RETIREMENT & BENEFIT PLAN SERVICES

Fiduciary Fundamentals

Basics and Best Practices

BANK OF AMERICA

This guide covers:

A plan fiduciary serves an important role

At Bank of America, we understand that constructing and maintaining a sound investment menu requires significant commitment of a plan fiduciary's time and resources. To help you fulfill this important obligation, Bank of America is proud to offer you an exceptional opportunity to tap into robust financial knowledge and experience through Merrill Lynch Fiduciary Advisory Services.

This guide from Bank of America gives you an overview of the role of a plan fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA) and provides suggested best practices that may help you fulfill your fiduciary responsibilities.

Serving as a plan fiduciary is no small challenge. Here's just a sampling of what a fiduciary needs to consider:

- Do you offer your participants a diversified menu of investment options that have been prudently selected?
- If participants make their own investment decisions, have you provided sufficient information and education for them to exercise control in making those decisions?
- Have you taken advantage of available fiduciary safe harbors?
- Have you reviewed plan costs for reasonableness?

We are prepared to assist you by drawing upon the expansive capabilities across our organization to help you fulfill your challenging fiduciary duties.

ⓘ For more information on the Merrill Lynch Fiduciary Advisory Services, see the ***Helping You Fulfill Your Fiduciary Responsibility fact sheet*** online at *go.bofa.com/ff-fas*.

The essential role of a fiduciary

Through Merrill Lynch Fiduciary Advisory Services, our experienced and specialized Merrill Designated Advisors will work with you to help make your plan investment management more efficient and valuable. These designated advisors can deliver fiduciary services and are qualified to provide objective advice on how to create an investment menu that fits your organization's needs, as well as provide advice to help manage investments over time.

Who is considered a retirement plan fiduciary under ERISA?

A fiduciary under ERISA is any person or entity that exercises authority or control over a plan's assets, gives investment advice for compensation or has discretion over plan administration. Plan sponsors are generally fiduciaries. For some plans, administrative committees or a company's board of directors may be fiduciaries.

At a minimum, a plan must have at least one fiduciary designated in the plan document or named pursuant to a procedure set forth in the plan document as having control over the plan's operation and investments. A person or entity becomes a fiduciary by virtue of the functions they perform. For example, individuals who exercise control over a plan's assets are fiduciaries no matter what titles or positions they hold. It is important to understand the fiduciary or non-fiduciary status of the plan's service providers.

ERISA defines a plan fiduciary to include "anyone who gives investment advice for a fee or other compensation with respect to any moneys or other property of a plan, or has any authority or responsibility to do so." The complete definition and responsibilities of qualified plan fiduciaries are contained in the Employee Retirement Income Security Act of 1974 (ERISA) and associated Department of Labor regulations.

The fiduciary role

Standards of fiduciary performance under ERISA generally are process-based as opposed to outcome-based. Fiduciaries must act with prudence consistent with the "prudent person" standard of care.

Plan fiduciaries must exercise their duties with the prudence of a person familiar with the business they are responsible for, or employ the assistance of those with the requisite experience. This is also known as the prudent expert rule.

The responsibilities of a plan fiduciary generally include:

- Acting solely in the interest of plan participants and their beneficiaries.
- Defraying reasonable expenses for the administration of the plan.
- Following the plan documents (unless inconsistent with ERISA).
- Diversifying the plan's investments.

Process-based prudence

Giving appropriate consideration to those facts and circumstances that…the fiduciary knows or should know are relevant to the particular investment or investment course of action involved…and then acting accordingly.

Fiduciary outsourcing options

There are several options, each referred to by a particular section of ERISA, available for a fiduciary that is interested in outsourcing some responsibilities. It is important to note that a fiduciary that outsources or delegates fiduciary responsibilities remains a fiduciary and has an ongoing responsibility to make sure that the person to whom they have outsourced or delegated fiduciary responsibilities is actually performing those duties.

- A 3(21) fiduciary gives non-discretionary fiduciary advice. This role is often referred to as a co-fiduciary with the responsibilities lining up with the plan sponsor fiduciaries. Merrill Lynch Fiduciary Advisory Services offers a Non-Discretionary 3(21) service.
- A 3(38) fiduciary is a discretionary fiduciary that takes full responsibility for the investment decisions for the plan menu without input from the sponsor fiduciaries. Merrill Lynch Fiduciary Advisory Services offers a Discretionary 3(38) service.
- A 3(16) fiduciary fulfills some or all of the plan administrator responsibilities. The plan administrator role is responsible for the day-to-day operations of the plan, making sure that the plan is being operated according to the plan document and the law, and making plan language interpretations. There is a wide range of services that are referred to as 3(16) and the services agreement is key to understanding the range of services provided.

Fiduciaries may be personally liable for any losses to the plan resulting from a breach of fiduciary duty. These duties can be breached by failing to perform their duties with prudence for the benefit of the plan, engaging in prohibited transactions or failing to monitor those to whom fiduciary duties have been delegated.

Responsibilities of a plan fiduciary include:

Loyalty

- Discharge plan duties solely in the interest of participants and beneficiaries.
- Ensure expenses are reasonable.

Prudence

- Act with the care, skill and diligence of a prudent expert.
- Develop and document processes for decision making.
- Hire third parties where internal expertise is lacking.
- Carefully select service providers.

Education

- Provide participants with tools and education that enable them to make sound investment decisions.

Monitoring

- Regularly review service providers, including performance and fees.
- Follow terms of plan document.

Diversification

- Ensure the plan's investments are adequately diversified to help minimize risk of large losses.*

* Diversification does not ensure a profit or protect against loss.

(i) For more information on the duties of a fiduciary, see the ***Fiduciary Compliance Checklist*** online at go.bofa.com/ff-fcc.

Fiduciary best practices

While outcomes are always important, a fiduciary will want to demonstrate procedural prudence by maintaining written policies and procedures, minutes or other documentation of actions and decisions. It is also important to maintain supporting documents and data used in the decision-making process. In addition, fiduciaries should consider taking advantage of safe harbors, which protect them from the liability associated with certain investment decisions. What follows is a list of practices that all plan fiduciaries should consider adopting.

1 Identify all plan fiduciaries

It is important to identify all the fiduciaries in an organization and to assure that they are aware of their responsibilities.

If an organization maintains an investment committee, it is important that the committee be properly formed. Investment committees are typically created by an organization's board of directors or the chief executive and the establishment of the committee should be documented.

When a fiduciary delegates responsibility to another person or committee, the original fiduciary retains a residual fiduciary responsibility.

It is important to understand your relationship with your Merrill Designated Advisor, investment advisor, investment consultant, etc. in order to understand if they are acting in a fiduciary capacity.

2 Maintain a written investment policy statement[1]

The selection, monitoring and maintenance of an investment menu are the duties most frequently identified with being an ERISA fiduciary. The investment policy statement provides the framework for this process. The investment policy statement should be reviewed at least annually and amended to reflect changes in the securities markets, plan objectives or other factors relevant to the plan. The policy statement should:

- Identify the key functions and responsibilities necessary for the ongoing management of the plan's assets.
- Describe the investment structure for the plan's investment menu, including the various asset classes that are expected to produce an investment return over the long term while prudently managing risk.
- Establish formal criteria to monitor and evaluate plan investment performance results on a regular basis.

ⓘ See the ***Helping You Fulfill Your Fiduciary Responsibility fact sheet*** (go.bofa.com/ff-fas), the ***FAS Non-Discretionary Menu Design & Fund Selection Guide*** (go.bofa.com/ff-mdg) or the ***FAS Discretionary Menu Selection Form*** (go.bofa.com/ff-msf) online.

[1] Investment policy statement (IPS) service is not available for FAS Discretionary. The plan sponsor is responsible for the approval and final adoption of the IPS.

3 Take advantage of fiduciary safe harbors

Fiduciary Liability Safe Harbor — 404(c)

Section 404(c) of ERISA provides a voluntary safe harbor intended to protect plan fiduciaries from liability for the decisions participants make in managing their investments. Three key requirements for compliance with the Section 404(c) safe harbor are:

- Participants must be offered at least three core investment options that are diversified and materially different in their risk and return characteristics.
- Participants must have the opportunity to exercise control over their accounts, such as changing investment options at least quarterly.
- Pursuant to ERISA 404(a)(5) Participant Disclosures, certain information about the plan must be disclosed or made available to participants, including sufficient details about the investments offered in the plan to make sound investment decisions and more.

Plan fiduciaries must continue to prudently select and monitor plan investments. To take advantage of ERISA 404(c), fiduciaries must provide notice to participants of the intent to use this safe harbor. Typically, this notice is provided in the summary plan description.

Additional 404(c) Safe Harbors

Default investments: The Pension Protection Act of 2006 extended certain protections of Section 404(c) to fiduciaries in plans that invest participants' accounts in default investment options in the plan. This protection relieves the fiduciary of liability associated with the choice of asset classes used for default investments. While utilizing a Qualified Default Investment Alternative (QDIA) is optional, fiduciaries for plans that utilize default investments should consider the benefits of this safe harbor protection.

ⓘ See the ***Default Investment Selection Guide*** (for Bank of America recordkeeping plans only) online at go.bofa.com/ff-disg.

Leveraging qualified default investments in automated programs

Your qualified default investment option can serve as the centerpiece of an automated program that includes enrollment and regular deferral increases to help your employees achieve retirement success. The Pension Protection Act of 2006 reflected strong endorsement of such programs by Congress based on the legislators' desire to encourage sponsors to take more aggressive steps to help employees secure their financial future.

4 Review fees and expenses for reasonableness

Plan fiduciaries are responsible for ensuring that the fees charged to plan assets are reasonable relative to the services provided. These costs should be reviewed periodically. Two main types of fees are commonly paid out of plan assets:

- Fees for the maintenance and administration of the plan.
- Investment management fees paid to fund managers and fund management companies.

The Department of Labor (DoL) requires plan sponsors to disclose fees paid directly or indirectly to providers on Schedule C of IRS Form 5500. The DoL has also issued final regulations under ERISA 408(b)(2) that require service providers to disclose to plan sponsors written details of services and fees to help plan fiduciaries evaluate the reasonableness of fees charged to the plan under service contracts or agreements.

(i) See the ***Defined Contribution Fee Policies White Paper*** (go.bofa.com/ff-dcfp) and ***Plan Sponsor Guide to Fee Disclosure*** (go.bofa.com/ff-psfd)

5 Maintain fiduciary liability insurance

While most documents will provide for the indemnification of fiduciaries by the plan sponsor, many plan sponsors maintain fiduciary liability insurance as an additional layer of protection. This is typically a separate policy distinct from any directors and officers or errors and omissions policy.

6 Educate and update participants with clear, consistent communications

It is always a good policy to identify those communication activities that are intended to be "educational" in nature, as opposed to "investment advice" under the Department of Labor's fiduciary guidance. It is important to communicate to participants the responsibilities assumed by them relative to those assumed by the plan fiduciaries. The maintenance of clear documentation on this point is viewed by many as a fiduciary best practice.

Bank of America delivers participant education in a variety of ways, including brochures, fact sheets, seminars and more. For plans where we provide recordkeeping services, a wealth of educational communications can be accessed through our Benefits OnLine® participant website. For participants separating from services, we also offer best interest distribution/rollover options through the educational services of our Retirement and Benefits Contact Center representatives.

(i) For more information on employee communication and education, see the ***Employee Communications Center*** online at https://rg.ml.com/2020/ECC/index.html.

7 Maintain a regular governance calendar

There is a myriad of issues that a fiduciary or fiduciary committee must monitor and manage. The most effective fiduciaries maintain a regular governance calendar. They identify their "key areas of focus," set objectives and establish policies, and identify leverage points — those action items that can impact the objectives.

After setting performance objectives, they implement a monitoring process and document the entire process. Each of the key areas of focus is revisited on a regular basis according to a governance calendar. These processes can be as formal or informal as circumstances require.

8 Document, document, document

In the unlikely event of litigation, the most effective way of proving a prudent fiduciary process is to produce the documents governing the process and the minutes or other records capturing how that process was followed.

It is important that fiduciaries document their efforts to act with prudence by maintaining written policies and procedures.

For more information on plan administration and processes as well as the role of a fiduciary, see the ***Plan Sponsor Guide to Compliance Resources*** online at go.bofa.com/ff-pscr.

Sample Plan Governance Calendar

1st Quarter

Plan Investments
- Review investment policy
- Review Qualified Default Investment Alternative
- Review plan menu design
- Evaluate fund/manager performance

Washington Outlook
- Legislative and regulatory updates

2nd Quarter

Review Plan Fees for Reasonableness

Plan Administration
- Review compliance issues
- Review 404(c) safe harbor procedures
- Review recent interpretations of plan language

Evaluation of Fund/Manager Performance

3rd Quarter

Business Planning
- Determine impact of corporate transactions
- Implement necessary plan or business changes

Fiduciary Update
- Fiduciary education refresher
- Review fiduciary liability insurance

Evaluation of Fund/Manager Performance

4th Quarter

Participant Utilization
- Participation and contribution rate analysis
- Investment pattern analysis
- Review participant communication strategies

Evaluation of Fund/Manager Performance

On-demand Fiduciary Education Series

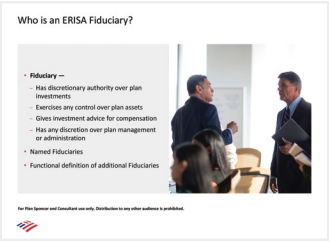
Our education series provides basic information that fiduciaries need in order to fulfill their responsibilities. These self-paced episodes can be easily accessed on-demand through the links provided below.

Four episode series covering:

Episode 1: Basics of Fiduciary Law

Overview of the basics of fiduciary law and regulations along with the basic responsibilities and associated liabilities for fiduciaries.

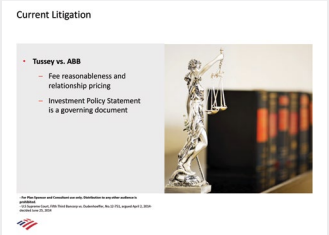
https://go.bofa.com/FF_ep_1



Episode 2: ERISA Litigation

This episode brings the theoretical liability associated with being a fiduciary to life by discussing some lessons learned from recent litigation.

https://go.bofa.com/FF_ep_2



Episode 3: ERISA Safe Harbors

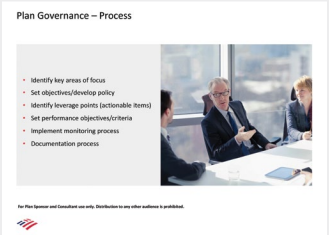
Discusses the various ERISA safe harbors that are available to fiduciaries.

https://go.bofa.com/FF_ep_3

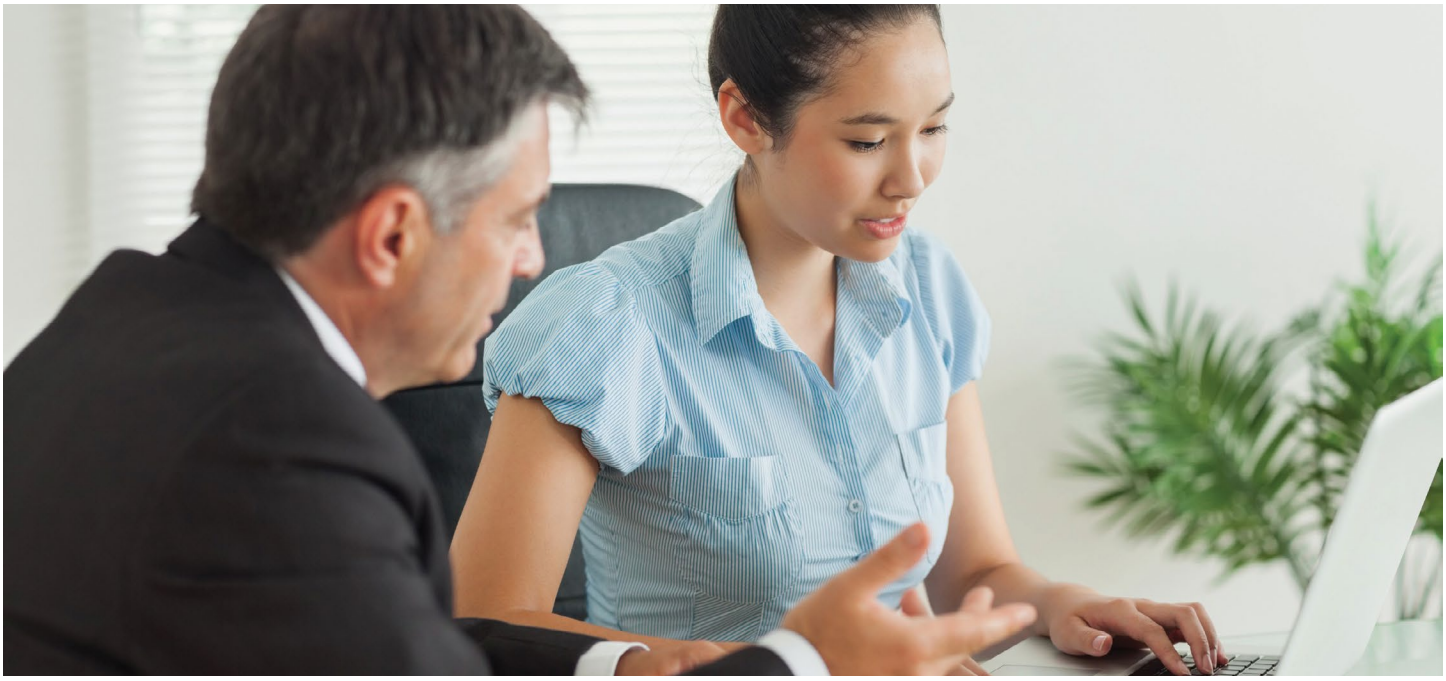
Episode 4: Governance Best Practices

Discusses the importance of a repeatable governance process.

https://go.bofa.com/FF_ep_4



Talk to us today



Speak to your Bank of America representative or Merrill Designated Advisor to learn more about how by working together, we can help you fulfill your plan fiduciary responsibilities. Learn how we are rethinking retirement and benefit plan design to help you maximize your defined contribution plan's effectiveness and help plan participants improve their financial wellness, which empowers individuals to pursue their best financial lives both in plan and beyond plan.

Helping your participants with the three "C's" of financial wellness:

- Feeling in control and living your best financial life
- Confidence not shaken by bumps in the road
- Making the connection between today's choices and tomorrow's results

For plan sponsors utilizing our Fiduciary Advisory Services, we will provide you with:

- A Merrill Designated Advisor who is actively involved and accessible.
- Fiduciary services to fit your needs.
- Investment menu design based on your plan goals and participant needs.
- Investment performance reporting.
- Ability to leverage the experience and expertise of the Chief Investment Office.
- Ongoing annual reviews of your investment strategy with your Merrill Designated Advisor.

Through Education and Plan Services, Bank of America can also help you design a tailored employee education and communication strategy that will encourage participants to make the most of the plan. We believe employees who understand and appreciate a plan are more likely to enroll and increase contributions over time. We can help you assess your current communication and education program.

Bank of America Corporation is one of the world's largest financial institutions, serving individual consumers, small- and middle-market businesses and large corporations with a full range of banking, investing, asset management and other financial and risk management products and services.

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