Fiduciary Fitness Program

Education Module #1:
Fiduciary Duties and Responsibilities

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Module 1: Fiduciary Duties and Responsibilities

The purpose of this module is to assist you in identifying the various individuals who are considered plan fiduciaries and to describe the duties and responsibilities those individuals have under ERISA.

Fiduciary Defined

A FIDUCIARY IS:

- Any individual or entity that has or exercises discretionary control over the management of the plan or the plan's assets
- A plan may have:
  - More than one fiduciary
  - An individual serving in more than one fiduciary capacity

A FIDUCIARY IS NOT:

- Anyone who performs ministerial functions and does not have the authority to make decisions with respect to plan policies, procedures, etc.
  - Example: individual who calculates benefits or processes claims

Named Fiduciaries

- Each plan must have one "named fiduciary"
  - Named in or identified with a procedure prescribed in the plan document
- May be the plan sponsor, officer, board of directors, board of trustees, member of the management team or committee
- Can allocate responsibilities to others if plan document permits

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Functional Fiduciaries

- The fiduciary test is a functional one
- You are a fiduciary if:
  - No *expressed* appointment or delegation of fiduciary authority but functionally in control or in possession of authority over the plan's management, assets or administration
  - Example: members of the employer's board of directors or board of trustees with power to exercise discretion and control
    - May include non-board and non-voting members

Fiduciary vs. Settlor Duties

- Business decisions related to the formation and design of a plan are not fiduciary in nature

Fiduciary Duties

- Implementing plan-related decisions
- Carrying out processes and procedures in regard to plan management
- Acts carried out on behalf of the plan
- Selection of provider, investments or investment manager

Settlor Duties

- Decision to establish a plan
- Include plan features
- Terminate a plan

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Co-Fiduciaries

- Co-fiduciaries are those to whom named fiduciaries delegate their responsibilities in an effort to better manage the plan
- Fiduciaries are not liable for the acts and omissions related to those delegated responsibilities but do have the duty to monitor the co-fiduciaries' performance of the delegated responsibilities

Board of Directors or Board of Trustees

- Board of directors or Board of trustees are fiduciaries only to the extent that they function as fiduciaries (i.e., exercise discretion and control)
  - If delegate authority, responsibility and liability are limited to selection and retention of fiduciaries unless individual becomes liable under co-fiduciary rules
  - Must monitor performance of co-fiduciaries

Benefit and Investment Committees

- Benefit and Investment Committees are fiduciaries if delegated fiduciary responsibilities
- Best practices to adopt Committee Charter
- Written meeting minutes should describe issues discussed, action taken and how each member voted
- Members can resign in protest to a fiduciary breach of another member on the committee
  - Resignation may not be sufficient to discharge reasonable efforts to remedy duties; other steps may be necessary

ACTION STEP

- **Prepare Board resolutions delegating fiduciary responsibility to committees or individuals**
  - **Adopt a Committee Charter**
  - **Solicit acknowledgment of committee members' appointment resignation forms**
- **Keep a copy of all Committee-related documents (resolutions, charter, acceptances) in your Fiduciary File**

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Trustees as Fiduciaries

- Trustees are fiduciaries due to management and control of plan assets
- Discretionary trustee has authority and discretion for the management and control of plan assets
- Directed trustee is subject to the direction of a plan fiduciary, other than the trustee only a fiduciary to the extent of its discretion which is generally limited
- Written meeting minutes should describe issues discussed, action taken and how each trustee voted
- Trustees can resign in protest to a fiduciary breach of another co-trustee
  - Resignation may not be sufficient to discharge reasonable efforts to remedy duties; other steps may be necessary

Investment Advisers

- An investment adviser is a fiduciary if adviser meets ERISA section 3(21) requirements.
  - Exercises discretionary authority or control over the management of the plan
- Renders investment advice for a fee
- New regulations to become effective in 2017 expand historical definition

Investment Managers

- An investment manager is a fiduciary if manager meets ERISA Section 3(38) requirements
  - Must be a bank, insurance company or investment adviser registered under the Investment Advisers Act of 1940
  - Manager must acknowledge being a fiduciary in writing
    - Generally, a discretionary trustee for a retirement plan is also an investment manager

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Attorneys, Accountants, Actuaries, Consultants and Employees

- Generally these professionals performing their usual professional functions are not fiduciaries
- They are considered a fiduciary, however, if they have discretionary authority or control over the management of the plan or render investment advice for a fee
- Consultants, attorneys and third party administrators may become fiduciaries when plan fiduciaries rely on their advice when making fiduciary decisions
- Employees are generally not plan fiduciaries, but can be depending on individual facts and circumstances

Individuals Prohibited from Fiduciary Role

- Individuals are prohibited if they have been convicted of or been imprisoned as a result of said conviction for:

- Robbery
- Bribery
- Extortion
- Fraud
- Embezzlement
- Grand larceny
- Kidnapping
- Burglary
- Arson
- Rape
- Murder
- A felony involving illegal substances
- Violation of §302 of Labor-Management Relations Act
- Crimes barring individual from serving as an investment adviser
- Violation of any ERISA provision
- Violation involving kickbacks from public works
- Violation of federal mail prohibitions

ACTION STEP

Complete the "List of Fiduciaries" to identify all fiduciaries and their responsibilities

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ERISA Section 404(a) Fiduciary Responsibilities

Duty of Loyalty

- A fiduciary must act **solely** in the interest of the plan participants, their beneficiaries and alternate payees
- In doing so, a fiduciary must:
  - Carry out duties prudently
  - Follow the terms of the plan document (unless the documents are inconsistent with ERISA)
  - Diversify plan assets
  - Pay only fair and reasonable expenses

Duty of Prudence

- When acting on behalf of the plan, exercise the care, skill, prudence and diligence that a prudent person familiar with such matters would exercise in similar circumstances
- With regards to investments, give "*appropriate consideration*" to the facts and circumstances that they know or should know are relevant to the investment or investment course of action involved
- The fiduciary's actions are considered prudent if the fiduciary exercises ordinary care based on the facts and circumstances
- **Note: The Department of Labor (DOL) and courts measure prudence by analyzing the process used to select an investment or course of action**

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Appropriate Consideration: Defined

- Appropriate consideration includes:
  - Determination that a course of action is reasonably designed to further the purposes of the plan
  - Consideration of the risk of loss and opportunity for gain associated with a course of action
  - With regards to investments
    - Composition of the portfolio(s) with regard to diversification
    - Liquidity and current return relevant to plan's anticipated cash flow needs
    - Portfolio's projected return relative to funding objectives

Follow the Terms of the Plan Document

- Be familiar with the plan documents
  - Plan/trust documents
  - Summary plan descriptions
  - Administrative procedures
- Carefully review documents periodically to ensure they are legally compliant
- Review plan administration to ensure plan is operating in accordance with the terms of the plan document, ERISA and the Internal Revenue Code ("Code")

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Diversify Plan Investments

- Fiduciaries are tasked with the responsibility to help minimize risk of large losses, unless it is clearly not prudent to do so
- Take the following into consideration:
  - The purpose and size of the plan
  - Economic and market conditions
  - The type and geographic dispersion of the investment

Relying on Information from Others

- A fiduciary may rely on information provided by individuals or other entities performing **ministerial** functions for the plan
  - But must exercise prudence in selecting or retaining such individual or other entities

Appointing Trustees or Other Fiduciaries

- Do **not** appoint fiduciaries based on the position they hold within the organization
  - Appoint based on expertise and experience; title alone is not a qualifier
- Fiduciary terms are indefinite; they serve until retirement, termination or resignation
- Plan fiduciaries must monitor performance routinely
  - Identify all fiduciaries, outline responsibilities, measure performance and review any complaints
  - Utilize a documented process
  - Annual reviews are recommended
- Immediate corrective steps must be taken for fiduciary deficiencies and termination

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Reporting and Disclosure Requirements

- Fiduciaries must comply with ERISA's reporting and disclosure requirements
- Reporting requirements can be met both electronically and non-electronically; special attention to be paid to DOL requirements for electronic delivery
- Delivery system should result in actual receipt of information and protect confidentiality

Fidelity Bond

- Every fiduciary and anyone who handles plan funds or property must be bonded, unless subject to an ERISA Section 412 exemption
- Bond must cover at least 10 percent of the amount handled by the individual
  - May not be less than $1,000 or greater than $500,000 ($1,000,000 for plans holding employer securities)

ACTION STEP

- **Establish a prudent process to comply with ERISA duties.**
- **Conduct administrative audit to confirm plan operating in compliance with plan documents and applicable law.**
- **Confirm appropriate fidelity bond in place.**

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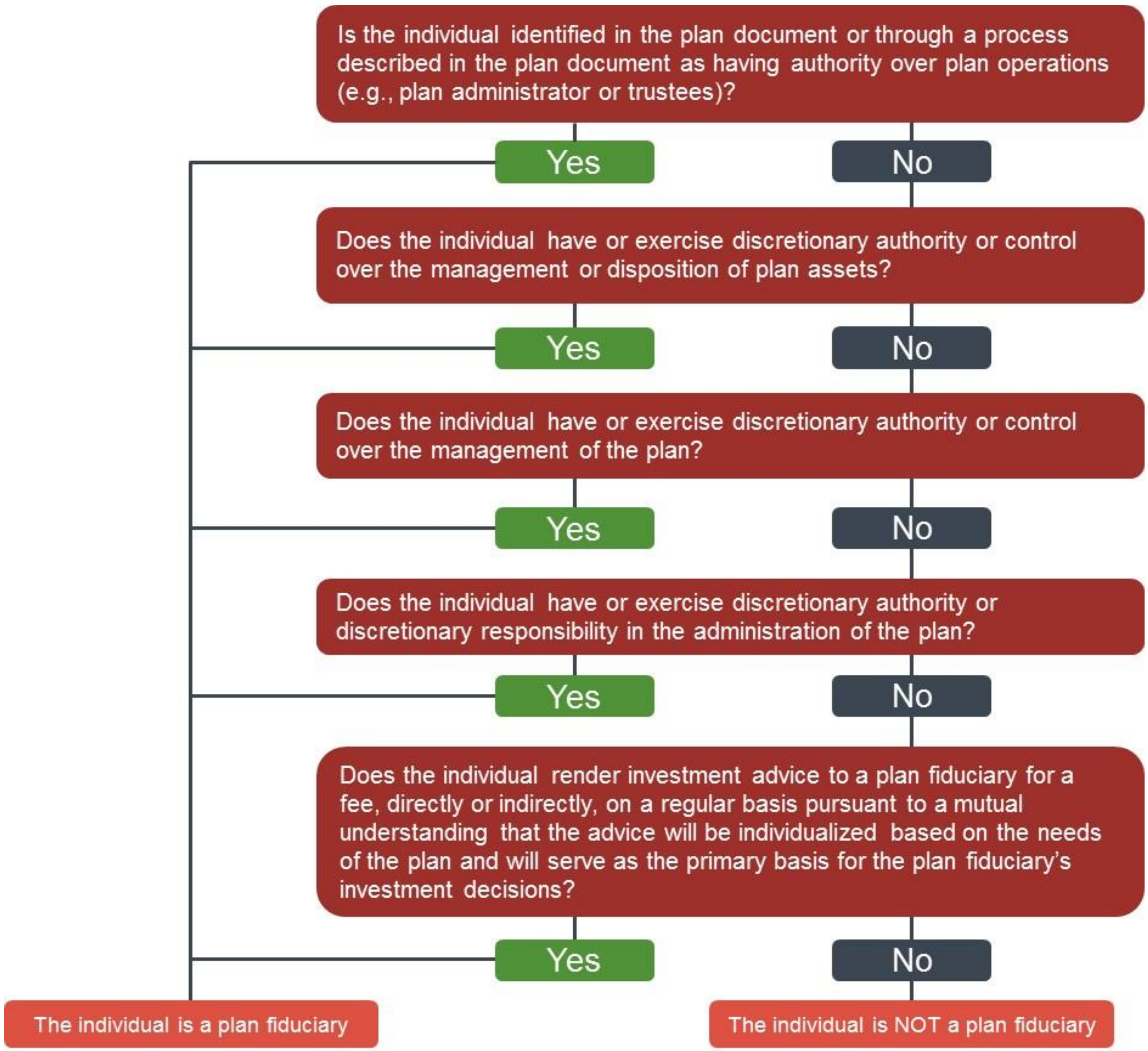
Conclusion – Determining if an Individual is a Plan Fiduciary



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Thank You