Today's Retirement Plan Fiduciary:

What Employers Need to Know to Achieve Plan Compliance and Minimize Personal Liability

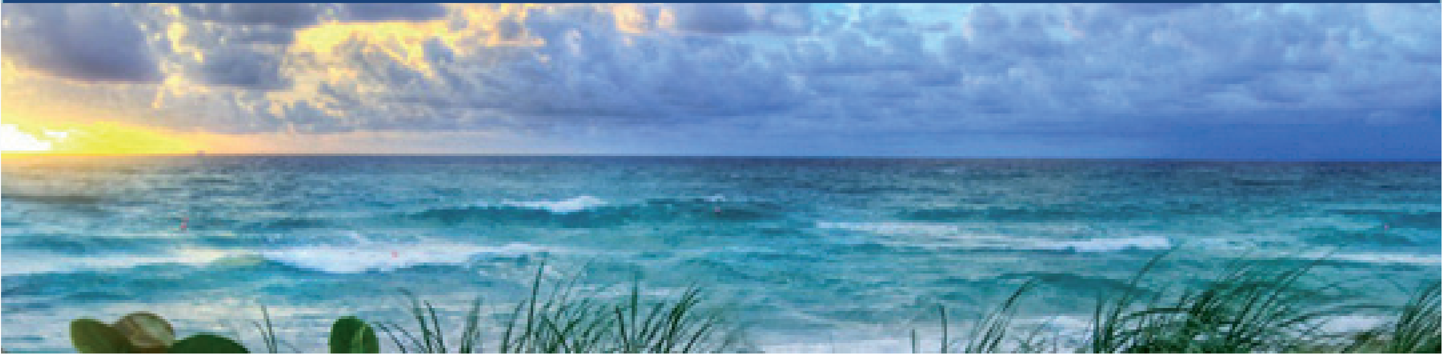

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TABLE OF CONTENTS

Foreword 1
Executive Summary 2
Part I: The Evolving Role of the Retirement Plan Fiduciary 3
- Once Upon a Time: The History of the Retirement Plan Fiduciary 3
- That Was Then, This Is Now 3
- Today's Challenges: Ignorance is No Longer Bliss 4
  - Increased class-action suits 4
  - Increased fee disclosures 5
- Today's Opportunities: Increased and Improved Plan Sponsor Support Systems 5

Part II: Implementing Fiduciary Risk Mitigation 7
- Overall: Process and Documentation 7
- Hire a Fiduciary Investment Advisor 7
- Create and Maintain an Investment Policy Statement 9
- Form an Investment Committee (and Meet Regularly) 9
- Conduct Periodic Benchmarking on Plan Fees 9
- Maintain Informed Procedural Prudence 10
- Conduct (and Document) Routing Plan Monitoring 10

Conclusion 11
Appendix A: Plan Documents Checklist 12
About the Author 13

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Foreword

We hope that a wide range of readers who offer or are responsible for managing retirement plans, particularly 401(k) retirement plans, will find our white paper clarifying and thought-provoking. We expect sponsors of small and medium plans will especially benefit from our examination of the regulatory challenges they face currently and the potentially more challenging regulations we believe they will face in the years ahead.

In our experience, the typical employer sponsor for small and medium retirement plans subject to ERISA is unaware of all that he or she is required to accomplish to ensure regulatory compliance. Of greater concern, that same employer plan sponsor does not realize that a failure to comply with U.S. Department of Labor regulations under the Employee Retirement Income Security Act (ERISA) could be considered a breach of fiduciary responsibility and could create serious personal liability. The scrutiny of retirement plans and their employer sponsors is only expected to increase with the new fee-disclosure requirements that took effect in 2012.

Plan sponsors are advised to ask themselves:

- Am I an investment expert?
- Have I delegated my responsibility (and liability) as an investment expert for our plan to a third-party investment fiduciary, who has specifically acknowledged acceptance of investment fiduciary liability *in writing?*
- Am I fully informed of all fees charged against our plan, both explicit and implicit, including those paid to all of our plan's service providers (investment manager, recordkeeper, third party administrator, custodian, trustee)?
- Have I confirmed that all of these fees are reasonable (usually by benchmarking them against industry standards)?
- Is my plan governed by a written Investment Policy Statement?
- Is my plan guided by counsel from an Investment Committee that meets regularly and records its activities?
- Do I regularly monitor my plan for ERISA compliance?

A Plan sponsor who answers "no" to even one of these questions is likely breaching his or her fiduciary duty to plan participants and unwittingly exposing himself or herself to potential personal liability as a result of the assumed role of plan fiduciary.

The good news is that employer plan sponsors can dramatically improve their compliance with ERISA by following a handful of straightforward processes to guide decision-making and manage fiduciary risk. The plan sponsor does not need to know *everything*; he or she need only know the *right* things. This paper will share what plan sponsors need to know to become compliant and remain in compliance with regulatory requirements, minimize personal liability and best serve plan participants.

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Executive Summary

U.S. retirement plans have come a long way since their late 1800s roots. As is often the case, we've seen many improvements, but also have faced plenty of challenges. Significant changes came in 1981, with the introduction of the **401(k) plan** — interestingly, seven years *after* the 1974 **Employee Retirement Income Security Act (ERISA)** was passed, to minimize retirement plan mismanagement. As the 401(k) has come to dominate most households' retirement savings, roles and responsibilities have shifted dramatically:

- **Employers** (rather than traditional pension plan professionals) are tasked with plan oversight, including negotiating reasonable service fees and ensuring sensible investment selections.
- **Employees** (rather than employers) are tasked with decisions related to their personal contributions, transactions and investment outcomes.

Not surprisingly, these separate roles have led to a series of high-profile, class-action participant lawsuits, seeking to hold plan sponsors accountable for their actions. With new fee disclosure requirements that took effect in 2012, there has been increased litigation against smaller plans and their employer sponsors as well as increased scrutiny from the U.S. Department of Labor.

Fortunately, along with the ERISA-mandated responsibilities has come enhanced guidance on how plan sponsors can most readily fulfill their fiduciary obligations. The keys for plan sponsors are to: (1) establish **well-documented processes** by which their plans operate, to safeguard against regulatory scrutiny and unwarranted liability; and (2) to transfer investment selection duties and liability to a professional known as a 3(38) fiduciary, usually in the form of a Registered Investment Advisor firm. In light of these key components, we offer specific recommended processes as well as advice on selecting an alliance that can and will accept the investment selection fiduciary role **in writing**.

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Part I: The Evolving Role of the Retirement Plan Fiduciary

Dialing a telephone. Rolling down the car window. Spinning a yarn. There are those who have first-hand experience with these activities; they actually remember how long it used to take to place a long-distance call with a lot of zeroes in it. But of course time and technology march on, sometimes modestly, often dramatically. Similar to the evolving meaning of an historical expression, today's retirement plan fiduciary role can be viewed as an intriguing blend of traditional assumptions meeting modern-day realities.

Once Upon a Time:
The History of the Retirement Plan Fiduciary

Just as it helps to know the history of typewriters to understand why our iPads have a button called "shift," it helps to know the origins of the retirement plan fiduciary to understand its current significance.

In 1961, President John F. Kennedy formed a presidential committee to explore the status of private pension plans, and whether improvements were warranted. Reform sentiments gained additional momentum in 1963, when the Studebaker Corporation in South Bend, Indiana closed its doors, along with its poorly funded pension plan. When its 10,500 employees lost their jobs, 3,600 of them received full pension benefits. But another 4,000 received only 15 percent of their promised pension benefit. The remaining 2,900 received nothing.[1]

Other similar crises unfolded in an environment in which oversight was lax and vesting was often unreasonably burdensome. In 1972, the movement toward pension reform reached a tipping point when NBC aired "Pensions: The Broken Promise," about the plight of the Studebaker employees and many others. Amidst escalated public awareness and support, Congress passed and President Gerald Ford signed into law the **Employee Retirement Income Security Act (ERISA)** on Labor Day, September 2, 1974.[2]

ERISA itself has evolved some over the years, but its roots run deep within efforts to overhaul the traditional company pension plan. Thus its overarching goal is relatively simple: "To address public concern that funds of private pension plans were being mismanaged and abused."[3] Toward this end, ERISA requires that all plans be prudently and expertly managed, with reasonable fees and diversified investment options. In effect, ERISA demands that managers act as **fiduciaries**, a level of responsibility that is governed by the highest available legal standards. It obligates the fiduciaries (plan management) to always act in the best interests of the trust's beneficiaries (the retirement plan's participants).

So far, so good. But the retirement plan landscape was very different in 1974 than it is today, complicating implementation for players and plans alike.

Different players — Responsible parties (fiduciaries) were mostly managing very large pension funds for very large employers (plan sponsors). As a result, most individuals assuming a fiduciary role were financial professionals, with the personal know-how and/or resources needed to manage large pools of retirement assets.

Different plans — Very large pension plans were essentially the only players on the field. 401(k) retirement plans didn't enter the game until seven years later in 1981, when they were authorized under Section 401(k) of the Internal Revenue Code.

In other words, during ERISA's formative years, existing retirement plan managers were (or at least should have been) relatively well-positioned to accept the mantle of fiduciary responsibility placed upon them.

That Was Then, This Is Now

Of course it didn't take long for the rules of engagement to evolve with the introduction and expansion of the 401(k) plan.

- By 1984, three years after the 401(k) plan was introduced, there were approximately 17,000 of them, with 7.5 million participants.[4]
- According to a 2007 Government Accountability Office (GAO) publication, that figure grew to an estimated 417,000 plans, representing about 95 percent of all defined contribution plans and approximately 47 million active private pension plan participants by 2005.[5]

[1]"Employee Retirement Income Security Act," Wikipedia.org. Accessed January 3, 2012.

[2]Ibid.

[3]U.S. Department of Labor, "History of EBSA and ERISA,"DOL.gov. Accessed December 26, 2011.

[4]Facts from EBRI, "History of 401(k) Plans: An Update," EBRI.org. Accessed January 3, 2012.

[5]Barbara D. Bovbjerg, U.S. GAO, "Private Pensions: Increased Reliance on 401(k) Plans Calls for Better Information on Fees," March 6, 2007.

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- By Fall 2010, the DOL estimated there were approximately 72 million private sector active participants.[6]
- As of early 2011, approximately 60 percent of households nearing retirement included active participants in 401(k)-type plans. [7]

In short, the large, traditional defined benefit plans (pension plans) — the original targets for ERISA regulations — have been increasingly overshadowed by defined contribution plans such as the 401(k), 403(b), or profit sharing plan. This is especially true for small and medium businesses.

The shift represents a fundamental change in the responsibility and risk assumed for decisions related to specific investment transactions and contributions. That burden of responsibility has transitioned *from* the plan sponsor (employer) within a defined benefit plan to the plan participant (employee) within the participant-directed defined contribution plan.

But here a serious challenge arises. Despite this fundamental shift of portions of the responsibility and risk from plan sponsor to participant, ERISA's definitions for fiduciary duty have remained the same. Just as when ERISA was enacted, plan sponsors of all size remain in the role of plan fiduciary, still responsible for:

ERISA's Definition for Fiduciary Duty

1. Putting participants' interests before their own during plan management
2. Prudently and expertly overseeing the plan
3. Ensuring plan fees are reasonable
4. Offering diversified investment options

Liability for breaching any of these fiduciary responsibilities likewise remains with the individuals who **can** *exercise* control and discretion over the plan.

Note our care in stipulating that those who ***can***, not simply those who ***do*** exercise control. As such, according to ERISA, employers of small and medium companies offering retirement plans remain exposed to a tremendous amount of responsibility and, therefore, personal liability. This is the case regardless of whether they offer a defined contribution or defined benefit plan.

ERISA originally may have been crafted to resolve concerns over much larger plans, governed by those who should have the professional expertise to "know better." But particularly in our current environment in which defined contribution plans are an increasingly dominant force, ERISA regulations remain every bit as applicable to the small business owners as they do to the nation's largest corporations.

We fear that far too many employer sponsors of small and medium plans may be unaware of the burdensome obligations to which they are subject. Or they may mistakenly believe that a small or medium business owner cannot be expected to comply with the high standards of expertise ERISA has set for all defined contribution plans.

Today's Challenges: Ignorance Is No Longer Bliss

What are the ramifications if an employer plan sponsor is ignorant of his or her ERISA requirements? The potential damage from non-compliance is significant, even if the damage is not willfully caused. According to a February 2012 Financial Advisor Magazine article, the DOL added close to 1,000 new employees in 2011, most of them assigned to enforce plan sponsor compliance. The article points out that, of the more than 3,100 plans audited in 2010, "more than 73% of them were required to restore losses to the plan or take another type of action to correct plan deficiencies," and that "the majority of violations generally come from oversight, errors and omissions by plan sponsors."[8]

And that's only considering DOL audit activities. Plan sponsors also face legal challenges from participants. For many years, the threat has been relatively benign, as actual legal challenges were few and usually directed at much larger plans. Once more, however, times are changing in at least a couple of significant ways.

Increased class-action suits — The word is out. There often is easy money to be had in plan participant, class-action lawsuits against plan fiduciaries and sponsors. Many household names (along with their plan providers) have been sued in the last five years. Outcomes have varied but typically have resulted in the companies settling for dollar amounts in the millions, along with written commitments to pursue lower fees in their negotiations. with investment providers.[9]

[6]U.S. Department of Labor, Employee Benefits Security Administration, "Fact Sheet: Final Rule to Improve Transparency of Fees and Expenses to Workers in 401(k)-Type Retirement Plans", October 14, 2010.

[7] E.S. Browning, "Retiring Boomers Find 401(k) Plans Fall Short," *The Wall Street Journal*, February 19, 2011.

[8]Jim McConville, "Plan Sponsors Getting Big Fines from DOL," *Financial Advisor Magazine*, February 21, 2012.

[9]Barry Burr, "Wal-Mart, Merrill Lynch Settle 401(k) Fee Suit," Pensions & Investments, December 12, 2011.

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The who's who list has included Wal-Mart Stores, General Dynamics Corp., John Deere, Ameriprise Financial Inc., Caterpillar Inc. and others. The Ameriprise case, for example, was filed September 28, 2011, and alleged that the company, its board of directors, the plan's administrative and investment committees, and other purported fiduciaries failed to act for the exclusive benefit of plan participants, imprudently selected investment options, and engaged in prohibited transactions.[10] The General Dynamics, Caterpillar and Wal-Mart cases have settled (without admitting wrongdoing) for $15.5 million, $16.5 million and $13.5 million, respectively, along with the aforementioned commitment to negotiate lower plan fees in the future.[11]

If firms of these magnitudes have been under pressure for potentially lax fiduciary practices, imagine if litigation becomes the norm among smaller plans as well. And well it could, as we'll describe next.

Increased fee disclosures — In 2009, the House of Representatives passed HR 2989, the 401(k) Fair Disclosure and Pension Security Act. Among other requirements, it tasked the Department of Labor (DOL) with developing rules to guide fee disclosures to employer plan sponsors and plan participants. The DOL issued rules 408(b)2 and 404(a)5 in response. The details of these rules are outside the scope of this paper but following is a summary.

408(b)2 went into effect July 1, 2012 and requires covered service providers to participant-directed retirement plans to disclose in writing: (1) their fees and (2) whether or not they are functioning as a plan fiduciary. It is the plan sponsor's obligation to ensure he or she has received these disclosures from the plan provider and that the fees disclosed there are reasonable. Otherwise, fees paid to the service provider might be deemed a prohibited transaction under ERISA and/or the Internal Revenue Code, thus potentially requiring the reimbursement to participants of plan fees plus significant interest. Severe penalties may be assessed as well.[12]

Since August 31, 2012, **404(a)5** has required information be provided annually to participants by the plan administrator related to investment and general fee information. Quarterly disclosures must now also disclose the fees each participant is incurring in his/her account, and the plan sponsor is responsible for assuring this happens.[13]

Many employer sponsors and participants alike have been surprised to realize the extent of their plan's costs. In particular, many plans previously had been marketed to plan sponsors as "no-cost." In reality, service costs have been hidden within share pricing, where the impact has been murky and difficult to quantify.

It's worth noting that ensuring reasonable fees has always been a plan sponsor's fiduciary obligation, but it has been admittedly difficult for sponsors to comply; hence the change. As benignly described by the U.S. Government Accountability Office, "Inadequate disclosure and reporting requirements may leave participants without a simple way to compare fees among plan investment options." [14] *St. Louis Post Dispatch* financial reporter David Nicklaus stated the challenge more directly: "Your 401(k) isn't free, but most employees — and even some employers — have no idea how much they're paying for the popular retirement plan. Fortunately, a series of lawsuits has put a spotlight on excessive fees within 401(k) accounts, and the U.S. Labor Department is moving ahead with long-delayed regulations on fee disclosure." [15]

In other words, with the disclosure rules, plan sponsors and participants are more fully informed of the extent of both direct and indirect plan fees. The new disclosure rules invite increased formal litigation under long-standing ERISA regulations when the costs that are now revealed are deemed unreasonable.

Today's Opportunities: Increased and Improved Plan Sponsor Support Systems

So far, we've delivered mostly cautionary news. Fortunately, along with evolving responsibilities for employer sponsors of small and medium plans, support systems and services have also been increasing and improving to help address current fiduciary obligations.

In other words, while it's become more important than ever to ensure a plan is compliant with ERISA, it's also become easier for smaller plans to delegate the responsibilities to the experts. Perhaps as a natural

[10] Spencer Fane Britt & Browne, LLP, "Despite Obstacles, 401(k) Excessive Fee Lawsuits Proliferate," October 3, 2011.

[11] Burr, "Wal-Mart, Merrill Lynch Settle."

[12] Fred Reish, "Consequences of Failure to Comply," November 7, 2011 and "Expanded Discussion on Failure to Disclose," October 7, 2011. Fred Reish LinkedIn Box.net Files, accessed January 23, 2012.

[13] Both May 31 and August 14, 404(a)5 deadlines are for calendar year plans.

[14] Bovbjerg, "Private Pensions," March 6, 2007.

[15] David Nicklaus, "Hidden Fees Keep Many 401(k) Investors in the Dark," *St. Louis Post Dispatch*, August 10, 2010.

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extension of age-old supply and demand, we have seen an increasing number of more affordably priced 401(k) plan providers (not the least of which is our own, Alliant Wealth Advisors 401(k) Solution) with quality service and knowledgeable advice.

"The new disclosure rules invite increased formal litigation under long-standing ERISA regulations when the costs that are now revealed are deemed unreasonable."

Anyone who can successfully run a thriving company, large or small, should not be overly challenged in running a thriving retirement plan, once they turn their attention to the matter. We would propose that a secret to success begins with understanding this essential equation:

ERISA Compliance = Process

This may run contrary to the common but false assumption that a plan fiduciary must somehow "guarantee" that participants will achieve satisfying returns. If this were the case, it would indeed be a frightening prospect; even in the best-constructed plan, return expectations are dependent on factors that are (and should be) well beyond the plan sponsor's control.

Instead, we propose that a plan's fiduciary "success" is not measured by the performance of its investment selections or its plan participants, but rather by the plan's fiduciary ***process*** — justifiably constructed and well documented. Yes, solid net performance is an expected and desired outcome within a well-structured plan, but it is not the defensible ingredient for it. ***Process*** should serve as a plan sponsor's strongest defense in the face of a legal challenge.

To review, ERISA requires plan sponsor fiduciaries to put participants' interests ahead of their own according to the following components. They must:

1. Ensure that plan participants pay only reasonable fees.
2. Establish and demonstrate adherence to plan documents that are in accordance with ERISA regulation.
3. Offer diversified investment options.
4. Act as an expert in selecting investment options or demonstrate prudent selection of an expert advisor to do the same.

At a glance, each of these responsibilities might seem daunting for a small or medium company plan sponsor. After all, the firm's core competencies rightfully center around their products or services being offered, not achieving high levels of in-house, financial expertise.

ERISA understands this is a dilemma for the employer plan sponsor, which is why the regulation not only allows but strongly encourages plan sponsors to hire the expertise required as a key component of their prudent, well-documented processes. With a process in place for each critical obligation, including the selection of expert financial advice, ERISA compliance can be reasonably ensured without requiring individual business owners to obtain advanced degrees in financial economics.

That said, *caveat emptor* remain advisable watchwords. The plan sponsor must be careful when selecting experts. How does the plan sponsor conduct appropriate due diligence to minimize this and other fiduciary risks? The remainder of our white paper is designed to explore the factors involved.

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Part II: Implementing Fiduciary Risk Mitigation

Overall: Process and Documentation

Now that we've explored the evolving historical context, challenges and opportunities that define today's retirement plan fiduciary role, let's discuss the actions we recommend for the owners and managers of small and medium businesses seeking to efficiently fulfill their role as fiduciary.

Remember, just as real estate values are determined by "location, location location," so fiduciary responsibilities are all about **process, process, process**. We suggest carefully adopting the following processes — and creating a paper trail to demonstrate good-faith efforts should they ever be called into question. We believe these two steps can serve as a plan sponsor's strongest pillars of defense should he or she face challenges from regulators, lawyers and/or plan participants in our increasingly litigious environment.

"We suggest carefully adopting the following processes—and creating a paper trail to demonstrate good-faith efforts should they ever be called into question."

Hire a Fiduciary Investment Advisor

A summary is warranted before we explore this concept in greater detail. As we've touched on in prior sections, the plan sponsor is and always will be a fiduciary to the plan. He or she cannot delegate the entire fiduciary role to others. However — and this is key — the role of *investment fiduciary* and its accompanying liabilities can (and we argue usually should) be transferred to a financial expert, to remove significant risk from the plan sponsor's personal fiduciary plate.

As described by the DOL (emphasis is ours), "A fiduciary [plan sponsor] can also hire a service provider or providers to handle fiduciary functions and set up the agreement so that the person or entity then assumes liability for those functions selected. … [Under these conditions] **the employer is responsible for the selection of the manager, but is not liable for the individual investment decisions of that manager.**"[16]

Next, let's delve into the details related to these criteria. The delegation of investment responsibility may sound relatively straightforward on the surface, but there are caveats worth noting.

At a minimum, the following characteristics are necessary to properly complete the transfer:

- The third-party investment fiduciary must accept sole responsibility for selecting, managing and monitoring the investment selections within the plan.
- The role should be agreed to in certain and unambiguous terms — *in writing*.
- There are relatively narrow definitions describing the kinds of financial professionals who are allowed by ERISA to fully accept the investment fiduciary duty as described. Others who cannot take on the full role may confuse the issue, but once the guidelines are understood, it becomes easier to separate the true investment fiduciary from those who may fall short on that count.

Most business owners have neither the time nor the interest to become investment experts. As described above, ERISA allows the investment fiduciary role to be properly transferred from the plan sponsor to an appropriate third-party investment manager. But whether a third party is willing and able to serve as a plan's investment fiduciary is a vital detail that is often buried deep in the fine print of the plan service agreement. The plan sponsor should seek clear and concise language that the advisor agrees to accept full investment fiduciary responsibility as allowed under ERISA Section 3(38).

We cannot overstate the importance of fully and clearly understanding the extent of accountability that is being offered in any given relationship; it cannot simply be assumed. As New York attorney Ary Rosenbaum of the Rosenbaum Law Firm has stated, "The problem is that many plan sponsors think when they are getting a plan provider offering 'fiduciary services' that they are getting someone serving in a fiduciary capacity. Too often, they found that not [to] be the case the hard way, in a court of law." [17]

[16] U.S. Department of Labor, "What are my liabilities as a fiduciary and how can I limit them?" DOL.gov. Accessed January 3, 2012. Additional information can be found on the DOL's website in this factsheet.

[17] Ary Rosenbaum, Esq., "Why Retirement Plan Sponsors Should Be Careful About Buying 'Fiduciary Services,'" JD Supra, October 14, 2011.

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To offer additional explanation, the DOL has determined that brokerage firms face an inherent conflict of interest that precludes them from being retirement plan fiduciaries. Because brokerage firms are presumably compensated by various levels of commissions from the investment options they can recommend, it's assumed they may have incentives to offer one product over another. This can come into conflict with their obligation to represent plan participants' highest interests in the advice being delivered, so they are not allowed to serve as fiduciaries. Under similar logic, insurance companies *may* legally act as fiduciary, but since they often operate under similar, potentially conflicting compensation models, they typically decline the role as well.

In our mind, a lack of fiduciary duty on the part of the plan provider should be a deal-breaker. In fact, if there is a DOL action or a lawsuit, the plan sponsor can not only be found liable as a fiduciary, but the service provider may have insulated itself from any responsibility.

We recommend a careful reading of any service agreement, even if — and especially if — the verbal sales process has led the plan sponsor to believe the provider is accepting a fiduciary role. Quite simply, if it's not in writing, and correctly written, it doesn't exist.

Be aware that the agreement may emphasize the general importance of fiduciary responsibility without accepting specific responsibility for making the plan's investment selections. Worse, the language may emphasize the service provider's responsibility for safeguarding its own business operations, which is essentially an indirect way of explaining why it is declining fiduciary responsibility for clients' plans.

Often, the agreement is either silent on whether the provider is acting as a fiduciary — which means they are not — or it specifically states that they are not. Or, in some cases, a "**warranty**" may discuss fiduciary standards and services, but it is our experience that these typically fall short of the preferable, highest levels of desirable fiduciary care. Sometimes the language has no legal significance. For example, we've seen comforting, but meaningless terms used such as "investment selection assurance." Another red flag is when the *only* plan fiduciary referred to within the language is the plan sponsor. These sorts of "warranties" may look good at a glance, but they may fall apart in courts of law or regulatory reviews, just when they are needed the most when the service provider has fallen short of taking on the full, formal role of the plan's investment fiduciary.

Fortunately, there are service providers who can function as the investment fiduciary to the plan, and are both willing and able to commit to the role in legally binding writing. The key phrase here is "**ERISA section 3(38)**," which provides that a Registered Investment Advisor firm, insurance company or bank can take responsibility for the plan's investment decisions on a **fee basis** (i.e., without the conflicts of a commission-based compensation model). As described by the DOL (emphasis is ours):

> A fiduciary [plan sponsor] can also hire a service provider or providers to handle fiduciary functions and set up the agreement so that the person or entity then assumes liability for those functions selected. For example, if an employer appoints an investment manager that is a bank, insurance company, or registered investment advisor, **the employer is responsible for the selection of the manager, but is not liable for the individual investment decisions of that manager**. [18]

In a separate release, the DOL seems to specifically, strongly recommend that plan sponsors to take advantage of this level of delegation, when they state, "If the fiduciary [plan sponsor] does not have the expertise required, he or she should hire someone with that professional knowledge." [19]

The 3(38) investment fiduciary will be tasked with making all investment decisions for the plan. He or she will select the investment options and, if there are model portfolios, will design and rebalance the models and decide when to swap out individual investment options.

In other words, plan sponsors can and often should delegate the responsibility and liability for selecting sound investment options to a 3(38) fiduciary. Although the plan sponsor retains responsibility for other fiduciary duties (as we will address below), serving as the expert investment advisor is an important duty that is usually wisely delegated to individuals with demonstrated expertise.

[18] U.S. Department of Labor, "What are my liabilities as a fi uciary and how can I limit them?" DOL.gov. Accessed January 3, 2012. Additional information can be found on the DOL's website in this factsheet.
[19] U.S. Department of Labor, "What are fi uciary responsibilities?" DOL.gov. Accessed January 3, 2012.

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Another type of investment fiduciary is described within **ERISA section 3(21)**. A 3(21) is a co-fiduciary, which can share liability by helping plan sponsors make the investment decisions for the plan.

We would suggest that the 3(21) option is best suited for larger plans with in-house investment professionals who wish to reach out for advice, support and research, but who are willing and able to retain fiduciary duty for the investment selections made. We feel that smaller plans that lack in-house financial expertise are usually better served by turning over the entire investment selection function to a qualified 3(38) fiduciary.

Create and Maintain an Investment Policy Statement

As described toward the end of Part I, a 3(38) fiduciary fully takes on the responsibility and liability for the most challenging of the plan sponsor's obligations: to offer diversified investment options and act as an expert in selecting investment options. This leaves the plan sponsor with the more manageable duties of ensuring reasonable plan fees, and documenting adherence to ERISA regulations.

An important way to manage these remaining duties is by creating and maintaining a written Investment Policy Statement (IPS) to direct the investment manager on plan-level issues such as:

- Investment objectives and purpose
- Investment fiduciary roles
- The decision to hire a 3(38) or 3(21) investment fiduciary
- Selection and monitoring of the plan's investment option menu
- Index proxies used to evaluate investment performance
- Guidelines on acceptable fees

In other words, the IPS serves as the plan's "marching orders" to guide the activities of the individuals chosen to select and monitor its investment options. Plan sponsors who hire a 3(38) or 3(21) investment fiduciary typically gain access to an IPS template from which to form their own, and often will receive assistance in drafting the document.

The IPS should be reviewed at least annually to ensure it remains relevant. By whom should it be reviewed? This brings us to our next recommendation.

Form an Investment Committee (and Meet Regularly)

The investment Committee (IC) certainly includes plan sponsor employees; it can also include independent consultants. In a smaller firm, the typical committee may include three senior managers and potentially additional staff "from the ranks" to foster interest and engagement within the plan.

One member should be named the in-house investment fiduciary. Typically this role is filled by the Chief Financial Officer or the most senior manager sitting on the committee. This eliminates, or at least substantially reduces personal exposure to a DOL action or lawsuit for the remaining members.

If the sponsor has hired an outside 3(38) investment fiduciary, then the role of the committee becomes easier. It should ensure that the outside investment fiduciary is adhering to the plan's written IPS; ensure that fees paid for investment options and management remain reasonable; and determine when the IPS should be modified for any reason.

If the sponsor has *not* hired a 3(38) investment fiduciary, then there is more to be done. In addition, investments will need to be regularly compared to their index proxy. If one or more investments are not tracking their proxy's investment returns and are underperforming by a meaningful margin, then the committee must determine a reason why, and decide whether to keep the fund; keep it, but on a watch list; or replace it outright. And as the investment industry innovates and provides new choices, consideration should be given to whether plan investment options should be replaced with new, better, alternatives. All considerations, both those accepted and rejected, should be documented to demonstrate that due diligence has been objective and ongoing.

The IC should meet at least once annually. It's important to stress that all meetings should be well-documented with detailed minutes, lest the well-intentioned activities fail to provide the desired protection against liability. Some plan service providers offer compliance services, including facilitating regular IC meetings.

Conduct Periodic Benchmarking on Plan Fees

The DOL has articulated three guiding principles for plan fiduciaries to follow in satisfying their duty to maintain reasonable fees as provided under ERISA: The plan fiduciary must:[20]

[20]Bovbjerg, "Private Pensions," March 6, 2007.

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1. Confirm that the compensation paid by the plan directly or indirectly to its investment and service providers is *reasonable*.
2. Obtain *sufficient information*.
3. *Engage in an objective process* to determine quality and fee reasonableness.

All three responsibilities can be met with a **plan benchmark**. A plan service provider can offer benchmarking services to help its plan sponsor clients with this important compliance function. Or, a sponsor can find an independent service to prepare the benchmark. We would advise against plan sponsors attempting to prepare benchmark reports on their own. It would seem a tall order for an individual plan sponsor to gain sufficient access to the statistics needed to compare its own plan fees to those for plans of similar size and/or industries.

A larger plan should consider forming a fee committee or IC subcommittee to devise a "Fee Policy Statement," similar to the plan's IPS but focused on managing fees. The plan sponsor's Third Party Administrator may be available to help with this plan document.

Maintain Informed Procedural Prudence

Part of a plan sponsor's "procedural prudence" as the plan's caregiver is to remain sufficiently informed of the plan's activities and the impact on participants' experiences. Plan sponsors who find themselves unable to answer the following questions may not be fulfilling their remaining fiduciary duties. Additional research is advised.

Interviewing Your Existing Relationships

Brokers & Insurance Agents

- How are they paid (amount and compensation model)?
- How do they select your investment offerings?
- Do they earn dealer concessions on the fund purchases?
- Do they offer investment advice?
- Are investments proprietary?
- Are they acting as an investment fi uciary? (If they answer yes, ask whether they will commit to the role in writing. Unfortunately some fi ancial advisors may not be suffici tly familiar with the rules to be answering the question completely accurately.)

Banks

- Is the bank acting as a trustee, if not, why not?
- Are they an investment fi uciary?
- Are the investments proprietary?

Third Party Administrators

- Do they receive asset-based compensation from the investment provider?
- Do they make QDRO determinations?
- Do they make hardship determinations?
- Do they calculate loan amortization schedules?
- Will they act as named fi uciary?

Answers can range from expected to eye-opening. Plan sponsors who have never gone through the exercise of interviewing their existing relationships may find they have additional questions, as well as potential due diligence, on which to follow up.

Conduct (and Document) Routine Plan Monitoring

Once the plan sponsor has delegated the responsibility for investment selections to an outside 3(38) investment professional, assessed fees, interviewed service providers, prepared an IPS and formed an IC, the bulk of the initial efforts are complete.

But, that's year one. From then on, the duty remains to monitor the plan and, again, document the process to demonstrate continued fiduciary compliance. Appendix A provides a list of plan documents that are worth keeping an eye on. While it is not an exhaustive list and not every item applies to every plan, sponsors who maintain sight of these should be well-positioned to fulfill their monitoring duties, with or without service provider support.

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Conclusion

If we can leave readers with our most important take-home point, it is this:

ERISA Compliance = Process

Too often, there's the perception that plan sponsors are responsible for positive investment results, and are liable if participants don't achieve them. This is simply not the case.

Rather, plan sponsors are responsible for managing a well-structured, cost-effective plan that complements rather than combats participants' individual investment activities. As plan fiduciaries, sponsors should:

- Always place participants' highest interests first in overseeing their 401(k) benefit
- Demonstrate their fiduciary compliance by forming and maintaining sound, documented processes
- Either be experts themselves at offering prudent investment selections, or should select an alliance that is; and document the selection process involved

We cannot predict exactly what the future holds for the retirement plan industry, but by adhering to these guidelines, plan sponsors stand the best chance for maintaining a long-term, viable plan that benefits the employer and employee alike.

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Appendix A: Plan Documents Checklist

Plan Documents	On File
Summary Plan Description	
Plan	
Safe Harbor Notice	
Qualified Default Investment Alternative Notices	
Summary of Material Modifications	
Loan Procedures	
Claims Procedures	
Post-EGTRRA "Good Faith" Amendment	
HEART Amendment	
Adoption Agreement	
Board Resolutions	
Investment Policy Statement	
Fee Policy Statement	
Service Agreements	
Investment Advisor	
Third Party Administrator	
Recordkeeper	
Custodian	
Trustee	
Periodic Review of Service Providers	
Benchmarking	
RFPs	
Tax Returns - Form 5500	
Custodian Account Statements	

Plan Documents	On File
Fidelity Bond	
Fiduciary Liability Insurance	
Investments	
Options	
Due diligence on selecting investment options	
Qualified Default Investment Alternative Due Diligence	
Manager Reports	
Investment Committee	
Charter	
Minutes	
Member Acceptance Letters	
Fee Committee	
Charter	
Minutes	
Member Acceptance Letters	
Administration	
Enrollment Forms	
Loan & Hardship Withdrawal Documentation	
QDRO Documentation	
Audit Reports (for plans over 100 participants)	

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About the Author

John A. Frisch, CPA/PFS, CFP®, AIF®, PPC™ is the president and founder of Alliant Wealth Advisors. He has nearly 30 years of experience in the finance industry. He is a CPA, a Personal Financial Specialist, a CERTIFIED FINANCIAL PLANNER™, an Accredited Investment Fiduciary® and a Professional Plan Consultant™.

John's business affiliations include:

- 1995 – Founded Alliant Wealth Advisors (formerly Millennium Capital Management).
- 1995 – Founded concurrently John A. Frisch, CPA, PC, which later became Frisch, Ambrosiano & Kontos, PC. FA&K grew to be the largest CPA firm in Prince William County, Virginia. In 2005 it was sold to the 12th largest accounting firm in the world.
- 1992-1995 – Executive Vice President of Voss & Co., a Springfield, Virginia, discount broker/dealer, where he oversaw all firm operations, encompassing sales, marketing, operations, finance and compliance.
- 1986-1992 – Senior Manager at The Rushmore Group, a $1.5 billion Bethesda, Maryland, mutual fund company, where he supervised the trading and portfolio accounting departments and managed the firm's broker/dealership.
- Before 1986 – Staff accountant for a Maryland-based accounting firm.

John has received these awards and publications:

- Super CPA – Financial Planning Category by the Virginia Society of CPAs – 2012, 2013
- Leadership Prince William Graduate – Class of 2012
- Published on the Financial Planning Association's Website – "Until Death Do You Part: Financial Pre-Planning During Marriage" – April 2010
- Top Area Financial Advisor by Northern Virginia Magazine – April 2009
- Small Business of the Year of the Prince William Regional Chamber of Commerce – October 2007
- Key Member of the Year of the Prince William Regional Chamber of Commerce – 2006
- Certificate of Appreciation from the Financial Planning Association for Pro Bono Efforts for 9-11 Financial Planning Relief Services – 2006

John is strongly committed to community service. He founded and facilitated the Prince William Financial Institute to provide networking and education opportunities for financial professionals in Prince William, Virginia. He serves on the three-county Battlefield Advisory Board for Branch Bank & Trust Co. (BB&T) and is actively involved in Virginia Society of CPA chapters in Virginia. Previously John served as Treasurer and on the Board of Directors for the Prince William Regional Chamber of Commerce and was the Accounting Chair on the Capital Campaign Steering Committee for Potomac Hospital, located in Prince William. Due to John's special concern for the families who lost loved ones in the 9/11 terrorist attacks, he has continuously served as a docent at the 9/11 Pentagon Memorial in Arlington since the program began in 2009.

John holds a bachelor's degree in accounting and information systems from Geneva College. He is a member of the American Institute of Certified Public Accountants, Personal Financial Planning Division; the Financial Planning Association; the National Association of Personal Financial Advisors; and the National Association of Tax Practitioners.

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