RETIREMENT PLAN FIDUCIARY RESPONSIBILITY GUIDE

This Retirement Plan Fiduciary Responsibility Guide (the "Guide") was created to provide you with general information that you may find helpful in complying with your fiduciary responsibilities under the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

OVERVIEW

Fiduciaries of retirement plans subject to ERISA are required to comply with certain standards when making decisions that impact the plan. Those principles must be applied when fulfilling fiduciary obligations. Fiduciaries are legally liable for their acts and omissions, and can also be held responsible for the acts and omissions of other fiduciaries. However, following a few procedures can substantially limit a fiduciary's liability.

Any fiduciary analysis starts with determining who is a fiduciary. Plan fiduciaries include anyone named as such in the plan document, as well as anyone who exercises discretionary authority on behalf of the plan. The plan's trustees, directors, appointed retirement plan committee members and investment advisers usually bear fiduciary responsibility, whereas attorneys, actuaries, accountants, and administrative personnel historically have not been identified as fiduciaries to the plan. The scope of a person's fiduciary obligations should be identified in writing and explained clearly to the person accepting fiduciary responsibilities. The responsibilities of a plan fiduciary include, but are not limited to, operating the plan in accordance with its provisions, clearly communicating those provisions to participants and their beneficiaries[1], properly reporting the plan's financial information to government agencies and participants, purchasing a fidelity bond, ensuring that deferrals are deposited into participant accounts as soon as possible, providing compliance oversight, selecting and monitoring investments, and hiring and monitoring service providers and ensuring reasonableness of fees paid to such service providers.

Certain fiduciary principles must be followed when carrying out fiduciary responsibilities. Plan fiduciaries must ensure that the provisions of the plan are strictly followed. They must also ensure that the plan is operated for the exclusive benefit of plan participants and avoid any prohibited transactions or conflicts of interest. Next, plan fiduciaries must carry out their responsibilities with prudence. Finally, plan fiduciaries must ensure that participants have a diverse range of investments from which to choose.

Fiduciary liability also comes with the territory, but it can be limited in a variety of ways. Simply following the principles outlined above will limit a fiduciary's liability. Documenting fiduciary decisions and actions can also limit fiduciary liability, so long as those decisions and actions are prudent. For example, maintaining an investment policy statement that identifies the methodology and criteria for investment selection and ongoing evaluation will limit fiduciary liability with respect to plan investments. Avoiding prohibited transactions that create a conflict between plan fiduciaries and other parties-in-interest and participants will also limit liability.

In the event of a breach of fiduciary duty when the above principles are not followed, certain civil and criminal penalties may apply. Fiduciaries may be ordered to restore profits, or they may face monetary penalty, legal fees and excise

[1] Fiduciary responsibilities extend to participants and their beneficiaries. Participants and their beneficiaries are collectively referred to as participants throughout the remainder of this Guide.

taxes as a result of a fiduciary breach. In certain instances, fiduciaries may even be charged with a crime under federal law. However, both the Department of Labor ("DOL") and the Internal Revenue Service ("IRS") maintain correction programs that are available in the event of a breach. These correction programs are usually only available before the DOL or IRS initiates an examination or audit of the plan. If a breach is detected, it is always prudent to correct it as soon as possible under the prescribed methods.

Should you have any questions related to your fiduciary responsibilities, contact your Multnomah Group Consultant for additional information.

FIDUCIARY ROLES AND RESPONSIBILITIES

ERISA is a comprehensive body of law that governs retirement plan operations as well as the underlying investments within a retirement plan. It was enacted to protect participants' retirement savings. The DOL's Employee Benefits Security Administration ("EBSA") is responsible for enforcement of ERISA's fiduciary standards. Failure to comply with ERISA's principles could result in substantial consequences for the plan's fiduciaries.

Identifying Plan Fiduciaries

ERISA attributes fiduciary status to anyone specifically named as a fiduciary in the plan document and to persons performing certain discretionary (i.e. decision-making) functions on behalf of the plan. A plan sponsor (in other words, the employer) is always considered a plan fiduciary by virtue of maintaining and administering a plan. Other plan fiduciaries typically include:

- ✓ Any other person specifically named as a fiduciary in the plan document. This may include the plan administrator, a board of directors or plan trustees, or an administrative or investment committee;
- ✓ Any person with discretionary control over the administration of the plan;
- ✓ Any person with discretionary control over the investment of plan assets; and
- ✓ Any person rendering investment advice to the plan or its participants for a fee.

On the other hand, the services performed by the following persons generally do not give rise to fiduciary status, unless they otherwise agree to accept fiduciary status:

- ✓ Attorneys, accountants, actuaries; and
- ✓ Persons performing ministerial or administrative functions for the plan as directed by the plan fiduciary.

Fiduciary Responsibilities

A plan fiduciary has a variety of duties with respect to the plan and must perform those duties prudently and in the best interest of plan participants. Identifying plan fiduciaries and ensuring that they are clear about their responsibilities under the plan is an important step toward satisfying the plan sponsor's fiduciary obligations. Often, fiduciary responsibilities will be delegated and identified through a committee charter.

In general, fiduciary responsibilities can be categorized into three broad areas of responsibility: (1) selection and monitoring of service providers; (2) selection and monitoring of investments; and (3) administration and reporting. More specifically, the following is a non-exhaustive list of fiduciary responsibilities that should be carried out in line with the provisions of the plan document:

selection and monitoring of service providers
retaining and evaluating recordkeepers, investment consultants and other advisers to the plan
understanding the needs of the participants in order to retain service providers to fulfill participants' and the plan's needs
monitoring reasonableness of plan costs
maintaining documentation on service providers
selection and monitoring of investments
establishing, maintaining and following an investment policy statement
selecting and monitoring the performance of investment options
monitoring reasonableness of investment costs
providing certain investment-related information to participants
maintaining records on investments
administration and reporting
communicating plan provisions to employees
determining employee eligibility
enrolling participants
depositing deferrals to participant accounts in a timely manner
ensuring proper vesting of employer contributions
approving loans and hardship distributions
preparing and reviewing consolidated financial reporting
reviewing the annual independent audit report, if applicable
purchasing and maintaining the appropriate fidelity bond
providing compliance oversight
maintaining records on contributions, disbursements and other transactions

Keep in mind that ERISA does not require the plan sponsor (i.e., the employer) to go it alone. ERISA requires that where fiduciaries lack expertise, they hire others to assist with the administration of the plan and as a result, certain fiduciary responsibilities are often delegated to others. However, fiduciaries should keep in mind that although responsibilities may be delegated, there is an initial responsibility to make a prudent selection of others to which fiduciary responsibility shall be delegated and there is an ongoing responsibility to monitor such fiduciaries. This periodic monitoring and evaluation of delegates is necessary to ensure that they are performing prudently and are charging reasonable fees for services rendered. Holding regular fiduciary committee meetings will help ensure that all plan fiduciaries are accountable and acting in concert.

FIDUCIARY PRINCIPLES

This section will discuss four fiduciary principles that ERISA plan fiduciaries are expected to follow when executing their responsibilities.

Exclusive Benefit Rule

One of the plan sponsor's most important fiduciary duties is that of loyalty to plan participants (i.e., the employees). ERISA specifically requires a plan sponsor to put their duties as a plan fiduciary ahead of their corporate responsibilities when making decisions as a plan fiduciary. The "exclusive benefit rule" requires plan sponsors to act solely in the best interest of the plan and its participants. This includes the duty to ensure that the expenses of the plan are reasonable based upon the services being rendered to the plan, for example. Plan sponsors must also ensure that participants receive clear communications describing the plan features, including any required notices, summary plan descriptions and benefit statements.

Prudence

A plan's named fiduciaries are not required or expected to be experts in every aspect of plan administration, but ERISA does require them to act with the care, prudence, skill and diligence that a knowledgeable person would use in a similar situation. This means that fiduciaries must carry out their duties in accordance with good judgment and sound processes when handling the affairs of the plan. This may require the hiring of experts to aid in making decisions with, or for, the plan. Such experts may include trustees, attorneys, accountants, consultants, and investment managers, to name a few.

Part of exercising prudence is following a sound process. A prudent process is an objective process whereby fiduciaries review relevant information (or that which the fiduciaries should know to be relevant). In following a prudent process, fiduciaries should conduct a meaningful comparison of information and use that comparison to arrive at a well-informed decision. Both the decision-making process as well as the end result should be documented. Once an initial decision is made, that decisions should be continually (or periodically) monitored over time.

Adherence to the Plan Document and Compliance with Applicable Law

The plan document is like a contract between the plan sponsor and the participants. It serves as the plan sponsor's manual for operating and administrating the plan. The plan document must be kept in compliance with ERISA, the Internal Revenue Code and applicable regulations. Amendments related to changes in law(s) and/or regulation(s) must be made in a timely manner.

Diversification of Investment Options

Another key fiduciary principle and duty is diversification of investments, which is required to minimize the risk of large investment losses to the plan. When reviewing investment choices, fiduciaries should consider each plan investment as part of the plan's entire investment portfolio. Diversification may be accomplished by offering investment options with materially different risk and return characteristics and investment objectives. Allowing participants to exercise control

over their investments (i.e. participant-directed) also alleviates potential fiduciary liability so long as participants receive the information necessary to make informed investment decisions.

LIMITING FIDUCIARY LIABILITY

Following the fiduciary principles outlined above and ensuring that fiduciary responsibilities are executed will go a long way toward limiting a fiduciary's liability. Other steps, however, must also be taken in order to limit liability as much as possible. Certain liability limiting steps are optional, while others are required by law.

Documentation of Decisions and Actions

While not specifically required by law, documenting fiduciary decisions and the actions that stem from those decisions can alleviate fiduciary liability. Documenting the process by which each fiduciary responsibility is executed will almost always aid in limiting fiduciary liability. Documentation of the processes and procedures related to the execution of fiduciary duties is critical; each decision made by a fiduciary should be well-documented.

For example, documenting the process by which investment options are selected, monitored and replaced, if necessary, may limit a fiduciary's liability with respect to a participant's investment elections. The development of a formalized written policy statement defining criteria to be used in selecting, retaining and terminating a fund will be an immensely valuable tool. If a fund does not meet the criteria set out in the investment policy statement, appropriate action must be taken and when such action is taken, that action should be documented.

Avoiding Prohibited Transactions

Avoiding prohibited transactions within the plan is critical and required. By law, fiduciaries must avoid causing the plan to engage in any transaction that may constitute (either directly or indirectly):

- a sale, exchange or lease between the plan and a party-in-interest;
- lending money or other extension of credit between the plan and a party-in-interest;
- furnishing goods, services or facilities between the plan and a party-in-interest;
- transferring or using plan assets for the benefit of any plan fiduciary or party-in-interest; or
- dealing with employer securities or property in violation of ERISA.

Parties-in-interest include plan fiduciaries and service providers; certain company owners, officers and directors; certain relatives of individuals who are parties-in-interest and certain other related organizations or entities. Certain prohibited transaction exemptions apply in certain cases (but are beyond the scope of this Guide).

Fidelity Bonding and Fiduciary Liability Insurance

All retirement plans subject to ERISA are required to purchase a fidelity bond. A fidelity bond is a form of insurance that protects plan assets against any loss that may result from fraudulent acts of those persons covered by the bond. The amount of the bond is determined by plan assets. The bond should not be less than 10% of the amount of the plan's assets or at least $1,000. While the bond amount does not legally need to exceed 10% of plan assets, plan sponsors may choose to purchase bond coverage in excess of the legally required amount.

Plan sponsors may also purchase additional fiduciary liability insurance to protect the plan and its fiduciaries from losses incurred as a result of breaches related to plan operations and investments. Unlike the fidelity bond, fiduciary liability insurance is optional.

ERISA Section 404(c) Compliance

Compliance with ERISA section 404(c) can also reduce a plan fiduciary's exposure to liability. ERISA section 404(c) generally provides for limited fiduciary liability if participants are able to direct their investments and if participants are provided with certain disclosures in order to make informed investment decisions. While the plan sponsor maintains responsibility for selection and monitoring of a diversified investment menu from which participants may choose their investments and for providing information necessary to make informed decisions, participants bear the sole responsibility for the risk and return of the portfolio they construct from the menu of available investment options.

In addition to the notice requirements associated with ERISA section 404(c), there are three general conditions that a participant-directed plan must satisfy in order to take advantage of the fiduciary relief:

- ✓ the plan must offer at least three diversified investment alternatives, each of which has materially different risk and return characteristics and enables participants to minimize risk through diversification;
- ✓ the plan must permit transfers among these three core funds at least quarterly; and
- ✓ the plan must give participants enough information to permit informed decision-making.

BREACH OF FIDUCIARY DUTY

As a fiduciary, you may be personally liable if you are considered to be in breach of your fiduciary duties under ERISA. Breach of fiduciary duty may result in participant lawsuits, monetary and criminal penalties or the intervention of the DOL. Fortunately, the DOL maintains the Voluntary Fiduciary Correction Program ("VFCP") for plans that experience a fiduciary breach. Anyone who may be held liable for fiduciary violations under ERISA may voluntarily apply for relief from enforcement actions under VFCP, provided they comply with the criteria and satisfy the procedures outlined in the VFCP. The VFCP cannot be used if the plan is under DOL examination or if there is any evidence of potential criminal violations.

In addition to the VFCP program, the IRS also sponsors a correction system known as the Employee Plans Compliance Resolution System ("EPCRS"), which assists plan sponsors in correcting IRS-related compliance failures. In some cases, the DOL's VFCP must be used in conjunction with EPCRS.

CONCLUSION

A retirement plan fiduciary's responsibilities may seem overwhelming, but acting as a plan fiduciary can be a rewarding experience so long as certain principles and procedures are carefully created and followed. By understanding the responsibilities outlined in this Guide and creating policies with your retirement plan committee to achieve these fiduciary principles, you will increase the chances of your participants' freedom to confidently pursue their retirement dreams while simultaneously decreasing your legal liability. Should you require additional assistance or have further questions, please contact your Multnomah Group Consultant.

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