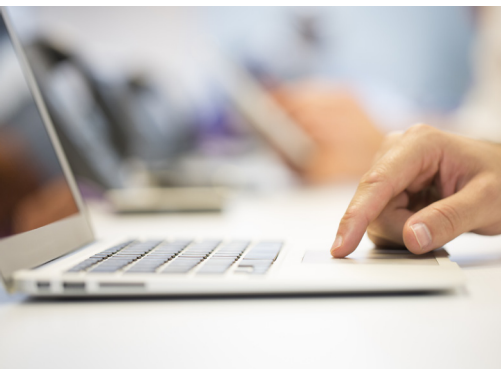
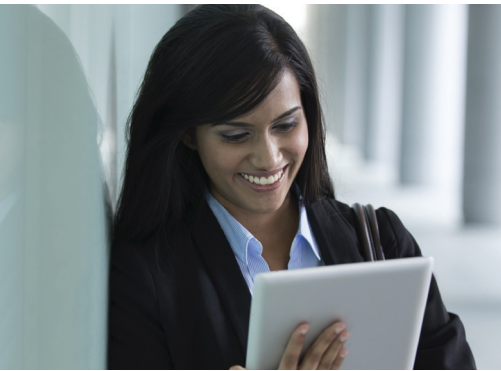


Focus on Fiduciary Responsibility



Introduction

Fiduciaries of defined contribution plans have come under increasing scrutiny in recent years, in part due to participant lawsuits filed against plan sponsors and the resulting media attention. The Internal Revenue Service (IRS) and Department of Labor (DOL) have also increased the number of plans they audit each year. Because there are significant consequences that can result from a fiduciary breach, it is imperative that you focus on your fiduciary responsibilities and understand the standards of conduct that apply to every plan-related decision you make.

Under a participant-directed defined contribution plan, the control and responsibility for participant benefit outcomes is substantially shifted from the plan sponsor to the participant. The plan sponsor, however, remains fully and solely responsible for maintaining the plan, meeting regulatory requirements, educating participants, prudently selecting and monitoring investment options and service providers and controlling plan expenses.

Empower Retirement™ created *Focus on Fiduciary Responsibility* to guide you, a fiduciary of a government participant-directed defined contribution plan, through the basic fiduciary responsibilities imposed upon plan sponsors. Since government plans are not subject to the Employee Retirement Income Security Act of 1974 (ERISA), your specific fiduciary duties are established by state and local law and the terms of your plan document. *Focus on Fiduciary Responsibility* provides a simple explanation of basic plan sponsor fiduciary responsibilities. It is not a legal interpretation of your responsibilities under state law, nor is it intended to be a substitute for the advice of your retirement plan attorney or other professional.¹

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



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Please note that Empower Retirement cannot provide you with legal or tax advice regarding your plan or your fiduciary duties. For that type of assistance, consider consulting with your own attorney or advisor.

The Plan Fiduciary

Fiduciary Capacity

A person acts in a fiduciary capacity when he or she handles money or property for the benefit of another. A governmental employer offering a defined contribution plan to its employees, herein referred to as the plan sponsor, handles money for the benefit of plan participants. Government plan sponsors have always had fiduciary responsibility with respect to their qualified plans where plan assets must be held in trust, such as 401(a) and grandfathered 401(k) plans. When 457(b) eligible deferred compensation plans were first enacted, however, all plan assets belonged to the employer and were subject to the employer's general creditors. These plans had few moving parts – no indexed contribution limits, no age 50 catch-up, no flexible distributions, no rollovers, no loans, no Roth accounts, and importantly, no plan sponsor fiduciary duty.

All that changed, however, with the enactment of Section 1448 of the Small Business Job Protection Act of 1996, (SBJPA), which added Internal Revenue Code (Code) §457(g). Code §457(g) requires governmental 457(b) plan assets and income to be held trust, or in custodial accounts or annuity contracts described in §401(f), for the exclusive benefit of participants and their beneficiaries. Section 457(g) applies generally to assets and income held by a governmental §457(b) plan on and after August 20, 1996, but any §457(b) plan in existence on August 20, 1996 was given until January 1, 1999 to establish a trust.

By sponsoring a defined contribution plan, you are offering your employees a great opportunity to save for their retirement, but that sponsorship comes with some important responsibilities. Your employees place their trust in you to offer a retirement plan that is in full compliance with applicable law and that will help them save for a more secure future. The obligation to make every plan-related decision prudently and with only the best interests of the plan participants in mind means it is essential for you to know and understand your fiduciary responsibilities.

Who Is NOT a Plan Fiduciary?

Some plan sponsors are under the mistaken impression that selecting one or more persons to serve as a plan fiduciary or service provider eliminates any further fiduciary responsibility or liability they may have. In fact, the act of selecting a third party to assist with the plan is a fiduciary action on the part of the plan sponsor and does not relieve them of their fiduciary responsibility.

If the person performing services for the plan has no discretionary authority or control over plan administration or plan assets, that person will generally not be considered a plan fiduciary. The services provided by the following persons generally do not cause the person to be considered a plan fiduciary:

- Attorneys, accountants, actuaries and consultants.
- Persons performing ministerial or administrative functions for the plan as directed by a plan fiduciary or plan participants.
- Service providers, such as recordkeepers, that do not perform any fiduciary functions.

Additionally, the plan sponsor has a fiduciary duty to continually monitor the performance and fees of each service provider to ensure that your decision to select them to serve the plan continues to be in the best interest of the plan and plan participants.

A **plan fiduciary** is ultimately responsible for maintaining the plan, and your employees place their trust in you to keep the plan in full compliance with applicable law.



Who Is a Plan Fiduciary?

It is important to understand that the employer sponsoring the plan, the plan sponsor, is always a plan fiduciary by virtue of the duties they must fulfill with respect to the plan. Fiduciary status is attributed to anyone who exercises discretionary authority over the administration of the plan and/or plan assets. Plan sponsors exercise discretionary authority over the plan with every plan-related decision they make. Such decisions include administering and operating the plan, selecting and monitoring the investment options to be offered to plan participants and selecting and monitoring the trustee and all other service providers.

The **employer sponsoring the plan**, the plan sponsor, is always a plan fiduciary by virtue of the discretionary authority they exercise over the administration of the plan and plan assets.

Identify all other plan fiduciaries - List all employees and third parties who work on the plan and determine if the functions they perform cause them to be fiduciaries to the plan. In addition to you, the plan sponsor, your fiduciaries will include any person:

- Specifically named as a fiduciary in the plan document.
- Exercising discretionary authority or control over plan administration or operation.
- Exercising any discretionary authority or control of plan assets.
- Providing investment advice for a fee or other compensation with respect to plan investment options.

Staff members performing only ministerial functions will not be fiduciaries. It is only when they exercise discretion, such as by interpreting the plan document, that they will be considered fiduciaries.

Plan Committee – It is extremely important to properly structure your committee and their activities. The term “committee” is used generically since not all plans refer to the plan decision-makers as a “committee.” Select qualified, committed individuals who have sufficient time to devote to prudent oversight of plan administration and operation, investment options, and service provider(s). Schedule regular meetings on the calendar to devote to plan review and decision-making.

Train your plan fiduciaries – From time to time, provide training to educate your fiduciaries on their basic fiduciary responsibilities. It is a rare case that a plan fiduciary wakes up in the morning and deliberately sets out to breach their fiduciary duty to the plan. Most often, a breach occurs because the individual does not know that he or she is a fiduciary or does not understand basic fiduciary standards of care, fiduciary responsibilities and liabilities.

Co-Fiduciary Liability

Not only does the plan sponsor remain liable as a fiduciary regardless of the number of other plan fiduciaries selected, you may be liable for the acts or omissions of those other fiduciaries. Co-fiduciary liability can cause you to be liable if another plan fiduciary commits a fiduciary breach and you knowingly participate in that breach. Likewise, if you have knowledge of a breach by another plan fiduciary (or you should have known) and you fail to make reasonable efforts to remedy the breach, you could be held responsible for that breach.

Stay Responsible

Generally, plan fiduciaries that hire or appoint other fiduciaries remain liable for the prudent selection and monitoring of those fiduciaries. Plan fiduciaries may be liable for the acts of the hired or appointed fiduciaries.

Employer Versus Fiduciary Functions



Employers sponsoring a defined contribution plan act in a dual capacity -- as the employer and as a fiduciary to the plan.

Employer Functions. Certain functions, known as “settlor” functions, are the responsibility of the employer and are not fiduciary in nature. You are acting in with your “employer hat” on when you:

- Decide to offer a retirement plan to employees.
- Design the plan’s benefits and features,
- Amending the plan to add or remove optional provisions, such as loans or Roth accounts, or
- Decide to terminate the plan.

Fiduciary Functions. You are a plan fiduciary when implementing the plan decisions made by the employer. Plan fiduciaries must focus on performing each of these duties solely in the best interests of plan participants, not for the benefit of the employer. Prudently performing each of the many duties required of fiduciaries will require a significant amount of time and effort, but will result in a well-maintained plan that benefits your employees. Things you do with your “fiduciary hat” on include:

- Establishing policies and procedures for the plan.
- Administering and operating the plan in compliance with the plan document by ensuring plan policies, procedures and forms match the plan provisions.
- Keeping the plan document compliant and updated for all required changes in law.
- Develop a formal written Investment Policy Statement (IPS) to detail the criteria you will follow in selecting, monitoring and replacing the plan’s investment options.
- Monitor the fees being charged by each investment option to ensure they are reasonable.
- Selecting and monitoring service providers, trustees, consultants and others who assist with the plan to ensure compliance with their contracts.
- Monitor each vendor’s fees periodically and benchmarking them to fees paid by plans of similar size and complexity.
- Create and distribute participant communications to educate participants about the benefits of the plan and increase participation.
- Educate participants about the plan’s investment options and provide the tools to help them save for a secure retirement.
- Repeat.

A Plan Fiduciary's Standards of Conduct

Duty of Loyalty

Loyalty to plan participants, called the “exclusive benefit rule,” is one of the most important of your fiduciary duties. The duty of loyalty requires you to act solely in the best interests of the plan and its participants every time you make a decision with respect to the plan. You must avoid, at all costs, putting political, personal or employer interests ahead of what is best for the plan. It also requires you to ensure the fees paid by plan participants are not excessive. All plan fees must be reasonable.

Avoid Conflicts of Interest – Resist making any decision with respect to the plan with your “employer hat” on. For example, do not make the mistake of selecting a service provider because that provider will somehow benefit you personally or politically or your governmental entity rather than the plan. Don't retain a service provider solely because it seems inconvenient or time consuming to prudently select and monitor the performance of service providers.



High Standards

Plan fiduciaries are held to a high standard under the law and you must resist making any plan-related decision that is not solely in the best interest of the plan and plan participants.

Duty to Ensure Plan Fees are Reasonable

In order to be loyal to your participants and act in their best interest, you must ensure fees are reasonable. First, of course, you must know what fees are being charged to the plan participants by each investment option and by each service provider. Your job is not necessarily to find the lowest cost fund or provider but rather to follow the criteria contained in your Investment Policy Statement when selecting and deselecting funds and to benchmark the quality of each provider's services and fees to plans of similar size and complexity.

Service Provider Fee Disclosure - The DOL is now requiring certain service providers, including recordkeepers, to provide detailed information about the fees they will charge and the services they will offer ERISA plan employers. Even though fee disclosure compliance is not mandated for non-ERISA plans, government plan sponsors should request the same fee and service information that each of their service providers is required to provide to ERISA plans.

Armed with the service provider fee disclosure, consider benchmarking the fees to other plans of similar size and complexity. Consider conducting a Request for Proposal (RFP) periodically to provide you with data to help in determining the reasonableness of fees charged. Consider retaining a consultant or other plan expert to assist you in analyzing your plan's fees.

Duty of Prudence

The prudent person standard of care requires you to act with the care, prudence, skill and diligence that a knowledgeable person would use when administering a defined contribution retirement plan. The following are some general guidelines for prudent fiduciary actions:

- Carry out your duties pursuant to the terms of the plan document.
- Use good judgment and sound processes when handling the affairs of the plan.
- Consider retaining experts, such as trustees, attorneys and consultants, to aid in making plan decisions. Retaining such experts is, however, a fiduciary function and does not reduce or eliminate your ongoing fiduciary responsibilities.
- Select experts carefully and continually monitor their performance and fees.

Prudent Processes - Develop prudent processes and internal controls for accurately managing and administering the plan. Your chances of limiting your fiduciary liability will be increased if you follow prudent fiduciary procedures and document compliance with those processes.

As plan sponsor, you must fulfill your fiduciary duty by **continually monitoring** the plan's trustees, service providers, attorneys and others who perform services for the plan to ensure that they continue to be the best choice for your plan.

Selecting and Monitoring Service Providers – Develop a prudent formal process for evaluating and selecting service providers using objective criteria. Choosing the service providers for your plan, and ensuring that those providers continue to provide valuable service for a reasonable fee over time, is a fiduciary decision that must be made in accordance with the prudent person standard of care. “Meeting Your Fiduciary Responsibilities,” published by the DOL, states in part: “An employer should establish and follow a formal review process at reasonable intervals to decide if it wants to continue using the current service providers or look for replacements.” In other words, a fiduciary has an ongoing responsibility to ensure that service providers continue to be best for plan participants. Document your review process and the basis for your hiring and firing decisions.

Duty to Diversify and Prudently Select and Monitor Investments

Selecting and Monitoring Investments – State statutes can be general in nature but still apply to retirement plans, such as the Uniform Prudent. See Appendix B for a summary of the rules and citations to state laws.

Investment Policy Statement – Plan fiduciaries are strongly encouraged to implement prudent policies and a deliberative process for the selection and monitoring of investment options. While the law does not require a plan to adopt an Investment Policy Statement (IPS), it may be the single most important document to help you manage your fiduciary duty when making investment decisions.

Your IPS should define the processes the plan sponsor has adopted for making investment-related decisions with respect to the plan assets. Begin by identifying the members of your investment committee and defining the roles of the parties involved in the management of plan assets. Identify the investment goals and objectives of the plan, establish how decisions will be made regarding the selection of investments and specify the procedures for measuring investment performance. Your IPS should set forth the goals and objectives of the investment options and include the criteria to be used as your guidelines for monitoring and evaluating the plan's investment options, including a procedure for terminating and replacing any under-performing fund.

Duty to Follow Your Plan Documents

Here are five suggestions for establishing an effective system to ensure your plan documents remain compliant and up to date and that you are operating the plan in compliance with those governing plan documents.

- **Review the terms of the plan document.** Read your plan document often and be sure that you understand each and every provision and how each should be administered. The IRS requires you to operate the plan in compliance with the terms of the document. The most common errors discovered in the operation of defined contribution plans relate to the employer not following the terms of the plan document.
- **Ensure documents are up-to-date.** Perform an annual review of your plan to ensure your plan document is updated for all changes to the Code and regulations. Be sure the plan is amended timely whenever you choose to add an optional feature, such as plan loans or Roth contributions. Be sure the plan document and all amendments, the trust agreement and all service agreements are properly executed. Retain all important plan documents in a safe, accessible place for the life of the plan.
- **Create a procedures manual.** Your plan document is your manual for operating the plan. Most compliance issues can be avoided by a periodic review of the plan document provisions and conforming the plan's policies, procedures and forms to the document. Audit several transactions to ensure your processes comply with the plan document.
- **Monitor plan investments.** Your written Investment Policy Statement (IPS) is a governing plan document for selecting, monitoring and deselecting the funds made available to plan participants. Drafting and adopting an IPS is not enough - you must follow it. Since things can change over time, review your IPS periodically and, if necessary, revise it as necessary. Compliance with your IPS will go a long way toward protecting you from liability, while noncompliance with your IPS may be evidence that you are not prudently managing plan assets.
- **Monitor third party service providers.** It is critical to properly oversee any plan operational functions that are outsourced to service providers. The plan sponsor has ultimate responsibility for the operation of the plan even for functions performed by other parties. An effective selection and monitoring program of providers is essential and can reduce the risk that errors will go undetected.

Informed Decisions

Fiduciaries must discharge their duties prudently, and the exercise of prudence in this context requires a deliberative process resulting in the best informed decisions possible under the circumstances.



Strategies for Limiting Fiduciary Liability

Communicating Fee and Investment Information to Participants

When participants are given investment control over their retirement plan accounts, they should be given enough information to allow them to make informed decisions. Importantly, you should review your current participant communications and educational pieces to determine if such materials are comprehensive as well as user-friendly and easy for participants to understand.

General Plan Disclosures Should include:

- A description of the structure and design features of the plan,
- An explanation of the fees and expenses charged for general plan administrative services,
- An explanation of the fees and expenses charged to or deducted from the participant's account based on an action taken by that person, such as initiating a loan, and
- If applicable, identify the existence of revenue sharing, but not the revenue sharing amounts.

Investment-Related Information Should be Disclosed, Including:

- Information about historical investment performance,
- The name and returns of an appropriate benchmark over one-, five- and 10-year periods,
- Total operating expenses expressed as both a percentage of assets and as a dollar amount per \$1,000 invested, and
- The address to a website containing additional information (e.g., a glossary of investment terms) about the investment options.

Quarterly Participant Disclosures Should include:

- The amount (expressed in dollars) of any administrative or individual fees charged to the participant's account during the preceding quarter.
- A general description of services provided for the fee.
- If applicable, a statement saying that some of the plan's administrative fees were paid from a revenue sharing arrangement.
- Include this information in quarterly benefit statements.

Investment Advice and Education - More and more employers are offering assistance to participants so they can make informed investment decisions. Employers may decide to retain an investment advisor offering specific investment advice to participants. Depending on the fees and services provided, these advisors likely qualify as fiduciaries and have a responsibility to the plan participants. Alternatively, the plan sponsor may retain a service provider to provide general financial and investment education, interactive investment materials, and information based on asset allocation models. Those who provide educational materials that are general in nature are not fiduciaries.

Consider offering formalized advice and guidance services to **assist participants** in making informed investment decisions.

Compliance with ERISA §404(c)

Even though governmental plans are not subject to ERISA, some state statutes contain a provision similar to ERISA §404(c), and compliance with its rules can go a long way toward alleviating your responsibility for your participants' investment decisions. ERISA §404(c) offers you limited relief from liability for losses resulting from the individual investment choices made by plan participants if certain rules are met.

It is important to note, however, that the plan fiduciary remains responsible for selecting the menu of investment options to be made available to plan participants. Any protection provided to the plan fiduciary under ERISA §404(c) does not extend to the selection and monitoring of the plan's investment options.

General Conditions

Plan participants should be advised that it is their responsibility to direct the investment of their accounts and that the plan fiduciaries may not be liable for any losses resulting from their individual choices. A number of general conditions that a fiduciary of a participant-directed plan must satisfy in order to take advantage of the fiduciary relief available under §404(c) include:

- The plan must offer at least three diversified investment alternatives ("core funds") that have materially different risk and return characteristics so participants can diversify to minimize risk.
- The plan must permit transfers among these three core funds at least quarterly.
- The plan must give participants enough information to permit informed decision-making. The regulation is very specific about what information must be given to participants automatically and upon request and these requirements are outlined in Appendix C.
- Participants must be given the opportunity to give investment instructions to an identified plan fiduciary who is obligated to comply with those instructions.

You can alleviate your fiduciary liability for losses resulting from a participant's investment choices by **complying with ERISA 404(c)**.

404(c) Relief for Defaulted Investments

One of the requirements for 404(c) relief is that participants must actively make their own investment decisions. A special rule does, however, extend 404(c) relief to certain types of default funds, called Qualified Default Investment Alternatives, or QDIAs. See Appendix C for a detailed description of the QDIA requirements. Some general requirements for compliance include:

- The default investment option must be a balanced fund, a target date or other type of asset allocation fund, or a managed account service and must satisfy all other requirements to be a QDIA investment option.
- A notice must be provided to participants both initially and annually containing specified information about the QDIA, how participants can avoid the default investment, and other information.
- The plan must offer a broad range of investment alternatives and participants must have had the opportunity to invest in those alternatives, but failed to do so.
- All of the fee and investment information required in participant-directed plans must be provided.

Monitor Plan Success

Perform ongoing internal analysis. Plan sponsors should be performing an ongoing internal analysis of their plan operations. IRS guidance can be found at:

- **Governmental 401(a) plans**
[http://www.irs.gov/Retirement-Plans/Governmental-Plans-under-Internal-Revenue-Code-Section-401\(a\)---Recent-Developments](http://www.irs.gov/Retirement-Plans/Governmental-Plans-under-Internal-Revenue-Code-Section-401(a)---Recent-Developments)
- **401(k) plans**
[http://www.irs.gov/Retirement-Plans/401\(k\)-Plan-Fix-It-Guide](http://www.irs.gov/Retirement-Plans/401(k)-Plan-Fix-It-Guide)
- **457(b) plans**
[http://www.irs.gov/Retirement-Plans/IRC-457\(b\)-Deferred-Compensation-Plans](http://www.irs.gov/Retirement-Plans/IRC-457(b)-Deferred-Compensation-Plans)



Retirement Readiness

Plan fiduciaries are not responsible for ensuring that participants make the right decisions about saving, investing and spending to have adequate savings to maintain their standard of living in retirement. Many plan sponsors, however, want their defined contribution plan to serve as a vehicle for improving their employees' retirement picture. And as a practical matter, the more satisfied participants are with their plan, the less likely they will be to blame others for a negative outcome. It makes sense, therefore, to monitor retirement readiness at the plan level, plan design, financial literacy and investment advice and employee outcomes.

Evaluate the current retirement readiness at the plan level by looking at the overall rate of employee participation, median contribution rate, median account balance and most popular investment alternatives. Certain plan design features are proven to simplify employee decision-making and encourage participation. Auto enrollment, in states where it is available, gets more employees into the plan and studies show most of them continue to participate. Auto escalation keeps contribution levels up and increases savings.

Limiting the number of providers and investment options encourages participation by employees who become overwhelmed by too many choices. A default investment (QDIA) is particularly helpful to participants seeking a quick and easy way to enroll. It may also make sense to offer participants tools to help them understand how the choices they make today will impact their future retirement income and what changes they might make to improve their retirement readiness. Monitoring participant behavior not only helps control risk and improve outcomes, but can also be helpful in measuring the effectiveness of plan service providers and plan design features.



Document Compliance with Your Prudent Processes

Keep minutes of all of the meetings of your plan fiduciaries and the processes and decisions reached with respect to the plan. Maintain a fiduciary file cabinet containing a complete set of all current signed plan documents, including:

- Plan documents and any summary plan materials,
- Trust agreement,
- Plan forms, rules and procedures,
- Service agreements,
- Third party contracts,
- Investment contracts,
- Investment Policy Statement, and
- All amendments to those documents.

Breaches of Fiduciary Duty

Depending upon the laws of your state, you may be personally liable if you are a fiduciary and you breach your fiduciary duties. Breach of fiduciary duty may also result in participant lawsuits. You may be considered in breach of your fiduciary duties if you:

- Fail to comply with the exclusive benefit rule by entering into self-dealing transactions, such as using plan assets for your own or your company's benefit.
- Fail to exercise your responsibilities to the plan in a prudent manner.
- Fail to prudently diversify the menu of investment options offered under the plan.
- Fail to monitor the plan's investment options and replace funds as necessary pursuant to your investment policy.
- Fail to provide participants with enough information to permit informed decision-making (see Appendix C).

Appendix A

Fiduciary Checklist

This list is designed to assist you in fulfilling your fiduciary responsibilities. Consult with your counsel or other experts to determine whether this list is appropriate or sufficient for your plan.

- Your plan document is up to date.
- You have a copy of IRS Favorable Determination Letter for your qualified 401(a)/(k) plan and/or a Private Letter Ruling on your 457(b) plan, if obtained.
- The plan document has been amended for all legislatively required changes.
- You are operating the plan in accordance with its terms and new legal requirements not yet reflected in the plan document.
- Plan trustees are properly appointed and trust agreement properly executed.
- All fiduciaries are identified and understand their duties and fiduciary responsibilities.
- All fiduciaries have received sufficient training to allow them to comply with their basic fiduciary standards of conduct.
- Contracts are executed with all service providers outlining their responsibilities.
- Periodic meetings are held with all plan fiduciaries to review the plan.
- If deemed appropriate, fiduciary liability insurance coverage has been purchased as a protection against personal liability.
- All salary reduction deferrals and loan repayments are invested in the plan as soon as administratively practicable.
- You have obtained the fee and service disclosures provided to ERISA plans from each of your service providers.
- The fees being paid by the plan are reasonable based upon the investment options and services being provided.
- The plan maintains and abides by a written Investment Policy Statement (IPS).
- Plan fiduciaries have selected a broad range of investment options for the plan.
- Plan fiduciaries monitor the investment options periodically to ensure the funds continue to comply with the plan's IPS.
- All third parties retained to provide plan services are monitored periodically to ensure compliance with performance standards.
- 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 maintain a due diligence file containing documentation supporting your fiduciary process and decision-making.
- You have provided quarterly Individual Benefit Statements to participants.
- You have effective, easy-to-understand participant communications on all important aspects of the plan.
- You educate participants about the plan, the importance of saving for retirement, and the basics of investing.
- You periodically review plan success metrics, such as participation rates, salary deferral rates, investment diversification, and retirement income readiness.
- You periodically review and consider changes to plan design, plan services and investment products as warranted to improve your plan's success metrics.
- If utilizing multiple service providers, you monitor all outsourced services to ensure compliance with plan documents.
- You comply with ERISA §404(c). See Appendix C.
- Amounts in a Plan Expense Account/ Unallocated Plan Account, if applicable, have been used to pay allowable plan expenses or have been allocated to participant accounts.
- No plan fiduciary has used assets of the plan for his or her personal interests.

Appendix B

Uniform Prudent Investor Act

The Uniform Prudent Investor Act provides plan fiduciaries with the standards of care that must be used when choosing investment options and managing plan assets.

Section 1. Prudent Investor Rule.

- a) Except as otherwise provided in subsection (b), a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in this Act.
- b) The prudent investor rule, a default rule, may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust. A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust.

Section 2. Standard of Care; Portfolio Strategy; Risk and Return Objectives.

- a) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.
- b) A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.
- c) Among circumstances that a trustee shall consider in investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries:
 - 1) general economic conditions;
 - 2) the possible effect of inflation or deflation;
 - 3) the expected tax consequences of investment decisions or strategies;
 - 4) the role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property;

- 5) the expected total return from income and the appreciation of capital;
 - 6) other resources of the beneficiaries;
 - 7) needs for liquidity, regularity of income, and preservation or appreciation of capital; and
 - 8) an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.
- d) A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.
 - e) A trustee may invest in any kind of property or type of investment consistent with the standards of this [Act].
 - f) A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise.

Section 3. Diversification.

A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.

Section 4. Duties at Inception of Trusteeship.

Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and with the requirements of this [Act].

Section 5. Loyalty.

A trustee shall invest and manage the trust assets solely in the interest of the beneficiaries.

(continued...)

Section 6. Impartiality.

If a trust has two or more beneficiaries, the trustee shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries.

Section 7. Investment Costs.

In investing and managing trust assets, a trustee may only incur costs that are appropriate and reasonable in relation to the assets, the purposes of the trust, and the skills of the trustee.

Section 8. Reviewing Compliance.

Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight.

Section 9. Delegation of Investment and Management Functions.

- a) A trustee may delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:
- 1) selecting an agent;
 - 2) establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and
 - 3) periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

- d) In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.
- e) A trustee who complies with the requirements of subsection (a) is not liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the function was delegated.
- f) By accepting the delegation of a trust function from the trustee of a trust that is subject to the law of this State, an agent submits to the jurisdiction of the courts of this State.

Section 10. Language Invoking Standard of [ACT].

The following terms or comparable language in the provisions of a trust, unless otherwise limited or modified, authorizes any investment or strategy permitted under this [Act]: "investments permissible by law for investment of trust funds," "legal investments," "authorized investments," "using the judgment and care under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital," "prudent man rule," "prudent trustee rule," "prudent person rule," and "prudent investor rule."

(continued...)

Section 11. Application to existing trusts.

This [Act] applies to trusts existing on and created after its effective date. As applied to trusts existing on its effective date, this [Act] governs only decisions or actions occurring after that date.

List of States Adopting the Uniform Prudent Investor Act

- Alaska - Alaska Stat. §§ 13.36.225 to 13.36.290
- Arizona - Ariz. Rev. Stat. Ann. §§ 14-10901 to 14-10909
- Arkansas – Arkansas A.C.A §§ 28-73-901 to 28-73-908
- California - Cal. Probate Code §§ 16045 to 16504
- Colorado – Colo. Rev. Stat. §§ 15-1.1-101 to 15-1.1-115
- Connecticut – Conn. Gen. Stat. §§ 45a-541 to 45a-5411
- District of Columbia - D.C. Code Ann. §§ 19-1309.01 to 19-1309.06
- Hawaii – Haw. Rev. Stat. §§ 554C-1 to 554C-12
- Idaho – Idaho Code §§ 68-501 to 68-514
- Illinois - 760 ILCS §§ 5/5 and 5/5.1
- Indiana – Ind. Code §§ 30-4-3.5 to 30-4-3.5-13
- Iowa - Iowa Code Ann. § 633 A.4301 to 633 A.4309
- Kansas – Kansas Stat. Ann. §§ 58-24a01 to 58-24a14
- Louisiana – La. Stat. RS §§ 9:2082, 9:2087, 9:2090; 9:2117; 9:2127
- Maryland - Md. Stat. § 15-114
- Massachusetts - Mass. Gen. L. Ch. 203C, §§ 1 to 11
- Michigan – Mich. Comp. Laws §§ 700.1501 to 700.1512
- Minnesota - Minn. Stat. § 501B.151
- Missouri - Mo. Rev. Stat. §§ 469.900 to 469.913
- Montana - Mont. Code Ann. § 72-34-601 to 72-34-610
- Nebraska – Neb. Rev. Stat. §§ 30-3883 to 30-3889
- Nevada - Nev. Rev. Stat. §§ 164.705 to 164.775
- New Hampshire – N.H. Rev. Stat. Ann. §§ 564-B: 9-901 to 564-B: 9-907
- New Jersey - N.J. Stat. Ann. §§ 3B:20-11.1 to 3B:20-11.12
- New Mexico - N.M. Stat. Ann. §§ 45-7-601 to 45-7-612

- North Carolina – N.C. Gen. Stat. §§ 36C-9-901 to 36C-9-907
- North Dakota - N.D. Cent. Code §§ 59-17-01 to 59-17-06
- Ohio – Ohio Rev. Code Ann. §§ 5809.01 to 5809.08
- Oklahoma - Okla. Stat. Ann. §§ 60-175.60 to 60-175.72
- Oregon - Oregon Rev. Stat. §§ 130-750 to 130-775
- Pennsylvania - Pa. 20 Cons. Stat. §§ 7201 to 7206
- Rhode Island – R. I. Gen. Laws §§ 18-15-1 to 18-15-13
- South Carolina - S.C. Code Ann. § 62-7-933
- Tennessee – Tenn. Code Ann. §§35-14-101 to 35-14-114
- Texas - Texas Prop. Code Ann. §§ 117.001 to 117.012
- Utah - Utah Code Ann. §§ 75-7-901 to 75-7-907
- Vermont – Vt. Stat. Ann. Tit. 9, §§901 to 906
- Virginia - Va. Code Ann. § 26-45.3 to 26-45.14
- Washington - Wash. Rev. Code §§ 11.100.010 to 11.100.140
- West Virginia – W. Va. Code §§ 44-6C-1 to 44-6C-15
- Wisconsin – Wisconsin Stat. §881.01
- Wyoming - Wyo. Stat. Ann. §§ 4-10-901 to 4-10-913

List of States Adopting the Uniform Prudent Investor Act with Substantial Modifications

- Alabama - Ala. Code § 19-3B-901 to 19-3B-906
- Delaware - Del. Title 12, Chpt. 33, §§ 3302 - 3304
- Florida – Fla. Stat. §§ 518.11 to 518.12
- Georgia - Ga. Code § 53-12-340
- Kentucky – KY Stat. §286.3–277
- Maine – Maine Rev. Stat. Title 18-B §§ 901 to 908
- Mississippi – Mississippi Code Ann. §§91-9-601 to 91-9-627
- New York - N.Y. Est. Powers and Trusts Law § 11-2.3
- South Dakota - S.D. Codified Laws Ann. § 55-5-6 to 55-5-17

Appendix C

ERISA §404(c) Checklist

ERISA §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 disclosures identified in the Checklist for Participant Fee Disclosure (Appendix B). 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.

(continued...)

- The disclosures identified in the Checklist for Participant Fee Disclosure (see Appendix B) must be provided.
- 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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