Fiduciary Planning Guide

Empower Retirement

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A focus on fiduciary responsibility

The Employee Retirement Income Security Act of 1974 (ERISA) established rules and responsibilities for plan sponsors and companies offering retirement plans to their employees. But over the past decade, there has been an increased focus on fiduciary responsibility. Why? The 401(k) plan — originally designed as a supplemental plan to pension or other employer-funded plans — has now become the primary retirement savings vehicle for most Americans. In 2014, defined contribution assets totaled more than $6.8 trillion*, most of which is invested in our nation's financial markets. This system offers tremendous choice and flexibility — with which comes a need for oversight by fiduciaries and education for participants. In 2006, the Pension Protection Act recognized gaps in both the defined benefit and defined contribution systems and provided some clarity, but it further heightened the responsibilities of the plan fiduciary.

Increasingly, lawsuits are being filed on behalf of plan participants against plan fiduciaries — including the company executives responsible for running 401(k) plans — to recover losses incurred by 401(k) plan participants. And right behind the private litigants are agents from the U.S. Department of Labor and state and local agencies, as well as the media.

Not surprisingly, these events have drawn the focus of many plan sponsors toward issues of fiduciary responsibility and the need to reduce risk in this area. Although the increased attention on fiduciary issues has created new complexity for plan sponsors, the end result is salutary and long overdue. At Empower Retirement, we believe that plan sponsors should make an active commitment to their role as plan fiduciary.

The Empower approach does not seek to minimize exposure absolutely through an attempt to avoid fiduciary responsibility. Rather, fiduciaries reduce risk by establishing procedures and managing their role, and thus sponsor a plan that provides the highest likelihood that participants will achieve their retirement goals.

To make this active commitment possible, plan sponsors must have both an appreciation of the roles and responsibilities of a fiduciary and an understanding of the practical steps that can be taken to fulfill them. This guide is designed as a primer for understanding the issues facing plan sponsors as fiduciaries, and it provides practical solutions to the most common challenges.

This guide is only a starting point. Professionals at Empower and its industry partners have a wealth of experience in dealing with fiduciary issues, and in their role as administrative services providers to your plan, they are in a unique position to assist you. In short, our approach is designed to help you embrace your responsibilities as a fiduciary, while managing risk.

This guide has been prepared for clients of Empower for informational purposes only. The summaries of legal matters or recommendations for action are general in nature and are not intended to provide authoritative guidance or legal advice. You should consult your own attorney, consultant, or financial or other advisor for guidance on your plan's and your company's particular situation.

*Source: SPARK's 2014 Marketplace Update.

Part 1: The Basics

Who is a fiduciary?

This is a simple question and, for plan sponsors at least, there is a straightforward answer: As the entity responsible for overseeing your plan's administration and operation, you are a fiduciary.

However, the simplicity of the answer is misleading. ERISA sets out a flexible scheme that permits assignment of responsibility to various parties associated with retirement plans, not just the plan sponsor. Individual employees and officers of the plan sponsor can be fiduciaries, even if this was not intended. In addition, service providers and other outside parties may be plan fiduciaries.

However, we do not believe identifying plan fiduciaries needs to be a complicated exercise. By keeping a few basic principles in mind, this can be a relatively easy first step in reviewing fiduciary compliance.

What is the basis for ERISA fiduciary responsibility? In 1974, the Employee Retirement Income Security Act — known as ERISA — was enacted to create a uniform body of federal law to protect employee pensions and retirement. ERISA responded to abuses that had occurred within pension plans by imposing strict standards of fiduciary behavior on persons administering plans and investing plan assets, and by providing mechanisms for enforcing these standards. Participants have the right to sue plan fiduciaries directly for failing to live up to the fiduciary standards. In addition, the Department of Labor has the authority to investigate and bring enforcement action, in court or administratively, against fiduciaries for violations of ERISA's fiduciary duties.

If found to be in violation of a fiduciary duty, the fiduciary is personally liable for the losses resulting from the violation. In addition, the Department of Labor can impose a 20% civil penalty based on the losses. Fiduciaries — very likely including executives in the plan sponsor's organization — have a direct and personal financial interest in making sure matters of fiduciary responsibility are taken seriously.

How does a plan sponsor become a fiduciary

A plan sponsor becomes a fiduciary under ERISA in one of two ways: (1) by assuming specifically designated roles under ERISA (think of this as "fiduciary by title"), or (2) by taking an action that is fiduciary in nature (think of this as "fiduciary by act").

Fiduciary by title

ERISA defines roles that make a plan sponsor a fiduciary of the plan:

Named fiduciary. ERISA requires that all plans have a named fiduciary who is the party with the authority to control and manage the operation and administration of the plan. The named fiduciary can either be specifically stated in the plan (e.g., by name, title or role) or the plan can provide a procedure by which the plan sponsor appoints the named fiduciary. A plan can have more than one named fiduciary, with different persons responsible for different roles (e.g., plan administration versus plan investments). In many cases, the plan sponsor itself or someone appointed by the plan sponsor is the named fiduciary.

Trustee. In general, ERISA requires that the assets of every retirement plan be held in trust by one or more trustees. A trustee can either be a discretionary trustee or a directed trustee.

A discretionary trustee has the exclusive authority and discretion to manage and control the assets of the plan. Most institutional trustees of participant-directed plans today serve as directed trustees. A directed trustee has no authority or discretion to manage or control the assets of the plan, and takes all direction from a named fiduciary.

Investment manager. A plan may, but is not required to, have one or more investment managers. This is a qualified entity or individual (other than a trustee or named fiduciary) who has been given the power to manage some or all of the assets under the plan. An investment manager must acknowledge, in writing, that it is a fiduciary of the plan. (Note that, by definition, under ERISA, managers of mutual funds are not investment managers and are not plan fiduciaries merely by virtue of managing the mutual funds.)

Administrative or 3(16) Fiduciaries. The named Plan Administrator, which is usually the employer, is a plan fiduciary for certain functions such as providing required notices, making benefit determinations, etc. Some or all of these functions may be delegated to a service provider who agrees to act as a fiduciary.

Fiduciary by act

In addition to the defined fiduciary roles, ERISA treats as a fiduciary anyone who exercises any discretionary authority or control with respect to management of the plan or its assets, exercises any discretionary authority or responsibility in administration of the plan, or provides investment advice for a fee. Since the focus is on the actual act and not a person's formal title, ERISA is often described as having a functional definition of fiduciary. Thus, even if someone has not been formally designated as a fiduciary, that person can be considered a fiduciary by his or her actions.

A fiduciary, but only for fiduciary functions

A person's role as a fiduciary does not necessarily extend to all areas of his or her involvement with the plan. A person who is a fiduciary can act in other capacities — wearing different hats, if you will — that do not involve being a fiduciary.

This is a particularly important concept for plan sponsors. Certain decisions that a plan sponsor makes about the plan are made in its capacity as an employer, including the decisions to establish the plan, the level of benefits, the vesting schedule, etc. These types of decisions are called settlor functions because they relate to the employer's role in creating (or, in trust law, settling) the trust, and not as a fiduciary managing the trust. Settlor decisions are generally not subject to ERISA's fiduciary rules.

Non-fiduciary administrative functions

In administering a plan, fiduciary status requires some exercise of discretion. Purely ministerial functions, done within a framework of rules and policies, are not fiduciary functions. Therefore, routine clerical or recordkeeping functions, including maintaining account balances, processing transactions, and computing service credits, do not involve the exercise of discretion and, therefore, are not fiduciary in nature.

Who are NOT fiduciaries in the typical participant-directed plan?

Recordkeepers – These entities perform ministerial functions that are non-fiduciary in nature.

Custodians – In addition to individual or institutional trustees, a plan may have a custodian who takes custody of certain assets of the plan. A custodian's functions are generally viewed as ministerial and non-fiduciary in nature.

Investment/financial advisors – While advisors play a valuable role in the establishment and maintenance of a plan, their assistance and education provided to plan sponsors regarding investment options may not be considered investment advice for purposes of ERISA.

Lawyers, accountants, employee benefits consultants, and other professionals – These people usually act in a non-fiduciary capacity.

What are the roles and responsibilities of a fiduciary?

Once the various fiduciaries associated with a plan are identified, the next important step is to understand their roles and responsibilities. Because the plan sponsor is generally at the top of the fiduciary structure, the plan sponsor should know not only its own role as a fiduciary, but also the roles of all other fiduciaries for the plan.

In general, a fiduciary is only responsible for the jobs assigned to it. For example, a committee given responsibility only for discretionary administration of the plan will not be responsible for selecting plan investments. However, it is extremely important that these responsibilities be assigned to the various parties in writing, in the plan documents, or according to procedures described in the plan documents.

Is a fiduciary responsible for the acts of another fiduciary? In general, one fiduciary is not responsible for the acts of another. However, there is one exception to this rule — known as co-fiduciary liability. This occurs when:

- One fiduciary participates knowingly in the breach of duty by the other fiduciary.
- The fiduciary breaches its own duty, enabling the other fiduciary to violate ERISA.
- One fiduciary knows about the other fiduciary's breach and fails to take reasonable efforts to remedy the breach.

The threshold for co-fiduciary liability is generally high, requiring actual knowledge or participation in the other fiduciary's violation. Nevertheless, when a breach occurs, it is likely that claims may be brought against all of the plan's fiduciaries under the theory of co-fiduciary liability.

The roles of plan fiduciaries

The structure for assigning fiduciary responsibility as described on these pages is typical for a participant-directed defined contribution plan.

Plan sponsor. The plan sponsor is usually at the top of the fiduciary structure. In general, plan sponsors and plan administrators are ultimately responsible for making sure all the fiduciary jobs get done and for determining what fiduciary jobs will be assigned to other parties. There are two main categories of fiduciary activities that are typically the responsibility of the plan sponsor:

- Plan administration
  - — Interpreting the plan terms
  - — Making discretionary decisions regarding claims for benefits and appeals of denied claims
  - — Selecting service providers to administer the plan
  - — Ensuring that the plan is operated in accordance with its terms
  - — Providing plan disclosures, including plan fee and expense disclosures
- Plan investments
  - — Determining the investment structure for the plan
  - — Selecting and monitoring the individual investment funds in the plan

Plan sponsors must have the necessary investment experience and skill when making plan investment decisions. Many often rely upon the skills and expertise of advisors to help evaluate plan administration and plan investment activities. It is also possible to delegate these jobs to other parties. In addition, the selection of another party to carry out these jobs is itself a fiduciary function that must be done according to — and that will be judged by — the standards of fiduciary responsibility.

Plan committees. Plan sponsors often assign administrative and investment functions to one or more committees, typically made up of officers or other employees. There are two approaches to committee assignment:

1. The committee can be a named fiduciary, such as the plan administrator, under the plan, in which case the plan sponsor is generally only responsible as fiduciary for selection of the committee members and monitoring their performances. The committee members themselves are responsible as fiduciaries for the committee's and their own actions and decisions.
2. The plan sponsor may retain the role of plan administrator or other named fiduciary but appoint a committee to carry out its responsibilities. In this case, the plan sponsor is responsible for the actions and decisions of the committee, as are the committee members themselves.

Some plan sponsors do not use formal committees and instead rely on certain individuals or other less formally organized groups of employees. In this case, the plan sponsor is virtually always a named fiduciary and so remains fully responsible for the decisions and actions of these individuals. In some cases a service provider will accept fiduciary responsibility for non-investment-related fiduciary acts, such as approving loans or hiring other service providers for the plan. Check the disclosure document to see if the administrative services provider is offering fiduciary services.

Directed trustee. For participant-directed 401(k) plans, the role of the trustee is usually limited to that of a directed trustee. The directed trustee's role is to hold the assets of the plan, investing and distributing them as directed by a named fiduciary. Provided the directions it receives do not violate ERISA or the terms of the plan, the directed trustee must follow the directions it receives. Nevertheless, under ERISA the directed trustee is still a fiduciary.

Financial or investment advisor. In some cases, advisors provide services that are not of a fiduciary nature. In other cases, advisors may provide fiduciary services to the plan sponsor in the form of advice on the choice of the plan investment lineup. Some plans retain a financial or investment advisor to provide fiduciary-level investment advice to participants in selecting investments for their individual accounts. In either case, plan sponsors should treat the selection of the advisor as a fiduciary decision.

Investment manager. An ERISA investment manager may be retained to manage plan assets. The plan sponsor or other named fiduciary would be responsible for selecting and monitoring the performance of the investment manager.

Scope of relief

When selecting service providers to participate in fiduciary responsibilities, it's important to fully understand which fiduciary responsibilities they are accepting and how that impacts your level of risk. For example, some types of fiduciary investment consultants share responsibility with the plan sponsor for investment decisions, while others accept full responsibility for those decisions, so the plan sponsor does not share in fiduciary liability as long as it has prudently selected and monitored the consultant.

The responsibilities imposed on all plan fiduciaries

While ERISA has a flexible structure for establishing the roles of plan fiduciaries, the law sets forth universal standards for their behavior. These standards are much higher than the law generally imposes on an employer's relations with its employees. In fact, they are among the highest standards of conduct prescribed anywhere in the law. A fiduciary's failure to perform its job up to the high level these standards require is called a breach of fiduciary responsibility and may mean personal liability for the fiduciary.

Although the standards of fiduciary responsibility are high, they do not impose specific, concrete requirements. On the contrary, the rules are stated in the broadest and most generalized form. This is one of the things that makes fiduciary compliance seem challenging. ERISA sets out a series of strict legal dictates, almost moral in character, but without a definitive road map for meeting these standards.

We do not believe this challenge is as daunting as it might at first seem. The emphasis of ERISA's fiduciary standards is on the "how." This means procedure and process are the keys. There is no specific benchmark against which performance is measured. Since procedure and process can be managed — and adapted to specific situations — complying with ERISA's fiduciary standards is a task that plan sponsors can realistically achieve.

The Prudent Man Rule

ERISA requires that a fiduciary discharge its duties:

> "...with the care, skill, prudence and diligence under the circumstances that a prudent man acting in a like capacity and familiar with such matters would use."

This rule deserves special prominence in any discussion of fiduciary responsibility. It is the rule that is hardest to define in concrete terms and the standard on which fiduciaries are most open to challenge. On the other hand, it is a standard where fiduciaries can take the most proactive steps to satisfy the rule and discharge their responsibilities. The following are key points to know about this rule:

- This is often described as the Prudent Expert Rule, because it requires the fiduciary to act with the care of not just any prudent man, but one familiar with the matters at hand. This means, at a minimum, that fiduciaries making a fiduciary decision should be — or should make themselves — knowledgeable about the subject matter of the decision.
- Much of the emphasis of this rule — evident in the terms "care," "skill" and "diligence" — is on procedure. Fiduciaries are required to perform the tasks a careful, deliberate, knowledgeable, diligent person would perform, such as investigating facts, asking questions, consulting experts, considering alternatives, etc. To be sure, judgment is needed at the end of any decision-making process, but following a process conscientiously is more than half the battle.
- What this rule does not require of fiduciaries is a specific result or even success. The fact that with 20/20 hindsight a fiduciary would have made a different decision does not mean the Prudent Man Rule has been violated. The prudence test focuses on the conduct of the fiduciaries when making the decision and not on the result.

Procedural prudence. Developing and following procedures for making fiduciary decisions, and documenting compliance with the procedures, are imperative for any fiduciary in discharging their duty to act prudently. A documented procedure may be the only way to show that a decision that has a bad outcome was, in fact, reached through a thorough investigation that a prudent man would have followed. More importantly, a well-thought-out process for decision-making will generally lead to better decision-making, meaning less basis for participant complaint or challenge. Because of the importance of procedure when dealing with the Prudent Man Rule, this guide emphasizes procedural prudence when addressing the concrete steps that plan sponsors should take. This is discussed in more detail in "Part III: Best Practices in Managing Fiduciary Liability."

The Exclusive Benefit Rule

ERISA requires that a fiduciary discharge its duties:

> "...solely in the interest of participants and beneficiaries ... and for the exclusive purpose of providing benefits [and] defraying the reasonable expenses of administering the plan."

In short, fiduciaries must put the interests of plan participants before all other interests. Key points to know about this rule are that:

- It imposes a duty of complete loyalty to plan participants.
- The interest in question is the interest of plan participants, and not the interest of the employer.
- A plan sponsor or fiduciary can receive an incidental benefit as long as the primary motivation for the fiduciary's action is to benefit participants.
- Any decision involving a potential conflict of interest is subject to special scrutiny.

Remember that these and other fiduciary standards apply to fiduciary decisions only, and not to settlor decisions, such as how to design a plan or whether to include a matching contribution. While compliance with the Exclusive Benefit Rule is not necessarily achieved through process and procedure, the rule provides a clear mandate: In fiduciary decision-making, always put the plan and participants first.

The Investment Diversification Rule

ERISA requires fiduciaries to:

> "...diversify the investments of the plan so as to minimize the risk of large losses, unless it is clearly imprudent to do so."

This rule may seem somewhat out of place in a participant-directed 401(k) plan, because it assumes that the fiduciary controls how the assets of the plan are invested. However, this rule can be relevant in a number of ways:

- Not all plan investments are participant-directed.
- In a section 404(c) plan, the plan sponsor is responsible for selecting a broad range of investments that includes diversified options.
- The diversification of the underlying designated investment options should also be considered.
- Participants should be properly educated regarding the importance of diversification.

For participant-directed 401(k) plans, investments in company stock are not subject to the Investment Diversification Rule. However, even in an ESOP, company stock investments are still subject to the fiduciary standards of the Prudent Man Rule and the Exclusive Benefit Rule.

The Plan Document Rule

ERISA requires that a fiduciary discharge its duties:

> "…in accordance with the documents governing the plan insofar as such documents are consistent with [ERISA]."

Key points to know about this rule are that:

- Fiduciaries must follow the terms of the plan documents, which include any trust agreement as well as an investment policy statement, loan policy, or other governing document. If there is any ambiguity in the documents requiring interpretation, this is the responsibility of the plan sponsor.
- Plan documents cannot be followed where the action is contrary to ERISA. While the terms of a plan document will, by themselves, rarely violate ERISA, their application to particular situations could be a violation.
- This rule could convert any plan operational failure into a potential claim for fiduciary breach.

Fee Disclosure Requirements

ERISA requires that plan sponsors of participant-directed plans must take steps to ensure:

> "…participants are provided sufficient information regarding the plan, including fees and expenses, … to make informed decisions with regard to the management of their individual accounts."

Key points to know about this rule are that:

- Participants must receive the fee and expense information when they become eligible for the plan and annually thereafter.
- The disclosure must include information on plan and participant-level fees and information on the plan's investment options.
- Failure to provide the disclosure is a fiduciary breach.

The role of investment education and advice

An important element of fiduciary planning is to promote participants' success in achieving their retirement savings goals. Even if that means stepping up to greater fiduciary responsibility, the point is that participant success can provide plan sponsors with the best protection against fiduciary liability. And, of course, a well-managed plan investment process can go a long way toward this result by making sure participants have access to a sound, comprehensive investment lineup.

Moreover, providing participants with tools to help them make informed decisions regarding the plan's investment lineup will do even more to promote participants' success. The key tools are those that will enable participants to take the investment lineup and create asset allocation strategies appropriate to their specific needs — such as either investment education or investment advice.

The goals of effective investment education and investment advice are basically the same: to lead participants to invest their accounts according to the asset allocation strategy that is best for them. The Department of Labor has stated that providing the following categories of information will not constitute investment advice: plan information, general financial and investment information, asset allocation models, and interactive investment materials.

From a fiduciary perspective, the key difference between investment education and investment advice is this: One who gives investment advice is a plan fiduciary, and giving investment advice is a fiduciary act — while providing investment education is not a fiduciary act, and the party providing the education is not a fiduciary.

Is there an obligation to provide investment education or advice? There is no specific fiduciary duty to provide participants with either investment advice or investment education. Nevertheless, providing participants with these tools, as outlined in a comprehensive education and communications strategy, can help protect against fiduciary liability in the long run.

- An effective education program is a process, not just a one-time event, and should be well-documented. To make the most impact, each element should make it simple for participants to update their strategy or account. An education program might include:
  - Scheduled education events at convenient times for participants
  - Proactive, scheduled mailings, targeted to subsets of the participant base (e.g., mailings regarding enrollment, deferral increases, diversification emphasis)
  - Personalized account overviews or projections (e.g., identifying savings shortfalls or diversification gaps)
  - Tools to help employees identify their progress toward lifetime income replacement and how they may close any gap in their savings shortfall

ERISA section 404(c)

Remember, the general rule is that plan fiduciaries have responsibility for operation and administration of the plan. There is an important exception to this rule under ERISA section 404(c) for plans in which investments are participant-directed: ERISA section 404(c) states that a plan fiduciary will not be held responsible for any losses resulting from participants' direction of investment of assets in their account. To take advantage of section 404(c), the plan must satisfy certain operational and disclosure requirements. There are some key points to know:

- Even if section 404(c) applies, the plan sponsor or other named fiduciary has fiduciary responsibility for the selection and ongoing monitoring of the investment options available under the plan.
- The view of the Department of Labor is that section 404(c) only applies to transactions where participants exercise active control over their accounts. Because of this, section 404(c) may not apply where "default" funds are used when participants fail to provide investment instructions (as in the case of automatic enrollment), and the plan sponsor will have responsibility for results of the participant's investment in the default fund. The one exception to this is the use of qualified default investment alternatives as described on Page 11.

What happens if a participant-directed plan does not comply with ERISA section 404(c)? The fiduciaries could still argue that the particular investment decisions were prudent and resulted in adequate diversification — in other words, the fiduciary standards were met. However, as a best practice, all participant-directed plans should take advantage of section 404(c) to provide fiduciary protection against participant allocation decisions.

The basic requirements for ERISA section 404(c) protection are:

- The plan must offer a broad range of investment options (at least three) with materially different risk and return profiles.
- Participants must be able to change investments with a frequency that is appropriate in light of the volatility of the investment options.
- Participants must be provided certain specific plan fee and investment information intended to permit them to make informed investment decisions. Almost all of this information has to be provided automatically and some only at the request of a participant.
- Notify participants that the plan is intended to be a 404(c) plan and that the plan sponsor may be relieved of liability for investment losses resulting from the participants' own decisions.

Qualified default investment alternatives

Department of Labor rules provide guidance on how plan sponsors may be shielded from fiduciary liability if they invest participant assets in a qualified default investment alternative (QDIA). Compliance with these rules is optional, but many plan sponsors take advantage of the protection the rules offer.

The QDIA rules provide three general categories of investment options that may be used as QDIAs. In each case, the investment option must be based on generally accepted investment theories and be diversified to minimize the risk of large losses. Also, the investment's objective must be to provide long-term appreciation and capital preservation through a mix of equity and fixed-income exposures. The relevant asset allocation strategy need only take into account participant age and need not take into account other considerations, such as risk tolerance or a participant's other investment assets.

The three categories are:

Life-cycle or targeted retirement-date funds. A QDIA can be a diversified fund product or model portfolio designed to provide varying degrees of long-term appreciation and capital preservation through a mix of equity and fixed-income exposures based on the participant's age and target retirement date or life expectancy. Such products change their asset allocations and associated risk levels over time with the objective of becoming more conservative with increasing age.

Risk-appropriate balanced funds or portfolios. A QDIA can be a diversified fund product or model portfolio that is designed to provide long-term appreciation and capital preservation through a mix of equity and fixed-income exposures consistent with a target level of risk that is appropriate for participants of the plan as a whole. Plan fiduciaries considering this type of QDIA need to determine the risk level that is appropriate for their plans' participant base.

Managed account. A QDIA can be a managed account in which a fiduciary, applying generally accepted investment theories, allocates the assets of a participant's individual account to achieve varying degrees of long-term appreciation and capital preservation. The fiduciary does this by investing in a mix of equity and fixed-income exposures offered through investment alternatives available under the plan, based on the participant's age, target retirement date (such as normal retirement age under the plan), or life expectancy.

The options may be mutual funds, collective trusts, or portfolios of assets such as separate accounts, funds-of-funds, or even collections of funds within the plan's investment lineup. In the case of a portfolio of assets, the portfolio must be managed by a trustee, investment manager (in each case acting as a fiduciary under ERISA), or plan sponsor that is a named fiduciary of the plan. If a plan sponsor chooses to manage a portfolio as a QDIA, the plan sponsor will not face fiduciary exposure for participants' default investment in the QDIA, but it will have fiduciary responsibility for managing the portfolio itself.

In selecting which option will serve as a QDIA, the options are treated equally in providing the desired fiduciary protection, as long as a plan sponsor follows general fiduciary standards in selecting and monitoring the option.

To ensure fiduciary protection for the QDIA, the regulations include additional requirements regarding communications and notifications. These rules generally require plan fiduciaries to provide certain notices to participants within specified time frames, provide participants with fund materials and investment information, and permit transfers out of QDIAs without restrictions or fees. Of course, the provisions of ERISA section 404(c) remain in effect, and each plan must continue to offer a broad range of investment alternatives and communicate these options to fund participants. Plan fiduciaries also still have the obligation to prudently select and monitor a QDIA.

Notice: Participants must be provided notice in advance of beginning investment in a QDIA, as well as an annual reminder. The advance notice must be provided at least 30 days prior to becoming eligible, or may be provided 30 days prior to when contributions are first invested in a QDIA. The latter option is intended to accommodate contributions other than elective deferrals, such as profit-sharing contributions made in the absence of any action by the participant. The annual reminder notice must be provided at least 30 days before the beginning of each subsequent plan year.

Target date funds

When offering target date funds (TDFs) as an available investment option under the plan, the plan fiduciaries must prudently select and monitor the TDFs. The Department of Labor issued guidance to plan fiduciaries in 2013 with the following tips for selecting and monitoring TDFs:

- Establish a process for comparing and selecting TDFs.
- Establish a process for the periodic review of selected TDFs.
- Understand the fund's investments — the allocation in different asset classes (stocks, bonds, cash) and individual investments, and how these will change over time.
- Review the fund's fees and investment expenses.
- Inquire about whether a custom or non-proprietary TDF would be a better fit for the plan.
- Develop effective employee communications.
- Take advantage of available sources of information to evaluate the TDF and recommendations received regarding the TDF selection.
- Document the process.

Generally, the asset allocation of each target date fund will change on an annual basis with the asset allocation becoming more conservative as the fund nears the target retirement date. The target date is the approximate date when investors plan to start withdrawing their money. The principal value of the fund(s) in a plan's lineup is not guaranteed at any time, including at the time of target date and/or withdrawal.

Part 2: Focus on Investments

The issues that require the most attention by the plan sponsor as fiduciary, and that have the greatest potential financial exposure, involve investment of the plan's assets. In a section 404(c) participant-directed defined contribution plan, participants bear all of the investment risk. Therefore, plan fiduciaries are a likely target of a lawsuit when expectations are not met.

A general perspective on fiduciary responsibility for investments

Some plan sponsors approach fiduciary decisions as something to be avoided at all costs. The theory behind this approach is: "The less I have to do as a fiduciary, the less anyone can find fault with."

Thus, while minimizing liability is a worthwhile goal, we believe that approaching fiduciary compliance by trying to minimize the plan sponsor's role in decision-making may not be the best approach. By offering a 401(k) plan to its employees, a plan sponsor is necessarily signing on to be a fiduciary. We believe the most effective way to manage this liability is to commit to an active approach that *embraces* the role of fiduciary and seeks to balance the responsibility and potential liabilities. An active approach has a number of advantages:

- Cultivating its fiduciary role by developing and following procedures will put the plan sponsor in the best position to demonstrate how it has carefully discharged its fiduciary roles and responsibilities.
- Active and engaged participation in the fiduciary decision process can lead to better results, promoting the most important goal of sponsoring a plan — enhancing the retirement savings of participants.
- Better results for participants mean less basis for complaint and fewer reasons for participants to bring claims.

Therefore, assuming a broader role in the end can provide plan sponsors with the best chances of success in reducing their exposure to fiduciary liability. The services of an investment or financial advisor can provide the plan sponsor with valuable assistance to make this happen.

Investment lineups

Constructing the investment lineup

The most important investment responsibility of the plan sponsor is constructing the plan's investment lineup. This is a multi-step process of:

- Choosing the asset classes to be represented in the plan.
- Selecting a QDIA.
- Selecting the individual funds to fit in the selected asset classes or specialized investment options.
- Deciding whether any specialized investment options (such as company stock) should be included to supplement the asset classes chosen.

The investment lineup: choosing the asset classes

Modern investment theory indicates that asset allocation, rather than selection of particular investments, is the key to long-term investment success. The plan sponsor, generally acting through the investment committee, should focus on the range of choices necessary to permit participants to achieve appropriate asset allocation. Two competing considerations about fiduciary liability should guide this choice:

- Offering an expansive range of options across most or all combinations of asset classes may offer the best protection, because it gives participants the greatest range of options to meet their needs.
- Too many funds can often end up increasing the exposure to fiduciary liability. A large number of funds may become too difficult for some investment committees to monitor adequately and too overwhelming for participants to choose from successfully.

Therefore, the investment lineup needs to strike a balance.

Section 404(c)

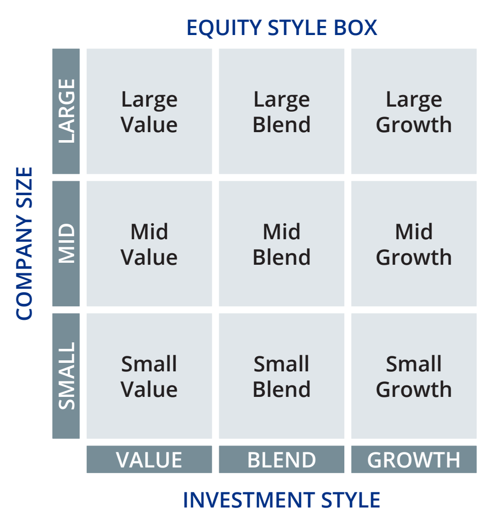
The starting point should be to ensure compliance with the broad range requirement of ERISA section 404(c), requiring three diversified options with materially different risk/return characteristics. It is generally understood that this requires diversified funds representing the following general asset classes:

- Capital preservation (i.e., money market or stable value)
- Equities (i.e., common stocks)
- Fixed income (i.e., bonds)

Beyond section 404(c)

ERISA section 404(c) should just be the starting point, however. Most investment experts would recommend offering far more than the three asset classes specified by section 404(c). Participants should have access to those asset classes in order to be able to achieve more complex asset allocation strategies and, therefore, a fully diversified portfolio. This means plan investment lineups should include asset classes chosen across the risk/return spectrum and reflecting a range of other investment attributes. The full range of possibilities can be seen in the adjacent charts.

Including every entry on the matrix of asset classes — particularly when also considering international versus domestic securities — could end up being unworkable for both participants and the investment committee. The investment committee needs to select from among the asset classes, choosing the range and number of options appropriate for the plan population. A more investment-savvy population or one with ready access to investment advice or guidance tools may be given a wider range of options, and a less savvy population should be given a more limited, core set of options.



Sample investment lineups

Here are samples of investment lineups designed to meet specific goals and accommodate different types of participant populations, while striking the balance between an expansive range and a workable number for participants.

INVESTMENT LINEUPS

Sample 1 – Simple	Sample 2 – Advanced
Tier 1	**Tier 1**
Prediversified	Prediversified
Tier 2	**Tier 2**
Money market/stable value	Money market/stable value
Bond/income	Core bond
Large-cap value	Multisector/nontraditional income
Large-cap growth	Large-cap value
Small/mid-cap core	Large-cap core
International	Large-cap growth
	Mid-cap growth
	Mid-cap value
	Small-cap growth
	Small-cap value
	International
	Absolute return/alternative asset class
	Tier 3
	Mutual fund window/self-directed brokerage

Part 3: Best Practices in Managing Fiduciary Liability

This section outlines specific strategies for enhancing fiduciary compliance and reducing exposure to fiduciary liability.

Identifying fiduciaries and assigning roles and responsibilities

Goal – To make sure all the appropriate roles are covered; be aware of the performance and activities that need to be monitored.

Action – Identify plan fiduciaries and establish their roles and responsibilities. This should be done within the plan sponsor's organization and for parties associated with the plan who are unrelated to the plan sponsor.

Guidelines/observations

- The named fiduciary of the plan is a matter of plan design, touching on matters of corporate liability that should be decided in consultation with legal counsel.
- Options generally are to designate as named fiduciary either the plan sponsor or a committee designated by the plan sponsor (though, occasionally, a single individual will be designated).
- Variations may include dividing administrative versus investment roles between the plan sponsor and a committee or between different committees. For example:
  - — The plan sponsor is the administrative-named fiduciary and a committee is the investment-named fiduciary.
  - — Separate administrative committee and investment committee are named fiduciary roles.
- A trustee of the plan is usually offered by an institution serving as a directed trustee. With the trustee selected (itself a fiduciary decision by the named fiduciary), the plan sponsor only needs to ensure that the trust agreement properly reflects the roles and responsibilities of the various fiduciaries.
- A financial advisor or consultant assisting the named fiduciary may or may not be acting itself in a fiduciary capacity. Any arrangement with the investment professional should be reviewed to confirm whether or not the consultant is a fiduciary and, if it is, the scope of its role and the fiduciary responsibilities it accepts.

Establishing investment and administrative committees

Goal – To promote procedural prudence by formally installing a group of competent individuals with clear fiduciary roles or responsibilities.

Action – Establish and appoint the members of one retirement plan committee or of separately constituted investment and administrative committees. If the plan sponsor, rather than a committee, is the named fiduciary, establish procedures for appointment of committees to act on behalf of the plan sponsor.

Guidelines/observations

- Regardless of whether the plan provides a committee structure for the named fiduciary or whether the plan sponsor is technically the named fiduciary, we believe procedural prudence is best served, particularly in larger plan sponsor organizations, by establishing committees for fiduciary decision-making.
- Though not legally necessary, we believe it can be helpful to have separate committees for the respective administrative and investment roles of the named fiduciary. Remember that fiduciaries are held to a "Prudent Expert" standard. Because the investment and plan administrative roles may require different expertise and experience, having the most appropriate membership for each committee may mean selecting different individuals.
- It may be best to consider executive-level decision-makers for the committee who are accustomed to acting independently, without necessarily consulting. At the same time, selection should take a realistic account of the time commitment the individuals will be able to give to the committees. And, if company stock is to be offered as an investment option in the plan, the fiduciary's possible obligation to use or disclose inside information about the company might also be relevant to the selection of committee members.
- Many employers with multiple divisions or business units represented in a plan find it desirable to include representation across divisions or business units.
- Many plan sponsors find it useful to include a member of the plan sponsor's legal department to serve as committee secretary or clerk and to offer legal input as needed. If all fiduciary decisions are made by a limited number of people on the committee and the rest serve in an advisory capacity only, it makes sense to document that structure to avoid spreading fiduciary risk unnecessarily to the non-decision-makers.

Specific to an investment committee or subcommittee

- Members of the committee should generally have experience and expertise in investment matters. Thus, for example, one or more individuals from the plan sponsor's treasury or finance areas should be included on the committee.
- Though they may have less investment expertise, members from the human resources or employee relations areas are also essential. Because the plan's investments must cater to the nature and needs of the specific workforce, people with the most firsthand knowledge should be included.
- Management for other, unrelated areas may be helpful to act as a sanity check, to question the assumptions of others and to make them justify what might otherwise be seen as conventional wisdom.

Specific to an administrative committee or subcommittee

- A plan sponsor will often have already established a committee responsible for deciding plan design and benefit issues. The administrative committee might be this committee or perhaps a subcommittee of the same individuals. The administrative committee might also be a subcommittee of the investment committee (or vice versa).
- It is typical that the administrative committee would delegate many day-to-day discretionary tasks to either a particular member (usually from human resources) or a trusted human resources representative who is not a member. Duties delegated might include:
  - — Making determinations regarding Qualified Domestic Relations Orders.
  - — Making non-routine determinations regarding eligibility, vesting, etc.
  - — Deciding first-level formal claims for benefits.
- The main responsibilities of the administrative committee would be to establish plan-wide procedures, interpret the plan, and decide formal appeals of denied benefit claims.

Establishing operating procedures for the committees

Goal – To promote procedural prudence by creating a concrete framework for fiduciary decision-making.

Action – Establish procedures governing how the committees will operate in meetings and in general.

Guidelines/observations

- The procedures should have general terms covering items like the following:
  - — Frequency of meetings
  - — Quorum for meetings
  - — Procedures for calling special meetings
  - — Voting rules (e.g., majority and super-majority votes required to carry motions on certain issues)
  - — Membership terms
  - — Membership positions (e.g., chair, vice-chair, secretary or clerk)
- The secretary or clerk should keep minutes of the meetings. This person should also be responsible for maintaining records of the minutes, as well as any other relevant documents considered at a meeting. These records should be readily available if requested, for example, by the Department of Labor on audit.
- It is not necessary that meetings follow Robert's Rules of Order, but some level of formality is advisable. For example, meetings should be formally convened, attendance taken and a quorum established, prior meeting minutes approved, and motions for a vote formally introduced and seconded.

- While the responsibilities of an administrative committee suggest it will need to meet on a more *ad hoc* basis, it should meet at least once annually, essentially to review the state of the plan.
- The procedures should recognize that individual members or subcommittees may be responsible for assuming specific investigative or fact-finding roles for reporting to the committee at large.
- If an investment committee is being newly formed and working with an investment policy statement, initial meetings should be frequent until either a new investment policy statement is established and first implemented or until the existing investment policy statement and fund lineup are validated. Once the investment committee is up and running, there should be periodic meetings to review the ongoing performance of the plan's investment funds.
- All decisions, including the investigation and facts that went into the decisions and reasoning behind the decisions, must be *documented*. Keep minutes of each meeting, noting time and place, attendees, and all matters discussed and decisions reached.
- If all fiduciary decisions are made by a limited number of people on the committee and the rest serve in an advisory capacity only, it makes sense to document that structure to avoid spreading fiduciary risk unnecessarily to the non-decision-makers.

Investment policy statements

Goal – To establish procedural prudence for investments by providing a framework for managing the process of selecting and monitoring the plan's investment options.

Action – Adopt and adhere to a written investment policy statement (IPS) that has three main purposes: to state the plan's mission, to establish standards, and to clearly define a process.

Guidelines/observations

The style and content of the IPS vary tremendously among plan sponsors. Some are relatively brief and general in nature, while others are detailed and specific. The IPS should address at least the following:

Mission – A statement of the plan's general investment philosophy and how that philosophy is to be reflected in the selection of investments for the plan.

- For the typical participant-directed plan, the overall philosophy of the plan's investment lineup should be to make it possible for participants to fully diversify their accounts, in line with their retirement savings needs.
- The philosophy should take account of any needs particular to the plan's participant population.
- The overall philosophy should ultimately be reflected in the selection of asset classes for the plan's investment lineup, with these classes set out explicitly in the IPS.

Standards – A listing of quantitative measures and qualitative factors to be considered in selecting and monitoring the investment funds to fill out the investment lineup.

- The quantitative measures should include items like performance benchmarks, performance relative to benchmarks, time frames for reviews of performance history (e.g., over one-, three-, five- and/or 10-year periods), performance volatility, share classes, and expense ratios.
- Prescribed minimums should be provided for consideration of new funds and for designating existing funds to a watch list.
- Qualitative measures for consideration should include such items as portfolio turnover, style consistency, and manager turnover.

Process – Procedures for reviewing and monitoring investments.

- The IPS should state the roles and responsibilities of the investment committee relative to the plan's investments, as well as how the committee should conduct its business.
- The IPS should provide a procedure under which investment funds performing below set standards are placed on a watch list for consideration to be dropped after a stated period.
- At least once a year, the investment committee should review the IPS itself to ensure that the asset class lineup and other general aspects of the statement are still appropriate, working, and up to date.

What are the benefits of an IPS? Having an IPS forcefully promotes procedural prudence. The adoption of an IPS demonstrates the care and seriousness with which the plan sponsor approaches investment issues. More important, the procedures set forth in the IPS make it easy to document the careful judgment and diligence that go into specific investment decisions.

The process of constructing the statement is an opportunity to take a big-picture view, allowing the development of an overall philosophy of how and which investments will be offered under the plan to make sure long-term strategic goals are not made the victim of overreaction to short-term market trends.

The IPS provides a touchstone for continuity as the individuals responsible for decision-making may change over time.

Is a plan required under ERISA to have an IPS? Although not generally required for a defined contribution plan, having an IPS is a hallmark of an active, engaged fiduciary. But, a word of warning: A plan sponsor should adopt an IPS only if it intends to follow it. It probably would be worse to adopt an IPS that isn't followed than to not have an IPS at all. That is, by establishing an IPS, the plan sponsor is basically making a statement about what, in its view, is prudent behavior. If it fails to live up to the standard it has set for itself, the plan sponsor makes it easy to be accused of a breach of its fiduciary duties of prudence and care and its duty to follow plan documents.

An investment or financial advisor can provide valuable assistance in establishing, maintaining and monitoring an IPS.

Selecting and monitoring plan service providers

Goal – To promote procedural prudence by filling in gaps in any fiduciary's expertise and obtaining an independent, informed expert's view on matters.

Action – Identify outside experts, such as investment professionals, lawyers, auditors and benefits consultants, to assist the fiduciaries.

Guidelines/observations

- ERISA encourages fiduciaries to make use of experts to advise them on matters involving their responsibilities to the plan and participants. In fact, courts have stated that fiduciaries must use experts when making investment decisions when the fiduciaries lack the requisite investment education, experience and skill. Accordingly, the plan document and any procedures developed for the activities of fiduciaries should specifically authorize the fiduciaries to employ experts.
- When selecting experts, fiduciaries should review their expertise, credentials and references carefully. It is also important to determine whether the fees the experts charge are competitive in the market and not excessive. An investment or financial advisor should be selected with this level of care, and the advisor may, in turn, provide valuable assistance in screening and selecting other experts.
- In general, the cost of experts to assist fiduciaries in their decision-making may be charged to the plan. However, if the expert will provide services that relate to non-fiduciary matters, such as plan design, such fees may not be charged to the plan.

How can a plan sponsor determine if fees relate to fiduciary or non-fiduciary matters? Plan sponsors should request that experts itemize all fees by the nature of the service, which can assist them in allocating to the plan only those fees properly payable by the plan.

Identifying and using outside experts to assist in fiduciary decision-making

Goal – To promote procedural prudence by ensuring services provided to the plan are necessary and are performed by competent organizations for reasonable fees, and by ensuring that the plan is administered properly and that the interests of participants are well-served.

Action – Choose and monitor on an ongoing basis the service providers directly serving the plan and participants.

Guidelines/observations

- While the ministerial aspects of plan administration are not fiduciary functions, the plan document rule requires, as a matter of fiduciary responsibility, that the plan be administered according to its terms. This means that the selection of a service provider to assume any of the ministerial functions of plan administration is a fiduciary decision that should be approached with the requisite care and prudence.
- When selecting a service provider, industry-standard practice calls for a request for proposal (RFP) process through which the provider's level of services, fees and expertise can be assessed on a competitive market basis.
- Where administrative and investment services both are to be offered by a single provider in a bundled arrangement, this selection process cannot be separated from the investment selection process.
- Once retained, the service provider should be subjected to ongoing review, assessing fees and any deficiencies in the provider's performance in administering the plan. An annual review with the service provider regarding the state of the plan is advisable.
- Again, an investment or financial advisor can be extremely helpful in the process of screening and selecting service providers, as well as monitoring their fees and ongoing performance.

Fees and disclosures to sponsors and participants

ERISA regulations require plan fiduciaries to ensure that all plan fees and expenses are necessary and reasonable, and they require plan sponsors to disclose fees and expenses to plan participants and, in the case of large plans, report plan fees and expenses on the plan's annual Form 5500. Below is a summary of the various regulations.

ERISA section 408(b)(2) — Sponsor disclosure

- Plan service arrangements must be necessary for the operation of the plan and no more than reasonable compensation must be paid by the plan for the services.
- Plan service providers must disclose all direct and indirect fees expected to be received by the provider for its services prior to entering into an agreement for the services.
- Failure to provide the fee and service disclosures results in an ERISA prohibited transaction.

ERISA section 404a-5 — Participant disclosure

- Plan sponsors must provide participants with an initial and annual notice disclosing information on plan administration and transaction fees and on plan investment options and expenses.
- Participants must receive notice of a change to any of the plan fee and investment information (such as a change to the plan's investment options) at least 30 days in advance of the change.
- Notice may be provided electronically to participants subject to Department of Labor rules.
- Failure to provide the plan fee and investment information to participants is a fiduciary breach.

Form 5500 — Schedule C

- Large plans (plans with more than 100 participants) must file a Schedule C with their Form 5500.
- Plan sponsors must report on Schedule C annual fee information for plan service providers that received $5,000 or more in direct or indirect compensation in connection with the services provided to the plan.
- Plan sponsors must report on Schedule C any plan service provider that failed or refused to provide any of the reportable fee information.

Establishing procedures for transmission of employee contributions

Goal – To promote procedural prudence and avoid violating the ERISA prohibited transaction rule and other rules.

Action – Establish a process to ensure that contributions withheld from employees' paychecks are transmitted to the plan within the time frames required by ERISA.

Guidelines/observations

- ERISA regulations require that employee contributions (i.e., salary deferrals and loan repayments) be transferred to the plan as soon as the funds can reasonably be segregated from the employer's general assets, but no later than the 15th business day of the month following the month in which the employee contributions were withheld. For small plans (plans with less than 100 participants at the beginning of the plan year), the regulations provide a seven-day safe harbor in which to transmit employee contributions to the plan. Many employers transmit employee contributions based on payroll frequency, which may or may not comply with the rule. Violation of this rule is a breach of fiduciary duty as well as a prohibited transaction. In both cases, the offense arises from the fiduciary's self-dealing in the plan's assets.
- Coordination between a competent payroll vendor and the trustee and recordkeeper will generally permit the plan sponsor to implement systematic procedures that comply with the rules.

Satisfying ERISA bonding requirements

Goal – To comply with ERISA bonding requirements.

Action – Confirm the plan has a fidelity bond as required by ERISA, and review the sufficiency of its coverage.

Guidelines/observations

- With certain exceptions for institutions, every fiduciary is required to be bonded. This requirement applies not only to fiduciaries, but also to all parties who handle plan assets. Handling includes any activity, beyond just physical contact, where the person's duties or activities present the risk of loss of plan assets due to fraud or dishonesty.
- The amount of the bond required is 10% of the plan assets handled, with the maximum required amount of the bond being $500,000, or $1 million if the plan offers employer securities. In practice, plan sponsors with plans of any size obtain bonding of the maximum required amount. The cost of the bond may be paid from plan assets.
- Plan sponsors should contact their insurance provider for assistance with the bonding requirement.

Obtaining fiduciary liability insurance

Goal – To protect the plan sponsor and other fiduciaries from potential losses incurred in their role as fiduciaries.

Action – Obtain fiduciary liability insurance, protecting both the plan and plan fiduciaries.

Guidelines/observations

- Although not legally required, plan sponsors may wish to obtain fiduciary liability insurance, covering losses and attorneys fees incurred as a result of claims of breach of fiduciary duty. Even a plan with a strong commitment to fiduciary compliance may have to defend against suits by disgruntled participants.
- The parties to be covered by fiduciary liability insurance should include the plan, to permit the plan to be made whole in the event of a fiduciary breach, and the plan sponsor and individual fiduciaries employed by the plan sponsor, to cover the cost of legal defense and potential liability resulting from a claim.
- The plan may be charged for the cost of fiduciary liability insurance as long as the policy gives the insurer the right to seek recourse to collect any loss from any fiduciary who engages in a breach. However, non-recourse riders can be purchased by the plan sponsor that cut off the insurer's right of recourse against the fiduciary. These non-recourse riders are relatively inexpensive and should be viewed as essential to providing individual fiduciaries with insurance protection.
- Typically, these policies do not insure against claims resulting from knowingly wrongful acts, such as fraud. A plan sponsor should not assume that its organization or the individual fiduciaries it employs will be covered by its existing E&O (errors and omissions) or D&O (directors and officers) insurance policies. Coverage for ERISA plans or fiduciary liability is often excluded.
- Plan sponsors should consult their insurance provider about the details and suggested levels of coverage for fiduciary liability insurance.

Part 4: Appendices

Appendix I: Sample minutes of fiduciary committee meetings

[Name of Plan]

Minutes of [Name of Fiduciary Committee]

[Date]

[Name] called the Meeting of the [Name of Fiduciary Committee] ("Meeting") of the [Plan Name] (the "Trust") to order in [City, State], at the office of [Name of Company] at [Time]. Committee members present were [Name Committee Members]. Present by proxy was [Name of Proxy], holding proxy for [Name of Absent Committee Member]. Also present by invitation was [Name], [Title].

Notice of the Meeting, which was mailed to all Committee Members, was directed to be filed with the minutes of the Meeting. [Name] welcomed the Committee Members to the Meeting and asked if there were any comments or questions regarding the minutes of either the [Date] Meeting or the [Date] Special Meeting, copies of which were distributed to the Committee Members in advance of the Meeting. Upon motion duly made and seconded, it was unanimously voted that the reading of the minutes be dispensed with and the Secretary be directed to place them on file.

Discussion of various agenda items, including any votes taken and approved.

After which, there being no further business, the Meeting adjourned.

[Name], Secretary

[NAME OF PLAN] [NAME OF FIDUCIARY COMMITTEE], [DATE]

Agenda item number two

(Description of agenda item, including appropriate votes)

[NAME OF PLAN] [NAME OF FIDUCIARY COMMITTEE], [DATE]

Agenda item number three (and so on)

APPENDIX 2: Fiduciary Checklist[1]

The following list is designed to assist you in fulfilling your fiduciary responsibilities. As always, you should consult with your ERISA counsel or other experts to determine whether this list is appropriate or sufficient for your plan.

- ☐ An up-to-date plan document is being used.
- ☐ A copy of the IRS Favorable Determination Letter and/or Prototype Opinion or Advisory Letter has been obtained.
- ☐ The plan document is amended for all legislatively required changes and the plan is being operated in accordance with its terms and new legal requirements that may not yet be reflected in plan documents.
- ☐ The plan trustees have been properly appointed, and the plan's trust agreement has been properly executed.
- ☐ All fiduciaries have been identified, and the scope of their responsibilities has been defined and documented.
- ☐ If appropriate, Plan Committees have been established, and appropriate members have been appointed.
- ☐ Any employee acting as a fiduciary has received sufficient training and assistance to fulfill his or her responsibilities in accordance with ERISA's fiduciary standards of conduct.

  Service contracts exist with all plan fiduciaries and service providers that clearly outline their responsibilities.

  Your plan's service providers have given you required disclosures about their fees and services and provide timely updates of those disclosures in the event of a change.

  The fees being paid by the plan are reasonable based upon the investment options and services being provided.
- ☐ A fidelity bond is maintained, covering fiduciaries and all persons handling plan assets.
- ☐ If deemed appropriate, fiduciary liability insurance coverage has been purchased as a protection against personal liability.
- ☐ All salary reduction deferrals and loan repayments are being collected and invested in the plan as soon as administratively practicable.
- ☐ The plan maintains and abides by a written Investment Policy Statement.
- ☐ Plan fiduciaries have selected a broad range of investment options and have designed an investment menu appropriate for the plan.
- ☐ Plan fiduciaries monitor the investment options periodically to ensure that the funds continue to meet the requirements set out in the plan's Investment Policy Statement.
- ☐ All experts and providers retained to provide services to the plan are monitored periodically to ensure they are meeting the performance standards set for them.
- ☐ You document each of your meetings, the results of your review and monitoring of investments and service providers, and the decisions made with respect to the plan.
- ☐ You document your review of, and the decisions made with respect to, the investment options to be deleted or retained by the plan.
- ☐ You maintain a due diligence file containing documentation supporting your fiduciary process and decision-making.

[1] The information contained herein is for general use only and it does not constitute legal advice upon which any party may rely. A plan sponsor is encouraged to consult its own advisors for specific guidance regarding its plan.

- ☐ You have provided an up-to-date Summary Plan Description to all employees, redistribute the Summary Plan Description or distribute a Summary of Material Modifications whenever plan design changes dictate, and provide Summary Annual Reports and any required notices based on plan design.
- ☐ You have provided all eligible recipients with the initial, quarterly and annual disclosures required by the participant disclosure rule and have responded timely to requests for additional information.
- ☐ You have provided Individual Benefit Statements to all eligible recipients on a quarterly basis.
- ☐ You have effective, easy-to-understand participant communications on all important aspects of the plan, and educate participants about the plan, the importance of saving for retirement and the basics of investing.
- ☐ You have reviewed plan success metrics, such as participation rates, salary deferral rates, investment diversification and retirement income readiness, on a periodic basis.
- ☐ You review and consider changes to plan design, plan services or investment products as warranted in order to improve plan success metrics.
- ☐ You have filed an accurately completed Form 5500 in a timely manner.
- ☐ If you are a large plan filer (generally a plan with 100 or more participants), you have included an accountant's opinion with your report.
- ☐ You have conducted all required testing for your plan based on plan design and have addressed any testing results that require action.
- ☐ You have a process in place, which is in compliance with ERISA, to respond to participant claims against the plan.
- ☐ You comply with ERISA section 404(c), if applicable. See Appendix 3.
- ☐ If the plan utilizes a Plan Expense Account (also referred to as an ERISA Spending Account), you have ensured that all payments were for allowable expenses and have determined the appropriate treatment of any assets remaining in the account.
- ☐ The plan has not engaged in any financial transaction with a party-in-interest (i.e., a fiduciary, service provider, employer, owner, employee or officer) that is not exempt.
- ☐ No plan fiduciary has used assets of the plan for his or her personal interests.

APPENDIX 3: ERISA Section 404(c) Checklist (Including QDIA)

ERISA section 404(c) applies to individual account plans that permit participants (or beneficiaries) to exercise control over assets in their individual accounts. To the extent this control is exercised, and if all the requirements of 404(c) are met, plan fiduciaries are not liable for losses resulting from the investment choices made by participants.

Fiduciary protection under 404(c) is available for both actively selected investments, and default funds into which a participant is invested. However, the rules vary based on whether a fund is actively elected or is a default fund. A plan can choose whether to have 404(c) relief for no funds, for actively elected funds, or for default funds.

1. CHECKLIST FOR ACTIVELY SELECTED INVESTMENTS

- ☐ Offer a broad range of investment alternatives — three or more funds that are diversified, have materially different risk and return characteristics, enable participants to achieve aggregate risk and return characteristics within the range normally appropriate for each participant, and enable participants to minimize risk through diversification.
- ☐ Give participants the opportunity to give investment instructions to an identified plan fiduciary who is obligated to comply with those instructions.
- ☐ Provide an opportunity for participants to receive written confirmation of investment instructions.
- ☐ Provide an opportunity for participants to make investment changes at a frequency that is appropriate in light of the market volatility of the investment options, but no less frequently than quarterly.
- ☐ Provide all of the required initial, quarterly and annual disclosures to participants about the investments available to them, as well as plan fees. In addition, provide a disclosure stating that the plan is intended to be a 404(c) plan and plan fiduciaries may be relieved of liability for any losses that are a direct and necessary result of investment instructions given by the participant.
- ☐ If employer securities are offered, provide a disclosure describing the procedures for maintaining the confidentiality of transactions and the exercise of voting, tender and similar rights. Also provide the name, address and phone number of the plan fiduciary responsible for ensuring compliance with these procedures.

2. CHECKLIST FOR DEFAULT INVESTMENTS (QUALIFIED DEFAULT INVESTMENT ALTERNATIVES, OR "QDIAS")

- ☐ The plan must offer a broad range of investment alternatives.
- ☐ Participants must have been given the opportunity to provide investment direction, but failed to do so.
- ☐ Participants must receive a notice initially and annually containing the following information:
  - — A description of the circumstances under which a default investment will be made.
  - — If applicable, a description of the circumstances under which a default contribution election will be implemented, the amount of any such contributions, and the right to elect out of the default contribution percentage.
  - — An explanation of the participant's right to direct investment of his or her plan account.
  - — A description of the default fund QDIA, including its investment objectives, risk and return characteristics, and fees.
  - — A description of the participant's right to transfer funds out of the default fund and into any of the other investment options available in the plan, as well as a description of any restrictions or fees that would apply.
  - — An explanation of where participants can access information about the other investment alternatives available in the plan.
- ☐ Participants must have the opportunity to direct investments out of the QDIA at least as frequently as participants who actively elect to invest in the QDIA, but at least quarterly.
- ☐ No transfer fees or restrictions can be imposed on a defaulted participant who opts out of the QDIA within 90 days of his or her first investment in the QDIA.
- ☐ Provide required initial, quarterly and annual disclosures to participants.
- ☐ The default investment option must qualify as a QDIA fund. There are three types of investment options that qualify as long-term QDIA funds:
  - — **Managed accounts** – Investments are made by a plan fiduciary, taking into account the age, target retirement date or life expectancy of participants and becoming more conservative as the participants age.
  - — **Balanced option** – Designed to provide diversification in equity and fixed income investments that are appropriate for the plan participants as a whole.
  - — **Target date option** – Designed to provide diversification in equity and fixed income investments that are appropriate for individual participants based on their age, target retirement date or life expectancy and that become more conservative as participants age.

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