

Fiduciary Compliance Checklist – Essential Points

Defining the Fiduciary Structure

- Who are the fiduciaries named under the plan?
- Who are the fiduciaries not named under the plan but are performing duties as fiduciaries — the “deemed fiduciaries”?
- Does the employer or Board of Directors serve as the Plan Administrator or has an Administrative Committee been appointed?
- Are all fiduciary delegations properly authorized and documented?
- Who is serving on the plan’s Administrative Committee or the Investment Committee?
- Are all fiduciaries able to answer the DOL’s 3 most common questions:
 - ✓ How does your Plan operate?
 - ✓ What are your Plan’s provisions that govern the Plan’s operation?
 - ✓ What are your fiduciary responsibilities under ERISA?

Business/Retirement Plan Issues

- Are there any affiliated companies, multiple retirement plans, or a history of mergers and acquisitions?
- Are any such transactions anticipated or pending?

Plan Document

- Did the employer obtain an IRS determination letter to “validate” compliance with GUST?
- Is the plan document qualified as to “form”?
- Do plan operations comply with the plan document provisions?
- Have all of the required amendments been adopted for the post-GUST period? EGTRRA? Minimum Distribution? Mandatory Distribution? New §401(k)/(m) regulations? New §415 Regulations?

Form 5500 Series filing

- Are there any “red flags” that could cause an IRS or DOL audit?
- Are 5500 filings being made via certified mail to avoid potential risk of late fines and penalties that can be as much as \$325 per day, up to \$45,000?

Disclosure to Employees

- Are there updates to the Summary Plan Description (SPD), Participant Loan Policy, Qualified Domestic Relations Order Policy (QDRO), Rollover Policy, and Expense Policy, and have Summary Annual Reports been provided to employees annually?
- Have any other events required notices to participants in the form of a Summary of Material Modifications (SMM) or an amendment to the SPD?
- Have participants received required QDIA notices upon enrollment and annually thereafter?
- If the plan provides for automatic enrollment, are the participants receiving the mandatory notices and disclosures?
- Is the record keeper providing PPA-compliant quarterly disclosures to the participants?

Sarbanes-Oxley

- If the plan participants experienced a “blackout period,” did the company provide proper disclosure under the Sarbanes-Oxley Act?
- Has the plan committee determined which events require a Sarbanes-Oxley notice?
- Have the participants been notified in advance of all trading restrictions or changes in investment choices?

Participant Contributions

(including all salary deferrals and loan payments made through payroll deduction)

- Is the timing of employer deposits to the trust occurring coincident with each payroll and within the DOL's new 7-business day requirement?
- Do the responsible parties know the consequences of late deposits?
- Has the DOL contacted the employer regarding deposits?

Participant Loans

- Does the plan permit loans?
- If so, are all loan payments being made through payroll deduction?
- Are participants limited to one or two loans outstanding at a time?
- Is there a loan policy to explain the parameters for loans?
- Are loans treated as segregated accounts?
- What steps are taken when a participant wants an additional loan?
- What steps are taken when a participant terminates employment and there is a loan outstanding?
- What happens when a participant misses loan payments?
- Have participants been notified of any loan fees?
- What is the process for advance loan payments or loan payoff?

Participant Distributions

- Does the plan permit in-service distributions?
- If so, are hardships allowed in accordance with safe-harbor hardship provisions? General hardship provisions?
- For severance distributions, is there a notice of employee termination to prompt the start of the distribution process?
- Who is authorized to approve participant distributions?
- Is the plan complying with minimum distributions with respect to those who have reached age 70-1/2; specifically, any "more than 5% shareholders" or family members who have attributed ownership?
- Do Joint & Survivor Annuity requirements apply?
- Does the Plan allow in-kind distributions or must all distributions be in cash to the participant or rollover account?
- How are state and federal tax withholding requirements satisfied?
- Does the plan have a workable "lost participant" process?

Rollover Contributions

- Does the plan permit rollovers by any employee or does the employee have to be an “eligible participant”?
- What types of rollovers will the plan accept? From other Plans? IRAs? SEPs? SIMPLEs? 403(b) Plans? 457 Plans? Roth 401(k) accounts?
- Can rollover accounts be withdrawn prior to the distribution of other plan benefits (while an employee is still employed)?

Plan Asset Management

- Does the plan have a written Investment Policy Statement?
- Does the composition of the asset portfolio appear to follow Department of Labor guidelines re: prudence, diversification, liquidity, and current return?
- Does the plan have an Investment Committee? If so, how often do they meet to review the investment policy benchmarks? Note: Fiduciaries are responsible for monitoring, reviewing, and replacing funds.
- How does the Investment Committee notify participants of fund additions or replacements?
- Do the fiduciaries know all fees paid by the plan and participants, including asset-based fees?

Plan Investments

- Are there any “difficult to value” investments?
- If so, have the fiduciaries obtained independent, third-party appraisals for any investments that are difficult to value such as limited partnerships, real estate, or collectibles?
- If the plan is a “small” plan, as defined by the IRS, has the plan acquired additional bonding for the audit exemption?

ERISA §404(c)

- Does the plan intend to comply with ERISA §404(c)?
- If so, is this addressed in the SPD and the Form 5500 filings?
- Do the fiduciaries know both the basic and expanded disclosure requirements to comply with 404(c)?
- Have the participants been notified of their rights under ERISA §404(c), of the §404(c) fiduciary assignment, and of the documents they are entitled to receive?
- Do the fiduciaries require that a “404(c) Checklist” is completed annually?

Self-Directed Accounts

- Does the plan have any self-directed, brokerage-option accounts where participants are permitted to choose all investments, rather than options from a restricted list of mutual funds, money managers, etc.?
- Is there an additional charge that participants must pay for the self-directed option?
- Do the trustees have current information on these brokerage accounts and are trustees aware of transactions before they occur (to ensure that prohibited transactions, unrelated business taxable income (UBTI), and other impermissible transactions are avoided)?
- Are the participants who have brokerage accounts receiving of the PPA '06 required quarterly notices?
- Are there any fund transaction restrictions on small accounts?
- What are the trading fees and how are they paid? What about trading fees for small accounts?

Department of Labor Bonding Requirements

- Bonding coverage should be analyzed for sufficiency. The law requires an ERISA bond equal to 10% of plan assets, up to a maximum of \$500,000. Is the plan required to obtain an additional “non-qualifying” asset bond that would take the bond amount in excess of \$500,000?

Independent CPA Audit

- If the plan is a “large” plan (with 100 or more eligible participants), was an audit transmitted with the most recent Form 5500 filing?

Note: Additional bonding needs apply to “small” plans with less than 100 participants who want to be “exempt” from the requirement to supplement the 5500 filing with an independent auditor’s report.

- ✓ If more than 5% of the assets on the first day of the plan year are non-qualifying Plan Assets, there needs to be a surety bond equal to the full value of the non-qualifying Plan Assets minus the amount of the regular 10% surety bond coverage.

Top-Heavy Plan Implications

- Have Top-Heavy plan implications been analyzed to ensure that minimum contribution and/or minimum benefit requirements are satisfied and to determine whether vesting may need to be accelerated, if the plan is top-heavy?
- Have the “Key Employees” been determined in accordance with IRC §416?
- Does the plan retain copies of its annual top-heavy tests?

Payroll Records

- Do W-3 payroll totals correspond with calendar-year census information provided to the Third-Party Administrator?
- Are all employee records retained properly and birth/hire/terminations dates maintained in addition to hours, compensation, deferrals, and loan data?

Plan Compensation

- Have Plan Compensation issues been reviewed to ensure that the Plan conforms to the annual limit on includible pay? Compensation definitions other than Total Compensation must conform with §414(s) guidelines.
- Does Plan Compensation include or exclude 401(k) or 125 deferrals? Bonuses? Overtime? Commissions? Shift differentials? Tips?
- Has the Plan made its new required §415 elections regarding compensation and has the §415 plan amendment been executed?

IRC §415 limit

- Were the total allocations to each individual in the defined contribution plan(s) limited to the lesser of the IRS' fixed dollar limit for the year or 100% of compensation?
- Were allowable catch-up contributions in addition to the §415 limit monitored?

IRC §402(g) limit

- Did every employee's W-2 show salary deferrals not larger than the deferral limit for the year?
- Is there an EGTRRA amendment in place to permit catch-up contributions?
- Are catch-up contributions excluded from the matching employer contribution calculation? If so, is there a Plan provision to define this difficult-to-administer choice?

Plan Coverage

- Are the only exclusions from coverage under the Plan union employees and non-resident aliens?
- Does the plan provide for the permissible 1-Year of Service, Age 21 eligibility requirements or quicker entry requirements?
- Enrollments. Are all of the eligible employees being enrolled and covered under the plan? Are those who choose to defer “0%” completing deferral election forms to show that they had the right to defer and have elected not to defer?
- Related Companies. Employers often need expert consulting to understand whether the plan sponsor is a member of a controlled group or affiliated service group which typically requires “aggregation” of employees for various compliance tests and “aggregation” of service credits when determining whether an employee has satisfied requirements for plan eligibility, accruals, or vesting. Has this issue been reviewed and resolved?
- Alternative Hiring Arrangements. Employers may need education concerning the legal ramifications for those who have established “alternative” hiring arrangements such as temporary employees, leased employees, or the use of full-time, independent contractors (1099 workers). Are there other employees employed by a PEO or a staffing arrangement? How does the plan document provide for exclusions of such individuals?
- Contribution Coverage. Does the plan provide for a last-day employment clause and/or a 1,000 hour requirement for an employee to receive matching contributions? Or employer non-elective contributions? If so, does the plan have “failsafe language” to pass the coverage test?
- Does the plan satisfy §410(b) “coverage” and “participation” requirements as prescribed by IRS regulations? Does the plan retain copies of the annual §410(b) tests per source?

Nondiscrimination Testing

- Have Highly Compensated employees been properly identified based on A) Shareholder status of more than 5% ownership or B) Earnings greater than the statutory limits in the prior year?
- ADP/401(k) Nondiscrimination Test and the ACP/401(m) Nondiscrimination Test should be reviewed to ensure that all available options were exercised to help the Plan pass the tests. Were all required corrections made within the 12-month period following the plan year end?
- 401(a)(4) Nondiscrimination testing. Does the plan utilize tiered allocation groups and, if so, is the plan in compliance with the latest §401(a)(4) requirements from the IRS (including the Gateway provisions)?
- Is the plan a safe-harbor plan? If so, are the required annual safe harbor notices given to participants on a timely basis?
- Does the plan retain copies of its annual §401(k), §401(m) and §401(a)(4) tests?

Plan Expenses

- Are the fiduciaries aware of the level of expenses being paid each year?
- Are plan expenses paid by the Plan Sponsor or from Plan assets?
- What services are being provided in exchange for the Plan's expense payments?
- Is there revenue sharing paid to third parties by any vendor related to the plan?
- Has the company made policy decisions concerning the regulations which permit plans to require that participants pay for fees directly attributable to their own actions: plan distributions, loans, Qualified Domestic Relations Orders, hardships, and other participant-driven requests?
- Have the plan's employee-paid expense policy decisions been disclosed to the participants in the Summary Plan Description (SPD)? Summary of Material Modifications (SMM)?

Fiduciary Liability

- How are the named and deemed fiduciaries protecting themselves from potential participant suits or governmental penalty assessments?
- Is there fiduciary liability insurance coverage in place? Even with this insurance, fiduciaries are responsible for putting consistent processes in place, monitoring compliance through regular reviews and meetings.
- Are fiduciaries involved in plan monitoring and reviews at least annually?
- Who is responsible for plan operations or decision-making?
- Is there adequate training for fiduciaries and those in-house who are helping to manage plan operations?