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FIDUCIARY RESPONSIBILITY

WHO IS A FIDUCIARY?

You are most likely a Fiduciary to your plan. ERISA defines many types of Fiduciaries, but the basic definition under §3(21) states that a Fiduciary is a person who has discretionary control/authority in the management of the plan and/or its assets. Although your Plan Document specifically names several Fiduciaries, you do not have to be named in the Plan Document to be considered a Fiduciary.

Your plan document names Trustees, which are Fiduciaries. Your plan document also names a Plan Administrator, which is typically the Company/Plan Sponsor. The Plan Administrator is also a Fiduciary. If you have a committee that selects investments or provisions for the plan, the committee members are Fiduciaries.

If you hire outside firms and delegate responsibility for some of the management functions, most of the outside firms will not be considered fiduciaries because they will not have discretionary control or authority. Even if the outside firm is a Fiduciary, it does not eliminate your liability.

WHAT ARE YOUR RESPONSIBILITIES AS A FIDUCIARY?

Legal obligations of Fiduciaries include:

1. Understanding the terms of the plan.
2. Selecting and monitoring service providers, and evaluating their fees.
3. Selecting and monitoring investment options.
4. Diversifying investments so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so.
5. Making timely deposits of contributions and loan repayments.
6. Avoiding prohibited transactions.
7. Making timely disclosures to plan participants and the government.

A Fiduciary's basic duty is to act solely in the interest of the plan's participants and beneficiaries and for the exclusive purpose of providing benefits for participants and their beneficiaries.

In selecting providers for an ERISA-covered plan, Fiduciaries must consider the quality of the services provided, not merely the cost thereof. The Fiduciaries' decision must be based on the best interests of the participants and beneficiaries, taking all steps necessary to prevent conflicting interests from affecting the decision.

A Fiduciary is subject to the prudent person standard of care; that is, the Fiduciary must act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like characters and with like aims. (ERISA 404(a)(1)(B))

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WHAT DOES ERISA PROHIBIT A FIDUCIARY FROM DOING?

1. Dealing with plan assets in the interest of the Fiduciary instead of the participants (self dealing).
2. Acting in any transaction involving the plan on behalf of a party whose interests are adverse to the interests of the plan or its participants or beneficiaries.
3. Receiving any consideration for the Fiduciary's own personal account from any person dealing with the plan in connection with any transaction involving plan assets. (ERISA §406(b)).

Any Fiduciary found to have not met the Fiduciary standards and requirements, whether intentionally, or not, will be personally liable for such actions. Any Fiduciary found to have participated in a prohibited transaction, whether intentionally, or not, will be personally liable for such actions. Furthermore, as a Fiduciary, you may also responsible for the actions of your co-Fiduciaries.

INVESTMENT DIVERSIFICATION FOR PARTICIPANT DIRECTED ACCOUNTS:

If your plan has individual participant accounts, you must adhere to the following.

1. Include at least 3 investment options with materially different risk and return characteristics.
2. Provide enough information on each investment alternative to allow the participant to make informed investment decisions.
3. Allow participants independent control to change investments at least quarterly, and more frequently if volatile investments are offered.

A plan is considered to offer a broad range of investment alternatives only if the available investment alternatives 1) provide the participant with a reasonable opportunity to materially impact the potential return on amounts in the account and the degree of risk to which these amounts are subject; and 2) permit the participant to choose from at least 3 investment~~s~~ alternatives each of which is diversified and has materially different risk and return characteristics, so that the participant may achieve a portfolio with aggregate risk and return characteristics within the range normally appropriate for the participant.

If these requirements are satisfied, including providing the new 404a-5 disclosure notices, the plan fiduciaries may be protected against liability for investment losses incurred as a result of the investment instructions given by the participant to the Fiduciary. The plan's Fiduciaries remain liable for choosing and monitoring the investment options available to participants in a prudent manner.

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