could assess the plan administrator up to $100 per day, per affected participant or beneficiary, for failure to comply with the applicable requirements.

**Fund Mapping**

One way to help ease fiduciary concerns over blackouts that occur when directing plan assets from the plan’s current investment options to options with similar objectives is to consider “fund mapping.” This is different from a conversion of assets from the current fund options to a money market fund. From a fiduciary standpoint, fund mapping can help ease concerns if the assets at issue are being moved to investment options with similar objectives.

Fund mapping may enable assets to remain invested during a blackout. It is also a positive communication to plan participants because they are usually not required to take any special action and are typically familiar with their plan’s current investment options. Mapping may also be less disruptive than a money market conversion because participants do not need to select new investment options, unless they wish to select an alternative investment following the blackout.

Of course, the particular approach used during an investment-related blackout period is an individual plan decision.

**Fiduciary Protections for Mapping**

The PPA also extended ERISA 404(c) fiduciary protection for mapping decisions if the new investment options are “reasonably similar” to the investment options being eliminated, with respect to risk and rate of return characteristics. As with blackouts, plan administrators must provide employees with written notice of mapping decisions at least 30 days, but not more than 60 days, before the effective date of the change. The notice must compare the old investment options to the new investment options. It must also explain that, in the absence of affirmative investment instructions from the participant to the contrary, the participant’s account will be invested in the new investment options.
Minimizing Investment Risk

There are a number of avenues plan sponsors can explore to help manage their fiduciary risk with respect to plan investments.

Investment Policy Statement

An important tool to consider for managing fiduciary risk relative to investments is the Investment Policy Statement (IPS). An IPS is a written policy that defines the criteria for selecting and monitoring investment options for the plan. The IPS both demonstrates the prudent process used for investment decisions and provides a consistent set of actions to follow during periodic investment reviews. Plan sponsors (or their plan investment committee) should work with their investment professional to draft the IPS or to periodically review it, if one is currently in place. The IPS should be reviewed at least annually and updated as needed to adapt to changes in the plan demographics as well as economic and financial industry developments. An IPS will typically include the following elements:

- The plan sponsor’s criteria for selecting and monitoring investments (such as performance criteria and benchmarks).
- The timing for investment performance reviews (such as monthly or quarterly).
- The rationale for deciding when to replace investments that are not performing well or that no longer suit the plan’s participants.

Asset Allocation

ERISA requires plan fiduciaries to provide a sufficiently diverse investment menu to minimize the risk of large investment losses to plan participants (and beneficiaries). Plan sponsors should select a robust and varied investment lineup that allows for a variety of asset allocation strategies for participants with varying investment goals, risk tolerance, savings time frames and diversification needs. Self-directed brokerage accounts (sometimes referred to as brokerage windows) are also a plan option if plan participants tend to be more sophisticated, and wish to invest in a broader range of investment options than are included in the plan’s investment menu.

In all cases, plan sponsors should work with their investment experts to assemble an investment menu that is sufficiently diverse to meet the needs of the plan demographic yet is not so broad as to overwhelm participants. The plan’s financial advisor is also typically the best resource to provide investment education, and in some cases investment advice, to participants to help them make informed decisions regarding the investments for their retirement dollars. Using investment experts to assist with both selecting the investment menu and providing participant investment services is an important step in managing your fiduciary exposure with respect to plan investments.

Qualified Default Investment Alternative

A plan must also select a default investment for plan contributions made by participants who have not made an investment selection, such as participants who are automatically enrolled in the plan. If a plan sponsor chooses an investment that meets the requirements of a Qualified Default Investment Alternative (QDIA), the plan sponsor will be relieved of fiduciary liability for participant losses in connection with the default investment. Four investment vehicles qualify as a QDIA:

- Life-cycle or target-date funds.
- Professionally managed accounts.
- “Balanced” funds.
- Capital preservation products (for only the first 120 days of participation on a default basis).
To obtain fiduciary relief for a QDIA investment, plan sponsors must provide a written notice to participants describing the circumstances under which a participant’s account may be invested in a QDIA, the participant’s right to select an alternative investment, a description of the QDIA and an explanation of where to obtain additional information. Information on the QDIA, such as a prospectus, must also be provided to participants or made available via a web link.

**Company Stock**

The rules governing 401(k) plans do not prohibit company stock from inclusion in the plan investment lineup. However, company stock is not considered a diversified plan investment option under ERISA. Therefore, if a plan sponsor wants to offer company stock through the plan, and qualify for ERISA 404(c) protection, the following criteria must be met:

- The stock must be a qualifying employer security as defined under ERISA.
- The plan must offer at least three other materially different investment options.
- Shares of the stock should be traded on a national exchange or other generally recognized market with sufficient frequency and sufficient volume. This is to help ensure that participant directions may be acted upon promptly.
- An independent fiduciary should be appointed for purposes of monitoring plan investment options if the designated fiduciary determines that a potential for undue influence exists.
- Participants should be provided with all applicable shareholder information including voting and tender rights.

Before adding this investment option, plan sponsors may want to consider consulting with their legal advisor and investment expert to explore the pros and cons of this investment. Over the past decade, this investment option has been the focus of heightened scrutiny and even litigation for breaches of fiduciary duty resulting from substantial declines in stock prices of some companies. Congress and the IRS have enacted additional rules to protect plan participants who have a high concentration of their 401(k) savings invested in company stock:

- Participants must have an opportunity to divest publicly traded company stock and reinvest those amounts in other diversified investment options under the plan.
- For employee contributions, the divestment opportunity must be immediate.
- For employee nonelective or matching contributions, the plan must allow participants to diversify out of company stock after three years of service. These diversification requirements apply only to plans with publicly traded company stock as an investment option.
- The plan’s investment fiduciaries must understand the company’s ongoing financial condition to be able to monitor and assess whether company stock continues to be an appropriate investment option for the plan.
- Plans with employer securities are also subject to a doubling of the maximum bonding requirement.
# Fee Disclosure

## ERISA 408(b)(2) Service Provider Disclosure Rules

The DOL’s service provider disclosure regulations shine a spotlight on the plan fiduciary’s responsibility to monitor the fees paid to service providers from plan assets. The rules are designed to ensure that plan fiduciaries receive the information they need to assess the reasonableness of the service provider contract or arrangement and identify potential conflicts of interest before entering into a service relationship. As a result, it is important to keep written records of when each disclosure was received, when it was reviewed, and the analysis used to determine whether the fees are reasonable, including any benchmarking information and a summary of experts consulted and their recommendations. If a service provider does not provide the required information, or provides information that the plan fiduciary discovers is incorrect, continuing the services of that provider is generally prohibited by ERISA and is a breach of a plan fiduciary’s responsibilities to the plan.

## Service Provider Checklist

The process of selecting service providers will vary depending on the services to be provided. Even after a service provider has been hired, it is important for you to periodically review the service provider’s performance. As a starting point, you should consider addressing some of the following issues in the Service Provider Checklist.

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1</strong></td>
<td>Are the services necessary for the administration of the plan?</td>
</tr>
<tr>
<td><strong>2</strong></td>
<td>Are the fees reasonable for the service provided?</td>
</tr>
<tr>
<td><strong>3</strong></td>
<td>Have you documented the process you used to select (or review) your service providers and the reasons you selected each particular provider?</td>
</tr>
<tr>
<td><strong>4</strong></td>
<td>Have you compared the service provider’s performance and fee schedule to other providers? Benchmarking your plan is a good way to obtain comparative information.</td>
</tr>
<tr>
<td><strong>5</strong></td>
<td>Is the service provider required to be licensed? If so, is the license current?</td>
</tr>
<tr>
<td><strong>6</strong></td>
<td>Has your service provider delivered the services described in your service agreement?*</td>
</tr>
<tr>
<td><strong>7</strong></td>
<td>Do you have any plan participant comments or complaints regarding the services?*</td>
</tr>
</tbody>
</table>

* Applies when reviewing existing service providers.
Best Practices

**Best Practices**

1. Establish and document prudent practices and policies
2. Line up the right support team
3. Secure favorable service arrangements with key providers
4. Explore opportunities to reduce investment risk

**Documentation Checklist**

Do you have the following documentation to demonstrate due diligence?

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Investment Policy Statement (IPS)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Reviewed on: ____________</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>Plan documents</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Summary Plan Description (SPD)</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>Adoption agreement (if applicable)</td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>Plan amendments</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>Board resolutions</td>
<td></td>
</tr>
<tr>
<td>7</td>
<td>Investment monitoring reports</td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>Non-discrimination testing results</td>
<td></td>
</tr>
<tr>
<td>9</td>
<td>Signed Form 5500</td>
<td></td>
</tr>
<tr>
<td>10</td>
<td>Compliance documentation</td>
<td></td>
</tr>
<tr>
<td>11</td>
<td>Plan communications to employees</td>
<td></td>
</tr>
<tr>
<td>12</td>
<td>Proof of ERISA fidelity bond</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Amount of coverage: ____________</td>
<td></td>
</tr>
</tbody>
</table>
ERISA Section 404(c) Checklist

Employers seeking to offer a plan complying with ERISA Section 404(c) should be able to answer “yes” to all of the following questions:

### Choosing Investments

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Are at least three diversified investment choices provided, each with materially different risk/return characteristics?</td>
<td>Yes</td>
</tr>
<tr>
<td>2</td>
<td>Can participants choose their own investments from among the options available?</td>
<td>Yes</td>
</tr>
<tr>
<td>3</td>
<td>Can each investment option be classified as a “prudent” investment option by plan fiduciaries?</td>
<td>Yes</td>
</tr>
<tr>
<td>4</td>
<td>Can participants change their investment allocations and transfer among investment accounts at least once every calendar quarter?</td>
<td>Yes</td>
</tr>
</tbody>
</table>

### Have Participants Been Provided with

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>A statement that the plan intends to comply with ERISA Section 404(c)?</td>
<td>Yes</td>
</tr>
<tr>
<td>2</td>
<td>Descriptions of each investment option and all fees and expenses charged to participants under each option?</td>
<td>Yes</td>
</tr>
<tr>
<td>3</td>
<td>Identification of the plan’s fiduciary?</td>
<td>Yes</td>
</tr>
<tr>
<td>4</td>
<td>Directions on how to select investments and change investment selections?</td>
<td>Yes</td>
</tr>
<tr>
<td>5</td>
<td>Investment prospectuses?</td>
<td>Yes</td>
</tr>
<tr>
<td>6</td>
<td>Access to regular account statements?</td>
<td>Yes</td>
</tr>
</tbody>
</table>

* Applies when reviewing existing service providers.
Considerations When Hiring a Fiduciary Advisor

| Advisor Experience | • Is the advisor committed to the retirement plan market?  
|                    | • How long has the advisor worked with retirement plans?  
|                    | • What relevant retirement credentials does the advisor have?  
|                    | • Does the advisor have experience with retirement plans similar to your plan size? And plan requirements?  
|                    | • Does the advisor work in a team or alone?  
|                    | • Can the advisor provide references?  
| Services | • What services does the advisor provide?  
|          | • Will the advisor assume fiduciary responsibility? What is the scope of the fiduciary responsibilities the advisor will assume?  
|          | • Will the advisor be a “named fiduciary?”  
|          | • Does the service agreement provide specific service and payment details?  
|          | • In the event that something goes wrong, how will the advisor make the plan “whole?” Does the advisor carry insurance? (Errors and Omissions (E&O) insurance policies typically exclude ERISA 3(38) functions unless there is a specific rider included in the insurance.)  
| Process | • Does the advisor provide a written/documented process for decision making? For example, what criteria does the advisor use to make recommendations to hire or replace investment providers or other plan service providers? Or if the advisor serves as a 3(38) investment manager, what criteria does he or she use to decide to hire or replace investment providers or other service providers?  
|          | • Is the process replicable?  
|          | • What are the plan goals and how will achievement of those goals be measured?  
| Fees | • What are the fees?  
|      | • Are fees associated with services easily identifiable?  
|      | • Are the fees reasonable for the services provided?  

Considerations for Establishing a Plan Committee

- **Committee framework and authority**—To establish a plan committee, your board of directors or other governing entity should formally authorize the purpose and scope of the committee in writing and appoint members.
- **Size**—The size of the committee should be relative to plan size, with more members being typical for larger plans, but three to seven members is a common number for most plans.
- **Members**—Effective committees often consist of a cross section of senior management, including human resources, finance and operations personnel. An odd number of members prevents voting ties.
- **Roles and responsibilities**—The committee should have a chairperson and secretary, each with specific duties, and the committee should observe meeting formalities, such as preparing an agenda, keeping minutes, and requiring a quorum to make binding decisions. Committee members should be educated about their ERISA fiduciary responsibilities and their committee responsibilities and authority. They should understand the business objectives for establishing the plan and be trained on the specific plan provisions and service provider contracts.
- **Documentation**—Ensure each committee keeps records of its meetings and decisions to demonstrate compliance with the ERISA fiduciary mandates.

Considerations When Evaluating Fees and Expenses

<table>
<thead>
<tr>
<th>Keep in Mind</th>
<th>Questions to Ask</th>
</tr>
</thead>
<tbody>
<tr>
<td>• ERISA requires that fees and expenses charged to a plan and plan participants be “reasonable.”</td>
<td>• Did you make informed decisions? Have you gathered the necessary materials to aid in your decision-making process? Be sure to document your due diligence efforts.</td>
</tr>
<tr>
<td>• “Reasonable” must be determined for each plan.</td>
<td>• Have you assessed the plan’s performance over time for each investment option?</td>
</tr>
<tr>
<td>• Ongoing due diligence is critical.</td>
<td>• What is the full value of services received?</td>
</tr>
<tr>
<td></td>
<td>• What are your plan’s fees?</td>
</tr>
</tbody>
</table>

| What Services Do the Fees Cover |                                                                              |
|---------------------------------|                                                                              |
| • One-time fees                 |                                                                              |
| • Recordkeeping                 |                                                                              |
| • Investments                   |                                                                              |
| • Administration                |                                                                              |
| • Trustee                       |                                                                              |
| • Individual fees to participants |                                                                              |
| • Other fees                    |                                                                              |
Conclusion

This guide highlights certain key fiduciary responsibilities and serves as an educational resource for plan fiduciaries. Plan fiduciaries can reduce risk by retaining the services of an experienced retirement plan advisor to assist with the operation and management of their plan. However, the appropriate fiduciaries remain ultimately responsible for the management and administration of the plan. Delegation of duties does not always mean delegation of fiduciary responsibility.
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