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So You've Become a Fiduciary: Signposts, Suggestions, and Sympathy

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Being appointed a fiduciary for a benefit plan subject to the Employee Retirement Income Security Act of 1974 (ERISA), is an honor many persons would prefer to forego. Individuals who perform administrative functions for a plan, advise ERISA fiduciaries, or who are appointed to carry out plan functions by a plan fiduciary should be aware of ERISA's basic fiduciary requirements. As discussed below, significant penalties may apply to a breach of fiduciary duty. Unfortunately, a "pure heart, empty head" defense is unlikely to protect individuals where there has been a failure to follow proper procedures for tasks such as handling of plan assets, payment of plan expenses, selection and monitoring of plan investments and service providers, and communications with plan participants.

This column provides an overview of ERISA's fiduciary requirements in order to assist individuals that work with ERISA plans to avoid pitfalls and liabilities with respect to plan administration. The column does not discuss in detail the fiduciary requirements that would apply to a person or entity responsible for investing plan assets.

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Who Is a Fiduciary?

The primary factor in determining whether an individual is a fiduciary for purposes of ERISA is the type of duties performed by that individual. The actions of an individual with respect to an ERISA plan govern this determination, not one's title, whether he or she was specifically appointed as a fiduciary, or whether he or she has consented to be a fiduciary to the plan. Under ERISA, an individual is a fiduciary if he or she:

- Exercises discretionary authority over the management of a plan and its assets;
- Provides investment advice for a fee with respect to plan assets; or
- Has discretionary authority or responsibility over plan administration.¹

Members of a plan administrative committee or investment committee and other individuals that exercise discretionary authority or control with respect to interpreting plan documents, entering into plan transactions, selection and retention of plan service providers, benefit claim determinations, and other plan decisions are generally fiduciaries. A person with the authority to decide how plan assets will be held, used or distributed and who will perform administrative functions for the plan, or who makes similar determinations, is likely to be an ERISA fiduciary.

By contrast, generally individuals who perform only "ministerial duties" for a plan will not be considered ERISA fiduciaries.² For example, consultants or accountants who prepare reports and perform tasks based on specific instructions from a plan fiduciary, and who do not have authority or control with respect to plan matters, may not be considered fiduciaries.³ Whether someone who performs both ministerial duties and discretionary duties will be deemed a fiduciary with respect to specific tasks must be determined on a case by case basis. However, even individuals who are not ERISA fiduciaries but who assist someone who is, such as a member of a plan administrative or investment committee, should have a basic understanding of the rules applicable to fiduciaries.

Fiduciary Basics

Once you have determined fiduciary status, the next step is to review the basic fiduciary obligations imposed by ERISA. ERISA fiduciaries have certain responsibilities with respect to operation and administration of a plan. Plan fiduciaries must:

- Act prudently, using the care and skill that an expert would use under similar circumstances;
- Act solely in the interest of plan participants and their beneficiaries and with the exclusive purpose of providing benefits to them;
- Defray reasonable expenses of administering the plan;
- Follow plan documents, to the extent they are consistent with ERISA;
- Diversify plan investments to minimize large losses, unless it is clearly prudent not to do so; and

- Avoid conflicts of interest and self-dealing in directing plan transactions.⁴

As discussed at the end of this column, a breach of one's fiduciary duties may result in liability under ERISA and the Internal Revenue Code (the Code).

There are four key compliance areas for fiduciaries to keep in mind:

1. Procedural prudence;
2. Appointment of service providers and investment managers;
3. Proper handling of plan assets; and
4. Communication with participants and the government.

Performance of plan administration functions often requires compliance with ERISA, the Code, state laws and other federal laws, such as the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Health Insurance Portability and Accountability Act (HIPAA). Fiduciaries should consider seeking counsel regarding the specific compliance obligations imposed by these laws, and other fiduciary issues that may be unique to the plans they administer.

A fiduciary does not necessarily have to take steps to engage in improper behavior, or even be aware of his fiduciary obligations, to run afoul of these requirements. Rather, acting imprudently, not acting for the exclusive benefit of plan participants and beneficiaries, and failing to perform certain necessary tasks can also result in fiduciary liability.

Procedural Prudence

Procedural prudence involves establishing and following reasonable decision making and communications processes, so that if unfavorable or unintended consequences do affect a plan, it can be shown that such consequences were not the fault of the fiduciary.

Importance of Plan Procedures

Plan fiduciaries must implement and follow prudent plan procedures. The purpose of the ERISA prudence requirements is not to make judgments on the effectiveness of fiduciary decisionmaking after the fact, but to ensure that decisions are made based on reasonable administrative procedures. The Department of Labor (the DOL) has indicated that "[p]rudence focuses on the *process* for making fiduciary decisions."⁵ The process used by fiduciaries in carrying out their duties can help to demonstrate that a fiduciary has acted prudently.

Under ERISA's "prudent man standard," a fiduciary must act with the care, skill, prudence and diligence that a prudent man acting in a similar capacity and familiar with such matters would use under the circumstances.⁶ To the extent that a fiduciary does not understand plan matters, he has the responsibility to hire individuals with the appropriate expertise to provide advice, and to carefully consider the advice of third parties, rather than blindly following such advice. The basic rule of thumb for a fiduciary to follow is to ask for appropriate advice when he needs it, and to exercise careful and independent judgment when applying such advice. Fiduciaries should also understand basic ERISA concepts, such as what conduct is considered

to be fiduciary in nature, the standard of conduct applicable to fiduciaries, and the consequences of breaching one's fiduciary duties. Although ERISA and the Code are the primary laws which impose duties on a plan fiduciary, fiduciaries should also be aware of other applicable laws, such as federal securities law, state insurance law, disability and discrimination laws, and HIPAA.⁷

Plan Documents

The plan document must be used as a roadmap for fiduciary decisionmaking, as long as it is consistent with ERISA.⁸ ERISA requires each plan to have a written plan document that provides for one or more "named fiduciaries."⁹ The plan document should indicate the powers of named fiduciaries, such as the power to delegate fiduciary responsibilities to others, the power to appoint investment managers, and the power to select service providers to hold plan assets and to perform administrative functions. A fiduciary needs to know how fiduciaries are appointed, who acts as a fiduciary to the plan, and whether fiduciary duties have been allocated to co-fiduciaries or can be delegated to other parties. The plan document should be his roadmap.

Plan fiduciaries should be familiar with the terms of the plan and other documents describing the plan, such as summary plan descriptions (SPDs). For example, in making claims determinations, it is essential that plan fiduciaries follow the benefit claim procedures set forth in the plan and SPDs. Plan procedures should always be applied fairly and consistently to all similarly situated participants. Plan fiduciaries should also carefully follow plan procedures for matters such as qualified domestic relations orders, qualified medical child support orders, making plan contributions and handling of plan assets, payment of plan expenses, adoption of plan amendments and, where applicable, termination of a plan.

Plan Administration

Fiduciaries must also consider related duties and practical considerations when they carry out plan policies. For example, if a plan change will restrict the rights of participants in a 401(k) plan to direct investments or obtain loans with respect to their individual accounts, the plan's fiduciaries must ensure that the length of time such restrictions are in place complies with the Sarbanes Oxley Act, and that participants receive any required blackout notices.

Over time, it may become necessary to amend procedures contained in a plan, due to changes in the law or the changed expectations of the plan sponsor or employee participants. Amendments to ERISA and the Code, the adoption of new regulations by the Internal Revenue Service (IRS) or the DOL, and new developments in applicable federal and state laws must be properly incorporated into a plan's terms and procedures. Therefore, a fiduciary must be reasonably informed regarding new developments in the law, and seek counsel as necessary to ensure that the "roadmap" provided by a plan document does not run afoul of such developments. In addition, fiduciaries should stay informed regarding the content and implementation of plan amendments.¹⁰

At some point, it may become necessary for a fiduciary to resign from his duties. Although a fiduciary can step down from his position, he must ensure that plan procedures are followed and that another fiduciary is available to take his place. Remaining fiduciaries must follow plan terms and procedures with respect to appointing a replacement.¹¹

Documenting Plan Decisions

Despite a fiduciary's best efforts, the prudence of his decisions may be questioned in the future. As indicated above, such decisions will be judged based on the decisionmaking process, rather than the ultimate outcome of the decision. For example, in cases involving investment of plan assets in employer stock, courts have looked to whether a fiduciary exercised care, skill and caution, or to whether the fiduciary abused the discretion granted to him under a plan, in making decisions to acquire or retain an investment.¹² In order to prove that a fiduciary acted prudently and did not abuse her discretion under the relevant plan documents, all fiduciary functions must be documented adequately. Prior to committee meetings, information concerning plan matters should be collected and distributed to named fiduciaries. If information is not available before a meeting, adequate time should be spent reviewing relevant information before any fiduciary decisions are made, even if this requires the decision to be postponed. Fiduciaries should carefully consider information obtained from third parties and ask questions as necessary.

Documentation of the decisionmaking process includes taking detailed minutes of all meetings, recording advice received from experts, and maintaining records of all resolutions approved, actions taken, or decisions made by the fiduciaries. Meeting minutes should clearly set forth what occurred at the meeting, the matters discussed and the authorities or documents relied upon in reaching a decision, and reflect the results of any vote. Meeting minutes should not include language that may be misconstrued upon review (*e.g.*, inflammatory statements regarding benefit claimants, self-interested language regarding plan transactions, etc.).¹³ Fiduciaries should also review meeting minutes and review and maintain copies of the plan's annual reports and plan documents, financial statements, auditor reports, legal opinions, investment reports, management reports and actuarial reports. Fiduciaries should consider seeking the advice of counsel regarding language to be used in meeting minutes and appropriate review of plan information and reports.

When making claims determinations, a fiduciary must comply with the terms of the plan and notify the claimant of specific "claims review" information set forth in DOL Regulations. Under these regulations, claimants must also be provided with the opportunity to appeal adverse benefits determinations. The appeals procedure must provide claimants with a full and fair review, including the opportunity to submit a written appeal, and review pertinent plan documents and information used by the committee in making its decision.¹⁴ Adequate documentation is essential to demonstrate that the plan is compliance with the DOL's claims determination requirements.

Avoiding Conflicts of Interest

Fiduciaries cannot ever use their position for personal gain. ERISA's exclusive benefit rule requires plan fiduciaries to act for the exclusive purpose of providing benefits to participants and beneficiaries.¹⁵ In addition, ERISA prohibits certain plan transactions with certain interested parties, including fiduciaries, employers, unions, employees, service providers, and a number of other individuals with a stated interest in or relationship with the plan or an interested party. Plan transactions must always promote the best interests of plan participants and beneficiaries, rather than the interests of those making plan decisions, or individuals related to the plan. If a plan transaction involves a conflict of interest with respect to the parties involved, or

self-dealing on the part of plan fiduciaries, the transaction is most likely prohibited by ERISA, regardless of the “fairness” or reasonableness of the transaction, unless an exemption applies.¹⁶

Generally, ERISA “prohibited transactions” include the following:

- Sales, exchanges or leases of property between a plan and an interested party (*e.g.*, an employer’s purchase of plan property);
- Loans between a plan and an interested party (*e.g.*, borrowing employee contributions or other plan assets);
- Goods, transactions, and service arrangements between a plan and an interested party (*e.g.*, a plan’s third party administrator retains its subsidiary to process benefit claims);
- Acquisition of employer securities or property on behalf of a plan, unless certain requirements are met (*e.g.*, the plan purchases the employer’s building without meeting such requirements); and
- Fiduciary self-dealing with assets of a plan for his own interest or his own account, or the realization of personal gain by a fiduciary in connection with a plan transaction (*e.g.*, a fiduciary receives a bonus from his employer for causing a plan to retain his company as a service provider).

This list is not exclusive, and numerous exemptions apply to the prohibited transaction rules. Both direct and indirect transactions are prohibited under ERISA, so these requirements cannot be avoided by simply attempting to rearrange the form of the transaction.

Whether a transaction is prohibited will often depend on the facts and circumstances of a particular situation. As with all other fiduciary rules imposed by ERISA, a prohibited transaction does not have to be a result of affirmative “bad” behavior. In fact, many prohibited transactions occur because the fiduciaries to a plan do not realize that these rules exist, or that they apply to a certain transaction.

Example. Plan A is administered by the Plan A Committee (the Committee), comprised of Anna, Christa and Emily. As named fiduciaries under the governing documents for Plan A, all three Committee members are fiduciaries to Plan A. Anna is also the President of Money Bank, which offers banking and custodial services to employee benefit plans. In a Committee meeting, Anna, Christa and Emily vote to retain Money Bank as Plan A’s custodian. Plan A’s assets are transferred to Money Bank, which charges fees comparable to those charged by other custodial service providers. As a custodial client of Money Bank, Plan A receives competitive rates of return and services. Regardless, the Committee has just engaged in a prohibited transaction. The reasonableness of the transaction is irrelevant because Anna had a conflict of interest in causing Plan A to engage in a transaction with Money Bank. In addition, this may be considered a self-dealing transaction, if Anna is deemed to have dealt with Plan A’s assets in her own interest or for her own account, or if she has received consideration for her own personal account as a result of the transaction.

Plan fiduciaries should take care to prevent the use of plan assets for self-interested sales or service arrangements. In the example above, Plan A’s fiduciaries could have potentially avoided a conflict of interest if Anna had recused herself from the

decision to retain Money Bank as a custodian. Due to the complexity of this area of the law, fiduciaries should consult legal counsel regarding transactions which may be prohibited and potential exemptions.

Delegating Authority

A plan document may permit allocation of fiduciary responsibilities between several named fiduciaries and delegation of duties to other individuals. Under ERISA, a named fiduciary cannot delegate trustee responsibilities to others. However, as with other administrative matters, to the extent that the plan document provides procedures for allocation and designation of responsibilities, these procedures should govern such activities. Following the plan's allocation and delegation procedures may limit the liability of other fiduciaries with respect to allocated or delegated duties.¹⁷

Examples of "delegable" responsibilities include plan administrative functions, such as benefit claims and recordkeeping, and investment management. As discussed below, when delegating duties, fiduciaries should take care to select appropriate service providers, and to monitor appointed providers. Delegation does not allow a fiduciary to "forget" about those functions that have been assigned to someone else. Instead, the fiduciary retains ultimate responsibility for whether persons it has delegated duties to carry out plan functions appropriately. Co-fiduciary liability may apply where another fiduciary breaches his duties, even if a fiduciary is completely unaware of the breach. This could occur, for example, when a fiduciary does not carefully monitor the behavior of other fiduciaries.

Appointment of Investment Managers and Service Providers

A fiduciary must carefully select and monitor plan service providers. Generally, fiduciaries should consider the qualifications of several different providers whose expertise is consistent with the plan's needs. Each provider should be given complete and identical information regarding the plan and its needs, to assess its ability to provide adequate service to the plan. Fiduciaries should collect information from each provider regarding its business structure, proposed services and fees, identity of the professionals that will be handling the plan's account and their experience and qualifications with plans of similar size and complexity, history of litigation and enforcement actions and other relevant information.

With respect to selection of investment managers, relevant information includes the manager's qualifications pursuant to ERISA Section 3(38), its proposed investment style and process, its experience and performance record, a statement of the types of transactions for which it would use its affiliates and its financial arrangements with such affiliates, a statement of its procedures for complying with the prohibited transaction requirements (including a statement that the manager is a qualified professional asset manager), its bonding status, proposed fee structure including all commissions, client references, total amount of assets under its control, and any other relevant information. Information provided by candidates should be verified with reliable independent sources.¹⁸ As with other plan decisions, the selection of service providers should be adequately documented.

Once a provider is selected, the parties should set forth detailed terms of the relationship in writing. These terms should include the services to be performed, all fees to be charged under the agreement, and termination provisions. The agreement

should include representations that the provider will comply with all applicable requirements of ERISA and other relevant laws, such as applicable state laws or HIPAA.¹⁹ All arrangements with service providers should be reasonable, including the amount of compensation and fees received by the provider.²⁰

After a service provider is selected, a monitoring system should be implemented, with frequent reviews of the provider's performance and fees.²¹ It is important to review all of the service provider's reports, check actual fees and commissions charged by the provider, ask about the provider's policies and practices and review such policies at least annually, and follow up on participant complaints.²² Fiduciaries should be mindful of any conflicts of interest present in selection or monitoring of service providers and should recuse themselves from the selection process if necessary to maintain its integrity, as discussed above.

Proper Handling of Plan Assets

Many consider the handling of plan assets as the heart of ERISA's fiduciary responsibilities, as these assets are the means to provide the participant's benefits

ERISA's Trust Requirement

ERISA requires all employee benefit plan assets to be held in trust, subject to certain exceptions, for the exclusive benefit of plan participants and beneficiaries.²³ The trust requirement promotes ERISA's anti-inurement rules and proper use of plan assets. Fiduciaries must appropriately identify and segregate plan assets, which include employer contributions to the plan and employee contributions.

Under DOL Regulations, employee contributions to a 401(k) plan must be segregated from company assets as soon as reasonably possible, but in any event, no later than the 15th business day of the month following the month in which the contribution is withheld from an employee's paycheck or the amount is received by the employer.²⁴ Therefore, plan fiduciaries should ensure that there is a system in place for segregating 401(k) contributions from company assets as soon as reasonably possible. Failure to properly segregate employee contributions or other plan assets from the employer's general assets not only violates ERISA's trust requirements, but may constitute a prohibited transaction. The Labor Department has strictly enforced this rule in order to prevent employers from using "float" on payroll withholding to pay company expenses rather than investing them for participants.

Payment of Plan Expenses

Plan expenses may be paid by participating employers, the plan, or both, but plan assets should only be used to pay expenses to the extent permitted by the plan document and by law. For example, under DOL Field Assistance Bulletin 2003-3, some expenses can be charged to an individual participant's 401(k) plan account, but only if certain requirements are met. In addition to ensuring that plan expenses are charged to the appropriate source, fiduciaries must also ensure that plan assets are used only to pay reasonable expenses of the plan. Fiduciaries should understand the nature of all fees and expenses charged to plan assets, and the services provided in return for fees. As noted above, this includes careful selection of service providers and continued monitoring of expenses.²⁵

These requirements are very specific in certain circumstances and fiduciaries should consult with their advisers to make sure such requirements are met before using plan assets to pay expenses. For example, expenses used to set up a new plan or make discretionary plan amendments are not payable from the plan, whereas fees from an outside entity calculate ordinary benefit payments generally are. Special rules apply in cases where an employer administers a plan “in-house”; use of plan assets to reimburse such costs is very limited and subject to detailed rules.

Plan Investments

Investment of plan assets must be reasonable. Although ERISA does not provide specific percentage guidelines for diversification of investments, diversification is required by ERISA.²⁶ (There are certain exemptions for employee stock ownership plans.) Investing all plan assets in a single or limited number of assets is generally considered to be imprudent. Each investment should fit within the plan’s overall investment portfolio strategy, meet the plan’s financial and timing needs (*e.g.*, cash flow needs, etc.), and have a favorable risk of loss and opportunity for gain relative to other investments. Investments should be selected pursuant to formal investment guidelines, which take into account all of the financial, economic and actuarial facts.²⁷ Where applicable, fiduciaries must exercise the right to vote proxies for the benefit of plan participants, in order to enhance the plan’s investments. Fiduciaries should also carefully consider the fees associated with each investment option.²⁸

The above discussion assumes that the plan sponsor or a manager or managers appointed by the sponsor is the fiduciary responsible for the selection and performance of a plan’s investments. This is generally true for defined benefit plans and welfare plans. However, although beyond the scope of this column, it should be noted that under Section 404(c) of ERISA, certain responsibilities for selecting a participant’s account investments can be delegated to plan participants if a number of very strict requirements are met. The procedures of Section 404(c) are primarily used with 401(k) or other defined contribution plans where the participants have control over the investments and/or the investment mix in their accounts. These procedures provide limited relief for fiduciaries with respect to losses suffered by participants who make unfortunate investment choices, but only if the fiduciaries and the plan meet strict rules regarding the investment options available, the ability to change investments, and appropriate communication. Even in this case, the fiduciaries retain some liability for the selection of the investment options offered.

Insurance and Bonding Coverage

Plan assets must be protected through adequate bonding and insurance coverage.²⁹ The purpose of a fidelity bond is to protect the plan from losses arising from fraudulent or dishonest acts.³⁰ Fidelity bonds do not protect the plan from losses arising from negligence, insolvency or many other events. Therefore, additional fiduciary liability insurance may be appropriate to adequately protect plan assets. Fiduciaries may also want to consider obtaining liability insurance to protect themselves personally, where the plan does not provide for such coverage, or the fiduciary wishes to obtain additional coverage. A plan cannot provide direct indemnification for the fiduciary (because that would relieve the fiduciary of his responsibilities), but the sponsoring employer can provide insurance.

Communication with Participants and the Government

Straightforward and sufficient communication in specific circumstances is not only required by a number of regulations under ERISA, but it serves to demonstrate the fiduciary's prudence and disinterestedness, and to protect the fiduciary against frivolous benefit and other claims.

General Communication with Participants

Fiduciaries must ensure that plan participants and beneficiaries receive adequate information regarding the terms, requirements and procedures of a plan. The following documents must be furnished to participants and beneficiaries:

- An SPD, which describes the plan in plain English and is comprehensive enough to inform participants of the plan's features, eligibility requirements, the source of plan contributions, vesting periods, claims procedures, and basic rights and responsibilities under ERISA;
- A summary of material modification (SMM), if applicable, to inform participants and beneficiaries of changes to the plan or information which is required to be included in an SPD;
- Individual benefit statements regarding account balances, vested balances and other account information;
- A summary annual report (SAR) outlining the plan's financial information and certain information reported on its Form 5500; and
- Blackout period notices, to the extent that a profit-sharing or 401(k) plan will be closed to certain participant transactions, such as directing investments and receiving loans or other distributions.

There are specific requirements regarding the time periods when SPDs, SMMs, benefit statements, SARs and blackout notices must be provided.³¹ Plan fiduciaries should ensure that the plan administrator has implemented a system for preparing, updating and distributing required information. Failure to provide information to plan participants and beneficiaries may result in penalties under ERISA and expose the plan and its fiduciaries to litigation.

Providing Investment Advice

For 401(k) plans and other plans that allow participants to direct investment of their individual accounts, participants must be provided with adequate information regarding investment options. Provision of such information is an important responsibility of plan fiduciaries and appointed investment advisers. Although participants must be able to make informed decisions with respect to their individual accounts, fiduciaries may want to limit their liability with respect to investment education materials. ERISA allows fiduciaries to limit their liability by keeping educational materials general in nature and avoiding provision of specific investment advice.³² For example, fiduciaries should avoid making statements like "this is the best investment," or "I would invest my money in this fund." Detailed rules apply to limiting liability

with respect to investment communications, therefore, fiduciaries seeking protection under these provisions should consult with legal counsel.

Annual Reporting Requirements

Plans must also comply with Form 5500 reporting requirements. The Form 5500 includes information regarding the plan's financial condition, number of participants, fees paid to service providers, whether prohibited transactions have occurred during the year, and other information regarding the plan. A Form 5500 must be filed by each plan annually by the last day of the seventh calendar month after the plan year ends (*i.e.*, July 31 for plans that use a calendar year). Penalties apply for failure to file required reports.³³

Fiduciary and Co-Fiduciary Liability

Under ERISA, plan fiduciaries are personally liable to the plan for a breach of fiduciary duty.³⁴ Fiduciaries may also have co-fiduciary liability for knowingly participating in the acts or omissions of other fiduciaries, enabling another fiduciary to commit a breach of duty, or knowing about another fiduciary's breach and failing to take steps to remedy such breach.³⁵ Therefore, fiduciaries should be aware not only of their own actions, but the actions of other fiduciaries to the plan. When a breach is discovered, fiduciaries should always take steps to correct the breach, including reversal of improper transactions, restoration of any losses to the plan, and a return of profits. It may also be necessary to amend tax forms and annual reports which have already been filed, to reflect the correction.

In some cases, fiduciary breaches can be "self-corrected" through programs offered by the DOL, the IRS, or the Pension Benefit Guaranty Corporation (the PBGC). Self-correction programs assist fiduciaries in correcting a breach, but are not available for all violations, particularly ongoing violations which take place over extended periods of time. The programs do not allow fiduciaries to correct violations for "free," although they may limit the amount of applicable penalties and future enforcement actions by governmental agencies. Self-correction programs include: the DOL's Voluntary Fiduciary Correction Program (for certain fiduciary violations, such as prohibited transactions), the DOL's Delinquent Filer Voluntary Compliance Program (for late filing or non-filing of Form 5500s), the IRS's Employee Plans Compliance Resolution System (for violation of Code requirements for tax-qualified plans), and the PBGC's Participant Notice Voluntary Correction Program (for plans that fail to distribute required notices to participants in a defined benefit plan).³⁶ In the event of a fiduciary breach, legal counsel should be consulted regarding proper correction of the breach, and whether relief is available under a voluntary self-correction program.

Where self-correction is not available, fiduciaries may be subject to the following consequences for a breach of fiduciary duty:

- Removal as a fiduciary and prohibitions on acting as a fiduciary in the future;
- Excise tax under Code Section 4975 for prohibited transactions;
- Civil penalties under ERISA for failure to file annual reports, failure to disclose required information to plan participants, prohibited transactions, or other fiduciary breaches;

- Criminal penalties for violations of the Sarbanes-Oxley Act of 2002 or ERISA; and
- Civil litigation liability under ERISA and other applicable laws.³⁷

Monetary penalties can be substantial and more than one penalty may apply.

Conclusion

Individuals that perform administrative functions for an ERISA plan, or provide assistance to such plans in carrying out plan matters, such as preparation of reports or advice, engaging in transactions, or determination of benefit claims, should be aware of ERISA's basic fiduciary requirements. Although ERISA and the Code impose detailed requirements for many plan matters, fiduciaries must be aware of these duties and act accordingly, including seeking the advice of legal counsel or other experts where a fiduciary does not have the appropriate expertise to make a particular decision. Fiduciaries should also take steps to "self-audit" their own performance and that of the plan(s) for which they are responsible, in order to ensure that any minor errors in interpretation, administration or communication do not mushroom into significant problems.

Notes

1. See ERISA § 3(21)(A).
2. See 29 C.F.R. § 2509.75-8.
3. See ERISA § 103(c)(3).
4. See ERISA §§ 402, 403, 404, and 406; U.S. Department of Labor, Employee Benefits Security Administration, *Meeting Your Fiduciary Responsibilities* [hereinafter "DOL Bulletin"] (May 2004), at 1, available at www.dol.gov/ebsa.
5. See *id.* at 2.
6. See ERISA § 404(a)(1)(B).
7. See David R. Levin and Tess J. Ferrera, *ERISA Fiduciary Answer Book*, 3d ed. (1998), at A-9-A-10.
8. See ERISA § 404(a)(1)(B).
9. See ERISA § 402(a)(1).
10. Plan amendments are generally considered a "settlor" rather than a fiduciary function. The DOL has noted that, in taking steps to implement settlor functions, an individual acts on behalf of the plan. Therefore, the individual is acting as a fiduciary when implementing plan amendments or other settlor functions, such as determining benefits offered or establishing a plan. See DOL Bulletin, at 2.
11. See *id.* at 9.
12. See *Crowley v. Corning, Inc.*, 2004 WL 763873, *13 (W.D.N.Y. Jan. 14, 2004); *Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995); *Moench v. Robertson*, 62 F.3d 553, 571 (3d Cir. 1995).
13. See Dan A. Bailey, *ERISA Fiduciary Liability Loss Prevention*, published by the Chubb Group of Insurance Companies, at 12-13.
14. See DOL Regulation § 2560.503-1.
15. See ERISA § 404(a)(1)(A).
16. See ERISA § 406.

17. See ERISA § 405(c).
18. See Stanley L. Iezman, "Operating Pension Funds in Compliance with ERISA Procedures," *Pension Plan Investments* (Spring 1999), at 35; DOL Bulletin, at 4.
19. See Stanley L. Iezman, "Operating Pension Funds in Compliance with ERISA Procedures," *Pension Plan Investments* (Spring 1999), at 35.
20. See ERISA § 408(b)(2).
21. *Id.* at 36.
22. See DOL Bulletin, at 5.
23. See ERISA §§ 403 and 404.
24. See DOL Reg. § 2510.3-102(b)(1); DOL Bulletin, at 4.
25. See *id.* at 5.
26. See ERISA § 404. Section 404(a)(2) provides an exemption for certain individual account plans (such as employee stock ownership plans), if certain requirements are met.
27. See Stanley L. Iezman, *Operating Pension Funds in Compliance with ERISA Procedures*, PENSION PLAN INVESTMENTS (Spring 1999), at 33-34.
28. See DOL Bulletin, at 5.
29. See ERISA § 412.
30. See *id.* at 4.
31. See DOL Bulletin, at 7-8.
32. See DOL Bulletin, at 6.
33. See DOL Bulletin, at 8; 2004 Form 5500 Instructions, at 4 and 7.
34. See ERISA § 409.
35. See ERISA § 405.
36. See DOL Bulletin, at 9; IRS Revenue Procedure 2003-44 (June 5, 2003); 69 Fed. Reg. 25792 (May 7, 2004).
37. See ERISA §§ 411, 501 and 502; Code § 4975(a) and (b); Sarbanes-Oxley Act of 2002 (H.R. 3763).

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