A guide to the fiduciary role in a retirement plan

Understanding your status, supporting plan sponsors as fiduciaries, and building business through your expertise
Guide content

1. **Understand the rules**
   This overview of the ERISA fiduciary framework provides a foundation to help you capitalize on the opportunities outlined in this guide.

2. **Prove your value**
   Here, you’ll find tips and resources to consider incorporating into your retirement plan practice with new plan prospects and existing clients.

3. **Know your resources**
   This reference guide compiles sample tools and practice aids that may be useful in implementing our recommendations, including items such as fiduciary checklists, plan sponsor training curricula, and retirement news resources.
A guide to the fiduciary role in a retirement plan

Executive summary

A new era for retirement plan advisors

No topic in the retirement industry has been the subject of as much discussion and debate in recent years as the fiduciary standards that apply to those responsible for administering retirement plans and managing plan assets. The Department of Labor (DOL), Congress, and the courts have all focused increased attention on the role of the ERISA fiduciary as a protector of the vast retirement savings of America’s workers.

Much of that attention has been centered on plan sponsors and whether they have the necessary knowledge and skills to satisfy their fiduciary mandates. As plan sponsors have become more aware of their responsibilities, they have in turn begun to demand a higher level of support from those they hire to help them manage their plans—especially Registered Investment Advisors (RIAs) and other investment advisors.

These increased demands for support, along with an increasingly complex regulatory environment, triggered in part by the DOL’s April 2016 Conflict of Interest – Retirement Investment Advice regulations, have led many advisors to re-examine their retirement business models. As plan sponsors look for deeper retirement plan expertise and support, advisors who want to grow their retirement practice need to evaluate how they are providing fiduciary support today—and whether that is the optimum model in the current regulatory environment.

As an advisor, you may encounter circumstances in which your best judgment suggests you should provide investment support as an ERISA fiduciary or introduce fiduciary investment support through an outsourced third-party. In other cases, you may decide to expand your menu of services, so that your plan sponsor clients have access to information and resources that will help them understand and comply with the high fiduciary standards demanded of them under ERISA. This guide will introduce you to some of the ways which you can help plan

sponsors satisfy their fiduciary responsibilities, such as expanding your educational programs or helping them assess the overall “health” of their plan from a fiduciary perspective.

That’s why we’ve asked thought-leaders to provide information on topics that impact your practice. Although the information included in this document isn’t tailored to the circumstances of any particular advisor, we hope you find it informative and helpful as you identify opportunities in your business.

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Understand the rules

A guide to the fiduciary role in a retirement plan
ERISA fiduciary rules overview

As a retirement plan advisor, you recognize that you and your plan sponsor clients need to have a basic knowledge of the ERISA fiduciary framework. This section helps develop that understanding and builds a foundation to empower you to capitalize on the opportunities outlined in the following section, Prove your value. In addition to providing a brief refresher on the fiduciary rules and how they are changing, some of the concepts presented in this section may be useful for building educational programs for prospective and existing clients.

What are the fiduciary mandates under ERISA?

The Employee Retirement Income Security Act of 1974 (ERISA) imposes strict standards of conduct on fiduciaries who have discretion over the administration of retirement plans and the investment of plan assets. The safeguards outlined in ERISA are designed to ensure proper handling of retirement plan assets on the part of business owners, key management personnel, and others who have the authority to make decisions and handle plan assets on behalf of participants and beneficiaries. The ERISA standards also apply to many retirement plan professionals, including RIAs who serve as ERISA investment fiduciaries to these plans. Because of the trust that participants must place in retirement plan administrators and their advisors, the consequences of fiduciary breaches are significant.

ERISA also mandates that fiduciaries refrain from engaging in certain “prohibited transactions” that create potential conflicts of interest between the fiduciary and the plan or participants. If a fiduciary’s actions are prohibited under ERISA, the fiduciary must either refrain from the transaction or operate under an “exemption” outlined in the applicable statutes or granted by the DOL. An exemption provides a framework
for engaging in the transaction while providing safeguards designed to protect participants’ interests. Examples of prohibited transaction exemptions available to ERISA fiduciaries are provided later in this Guide (see Section 1, Practice tip 1 – Review your service model and compensation structure).

ERISA and its fiduciary rules apply to defined contribution plans like 401(k) plans, ERISA 403(b) plans, and defined benefit plans. Prohibited transactions rules similar to those outlined in ERISA are also found in Internal Revenue Code Section 4975 and apply to IRAs (traditional and Roth), IRA-based employer plans (SEP and SIMPLE IRA plans), Health Savings Accounts (HSAs), and Coverdell Education Savings Accounts.

The Department of Labor (DOL) administers and enforces the fiduciary rules and participant protections set forth in ERISA. Examples include requiring various participant notices and disclosures to help plan participants understand and manage their plan benefits and ensuring timely deposits of employee contributions. The service provider and participant fee disclosure requirements are also examples of DOL regulatory initiatives under ERISA. The Treasury Department, primarily through its division the Internal Revenue Service (IRS), enforces the prohibited transaction rules contained in the Internal Revenue Code applicable to certain non-ERISA plans.
An ERISA fiduciary has specific duties, which are found in ERISA section 404. To paraphrase, those duties include:

1. Acting solely in the interests of plan participants (and beneficiaries) for the exclusive purpose of providing benefits to participants (and beneficiaries)

2. Carrying out duties with the care, skill, and diligence that a prudent person familiar with the matter at hand would use

3. Diversifying investments to reduce the risk of large investment losses

4. Following the terms of the plan documents

5. Paying only reasonable expenses from plan assets

Let’s explore each of these five standards in more depth:

- **An ERISA fiduciary must act solely in the interests of the plan participants (and beneficiaries) and with the “exclusive purpose” of providing benefits to them. A fiduciary must always focus on participant and beneficiary interests and protection, not what’s best for the fiduciary.**

- **A fiduciary must carry out duties with the care, skill, and diligence that a prudent person familiar with the matter at hand would use. If fiduciaries do not have the expertise to handle their responsibilities, they must hire professionals who have that expertise. For example, if plan sponsors do not have the investment expertise to make educated investment decisions, they need to hire an investment expert to assist them. If they are not equipped to handle the intricacies of plan administration, they need to engage third-party administrators or recordkeepers to handle those tasks. This rule is sometimes referred to as the “prudent person” rule. Prudence focuses on the process for making fiduciary decisions.**

- **A plan fiduciary must diversify investments to reduce the risk of large investment losses. Each investment should be considered as part of the plan’s entire portfolio.**

- **The plan documents serve as the foundation for plan operations. Interpretation of plan documents and providing operational direction is a fiduciary function, and failing to follow the terms of the plan document is a fiduciary breach. The plan sponsor and all fiduciary service providers must be familiar with the terms of the plan document.**

- **The plan fiduciary must hire and monitor service providers and ensure that only reasonable fees are paid from plan assets for plan services and investments.**
Advisors who serve as ERISA fiduciaries typically limit their fiduciary role to investment services subject primarily to the first two duties of loyalty and prudence outlined to the right.

ERISA plan fiduciaries need to make sure they fully understand their responsibilities. They must also adopt prudent processes and procedures for administering plans and managing plan investments in order to fulfill their fiduciary role.

The ERISA fiduciary rules discussed in this guide are quite different from the standards of conduct that apply to advisors under securities law. As a fiduciary, an advisor is also required to disclose conflicts of interest and refrain from engaging in “prohibited transactions” that primarily serve the fiduciary’s interests. Under securities law, advisors may be permitted to engage in certain transactions in which the advisor has a conflict of interest, if the conflict is properly disclosed. Under ERISA, however, advisors must refrain from engaging in conflicted transactions unless they are operating under a specific “exemption” outlined in the law or granted by the DOL.

While the primary focus of this guide is the ERISA fiduciary standards, it is important for advisors to manage their roles and responsibilities under both ERISA and securities law when providing services to retirement plan clients.

**SEC focus on fiduciary standards**

Currently, two separate standards under securities law apply when providing support to investors, including retirement plan clients. Broker-dealers are mainly regulated under the Securities Exchange Act of 1934 and are generally held to a “suitability standard” in making investment recommendations. Registered Investment Advisors (RIAs), on the other hand, are regulated under the Investment Advisers Act of 1940 or state laws and are subject to the higher fiduciary standard of care, requiring RIAs to act in their clients’ best interests.

The SEC has been reviewing these rules and evaluating whether a single fiduciary standard should apply for both investment advisors and brokers when providing personalized investment advice about securities to retail customers. The SEC review is required by the Dodd-Frank financial reform law. The SEC has included guidance on this issue in its 2017 regulatory agenda.
Who are the plan’s ERISA fiduciaries?

In general, fiduciaries are those individuals who have discretionary control over the management of the plan or plan assets. Fiduciary status can arise from an appointment or assignment of responsibilities, or it can be based on the functions a person performs for the plan. If an individual exercises discretion in administering the plan or has control over plan assets, that person will be an ERISA fiduciary to the extent of that discretion or control.

Let’s look at the main categories of ERISA fiduciaries.

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<th>Type of fiduciary</th>
<th>Primary role</th>
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<td>402 Named fiduciary</td>
<td>Overall responsibility for the plan</td>
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<tr>
<td>3(16) Plan administrator</td>
<td>Responsible for the day-to-day administrative decisions for the plan</td>
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<tr>
<td>3(21) Investment advisor</td>
<td>Shares fiduciary responsibility with the plan sponsor for selecting and monitoring investments</td>
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<tr>
<td>3(38) Investment manager</td>
<td>Discretionary responsibility for selecting and monitoring plan investments</td>
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**ERISA 402 named fiduciary**

ERISA Section 402 requires that each plan subject to ERISA have at least one fiduciary, referred to as a named fiduciary. The named fiduciary is generally the employer sponsoring the plan (the plan sponsor) and may be identified by position (e.g., chief executive officer, board of directors, plan committee) or by name. Named fiduciaries have the overall responsibility for their plans and fiduciary functions, but they may hire or appoint other individuals to be fiduciaries for specific purposes, such as the investment of plan assets. Named fiduciaries may also hire non-fiduciary service providers such as recordkeepers, third-party administrators, and non-fiduciary investment advisors to provide services to the plan. Although named fiduciaries can delegate or share fiduciary responsibility, they can never fully absolve themselves of their fiduciary responsibilities.
ERISA Section 3(16) plan administrator

An ERISA Section 3(16) fiduciary is named in the plan document or appointed by the named fiduciary. Typically, the plan sponsor assumes this role. The plan administrator’s fiduciary responsibilities include general plan duties such as:

- Interpreting the plan document
- Determining eligibility of plan participants
- Establishing plan policies, such as loan procedures
- Ensuring that the Summary Plan Description and other required notices or disclosures are properly drafted and delivered to participants and beneficiaries
- Filing Form 5500

The 3(16) plan administrator should be distinguished from the third-party administrator (TPA) and recordkeeper, who are hired by the named fiduciary to perform certain administrative tasks. The TPA and recordkeeper do not generally have discretion over the administration of the plan and only act based on instructions from the named fiduciary or plan administrator. While some TPAs and trust companies are offering ERISA 3(16) fiduciary solutions, it is not a common practice for plan sponsors to delegate their ERISA 3(16) responsibilities to a third-party. Most TPAs provide non-discretionary, non-fiduciary support.

Attorneys, accountants, and actuaries providing professional services to the plan are also generally not ERISA fiduciaries because they are governed by separate legal standards and licensing requirements.
ERISA Section 3(21) investment advisor

One path for advisors wishing to take on ERISA investment responsibility is provided by ERISA 3(21). While a 3(21) fiduciary agrees to be subject to the fiduciary standards with respect to their investment recommendations and submits to the DOL’s enforcement jurisdiction, the plan fiduciary (the plan sponsor) shares legal responsibility for the selection and performance of the investments. An ERISA 3(21) fiduciary typically serves as a non-discretionary fiduciary, monitoring the investment performance of plan assets and providing investment advice, but leaving the ultimate investment decisions to the named fiduciary (the plan sponsor). The appointment of an ERISA 3(21) investment advisor is a fiduciary function and is typically documented in a service agreement between the plan sponsor and the investment advisor. The plan sponsor has an ongoing fiduciary obligation to monitor the actions of the investment advisor.

Even advisors not appointed as ERISA 3(21) fiduciaries can become subject to the ERISA fiduciary standards if their actions fall within the definition of “investment advice” provided in the DOL Conflict of Interest – Retirement Investment Advice regulations under ERISA 3(21)(A)(ii).

Under the rules in place prior to the 2016 DOL regulations (applicable beginning April 1, 2017), a five-part test was used to determine when a person was deemed to be rendering investment advice that results in fiduciary status.

Retirement investment advice – 5-part test (prior rule)

A person who provides investment advice will be a fiduciary if they receive compensation:

1. For rendering advice as to the value of securities or other property, or making recommendations as to the advisability of investing in, purchasing, or selling securities or other property
2. On a regular basis
3. Pursuant to a mutual agreement, arrangement, or understanding with the plan or a plan fiduciary
4. For advice that will serve as a primary basis for the investment decisions with respect to plan assets
5. For advice individualized based on the particular needs of the plan
Under the DOL’s April 2016 regulations, the five-part test for determining who is a fiduciary under ERISA 3(21)(A)(ii) and Section 4975(e)(3)(B) of the Internal Revenue Code has been replaced with the following two-step process for determining whether an advisor is providing retirement investment advice for a fee or other compensation:

**Retirement investment advice – final DOL Conflict of Interest regulations**

**Step 1**
Determine if the advice constitutes a “recommendation” for which the person or financial institution providing the advice receives a fee or other compensation:

- A recommendation as to the advisability of acquiring, holding, disposing of, or exchanging securities or other investment property, or a recommendation as to how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA

- A recommendation as to the management of securities or other investment property, including, among other things:
  - Recommendations on investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, selection of investment account arrangements (e.g., brokerage vs. advisory); or
  - Recommendations with respect to rollovers, transfers, or distributions from a plan or IRA, including whether, in what amount, in what form, and to what destination such a rollover, transfer or distribution should be made

**Step 2**
If a recommendation has been made, determine if the person making the recommendation:

- Acknowledges fiduciary status
- Renders the advice pursuant to an arrangement that the advice is based on the particular investment needs of the recipient or
- Directs the advice to a specific recipient

A “recommendation” is a communication that would reasonably be viewed as a suggestion that the recipient engage or refrain in a course of action. The DOL clarified in the regulations that the more individually tailored the communication is to a particular customer about a specific security or investment strategy, the more likely the communication will be viewed as a recommendation.

In evaluating whether an advisor has received “a fee or other compensation” for the advice, compensation received by the advisor or by an affiliate will be taken into consideration if paid “in connection with or as a result of the transaction” or if the fee would not have been paid but for the transaction.
Under the final rules, a broader range of investment support services will lead to fiduciary status, including recommendations regarding rollovers and distributions for retirement plans or IRAs. If an advisor is deemed to be providing fiduciary investment advice, the advice must be impartial and in the client’s best interest under the ERISA standards of loyalty and prudence.

The final Conflict of Interest regulations also expand the types of plans subject to the fiduciary standards.

### Plans subject to DOL’s Conflict of Interest regulations

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<tr>
<th>Plans subject to ERISA</th>
<th>Defined benefit plans</th>
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<td>Defined contribution plans (profit sharing plans, 401(k) plans, and ERISA 403(b) plans)</td>
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<tr>
<td>Plans listed in the Prohibited Transaction rules under Internal Revenue Code Sec. 4975(e)(1)</td>
<td>IRAs – Traditional and Roth</td>
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<td>SEP and SIMPLE IRA plans</td>
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<td></td>
<td>Keogh plans</td>
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<td>Health Savings Accounts (HSAs)</td>
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<td>Coverdell Education Savings Accounts</td>
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The DOL’s final regulations redefining investment advice apply to retirement investment advice beginning April 10, 2017.

### ERISA Section 3(38) investment manager

The plan sponsor can choose to hire an ERISA 3(38) investment manager to take on full discretionary control of the plan investments. Appointing an investment manager relieves the plan sponsor of fiduciary liability regarding plan investments. Under ERISA 3(38), only a bank, an insurance company, or an RIA may be an investment manager, and that entity must agree, in writing, to the appointment. The plan sponsor retains the fiduciary duties of selecting and monitoring the investment manager to ensure that the investment manager continues to be a prudent selection as a service provider to the plan.
IRA rollovers and the final Conflict of Interest rules

Many advisors who serve retirement plan clients also provide services to plan participants who roll their balances over to IRAs, for example when participants retire or change employers. Prior to the final DOL Conflict of Interest rules, a recommendation regarding a rollover did not alone result in ERISA fiduciary status for an advisor, even if the advice included a recommendation regarding how the rollover should be invested. If an advisor had an ERISA fiduciary role with respect to a plan, rollover advice to a participant, unless it was limited to education, was typically subject to the ERISA fiduciary standards, and the advisor would have to act prudently and solely in the best interests of the participant. The rollover could result in a prohibited transaction if the fiduciary advisor was considered to be using plan assets in his or her own best interest. This could occur when an advisor utilized his or her fiduciary position to cause the participant to take a distribution that is invested in an IRA managed by the fiduciary, and the fiduciary advisor receives higher compensation for managing the IRA as compared with the compensation he or she received when the assets were in the retirement plan (DOL Advisory Opinion 2005-23A).

Under the final DOL rules, Conflict of Interest recommendations to take a distribution or rollover from a retirement plan or an IRA is considered investment advice that would trigger ERISA fiduciary status, including whether, in what amount, in what form, and to what destination such a rollover, transfer or distribution should be made.

Some advisors may choose to limit their rollover consultations to educational services and refrain from making rollover “recommendations.” For those who choose to make rollover recommendations, to avoid engaging in a prohibited transaction, most advisors will need to structure their services to comply with one of the prohibited transaction exemptions included in the statutes or granted by the DOL. One of the exemptions released in conjunction with the DOL Conflict of Interest rules, the Best Interest Contract Exemption (BICE), is among the exemptions that may be relied on when making rollover recommendations. BICE is described in more detail in the Practice tips discussed later in this guide.
Is all investment support fiduciary advice?

No. Many of the important services you provide to a plan are considered non-fiduciary functions—such as providing valuable education and support to plan sponsors and plan participants. You are not only a source of deep investment expertise; you can also be an excellent guide to help plan sponsors understand their fiduciary responsibilities, identify solutions to help mitigate fiduciary risk, and assess the health of their plan from a fiduciary perspective.

If you do not intend to serve as an ERISA fiduciary, make certain you have not inadvertently crossed the fiduciary line and become a functional fiduciary by exercising discretion or control over certain aspects of the plan—or because you are considered to provide “investment advice for a fee” as defined by the DOL Conflict of Interest rules under ERISA 3(21).

Non-fiduciary investment services:

- Providing participant investment education
- Monitoring investment performance
- Assisting with designing a service provider selection process and providing information and fee benchmarking support
- Reporting on financial market trends
- Providing data regarding investment fund usage within the plan
- Benchmarking funds’ performances or plan features
The DOL Conflict of Interest regulations also contain a list of communications and transactions that will not be considered “investment advice.”

### Services that are NOT retirement investment advice

| Communications that are not a “recommendation” under the final rules |
|-------------------------|---|
| **Platform providers** – A list of available investments from a platform provider from which a plan fiduciary can build an investment menu, including investment selection and monitoring assistance that identifies investments that meet certain objective criteria (e.g., expense ratios, fund size), or a sample set of investments in response to a request for proposal based on plan size or current investments |   |
| **General communications** – Communications that a reasonable person would not consider a “recommendation” (e.g., newsletters and speeches at conferences) |   |
| **Investment education** – Plan and investment information that does not include specific investment recommendations |   |

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<thead>
<tr>
<th>Communications that fall outside the investment advice definition</th>
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<tr>
<td><strong>Independent fiduciaries with financial expertise</strong> – Transactions with fiduciaries who have investment expertise and are independent of the person providing the advice such as plan fiduciaries with at least $50 million under management</td>
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<tr>
<td><strong>Swap and securities-based swap transactions</strong> – Advice provided to a plan by a party such as a swap dealer where the plan is represented by a fiduciary and the person providing the advice is not acting as an advisor to a plan and does not receive a fee or other compensation</td>
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</tr>
<tr>
<td><strong>Plan sponsor employees</strong> – Communications by a plan sponsor’s employees provided the employee’s job does not include providing investment advice and they receive no compensation for their recommendations</td>
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Even if you do provide ERISA fiduciary support to the plan, only some of the services you deliver will be provided as ERISA fiduciary functions. Other tasks will be non-fiduciary support. Review your service agreement to ensure that it clearly outlines your services and relationship to the plan. If you are assuming a fiduciary role with respect to the plan, plan sponsor, or participants, make certain the specific scope of your fiduciary role is clear, and explain that other services will be performed as a non-fiduciary. Make it equally clear what role the plan sponsor is expected to play.
Investment education vs. advice

The DOL Conflict of Interest regulations include a definition of “education” services that will fall outside the scope of “investment advice.” There are four categories of non-fiduciary investment education.

1. **Information regarding investments or plan alternatives**
   - Benefits of plan participation
   - Impact of distributions
   - Forms of distribution and advantages/disadvantages of each option
   - Fee and expense information
   - Trading restrictions
   - Investment objectives and philosophies
   - Risk and return characteristics or historical return information

2. **General financial, investment and retirement information**
   - Standard investment and financial concepts such as diversification, risk and return, dollar cost averaging, tax-deferred investments
   - Historic differences in rates of return between different asset classes
   - Effects of fees
   - Effects of inflation
   - Estimating future retirement income needs
   - Determining investment time horizons
   - Assessing risk tolerance
   - Retirement related risk such as longevity risk, health care expenses
   - General strategies for managing assets in retirement (e.g., systemic withdrawals, annuitization) including options outside the plan
Asset allocation models

- Pie charts, graphs, case studies or other materials that provide illustrations of model investment portfolios for hypothetical individuals with different time horizons and risk profiles

Interactive investment materials

- Questionnaires, worksheets, software that enable individuals to estimate future retirement needs or evaluate the impact of various investment allocations

Asset allocation models and interactive tools often include in their illustrations specific investments available in the plan, a practice that has been effective in helping participants apply the educational information in the context of their plan options. To prevent the reference to specific investments from being perceived as “recommendations,” the DOL included some additional requirements in the Conflict of Interest rules. Specific investments may only be included in asset allocation models for retirement plan education (not IRAs) and must satisfy the following requirements:

1. The alternative is one of the designated investment alternatives in the plan.

2. The alternative is subject to fiduciary oversight by a plan fiduciary.

3. The asset allocation models or interactive materials identify all other investment alternatives available in the plan that have similar risk and return characteristics.

4. The asset allocation models or interactive tools are accompanied by a statement that identifies where to obtain additional information regarding the investment alternatives.

Because IRAs do not have independent fiduciary oversight in the manner applicable to retirement plans, the DOL concluded that “education” was more likely to be perceived as “advice” such that specific investments listed in asset allocation models or interactive tools will be considered an investment recommendation. If an advisor’s services exceed the scope of non-fiduciary investment education and constitute investment advice, the advisor will be considered a fiduciary and the recommendation must be prudent and in the best interests of the person receiving the advice.
Which fiduciary is responsible for monitoring plan fees?

Plan fiduciaries, typically the plan sponsors, are responsible for monitoring plan fees. In recent years there has been an intense focus on retirement plan fees both through regulatory initiatives and class action participant lawsuits raising concerns that excessive fees paid from plan assets have eroded retirement benefits.

Under ERISA, a plan fiduciary engages in a prohibited transaction if he or she uses plan assets to pay a service provider (technically a “party in interest”), unless a prohibited transaction exemption applies. ERISA Section 408(b)(2) provides an exemption for service contracts or arrangements that are “reasonable.” The DOL’s regulations under ERISA Section 408(b)(2) require that in order for an arrangement to be “reasonable,” certain disclosures must be provided by “covered service providers” to the “responsible plan fiduciary.” If a service provider does not provide the required disclosures, causing a prohibited transaction, the consequences can be severe, including payment of excise taxes, return of compensation earned (plus interest), and a potential additional DOL penalty of 20 percent (if the provider is also a fiduciary).

The service provider disclosure rules are designed to ensure that plan fiduciaries receive the information they need to assess the reasonableness of the service provider contract or arrangement and identify potential conflicts of
interest before entering into a service relationship. The service provider disclosure regulations apply to all defined contribution plans, such as 401(k) plans and profit sharing plans, all defined benefit plans, and all 403(b) arrangements that are subject to ERISA. A service provider who expects to receive compensation of $1,000 or more (measured over the life of the contract or arrangement) for services provided to these plans is subject to the disclosure requirements if he or she is:

- An investment advisor registered under the Advisers Act or state law
- An ERISA fiduciary
- A recordkeeper or broker offering investments through a trading platform, or
- Receiving indirect compensation

Most RIAs who work with retirement plans will be “covered service providers” and subject to the fee disclosure requirements. An RIA who receives indirect compensation in the form of 12b-1 fees from mutual fund investments or commissions from annuity contract sales is a covered service provider. Covered service provider status may be triggered for an RIA if he or she provides (i) ERISA fiduciary services directly to the plan (e.g., discretion over the management of plan assets), (ii) ERISA fiduciary services to certain investment contracts, products, or entities in which the plan has a direct equity interest (e.g., collective investment trusts, certain insurance company separate accounts), or (iii) services as an investment advisor registered under the Advisers Act of 1940 or under state law. A service provider’s fiduciary status must be disclosed to the plan sponsor.

The service provider disclosure rules apply to both new and existing service arrangements, and service providers must disclose both direct and indirect compensation. “Direct compensation” is compensation a service provider expects to receive directly from the plan, excluding compensation paid directly by the plan sponsor. “Indirect compensation” is compensation a service provider (or its affiliates) reasonably expects to receive from a source other than the plan or the plan sponsor (e.g., soft dollar arrangements, commissions, non-monetary compensation such as trips or gifts). The disclosure of indirect compensation must also describe who the payor is and how the compensation is paid, such as billed directly or debited from plan assets. The portion of fees related to recordkeeping services must be disclosed separately and must include any revenue sharing or fee offset arrangements. If the services or fees change, an updated disclosure must be provided.
What is the difference between a fiduciary bond and fiduciary insurance?

To further protect the plan, ERISA Section 412 requires each fiduciary who “handles” plan assets to be bonded. The purpose of the bond is to help restore losses to the plan in the event of a fiduciary breach. Bonding rules apply to plan sponsors and their employees who handle plan assets—as well as to third-parties who are considered to handle plan assets—and can be somewhat complex. For example, the DOL has clarified that a person who renders investment advice to a plan but who does not exercise discretionary authority with respect to purchasing or selling securities or other plan assets does not need to be bonded (DOL Field Advice Bulletin 2008-04). In addition, there are a number of exemptions to the bonding rules that apply to certain types of service providers. Even if the rules apply, a service provider may be covered under the bond secured by the plan sponsor. Given the complexity of the bonding rules, if you serve as an ERISA fiduciary, you should consult with your legal advisor to determine whether, and how, the ERISA bonding rules apply to your practice.

In addition to the bonding requirements, some ERISA fiduciaries elect to carry fiduciary insurance. The purpose of fiduciary insurance is to help defray the costs incurred by fiduciaries if they are required to take corrective action following a fiduciary misstep.

What are the consequences for a breach of fiduciary responsibility?

It is important for fiduciaries to take their responsibilities seriously. When fiduciaries do not follow the basic fiduciary standards of conduct, they can be held personally liable for plan losses caused by the breach and may be required to provide compensation through one or more of these actions:

- Restore plan losses (including interest)
- Return ill-gotten gains such as excessive fees
- Pay the expenses relating to correction of inappropriate actions (e.g., appraisals, calculations)

The DOL has enforcement powers under ERISA regarding breaches of fiduciary duty. The DOL may become aware of transgressions through information on the Form 5500, through a plan audit, or via a plan participant complaint. For violations of the civil provisions of ERISA (e.g., failure to act for the exclusive benefit of the participants or using plan assets to benefit

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**ERISA section 412 requires each fiduciary who “handles” plan assets to be bonded.**
a fiduciary), the DOL promotes voluntary compliance through plan corrections, including paying amounts to restore losses, returning profits, and paying penalty amounts (when applicable). If the proper corrective action is taken, the DOL will not bring a civil lawsuit. Criminal actions may be warranted for significant breaches such as embezzlement. Prosecution of these criminal violations is handled by the U.S. Attorneys’ offices.

ERISA also provides that the plan sponsor, participants, and other fiduciaries may take legal action to enforce their legal rights if they think they have been harmed by a breach of fiduciary duty. All ERISA litigation occurs in federal court, and such cases can be lengthy and time-consuming. In recent years, ERISA litigation over the issue of fiduciary duty has increased, particularly class action lawsuits by participants alleging that excessive fees have been paid from plan assets for investments or plan services.
Evaluate your current business model

Before moving ahead to the next section, Prove your value, consider these tips, which are designed to help you monitor your compliance with the ERISA fiduciary requirements.

Practice tip 1 – Review your service model and compensation structure

Examine the services you provide to plan sponsors and plan participants to determine whether you have presented your services as investment advice under ERISA 3(21) or investment management under ERISA 3(38). If you provide non-fiduciary services, evaluate whether your services could be considered “retirement investment advice” under the final DOL rules, triggering ERISA fiduciary status. As you review your service model, analyze both the services you provide to the plan and plan fiduciaries and the services you deliver to plan participants such as investment education or investment recommendations.

If you serve as an ERISA fiduciary, make certain that your compensation structure is permissible under ERISA. As a general rule, ERISA and the Internal Revenue Code prohibit investment fiduciaries from receiving compensation from third-parties or compensation that varies based on the investment vehicles they recommend unless the advisor operates under a prohibited transaction exemption. A prohibited transaction exemption allows activity that would otherwise be prohibited so long as certain safeguards contained in the exemption are followed. The exemption requirements are designed to protect plan participants against potentially conflicted advice.

As described next, some exemptions were created by Congress. Other exemptions are granted by the DOL, including the Best Interest Contract Exemption (BICE), which was released at the same time as the final DOL Conflict of Interest rules.
Service fee arrangements

One approach to align with acceptable compensation models might be to forego the compensation paid by investments and use an alternative arrangement that assesses fees based on specific services, with the fees either paid by the plan sponsor or debited from plan assets. A level fee that does not vary based on an advisor’s recommendations (e.g., fees based on a percentage of assets under management) is another option that does not trigger potential conflicts of interest for investment fiduciaries.

Class exemption

Some advisors and advice services operate under a fee arrangement where you are paid by the investment vehicle but the arrangement has been ruled by the DOL to have adequate checks and balances to protect participant interests from potential conflicts of interest (Advisory Opinions 2011-08A, 2005-10A (Country Trust Bank), 2001-09A (SunAmerica Retirement Markets), 1997-15A (Frost National Bank)). Both amendments to certain existing prohibited transactions (e.g., PTE regarding the sale of immediate and deferred fixed rate annuities) and new exemptions were published by the DOL along with the release of the Conflict of Interest regulations. The new Best Interest Contract Exemption is designed to provide relief from the prohibited transaction rules for business models that include variable compensation and for certain rollover recommendations.

Best interest contract exemption (BICE)

A new prohibited transaction exemption was introduced with the final DOL regulations—the Best Interest Contract Exemption (BICE). This exemption enables advisors to receive variable compensation such as commissions and 12b-1 fees and compensation from third-parties that would otherwise be prohibited under the final regulations. BICE is available for advice provided to:

- IRA owners
- Plan participants
- Small plans (those who hold or manage less than $50 million in assets)
Statutory exemptions under participant advice regulations

Another avenue for structuring compensation is to rely on the fee-leveling or computer fee model arrangements outlined in the DOL’s final investment advice regulations (Regulation 2550.408g). These arrangements, referred to as “eligible investment advice arrangements,” enable investment fiduciaries to accept fees (e.g., commissions and 12b-1 fees) from the investment vehicles they recommend, provided they follow the parameters in the regulations.
Fee-leveling arrangement

- Under the level compensation options, all investments selected by a plan will result in the same amount of compensation paid to the advisor and the applicable broker-dealer firm. In these arrangements, advisors receive a set amount (e.g., 25 or 40 basis points) regardless of which investments are ultimately selected by plan participants. This eliminates the potential for any conflicts of interest because advisors’ recommendations will not impact their compensation. Fee-leveling options are becoming increasingly available in the retirement plan marketplace.

Computer model

- The second eligible advice arrangement set forth in the regulations limits fiduciary investment recommendations to a list of investments generated by a computer model that has been developed and audited under DOL standards.

Changing fee structures

Adjusting your fee structure is an important business decision that should be carefully considered with the support of compliance experts within your firm and legal experts. Under the Conflict of Interest rules, a recommendation to change a fee structure, for example to move from a brokerage account to an advisory account with level compensation, is considered advice and triggers ERISA’s fiduciary standards of loyalty and prudence. Changes in compensation structure also typically impact systems, service agreements and client communications.
Practice tip 2 – Evaluate your IRA rollover practice

The final rules do not change the definition of an ERISA 3(38) investment manager or an ERISA 3(21) investment advisor who acknowledges fiduciary status under an agreement with the plan sponsor or individual retirement investor. As an ERISA fiduciary, you are already subject to the strict fiduciary standards of conduct and must avoid conflicts of interest such as compensation that varies based on the investment selections made, unless you are operating under a prohibited transaction exemption (PTE). Therefore, the service model and compensation structure you use with plan sponsors and plan participants may not change. For this reason, some RIAs mistakenly believe the DOL Conflict of Interest rules will have little impact on their business practices.

The DOL Conflict of Interest rules, however, state that a potential conflict of interest exists when an advisor recommends a distribution or a rollover, such as rolling money out of a plan and into an IRA, that will generate fees for the advisor or the advisor’s firm. This is true even for advisors who have level fee arrangements with IRA owners rather than basing compensation on commissions or 12b-1 fees generated by recommended investments.

Some advisors who serve as ERISA fiduciaries to the plan have established procedures and written agreements with the plan sponsor and the affected participant to separate the advisor’s fiduciary functions from their rollover services (e.g., providing non-fiduciary rollover education but not making a recommendation). Advisors considering this option should consult with their legal advisors to analyze their rollover service model and review applicable service agreements.

Advisors who make rollover or distribution recommendations that are considered “retirement investment advice” under the DOL rules have an alternative path to compliance. Advisors who receive variable compensation (e.g., commissions, 12b-1 fees) in connection with their recommendations may operate under BICE (discussed earlier in the guide). Advisors who will receive level fees (e.g., fees based on a percentage of plan assets) may be able to operate under a streamlined version of the BICE requirements when providing distribution or rollover recommendations.
### Streamlined BICE for level fee advisors

<table>
<thead>
<tr>
<th>Adhere to “Impartial Conduct Standards”</th>
<th>Same requirements as for full BICE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Written statement</td>
<td>Acknowledge fiduciary status</td>
</tr>
</tbody>
</table>
| Provide documentation when recommending a rollover | From an ERISA plan to an IRA – Consideration of alternatives to a rollover, taking into account for each option  
  - Fees and expenses  
  - Whether the employer pays administrative expenses  
  - The different levels of services and investments available  
  From an IRA to another IRA or a switch from a commission-based account to a level fee arrangement  
  - The reasons that the arrangement is considered to be in the “best interest” of the investor, specifically the services that will be provided for the fee |
Practice tip 3 – Monitor new developments

To keep up-to-date on new developments you may also want to subscribe to the IRS’s e-news service, *Employee Plans News*, which includes information regarding significant DOL regulations and enforcement initiatives. A link to subscribe to this newsletter is included in the final section, *Know your resources*. 

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Employee Plans News

The *Employee Plans News* is a periodic newsletter with retirement plan information for retirement plan practitioners - attorneys, accountants, actuaries, and others - from Employee Plans (Tax Exempt and Government Entities (TE/GE) at the IRS).

Sign-up for the *Employee Plans News* and you’ll get information on:

- Upcoming EP benefits conferences;
- What’s new on the IRS web site for retirement plans;
- Recently published guidance; and
- Current EP determination and examination activities.

As needed, news flashes and special editions of the *Employee Plans News* will be issued with news-breaking information.

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A guide to the fiduciary role in a retirement plan
With the regulatory spotlight on fiduciary responsibilities, plan sponsors understand that they need to take steps to manage their fiduciary risk, but they may not know what those steps are. The rules governing fiduciaries in ERISA plans can be complex, and compliance can be challenging—for both advisors and plan sponsors. However, investing the time to understand these rules and how they impact you and your clients can not only prepare you for your responsibilities, but can also position you to incorporate fiduciary support services into your retirement plan business model, helping to set you apart from your competition. Consider making the support services outlined in this section part of your sales and marketing plan—as well as your client retention strategy.

In this section of the guide, we have compiled some practice tips for you to consider incorporating into your retirement plan practice, both with respect to new plan prospects and existing clients. Accompanying each suggested tip, you will find sample tools and practice aids for implementation, such as a flow chart and checklists. Each tool or practice aid referenced in this section is included in Know your resources, the final section of this guide. There, you’ll also find a copy of the document or instructions for accessing the most current version of a DOL document or practice aid. To help you easily locate each practice aid, a graphic of the document is positioned next to the related text in this section.
Practice tip 1 – Position your services relative to the fiduciary requirements

Key takeaway

Define and communicate the scope of your fiduciary support as part of both your prospecting strategy and your client support model to demonstrate your expertise and the depth of services you can provide.

Determine the scope of your fiduciary support

Before you begin to fine-tune your fiduciary support services, it is a good idea to take a step back. Evaluate your existing business model in terms of fiduciary support, and determine how well it is serving you in your target market. There is no single optimum model that fits all advisors. The best business model for you will capitalize on your unique skill set, take into consideration your target clients, and incorporate insights regarding the competitive landscape. A good starting point is to address the following three questions:

1. What ERISA fiduciary support do you provide today?
2. Is your service model competitive in your target market or does it require adjustment?
3. Are you effectively incorporating your fiduciary services into your value proposition?
1. What ERISA fiduciary support do you provide today?

As we discussed in the previous section, Understand the rules, there are different ways to provide ERISA fiduciary support to a retirement plan, including serving in one of the following three capacities:

- A non-fiduciary investment advisor who assists the plan sponsor in meeting their fiduciary responsibilities
- An ERISA 3(21) fiduciary investment advisor
- An ERISA 3(38) investment manager

Many advisors assume ERISA fiduciary responsibility as either an ERISA 3(21) investment advisor or ERISA 3(38) investment manager, but most will limit their fiduciary status to providing investment support. As we discussed earlier, if you represent yourself as an ERISA fiduciary, you will be held to the ERISA fiduciary standards. Even if you do not currently consider yourself an ERISA fiduciary, you will want to reevaluate your current business model in light of the DOL Conflict of Interest rules to assess whether you might now be considered an ERISA 3(21) fiduciary based on the functions you perform. You might be taking on greater responsibility and risk without being compensated for it. In addition, your client may not be aware of the extra services you are providing and thus may not appreciate or value that service.

Remember a few key points as you analyze your current business model:

- You may be a fiduciary to one client and not to another. Your service model may vary depending upon your particular clients’ needs.
- You may be a fiduciary only with respect to certain services that you deliver to the plan (e.g., investment support) but not others (e.g., helping select and monitor service providers).
- If you are a fiduciary, review your compensation structure and service agreements to ensure that they are aligned with your service model. See Understand the rules for a discussion of the impact of fiduciary status on service agreements and compensation models.
- Confirm with your internal legal and compliance resources that you have the appropriate service agreements and disclosures in place to support your business model.

Recommending IRA rollover recommendations triggers fiduciary status

As you analyze your current practices, review your IRA rollover services. As discussed in Understand the rules, rollover recommendations fall within the parameters of investment advice.
subject to the fiduciary standards of loyalty and prudence. Evaluate whether your services will be limited to educational services or will include recommendations. If you will be making distribution and rollover recommendations, work with your compliance resources to review your business practices, documentation, and compensation structure to make certain you are operating in compliance with ERISA or one of the prohibited transaction exemptions such as the streamlined BICE discussed in Understand the rules.

2. Is your service model competitive in your target market or does it require adjustment?

As an advisor active in the retirement plan market, you need to determine what role you want to assume with your clients going forward, particularly whether you want to serve as a non-fiduciary advisor, take the role of a discretionary investment manager fiduciary under ERISA 3(38), or share fiduciary responsibility with the plan sponsor as a non-discretionary investment advisor under ERISA 3(21). With the significant focus on fiduciary standards of conduct triggered by the DOL Conflict of Interest rules, advisors need to be prepared to communicate where their services fall on the fiduciary spectrum.

As you consider your options, evaluate your competition in your marketplace. One way to evaluate the competition is to analyze any recent prospects or clients that you lost to a competitor.
- Was that competitor offering fiduciary investment services that differ from your own business model?

- Would expanding the scope of fiduciary services in your proposal have made a significant difference in your gaining or keeping that client?

- If expanded fiduciary services make sense in your target market, would it be beneficial to introduce outsourced third-party fiduciary service providers for certain services rather than providing them yourself?

- If you are contemplating expanding your fiduciary support services, are there any barriers to entering that space (e.g., broker-dealer restrictions, lack of expertise, or inadequate experience)?

You may find that you need flexibility in your service model. Different plan sponsors have different needs and adhere to different budgets for investment support. Many small business owners are reluctant to hand over the full investment responsibility to anyone, including a trusted advisor. They want to have the ability to challenge and possibly veto an investment recommendation. In other words, they are looking for a partner to advise them, rather than take on full delegation of responsibility. These clients may prefer to work with an ERISA 3(21) investment advisor who provides them investment advice to support them in selecting and monitoring investments. Other plan sponsors may be interested in delegating their investment responsibilities to the greatest extent permitted under the law, in which case an ERISA 3(38) solution may be desirable, provided the costs for such services are within their budget. For a more in-depth discussion of advisor service models, refer to TD Ameritrade’s A Roadmap for Evaluating Retirement Plan Opportunities. A link to this resource is provided in the following section, Know your resources.
3. Are you effectively incorporating your fiduciary services into your value proposition?

Positioning your ERISA expertise and fiduciary support services is an important element of your value proposition—whether or not you actually assume a fiduciary role. Make sure your value proposition describes the breadth of services you will provide to help plan sponsors maintain the health of their plan from a fiduciary perspective. As a trusted colleague in the operation of the retirement plan, you will be much harder to replace than a provider whose support is limited to making investment recommendations.

Plan sponsors may not be fully aware of the value of fiduciary support services. Consider incorporating information in your sales and marketing material about the importance of ERISA fiduciary compliance, stressing the plan sponsor’s responsibilities under ERISA. You might position yourself as the advisor who will be at their side for the long term, playing a critical role in helping them manage their fiduciary responsibilities and operate a healthy plan that meets their business objectives. It is important to help plan sponsors understand that, even if you take on some fiduciary duties, you cannot totally relieve them of their fiduciary role. As you review your value proposition, refer to the tool entitled Building your value proposition located in the following section, Know your resources, for a list of potential fiduciary support messages to incorporate.

Review your sales and marketing materials and make sure your value proposition relative to fiduciary support is clearly communicated. A good way to start the conversation about fiduciary duties is to ask a prospective client with an existing plan, “Who are the current fiduciaries to the plan?” Based on how the plan sponsor responds, you will gain insight as to whether they are fully aware of the fiduciary responsibilities and whether any significant time or energy has been spent addressing them. You can then introduce the breadth and depth of support you can provide, thus demonstrating your expertise in this area and increasing your value as perceived by the client. Work with your compliance resources to make certain your communications comply with your firm’s requirements and any applicable portions of the Conflict of Interest rules or prohibited transaction exemptions (e.g., BICE).
Don’t neglect to also include a fiduciary discussion with your current clients at your next quarterly presentation of investment results. This can emphasize the value-add services that you have already been giving them or introduce an expanded level of service.

Even if you do not assume the role of an ERISA fiduciary, communicate how your services are critical in helping the plan sponsor fulfill fiduciary responsibilities through services such as:

- Delivering reports regarding investment performance
- Reviewing investments against the criteria outlined in the plan’s Investment Policy Statement (IPS)
- Providing references to compliance resources
- Providing investment information and benchmarking resources
- Providing regulatory information and updates that are relevant to the plan

**Practice tip 1 – summary**

- Evaluate your current service model relative to fiduciary support and determine whether your existing model is competitive. Analyze recent cases lost to a competitor to determine whether the scope of your fiduciary support was a factor.

- If you assume fiduciary responsibility under ERISA 3(21) or 3(38), review your service agreements and compensation structure with your compliance resources to ensure they are appropriate given your fiduciary status.

- Make a commitment to stay educated and current on retirement plan industry developments.

- Review the value proposition you present in your marketing and sales materials to ensure you are clearly communicating how your fiduciary support services will help prospective clients.

- Include fiduciary discussions as part of your quarterly investment updates with existing clients.
Practice tip 2 – Educate plan sponsors about the importance of fiduciary compliance

Key takeaway

Provide crucial support to plan sponsors by helping them understand the full scope of their fiduciary responsibilities and the risk they face if they do not comply with ERISA’s fiduciary mandates.

As discussed in Understand the rules, plan sponsors typically serve as both the named fiduciary and ERISA 3(16) plan administrator and are held to high standards of conduct as they administer the plan and manage plan assets. Yet, many plan sponsors lack a deep understanding of their role as an ERISA fiduciary and think that by hiring service providers, they’ve absolved themselves of these responsibilities. One of the most valuable services you can provide as an advisor is to help plan sponsors understand what it means to be a fiduciary—and how important it is to comply with ERISA’s fiduciary rules. Plan sponsors will be in the best position to meet their fiduciary responsibilities when they understand their responsibilities, hire experts as needed, and diligently follow processes and procedures designed to ensure that all of ERISA’s standards of conduct are met. Showcasing your fiduciary education services to prospective clients as part of your value proposition can help differentiate you from your competition.

Educate plan sponsors about their fiduciary role

The ERISA fiduciary education you deliver can take a number of different forms and can cover a broad range of topics. **Consider delivering basic fiduciary education to all new clients who are setting up a new plan.** Include all staff members who will be performing fiduciary functions (i.e., anyone who will have discretionary control over the management of the plan or its assets). An important component of the educational process may involve helping the plan sponsor identify all of the plan’s fiduciaries and the roles and responsibilities of each. **You may want to repeat the basic fiduciary training as new staff members are assigned to fiduciary functions or new members are added to a plan committee or investment committee.** Reviewing the terms of the plan document may be another component of your fiduciary training, since fiduciaries are responsible for ensuring that the plan is administered in accordance with the terms of the plan document.

For new clients who have an existing plan, evaluate their depth of understanding regarding fiduciary responsibilities, and tailor your training accordingly. Even if they have sponsored a plan for years, it may be beneficial to provide an ERISA fiduciary refresher course.
Once you have established a foundational level of ERISA knowledge among your clients, introduce fiduciary topics to your clients as appropriate. Topics could include regulatory developments, DOL enforcement trends, or significant litigation affecting fiduciaries. As you help your clients evaluate their level of ERISA fiduciary compliance, you may identify gaps that indicate a need for deeper fiduciary education.

Match the method for delivering training to your personal strengths and to your client’s preferred learning model. If you find live presentations most effective, consider incorporating fiduciary education into your quarterly or annual meetings. This may drive strong attendance—and result in efficiencies with respect to your time and resources, as well as those of your clients. Consider supplementing your presentation with materials plan sponsors can reference and share in order to reinforce the messages you deliver in your training sessions. You may also want to introduce your clients to third-party webinars or seminars such as those offered by the DOL.

**Tap into DOL fiduciary training resources**

Few advisors have the time to build their own fiduciary educational materials. Fortunately, there are a variety of resources you can leverage as you conduct educational programs or consult with plan sponsors that will help them in performing their fiduciary duties. For example, the DOL website offers a valuable library of fiduciary educational resources.

**DOL fiduciary education campaign**

The DOL has developed extensive training materials, brochures, and other tools designed to help plan sponsors understand their fiduciary responsibilities. These resources are free and can be accessed through the DOL website at [www.dol.gov](http://www.dol.gov). One example you may wish to incorporate into your fiduciary education model is the brochure *Meeting Your Fiduciary Responsibilities*. A link to this item is included in the following section, *Know your resources*. This brochure provides an overview of various fiduciary responsibilities and can be useful in providing basic fiduciary education to plan sponsors.

**Practice tip 2 – summary**

- Describe your fiduciary education services in presentations to prospective clients
- Deliver basic fiduciary education to new clients
- Provide discussions of timely fiduciary topics at quarterly and annual plan meetings
- Tap into the DOL’s library of fiduciary education materials, such as *Meeting Your Fiduciary Responsibilities*
Practice tip 3 – Help plan sponsors conduct a fiduciary compliance assessment

Key takeaway
Helping your retirement plan clients proactively assess the fiduciary health of their plan provides an excellent opportunity to strengthen your relationship. In addition, showcasing your assessment support services to prospective clients can be a powerful component of your sales and marketing messaging.

Confirm prudent practices and procedures are in place

A critical aspect of carrying out a fiduciary’s duties under ERISA is following the prudent person rule—in other words, carrying out duties with the care, skill, and diligence that a prudent person familiar with the matter at hand would use. While the list of fiduciary responsibilities can seem daunting to a plan sponsor, the good news is that procedural due diligence—that is, following a prudent decision-making process—is key to ERISA compliance. Different fiduciaries may reach different conclusions, but if they set up and follow sound procedures and systems with checks and balances, they have likely satisfied their fiduciary obligation. Courts place great deferential weight on decisions made by fiduciaries that follow a reasonable, well-documented process.

You can play a critical role in helping plan sponsors review their existing policies and practices and identify gaps that could lead to compliance missteps. Begin by finding out what current polices have been adopted and documented. For plan sponsors, creating written operating policies and procedures for critical plan functions is a key best practice. Written polices will help guide individuals to consistently consider all important factors and make educated decisions. Examples of policies could include an Investment Policy Statement (IPS) and steps to follow for selecting and monitoring service providers. Written policies should be reviewed on a regular basis and updated as needed. For example, an IPS must be evaluated regularly in order to admit for consideration newly introduced investment products and to keep current with any changes to the plan or within the economic environment or financial industry.
There should be a clear understanding regarding who is responsible for driving critical plan functions and the timeline for completing those functions.

For example:

- How often will investments be reviewed, and who will participate in the review?
- Which investment and administrative functions have been delegated to service providers?
- Who will oversee the service provider relationships (e.g., reviewing reports or other information and monitoring service provider performance and fees)?
- Who will be responsible for monitoring payroll practices to ensure timely deposits of employee contributions are made to the plan?

Explain to plan sponsors the importance of keeping written records documenting their compliance with the written policies and procedures. For example, meeting minutes should be drafted for all plan and investment committee meetings. If retirement plan issues were addressed by the board of directors or other governing authority (e.g., authorization for plan amendments, investment decisions, or replacing service providers), those meeting minutes should be part of the plan record. At minimum, the meeting minutes should include the following:

- The date, time, and location of the meeting
- Who attended
- A summary of all critical decisions made at the meeting

A copy of the meeting agenda, minutes, and all reports and collateral material reviewed at the meeting should be stored with the plan document and other plan information.
Help plan sponsors assess current fiduciary compliance

In addition to assessing whether prudent practices have been adopted and documented, you can help plan sponsors assess their compliance by reviewing some of the most common fiduciary missteps. Given plan sponsors’ potential fiduciary liability, it is critical that they have a grasp of some of the most common fiduciary missteps and proactively assess their compliance. A fiduciary checklist is included in Know your resources. The checklist includes a number of the fiduciary compliance issues that have been the subject of fiduciary litigation as well as common fiduciary breaches that can be corrected through the DOL Voluntary Fiduciary Correction Program (VFCP). If you are working with a new plan prospect, use the checklist to help identify gaps in knowledge or illustrate the types of fiduciary support services you can provide. It will also help you illustrate the depth of your knowledge regarding fiduciary compliance. For existing plans, the checklist can be leveraged to conduct a self-assessment exercise and identify areas where you can help the plan sponsor improve overall fiduciary compliance.

If one of your clients discovers a fiduciary breach, encourage him or her to explore self-correction options offered by the DOL.

Encourage proactive correction of fiduciary breaches

If one of your clients discovers a fiduciary breach, encourage him or her to explore self-correction options offered by the DOL. As an advisor, you will not typically be involved in selecting correction methodologies or performing calculations. Rather, your role is to make plan sponsors aware that self-correction programs are available and to introduce them to service providers such as third-party administrators and attorneys who offer correction services. The DOL developed the Voluntary Fiduciary Correction Program (VFCP) to allow plan sponsors to self-correct certain
violations of ERISA—such as the late deposit of employee contributions, payment of improper plan expenses, and sales and exchanges between the plan and a party in interest. The VFCP is designed to help plan sponsors and other fiduciaries identify and voluntarily correct certain ERISA violations by making corrective contributions that restore the plan to the position it would have been in had the breach not occurred. The VFCP program includes:

- A list of transactions that can be corrected under VFCP
- Descriptions of acceptable correction methods
- An online calculator and other resources to determine the correction amount

A second DOL correction program you may wish to discuss with your clients is the Delinquent Filer Voluntary Compliance Program (DFVCP). This program allows late or missed Form 5500 filers to bring their filings up-to-date.

Links to VFCP’s online calculator and more information about both of these correction programs are provided in the following section, Know your resources.

Practice tip 3 – summary

- Educate plan sponsors about the importance of adopting prudent practices and policies.
- Help plan sponsors assess their compliance with fiduciary requirements using the fiduciary checklist located in Know your resources.
- Leverage the fiduciary checklist as a prospecting tool to demonstrate the depth of fiduciary support you can provide to prospective clients.
- Introduce your clients to self-correction programs and help them secure correction support services if they discover a fiduciary breach.
Practice tip 4 – Help plan sponsors select and monitor service providers and plan fees

Key takeaway

Helping plan sponsors fulfill the important fiduciary task of prudently selecting and monitoring service providers is a valuable service that you can deliver.

Help plan sponsors understand plan fees

Your plan sponsor clients have a fiduciary obligation to make certain that only reasonable fees are paid from plan assets. As a first step in helping your clients monitor plan fees, you may need to educate plan sponsors about the basic types of investment and administrative fees that are typical for a retirement plan. Included in the Know your resources section is a sample article that you may wish to leverage as you conduct conversations about fees and fee structures with clients. As you review the types of fees outlined in the article, discuss your fee model and outline the breadth and depth of support you provide to the plan in exchange for the fees. It’s important to communicate to plan sponsors that fees are one element of investment and service provider selection, not the only factor that they should take into consideration. The lowest cost service or lowest cost investment may not be a prudent option for their plan.

Educate plan sponsors about their fiduciary role in selecting service providers

Your plan sponsor clients have a fiduciary obligation to prudently select and monitor service providers and to make certain that only reasonable fees are paid from plan assets. For you, this is yet another opportunity to lend your support. Even if you choose to serve as a plan fiduciary with respect to investment selection—you may elect to provide service provider selection support as a non-fiduciary function, offering information but leaving the ultimate decisions to the plan sponsor. If you make a recommendation regarding a service provider that will be providing investment advice services and you or your firm receive compensation as a result of that recommendation, you will be considered an ERISA fiduciary under the DOL
Conflict of Interest regulations. It is a good practice to incorporate a description of your service provider selection and monitoring services in your presentations to prospective clients.

Offering checklists or questionnaires is one way to assist the plan sponsor in understanding the importance of carefully selecting and monitoring service providers. The DOL has created a list of issues plan sponsors should consider when evaluating service providers. A link for the two-page summary, *Getting It Right: Tips for Selecting and Monitoring Service Providers for Your Employee Benefit Plan*, is included in the following section, **Know your resources**.

As a means of making the DOL’s service provider evaluation content more usable in the context of the service provider disclosure requirements, we created a **sample review checklist** that you can leverage. Content for the **review checklist** is included in the final section of this guide. Of course, the process of selecting service providers will vary depending on the services to be provided.

Help plan sponsors define their processes and document decisions

As a fiduciary, procedural prudence is critical. The plan sponsor must follow a reasonable process for selecting and monitoring all service providers and reviewing service provider disclosures. You can provide valuable support by helping plan sponsors define their objectives, needs, and processes for conducting their search.

It is likely that the service provider information will be collected and analyzed in different ways, depending upon the type of services needed. For example, some plans may elect to use a formal Request for Proposal (RFP) process, while others will simply solicit certain information from a selected group of service providers. Typically, the employer will want to request the same information from each service provider under consideration in order to make a meaningful comparison. In its online eLaws® **ERISA Fiduciary Advisor**, the DOL provides a list of information a plan sponsor should request from each service provider. A copy of the list and instructions for accessing the DOL’s fiduciary advisor tool are provided in **Know your resources**.
The plan sponsor should define who will be responsible for making ultimate decisions as well as the process that will be followed. If a plan sponsor uses a plan committee or investment committee to oversee service provider selection, it is likely that some of the important decisions regarding service providers will be made during those meetings. You can help your plan sponsor clients understand the importance of keeping written records of any actions taken at those meetings. There may be phone calls with certain “experts” or other discussions that should also be tracked. One of your roles may be to help plan sponsors understand the importance of keeping records of key service provider decisions and designing a strategy for retaining this information.

Help plan sponsors comply with the ERISA 408(b)(2) service provider disclosure requirements

Under ERISA, a plan fiduciary engages in a prohibited transaction if they use plan assets to pay a service provider (technically classified as a “party in interest”), unless an exemption applies. ERISA Section 408(b)(2) provides an exemption for service contracts or arrangements that are “reasonable.” The DOL’s regulations under ERISA Section 408(b)(2) require that in order for an arrangement to be “reasonable,” certain disclosures must be provided by “covered service providers” to the “responsible plan fiduciary.”

To assess whether a service provider’s fees are reasonable, the plan sponsor’s review of the fee disclosure should typically include benchmarking the fees of the plan’s service providers against other service providers who deliver comparable services. In your role as an advisor, you may wish to collect fee schedules from other providers to help plan sponsors perform this function—or share various benchmarking tools that have become available in the marketplace. Your role will typically include helping a plan fiduciary weigh fees against other elements that should be considered when selecting investments or services, including comparing fees for various investment and service options. You may want to communicate to plan sponsors that while the amount of fees paid for a service is important when selecting service providers and investments, cost is not the only variable to consider.

If a service provider does not provide the required information, or provides information that the plan sponsor discovers is incorrect, accepting services is generally prohibited by ERISA and is considered a breach of a plan sponsor’s fiduciary responsibilities to the plan. The service provider disclosure regulations provide plan sponsor relief if the plan sponsor provides written notice to the service provider requesting the information as soon as the deficiency is discovered. If the service provider refuses or fails to respond within 90 days, the plan sponsor must notify the DOL.

The DOL has developed a Web page that allows plan sponsors to electronically notify the DOL of a service provider’s failure to provide fee information required by the regulations.
The electronic submission process contains mandatory fields that collect plan information and information regarding the noncompliant service provider. A plan sponsor will not be able to file the notice electronically unless the required information is provided. The plan sponsor must generally provide notice to the DOL within 30 days to qualify for relief.

A link to the DOL web page is included in the Know your resources section. Educate your plan sponsors about the rules requiring them to terminate the relationship with any service provider who fails to provide the required notices regarding future services and alert plan sponsors to the DOL electronic notification process.

Help plan sponsors document their compliance efforts

For a fiduciary, procedural prudence is critical. The plan sponsor must follow a reasonable process for reviewing service provider disclosures and assessing the reasonableness of fees. Even if a different plan sponsor would have made a different choice, if your client followed a reasonable process, his or her requirements would have been met under the regulations.

Using the checklists discussed in this section is one means of documenting compliance with the regulations. It is likely, however, that the information will be collected and analyzed in different ways. For example, if a plan sponsor uses a plan committee or investment committee to oversee the fee disclosure requirements, it is likely that some of the important decisions regarding service providers will be made during those meetings. You can help your plan sponsor clients understand the importance of keeping written records of any actions taken at those meetings. There may be phone calls with certain experts or other discussions that should also be tracked.

One of your roles may be to help plan sponsors (1) understand the importance of keeping records of key service provider decisions and (2) design a strategy for retaining this information. Following is a list of plan sponsor fee-related documentation that you may wish to suggest to your clients.

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Plan sponsor fee-related documentation

- Document when and how fee disclosures were collected from each vendor.
- Keep in the file any benchmarking information used to compare fees with other service providers.
- Document the vendors selected and the criteria used. (A checklist or chart can be helpful in tracking this information.)
- Keep a list of consultants or other experts engaged, along with a summary of their recommendations.

Practice tip 4 – Summary

- Educate plan sponsors about the types of fees that may arise in connection with a retirement plan and help them understand their fiduciary responsibility to monitor plan fees.
- Incorporate a description of any service provider selection and monitoring services in your presentations to prospective clients.
- Leverage checklists or questionnaires to assist plan sponsors in selecting and monitoring service providers. A link for the DOL’s summary *Getting It Right: Tips for selecting and Monitoring Service Providers for Your Employee Benefit Plan* is included in the next section’s Addendum.
- Help plan sponsors understand their responsibility to collect and analyze service provider fee disclosures.
- Provide benchmarking information to help plan sponsors determine whether fees are reasonable.
- Educate plan sponsors about the requirement to terminate their relationship with any service provider who fails to provide the required notices regarding future services. A link to the DOL’s electronic notification process is included in the Know your resources section.
- Help plan sponsors understand how to keep records documenting their compliance with the service provider disclosure regulations.
Practice tip 5 – Introduce options for managing fiduciary risk

Key takeaway

Demonstrate your value by introducing risk-mitigation strategies and resources.

Your retirement plan clients need information about how to better manage their plans relative to fiduciary risks. When you are the source of that information, you increase the value of your relationship with the client. If you guide your clients to critical resources and serve as a source of information as plan sponsors seek to mitigate fiduciary risk, you may help them prevent or correct problems before they become crises.

Line up the right team of professionals

Plan sponsors cannot fully delegate away all accountability under ERISA, but they can and should choose experts for support. Most plan sponsors find it necessary to engage the services of investment professionals to help select and monitor investment options for their plan. As we discussed earlier, there are different models for delivering investment support:

- Non-fiduciary guidance
- ERISA 3(21) investment advice
- ERISA 3(38) investment management

Your role is to help educate plan sponsors about their various investment support options so that plan fiduciaries can select models that best suit their needs.

Most plan sponsors also need a third-party administrator or recordkeeper to provide administrative support. And while many plan sponsors fulfill the role of the ERISA 3(16) plan fiduciary, some plans have elected to hire a third-party to provide fiduciary oversight of the plan administration functions. If this is a need expressed by your clients or prospects, you can help them explore ERISA 3(16) service options available through third-parties or through certain third-party administrators. Other sources for plan sponsor support include attorneys and CPAs who can provide valuable accounting, auditing, and legal services.

Working with retirement plans subject to ERISA is a highly specialized knowledge area. You can help plan sponsors locate professionals with special expertise in handling ERISA plans. Be aware, though, that selecting investment professionals and administrative service providers is a fiduciary function.
Explore the benefits of assembling an internal team

In addition to hiring outside professionals, certain plan sponsors may wish to explore the potential of delegating certain fiduciary responsibilities to a plan committee. Using a committee can help formalize a prudent decision-making process, as discussed earlier in Practice tip 2—Educate plan sponsors about the importance of fiduciary compliance. If a plan sponsor establishes a committee to oversee the operations of the retirement plan, they typically grant the committee authority to make decisions regarding the administration of the plan or selection of plan investments, and the members of the committee will be considered fiduciaries. A single plan committee can manage both plan investments and plan operations—or the plan sponsor may choose to establish a separate investment committee.

If a plan sponsor uses committees, a clear set of responsibilities and expectations must be established (e.g., it must be clear which decisions the committee will make versus those recommendations that must be referred to the Board of Directors or other governing body for approval). Given the important role of the committee, the plan sponsor should ensure that committee members understand the business objectives behind establishing the plan as well as the plan features. Committee members should also receive education regarding what it means to be a plan fiduciary.

For small businesses, it may be too cumbersome to establish a committee and observe the formalities that go along with that approach.
In these situations, plan sponsors should still consider whether they can tap into the expertise of other individuals in the company, such as the chief financial officer or human resources staff, to help manage the plan.

**Help clients understand the option to delegate investment responsibility to participants**

One action a plan sponsor can take to minimize fiduciary risk is to follow the requirements of ERISA Section 404(c) regarding participant investment control in 401(k) plans. If a plan meets the requirements for the 404(c) safe harbor, then the fiduciaries are not liable for any investment loss incurred by the participants due to the participants’ investment decisions. Educating plan sponsors about the ability to delegate investment risk under ERISA 404(c) can be a component of the value-add service you provide.

In a nutshell, under ERISA 404(c), participants must be allowed the following:

- To choose from a broad range of investment alternatives (with at least three core investment options that have materially different risk and return characteristics)
- To diversify both among and within each core investment
- To make investment changes at a frequency that is appropriate in light of the market volatility of the investment (at least quarterly)
- To receive sufficient information to make informed investment decisions

**Explain the benefits of using a QDIA as the designated default investment**

If a plan allows participants to select investments, the plan sponsor must select a default investment for plan contributions made by participants who do not make an investment selection. A default investment is necessary for any plan that allows participant investments, but it may be even more heavily used in certain plans, such as those that offer automatic enrollment. If a plan sponsor chooses an investment that meets the requirements to be a Qualified Default Investment Alternative (QDIA), the plan sponsor will be relieved of fiduciary liability for the performance of the default investment. Adding a QDIA option is often considered as part of an investment risk mitigation plan. Four investment vehicles qualify as a QDIA:

- Life-cycle or targeted-retirement-date funds
- Professionally managed accounts
- Balanced funds
- Capital preservation products (only for the first 120 days of participation)

To obtain the fiduciary relief for a QDIA investment, plan sponsors must provide a written notice to participants describing the circumstances under which a participant’s account may be invested.
in a QDIA, the participant’s right to select an alternative investment, a description of the QDIA, and an explanation of where to obtain additional information. Information on the QDIA, such as a prospectus, must also be provided to participants. Like the ERISA 404(c) option, offering a QDIA is not mandatory, but it is a popular risk mitigation practice that you may want to discuss with clients.

**Practice tip 5 – summary**

- Clarify to plan sponsors that they cannot fully delegate their fiduciary responsibilities.
- Help plan sponsors evaluate the various fiduciary and non-fiduciary investment support options available to them.
- Introduce plan sponsors to administrative support service providers such as recordkeepers, custodians, and third-party administrators.
- Assist plan sponsors in evaluating the potential benefits of establishing a plan committee or investment committee.
- Help plan sponsors evaluate whether they would benefit from delegating investment responsibility under ERISA 404(c).
- Educate plan sponsors about the role of a default investment and the potential benefits of using a QDIA as a designated default option.

**Prove your value summary**

This guide has covered a large amount of material regarding fiduciary roles in ERISA retirement plans. We hope that it has been helpful in clarifying the various fiduciary responsibilities and shaping your thoughts regarding your desired role when working with ERISA retirement plans. Use this guide as a reference tool as you develop your retirement plan practice. By staying alert to the changing rules and products in the retirement plan marketplace, you can position yourself as a retirement plan specialist for your clients, assisting them in fulfilling their fiduciary responsibilities, and perhaps providing your own fiduciary services. We hope that this discussion and the various tools and reference items are useful for you in your practice.

Get detailed information about and access to the resources referenced in this section by proceeding to the next component of this guide.
Know your resources

A guide to the fiduciary role in a retirement plan
Get to know your resources

In this section

You’ll find references to tools and practice aids that may be useful in implementing each of the tips presented in the previous sections, Understand the rules and Prove your value, including items such as fiduciary checklists, plan sponsor training curricula, and retirement news resources.
As described in Understand the rules, Practice tip 3, an easy way for advisors to monitor new developments affecting retirement plans is to subscribe to the free IRS e-news service, Employee Plans News. Three to four times per year, the IRS provides an electronic newsletter with a summary of significant developments. While the newsletter focuses primarily on IRS pronouncements and enforcement activity, a DOL column is typically included to highlight significant DOL projects and pronouncements. Use the URL above to subscribe to this newsletter.

As mentioned in Prove your value, Practice tip 1, it’s a good time analyze your current service model relative to retirement plan services both for regulatory compliance and competitiveness in the marketplace. The Advisor Practice Guide is a comprehensive resource designed to help you evaluate whether adding or expanding retirement plan services has the potential to help diversify and stabilize your business—and position you for growth.
Building your value proposition

Source: Integrated Retirement Initiatives, LLC
Link: View on page 64 of this section
File: 1-page PDF

DOL publication: Meeting Your Fiduciary Responsibilities

Source: www.dol.gov
File: 20-page PDF

As proposed in Prove your value, Practice tip 1, consider incorporating information about the importance of ERISA fiduciary compliance into your sales and marketing materials. Position yourself as an advisor who will be available to plan sponsors for the long term, helping them manage their fiduciary responsibilities and operate healthy plans. This tool highlights some potential fiduciary support messages you can consider and build on as you develop your unique value proposition.

This DOL publication provides plan sponsors with an overview of the basic fiduciary responsibilities applicable to retirement plans under the Employee Retirement Income Security Act (ERISA). It includes a simplified explanation of the law and accompanying regulations. As discussed in Prove your value, Practice tip 2, this can be useful in providing basic fiduciary education.
Fiduciary checklist

Source: Integrated Retirement Initiatives, LLC

Link: View on page 65 of this section

File: 2-page PDF

As explained in Prove your value, Practice tip 3, this fiduciary checklist includes a number of compliance issues that have been the subject of litigation as well as common breaches that can be corrected through the DOL Voluntary Fiduciary Correction Program (VFCP). The checklist may help identify knowledge gaps for a new prospect or illustrate the types of fiduciary support services that you provide. For existing plans, it can be used to conduct a self-assessment exercise to identify areas where you can help the plan sponsor improve overall fiduciary compliance.
DOL frequently asked questions (FAQs): Voluntary Fiduciary Correction Program (VFCP)

Source: www.dol.gov


File: 4-page PDF

In Understand the rules, we discussed the consequences of fiduciary breaches, and in Prove your value, Practice tip 3, we discussed the DOL’s program for correcting certain fiduciary breaches. This set of frequently asked questions (FAQs) provides an overview of the DOL’s voluntary correction program for fiduciary violations. These FAQs describe what types of ERISA violations may be corrected under the VFCP, who is eligible for the program, and how to submit an application for relief. This may be a good source of information when responding to plan sponsor inquiries, or you may elect to provide the FAQs to plan sponsors who have engaged in actions that may require correction.
DOL online tool: VFCP online calculator  
Source: www.dol.gov  
Link: http://askebsa.dol.gov/vfcpcalculator/webcalculator.aspx  
File: Interactive website  
Plan fiduciaries may use the VFCP to correct certain types of ERISA fiduciary violations and apply for relief from enforcement actions, including fines. The DOL website includes an online VFCP calculator that helps plan sponsors calculate the correction amounts that must be paid to the plan.

DOL frequently asked questions (FAQs): The Delinquent Filer Voluntary Compliance Program (DFVCP)  
Source: www.dol.gov  
File: 8-page PDF  
The DFVCP is designed to encourage voluntary compliance with the annual Form 5500 reporting requirements under ERISA. The program gives delinquent plan sponsors a way to avoid potentially higher civil penalty assessments. This set of FAQs provides information regarding who is eligible to participate in the DFVCP, how to calculate the penalty amounts, and how to file. The FAQs may be helpful in responding to plan sponsor inquiries, or you may elect to provide the FAQs to plan sponsors who have filed an incomplete Form 5500 or missed their filing deadline.
Introduction to retirement plan fees

Source: Integrated Retirement Initiatives, LLC

View on pages 67–68 of this section

File: 2-page PDF

This article introduces the various types of fees associated with administering a retirement plan. In order to help plan sponsors better understand fee disclosure, you may need to begin by providing them with information about the basic types of investment and administrative fees that are typical for a retirement plan. As discussed in Prove your value, Practice tip 4, you may want to leverage this article as you conduct conversations about fees and fee structures with clients.

DOL publication:
Getting It Right: Tips for Selecting and Monitoring Service Providers for Your Employee Benefit Plan

Source: www.dol.gov


File: 2-page PDF

There are numerous issues that plan sponsors should consider when selecting and evaluating service providers. This 2-page summary provides a starting point for helping plan sponsors fulfill their fiduciary obligations when selecting and monitoring plan service providers. As suggested in Prove your value, Practice tip 4, offering checklists or questionnaires (like this DOL list of issues to consider) is one way to assist plan sponsors in evaluating service provider fees and services.
Sample review checklist

Source: Integrated Retirement Initiatives, LLC

View on page 69 of this section

File: 1-page PDF

As stated in Prove your value, Practice tip 4, offering checklists or questionnaires is one way you can assist plan sponsors in complying with their responsibilities under the fee disclosure regulations. The sample review checklist was created as a component of the Practice Guide to help plan sponsors apply some of the principles outlined in the DOL publication, Getting It Right: Tips for Selecting and Monitoring Service Providers for Your Employee Benefit Plan.
DOL publication: eLaws® ERISA Fiduciary Advisor excerpt: Hiring a service provider
Source: www.dol.gov
Link: http://webapps.dol.gov/elaws/ERISAFiduciary.htm
File: View a formatted PDF of the checklist on page 70 of this section

As fiduciaries, plan sponsors must follow a reasonable process for selecting and monitoring all service providers. You can provide valuable support by helping plan sponsors define their objectives, needs, and process for conducting their search. As noted in Prove your value, Practice tip 4, one of the most helpful sections of the DOL’s online eLaws® ERISA Fiduciary Advisor interactive web tool provides a list of information that plan sponsors should request from each service provider. We have re-created this checklist in the Addendum to this guide.

Fee Disclosure Failure Notice
Source: www.dol.gov
Link: https://www.askebsa.dol.gov/fdfn/
File: Web-based document

If a service provider refuses or fails to respond to a plan sponsor notification of delinquent or inaccurate fee disclosure information within 90 days, the plan sponsor must notify the DOL. As stated in Prove your value, Practice tip 4, the DOL has developed a Web page that enables plan sponsors to electronically notify the DOL of the service provider’s refusal or failure to respond.
Get to know your resources: Addendum

Contents

• Building your value proposition
• Fiduciary checklist
• Introduction to plan fees
• Sample review checklist
• eLaws® ERISA Fiduciary Advisor excerpt: Hiring a service provider
Building your value proposition

As you build your unique value proposition, consider whether some of the following messages should be incorporated:

- You have deep experience with retirement plans (e.g., number of retirement plan clients or volume of retirement plan assets)
- You have special credentials or experience in helping other plan sponsors succeed
- You understand the important ERISA fiduciary obligations that plan sponsors assume when they choose to offer a retirement plan
- You can provide education to deepen plan sponsors’ understanding of their fiduciary responsibilities and keep them updated on new developments
- You can work with Investment Committee members to guide them through complex issues
- Fiduciaries are in the DOL spotlight and face new responsibilities as a result of the DOL fee disclosure initiative
- You can introduce resources to help assess plan sponsors’ fiduciary compliance
- Where applicable, you can offer investment risk mitigation through ERISA 3(38) services or shared risk through ERISA 3(21) services
- You can introduce plan sponsors to service providers and other resources that will help them meet their ERISA obligations (e.g., third-party administrators, recordkeepers, and plan corrections experts)
Fiduciary checklist

The following checklist captures a number of the fiduciary compliance issues discussed in this guide. If you are working with a new plan prospect, the checklist may help identify gaps in knowledge regarding fiduciary compliance and illustrate the depth of support services you can provide. For existing plans, the checklist can serve as a reminder of the broad range of fiduciary responsibilities that must be monitored on an ongoing basis. It can also identify opportunities for you to help plan sponsors improve overall compliance.

1. Who are the plan fiduciaries (staff and service providers)?
   - What responsibilities have been assigned to each fiduciary?
   - Has each fiduciary employed by your business received sufficient basic fiduciary education?
   - Do you receive ongoing fiduciary education on DOL enforcement trends and other current developments?

2. Do you have a fidelity bond covering the fiduciaries who “handle” plan assets?

3. How would you grade your investment expertise? Have you engaged adequate investment support?
   - What investment support services have you retained (e.g., non-fiduciary advisor, ERISA 3(21) investment advisor, ERISA 3(38) investment manager)?
   - Do you have a clear understanding of your responsibilities regarding the monitoring of your investment professional?

4. Have you adopted written policies and procedures for key plan functions?
   - Have you adopted an Investment Policy Statement (IPS)?
   - If so, when was the IPS last reviewed?
Fiduciary checklist (Continued)

5. What is your process for selecting and monitoring service providers?
   - How do you document the criteria used to select service providers?
   - How do you benchmark fees?
   - Do you have written records confirming receipt of all required fee disclosures?
   - Do you have an ongoing service relationship with any service provider who has not provided the required fee disclosures?
   - Do you understand which fees can be paid from plan assets?

6. What is your timeline for depositing employee contributions and loan repayments into the plan?
   - How do you monitor compliance with the DOL’s timely deposit requirements?
   - Have any of your deposits been delinquent?
   - If so, have you made corrective contributions?

7. Is your plan administered according to the terms of the plan document?
   - When did you last review the plan terms with plan fiduciaries and administrative service providers?
   - How do you administer defaulted loans?

8. Have you filed all required reports and provided all required participant disclosures in a timely manner?

9. What written records do you keep to confirm that you are following your policies and procedures?
Introduction to retirement plan fees

An employer that adopts a retirement plan (the “plan sponsor”) has a fiduciary obligation under the Employee Retirement Income Security Act of 1974, as amended, (ERISA) to monitor service providers and investment providers and ensure that retirement plan fees are reasonable and necessary for the administration of the plan. To help employers fulfill these obligations, the Department of Labor (DOL) requires service and investment providers to furnish clear and complete fee information to employers.

To analyze this fee information and make cost-benefit decisions, employers must understand the fees incurred. But the level of services and the combining of services (from a fee standpoint) vary greatly from one service provider to another. As a result, these fee arrangements often appear complex and make an “apples-to-apples” comparison of costs challenging. This section provides a basic introduction to the various types of plan fees and how they can be paid.

In general, plan fees can be separated into two main categories: (1) fees related to investments, and (2) fees related to the setup and ongoing operations of the plan.

### Investment fees

Investment fees, associated with managing the plan investments, make up the largest component of plan fees. Typically expressed as an expense ratio, these fees reduce the net total return of the investment. Because investment fees are deducted directly from the investment account, rather than being paid independently by the employer or participant, they are considered indirect charges.

Investment fees are generally disclosed to the employer and plan participants through the investment disclosure, such as the prospectus for a mutual fund investment or in an annuity contract. Fees vary with the type of investment and among investments within the same class of investments. Financial advisors can help employers understand and compare the fee structure for various investment options, as well as more complex fee structures, such as “revenue sharing” arrangements wherein a portion of the investment fees (e.g., subtransfer agent fees) may be used to offset the cost of administrative services that would otherwise be charged to the plan or participants.

- Deducted directly from investment returns
- Generally listed in investment disclosure (prospectus)
Plan administration and other service fees

Plan administration expenses are assessed for the day-to-day operational support needed to run the plan efficiently and in compliance with the rules and regulations applicable to retirement plans. These expenses typically include recordkeeping and/or third-party administrator fees. Administrative fees are usually assessed as quarterly or annual flat fees, a per-employee fee, or some combination of these two fee structures. Fees may also be calculated based on a percentage of plan assets, particularly if the administrator is a third-party administrator offering investments.

Employers using optional services, often made available through a third-party administrator, recordkeeper, trustee, or custodian, will incur additional fees. Administration fees and a description of the services being provided are usually disclosed to the employer in a written service agreement. Supplemental services such as investment advice (through software applications or individual participant-level investment counseling) or retirement planning tools are examples of supplemental services that may result in additional fees. Certain participant communications and educational services may also fall under the category referred to as supplemental plan administration services.

Some fees are incurred not by the plan as a whole, but as participant transaction fees. For example, the cost of processing a transaction or optional plan feature for an individual participant (e.g., a participant taking out a loan) is a transaction fee. Transaction fees are typically expressed as flat dollar amounts rather than percentages of assets and are often debited from the affected participant’s plan account balance.

Plan administration fees may be paid by the employer or by plan assets.

Plan administration fees

- Assessed for the day-to-day operation of the plan (e.g., recordkeeping and third-party administrator fees)
- May be paid by employer or from plan assets
- Generally listed in service agreement
### Sample review checklist

| ✓ | Have you received the required disclosures from the covered service provider? | Yes ☐ No ☐ |
| ✓ | Do you understand all of the fees listed in the disclosure? | Yes ☐ No ☐ |
| ✓ | Are the services of each provider necessary for the administration of the plan? | Yes ☐ No ☐ |
| ✓ | Are the fees reasonable for the services provided? | Yes ☐ No ☐ |
| ✓ | Are the fees within an acceptable range as compared to other providers? | Yes ☐ No ☐ |
| ✓ | Did you document the rationale you used to select (or renew) each service provider? | Yes ☐ No ☐ |
| ✓ | Has your service provider delivered all of the services outlined in the service agreement (for renewals of existing providers)? | Yes ☐ No ☐ |
| ✓ | Is the service provider required to be licensed? If so, is the license current? | Yes ☐ No ☐ |
| ✓ | Do you have any plan participant comments or complaints regarding the services (for renewals of existing providers)? | Yes ☐ No ☐ |
| ✓ | If you have service providers who have not provided the required disclosures, will you be terminating their services (for renewals of existing providers)? | Yes ☐ No ☐ |
Is hiring a service provider a fiduciary function, and if so, what do I need to do?

Hiring a service provider is, in and of itself, a fiduciary function. Employers should document the selection and monitoring process. When considering which service provider to hire, employers should provide each with complete and identical information about the plan and what services it is requesting in order to make a meaningful comparison.

Employers should ask each provider for:

- Information about the firm itself, including
  - Financial condition
  - Experience with retirement plans of similar size and complexity

- Information about the quality of the firm’s services, including
  - The identity, experience, and qualifications of professionals who will be handling the plan’s account
  - Any recent litigation or enforcement action taken against the firm
  - The firm’s experience or performance record

- A description of business practices, including
  - How plan assets will be invested if the firm will manage plan investments or how participant investment directions will be handled
  - The proposed fee structure
  - Whether the firm has fiduciary liability insurance

If employers use an internal administrative committee, they should educate committee members on their roles and responsibilities.

Monitoring a service provider

Fiduciaries are also required to monitor the service provider. Employers should establish and follow a formal review process at reasonable intervals to decide whether to continue using the current service providers or look for replacements.

When monitoring service providers, employers should:

- Review the service providers’ performance
- Read any reports provided
- Check actual fees charged
- Ask about policies and practices, such as trading, investment turnover, and proxy voting
- Follow up on participant complaints
Additional resources that may be useful in hiring and monitoring a service provider include:

**Resource:** Selecting An Auditor For Your Employee Benefit Plan  

**Resource:** Selecting And Monitoring Pension Consultants–Tips For Plan Fiduciaries  

**Resource:** 401(k) Plan Fees Disclosure Tool  

This list can be found within the eLaws® - ERISA Fiduciary Advisor tool, which can be accessed at [http://webapps.dol.gov/elaws/ERISAFiduciary.htm](http://webapps.dol.gov/elaws/ERISAFiduciary.htm)
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