

ERISA fiduciary issues

A practice guide for advisors



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EXECUTIVE SUMMARY

Focus on fiduciaries

New regulatory mandates, a roller coaster economy, dwindling retirement confidence among America's workers — all of these factors have converged to shine a spotlight on the important role plan fiduciaries play in helping workers save for retirement and safeguarding those savings. As plan sponsors become aware of the fiduciary responsibilities they have undertaken in sponsoring a retirement plan, they are increasingly turning to advisors to guide and support them in performing their duties.

Although stories of delayed retirement and lost savings have led some members of Congress to challenge whether our private employer-sponsored retirement framework should be retained, there has been support for preserving the defined contribution system but with increased attention to those responsible for overseeing the plans and protecting participants' interests – the plan fiduciaries.

The DOL's regulatory agenda reflects the intensified focus on the plan fiduciary as the protector of participant rights. The service provider fee disclosure regulations, which became effective July 1, 2012, spotlight the plan sponsor's fiduciary obligation to prevent excessive fees from eating away at participants' savings. A separate DOL project is designed to expand the circle of individuals subject to fiduciary duties by expanding the definition of who is a fiduciary as a result of providing investment advice. The purpose of this regulatory project is to ensure that those who provide investment advice are required to disclose conflicts of interest and are held to the high fiduciary standards under ERISA. As described later in the Practice Guide, this initiative could significantly alter the landscape for advisors.

The DOL's regulatory agenda reflects the intensified focus on the plan fiduciary as the protector of participant rights

The fiduciary conversation is sure to intensify as the DOL begins to enforce its fee disclosure regulations and continues its efforts to expand the definition of investment fiduciary. As with most changes on the regulatory landscape, the focus on ERISA fiduciaries creates opportunities for advisors who make the investment to become retirement specialists, and creates challenges and business risks for those who ignore the issue, and end up reacting defensively. As plan sponsors gain a deeper understanding of their duties, they are increasingly looking for support in shouldering their fiduciary burden, including looking for retirement specialists among their investments advisors. Retirement plan advisors, both registered representatives and registered investment advisors, should evaluate their current service models against plan sponsors' increasing demands for fiduciary support.

New focus on retirement plan advisors

Plan advisors to ERISA retirement plans are under heightened scrutiny. Today, the focus is on the advisors' fees and the impact of those fees on participants' ultimate retirement income. Recent years have seen increased inquiries by both the government and plan sponsors into plan advisor fees, how fees are paid, and services provided for those fees.

The Department of Labor (DOL) has also stepped up its regulatory agenda to highlight advisor issues. For example, the DOL's new service provider fee disclosure regulations, which became effective July 1, 2012, requires full disclosure of all fees paid by retirement plans to advisors.

Definition of fiduciary under scrutiny

The definition of "fiduciary" as it relates to plan advisors is also in a state of flux. Proposed DOL rulemaking would have expanded the definition of fiduciary. Had these rules been finalized, many more retirement plan advisors would have been swept into the definition of fiduciary. Advisors, who previously did not consider themselves fiduciaries with fiduciary responsibilities, would have found themselves with new obligations to the plan and plan participants. The DOL withdrew these proposed rules after industry outcry, but indicated it intends to revisit the issue.

Only investment advisors are currently bound by a fiduciary duty, meaning they must always act in their clients' best interests. In contrast, brokers must ensure their investment recommendations are suitable for the client, based on factors like age and risk tolerance.

WHY ADVISORS NEED TO KNOW THE FIDUCIARY RULES

With increased governmental scrutiny and new rule-making in play, it is in the best interest of all advisors working with retirement plans, even if it's just one plan, to know if and when they act as fiduciaries to the plan, as well as what their responsibilities are if they are a fiduciary.

Additionally, because plan sponsors are also looking for assistance, advisors need to know when their clients are acting as fiduciaries and what steps they must take to avoid breaching their fiduciary duties.

Advisor opportunities

While increased scrutiny and new rules create challenges and business risks for advisors, it also creates opportunities. As plan sponsors gain a heightened understanding of their fiduciary obligations, they are looking for specialized support in fulfilling those obligations. This creates opportunities for advisors willing to make the investment to become retirement plan specialists. Retirement plan advisors, both registered representatives and investment advisor representatives (IARs), should evaluate their current service models against new regulatory mandates and plan sponsors' increasing demands for fiduciary support, to see what opportunities exist for their firms.

Scope of this practice guide

ERISA Fiduciary Issues: A Practice Guide for Advisors (Practice Guide), will answer these five questions for retirement plan advisors:

- What does it mean to be an ERISA fiduciary?
- When is an advisor acting as a fiduciary?
- What are advisors' responsibilities if they are fiduciaries?
- Does an advisor need to be a fiduciary to be successful in the retirement plan industry?
- Does the focus on fiduciary responsibilities create any business opportunities for advisors?

ERISA Fiduciary Framework: A Deeper Look

Retirement plans require a team of skilled players to run smoothly, including a plan sponsor, an investment advisor, a third-party administrator, and a record-keeper. While some team members are fiduciaries, others are not. Even among the plan's fiduciary team members, there is a broad range of fiduciary responsibilities, and each fiduciary may have different duties. Furthermore, even if a player is a fiduciary, not every player comes within the scope of the fiduciary rules.

Sources of fiduciary rules

The Employee Retirement Income Security Act (ERISA) requires that fiduciaries act in the best interest of participants and imposes a set of requirements for dealings with plan assets. The ERISA fiduciary rules apply to a broad range of employer-sponsored retirement plans, including:

- 401(k) plans
- Defined contribution plans
- Defined benefit plans
- ERISA 403(b) plans

Additionally, there are two sets of fiduciary standards under the securities laws that may apply when advisors are delivering investment advice to retirement plan clients:

- **The Securities and Exchange Commission (SEC) rules**, which treat registered investment advisors as fiduciaries when delivering investment advice.
- **Financial Industry Regulatory Authority (FINRA) rules**, which regulate broker-dealers and impose the “suitability standard” on registered representatives for the selling of investments.

Broker-dealers are mainly regulated under the Securities Exchange Act of 1934, and investment advisors under the Investment Advisors Act of 1940. Broker-dealers are generally held to a “suitability standard,” in making recommendations. This is a lesser standard that only requires that an investment be “suitable” for a particular investor.

Registered Investment Advisors (RIAs), on the other hand, are subject to the higher fiduciary standard of care, requiring RIAs to act in their clients' best interests. The fiduciary standard requires fiduciary advisors to:

- Act solely in the best interest of the plan sponsor, participants and beneficiaries to the plan.
- Avoid conflicts of interest or fairly manage them in the client's favor.
- Disclose all forms of compensation both direct and indirect.

As with the definition of “fiduciary” under ERISA, the SEC rules are also in a state of flux. The Dodd-Frank financial reform law, an overhaul of financial regulation passed in the wake of the 2008 credit crisis, instructed the SEC to consider mandating that brokers operate under a fiduciary standard as rigorous as that for investment advisors. As of the date this Practice Guide was published, the fate of efforts to create a uniform fiduciary standard remains uncertain. The 2012 Agency Financial Report, released in September 2012 under former SEC chairman Mary Shapiro, stated that in 2013 the SEC expects to move forward to consider a uniform fiduciary standard of conduct for investment advisors and broker-dealers when providing personalized investment advice to retail investors about securities.

The likely next step is for the SEC to ask for public comments in the form of a request for information to allow public participation in the cost-benefit analysis of the uniform standard. The SEC has not communicated any time frame for further action on the uniform proposal, and it is unlikely any significant activity will occur prior to confirmation of a new SEC Chairman.

As previously indicated, the primary focus of this Practice Guide is the ERISA fiduciary rules. RIAs and registered representatives, however, should be aware that the SEC and FINRA also impose separate sets of obligations on their actions, and seek out guidance to avoid potential SEC or FINRA violations.

Types of fiduciaries

FOUR TYPES OF ERISA PLAN FIDUCIARIES

- Named Fiduciaries
- Plan Administrator
- Investment Managers
- Investment Advisors

Fiduciary status can occur either proactively through appointment or passively through actions. At a minimum, every plan must have at least one person or entity specifically delineated as a fiduciary to the plan (the Named Fiduciary). This person or entity must be named in:

- the written plan, or
- through a process identified in the plan.

Additionally, the Named Fiduciary may be identified:

- by office, e.g., chief financial officer or director of human resources, or by name.

Named Fiduciaries may hire non-fiduciary service providers such as record-keepers, third-party administrators, and non-fiduciary investment advisors to help them meet their fiduciary responsibilities.

The Named Fiduciary may also hire or appoint other fiduciaries. ERISA identifies three categories of fiduciaries that a Named Fiduciary may appoint. These are:

- Plan Administrators who are responsible for plan administrative decisions
- Investment Managers who are responsible for selecting and monitoring plan investments
- Investment Advisors who share fiduciary responsibilities with the plan sponsor and provide investment advice

Specifically, under section 3(16) of ERISA, Plan Administrators are responsible for the day-to-day administrative decisions of running the plan.

This includes:

- Interpreting plan documents
- Making benefit determinations
- Authorizing distributions

Most plan documents name the plan sponsor as the ERISA Plan Administrator.

Under Section 3(38) of ERISA, the Investment Manager assumes full discretionary responsibility for selecting and monitoring plan investments. Plan sponsors have a fiduciary responsibility to prudently select Investment Managers, but the Investment Manager has the legal responsibility and liability for actual investment decisions. Registered representatives generally cannot serve as ERISA 3(38) Investment Managers because ERISA requires that Investment Managers be a bank, insurance company or a registered investment advisor.

Section 3(21) Investment Advisor fiduciaries share fiduciary responsibility with the plan sponsor. The plan sponsor, however, retains ultimate legal authority and must monitor the performance of the 3(21) fiduciary. An advisor may be specifically appointed by the plan sponsor as a Section 3(21) fiduciary, or may assume that status by exercising discretionary control over the plan or plan assets. Specifically, advisors become ERISA 3(21) fiduciaries if they:

- exercise any discretionary authority or discretionary control respecting the management of the plan or disposition of plan assets; or
- render investment advice for a fee or any other direct or indirect compensation; or
- have discretionary authority or responsibility in the administration of the plan.

As we'll discuss below, an advisor typically serves as an ERISA fiduciary based on investment support provided as an ERISA 3(38) investment manager or as an investment advisor under ERISA 3(21).

TYPE OF APPOINTED FIDUCIARY	RESPONSIBILITIES
ERISA 3(16) Plan Administrator	<ul style="list-style-type: none"> • Responsible for the day-to-day administrative decisions regarding a plan: interpreting plan documents, authorizing distributions, etc.
ERISA 3(38) Investment Manager	<ul style="list-style-type: none"> • Assumes full discretionary responsibility for selecting and monitoring plan investments. • Plan sponsor has fiduciary responsibility for the prudent selection of the investment manager, but the investment manager assumes legal responsibility and liability for actual investment decisions.
ERISA 3(21) Investment Advisor	<ul style="list-style-type: none"> • Shares fiduciary responsibility with plan sponsor as a result of rendering investment advice for a fee. • May also become a fiduciary if exercises any discretionary authority or discretionary control with respect to plan assets.

When are advisors fiduciaries?

Generally, a registered representative who simply makes recommendations under the suitability standard, with the plan sponsor having the ultimate discretion to follow or disregard their recommendations, is not a fiduciary under the current rules. If an advisor, however, is named or proactively accepts appointment as a fiduciary, they will be subject to the ERISA fiduciary standards. Most RIAs and some registered representatives already proactively accept fiduciary status. Other registered representatives, on the other hand, do not proactively accept fiduciary status, and may be prohibited by their broker-dealers from doing so.

However, just because advisors have not proactively obligated themselves to abide by the fiduciary rules, it does not necessarily mean that they are not fiduciaries subject to the rules.

An advisor could passively assume fiduciary status through their actions and not be aware of it.

For example, if an advisor actually makes a decision regarding a 401(k) plan's investment lineup, then the advisor would have fiduciary liability with respect to that decision.

Additionally, the long standing view of the DOL is that fiduciary status may flow from providing

advice or recommendations to plan participants or beneficiaries. An advisor can inadvertently assume fiduciary status by providing such advice to participants or beneficiaries.

The DOL created a five-part test to determine when investment advice provided by an advisor for a fee results in fiduciary status under ERISA 3(21) (A) (ii). If an advisor engages in all five of the following, they will be considered a fiduciary to the plan:

1. renders advice as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing, or selling securities or other property.
2. on a regular basis.
3. pursuant to a mutual agreement, arrangement, or understanding with the plan or a plan fiduciary, that
4. the advice will serve as a primary basis for the investment decisions with respect to plan assets, and that
5. the advice will be individualized based on the particular needs of the plan.

For example, advisors with authority to select or replace plan investments are fiduciaries subject to the ERISA fiduciary rules, even if they have not proactively assumed fiduciary status. Advisors who simply make recommendations under the suitability standard with the sponsor having the option to accept or reject those recommendations, however, are not ERISA fiduciaries, even if the advisors receive commissions or 12b-1 fees.

There are examples of investment guidance activities advisors can provide to plans and participants without passively becoming subject to the fiduciary rules. These activities include:

- **Investment Education.** Investment education to plan participants through group enrollment meetings in which an advisor discusses general investment principles and provides tools that enable participants to model different investment scenarios based on a participant's risk tolerance and savings objectives will not subject an advisor to the fiduciary rules.

THE FIVE ELEMENTS THAT MUST BE PRESENT FOR ADVISORS WHO RECEIVE FEES TO BE DEEMED FIDUCIARIES

1. offering advice as to the value of securities or other property rendered, or making recommendations as to the advisability of investing in, purchasing or selling securities or other property.
2. done on a regular basis.
3. done pursuant to a mutual agreement, arrangement, or understanding with the plan or a plan fiduciary.
4. advice will serve as a primary basis for the plan investment decisions.
5. individualizing advice based on the particular needs of the plan.

As discussed at the beginning of this Practice Guide, the DOL proposed rules that would have greatly expanded the number of advisors who would have been considered fiduciaries to the plan. The proposal would have modified the five-part test by eliminating the requirement that the advice be provided on a "regular basis" and that the advice be the "primary basis" for the investment decisions. The proposed changes stirred up a strong response from the retirement industry and other interested parties, and on September 19, 2011, the DOL announced they will solicit additional public comment and then repropose the fiduciary definition regulations at some point in the future.

FIDUCIARY STATUS IN A NUTSHELL

Fiduciary status depends more on function, authority and responsibility rather than title or label. However, some individuals do become fiduciaries by virtue of their position, such as:

- plan trustees
- members of an investment committee

Generally, in addition to anyone specifically named in the plan as a fiduciary, individuals are ERISA fiduciaries, whether they acknowledge it or not, to the extent they:

1. exercise any discretionary authority or responsibility in the administration of the plan;
2. exercise any authority or control concerning the management and disposition of plan assets;
3. render investment advice with respect to plan assets, or has any authority or responsibility to do so, for a fee or other compensation, other than regular compensation received as an employee of the sponsor.

Fiduciary responsibilities

ERISA imposes strict standards of conduct on fiduciaries who manage employee benefit plans and investments. Plan fiduciaries have a duty to:

- Act in plan participants' best interests
- Act prudently
- Follow the terms of the plan document
- Diversify investments
- Ensure that plan expenses are reasonable

Additionally, ERISA imposes a number of prohibitions on fiduciaries including:

- **Prohibitions on transactions between the plan and "parties in interest."** A "party in interest" includes any fiduciary, the sponsor or persons or entities related.
- **Prohibitions on self-dealing and other conflicts.** i.e., the fiduciary cannot participate in actions that primarily serve the fiduciary's interests, or which would create a conflict with the interest of the plan or plan participants.

FIDUCIARY RESPONSIBILITIES UNDER ERISA

Act in plan participant's best interests:

An ERISA fiduciary must act solely in the interests of the plan participants (and beneficiaries) and with the exclusive purpose of providing benefits to them. Fiduciaries are required to disclose conflicts of interest and are prohibited from engaging in self-dealing, that is, actions that primarily serve the fiduciary's interests.

Act prudently:

A fiduciary must carry out their duties prudently. Fiduciaries are required to act with the care, skill and diligence of a prudent man under similar circumstances. If a fiduciary does not have the expertise to handle matters under their charge, they must hire professionals who have that expertise.

Follow the terms of the plan document:

The plan documents serve as the foundation for plan operations. Interpretation of document and operational direction is a fiduciary function. Fiduciaries must discharge their duties in accordance with the governing plan document and instruments, insofar as they are consistent with ERISA.

Diversify investments:

Plan assets must be diversified to reduce the risk of large investment losses, unless under the circumstances it is clearly prudent not to do so.

Pay reasonable plan expenses:

The plan fiduciary must hire and monitor service providers and ensure that only reasonable fees are paid for plan services and investments.

- **Prohibition on fiduciaries from dealing with the assets of the plan in their own interest or for their own account.** i.e., unless a specific exemption applies, a fiduciary may not hire itself or its affiliate to provide services to the plan.
- **Prohibitions against fiduciaries representing an adverse party in a transaction involving the plan.** An “adverse party” is any party whose interests conflict with those of the plan and its participants.
- **Prohibitions against fiduciaries receiving any consideration for their own personal account from any party dealing with the plan in connection with a transaction involving the assets of the plan.**

Fiduciary liabilities

Fiduciaries are personally liable for plan losses caused by a breach of their ERISA fiduciary responsibilities and may be required to:

- restore plan losses (including interest);
- return ill-gotten gains; and/or
- pay the expenses relating to correction of inappropriate actions (e.g., appraisals, calculations).

FIDUCIARY STATUS MEANS YOU CAN BE LIABLE FOR OTHER FIDUCIARIES' BREACHES

Fiduciary advisors can be liable not only for their own breaches of fiduciary duties, but for the breaches of co-fiduciaries, unless they take steps to limit their liability.

Additionally, unless fiduciaries clearly limit the scope of their fiduciary role with respect to the plan, they may be responsible for actions of other plan fiduciaries (referred to as co-fiduciaries). If co-fiduciaries fail to take corrective actions once aware of a breach by the other fiduciary, or they knowingly participate in inappropriate behavior, they become liable for any losses caused by the co-fiduciary's breach.

Bonding

ERISA requires that every fiduciary of a plan and every individual who handles plan assets must be bonded (ERISA § 412). The required fidelity bond protects the plan against losses that result from fraudulent or dishonest acts of those covered by the bond. A fidelity bond protects the plan.

PRUDENT PROCEDURAL PROCESS IS KEY TO AVOIDING FIDUCIARY LIABILITY

Following a prudent decision-making process, known as procedural due diligence, is key to ERISA fiduciary compliance. Whenever fiduciaries make plan decisions, such as picking or monitoring investments or choosing vendors, they must fully evaluate that decision and document it. Different fiduciaries may reach different conclusions, but if they set up sound procedures and systems with checks and balances, they have satisfied their fiduciary obligation. It is important for fiduciaries to document their decision-making process relative to the responsibilities to demonstrate procedural prudence.

Investment fiduciary compensation options

When RIAs or registered representatives assume fiduciary status to a plan, it limits the compensation options they may receive. As a general rule, ERISA and the Internal Revenue Code prohibit fiduciary investment advisors from receiving compensation for the investment vehicles that they recommend to plan participants (ERISA Section 406(b)(1) and (3), Internal Revenue Code Section 4975(c)(1)(E) and (F)). RIAs or registered representatives who are fiduciaries to the plan must use a fee arrangement unrelated to investments or operate under a statutory or individual prohibited transaction exemption. The purpose of these rules is to protect plan participants from conflicts of interest, i.e., recommendations of investments that would generate higher compensation to the advisor.

RIAs and registered representatives who assume fiduciary status to the plans they advise are limited as to the compensation arrangements they can participate in with respect to the plan. To avoid conflicts of interest, fee arrangements must be unrelated to investments or operate under a prohibited transaction exemption.

The following are the types of compensation frameworks available to fiduciary investment advisors:

- **Fee-for-service model.** Some fiduciary advisors, such as RIAs, establish a fee schedule for their services and are paid directly by the plan sponsor or from plan assets, rather than the investment vehicles. Fee-for-service models are becoming increasingly popular in the retirement plan industry.
- **Options under Final Investment Advice Regulations** (DOL Reg. 2550.408g). Advisors can rely on the statutory exemption to the prohibited transaction rules that allows investment fiduciaries to accept fees from the investment vehicles they recommend if they deliver advice to participants under one of the two “eligible investment arrangements.” Each option requires annual audits and special participant disclosures.
 - *Level Compensation.* Fiduciary advisors can still receive 12b-1 fees or commissions if they use an arrangement in which fees will not vary based on the investments selected by a participant. All investments selected by a plan will result in the same amount of compensation paid to the advisor and their broker-dealer firm. In these arrangements, the trading platform or other service provider typically collects all 12b-1 fees, for example, and pays a set amount to the advisor (e.g., 25 or 50 basis points) regardless of which investments are ultimately selected by plan
- *participants.* This eliminates the potential for any conflicts of interest between the advisor’s fiduciary obligations to the participants because their recommendations will not impact their compensation. Level compensation options are becoming increasingly available in the retirement plan market place.
- *Computer Model.* Another option for receiving investment-related compensation is to limit fiduciary investment recommendations to a list of investments generated by a computer model that has been developed and audited under DOL standards. These investment-related compensation limits do not apply to nonfiduciary advisors (i.e., there are no changes in the rules enabling nonfiduciary advisors to accept 12b-1 fees or commissions based on the investments selected by plan participants).
- **Other DOL-Approved Compensation Programs.** The DOL has approved other programs’ investment-based fee arrangements for fiduciary advisors where there were adequate checks and balances to protect participant interests (Advisory Opinions 2011-08A, 2005-10A (Country Trust Bank), 2001-09A (SunAmerica Retirement Markets), 1997-15A (Frost National Bank).

Non-fiduciary compensation options

Advisors who are not fiduciaries may also be entitled to receive such fees as provided by the mutual fund companies and authorized by their broker-dealer.

Investment fiduciaries who accept fees from an investment vehicle in a manner that does not satisfy one of the options above have breached their fiduciary duties and are engaged in prohibited transactions under ERISA. If advisors engage in prohibited transactions, they can be subject to steep fines and be required to unwind the offending transaction in addition to any liabilities incurred due to breaching their fiduciary duties.

MATRIX PLAN DATA FEED AND LEVEL

Compensation Services

Whether its increased visibility throughout the organization or implementing better controls for advisors to ensure compliance, Matrix's Plan Data Feed and Level Compensation services enable firms to win new business and better serve existing clients while reducing the risk associated with selecting a fund line-up resulting in an advisor's non-levelized compensation. These services empower the firm and advisor with better information and a powerful competitive advantage.

Matrix's Plan Data Feed and Level Compensation services

- Provide visibility into current financial advisor activity
- Ensure financial advisors who act as fiduciary are following firm fund selection guidelines
- Allow financial advisors to select from firm mandated sleeve of 25 and 50 bps funds
- Compensate financial advisors in one payment, not multiple payments from multiple funds
- Guarantee funds are selected based on merit, not fee structures

Business Considerations

Non-fiduciary support

It is important to understand that an advisor does not need to be a fiduciary to serve retirement plan clients. There are pros and cons to each business model. Advisors, particularly registered representatives, are not required to become ERISA fiduciaries when providing services to the plan and many do not take on that responsibility. In fact, many of the traditional activities of registered representatives are considered nonfiduciary functions under the DOL regulations including:

- delivering generic investment education and helping with risk tolerance assessments or providing sample age and risk-based portfolios,
- providing enrollment services,
- offering operational support such as helping with the mechanics of moving to a new recordkeeper,
- assisting with vendor searches,
- providing plan reports and analytics such as participation rates, or
- helping plan sponsors understand THEIR fiduciary responsibility.

There are many pros to not assuming fiduciary status. By not proactively assuming fiduciary status, advisors are avoiding the additional work and liabilities associated with being a fiduciary.

However, plan sponsors, even at smaller firms, are increasingly stipulating that their advisors assume fiduciary status. By choosing to avoid fiduciary responsibility, advisors may be limiting business opportunities for expansion. Additionally, if advisors are not cautious, they may unwittingly assume fiduciary status and not be adequately insured for the risk.

Broker-dealer requirements

Registered representatives who wish to assume a fiduciary role must first determine if their broker-dealers impose limits on advisors' ability to serve as a fiduciary. While several years ago broker-dealers pretty much uniformly prohibited their registered representatives from serving as fiduciaries, the tide is now changing. However, there is still some reticence in the industry. While some broker-dealer firms are actively encouraging the new business model, others are only beginning to venture in.

Registered representatives should check with their broker-dealers as to whether they can assume fiduciary status, and whether there are certain requirements necessary to do so. For example, some firms do not allow registered representatives to offer fiduciary investment support unless the advisor has completed specialized training or certification.

Some firms also require advisors to have extensive industry experience working with retirement plans prior to assuming fiduciary status.

Insurance for fiduciary breaches

When advisors assume a fiduciary role, they should have insurance to cover the risk that they may be sued for in the event of any ERISA fiduciary breaches. Though ERISA does not require that fiduciaries carry insurance to cover their breaches, such insurance protects advisors in the event they incur expenses related to their responsibilities to the plan.

The typical Errors and Omissions (E&O) policy most advisors carry does not insure against this risk, although coverage for fiduciary breaches can be obtained through an add-on rider to the E&O policy. Registered representatives who assume fiduciary status may also want to check with their broker-dealer to see what type of coverage for fiduciary breaches they provide. Non-fiduciary registered representatives may also want to explore having coverage in the event that they are sued for a fiduciary breach to cover litigation expenses even if they win because it's determined that they are indeed not fiduciaries.

Advisor Action Steps

In this section of the Practice Guide, we'll suggest three actions that will help advisors capitalize on the opportunities presented by the fiduciary "conversation" that is going on in the retirement industry.

Action #1: assess your current business model

Checklist for fiduciary advisors

For RIAs and registered representatives who have already assumed a fiduciary role with respect to plans they advise, it is prudent to periodically self-audit and analyze current practices both for regulatory compliance under ERISA and market viability. Listed below is checklist of some of the key issues to include in the self-assessment.

FIDUCIARY ADVISOR CHECKLIST	✓
<p>1. Are you an ERISA investment fiduciary?</p> <ul style="list-style-type: none"> • Determine scope of fiduciary services • Identify clients for whom you are a fiduciary vs. those only receiving non-fiduciary support 	
<p>2. Do you have the proper licensure and training?</p> <ul style="list-style-type: none"> • 3(38) RIA status • Broker-dealer requirements • Education or certification 	
<p>3. Does your service agreement properly describe your fiduciary services?</p> <ul style="list-style-type: none"> • Statement of fiduciary status relative to investment support services • List of services provided as a non-fiduciary • Description of plan sponsor/named fiduciary responsibilities 	
<p>4. Is your fee structure appropriate?</p> <ul style="list-style-type: none"> • Fee-based revenue model • Investment-based revenue model <ul style="list-style-type: none"> • Level compensation • Computer-generated model • Fees benchmarking against competitors/market 	
<p>5. Do you showcase your fiduciary status in marketing materials, proposals, presentations?</p> <ul style="list-style-type: none"> • Articulate benefits of sharing fiduciary responsibilities 	
<p>6. Do you have a fidelity bond?</p>	
<p>7. Have you secured insurance to cover fiduciary breaches?</p>	
<p>8. Do you have a process for documenting all fiduciary actions and decisions?</p>	
<p>9. How do you help plan sponsors meet their fiduciary responsibilities?</p>	

Checklist for non-fiduciary advisors

For non-fiduciary advisors, a self-assessment can serve multiple purposes.

- First, from a regulatory standpoint, an advisor should confirm that their current business practices do not render them an unintentional fiduciary.
- Second, non-fiduciary advisors should evaluate whether their status poses any competitive disadvantages.

If an advisor concludes they are losing business because they do not offer fiduciary support services, it may be more a matter of how they communicate their support services than their actual non-fiduciary status. If advisors conclude they would benefit from serving as fiduciaries, they should evaluate the steps needed to pursue that status and identify any barriers that prevent attaining that status.

Action #2: define & communicate your value proposition relative to fiduciary support

A key step in building a business plan and sales strategy is defining your value proposition or “theme” to clients and potential clients. You want to communicate clearly and consistently why a prospect should work with you as opposed to another advisor, and how your existing clients benefit from your expertise. Here are some of the components you may want to include in your value proposition:

- Special licensing or credentials
- Any honors or recognition
- Retirement plan training programs completed
- Your experience in working with other plan sponsors
- Success stories in terms of how your services have helped other plan sponsors

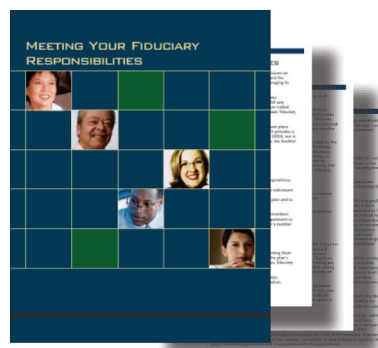
NON-FIDUCIARY ADVISOR CHECKLIST	✓
<p>1. Would any of your services create fiduciary status under ERISA 3(21)?</p> <ul style="list-style-type: none"> • Plan-level vs. participant-level investment support • Review of 5-part test • Consider impact of proposed DOL expansion of fiduciary status 	
<p>2. Have you communicated to your clients that you are not a fiduciary?</p>	
<p>3. Have you lost plans to advisors who offer fiduciary investment support?</p>	
<p>4. Are there fiduciary investment services from other providers that would complement your business model?</p>	
<p>5. If you conclude you would benefit by offering fiduciary services, what are your barriers to entry?</p> <ul style="list-style-type: none"> • Expertise – specialized knowledge and training • Licensure • Broker-dealer requirements 	
<p>6. How do you help plan sponsors meet their fiduciary responsibilities?</p>	

If you are a fiduciary, explain how your support will help plan sponsors meet their fiduciary obligations. Keep in mind that there is no single correct formula for positioning your services. Focus on the higher level of support and oversight you provide as a fiduciary, and the strict standards of conduct you will follow. Also, whether you are a fiduciary or non-fiduciary, highlight the deep retirement plan expertise you can bring to the relationship. Describe any special relationships you have with other service providers to illustrate the depth and breadth of support the plan sponsor will receive if they engage your services. Focus your message on how your services benefit the plan sponsor rather than simply providing a checklist of services.

Action #3: help plan sponsors meet their fiduciary duties

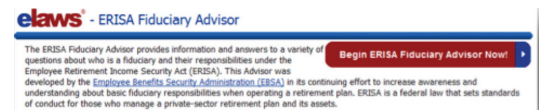
Fiduciary education

Understanding their fiduciary responsibilities in offering and administering an ERISA retirement plan is an area of great need among plan sponsors, and provides you an opportunity to really set yourself apart from other advisors. Very few plan sponsors really understand what ERISA demands of them. A great step in building a strong relationship with a plan sponsor is to provide them with educational resources explaining their fiduciary role, and then help them meet their fiduciary obligations. You can deliver that help directly, or you can bring in other players like a TPA for support. Incorporate your fiduciary education services into the value proposition you present to prospective clients as well as introducing it to your existing clients.



There are a variety of ways to approach this education. You will also find a wealth of free educational resources such as booklets and checklists on the DOL website (www.dol.gov). The publication *Meeting Your Fiduciary Responsibilities* is an example of a DOL resource an advisor could provide as a training guide or as a “leave behind” for plan sponsors.

A helpful tool an advisor can introduce to their plan sponsor clients is the DOL’s interactive *ERISA Fiduciary Advisor*. This online tool guides the plan sponsor through a series of questions to identify whether they are a fiduciary, and provides information and answers to frequently asked questions about fiduciaries and fiduciary responsibilities. It also provides links to more detailed information on key topics. Advisors may wish to incorporate some of the content from these DOL materials into their presentations at quarterly meetings, or simply introduce the tools to plan sponsor clients to review on their own.



Support services

In addition to fiduciary education, there are many ways an advisor, in a non-fiduciary capacity, can help plan sponsors meet their fiduciary duties and mitigate risk:

- Educate plan sponsors about the impact of ERISA 404(c) compliance and providing investment education to plan participants.
- Introduce qualified default investment options (QDIAs).
- Help plan sponsors understand their plan costs and fees.
- Assist with the selection and monitoring of third-party service providers by looking at a number of providers, comparing the same variables with each provider and considering whether the fees are reasonable for the services provided.

- Explain the importance of timely deferral deposits.
- Provide regulatory updates to help plan sponsors understand how new rules will impact their plan.
- Serve as a plan sponsor's gateway to compliance resources (e.g., TPAs and recordkeepers).
- Deliver investment information and benchmarking information to help plan sponsors fulfill their fiduciary responsibilities.
- Discuss the benefits of using an Investment Committee to manage investment risk (See the Practice Guide Addendum for more information on Investment Committees).

Helping sponsors understand the fiduciary advisor's role

Advisors should make sure that plan sponsors know their fiduciary responsibilities. Many plan sponsors believe that if they hire an advisor who assumes fiduciary status, they are relieved from their fiduciary obligations. Plan sponsors must be made aware that fiduciary advisors are not alleviating all fiduciary liability for plan sponsors.

For example, if a plan sponsor picks an ERISA Section 3(38) Investment Manager fiduciary to make investment decisions for the plan, it helps the sponsor better manage and mitigate their fiduciary risk, but it does not eliminate it. The plan sponsor cannot completely eliminate its fiduciary liability. The sponsor is still responsible for the prudent selection of the investment manager and has a fiduciary obligation to monitor and benchmark the Investment Manager. Furthermore, if the sponsor at any time overrides the decisions of the 3(38) Investment Manager, then the sponsor assumes the fiduciary responsibility and liability for that decision.

Summary

The fiduciary responsibilities for plan sponsors and investment advisors will be an increasingly important focus for plan sponsors and the DOL. Advisors who proactively evaluate and adjust their current business practices — whether offering fiduciary support or non-fiduciary services—will be in the best position to capitalize on the fiduciary conversation. Being a proactive retirement specialist is the key to growing one's retirement book of business in this changing environment.

Addendum

Investment committee best practices

Advisors should educate plan sponsors as to the benefits of establishing Investment Committees to help sponsors manage their fiduciary duties relative to plan investments. Investment Committee members are fiduciaries and typically share responsibilities in:

- Developing an Investment Policy Statement
- Selecting and monitoring the plan's investment options
- Selecting and monitoring an investment professional

Helping plan sponsors understand the benefits and mechanics of setting up investment committees is a service advisors can deliver

regardless of whether they are a fiduciary or non-fiduciary advisor. The benefits to plan sponsors of established Investment Committees include:

- That they share their fiduciary responsibility for investment oversight
- That they potentially broaden expertise by including key members with special skills such as a chief financial officer or human resources representative

An Investment Committee, if managed properly, can also help formalize and document that a prudent decision-making process was followed. While an Investment Committee may not be manageable for small businesses, it may be a useful risk mitigation tool for mid-size and larger plans. Listed below is a checklist of some of the steps involved in establishing an Investment Committee.

INVESTMENT COMMITTEE BEST PRACTICES

✓ **Authorize the investment committee**

- Formal establishment (e.g., board resolution)
- Define purpose and scope of responsibilities

✓ **Appoint members and establish operating procedures**

- Frequency of meetings (e.g., quarterly)
- Roles and responsibilities of members

✓ **Provide orientation and education to Investment Committee members**

- Objectives for establishing the plan
- ERISA fiduciary responsibilities
- Terms of the plan documents
- Current service provider relationships

✓ **Review Investment Policy Statement**

- If one has been adopted, review and adjust as needed
- If not adopted, decide whether to adopt one
- Consider whether to adopt a fee review policy

✓ **Maintain written records of Investment Committee decisions**

- Investment reviews (including benchmarking information)
- Rationale for adjusting investment lineup (if applicable)
- Summary of presentations and copies of information provided by experts (financial advisors, legal or tax advisors)

Contact Us

Cindy Dash COO,
Matrix Financial Solutions Broadridge Financial Solutions, Inc.
+1 720 956 5414

Pamela S. O'Rourke Senior Vice President and Senior Counsel
Integrated Retirement Initiatives
+1 877 731 3947

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