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Statement of
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Before the
U.S. Department of Labor
Employee Benefit Security Administration
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Subject: Conflicts of Interest Proposed Rule (RIN 1210-AB32)

I think research will show that over the last 15 - 20 years, fiduciaries have stolen more money from investors and retirement savers, than brokers. Bernie Madoff was subject to a fiduciary standard. And, if he was here today, I think he would say that the Department's proposed rules would not have slowed him down.

Thank you for the invitation and opportunity to appear today.

I have been a very strong advocate for fiduciary standards for more than 28 years; however, I am opposed to the Department's current proposal.

What is being proposed is not a fiduciary standard, but rather punitive rules. These rules are going to make it easier for bad advisors to hide behind the complexity of the rules, and make it harder for honest advisors to provide their services. The greatest harm is going to come to small retirement plans, retirement savers with small account balances, and small retirement advisory firms.

Before entering the financial services industry, I was a U.S. Coast Guard helicopter pilot. Military pilots live or die, by the quality of their checklists and training programs.

I was, therefore, shocked when I entered the financial services industry in 1987 and discovered that men and women who were serving as retirement fiduciaries had no checklists to manage their critical decision-making process. Even worse, most had never received training on their fiduciary responsibilities, nor understood that they were serving in a fiduciary capacity.

I have devoted my second professional career to developing fiduciary checklists. These checklists have been incorporated in speeches, books, and in training programs that have been conducted for tens of thousands of advisors, trustees, and investment committee members.

What's important to point out, is that these checklists have included fiduciary best practices that are fully substantiated by **existing** legislation, regulations, regulatory opinion letters and bulletins, and case law. The most current checklist of fiduciary best practices is copied below, and the legal substantiation for the checklist is provided as an addendum to my written remarks.

To be clear, my firm defines a principle as a fundamental truth; and, a practice as a specific application to support a principle. As an example: *A best interest's standard* is a principle; *the preparation of an investment policy statement* is a practice to support the principle. It appears that nearly witness at these hearings support the best interests principle. However, where there has been virtually no discussion, and therefore no agreement, is on the fiduciary practices needed to satisfy the proposed best interests principle.

O	**1. State goals and objectives ("objectives")**
O	**2. Define roles and responsibilities of key decision-makers**
O	**3. Brief key decision-makers on objectives, standards, policies, and regulations**
O	**4. Identify sources and levels of Risk**
O	**5. Identify Assets**
O	**6. Identify Time Horizons**
O	**7. Identify Expected Outcomes**
O	**8. Define the strategy that is consistent with Risks, Assets, Time Horizon and Expected Outcomes**
O	**9. Ensure the strategy is consistent with implementation and monitoring constraints**
O	**10. Prepare an investment policy statement**
O	**11. Define the process for selecting key personnel to implement the strategy**

O	**12. Define the process for selecting tools, methodologies and budgets to implement the strategy**
O	**13. Ensure that service agreements and contracts do not contain provisions that conflict with objectives**
O	**14. Prepare periodic reports that compare performance with objectives**
O	**15. Prepare periodic reports that analyze fees and expenses**
O	**16. Conduct periodic examinations for conflicts of interest and self-dealing**
O	**17. Prepare periodic qualitative reviews of key decision-makers**

For the sake of time, I am not going to read the entire checklist into the record. However, I do want to point out several of the more important practices; such as controlling and accounting for fees and expenses; having defined due diligence procedures that are consistently applied when selecting and monitoring service providers; and periodically reviewing how well a plan or plan participant is progressing towards meeting their goals and objectives.

When I read the Department's reproposed fiduciary standard 122 days ago, I didn't see any reference to these fiduciary best practices. I started asking other industry experts the following two questions:

> *Is the Department proposing additional fiduciary practices to those already required?*
>
> *Or, is the Department saying that a fiduciary only has to demonstrate compliance with the new rules.*

No one seems to know the answers to these two fundamental questions. I would strongly suggest that the Department not proceed until these answers are clearly communicated to the industry, and the industry has had a chance to contemplate the consequences.

For if the answer to the first question is that there will be new practices added to the existing fiduciary checklist, then it is going to be nearly impossible to provide fiduciary services to small retirement plans, and retirement savers with account balances of less than $300,000.

And, if the answer to the second question is that fiduciaries will only have to demonstrate compliance to the proposed rules, then the Department will destroy the very essence of the fiduciary standard of care it is trying to promote.

One other related issue: The Department cannot simply wave its regulatory wand and make every advisor a fiduciary. In my professional opinion, an advisor needs, at least, five years of industry experience and additional training on fiduciary best practices before the person can judge wisely and objectively – which is what is required to serve in a client's best interests.

If the Department is going to move forward with this initiative, I would suggest the following four steps:

> **Step 1:** Build a checklist to answer the following question: ***To be compliant, what practices will a fiduciary have to demonstrate?*** It is essential that the practices be clearly stated. Checklists used by military pilots are prepared by pilots – not by lawyers. Writing rules and regulations that are so complex that only lawyers can interpret them does not benefit the men and women who carry the legal liability for their decision-making process.
>
> **Step 2**: Once the checklist is complete, determine which prohibited transaction exemptions need to be edited. The Department cannot execute Steps 1 and 2 at the same time. When building a house, the general contractor can't start until the architect is finished.
>
> **Step 3:** Apply the checklist from Step 1 to determine the amount of time that is required to satisfy each practice. Multiply the time by a reasonable professional billing rate to determine the minimum account balance that can be serviced. Keep in mind; the median account balance for an IRA rollover is only $24,000.
>
> **Step 4**: Determine how much training, experience, and expertise is required for an advisor to be able to effectively apply the checklist from Step 1.

I believe that if the Department follows these four Steps, it will determine that the better course of action is not to proceed with its current proposal.

Whatever next steps the Department takes, it will also need to support and protect organizations that are providing fiduciary training. Unfortunately, there are organizations today that are deliberately interfering with training, and others that are making false and misleading statements about their experience, expertise or independence. This interference is not coming from groups that oppose fiduciary standards, but rather from the very same organizations that are promoting themselves as "pro-fiduciary" leaders. Interference is causing irreparable harm to the public, to the industry and retirement savers. Something as simple as the Department identifying an ombudsmen for fiduciary training would be a great help.

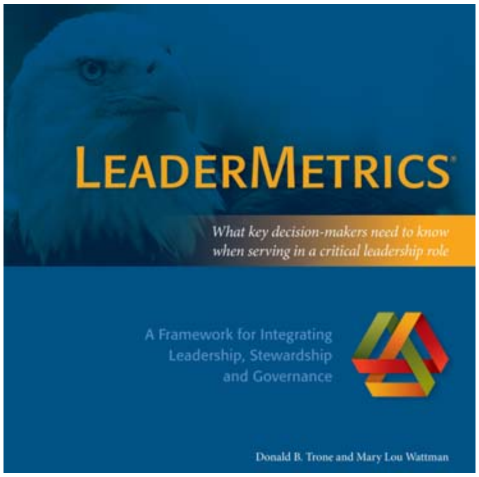
In closing: A positive comment I can make about the Department's current initiative is that the Department has the industry standing at attention. Right now every single service provider, whether they currently serve as a fiduciary or not, is reviewing its business practices to determine whether it complies with a fiduciary standard of care.

Military pilots live or die, by the quality of their checklists and training programs. Likewise, the success of the Department's current initiative is going to be determined by the quality of the fiduciary checklists and training programs that spring from the Department's reproposed rules and regulations. Personally, I don't think this proposal is going to fly.

3ethos Challenge Coin

Addendum: Fiduciary Checklist and Legal Substantiation

Sources



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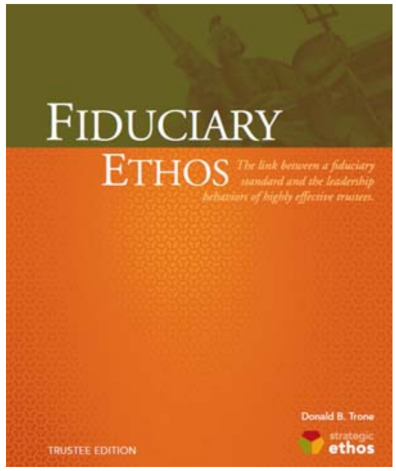

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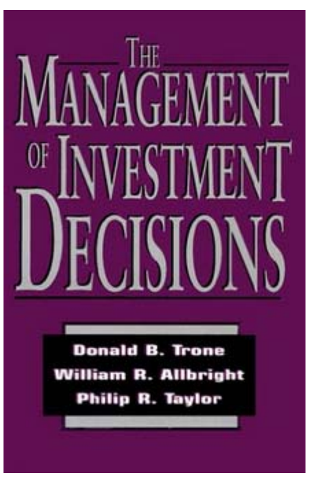

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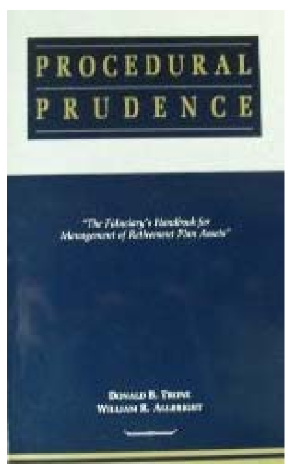

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Checklist of Fiduciary Best Practices

O	**1. State goals and objectives ("objectives")**
O	**2. Define roles and responsibilities of key decision-makers**
O	**3. Brief key decision-makers on objectives, standards, policies, and regulations**
O	**4. Identify sources and levels of Risk**
O	**5. Identify Assets**
O	**6. Identify Time Horizons**
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Legend

Abbreviation	Full Title	Impacts	Enforcement
ERISA	Employee Retirement Income Security Act of 1974	Qualified retirement plans	Federal
29 CFR 2509	Code of Federal Regulations Pertaining to the DOL - Interpretive Bulletins	Qualified retirement plans	Federal
UMPERSA	Uniform Management of Public Employee Retirement Systems Act	State, county, and municipal retirement plans	State (check for adoption)

1. State goals and objectives ("objectives")

ERISA §402(a)(1): *Every employee benefit plan shall be established and maintained pursuant to a written instrument.*

ERISA §404(a)(1): *... a fiduciary shall discharge his duties*

> *(A) For the exclusive purpose of:*
>
> > *(i) Providing benefits to participants and their beneficiaries; and*
> >
> > *(ii) Defraying reasonable expenses of administering the plan.*
>
> *(B) With the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;*
>
> *(C) By diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and*
>
> *(D) In accordance with the documents and instruments governing the plan, insofar as such documents and instruments are consistent with the provisions of this title and title IV.*

ERISA §404(a)(1)(B): *… 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 ….*

2. Define roles and responsibilities of decision-makers

ERISA §403(a)(2): *(a) Except as provided in subsection (b), all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall either be named in the trust instrument or in the plan instrument described in section 402(a) or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that …*

> *(2) Authority to manage, acquire, or dispose of assets of the plan is delegated to one or more investment managers pursuant to section 402(c)(3*).

ERISA §405(c)(1): *The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee functions) among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan ....*

29 C.F.R. §2509.96-1(e): *As with any designation of a service provider to a plan, the designation of a person(s) to provide investment education services or investment advice to plan participants and beneficiaries is an exercise of discretionary authority or control with respect to management of the plan; therefore, persons making the designation must act prudently and solely in the interests of the plan participants and beneficiaries, both in making the designation(s) and in continuing such designations(s).*

3. Brief decision-makers on objectives, standards, policies, and regulations

ERISA §404(a)(1)(B): *... with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.*

Marshall v. Glass/Metal Association and Glaziers and Glassworkers Pension Plan: *A trustee's lack of familiarity with investments is no excuse: under an objective standard, trustees are to be judged according to the standards of others acting in a like capacity and familiar with such matters.*

Marshall v. Snyder: *… the framers of §404(a)(1)(B) established a standard of conduct based on a measure of how a prudent man in a like capacity (administration of employee benefit plans) and familiar with such matters would act. Thus, ERISA's prudence test is not that of a prudent layperson but rather that of a prudent fiduciary with experience dealing with a similar enterprise.*

4. Identify sources and levels of *Risk*

29 CFR §2550.404a-1(b)(2)(A): *… a determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio … to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or the investment course of action ….*

GIW Industries, Inc. v. Trevor, Stewart, Burton, & Jacobsen, Inc.: *When investment managers make decisions, they do not view individual investments in isolation. Rather, the goal is to create a diversified portfolio that balances appropriate levels of risk and return for the investor. The risk of a given instrument is neutralized somewhat when the investment is combined with others in a diversified portfolio. The risk inherent in the entire portfolio is less than that of certain assets within that portfolio. Ideally, after diversification, only market risk remains. Likewise, the return from a portfolio over time should be more stable than that of isolated investments within that portfolio.*

5. Identify *Assets*

UMPERSA Prefatory Note: *The Act facilitates the incorporation of modern investment practices …. Five generally accepted principles of modern fiduciary investment practice are implemented …:*

> (*1) The standard of prudence is applied to any investment as part of the total portfolio, rather than to individual investments. In the retirement system setting, the term portfolio embraces the assets of each retirement program or appropriate grouping of programs.* MPERS Act §10(2)
> *(2) The trade-off in all investing between risk and return is identified as the trustee's central investment consideration.* MPERS Act §10(2)
> *(3) All categoric restrictions on types of investments have been abrogated; the trustee can invest in anything that plays an appropriate role in achieving the risk/return objectives of the program and that meets the other requirements of prudent investing.* MPERS Act §8(a)(4).
> *(4) The long-familiar principle that trustees diversify their investments has been integrated into the definition of prudent investing. MPERS Act § 8(a)(2).*
> *(5) The power of a trustee to delegate investment and management functions is affirmed, clarified, and subjected to safeguards. MPERS Act § 6.*

6. Identify *Time Horizons*

ERISA §404(a): [fiduciaries, in fulfilling their investment duties, to take into consideration such factors as]:

> *(ii) The liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan; and*
> *(iii) The projected return of the portfolio relative to the funding objectives of the plan.*

Interpretive Bulletin 94-2: *The ERISA Conference Report indicates that the purpose of the requirement for a funding policy is to enable the plan fiduciaries to determine the plan's short- and long-run financial needs, and communicate these requirements to the appropriate persons. For example, with a retirement plan it is expected that under this procedure, the persons who manage the plan will determine whether the plan has a short-run need for liquidity (e.g., to pay benefits) or whether liquidity is a long-run goal and investment growth is a more current need. This, in turn, is to be communicated to the persons responsible for investments so that investment policy can be appropriately coordinated with plan needs.*

29 CFR 2509.96-1 – Interpretive Bulletin Relating to Participant Investment Education: *[t]here has been an increasing recognition of the importance of providing participants and beneficiaries, whose investment decisions will directly affect their income at retirement, with information designed to assist them in making investment and retirement-related decisions appropriate to their particular situations .... Information and materials that inform a participant or beneficiary about: … (v) determining investment time horizons ….*

29 CFR §2550.404a-1(b)(2)(ii)(A–C) – Investment duties: (2) For purposes of paragraph (b)(1) of this section, *"appropriate consideration" shall include, but is not necessarily limited to:*

> *(A) Determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio … to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or the investment course of action; and*
> *(B) Consideration of the following factors as they relate to such portion of the portfolio:*
>
> > *(i) The composition of the portfolio with regard to diversification;*
> > *(ii) The liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan; and*
> > *(iii) The projected return of the portfolio relative to the funding objectives of the plan.*

Metzler v. Graham: *The degree of investment concentration that would violate this requirement to diversify cannot be stated as a fixed percentage, because a fiduciary must consider the facts and circumstances of each case. The factors to be considered include (1) the purpose of the plan; (2) the amount of the plan assets; (3) financial and industrial conditions; (4) the type of investment, whether mortgages, bonds, or shares of stock or otherwise; (5) distribution as to geographical location; (6) distribution as to industries; and (7) the dates of maturity.*

7. Identify *Expected Outcomes* ("performance")

ERISA §404(a): A fiduciary shall discharge his [or her] duties solely in the interest of the participants [taking into account] ...

> *(ii) The liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan; and*
> *(iii) The projected return of the portfolio relative to the funding objectives of the plan.*

8. Define the strategy that is consistent with *RATE*

ERISA §404(a)(1)(C): *A fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries ... by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so ....*

ERISA Section 404(a)(1)(C) (1974 Conference Report on ERISA): *The degree of investment concentration that would violate this requirement to diversify cannot be stated as a fixed percentage, because a fiduciary must consider the facts and circumstances of each case. The factors to be considered include: (1) the purposes of the plan; (2) the amount of the plan assets; (3) financial and industrial conditions; (4) the type of investment, whether mortgages, bonds, or shares of stock or otherwise; (5) distribution as to geographical location; (6) distribution as to industries; and (7) the dates of maturity.*

DOL Interpretive Bulletin 96-1: *Asset allocation models must be based on generally accepted theories that take into account the historic returns of different asset classes (e.g., equities, bonds, or cash) over defined periods of time .... This requirement was included to ensure that any models or materials presented to participants or beneficiaries will be consistent with widely accepted principles of modern portfolio theory, recognizing the relationship between risk and return, the historic returns of different asset classes, and the importance of diversification.*

Leigh v. Engle: *When investment managers make decisions, they do not view individual investments in isolation. Rather, the goal is to create a diversified portfolio that balances appropriate levels of risk and return for the investor. The risk of a given instrument is neutralized somewhat when the investment is combined with others in a diversified portfolio. The risk inherent in the entire portfolio is less than that of certain assets within that portfolio. Ideally, after diversification, only market risk remains. Likewise, the return from a portfolio over time should be more stable than that of isolated investments within that portfolio.*

9. Ensure the strategy is consistent with implementation and monitoring constraints

ERISA Section 404(a) (Preamble): *The Department is of the opinion that (1) generally, the relative riskiness of a specific investment or investment course of action does not render such investment or investment course of action either per se prudent or per se imprudent, and (2) the prudence of an investment decision should not be judged without regard to the role that the proposed investment or investment course of action plays within the overall plan portfolio …. Under the "prudence" rule, the standard to which a fiduciary is held in the proper discharge of his investment duties is defined, in part, by what a prudent person acting in a like capacity and familiar with such matters would do. Thus, for example, it would not seem necessary for a fiduciary of a plan with assets of $50,000 to employ, in all* *respects, the same investment management techniques as would a fiduciary of a plan with assets of $50,000,000.*

10. Formalize the strategy in detail and communicate

ERISA §402(a)(1): *Every employee benefit plan shall be established and maintained pursuant to a written instrument.*

ERISA §404(a)(1): *... a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and …*

> *(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title and title IV.*

29 CFR §2509.94-2(2): *[t]he maintenance by an employee benefit plan of a statement of investment policy designed to further the purposes of the plan and its funding policy is consistent with the fiduciary obligations set forth in ERISA §404(a)(1)(A) and (B) …. For purposes of this document, the term "statement of investment policy" means a written statement that provides the fiduciaries who are responsible for plan investments with guidelines or general instructions concerning various types or categories of investment management decisions …. A statement of investment policy is distinguished from directions as to the purchase or sale of a specific investment at a specific time ….*

DOL Interpretive Bulletin 94-2: [Investment policy statements] *serve a legitimate purpose in many plans by helping to ensure that investments are made in a rational manner and are designed to further the purposes of the plan and its funding policy.*

DOL Interpretive Bulletin 94-2: *While this regulation states only that a written investment plan is "consistent" with ERISA's fiduciary duty requirements, in the circumstances here, absence of any plan constitutes a breach of fiduciary duty …. Statements of investment policy … would be part of the documents and instruments governing the plan within the meaning of ERISA §404(a)(1)(D).*

11. Define the process for selecting key personnel to implement the strategy

ERISA §402(b)(2-3): *… any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan …*

> (*2) That a named fiduciary, or a fiduciary designated by a named fiduciary pursuant to a plan procedure described in section 405(c)(1), may employ one or more persons to render advice with regard to any responsibility such fiduciary has under the plan; or*
> *(3) That a person who is a named fiduciary with respect to control or management of the assets of the plan may appoint an investment manager or managers to manage (including the power to acquire and dispose of) any assets of a plan.*

ERISA §402(c)(2): *A fiduciary … may employ one or more persons to render advice with regard to any responsibility such fiduciary has under the plan.*

DOL Interpretive Bulletin 96-1: *As with any designation of a service provider to a plan, the designation of persons to provide investment educational services or investment advice to plan participants and beneficiaries is an exercise of discretionary authority or control with respect to management of the plan; therefore, persons making the designation must act prudently and solely in the interest of the plan participants and beneficiaries, both in making the designation(s) and in continuing such designation(s).*

12. Define the process for selecting tools, methodologies, and budgets to implement the strategy

ERISA Section 404(a) (Preamble): *The Department is of the opinion that ... under the "prudence" rule, the standard to which a fiduciary is held in the proper discharge of his investment duties is defined, in part, by what a prudent person acting in a like capacity and familiar with such matters would do. Thus, for example, it would not seem necessary for a fiduciary of a plan with assets of $50,000 to employ, in all respects, the same investment management techniques as would a fiduciary of a plan with assets of $50,000,000.*

29 C.F.R. §2550.404a-1(b)(1)(A)(i): *Has given 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, including the role the investment or investment course of action plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties ….*

13. Ensure that service agreements and contracts do not contain provisions that conflict with objectives

UMPERSA §6(b)(2): *The trustee or administrator shall exercise reasonable care, skill, and caution in … establishing the scope and terms of the delegation, consistent with the purposes and terms of the retirement program.*

UMPERSA §6 (Comments): *[A] trustee could not prudently agree to an investment management agreement containing an exculpation clause that leaves the trust without recourse against reckless mismanagement.*

14. Prepare periodic reports that compare performance with objectives

29 CFR. §2509.75-8 FR-17: *At reasonable intervals, the performance of trustees and other fiduciaries should be reviewed by the appointing fiduciary in such manner as may be reasonably expected to ensure that their performance has been in compliance with the terms of the plan and statutory standards and satisfies the needs of the plan.*

29 C.F.R. §2509.94-2: *Maintenance of a statement of investment policy does not relieve the named fiduciary of its obligations under ERISA §404(a) with respect to the appointment and monitoring of an investment manager or trustee. In this regard, the named fiduciary appointing an investment manager must periodically monitor the investment manager's activities with respect to the management of the plans assets.*

DOL Interpretive Bulletin 94-2: *It is the view of the Department that compliance with the duty to monitor necessitates proper documentation of the activities that are subject to monitoring …. Maintenance of a statement of investment policy does not relieve the named fiduciary of its obligations under ERISA §404(a) with respect to the appointment and monitoring of an investment manager or trustee. In this regard, the named fiduciary appointing an investment manager must periodically monitor the investment manager's activities with respect to the management of the plans assets.*

Morrissey v. Curran: *ERISA fiduciaries must monitor investments with reasonable diligence and dispose of investments which are improper to keep.*

Harley v. Minnesota Mining and Manufacturing Company: *Once an investment has been made, a fiduciary has an ongoing duty to monitor investments with reasonable diligence and remove plan assets from an investment that is improper.*

15. Prepare periodic reports that analyze fees and expenses

ERISA §404(a)(1)(A)(i) and (ii): *… discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries, and for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan.*

DOL Advisory Opinion 97-16A dated May 22, 2007: [Relative to parties receiving 12b-1 fees and other revenue-sharing fees; plan fiduciaries have a duty to]*:*

> *(i) Know whether its service providers are receiving such compensation;*
> *(ii) Know the amount of such compensation; and*
> *(iii) Ensure that the total compensation, including such forms of indirect compensation, received by the service providers from the plan, directly or indirectly, is no more than reasonable compensation for the services provided to the plan.*

DOL (PWBA) handbook, "A Look at 401(k) Plan Fees": *Fees and expenses are one of several factors to consider when you select and monitor plan service providers and investments. The level and quality of service and investment risk and return will also affect your decisions.*

- *Begin by establishing an objective process to aid in your decision-making. This process should include an understanding of the fees and expenses you will pay and a review of those charges as they relate to the services to be provided and the investments you are considering.*
- *Before negotiating with prospective providers, think about the specific services you would like from a service provider (e.g., legal, accounting, trustee/custodian, recordkeeping, investment management, investment education or advice). Include the types and frequency of reports you wish to receive, communications to participants, meetings for participants, and the frequency of participant investment transfers.*
- *You will also need to consider the level of responsibility you want the prospective service provider to assume, the services that must be included in any retirement plan, the possible extras or customized services you wish to provide, and optional features, such as loans, Internet trading, and telephone transfers.*

DOL (PWBA) Letter dated July 29, 1998: *Section 404(a)(1)(D) of ERISA requires plan fiduciaries to discharge their duties in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with Title I of ERISA. In evaluating the payment by a plan of particular expenses, the fiduciaries must first examine the language of the plan documents. If the expense would be permitted under the terms of the plan documents, then the fiduciaries must determine whether such payment would be consistent with Title I of ERISA …. In choosing among potential service providers, as well as in monitoring and deciding whether to retain a service provider, the trustees must objectively assess the qualifications of the service provider, the quality of the work product, and the reasonableness of the fees charged in light of the services provided ….*

Liss v. Smith: *At the very least, trustees have a duty to (i) determine the needs of a fund's participants, (ii) review the services provided and fees charged by a number of different providers, and (iii) select the provider whose service level, quality, and fees best match the fund's needs and financial situation.*

16. Conduct periodic examinations for conflicts-of-interest and self-dealing, and breaches of a code of conduct

ERISA §406(a)(1): [A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction] *… constitutes a direct or indirect … furnishing of goods, services, or facilities between the plan and a party in interest; [or] transfer to, or use by or for the benefit of, a party in interest or any assets of the plan.*

ERISA §406(b): *A fiduciary with respect to a plan shall not –*

(1) Deal with the assets of the plan in his own interest or for his own account;
(2) In his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or
(3) Receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

Whitfield v. Tomasso**:** *In addition to the general fiduciary duties of loyalty and prudence, ERISA also regards specific types of transactions between a plan and related persons, known as "parties in interest," as inherently susceptible to abuse.*

Whitfield v. Tomasso**:** *In addition to the prohibitions of section 406(a), section 406(b), 29 U.S.C. §1106(b), prohibits plan fiduciaries from placing themselves in a conflict-of-interest situation where their loyalty to the plan may be divided.*

17. Prepare periodic qualitative reviews or performance reviews of decision-makers

29 C.F.R. §2509.75-8: *At reasonable intervals, the performance of trustees and other fiduciaries [such as investment managers] should be reviewed by the appointing fiduciary in such manner as may be reasonably expected to ensure that their performance has been in compliance with the terms of the plan and statutory standards, and satisfies the needs of the plan. No single procedure will be appropriate in all cases; the procedure adopted may vary in accordance with the nature of the plan and other facts and circumstances relevant to the choice of the procedure.*