



FIDUCIARY RESPONSIBILITY AND LIABILITY

A Guide to Compliance and Protection for Plan Sponsors
Participating in the ACEC Retirement Trust

THE PLAN SPONSOR BEST PRACTICES FIDUCIARY CHECKLIST

The following checklist is designed to help you as a Plan Sponsor fulfill your fiduciary responsibilities under Employee Retirement Income Security Act of 1974 (“ERISA”). The checklist lays out what responsibilities remain with you and what responsibilities the ACEC Retirement Trust (“ACEC RT”) and the Board of Trustees of the ACEC RT (“Trustees”) take care of for you, with the assistance of its Business Partners. Ensuring that the items on this checklist are completed will put you and your 401(k) Plan’s fiduciaries in the best position for fiduciary compliance.

If you are interested in reading more about these responsibilities or topics, a comprehensive overview is available in the Appendix beginning on page 6 of this document.



This guide was prepared for the ACEC Retirement Trust by McDermott Will & Schulte, LLP (“MWS”), legal counsel to the ACEC Retirement Trust and a nationally recognized law firm for their Employee Benefits & Executive Compensation Practice.

ACEC Retirement Trust Responsibilities *(with the assistance of the Trust's Business Partners)*

- ✓ Ensures your 401(k) Plan document is executed and in use in the administration of your 401(k) Plan.
- ✓ Obtains a copy of the IRS favorable determination letter and/or prototype opinion or advisory letter or other documentation supporting the tax-qualified status of your current 401(k) Plan document.
- ✓ Ensures your 401(k) Plan document is amended for all legislatively required changes, and the 401(k) Plan is being operated in accordance with its terms and new legal requirements that may not yet be reflected in 401(k) Plan documents.
- ✓ Assists with preparation of the Form 5500 for your 401(k) Plan.
- ✓ Monitors and ensures salary-reduction deferrals and loan repayments are collected and invested in your 401(k) Plan as soon as administratively practicable.
- ✓ Maintains an ERISA compliant process to respond to participant claims against your 401(k) Plan.
- ✓ Maintains a due diligence file that contains all relevant ACEC RT documentation as well as documentation supporting the fiduciary process and decision-making. Including the following documents:
 - ACEC RT Declaration of Trust *(including the Acceptance of the Agreement for Recordkeeping Services, Group Fixed Deferred Annuity Contract, Directed Trust Agreement or Custodial Account Agreement, Agreement for Advisory Services, and Plan Sponsor Disaffiliation Agreement.)*
 - Investment Policy Statement
 - Prospectuses
 - Required notices (Safe Harbor, QDIA, Blackout, etc.)
 - Quarterly Participant Statements
 - Service Provider Selection, Monitoring and Removal Policy
 - Trust Policies
 - Service Agreements with all Business Partners
 - Trustee Meeting Minutes
- ✓ Ensures service contracts with all Business Partners are in place, have been fully negotiated and clearly outline all parties' responsibilities.
- ✓ Ensures all experts and Business Partners are monitored periodically, and participate in annual performance reviews, to ensure they are meeting the performance standards set for them.
- ✓ Ensures meetings, including the results of any review or monitoring of investments and Business Partners and any decisions made with respect to your 401(k) Plan, are documented and distributed.
- ✓ Ensures your 401(k) Plan follows a written investment policy statement that is reviewed and approved by ACEC RT's legal counsel financial advisor.
- ✓ Helps you ensure your 401(k) Plan complies with ERISA section 404(c).

- ✓ Works with the ACEC RT 3(38) Investment Manager to select a broad range of investment options with an investment option menu appropriate for your 401(k) Plan.
- ✓ Works with the ACEC RT Investment Manager to monitor the investment options regularly (including benchmarking, regular RFPs, and strategic use of best-in-class advisors) to ensure that the investment options continue to meet the requirements set out in the ACEC RT Investment Policy Statement and ensure that decisions with respect to the investment options are well documented.
- ✓ Ensures that all payments from the ACEC RT are for allowable expenses and any assets received through fee sharing of an ERISA spending account are properly used for the benefit of or to provide retirement benefits to your 401(k) participants.
- ✓ Ensures that all fees being paid by your 401(k) Plan through the ACEC RT are reasonable based upon the investment options and services being provided, and any conflicts of interest in the ACEC RT's fee arrangements that could harm participants have been identified and mitigated.
- ✓ Reviews success metrics at least annually, such as participation rates, salary deferral rates, investment diversification and retirement income readiness.
- ✓ Reviews and considers changes to services or investment products as warranted in order to improve ACEC RT success metrics.
- ✓ Ensures all initial, quarterly and annual disclosures required by the participant disclosure rules are distributed and responds in a timely manner to requests for additional information.
- ✓ Provides effective, easy-to-understand participant communications on all important aspects of your 401(k) Plan and educates participants about your 401(k) Plan, including the importance of saving for retirement and the basics of investing.
- ✓ Maintains effective practices and procedures to ensure accurate contact information is retained for all 401(k) Plan participants and beneficiaries, including employees who are no longer working for you.
- ✓ Maintains robust and fully compliant policies and procedures in place for ensuring the security of 401(k) Plan data and 401(k) Plan assets against unauthorized access or use (e.g., cybersecurity threats).



Your (Plan Sponsor) Responsibilities

- ☐ You have delegated specific fiduciary duties — all investment fiduciary responsibility and most plan administration responsibility — in writing, through the: Acceptance of the ACEC RT Declaration of Trust, Agreement for Recordkeeping Services, Group Fixed Deferred Annuity Contract, Directed Trust Agreement or Custodial Account Agreement, Agreement for Advisory Services, and Plan Sponsor Disaffiliation Agreement.
- ☐ You regularly monitor actions taken by the Trustees (e.g., through review of the quarterly meeting minutes) and evaluate whether they are satisfying their fiduciary duties, so as to support your decision to continue participation in the ACEC RT.
- ☐ If appropriate, you have established 401(k) Plan committee(s), and appropriate members have been appointed. See p. 11 for more information on committees.
- ☐ Any employee acting as a fiduciary has received sufficient training and assistance to fulfill their responsibilities in accordance with ERISA fiduciary standards of conduct. For example, by reading the Appendix to this Checklist and Guide, and by attending the ACEC RT Annual Fiduciary Webinar Training.
- ☐ You have identified all fiduciaries, and the scope of their responsibilities has been defined and documented. See p. 7 for more information.
- ☐ You have purchased fiduciary liability insurance coverage as a protection against personal liability for employees of the Plan Sponsor and all fiduciaries serving the 401(k) Plan. See p. 19 for more information on fiduciary insurance.
- ☐ You ensure the Form 5500, prepared by Empower, gets filed in a timely manner.
- ☐ If you are a large 401(k) Plan filer (e.g., 100 or more participants), you have included an audit with the accountant's opinion with your Form 5500 report.
- ☐ You ensure all required testing for your 401(k) Plan based on 401(k) Plan design is done and have addressed any testing results that require action with Empower.
- ☐ You provide an up-to-date SPD to all new employees, redistribute the SPD or distribute a summary of material modifications whenever 401(k) Plan design changes dictate.
- ☐ You maintain a fidelity bond that covers all persons handling 401(k) Plan assets.
- ☐ Outside of the ACEC RT, you carefully select any service providers the 401(k) Plan engages with and ensure that the 401(k) Plan does not engage in any financial transaction with a party-in-interest (i.e., a fiduciary, service provider, employer, owner, employee or officer) that is not exempt.
- ☐ No Plan Sponsor fiduciary has used assets of the 401(k) Plan for their personal interests.



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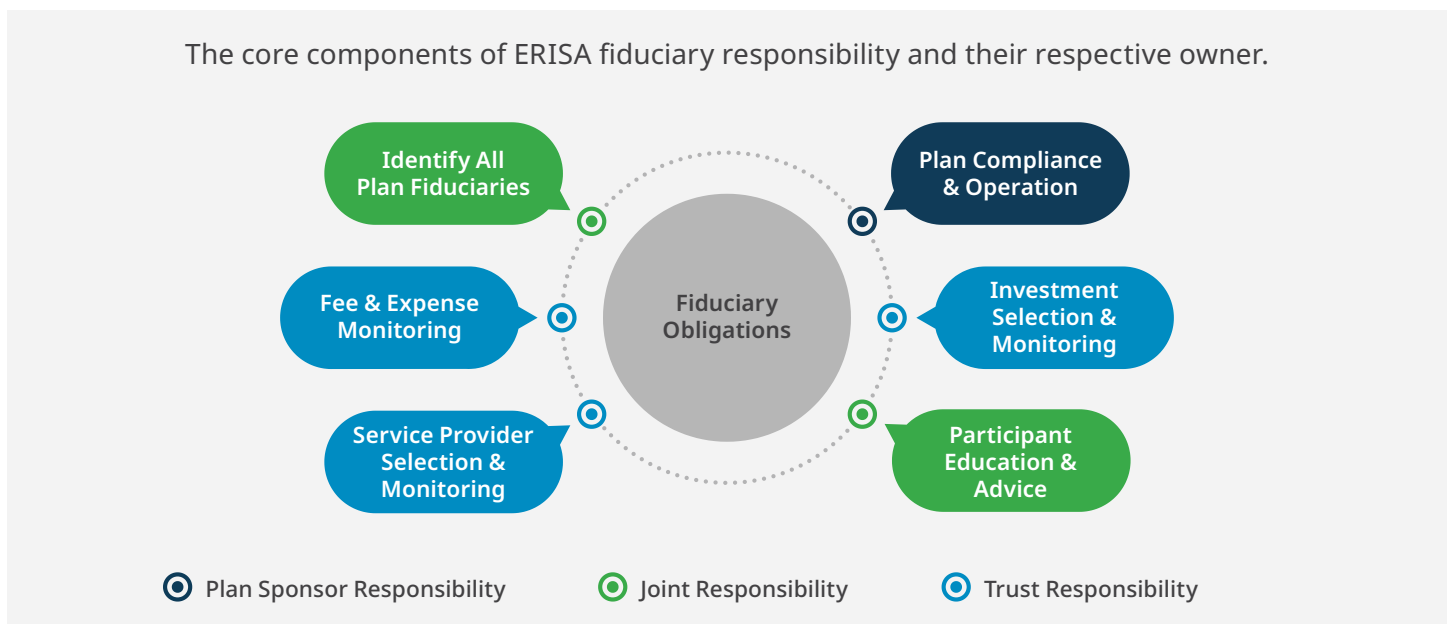
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INTRODUCTION

A successful 401(k) Plan gives your employees the tools and information they need to save for their retirement. It must also meet ERISA fiduciary requirements. ERISA aims to promote the interests of the participants and beneficiaries of 401(k) Plans by establishing fiduciary standards of conduct, responsibility, and liability.

This guide provides a high-level overview of what it means to be a fiduciary and describes the main areas of fiduciary responsibility and best practices that the ACEC Retirement Trust recommends to all our participating Plan Sponsors, and their plan fiduciaries, to ensure you understand your fiduciary roles and responsibilities, reduce your legal risk, and help your employees reach their retirement goals.



I. IDENTIFYING THE PARTIES

You, as a Plan Sponsor, or your employees can become a fiduciary under ERISA either by functioning as a fiduciary or by being named as a fiduciary in the 401(k) Plan document. All fiduciaries, whether functional or named, are held to ERISA's standards of conduct.

Functional Fiduciary

Under ERISA Section 3(21), if you exercise discretionary authority over 401(k) Plan management, administration, or assets, or you render investment advice for a fee with respect to the assets of the 401(k) Plan, you're functioning as a 401(k) Plan fiduciary, even if you aren't specifically named as a fiduciary in the 401(k) Plan document. Functional fiduciaries could include your 401(k) Plan's service providers.

Named Fiduciary

Other fiduciaries are named in the 401(k) Plan document, such as the 401(k) Plan's trustee and the 401(k) Plan Administrator. The named fiduciary is designated in the 401(k) Plan document, by name or title, to have authority to control and manage the operation and administration of the 401(k) Plan. The named fiduciary is often the employer/the Plan Sponsor.

The Fiduciaries in the ACEC Retirement Trust Program

Investment Manager — The entity managing the investments under Section 3(38) of ERISA on behalf of the ACEC RT, i.e., selecting the investment menu, identifying the qualified default investment alternative, and overseeing and monitoring the performance of nearly all of the selected investment alternatives, currently, CAPTRUST Financial Advisors.

Plan Administrator — Person or persons within the Plan Sponsor responsible for the administration of the 401(k) Plan, such as delivering important disclosures to 401(k) Plan participants and selecting the 401(k) Plan's service providers. The Plan Administrator in the ACEC RT program elects to participate in the ACEC RT and the ACEC RT to delegate their responsibility and liability.

Plan Participant — Employee (or beneficiary) with an account balance under the 401(k) Plan or an employee eligible to contribute to the 401(k) Plan.

Plan Sponsor — Employer or the ACEC organization that establishes and maintains the 401(k) Plan.

Trustees — The Trustees of the ACEC RT ("Trustees") who manage and oversee the ACEC RT program, including the Investment Manager.

Non-Fiduciary Functions

When a Plan Sponsor administers a 401(k) Plan, fiduciary status requires some exercise of discretion. Purely ministerial functions, done within a framework of rules and policies, are not fiduciary functions. Therefore, routine clerical or recordkeeping functions, including maintaining account balances, processing transactions and computing service credits, do not involve the exercise of discretion and, therefore, are not fiduciary in nature. Fiduciary status also does not apply when making "settlor" or purely business-related decisions for a 401(k) Plan, such as deciding whether or not to offer a 401(k) Plan or make 401(k) Plan amendments.

Non-Fiduciaries

Recordkeepers — Recordkeepers historically have performed ministerial functions that are non-fiduciary in nature. Empower does not act as a fiduciary to Plan Sponsors but does offer fiduciary services to participants.

Custodians — In addition to individual or institutional trustees, a 401(k) Plan may have a custodian who takes custody of certain assets of the 401(k) Plan. A custodian's functions are generally viewed as ministerial and non-fiduciary in nature.

Lawyers, Accountants, Employee Benefits Consultants, and other Professionals — These people usually act in a non-fiduciary capacity.



II. CONDUCT EXPECTED

Conduct Expected of Fiduciaries

ERISA sets out fiduciary duties that must be adhered to and apply to all fiduciaries:

Duty to act for the exclusive purpose of providing benefits and paying the reasonable expenses of the 401(k) Plan — Fiduciaries must act solely in the interests of participants and beneficiaries.

Duty to act in accordance with the 401(k) Plan documents — Fiduciaries must strictly follow the terms of the documents governing the 401(k) Plan unless they are inconsistent with ERISA.

Duty to avoid engaging in prohibited transactions — Fiduciaries must avoid causing the 401(k) Plan to engage in transactions with parties in interest and must also avoid transactions that involve self-dealing or conflicts of interest unless an exemption applies.

Duty to be a prudent expert — Fiduciaries must be more than well intentioned; they must perform their duties with care, skill, prudence, and diligence in each area in which they make decisions for the 401(k) Plan. The duty of prudence is generally satisfied if the fiduciaries, at the time a decision is made, consider facts and circumstances that are relevant to the particular decision and act accordingly. Therefore, fiduciaries will generally be able to demonstrate that they acted prudently if they engage in a prudent process, meaning that they gathered all the information relevant to deciding, reviewed the information, and consulted with a financial professional, if needed.

Duty to disclose — The 401(k) Plan administrator is responsible for providing employees with various disclosures, such as a summary plan description (“SPD”), quarterly benefit statements, investment information, and ERISA Section 404a-5 notifications.

Duty to diversify 401(k) Plan investments —

ERISA provides that a fiduciary responsible for investment selection has a general duty to diversify the 401(k) Plan’s investments to minimize the risk of large losses unless, under the circumstances, it is clearly prudent not to do so. For participant-directed plans, such as 401(k) Plans, this duty generally does not apply to the investments that are directed by the participant, although to comply with Section 404(c), the Plan Sponsor must still select a broad range of investment alternatives from which employees can select. If the 401(k) Plan contains any investments that are not directed by participants, however, the fiduciary will then generally have a duty to diversify.

Duty to monitor — After selecting service providers, the fiduciary is under continuing duty to monitor the performance of all service providers and investment options.

Is a fiduciary responsible for the acts of another fiduciary?

In general, one fiduciary is not responsible for the acts of another. However, there is one exception to this rule known as co-fiduciary liability. This occurs when:

- One fiduciary participates knowingly in the breach of duty by the other fiduciary.
- The fiduciary breaches their own duty, enabling the other fiduciary to violate ERISA.
- One fiduciary knows about the other fiduciary’s breach and fails to take reasonable efforts to remedy the breach.

The threshold for co-fiduciary liability is generally high, requiring actual knowledge or participation in the other fiduciary’s violation. Nevertheless, when a breach occurs, it is likely that claims may be brought against all of the 401(k) Plan’s fiduciaries under the theory of co-fiduciary liability.

ACEC RT Note — The Trustees are bound by the duties enumerated. Similarly, you the Plan Sponsor and your internal person or persons responsible for 401(k) Plan administration are also bound

by these duties. In fact, you, your 401(k) Plan's fiduciaries, the Trustees, and CAPTRUST Financial Advisors are all co-fiduciaries to each other.



III. BEST PRACTICES

Management of 401(k) Plan Operations

The 401(k) Plan document describes the terms and conditions related to the operation and administration of a 401(k) Plan. Generally, it should contain the following information:

- Designation of the named fiduciary or fiduciaries.
- Description of the benefits provided.
- Standard of review for benefit decisions.
- Eligibility criteria (e.g., classes of employees, employment waiting periods, and hours per week).
- Effective date of participation (e.g., next day or first day of the month following the waiting period).
- Amendment and termination rights and procedures, as well as what happens to 401(k) Plan assets, if any, in the event of 401(k) Plan termination.
- How the 401(k) Plan is funded (e.g., employer or employee contributions).

Both named and functional fiduciaries should be aware of the extent of their fiduciary duties so that they can establish prudent procedures to ensure

compliance with the applicable terms of the 401(k) Plan and ERISA.

ACEC RT Note — Empower maintains the 401(k) Plan document, but you as the Plan Sponsor should have a copy of the plan document and keep Empower apprised of any changes in operation or administration.

There are two main categories of fiduciary activities that are typically the responsibility of the Plan Sponsor:

401(k) Plan Administration

- Interpreting the 401(k) Plan terms.
- Making discretionary decisions regarding claims for benefits and appeals of denied claims.
- Selecting service providers for the 401(k) Plan.
- Ensuring the 401(k) Plan is operated in accordance with its terms.
- Providing 401(k) Plan disclosures, including 401(k) Plan fee and expense disclosures.
- Completing and filing Form 5500s and other required government filings.

401(k) Plan Investments

- Determining the investment structure for the 401(k) Plan.
- Selecting and monitoring the individual investment funds in the 401(k) Plan.

Plan Sponsors must have the investment experience and skill of a prudent expert when making 401(k) Plan investment decisions. To have the necessary knowledge, many often rely upon the skills and expertise of advisors to help evaluate 401(k) Plan administration and 401(k) Plan investment activities. It is also possible to delegate these jobs to other parties. In addition, the selection of another party to carry out these jobs is itself a fiduciary function that must be done according to — and that will be judged by — the standards of fiduciary responsibility.

Being a fiduciary requires always acting prudently, in the same way that you're prudent about how your business is managed. The focus is on whether you have met your fiduciary duties, meaning process matters more than outcome.

ACEC RT Note — *Plan Sponsors participating in the ACEC RT have delegated the majority of their 401(k) Plan administration duties and their investment duties to the Trustees. Consequently, you as the Plan Sponsor only have a duty to oversee and monitor the Trustees to ensure they are acting appropriately. You are responsible for this delegation rather than being directly responsible for the functions.*

Establishment of 401(k) Plan Committees

401(k) Plan committees can help limit fiduciary exposure by sharing the responsibility with others participating in:

- 401(k) Plan governance.
- 401(k) Plan administration.
- Oversight of the 401(k) Plan's investment options.

401(k) Plan committees can also help demonstrate that prudent steps were taken with regard to a 401(k) Plan's administration and management. That is why minutes should be taken at every meeting and retained in each 401(k) Plan's due diligence file. Minutes should include the meeting date, attendees, issues discussed, materials reviewed, decisions made, and action items.

The size of a 401(k) Plan committee will depend on the size and structure of your company. Committee members can include senior executives and personnel from human resources, finance, and operations. They can also include the experts the 401(k) Plan has hired, such as a financial professional or third-party administrator/recordkeeper ("TPA/recordkeeper"). Creating a formal charter that outlines the committee structure, purpose, and responsibilities can further document your fiduciary process.

All committee members should be aware that they have a fiduciary responsibility and liability under ERISA. When new members are added, they should also be trained to understand their fiduciary responsibility and liability. An integral part of their training should include reading this guide and attending the annual ACEC RT Plan Sponsor Fiduciary Training.

A single or multiple committees can be utilized, some examples include:

Investment Committee

- Members of an investment committee or subcommittee should generally have experience and expertise in investment matters. Thus, for example, one or more individuals from a Plan Sponsor's treasury or finance areas should be included on such a committee.
- Though they may have less investment expertise, members from the human resources or employee relations areas are also essential. Because a 401(k) Plan's investments must cater to the nature and needs of a specific workforce, people with the most first-hand knowledge of

the 401(k) Plan's participant population should be included.

- Management for other, unrelated areas may be helpful to act as a sanity check, to question the assumptions of others and to make them justify what might otherwise be seen as conventional wisdom.

Administrative Committee

- A Plan Sponsor will often have already established a committee responsible for deciding 401(k) Plan design and benefit issues. An administrative committee might be this committee or perhaps a subcommittee of the same individuals. It might also be a subcommittee of an investment committee (or vice versa).
- It is typical that an administrative committee would delegate many day-to-day discretionary tasks to either a particular member (usually from human resources) or a trusted human resources representative who is not a member.
- Duties delegated might include:
 - » Making determinations regarding qualified domestic relations orders.
 - » Making non-routine determinations regarding eligibility, vesting, etc.
 - » Deciding first-level formal claims for benefits.
 - » Establishing policies and procedures for dealing with missing or unresponsive participants and uncashed checks.
- The main responsibilities of an administrative committee are to establish 401(k) Plan-wide procedures, interpret the 401(k) Plan and make decisions related to formal appeals of denied benefit claims.

Committee Charter

- If a committee or committees are established, consider adopting a committee charter that

includes provisions governing:

- » Frequency of meetings.
- » Quorum for meetings.
- » Procedures for calling special meetings.
- » Voting rules (e.g., majority and super-majority votes required to carry motions on certain issues).
- » Membership terms.
- » Membership positions (e.g., chair, vice-chair, secretary).
- The secretary of each committee should keep minutes of the meetings. This person should also be responsible for maintaining records of the minutes as well as any other relevant documents considered at meetings. These records should be readily available if requested, for example, by the DOL on audit.
- It is not necessary that committee meetings follow Robert's Rules of Order, but some level of formality is advised. For example, meetings should be formally convened, attendance taken, and a quorum established, prior meeting minutes approved, and motions for votes formally introduced and seconded.
- While the responsibilities of an administrative committee suggest it will need to meet on a more ad hoc basis, it should meet at least annually to review the state of the 401(k) Plan.
- Committee procedures should recognize that individual members or subcommittees may be responsible for assuming specific investigative or fact-finding roles for reporting to the committee at large.
- If an investment committee is being newly formed and working with an investment policy statement, initial meetings should be frequent until either a new investment policy statement is established and first implemented or until the existing investment policy statement and fund line-up are validated. Once an investment

committee is up and running, periodic meetings should be held to review the ongoing performance of the 401(k) Plan's investment funds.

- All decisions, including the investigation and facts that went into the decisions and reasoning behind the decisions, should be documented. This is the strongest evidence of procedural prudence. Keep minutes of each committee meeting, noting time and place, attendees, and all matters discussed, and decisions reached. The minutes you keep may be available to a DOL auditor or to the attorney of someone suing for breach of fiduciary duty in the future. The minutes should demonstrate procedural prudence and the reasons why a decision was a good one at the time it was made, but they should not be a transcript or include extraneous details that could be used against the 401(k) Plan fiduciary in the future.
- If all fiduciary decisions are made by a limited number of people on each committee and remaining committee members serve in an advisory capacity only, it makes sense to document that structure to avoid spreading fiduciary risk unnecessarily to the non-decision-makers.

ACEC RT Note — *Most of the functions that a Plan Sponsor outside the ACEC RT would have an Investment Committee perform have already been delegated to the Trustees. Similarly, most of the functions that would be performed by an Administrative Committee have also been delegated to the Trustees, so the only committee recommended for a Plan Sponsor within the ACEC RT is an Administrative Committee that: (i) makes the decision to participate in the ACEC RT and then (ii) is responsible for oversight and monitoring of the Trustees.*

Develop Due Diligence Procedures

Though the ACEC RT has established routine procedures that it regularly follows. Some best practices for your 401(k) Plan committee or fiduciaries to consider are:

- Develop policies and procedures around administrative functions, such as reviews, reporting, contributions, and withdrawals, to help ensure the 401(k) Plan is prudently managed.
- Review and, if necessary, implement internal safeguards and controls, as well as checks and balances, for all key 401(k) Plan processes. This can include monitoring the performance of delegates or other service providers.
- Prepare a calendar to help ensure the ERISA Plan fulfills its reporting and participant communication obligations.

Document Decisions

Document actions in writing. As a general rule, meeting minutes should be taken whenever the 401(k) Plan is being discussed by those responsible for its management – whether you choose to set up a 401(k) Plan committee or not. These minutes can serve as important documentation to demonstrate that a prudent process was followed and that the 401(k) Plan was prudently managed.

Create a Due Diligence File

Leave a paper trail—maintain all documentation in a due diligence file. That way, if a legal issue ever arises, your documentation can help protect you. When government agencies audit a 401(k) Plan, or in the event of a lawsuit, being prepared with evidence of fiduciary prudence is imperative. That is why it is important to document and keep records of all communications (e.g., disclosures, meeting minutes, 401(k) Plan-related documents, reports, reviews, audit tests, assessments, and participant notices) that pertain to your 401(k) Plan in a dedicated and readily accessible due diligence file. Use the following lists to guide what you save in your due diligence file.

General Materials

- Management of 401(k) Plan operations.
- 401(k) Plan document and amendments.
- 401(k) Plan testing.
- Form 5500 filings.
- 401(k) Plan audits.
- *Service provider selection and monitoring.*
- *ERISA Section 408(b)(2) disclosures.*
- *Service provider agreements.*
- Selection and monitoring criteria and documentation.
- *Meeting discussions (i.e., quarterly Trustee meetings).*

Investment Selection and Monitoring Materials

- *Investment Policy Statement.*
- *Prospectuses.*
- *Selection and monitoring documentation.*
- *QDIA documentation.*

Participant Communication Materials

- *ERISA Section 404a-5 notice.*
- SPD.
- *Quarterly statements.*
- *Other notices (blackout or QDIA).*

ACEC RT NOTE — *You as the Plan Sponsor can rely on the due diligence file created and maintained by the ACEC RT (and/or its selected Business Partners) to show documentation and fulfillment of the above listed actions, noted in blue, and by italics.*

Service Provider Selection and Monitoring

Under ERISA, Plan fiduciaries are expected to act as prudent experts. Given the breadth of knowledge required to manage a 401(k) Plan, fiduciaries may

want to consider partnering with service providers that have the skill sets or expertise that the fiduciary does not.

You may want to designate service providers to take on certain fiduciary duties, such as the following:

- A 3(16) Plan administrator can help you with certain 401(k) Plan management responsibilities – though not a 3(16) Plan administrator many of the functions the ACEC RT handles fall under 3(16).
- A 3(38) investment manager will select and monitor the investments for your 401(k) Plan.
- A 3(21) fiduciary can give you advice regarding the selection and monitoring of the investments for your 401(k) Plan – CAPTRUST Financial Advisors.
- A TPA/recordkeeper can help you with your day-to-day 401(k) Plan administration, 401(k) Plan audits and compliance testing – Empower.

Although obtaining third-party support can sometimes help provide the expertise required by ERISA, it does not absolve you of your fiduciary duties, which also include monitoring the provider. That is why demonstrating procedural prudence (e.g., by documenting your hiring decision, the provider's role and responsibilities, and related discussions and reviews) is necessary.

ACEC RT NOTE — *You as the Plan Sponsor have delegated to the Trustees all responsibility and liability related to the selection and monitoring of all Business Partners of the ACEC RT and ensuring receipt of all required disclosures. Your responsibility is to monitor the Trustees actions. If you did choose to hire an outside service provider, then you can rely on the information below.*

Establish Clear Selection Criteria

You should establish clear criteria for hiring a service provider, and for why you choose to retain or remove them. For example, what expertise are they bringing to the table? As part of that selection process, be sure to consider their:

- Experience with 401(k) Plans similar to yours in size and makeup – based on performance and benchmarked results.
- Credentials, including education, certifications, and licenses.
- Level of service and support.
- Competitiveness of fees for the level of service.
- References and reputation.

Know What is Required Under ERISA Section 408(b)(2)

To help you evaluate covered service providers (“CSP”) effectively, ERISA Section 408(b)(2) mandates that, before you enter into any arrangement with them, the CSP must provide you, the 401(k) Plan fiduciary, with written disclosures about their services, compensation, and fiduciary status.

With this information, you should then assess the reasonableness of the arrangement being entered into.

Questions to consider include:

- Is the CSP providing the necessary services?
- Are their fees reasonable?
- Are there any conflicts of interest?

By reviewing and acting on the information presented, you will be better able to demonstrate the prudence of your selection decision. On the other hand, if a CSP does not provide you with their disclosures, you should consult with ERISA legal counsel to determine whether entering into the arrangement may be a prohibited transaction.

U.S. Department of Labor Guidance on Managing Incomplete ERISA Section 408(b)(2) Disclosures

If you entered into an agreement with a CSP and later discovered that their disclosures were incomplete, you can protect yourself from a prohibited transaction by:

- Sending the CSP a written request for the missing information; the CSP has 90 days to respond.
- If the CSP fails to comply with your request, notifying the U.S. Department of Labor (“DOL”) within 30 days of the earlier of: (a) the CSP’s failure to comply with the written request for information or (b) 90 days after the written request.

If the information requested relates to future services and is not disclosed promptly after the 90-day period, the DOL states that 401(k) Plan fiduciaries must “terminate the contract or arrangement as expeditiously as possible,” but in a prudent manner.

Follow and Document Monitoring Processes

401(k) Plan fiduciaries have an ongoing duty to monitor the provider’s performance and to ensure that the provider’s performance complies with the terms of the 401(k) Plan, ERISA, and any applicable contract.

To do this effectively, consider establishing ongoing review processes and performance criteria that can help you determine whether the 401(k) Plan is receiving the value-added, reasonably priced services for which it bargained. And do not forget to document the information you receive and any related decisions that you make to demonstrate ongoing procedural prudence.

Benchmark Your 401(k) Plan

Although not a fiduciary requirement, benchmarking is a good way for 401(k) Plan

fiduciaries to evaluate a service provider's performance.

Common 401(k) Plan benchmarks include:

- Participation rate.
- Contribution and deferral rates.
- Maximizing company match.
- Use of catch-up contributions.
- Use of goal-setting tools.

Investment Selection and Monitoring

Offer Diversified Options

Selecting and monitoring investment options is one of the most important roles performed by 401(k) Plan fiduciaries. 401(k) Plan fiduciaries have an ongoing duty to select and monitor investments, as well as to ensure that the 401(k) Plan has a well-balanced investment line-up. CAPTRUST Financial Advisors, as the investment manager to the ACEC RT, along with the Trustees is responsible for your 401(k) Plan's investment selection and monitoring.

Generally, there are three safe harbors available with respect to participant-directed 401(k) Plans that can help fiduciaries reduce their liability for losses resulting from investments.

ERISA Section 404(c)

ERISA Section 404(c) may relieve 401(k) Plan fiduciaries from liability for losses resulting from participants' direction of their investments. While not mandatory, if 401(k) Plan fiduciaries want to obtain fiduciary relief under 404(c), they must comply with its provisions, which include:

- Providing all employees with the disclosures and notifications outlined under the ERISA Section 404a-5 regulation.
- Notifying employees that the 401(k) Plan is designed to comply with 404(c) and, therefore, the fiduciary may not have liability for losses resulting from their investment choices.

And they must provide employees with the ability to:

- Choose from a broad range of investment alternatives consisting of at least three core diversified investment options with materially different risk and return characteristics.
- Make changes to their investment elections at least quarterly, or as frequently as the market volatility of the particular investment option dictates.

If the provisions of 404(c) are not followed, you may not qualify for relief under 404(c) – and you could be held liable for any investment losses suffered by employees.

QDIA

In situations in which an employee does not choose investments, such as when there's a change in investment provider or in auto-enrollment, 401(k) Plan fiduciaries can limit their liability by investing such employee's contributions in a qualified default investment alternative ("QDIA").

Under ERISA Section 404(c)(5), a QDIA must be:

- Based on a generally accepted investment theory.
- Diversified to minimize the risk of large losses.
- Focused on long-term appreciation and capital preservation.
- Through a mix of equity and fixed-income exposures.

Although a QDIA can provide a safe harbor for 401(k) Plan fiduciaries, it does not relieve them of their responsibility to prudently select and monitor the QDIA. You must adhere to the following two QDIA guidelines:

1. Provide participants and beneficiaries with the QDIA notice at least 30 days before they become eligible to participate in the 401(k) Plan or their money is initially invested in the QDIA and generally at least 30 days prior to the start

of each 401(k) Plan year thereafter. Generally, the QDIA notice must contain a description of the QDIA, as well as information about its performance, fees, and expenses.

2. Provide participants and beneficiaries, on whose behalf the investment in a QDIA is being made, the opportunity to direct the investment of assets in their accounts.

Consider an Investment Policy Statement

An investment policy statement (“IPS”) is a document that provides fiduciaries with a framework to help them detail the standards by which investment decisions are made and monitored, and investment performance is measured, under the 401(k) Plan.

Generally, an IPS may:

- Identify the investment alternatives.
- Document the process and criteria for selecting and monitoring investment options.
- Highlight the types of educational and advisory services available to help employees make decisions.

What are the Benefits of an IPS?

Having an IPS forcefully promotes procedural prudence. The adoption of an IPS demonstrates the care and seriousness with which the Plan Sponsor approaches investment issues. More importantly, the procedures set forth in the IPS make it easy to document the careful judgment and diligence that go into specific investment decisions.

The process of constructing the statement is an opportunity to take a big-picture view, allowing the development of an overall philosophy of how and which investments will be offered under a 401(k) Plan to make sure long-term strategic goals do not result from overreaction to short-term market trends.

The IPS provides a touchstone for continuity as the individuals responsible for decision-making may change over time.

ACEC RT NOTE — *You as a Plan Sponsor have delegated to the Trustees all responsibility and liability for investment selection and monitoring including selection of the QDIA. You have also delegated to the Trustees all responsibility and liability for the negotiation, monitoring, and payment of all fees charged by the ACEC RT Business Partners and the fees charged by such investments to the ACEC RT and all plans participating in the ACEC RT.*

Participant Communication

An important fiduciary consideration is 401(k) Plan health, defined, for example, as strong participation and deferral rates. To achieve this, you will need to help your employees become engaged in their retirement by:

- Meeting the disclosure requirements under ERISA from a fiduciary standpoint.
- Providing value-added education and support from a non-fiduciary standpoint.

When a 401(k) Plan is committed to both communication and education, employees have a well-rounded picture of the 401(k) Plan’s features and benefits and the resources available to help them to take control of their retirement planning. As a member of the ACEC RT, you can rely on the Business Partners to the ACEC RT for participant communications and disclosures.

Meet Mandatory Disclosure Requirements

Under ERISA, the Plan Administrator, usually the Plan Sponsor, must provide employees with certain disclosures and notifications about the 401(k) Plan, investment options, and related fees so that they have the information they need to make informed decisions.

The type of disclosures these 401(k) Plan fiduciaries must provide is dependent on circumstances. For example, ERISA Section 404a-5 and investment disclosures apply only to 401(k) Plans that have

participant-directed accounts. Meeting ERISA Section 404(c) requirements applies only to 401(k) Plans with a fiduciary who wants to take advantage of the safe harbor it provides, while others, such as the provision of the SPD, apply to all 401(k) Plans.

As a 401(k) Plan fiduciary, it is important for you to be aware of the disclosures that you must provide and to ensure they are provided in accordance with ERISA.

Examples of Mandatory Disclosures

SPD — A document that explains how the 401(k) Plan works, including features, benefits, and employees' rights under ERISA.

ERISA Section 404a-5 401(k) Plan and Investment-Related Disclosure — Disclosures that inform employees of the 401(k) Plan and investment-related information associated with the 401(k) Plan; 401(k) Plan administrators must furnish this information to eligible employees on or before the date they can first direct the investments in their account. Changes to the 401(k) Plan-related information must also be provided 30 to 90 days in advance.

Participant quarterly statement — Provides employees with information about the fees charged to their accounts, their account balances, and vested benefits.

Summary annual report — Summarizes what is in the 401(k) Plan's Form 5500 annual report.

Blackout notice — Notifies employees of a transaction freeze at least 30 days in advance of a change in record keepers or investment options.

Disclosure of Fees and Services

ERISA regulations require 401(k) Plan fiduciaries to ensure that all 401(k) Plan fees and expenses are necessary and reasonable. They also require Plan Sponsors to disclose fees and expenses to 401(k) Plan participants and, in the case of large 401(k) Plans, report 401(k) Plan fees and expenses on the

401(k) Plan's annual Form 5500. The following is a summary of the various regulations.

ERISA Section 404a-5 — Participant Disclosure

- Plan Administrators must provide participants with an initial and annual notice disclosing information on 401(k) Plan administration and transaction fees and on 401(k) Plan investment options and expenses.
- Participants generally must receive notice of a change to any of the 401(k) Plan fee and investment information (such as a change to the 401(k) Plan's investment options) at least 30 days in advance of the change.
- Notice may be provided electronically to participants subject to DOL rules.
- Failure to provide the 401(k) Plan fee and investment information to participants is a fiduciary breach.

Form 5500 — Schedule C

- A Plan Sponsor of a large 401(k) Plan (with more than 100 participants) must file a Schedule C with their Form 5500.
- The Plan Sponsor must report on Schedule C annual fee information for 401(k) Plan service providers that received \$5,000 or more in direct or indirect compensation in connection with the services provided to the 401(k) Plan.
- The Plan Sponsor must report on Schedule C any 401(k) Plan service provider that failed or refused to provide any of the reportable fee information.

ACEC RT NOTE — *You as a Plan Sponsor have delegated to the Trustees (and/or our Business Partners) the many of the responsibilities for participant communication and disclosure.*



IV. LIMITING FIDUCIARY EXPOSURE

Below, are additional ways to mitigate fiduciary risk.

Use of Fiduciary Warranties

Warranties provide specific assurance from the investment provider to the 401(k) Plan fiduciary with regard to the provider's fund line-up. Generally, the investments are selected and monitored by the provider in a way that meets ERISA standards.

Purchase of Fiduciary Liability Insurance

ERISA permits the purchase of fiduciary liability insurance to cover liability or losses occurring by reason of a breach of fiduciary duty. It is generally recommended that the insurance be purchased by the Plan Sponsor or by the individual fiduciary. If the insurance is purchased with 401(k) Plan assets, the insurance policy must permit recourse. In other words, insurance must allow the insurer to try to collect any losses from the fiduciary if the fiduciary has breached his or her duties.

ACEC RT NOTE — You as a Plan Sponsor are protected by the fiduciary warranties the ACEC RT has negotiated with all Business Partners to the ACEC RT. In addition, the ACEC RT maintains a \$10,000,000 fiduciary insurance policy that covers the Trustees to minimize the potential indemnification due from Plan Sponsors. Notwithstanding the proceeding, the Trustees highly recommend that each Plan Sponsor participating in the ACEC RT purchase and maintain its own fiduciary liability insurance policy to protect you and your employees and to cover any costs that may arise under your indemnification obligation to the Trustees.



QUESTIONS? GET IN TOUCH.

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