TRENT CAPITAL MANAGEMENT, INC.

Knowing one's responsibility as Plan Sponsor not only protects you from unreasonable liability, but helps to provide the type of retirement plan that attracts and retains good employees. A Plan Sponsor should demand the type of investment management provider that focuses on maximizing the participant's retirement assets, and *nothing* else. Trent Capital seeks out no other goal than acting in the best interests of our clients…at all times. We hope this Reprint from PLAN SPONSOR assists you in making the proper decisions about whom to hire as your investment management provider.

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10 THINGS YOU'RE [PROBABLY] DOING WRONG

OR NOT DOING RIGHT AS A PLAN FIDUCIARY

A couple of disclaimers up front: First, if you're taking the time to read this, odds are you probably are doing a better-than-average job as a plan fiduciary. Second, you may well be able to identify things that are not on this list. This is a list compiled based upon three decades of experience working with retirement plans" numerous conversations with providers, plan sponsors, regulators, and advisers; as well as a review of documented compliance shortfalls. Note, however, that here is frequently a difference between doing all that he law requires and doing everything that you can do. This listing is a combination of the things that you must do, and things that you do not have to do -- but that, if done, would keep you and your plan(s) in good stead. I hope you find this list informative and that you draw insight and comfort from its contents as well as a reminder of the awesome responsibilities you have as plan fiduciary.

1. Not having a plan/plan investment committee

ERISA only requires that the named fiduciary (and there must be one of those) make decisions regarding the plan that are in the best interests of plan participants and beneficiaries, and that are the types of decisions that a prudent expert would make about such matters. ERISA does not require that you make those decisions by yourself—and, in fact, requires that, if you lack the requisite expertise, you enlist the support of those who have it.

You may well possess the requisite expertise to make those decisions—and then again, you may not. However, even if you do, why forgo the assistance of other perspectives?

However, having a committee for the sake of having a committee not only can hinder your decision(s), but also can result in bad decisions. Make sure your committee members add value to the process (hint: once they discover that ERISA has a personal liability clause, casual participants generally drop out quickly).

2. Not *having* committee meetings

Having a committee and not having committee meetings is potentially worse than not having a committee at all. In the latter case, at least you ostensibly know who is supposed to be making the decisions. However, if there is a group charged with overseeing the activities of the plan and that group does not convene, then one might well assume that the plan is not being managed properly, or that the plan's activities and providers are not managed and monitored prudently, as the law requires.

3. Not keeping minutes of committee meetings

There is an old ERISA adage that says "prudence is process." However, an updated version of that adage might be "prudence is process—but only if you can prove it." To that end, a written record of the activities of your plan committee(s) is an essential ingredient in validating not only the results, but also the thought process behind those deliberations.

More significantly, those minutes can provide committee members—both past and future—with a sense of the environment at the time decisions were made, the alternatives presented, and the rationale offered for each, as well as what those decisions were. They also can be an invaluable tool in reassessing those decisions at the appropriate time and making adjustments as warranted—properly documented, of course.

4. Not having an investment policy statement (IPS)

While plan advisers and consultants routinely counsel on the need for, and importance of, an IPS, the reality is that the law does not require one and, thus, many plan sponsors—sometimes at the direction of legal counsel—choose not to put one in place. Of course, if the law does not specifically require a written IPS—think of it as investment guidelines for the plan—ERISA nonetheless basically anticipates that plan fiduciaries will conduct themselves as though they had one in place. Generally speaking, you should find it easier to conduct the plan's investment business in accordance with a set of established, prudent standards if those standards are in writing, and not crafted at a point in time when you are desperately trying to make sense of the markets. In sum, you want an IPS in place before you need an IPS in place.

It is worth noting that, though it is not legally required, Labor Department auditors routinely ask for a copy of the plan's IPS as one of their first requests. Therein lies the rationale behind the counsel of some in the legal profession to forgo having a formal IPS because, if there is one thing worse than not having an IPS, it is having an IPS—in writing—that is not followed.

5. Not removing "bad" funds from your plan menu

Whether or not you have an official IPS, you are expected to conduct a review of the plan's investment options as though you do. Sooner or later that review will turn up a fund (or two) that no longer meets the criteria established for the plan. That's when you will find the true "mettle" of your investment policy. Do you have the discipline to do the right thing and drop the fund(s), or will you succumb to the very human temptation to leave it on the menu (though perhaps discouraging or even preventing future investment)? Oh, and make no mistake, there will be someone with a balance in that fund. Still, how can leaving an inappropriate fund on your menu—and allowing participants to invest in it—be a good thing?

6. Thinking your plan qualifies for 404(c) protection—and misunderstanding what that means

Any number of studies suggest that many, perhaps most, plan sponsors think their plan meets the standards of ERISA 404(c), a provision that ostensibly shields them from being sued for participant investment decisions, so long as certain conditions are met.

On the other hand, industry experts are nearly uniform in their assessment that very few, perhaps no, plans meet those standards (though the courts have been somewhat more liberal in their application). So, even if you think your plan does comply, check. Even if your plan does comply, understand that, while 404(c)'s shield may offer some protection against

an individual participant suit, it offers no insulation against a participant suit predicated on an inappropriate investment option. Remember, too, that the DoL thinks you're responsible for every participant investment decision except those behind the 404(c) "wall."

7. Depositing contributions on a timely basis

The legal requirements as to when contributions must be deposited to the plan are perhaps one of the most widely misunderstood elements of plan administration. Unfortunately, a delay in contribution deposits is also one of the most common flags that an employer is in financial trouble—and that the DoL is likely to investigate.

Note that the law requires that participant contributions be deposited in the plan as soon as it is reasonably possible to segregate them from the company's assets, but no later than the 15th business day of the month following the payday. If employers can reasonably make the deposits sooner, they need to do so. Many have read the worst-case situation (the 15th business day of the month following) to be the legal requirement. It is not.

8. (Not) monitoring providers on a regular basis

In some sense, we all "monitor" the performance of plan providers all the time. Is the Web site available when people try to access it? Do checks and statements arrive on time? Are the balances displayed accurate? The reality is that, for most of us, no news is seen as "good" news. After all, if the answer to any of those questions was "no," we'd not only know about it, we'd be complaining about it (after fending off our own set of complaining phone calls). Odds are that you have a very full-time job dealing with the things that are "broken"—why go looking for trouble?

However, relationships with providers are like any other relationship—we all slip into "ruts" of complacency—and the best way to keep that new customer "honeymoon" feeling alive is to do something as simple as ask your current provider for a regular service review. At least once a year—no matter how well things are going—you should determine if your plan has access to the new services that have come online since you converted, and that you are getting the advantages of the most current thinking about costs and fees. How do your plan's participation, deferral, and asset diversification stack up? In addition, every three to five years (sooner if there are problems, of course), you should go through a formal request for information (RFI) or request for proposal (RFP) process—on your own or with the help of an adviser (who doubtless has more experience with such things).

Remember also that the DoL says that, "among other duties, fiduciaries have a responsibility to ensure that the services provided to their plan are necessary and that the cost of those services is reasonable."

9. Not following the terms of the plan document.

Plan documents are, after all, legal documents and can skirt the fringes of readability. Retirement plans develop certain patterns or routines—the way things are handled—that may not, over time, remain consistent with the terms of the plan—particularly if you are using a plan document prepared by a provider (or, worse, an ex-provider) that may well accommodate that provider's approach, but not (or may not have kept up with) how you actually administer the plan. It is a good idea to do a document/process "audit" every couple of years. Don't assume that "the way we've always done things" is supported by the legal document governing your plan.

10. Not realizing who is a fiduciary—and what that means

The first thing to understand is who a plan fiduciary is, and to understand that the "test" isn't what you call yourself (or, in some cases, what you avoid calling yourself), but your ability to control and influence plan assets. A fiduciary is any person or entity named in the plan document (e.g., the plan sponsor and trustee), any person or entity that has discretionary authority over the management of a retirement plan or its assets (all individuals exercising discretion in the administration of the plan, all members of a plan's administrative committee—if it has such a committee—and those who select committee officials), and any person or entity that offers investment advice with respect to plan assets, for a fee.

Remember, too, that the authority to appoint a fiduciary makes you a fiduciary—and that hiring a "co-fiduciary" does not make you an "ex" fiduciary. If you are a fiduciary and you feel that you lack the expertise to make those decisions, you will, of course, want—and, in fact, are expected—to hire someone with that professional knowledge to carry out the investment and other functions. *—Nevin E. Adams, JD*

You can find more information on fulfilling your fiduciary responsibilities at the Employee Benefit Security Administration's (EBSA) Web site at www.dol.gov/ebsa/publications/fiduciaryresponsibility.html