

Tips for Pension Plan Sponsors

More than a best practice, acknowledgment of your fiduciary status is a key link in your personal risk management system.

The Case for Written Acknowledgment of Fiduciary Status

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Who Should Declare Their Status?

When the subject of acknowledging in writing a person's fiduciary status with an ERISA qualified plan emerges, questions arise about the need for such documentation and who should sign it.

ERISA assigns legal accountability for the prudent management of its pension plans to two groups. They are; Named Fiduciaries and Functional Fiduciaries.

Named Fiduciaries are easy to identify, since their signatures appear in plan documents and service agreements.

Functional Fiduciaries are less easy to pick out because their legal status is linked to the functions they perform, not necessarily triggered by documents they sign.

A function that conveys clear fiduciary status is the appointment of an ERISA plan's Administrator. Such an act imputes fiduciary status to the members of the appointing body. A board of directors is a good example.

Many others may be functional fiduciaries without awareness of their legal obligations. Ask, don't assume!

Declaration of Your Fiduciary Status Helps Protect You

The Employee Retirement Income Security Act ("ERISA") defines a fiduciary as a person who acts in a position of trust on behalf of a third party. While defining a fiduciary is easy, determining who is a fiduciary is not quite as simple. Because fiduciary status is based on facts and circumstances. Consequently, it is not unusual for individuals to be unaware of their fiduciary status.

Numerous parties are typically involved in the process used to invest the assets of participants in an ERISA pension plan. Each one should have their specific duties and requirements detailed in writing. Some plans use their investment policy statement for this purpose, while others use a different document.

No matter the method used for defining the roles and responsibilities of a pension plan's fiduciaries, each party should acknowledge in writing their duties, and their level of understanding of their fiduciary responsibility. There are several reasons for this.

Persons that occupy the stewardship positions for an ERISA pension plan are responsible for the management of the plan's investment decision making process. The chain of responsibility begins with a company's board of directors. Stewards may delegate, with close supervision, certain decisions to professional independent administrators, money managers, trustees, and investment advisors, which go by several names (e.g., financial consultants, securities brokers, insurance agents, and financial planners). But even when decisions are delegated to one or more professionals, a Steward can never abdicate these primary responsibilities:

- ◆ Prudently monitor all fiduciaries and service providers;
- ◆ Determine investment goals and objectives;
- ◆ Approve asset allocation strategy;
- ◆ Establish explicit written investment policy;
- ◆ Prudently select money managers;
- ◆ Ensure compliance with the investment policy; and
- ◆ Avoid conflicts of interest and prohibited transactions.

An ERISA fiduciary's conduct is to be judged against a presumption of a high degree of knowledge. For example, the Joint Committee on Taxation in its report, *Overview of the Enforcement and Administration of the Employee Retirement Income Security Act of 1974*, [at 12 (JCX-16-90, June 6, 1990)] reads, "The standard measures the decision of plan fiduciaries against the decision that

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would be made by experienced investment advisers." While not all fiduciary decisions are investment related, the point is clear. Persons who serve as fiduciaries, from board members down the line, are expected by ERISA to possess a high degree of knowledge of the skills needed to fulfill their class of duty. If such skills are lacking, then professional experts should be hired in order to fill the gap.

Ignorance of the duties imposed on a fiduciary is no excuse. A fiduciary who is not aware that he or she is violating ERISA's fiduciary statutes is still liable for the violation. The ERISA standard of conduct is an objective one; good faith is not sufficient.

An example of case law emphasizes the point further. The Stewards in the lawsuit named *Katsaros v. Cody* were denied relief when they were found to be ill-equipped to evaluate the soundness of a proposal. They were held personally liable for breach of fiduciary duty due to their failure to seek outside assistance to help them. A key element in their case was their lack of acknowledgment of their roles and responsibilities, which if they had been documented, would have caused them to see the gap in their skills when aligned against their responsibilities. In ERISA, the fiduciary is held to the so-called prudent expert rule even if he or she lacks the capabilities required to carry out their fiduciary responsibilities. Under these circumstances, he or she must engage an expert who has the requisite skill, knowledge, and expertise needed by the plan. However, the plan's fiduciaries retain the ultimate responsibility for all decisions.

A properly constructed acknowledgment of fiduciary status provides evidence of a person's efforts to shore up skill deficiencies by seeking expert help. Documenting fiduciary status is so important to the health of an ERISA plan that it is one of the twenty-two steps contained in the *Prudent Practices for Investment Stewards*, which is used by many Department of Labor investigators as a guide during their enforcement audits.

Roland|Criss' FiduciaryPLUS™ program contains the steps needed to comply with the "Prudent Practices." A large number of Roland|Criss' clients have adopted them as their ERISA quality management system.

The Solution

Written acknowledgment of fiduciary status should be maintained on file by a plan's Administrator, which is the person or entity named in the plan's adoption document. A list of the persons and entities that should submit to the Administrator their written acknowledgment includes the following:

- ◆ Members of the body that adopted the ERISA plan (e.g., board of directors)
- ◆ Administrator
- ◆ Independent administrator [outside professional firm that assumes the Primary Fiduciary responsibility of the plan under ERISA Section 3(16)]
- ◆ Investment committee members
- ◆ Investment advisor (any person or firm that receives compensation for advising the fiduciaries on investment policy, asset allocation, investment options, or money manager selection)
- ◆ Money managers (e.g., mutual funds, separate accounts, lifestyle funds)
- ◆ Any other person or entity that performs fiduciary functions.

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