Managing Your Fiduciary Responsibilities

An Overview for Plan Sponsors

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Inside

OppenheimerFunds Retirement Services understands the challenges you face and offers solutions to meet them in today's increasingly complex environment.

The experience and strength of industry leader OppenheimerFunds are fundamental components of each retirement plan. We focus extensive resources on the technology, people and products necessary to help plan sponsors meet fiduciary responsibilities and participants work towards a successful retirement.

With our dedication to investment excellence, we bring the breadth and depth of high quality investments necessary for successful plans, including time-tested mutual funds, asset allocation solutions and multiple manager offerings.

Finally, we offer these investments through flexible retirement plan programs that include a comprehensive package of education, planning tools, communication and support.

From enrollment to retirement income planning, we provide solutions for today's challenges.

In short, we create ***Plans That Work.***

Fiduciary Responsibility

As fiduciaries, plan sponsors are required to satisfy certain responsibilities to ensure that their companies are acting in the best interests of their employees regarding their retirement plans. While the rules may seem complex, this overview is designed to walk through the major obligations and considerations while providing helpful tips, checklists and worksheets.

Who Is a Fiduciary?

The first step in managing fiduciary responsibility is to identify and understand who is a fiduciary. According to ERISA, anyone who has discretionary control over plan assets is presumed to be a fiduciary. This can include, but is not limited to:

- **Plan Sponsors**
- **Trustees**
- **Plan Administrators**
- **Investment Managers**

Next, it is important to identify a fiduciary's responsibilities and ensure they are being met. They include:

- **Executing responsibilities with the care, skill and diligence of a prudent person.** ERISA requires fiduciaries to act with the care, skill, prudence and diligence of a "prudent" person acting in a similar capacity. The test of acting prudently is whether the fiduciary is acting in "good faith." While "good faith" seems to suggest that acting with integrity fulfills this obligation, integrity itself is, in fact, *not* enough. Fiduciaries must be able to prove that all decisions with respect to the plan were made with prudence. This prudence is comprised of two elements: proper investigation and proper documentation, which will be discussed in this workbook
- **Making decisions in the sole interest of participants and beneficiaries.** This is to ensure that plan sponsors are not managing the plan to serve the interests of the company
- **Selecting a diverse range of investments.** ERISA requires plan sponsors to diversify the plan's investments in order to minimize the risk of large losses, unless under the circumstances, it's clearly prudent not to diversify
- **Monitoring prohibited transactions.** ERISA prohibits a fiduciary from allowing the plan to engage directly or indirectly in any impermissible transaction that is between parties in interest. An example of a prohibited transaction would be a direct or indirect loan between a qualified plan and the investment manager of the plan
- **Responding to inquiries.** Plan sponsors must fully and accurately respond to all inquiries from a participant or beneficiary. Misleading communications, misrepresentations or omissions may constitute a breach of fiduciary duty
- **Following the plan documents.** All fiduciaries are required to follow the terms of the plan documents and other instruments governing the plan and ensure compliance by others
- **Being "bonded."** Fiduciaries need to ensure that a fidelity bond covers the plan's assets, in accordance with ERISA

What Is ERISA?

The Employee Retirement Income Security Act of 1974, as amended (ERISA) is a federal law that sets minimum standards for many voluntarily established retirement savings plans and provides protection for individuals participating in these plans.

ERISA requires plans to provide participants with plan information including important information about plan features and funding; outlines fiduciary requirements for those who manage and control plan assets; requires plans to establish a grievance and appeals process for participants to get benefits from their plans; and gives participants the right to sue for benefits and breaches of fiduciary duty.

What Is the Pension Protection Act of 2006?

The Pension Protection Act of 2006 (PPA) is federal legislation intended to strengthen workers' retirement security. Among its provisions include changes to the rules governing defined benefit plan funding, conversions of pension plans to cash balance plans, automatic enrollment in 401(k) plans, and the availability of investment advice. In addition, the PPA made permanent the retirement savings incentives and contribution limits of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA).

An Example of a Prudent Fiduciary

It is critical for plan sponsors to know and perform their fiduciary responsibilities. One lawsuit that illustrates this is the Unisys Savings Plan Litigation case. This 1999 case involved a group of employees who sued their employer, Unisys Corp., after one 401(k) investment—Guaranteed Investment Contracts (GICs)—experienced serious losses. Some assets comprising the GICs were "junk" bonds, with losses that led to the financial failure of the insurance company issuing the GICs. Participants claimed that Unisys breached its fiduciary duty by including the "risky" investment option in its 401(k) plan.

Both a federal district judge and an appellate court panel found that the company had acted prudently and therefore, was not responsible for the losses experienced by the participants. The fiduciaries in this case prevailed because they

- Proved they had a philosophy for investing
- Demonstrated they had a process for implementing and reviewing investments
- Retained outside consultants to provide guidance, and
- Most importantly, had written documentation to back up their actions and decisions

Source of data: *In re* Unisys Savings Plan Litigation (173 F3d 145 (3rd Cir.), *cert. denied,* 528 U.S. 950 (1999)).

Minimizing Fiduciary Risk

There are a number of ways plan sponsors can seek to minimize their fiduciary risk. The key is to follow a process that ensures decisions are well informed and consistent with the plan's objectives and the plan itself.

It is crucial that all fiduciary actions and decisions be documented and preserved. Should you become the subject of legal action, you will need to prove that a diligent procedure was followed.

Examples of proper documentation that demonstrate due diligence are:

- Investment Policy Statement (IPS)
- Plan documents and amendments, Summary Plan Descriptions (SPDs) and other required disclosures, board resolutions, etc.
- Reports provided by investment managers, recordkeepers, service providers or others
- Discrimination test results, signed Form 5500s, compliance documentation
- Plan communications to employees
- Proof of fidelity bond

Maintaining Your Plan's Records

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

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

ERISA requires that records be kept for a period of not less than six years after the filing date of the Form 5500 created from those records, but it's a good idea to retain plan records for eight years (to account for records applicable to the entire first plan year within this period). Other issues, such as rules relating to benefit claims under ERISA and state statutes, may affect the period for which records must be kept. Plan administrators and plan sponsors should consult legal counsel when designing record retention guidelines.

ERISA Section 404(c)

ERISA Section 404(c) Guidelines

Section 404(c) of ERISA (ERISA 404(c)) provides a set of voluntary guidelines that a plan sponsor can follow to effectively transfer the potential liability associated with investment decision-making responsibilities to employees who participate in a 401(k) plan or other participant-directed defined contribution plan. The key requirements to be considered in compliance with ERISA 404(c) are:

- Rights of participants to choose from a **"broad range"** of investment options
- Opportunity for participants to **"exercise control"** over their accounts

The **"broad range requirement"** is satisfied if three considerations are met:

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

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

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

Under ERISA 404(c), the plan sponsor must

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

Responsibility for Selecting and Monitoring Investments

Following ERISA 404(c) helps to shift the responsibility of saving for retirement and designating investments to the participant. As a result, a plan fiduciary may be protected from the consequences of investment decisions. However, the appropriate plan fiduciary continues to be responsible for selecting investments and deciding to keep them in the plan.

Accordingly, the appropriate plan fiduciary is obligated to monitor the investments and ensure continued ERISA 404(c) compliance. Plan sponsors should also ensure that they are following the terms of the plan document.

When choosing the plan's investments, ERISA requires that the fiduciary take an active role in selecting the investment manager or managers for the plan. It is not enough that the fiduciary act with the skill and care of a "prudent person," but also as a "prudent expert." This means that an employer who does not have the expertise to prudently select an appropriate investment manager is required to enlist the advice of a professional who does have this expertise.

However, the employer's role as fiduciary does not end when the investments have been selected. Rather, the role of fiduciary is an ongoing process, and investments should be continually monitored to ensure they remain prudent.

Mistakes to Avoid

Complying with ERISA 404(c) includes knowing the requirements and then monitoring for compliance. Common mistakes that fiduciaries make include the failure to

- **Communicate to participants that the plan intends to comply with ERISA 404(c).** If a plan fails to say that it intends to comply, then the affected fiduciaries can lose ERISA 404(c) protection even if all other requirements are closely followed. This statement should be included in the plan's Summary Plan Description (SPD)
- **Identify who has the responsibility for ensuring the plan's ERISA 404(c) compliance and for providing information to participants.** ERISA 404(c) regulations require that participants be provided with the name, address and telephone number of the fiduciary, along with the name of anyone designated to act on its behalf. This can also be included in the SPD
- **Provide participants with prospectuses and other important information.** This includes, but is not limited to, all of the information described previously which is required to be provided

Auto Enroll and Auto Increase Programs

To improve plan effectiveness, many plan sponsors are looking for ways to increase plan participation and seeking tools to assist employees with retirement planning. The PPA encourages these types of programs and provides a new non-discrimination testing safe harbor for those employers offering them, provided certain requirements are satisfied.

An automatic enrollment and deferral increase program is designed to increase plan participation and further assist participants in reaching their retirement goals. When plan sponsors elect to include an automatic enrollment and deferral increase program in their company's retirement plan, all eligible employees are automatically enrolled in the plan at a minimum deferral rate. This rate then automatically increases on an annual basis until a maximum deferral rate is reached. Employees can opt out of the program at any time or elect a different deferral rate. Over time, contributing even a small amount of money can have a significant impact on a participant's retirement savings.

Default Investments

Extending Fiduciary Protection with Qualified Default Investment Alternatives (QDIAs)

The PPA extends ERISA Section 404(c) protection to offer safe harbor relief to plan sponsors from liability for their plan's default investment. This relief is in the form of special ERISA fiduciary protection for plan sponsors that implement a Qualified Default Investment Alternative (QDIA).

A plan fiduciary following these regulations will not be liable for loss or breach that is a result of a participant investing in a QDIA. However, plan fiduciaries still remain responsible for prudently selecting and monitoring the QDIA for their plan.

The final regulations issued by the DOL provide that the following conditions must be satisfied to obtain safe harbor relief from fiduciary liability for default investment outcomes:

- Participant assets must be invested in a QDIA, as defined by the DOL
- Participants and beneficiaries must have had the opportunity to direct the investment of the assets in his or her account, but did not do so
- Participants and beneficiaries must have the opportunity to direct investments out of a QDIA as frequently as from other plan investments, but not less frequently than once per quarter
- Material provided to the plan about default investments must be provided to the QDIA participant. They information should be the same information provided to participants who affirmatively directed their account into the investment serving as a QDIA
- Employees must be given initial and annual notice about the QDIA
- For the 90-day period starting with the date of the participant's first defaulted investment, the regulations prohibit any restrictions, fees, or expenses to be imposed on transfers out of the QDIA. Sales loads, surrender charges, liquidation or exchange fees, redemption fees, and market value adjustments are not permissible for transfers from a QDIA during the 90-day period
- A plan must offer a "broad range of investment alternatives," as defined in regulations under ERISA Section 404(c)

What Is a QDIA?

The final regulations generally define a QDIA as an investment fund, product, or model portfolio that "applies generally accepted investment theories, is diversified so as to minimize the risk of large losses and that is designed to provide varying degrees of long-term appreciation and capital preservation through a mix of equity and fixed income exposures." The intent is to ensure that the chosen QDIA is, on its own, capable of meeting an employee's long-term retirement savings needs.

The final regulations do not identify specific investment products—rather, they describe the investment characteristics and objectives of the permitted QDIA types.

Stable Value and the Transition Rule

For plan sponsors that adopted stable value or similar products[1] as their default investment prior to the effective date of the final QDIA regulations (December 24, 2007), there is a transition rule that "grandfathers" these arrangements for safe harbor purposes. This transition rule does not provide relief for default investments in stable value or similar products starting December 24, 2007. As of this date, a QDIA must be offered in order for the fiduciary relief to apply.

Bear in mind that while stable value and other capital preservation investment vehicles do not qualify as QDIAs by themselves, they may still be a prudent plan investment for some participants and remain a viable option in a plan's investment menu.

1. The DOL defines these as investment products or funds "designated to preserve principal; provide a rate of return generally consistent with that earned on intermediate investment-grade bonds; and provide liquidity for withdrawals by participants and beneficiaries, including transfers to other investment alternatives."

Types of QDIAs

To assist in QDIA selection, the DOL has specified the following investment characteristics and objectives of the default investment alternatives available under the safe harbor:

1. A product designed to meet the plan's needs based on participant age, target retirement date or life expectancy. Investment allocations must change over time to become more conservative with increasing age; risk tolerances, investments or other preferences of an individual participant need not be considered. **("Lifecycle" or target-retirement-date funds are examples of this QDIA type.)**

2. A product designed to meet the plan's needs based on a target level of risk appropriate for participants in the plan as a whole; individual participant ages, risk tolerances, investments or other preferences need not be considered. Plan fiduciaries must consider participant demographics such as the age of the participant population. **(A balanced fund is an example of this QDIA type.)**

3. An asset allocation service that allocates the assets of each participant's individual account according to the general QDIA definition above, and changes the investment allocation over time to become more conservative with increasing participant age. The asset allocation decisions are not required to take into account risk tolerances, investments or other preferences of an individual participant. **(Third-party managed accounts are an example of this QDIA type.)**

4. A capital preservation product may be chosen for the first 120 days after the first elective contribution is made in an eligible automatic contribution arrangement. However, the investment must be redirected to one of the other QDIAs above, for use after the 120-day period ends.

Generally, a QDIA may not invest participant contributions in employer securities. A QDIA can be managed only by an investment manager or plan trustee under ERISA, a plan sponsor who is named fiduciary or an investment company registered under the Investment Company Act of 1940.

Company Stock

Company Stock and ERISA 404(c)

Company stock is not considered a diversified plan investment option under ERISA.

Therefore, if a plan sponsor wants to offer company stock through the plan, and qualify for ERISA 404(c) protection, then

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

Diversifying Out of Company Stock

The PPA provides guidance on diversifying out of company stock. For employer nonelective or matching contributions, the plan must allow participants to diversify out of company stock after three years of service. The plan must offer participants at least three investment options, other than company stock, each of which is diversified with materially different risk and return characteristics. For employee contributions, diversification of company stock must be immediate. These diversification requirements apply only to plans with publicly traded company stock as an investment option. Plans with employer securities are also subject to a doubling of the maximum bonding requirement.

Diversification Notice

Notice must be provided to participants at least 30 days before they are eligible to exercise these rights. The notice must describe the diversification rights and importance of diversification. A model notice will be issued by the Department of Treasury.

Company Stock and Public Companies

ERISA 404(c) protection for fiduciaries of plans offering company stock is most common in public companies. This is because many private companies find reporting and disclosure requirements difficult to fulfill. For example, plan sponsors are required to provide enough investment information to help plan participants make informed decisions. To satisfy this requirement, the employer may have to provide company financial statements or other reports related to the company, such as annual operating expenses. Making employer securities an investment option could also subject those securities to registration with the Securities and Exchange Commission (SEC) or to disclosure requirements under state securities laws.

Fiduciary Protections

As with all aspects relating to the plan, plan fiduciaries must always act in the best interests of the plan's participants. Remember, the plan is for the benefit of the participants and should not be managed according to the company's or plan sponsor's interests. This includes all decisions regarding company stock.

Below are a few guidelines to follow:

- Educating participants is critical, especially in the areas of diversification and asset allocation. If restrictions on the transfer or sale of the company stock exist, they should be reviewed to ensure the interests of participants are being considered as well as compliance with applicable law
- Remember to actively monitor the company stock just as any other investment option. This entails actively researching, reviewing and questioning the company stock investment to ensure that the decision to retain it as an investment option is reasonable based on this data
- Disclosure with proper investigation and proper written documentation are important. Employees must be provided any critical information they would need in order to make informed decisions. This includes information that could impact a participant's decision to buy or sell the stock. Withholding information can constitute a breach of fiduciary duty
- Consider avoiding a blackout (defined below) involving company stock at the end of a fiscal quarter or when the company reports earnings. This is especially critical if the stock is highly volatile

Some fiduciaries feel that the benefits of offering company stock to participants outweigh the risks. It is an individual plan decision that must be reviewed carefully, including the advantages, disadvantages and potential liabilities.

Blackouts

What Is a Blackout?

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

The PPA extends ERISA 404(c) fiduciary protection during blackout periods if the fiduciary satisfies ERISA requirements for authorizing and implementing the blackout (including the blackout notice requirements outlined below).

Blackout Notice

Blackout periods are governed by a federal law designed to protect participant interests. As a result

- Company directors and executive officers are prohibited from selling their own stock during blackout periods when at least 50% of employees can't make changes to their own company stock investments in the plan
- Plan administrators need to notify employees at least 30 days and no more than 60 days before the start of a blackout period. This is to help ensure that participants understand the reason for and scope of the blackout period and what their options are prior to the start of the blackout. The notice must be in writing; however, it can be delivered electronically, provided special rules are satisfied

The blackout notice should include

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

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

Blackout Timing

When scheduling plan changes that would involve a blackout period, consider avoiding the end of a quarter or holidays. During these times, participants may not be able to make changes before the blackout period begins. Providing adequate time to properly communicate to participants and enough time for them to take appropriate action can be critical.

Checklist for Evaluating Fees and Expenses

- ☐ Document a reasonable basis for decisions.
- ☐ Fees are just one of several factors to consider. It is important to also assess the performance over time of each investment option. This can help plan sponsors understand the relative nature of each fund option and its specific fees.
- ☐ Look at the full value of all services. There are fees other than fund expenses that should be considered and evaluated.
- ☐ Compare all services received with the total cost.
- ☐ Keep in mind that some investments, due to their nature, may involve higher fees.
- ☐ Performance should be evaluated against the fund's objectives.
- ☐ Ask providers which services the fees cover and which they do not.
- ☐ Remember that lower fees don't necessarily translate into a better performing fund—cheaper is not necessarily better.

Fund Mapping

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

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

Fund mapping allows participants access to their full account balances once the blackout is complete. Of course, what may be right for the plan is an individual plan decision.

Fiduciary Protections for Mapping

The PPA extends ERISA 404(c) fiduciary protection for mapping decisions if the new investment options are reasonably similar to the investment options being eliminated. Written notice must be provided, at least 30 days but not more than 60 days, before the effective date of the change. The notice must compare the old investment options to the new investment options. It must also explain that, in the absence of affirmative investment instructions from the participant to the contrary, the participant's account will be invested in the new investment options.

Fees and Expenses

Assessing Fees and Expenses

Fees and expenses charged to plans and plan participants have been the subject of increased scrutiny. Plan fees and expenses generally fall into three categories: Plan administration fees, investment fees and sales charges, individual service fees and other charges. ERISA requires that the fees and expenses charged to a plan be "reasonable." What is deemed reasonable differs for each plan based on the services the plan receives and must be determined for each specific plan. Reasonableness can be determined by evaluating the services included and by benchmarking against other plans with similar characteristics and features.

Plan sponsors should evaluate what services are included and compare different providers' programs. Some fees may not be explicitly stated, so scrutinizing all fees is necessary. Ongoing due diligence by plan fiduciaries must ensure that fees and expenses continue to be reasonable.

Investment Policy Statement

Developing a Plan's Investment Policy Statement (IPS)

One way for fiduciaries to demonstrate their adherence to established controls and procedures is to document actions and decisions. One of these documents can be an Investment Policy Statement (IPS).

An IPS defines how the plan's investment options and investment managers are selected, monitored and evaluated. It also describes how investment decisions are related to a plan's objectives, as well as the strategic vision for the investments.

ERISA requires that plans "provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan…" While not specifically stating that an IPS is required, qualified retirement plans may want to consider establishing procedures for plan investment-related decision making. A written IPS can help satisfy this requirement and help ensure the formation and implementation of appropriate investment strategies.

Investment Advice

Asset Allocation Programs

Under a 2001 DOL opinion, retirement plan providers are permitted to offer discretionary (managed accounts) and non-discretionary (third-party advice) asset allocation programs to 401(k) plan participants as long as certain criteria are satisfied. Model portfolios need to be determined using a program developed and maintained by a financial expert who is unrelated to the retirement plan provider. Further, the models must be based on generally accepted principles of modern portfolio theory.

The DOL determined that this type of program does not violate ERISA's prohibited transaction conflict of interest provisions, even though a retirement plan provider may receive additional compensation for dealing with the plan's assets. The DOL's ruling sets forth multiple requirements including required oversight by an independent third-party financial expert who retains sole control over the asset allocation program.

In determining whether to implement an asset allocation program, the appropriate plan fiduciaries must carefully review the full program disclosure, information on the services being provided, costs and the role of the third-party financial expert. If implemented, on an ongoing basis, the plan fiduciary must receive, review and evaluate investment performance information, rates of returns, expenses and fees charged to the plan, as well as any proposed fee increases.

A plan fiduciary must carefully review the details of an asset allocation program offered to participants. The fiduciary must decide if offering this type of program to plan participants is in their best interests and whether program fees are reasonable.

Benefits of an IPS

Developing and implementing an IPS may

- Help prudently manage plan assets and conduct due diligence. It allows the appropriate fiduciaries to follow a structured process and communicate the plan's objectives. It also demonstrates how the plan is designed to achieve these objectives
- Aid in fulfilling fiduciary responsibility by providing a clear process for selecting and monitoring investments and managers
- Help document the plan's goals and demonstrate the foundation for investment decisions
- Communicate the plan's investment policy. It can also be a useful handout if participants have questions on how the plan is managed
- Provide continuity in decision making as fiduciaries change. Having the process in writing can help it remain consistent in the event of a fiduciary change

Implications of an IPS

Although implementing an IPS can be a beneficial tool for the plan, there are some implications that should be considered. For example, having an IPS may help fiduciaries in the event of legal action. A well-constructed IPS can provide evidence of a process and methodology. Those who have not documented the plan's procedures may be more vulnerable.

However, there is a risk for fiduciaries if they are not properly executing the procedures specified in the IPS. Also, the execution of the process, even if proper, might not be sufficiently documented. This also presents potential fiduciary risk. The appropriate plan fiduciaries are responsible for monitoring the IPS on an ongoing basis and ensuring the plan is following it.

Managed Accounts

The DOL guidance permits plan fiduciaries to offer managed accounts. In a managed account, a third-party financial professional is paid to allocate a participant's 401(k) assets among the plan's available investment options based on age, assets, risk tolerance and other factors.

The goal is to assist investors who would rather not manage their retirement plan assets themselves. For some individuals, managed accounts may be the answer. Managed accounts go beyond advice or guidance by providing ongoing professional asset management at the participant level.

The concept is simple. Many individuals look to experts to help with life's many decisions or tasks, like servicing a car or working on a house. Others may prefer to do it themselves. The same holds true for managing an individual's retirement account. Some individuals may want advice or guidance and they prefer to handle the rest. Others want someone to do it for them.

The way most third-party advice providers work is that participants assign responsibility for managing their plan account assets to the third party. The third party then creates diversified portfolios from the plan's funds. The third party serves as discretionary asset manager, providing fund selection, asset allocation strategy, ongoing monitoring and rebalancing. As a result, the third party assumes fiduciary liability with respect to its investment advice.

Managed accounts do not reduce a plan sponsor's potential liability. Companies that do not provide proper safeguards or sufficient investment options could end up liable for adverse investment results. However, a participant's loss does not automatically translate into liability. It depends on whether the appropriate plan fiduciaries acted prudently and in the best interest of participants when offering, implementing, and monitoring a managed account option.

Current State of Investment Advice

The issue of investment advice to participants continues to evolve. The PPA permits retirement plan service providers who offer investments to the plan ("fiduciary advisers") to recommend their own funds without violating fiduciary rules, provided certain requirements are satisfied.

To qualify, this "eligible investment advice arrangement" must either: (1) provide that the fees received by the fiduciary adviser do not vary on the basis of which investment options are chosen; or (2) use a computer model under an investment advice program meeting certain conditions. An independent fiduciary would have to approve the computer model and an independent auditor would have to annually review it for compliance with all applicable requirements.

Disclosures to participants regarding the fiduciary adviser's fee arrangement, the adviser's relationship to the development of the computer model, certain performance statistics and other applicable information would be required.

While the relief available to fiduciary advisers and plan sponsors is significant, it is not complete. The plan sponsor will still be responsible for the prudent selection and periodic monitoring of the fiduciary adviser (but will not be responsible for monitoring the specific advice to participants given by the fiduciary adviser).

DOL guidance regarding eligible investment advice arrangements continues to be forthcoming. Plan sponsors should continue to monitor this area for developments.

Third-party Advice

In addition to managed accounts, third-party investment advice between third parties and participants is an option. Examples include third-party providers or Internet-based tools that are not affiliated with the investment managers of the plan. These retirement-planning programs help participants set retirement goals and select an asset allocation strategy designed to meet those goals. The program provides specific investment advice by creating diversified investment portfolios for participants using options offered in their retirement plan.

Investment Education

Distinct from investment advice, investment education is encouraged in order to provide participants with the information and tools needed to make educated decisions. A plan sponsor may hire a service provider to provide general investment education. As long as the material is general in nature, providers of investment education are not fiduciaries. However, the decision to select a provider offering investment education may be considered a fiduciary action and must be carried out in the same manner as hiring any service provider.

A Decision Is Critical

It is important for plan fiduciaries to remember that not making a decision is actually a fiduciary decision. If fiduciaries know or strongly suspect that their participants need help, responsibility is not avoided by not making a decision. Fiduciaries can't just ignore issues and decision points. Fiduciaries need to perform due diligence and decide what is in the best interest of participants and act.

A good example to consider is the danger of unsophisticated participants that invest only in one aggressive fund or over-invest in company stock, if applicable. Consider whether affirmative steps in participant education, or offering investment advice through a third party, might have helped them to make appropriate decisions for their respective situations.

As with all their duties, fiduciaries should evaluate the needs of participants. Think about developing an integrated program using all available tools. Fiduciaries can begin by evaluating the needs of their employees and then addressing those needs.

In the end, investment advice, including asset allocation programs and managed account options, may or may not be part of the offering. Either way, fiduciaries need to make and document informed decisions.

Top 10 Fiduciary Mistakes

Failure to

1. Establish written policies and procedures.
2. Follow policies and procedures.
3. Deal with bad investment options.
4. Pay attention to fees.
5. Administer correctly, monitor periodically.
6. Identify conflicts of interest.
7. Differentiate between corporate and plan fiduciary roles.
8. Appropriately manage company stock.
9. Give employees the help they need.
10. Take action.

Source of data: "Top Ten Ways to Fail as a Fiduciary," Olena Berg Lacy, July 28, 2004, PSCA.org.

An Expert Can Help

A financial advisor can help the appropriate plan fiduciaries select and review a plan's investments. In addition to a financial advisor's expertise, OppenheimerFunds helps by providing alternatives across major asset classes, as well as a variety of approaches and investment styles.

Remember, fiduciaries can reduce risk by hiring competent experts. A financial advisor has the expertise to help select and review a plan's investments. However, the appropriate plan fiduciaries remain ultimately responsible for the management and administration of the plan. Delegation of duties does not mean delegation of fiduciary responsibility. Fiduciary responsibilities continue even after the initial selection of the plan's investment options.

Ongoing review and due diligence are critical to ensure that fund options remain appropriate. Implementing an IPS can help the appropriate plan fiduciaries stay on track.

OppenheimerFunds *Tru*(k)ourse™ Helps Bring It All Together

OppenheimerFunds *Tru*(k)ourse™ is an innovative feature available through OppenheimerFunds' retirement programs that can empower your employees by providing an important retirement savings tool. This feature was designed specifically to help you take maximum advantage of key provisions of the PPA, including QDIA fiduciary relief—automatically. Selecting *Tru*(k)ourse can help you address critical plan goals, such as boosting overall participation and deferral rates and enhancing participants' asset allocation strategies.

***Tru*(k)ourse automatically**

- Enrolls eligible employees into your plan at a minimum deferral rate
- Increases participants' deferral rates annually until they reach a maximum rate
- Invests contributions in the designated OppenheimerFunds QDIA if a participant fails to select his or her own plan investments. Also it allows for the **ability to automatically select funds for participants based on their ages**

Benefits

- Helps you take advantage of PPA's QDIA fiduciary relief
- Provides a comprehensive and automatic program that includes critical plan features such as auto enrollment and auto escalation along with a diversified investment solution
- Easy to implement

Resources

OppenheimerFunds Works for You

This workbook provides background to help you understand fiduciary responsibilities and the importance of carrying them out diligently. If you have any questions, please contact your plan's financial advisor or legal counsel.

To assist you, OppenheimerFunds also offers:

- **Employer Guides** Review each program's plan design, administration, recordkeeping and compliance, investment program and employee education initiatives
- ***Pension Protection Act of 2006:* Plan Sponsor Guide** This overview of the PPA discusses the most important provisions and outlines potential next steps for your plan
- ***Qualified Default Investment Alternatives (QDIAs)*—Minimizing Fiduciary Risk Flyer** For a more in-depth discussion of QDIAs, you may review our detailed white paper
- ***Plan Sponsor Outlook*** This informative newsletter is sent out to employers every quarter. It contains the latest news on topics of interest to plan sponsors, such as legislative developments, plan issues and trends, guidance on maximizing the value of plan sponsorship and more
- **Annual Plan Review** OppenheimerFunds provides the tools you need to review your plan on an ongoing basis to ensure that it meets the needs of your participants
- ***Evaluating Your Retirement Plan*** Fiduciaries are ultimately responsible for their plan and the plan's investments. This program follows the *"Managing Your Fiduciary Responsibility"* program. It educates plan sponsors on how to evaluate and review their plan, their plan's providers and their plan's investments. It also provides action steps, checklists and available resources
- **Comprehensive Enrollment and Ongoing Educational Materials** for your employees including online tools and resources
- ***Developing Your Plan's Investment Policy Statement (IPS)*** We can help get you started with the IPS development process

Call your financial advisor to learn about the OppenheimerFunds value-added programs and support services designed to help you manage your retirement plan.

You're Not Alone

Your financial advisor and OppenheimerFunds are here to help you manage your fiduciary responsibilities. By reviewing your plan—and documenting your efforts—you are taking important steps toward acting in the best interest of your participants and protecting your organization. The following checklists can help your plan and create a record of your due diligence.

Checklists and Worksheet

Documentation Checklist

There are a number of ways that fiduciary risk may be minimized. The key is to execute all fiduciary responsibilities faithfully and with diligence. The best defense is to follow a process that ensures decisions are well informed and consistent with the plan's objectives.

ERISA requires that records be kept for a period of not less than six years after the filing date of the Form 5500 created from those records, but it's a good idea to retain plan records for eight years (to account for records applicable to the entire first plan year within this period). Other issues, such as rules relating to benefit claims under ERISA and state statutes, may affect the period for which records must be kept. Plan administrators and plan sponsors should consult legal counsel when designing record retention guidelines.

Do you have the following examples of documentation to demonstrate due diligence?

- ☐ Investment Policy Statement (IPS)

  Reviewed on ______________________________
- ☐ Plan documents
- ☐ Summary Plan Descriptions (SPDs)
- ☐ Adoption agreement
- ☐ Plan Amendments
- ☐ Board resolutions
- ☐ Monitoring reports
- ☐ Discrimination test results
- ☐ Signed Form 5500s
- ☐ Compliance documentation
- ☐ Plan communications to employees

  1. ______________________________
  2. ______________________________
  3. ______________________________
- ☐ Proof of Fidelity Bond

  Amount of coverage ______________________________

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ERISA Section 404(c) Checklist

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

Choosing Investments:

- Are at least three diversified investment choices provided, each with materially different risk/return characteristics?

  ☐ Yes ☐ No

- Can participants choose their own investments from among the options available?

  ☐ Yes ☐ No

- Can each investment option be classified as a "prudent" investment option by plan fiduciaries?

  ☐ Yes ☐ No

- Can participants change their investment allocations and transfer among investment accounts at least once every calendar quarter?

  ☐ Yes ☐ No

Have Participants Been Provided with:

- A statement that the plan intends to comply with ERISA Section 404(c)?

  ☐ Yes ☐ No

- Descriptions of each investment option and all fees and expenses charged to participants under each option?

  ☐ Yes ☐ No

- Identification of the plan's fiduciary?

  ☐ Yes ☐ No

- Directions on how to select investments and change investment selections?

  ☐ Yes ☐ No

- Prospectuses?

  ☐ Yes ☐ No

- Access to regular account statements?

  ☐ Yes ☐ No

Common ERISA Section 404(c) Mistakes:

Three common mistakes that fiduciaries make are the failure to:

- Communicate to participants that the plan intends to comply with ERISA Section 404(c)
- Identify the fiduciary
- Provide participants with prospectuses and other important information

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Evaluating Fees and Expenses Worksheet

- **ERISA requires that fees and expenses charged to a plan and plan participants be "reasonable"**
- **"Reasonable" must be determined for each plan**
- **Ongoing due diligence is critical**

When Evaluating Fees and Expenses:

- Did you make informed decisions? Have you gathered the necessary materials to aid in your decision-making process? Be sure to document your due diligence efforts

- Assess the plan's performance over time for each investment option

- What is the full value of services received? Please see page 10 for additional information on evaluating fees and expenses

- What are your plan's fees? Remember to look at the full value of all services

- What services do the fees cover?

One-time fees

Recordkeeping

Investments

Administration

Trustee

Individual fees to participants

Other fees

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Understanding and managing your fiduciary responsibilities can be a challenge. OppenheimerFunds can help. This booklet outlines a comprehensive, ongoing process for fulfilling your obligations. Inside, you'll find key information, insights, tools and resources to help you manage your fiduciary duties. For further assistance, contact your financial advisor or OppenheimerFunds.

Get Started

Visit oppenheimerfunds.com

Call your financial advisor

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RE0001.642.0810 August 11, 2010

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