



A Dozen Areas of Key Fiduciary Emphasis

ERISA is not so much about whether fiduciary decisions are right or wrong, but more about whether the “correct” information was evaluated in the “correct” way using a prudent and well documented process. Taking the necessary measures to protect yourself personally as a fiduciary as well as the company you represent is important. As a plan fiduciary you should be able to answer the following questions based on specific policies and procedures you actively perform (and be able to back up your answers with documentation):

- Can you accurately articulate your current fiduciary risk exposure?
- Have you adopted a corporate governance policy statement?
- Are you exposed to unnecessary liability?
- Have you taken advantage of and are you accurately applying “safe harbor” liability exemption opportunities?
- Are your employees on track to reach their retirement goals?
- Do you offer an employee education program? Does it meet the needs of all employees or simply certain demographic groups? How do you measure its effectiveness on each “individual” employee?
- Do you engage a qualified independent party to review your fiduciary practices on a periodic basis? Are you certain of their independence?
- Do you share your fiduciary role with an independent plan fiduciary?
- Do you believe your service providers are liable for the services and advice they provide? If so, have they put it in writing?

If you cannot fully articulate an accurate answer for each of these questions, you are not alone.

Fiducia Group has identified a dozen key areas of emphasis for fiduciaries. Many fiduciaries observe the basics of “fiduciary fitness” and have spent time on the following four areas of emphasis:

Appointments to Fiduciary or Investment Committees. It is appropriate to appoint the senior officers to your plan's fiduciary or investment committees consistent with (1) knowledge and understanding of financial matters, (2) ability to devote appropriate time and resources to serving on the committee, and (3) a need to avoid "conflicts" with company responsibilities (typically more important for companies with significant insider information concerns).

Observing a Regular Schedule for Committee Meetings. It is important to establish a protocol for meetings and the documentation of committee deliberations and decisions in order to prove that plan fiduciaries did, in fact, act prudently in making decisions. If your plan is one of the many that fail to hold regular committee meetings and/or keep complete records, start getting into good habits.

Implementation of an Investment Policy Statement (IPS). An IPS can provide fiduciary protection assuming it is kept current and followed. An IPS will help clarify fiduciary roles and expectations, serve as evidence of proper fiduciary process and help to avoid the types of participant misunderstandings that can lead to litigation. The typical IPS contains a statement of purpose, a statement of plan investment objectives, a description of the investment structure, and a description of investment selection / monitoring process.

Development of Prudent Investment Oversight Procedures. Plan fiduciaries should have procedures in place for monitoring the performance of plan investments relative to guidelines set forth in the plan's IPS. Fiduciaries should be reviewing quantitative performance data on managers vis-à-vis benchmarks and peer groups quarterly. Quarterly investment reporting and documentation should correlate to the criteria outlined in the IPS. Qualitative review of each manager or designated investment alternative should ideally be performed annually.

While most of the fiduciary emphasis is on the preceding four areas, **the other eight areas of fiduciary responsibility are equally important.** The following are areas of fiduciary emphasis that are sometimes overlooked:

Reasonableness of Fees & Expenses. This topic rapidly is becoming the No. 1 issue for consideration by plan committees—or, at least, it should be. The committee should focus on the reasonableness of the expenses and on understanding and evaluating all indirect revenues (mutual fund subsidies) being paid to the plan's providers. If your participants are absorbing servicing fees, benchmarking to the marketplace with actual quotes from the competition is a very critical practice and should be done at least every three years. With several lawsuits pending, new Department of Labor disclosure requirements completed or pending, and rumblings of discontent from Capitol Hill, plan fees are going to be in the spotlight in 2008 and beyond.

Fiduciary Acknowledgement. Have all of your providers, especially those providing investment assistance, acknowledged their fiduciary status in writing? Have each of your internal fiduciaries / committee members assigned by the company acknowledged their fiduciary status, duties, chaired positions and responsibilities in writing?

Outsourced Services. The services used by the plan should be monitored at least annually, including the plan-level investment consultant; compliance services; the recordkeeper; enrollment and investment education services; and, yes, the plan's attorney. The services should be reviewed for quality, effectiveness, and adherence to the governing agreements.

Soft-dollar Compensation Arrangements. There is nothing inherently wrong with the use of revenue-sharing to pay for the cost of operating a plan. Fiduciaries, however, must be very aware of, and consider the impact of, conflicts of interest. If your providers are receiving more compensation, including the indirect payments, when they promote one investment over another, there is a conflict of interest. Plan sponsors also need to be aware that, with asset-based fees, fees can grow as the size of the asset pool grows, regardless of whether any additional services are provided by the vendor. The fee increase that occurs when assets grow needs justified and should be reasonable. If mutual fund subsidies are not allocated back to participants and are used to pay fees, you need to document decision making very carefully.

Adequacy of Deferrals. The scope of this area for fiduciaries is not entirely clear, however, reasonable diligence is prudent. Fiduciaries should solicit input from their advisers and providers about the available services to educate participants, about appropriate deferral rates, and should consider services to help participants increase their deferrals.

Quality of Participant Investing / 404(c) Protection. It is not well known that fiduciaries have significant responsibilities for the quality of participant investing. Many fiduciaries feel they are protected under 404(c) and absolved of responsibility for participant directed investments. The Enron decision made it clear that fiduciaries retain personal liability for the plan investment decisions including those made by participants if the plan does not qualify as a 404(c) plan. 404(c) has 20+ requirements (depending on the design of the plan) and most plan sponsors satisfy only 10-15 of those requirements. Those with company stock in the plan have an additional burden.

Typical common failures:

- *Failure to give participants (including those separated) appropriate disclosure that the plan is a Section 404(c) plan*
- *Failure to appoint the required Section 404(c) fiduciaries and identify them to the participants*
- *Failure to disclose the information that must be made available on request*
- *Company stock failures...in a plan that has company stock as a possible participant-directed investment, fiduciaries must develop and communicate a confidentiality procedure to protect the identity of participants who buy or sell company stock*
- *Failure to deliver a prospectus when required*

Level of participation. Fiduciaries have a responsibility to implement a plan's eligibility provisions and to oversee the communications with their eligible employees. However, the scope of that duty is not well-defined. As a result, fiduciaries periodically should evaluate the plan's communication and enrollment services. That can be done by reviewing, among other things, data about the actual levels of participation and then comparing it with industry benchmarks. Ongoing communication to eligible but non-participating employees encouraging their participation is highly recommended as well.

External Changes. This might include things like Roth deferrals, automatic enrollment, and qualified default investment alternatives (QDIAs), as well as age-based lifecycle funds, education for participants, and so on. A fiduciary should be earmarked to review the impact of legislative changes and environmental factors internally as to how they impact the participants.