

# 15 Tips for Fiduciary Compliance

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Part 4 of Title I of ERISA contains standards for fiduciaries' performance of their fiduciary duties. With the exception of specific rules relating to prohibited transactions, these standards are rather general and were in fact taken from the common law of trusts. Since ERISA was adopted over 40 years ago, regulations and court cases have not issued many specific guidelines for fiduciaries.

The application of the standards to specific situations has generated confusion as well as trepidation among plan sponsors and in-house personnel for whom the role of plan fiduciary is only one of many responsibilities they perform for their employers. However, with a few exceptions, the standards are logical applications of the concept that fiduciaries should act with fairness, a basic level of expertise, in a manner calculated to provide retirement benefits to participants and beneficiaries, and without being subject to conflicting concerns.

Although fiduciary regulations and court decisions are often complicated, applying certain principles should help enable plan fiduciaries to achieve substantive compliance in virtually all cases.

**To aid fiduciaries in their day-to-day ERISA fiduciary activities, I have developed a list of 15 tips:**

**1. Establish a Process and Follow it**

ERISA doesn't require a fiduciary to always be right; ERISA requires him or her to be prudent, and for purposes of ERISA, prudence is a process. However, if the fiduciary doesn't follow it, a process doesn't demonstrate prudence or anything else (except non-compliance).

So set up a reasonable process for decision-making, and make sure it is followed.

**2. Put It in Writing**

Rules governing the plan's operations should be in writing, but they shouldn't be too complicated. Following reasonable rules goes

operations, including the allocation of responsibilities among various fiduciaries. For example, members of an investment committee are typically not responsible for administration, and members of an administrative committee are typically not responsible for investments. Making this clear may require education sessions for new fiduciaries and periodic reviews for the company's management and/or board of directors.

**4. Know What is in Plan Documents**

Each plan must be in writing. These documents, along with rules and guidelines for operation of the plan, govern the fiduciary's actions, and a failure to comply violates ERISA. Each fiduciary needs to keep copies of the plan documents and be familiar

to ERISA's fiduciary rules. Establish clear distinctions between actions that are settlor functions and fiduciary actions that are subject to ERISA, even if the same individual or committee is responsible for both. It is possible to draft the plan so that the settlor functions are expanded, which limits the application of the ERISA fiduciary rules.

**6. Meet Regularly and Keep Minutes of the Meetings**

Responsible fiduciaries should meet periodically to review the plan's operations and investment performance. Their decisions and the reasons for them should be memorialized in written minutes, but the minutes should not be too detailed. Investment consultant reports and investment performance analysis documents supporting the fiduciaries' decisions should be included with the minutes.

**7. Get Separate Written Service Agreements from Each Vendor**

Service agreements should govern every relationship with an outside vendor, spelling out each party's obligations and requiring the vendor to indemnify each fiduciary and the company for liability or losses to the plan or participants resulting from the vendor's misconduct, negligence, or breach of the agreement's terms or ERISA. A vendor's liability should, if possible, not be subject to dollar limits. To the extent possible, the agreement should also limit the vendor's access to participants for purposes of cross-selling its services outside the plan.

**"FOLLOWING REASONABLE RULES GOES A LONG WAY TOWARD DEMONSTRATING FIDUCIARY COMPLIANCE."**

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a long way toward demonstrating fiduciary compliance, but overly complicated rules tend not to be followed. Plus, non-compliance with plan rules and processes is a per se fiduciary breach.

**3. Allocate Specific Responsibilities**

Each fiduciary should know he or she is an ERISA fiduciary, understand what that means, and be familiar with the rules governing the plan's

with their provisions. Since plan documents are updated periodically to reflect changes in the law and the plan's operation, a fiduciary also has to make sure he or she is aware of any changes.

**5. The More Settlor Functions, the Better**

Settlor functions, such as deciding to establish or terminate a plan or changing benefit formulas or distribution options, are not subject

### 8. Get Outside Help on Fees

If the plan is being charged fees for administrative, investment, or other services, let an independent third party make the initial recommendation as to whether billing the plan, as opposed to the plan sponsor, is appropriate.

### 9. Make Clear Who is a Fiduciary

Corporate officers or other employees frequently have fiduciary responsibility for a plan's operation. This responsibility can lead to real or perceived conflicts of interest. A key to avoiding any fiduciary breach is to make sure it is clear to the fiduciaries and third parties when they are—and are not—operating in their fiduciary capacities.

### 10. Avoid Decision-Making Conflicts

If a fiduciary has a real or perceived conflict, he or she should not make the decision. Each fiduciary should understand his or her rights and obligations to withdraw from any decision in which there is a conflict. If the plan sponsor has a real or perceived conflict, the record must demonstrate that the conflict did not impact the decision.

### 11. Know What Fees the Plan is Paying

A fiduciary can't conclude that a plan is getting what it is paying for when he or she doesn't know what the plan is paying and what the service provider is receiving. The fee disclosure rules developed by the US Department of Labor in the last few years should give the fiduciary access to necessary information, but it is up to the fiduciary to understand the

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information provided and determine if the aggregate fees are reasonable.

### 12. Know the Share Classes

Mutual funds typically offer two classes of shares: retail and institutional. Retail shares are the same class offered to individual investors. Institutional share classes are available to investors with larger amounts to invest and typically come with lower fees. Often, a plan will be invested in a retail share class even though it is eligible for an institutional class. Many recent lawsuits against plan sponsors and fiduciaries involve claims that participants were charged excess fees because the fiduciary failed to offer an available institutional share class. The plan should purchase the share class with the lowest cost unless there is a demonstrable and defensible reason to purchase a share class with higher costs.

### 13. Review Service Provider Selections and RFPs

The initial selection of a plan recordkeeper, trustee/custodian, and investment consultant or advisor is a fiduciary decision. However, fiduciary responsibility does not end

there. Fiduciaries also must monitor the performance of the plan's service providers to determine if their selection remains prudent. Even if a service provider's performance is generally adequate, the fiduciary should periodically invite several service providers to submit proposals to determine if a different provider would be a less expensive and/or a better choice.

### 14. Review Participant Communications

Typically, recordkeeping services include drafting and distributing necessary or desirable (at least in the view of the recordkeeper) disclosures and other communications to participants. These communications often feature the plan sponsor's logo or letterhead, and participants view them as coming from, or at least endorsed by, the plan sponsor. The only way to control potential liability for any errors or misrepresentations in these communications is to carefully review and approve the language before distribution. Further, it should be made clear that the recordkeeper is the source of ancillary communications, such as investment education and a

description of the recordkeeper's other services, and that the plan sponsor does not endorse them.

### 15. Check Plan Materials

#### RE: DOMA

The US Supreme Court declared the Defense of Marriage Act (DOMA) unconstitutional in 2013, giving same-sex spouses all the spousal rights granted by ERISA. The plan document, procedures, summary plan description, and employee communications should all be reviewed to ensure they comply with this rule. Since prior plan documents and participant communications limited such benefits to opposite-sex spouses, new communications should be distributed to all participants and employees to avoid confusion, misrepresentations, and potential liability.

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