

# Conversations with the DOL

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Recently, our Benefits Law Group has had several occasions to discuss the top concerns for plan fiduciaries with staff investigators and attorneys from the Employee Benefits Security Administration ("EBSA"), a division of the Department of Labor ("DOL") that is responsible for employee benefit plan oversight and enforcement. While their guidance was expressed as individual opinions, and not the official opinion of the EBSA, these words of wisdom are important to share with our clients and friends. We identified three key areas of concern: Top 10 Fiduciary Failures, Making Sound Fiduciary Decisions, and Insulating Officers and Directors from Fiduciary Liability.

### TOP 10 FIDUCIARY FAILURES

In their investigations, the EBSA has identified the top 10 fiduciary failures and is now quick to look for these failures in pending investigations. They are the following:

1. Failure to forward employee deferrals to plan trust.
2. Failure to make required or promised contributions.
3. Improper valuation of plan assets.
4. Failure to make benefit payments according to plan terms.
5. Orphaned plans after the closure of a business.
6. Adverse actions against individuals trying to enforce plan rights.
7. Failure to put plan assets in the plan's name or the trustee's name.
8. Prohibited transactions.
9. Failure to have procedures in place for service providers, investments.
10. Improper allocation of expenses, especially among multiple employer plans.

How does a plan fiduciary avoid these failures? Following three basic rules will eliminate many of the circumstances that could result in the failures listed above. First, establish good procedures. Determining who has the power to do what is an important first step. Next, plan administrators should memorialize the way they will approach plan business. These procedures, if documented and followed, can serve as a plan fiduciary's

defense in an IRS audit or DOL investigation.

Second, educate plan administrators. Plan administrators need to know and understand fiduciary duties before they can be fulfilled. Advisors in key areas (such as legal and investment) can instruct plan administrators on these duties and methods for reducing exposure.

Third, separate the fiduciary and employer functions. A plan fiduciary must be free to act in the exclusive interests of the plan participants and beneficiaries. A plan sponsor can avoid conflicts by separating the roles of plan sponsor and plan fiduciary, whether by developing separate roles with separate duties or developing procedures for each function. The separation of employer and fiduciary functions can also help preserve the confidentiality of plan-related decisions.

Of course, a plan fiduciary will encounter circumstances that are particularly complex and careful deliberation and advice from experts will be necessary for the fiduciary to make a sound decision

## MAKING SOUND FIDUCIARY DECISIONS

During an investigation, the EBSA will look for particular steps in typical fiduciary decision-making to determine whether the fiduciary duties have been satisfied, so it is important to be conscious of procedural due diligence as a fiduciary.

***Plan Investments.*** When examining the prudence of plan investments, or the selection of investment options in a qualified plan, the EBSA will typically consider these questions:

Is there an investment policy? Has the plan fiduciary complied with the investment policy?

Did the plan fiduciary engage an expert to evaluate the investment alternatives?

Did the plan fiduciary engage an expert to educate itself on the investment selection?

What percentage of plan assets is invested in any on investment options? Is the investment of plan assets diversified?

How well is the plan fiduciary monitoring investment results? What steps is the plan fiduciary taking to monitor investment results?

How well is the plan fiduciary monitoring the fees and expenses charged to participant and beneficiary accounts?

How frequent are the fiduciary meetings? The EBSA expects all plan fiduciaries to keep minutes of their meetings.

Does the plan fiduciary review investment strategy and how

well each particular investment fits into the investment strategy?

Has the plan fiduciary hired an investment advisor? Does the plan fiduciary ignore or follow the investment advisor's advice, or take it into consideration to reach its own conclusion?

Does the plan fiduciary document its fiduciary decisions and reasons for those decisions?

***Mutual Fund Review and Selection.*** In light of the late trading and market timing committed by a considerable number of mutual fund companies, the EBSA is checking not only whether the plan fiduciary has taken the steps outlined above for plan investments, but also whether the plan fiduciary has taken these additional steps:

Review the financial impact of any trading misconduct (or reaction to the misconduct) may have on plan participants and beneficiaries.

Consider whether and what type of remedial action may be required to make participants and beneficiaries whole.

Review with the mutual fund company what steps the company is taking to prevent abuse.

***Service Provider Selection.*** The plan fiduciary's relationship with plan service providers is a critical piece of the compliance puzzle. In an investigation, the EBSA will expect answers to these relevant questions:

Did the plan fiduciary get bids from multiple service provider candidates?

Did the plan fiduciary compare services offered by each candidate? Did the plan fiduciary analyze the fees quoted by each candidate?

Did the plan fiduciary understand all aspects of each candidate's bid?

Did the plan fiduciary compare the quality of services offered by each candidate?

Was the selection process prudent? Factors to consider include whether the plan fiduciary hired an expert in analyzing the bids, structured a competitive bidding process and reviewed industry ratings.

Is the plan fiduciary regularly monitoring the service provider's performance? This regular review may consider the factors used in initially selecting the service provider.

The EBSA has opined that an informed fiduciary is in the best position to protect participants' and beneficiaries' interests. If a plan fiduciary can

demonstrate that it has made efforts to educate itself on how to fulfill its duties and has adopted and abided by prudent procedures, the plan fiduciary should be well equipped to handle an investigation and pass with favorable marks from the EBSA.

### **INSULATING OFFICERS AND DIRECTORS FROM FIDUCIARY LIABILITY**

Executive officers and boards of directors are typically responsible for appointing ERISA plan fiduciaries to administer the plan, manage plan assets and make investment selections. These officers and directors continue to be responsible for monitoring the performance of plan fiduciaries even after the appointment process is over.

The duty to monitor requires that the appointing officer or directors review the performance of the plan administrator, trustees and other fiduciaries periodically to ensure that the fiduciaries' performance is in compliance with ERISA and the terms of the plan. In practice, this means that the appointing officers or directors must hold regular meetings with the plan fiduciaries and review reports regarding their administration of the plan or plan assets.

The duty to monitor also requires disclosure of "necessary information" to the plan fiduciaries. What information is necessary is a particularly difficult question if the ERISA plan invests in employer stock. Courts have yet to provide a standard for determining what is necessary information, but so far, many claims have survived challenge, alleging that officers and directors failed to disclose sufficient information to plan fiduciaries to enable them to make informed judgments about a plan's investment in employer stock. In certain cases, the DOL notes, disclosure of necessary information to plan fiduciaries may be made in the form of disclosures of non-public information to the investing public in general, so that plan participants and shareholders outside the plan have the same information to make investment decisions

If you have any questions regarding your ERISA plans or your fiduciary duties with respect to those plans, please contact any member of our Benefits Law Group.

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