
ACG

ATLANTA CONSULTING GROUP

WHAT IT MEANS TO BE AN INVESTMENT FIDUCIARY

THE INFORMATION CONTAINED HEREIN WAS GATHERED FROM SOURCES BELIEVED TO BE RELIABLE BUT IT IS NOT GUARANTEED BY US NOR IS IT TO BE CONSIDERED ALL INCLUSIVE.

THIS INFORMATION IS EDUCATIONAL IN NATURE, PROVIDED AS GENERAL GUIDANCE ON THE SUBJECT COVERED, AND IT IS NOT INTENDED TO BE AUTHORITATIVE OR TO PROVIDE LEGAL ADVICE.

PLEASE NOTE:

AVAILABLE TO YOU UPON WRITTEN REQUEST, AT NO COST, IS AN INVESTMENT ADVISORY DISCLOSURE DOCUMENT (RAYMOND JAMES' FORM ADV, PART II). IF YOU WOULD LIKE A COPY, PLEASE CONTACT YOUR RAYMOND JAMES REPRESENTATIVE.

Table of Contents

Section 1	What is a Fiduciary?
Section 2	Standards of Fiduciary Conduct
Section 3	Common Sense Principles
Section 4	Fiduciary Safe Harbors
Section 5	Proposed/New Regulations
Section 6	Plan Checklist

What Is An Investment Fiduciary?

A fiduciary is someone acting in a position of trust on behalf of, or for the benefit of, a third party.

- Fiduciary status is based on facts and circumstances – it can sometimes be difficult to determine who is a fiduciary
- A fiduciary has effective control or influence over *substantial* investment decisions.

✓ ***Does an individual exercise discretion or have influence over the investment decisions?***

Who Is An Investment Fiduciary?

The term “investment fiduciary” can be divided into three groups:

- **Investment Steward** – A person who has the legal responsibility for managing investment decisions (includes trustees and investment committee members)
- **Investment Advisor** – A professional who is responsible for managing comprehensive and continuous investment decisions (includes trust officers and investment consultants)
- **Investment Manager** – A professional who has discretion to select specific securities for separate accounts, mutual funds and commingled trusts.

✓ Fiduciary status is based on the functions performed, not just a person’s title.

Legislation

- ***ERISA – Employee Retirement Income Security Act***
Impacts private retirement plans.
- ***UPMIFA - Uniform Prudent Management of Institutional Funds Act***
Impacts foundations, endowments, and government-sponsored charitable institutions. In 2006, UPMIFA replaced UMIFA and provides statutory guidelines for management, investment and expenditure of endowment funds held by charitable institutions.
- ***MPERS – Uniform management of Public Employee Retirement Systems Act***
Impacts state, county and municipal retirement plans.
- ***UPIA – Uniform Prudent Investor Act***
Impacts private trusts.

Standards of Fiduciary Conduct

- ***Duty of loyalty***
 - (ERISA) To discharge their duties for the “exclusive purpose” of providing participants and beneficiaries with benefits
 - (UPMIFA) To act in a manner reasonably believed (“reasonable purpose”) by the director to be in the best interest of the non-profit corporation
- ***Duty of prudence (care)***
 - (ERISA) To act “with care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person 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”
 - (UPMIFA) To act “in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances”. Incorporates the duty to minimize costs and the duty to investigate with respect to investment decisions.
- ***Duty of obedience***
 - (ERISA) Comply with applicable laws and follow plan documents, to the extent that they comply with ERISA.
 - (UPMIFA) Comply with applicable federal, state, and local laws, comply with the organization’s governing documents, and act to advance the organization’s mission and exempt purpose.
- ***Duty to diversify investments***
 - (ERISA, UPMIFA) A fiduciary should consider the purpose of the plan/assets; the size of the investments; the economic and market conditions; the type of investments; the geographic and industry dispersion; and dates of maturity.

A Duty of Loyalty

Investment Fiduciaries have a duty of loyalty

- (ERISA) To discharge their duties for the “exclusive purpose” of providing participants and beneficiaries with benefits
 - ✓ To inform participants and beneficiaries of their rights
 - ✓ To give complete and accurate information in response to participants’ questions, a duty that does not require the fiduciary to disclose internal deliberations nor interfere with substantive aspects of the bargaining process
 - ✓ However, a fiduciary is not under any obligation to offer precise predictions about future changes to the plan
 - ✓ A truthful statement made in good faith creates no breach of duty if participants misunderstand it
- (UPMIFA) To act in a manner reasonably believed by the director to be in the best interest of the non-profit corporation (“reasonable purpose”) including disclosure of conflicts of interest, avoidance of competition with the organization for business opportunities, maintenance of confidentiality, and avoidance of use of the organization’s assets for personal benefit.

A Duty of Prudence (Care)

Investment Fiduciaries have a duty of prudence (care)

- (ERISA) To act “with care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person 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”
- (UPMIFA) To act “in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances”. Incorporates the duty to minimize costs and the duty to investigate with respect to investment decisions. In addition, UPMIFA directs managers of charities to consider: the charitable purpose of the charity and purposes of the endowment fund, general economic conditions, to make decisions on a portfolio basis, to allocate risk and return across the portfolio, and to consider the needs of the charity both to make distributions and to preserve capital.
- Investment fiduciaries should define policies and procedures for overseeing and managing potential conflicts of interest
 - Acknowledge the organization’s ethic policies on an annual basis, in writing
 - Disclose potential conflicts of interest on an annual basis, in writing

✓ ***Who will benefit most from an investment decision? Avoid self-dealing.***

A Duty to Diversify Investments

Investment Fiduciaries have a duty to diversify investments

- A fiduciary should consider the purpose of the plan/assets; the size of the investments; the economic and market conditions; the type of investments; the geographic and industry dispersion; and dates of maturity
- Assets are appropriately diversified to conform to the specified time horizon and risk/return profile
- The methodology and tools used to establish appropriate diversification are effective and consistently applied
- (ERISA) For participant directed plans, selected asset classes provide each participant the ability to diversify their portfolio appropriately given their time horizon and risk/return profile.

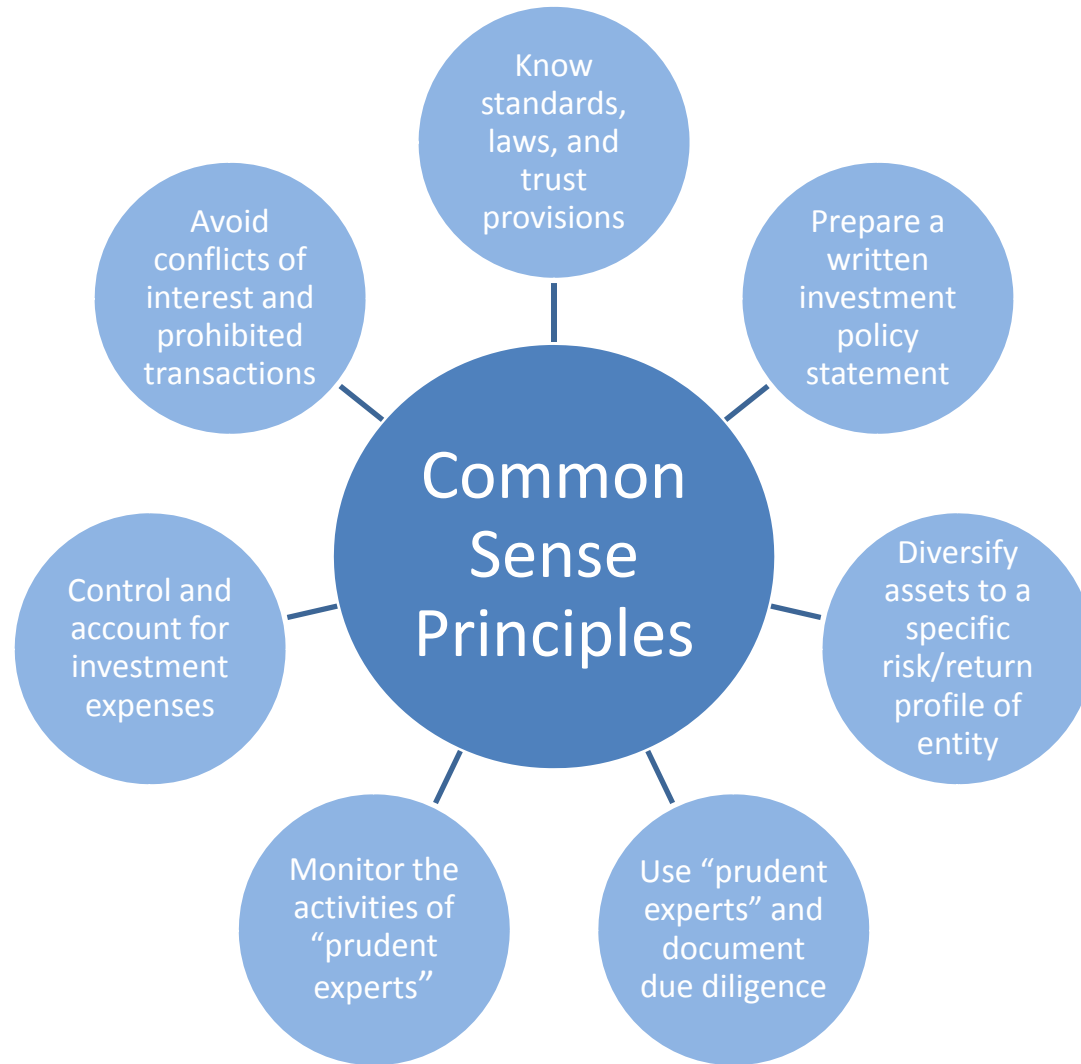
A Duty of Obedience

Investment Fiduciaries have a duty of obedience

- (ERISA) A duty to comply with applicable laws and to follow plan documents, to the extent that plan documents comply with ERISA
- (ERISA) Trust agreement should allow for delegation of investment responsibility, or otherwise appoints, an Investment Advisor other than the trustee of the trust and the document clearly directs the trustee to allow such delegation
- (UPMIFA) A duty to comply with applicable federal, state, and local laws, comply with the organization's governing documents, and to act to advance the organization's mission and exempt purpose.

✓ ***Does the plan have an IRS-approved plan document? Is the Summary Plan Description (SPD) updated for all plan design changes and distributed to participants?***

Common Sense Principles For Investment Fiduciaries



Common Sense Principles For Investment Fiduciaries

The following common sense principles apply to all Investment Fiduciaries:

- Know standards, laws and trust provisions
- Prepare a written investment policy statement
- Diversify assets to specific risk/return profile of entity
- Use “prudent experts” and document due diligence
- Monitor the activities of “prudent experts”
- Control and account for investment expenses
- Avoid conflicts of interest and prohibited transactions

Know Standards, Laws and Trust Provisions

Review all documents including trust documents, service agreements, investment policy statement, investment performance reports, and manager information.

- On a periodic basis by trustees
- On a periodic basis by legal counsel
- Review third party vendor contracts periodically
- Stay abreast of new laws and regulations that may affect your plan/organization

Prepare A Written Investment Policy Statement (IPS)

A well-written investment policy statement will:

- Avoid unnecessary differences of opinion and resulting conflicts
- Minimize potential missteps due to a lack of clear guidance
- Establish a reasoned basis for measuring their compliance
- Establish and communicate reasonable and clear expectations

✓ The IPS should contain enough detail to define, implement and manage the investment strategy of the plan, be flexible enough that it can be implemented in a complex and dynamic environment, and yet not be so detailed that it requires constant revisions or updates.

Prepare A Written Investment Policy Statement (IPS)

Elements of a well-written investment policy statement:

- Outline the purpose and mission of the assets
 - Define the duties and responsibilities of all interested parties
 - Define time horizon and goals and objectives, including socially responsible guidelines and restrictions
 - Define asset allocation and rebalancing guidelines
 - Define selection and review criterion procedures for investments
 - Define monitoring and control procedures for investments
 - Define procedures for controlling for fees
- ✓ ***On a periodic basis, review the IPS for accuracy and completeness. New trustees should review and be in agreement with provisions in the IPS.***

Diversify Assets to Specific Risk/Return Profile of Entity

A fiduciary should consider the purpose of the plan; the size of the investments; the economic and market conditions; the type of investments; the geographic and industry dispersion; and dates of maturity

- Assets are appropriately diversified to conform to the specified time horizon and risk/return profile of the plan/organization
 - For participant directed plans, selected asset classes provide each participant the ability to diversify their portfolio appropriately given their time horizon and risk/return profile.
 - The methodology and tools used to establish appropriate diversification are effective and consistently applied. Consider a worst case scenario for liquidity needs.
- ✓ ***On a periodic basis, review the time horizon, risk profile, cash flow and liquidity needs, goals and objectives, and asset allocation of the assets.***

Use Prudent Experts and Document Due Diligence



Use Prudent Experts and Document Due Diligence

An Investment Fiduciary may delegate certain decisions to professionals; however can never fully abdicate these primary responsibilities:

- Determining investment goals and objectives
- Approving an appropriate asset allocation strategy
- Establishing a written IPS consistent with goals and objectives
- Approving appropriate money managers, mutual funds or other “prudent experts” to implement the IPS
- Monitoring the activities of the overall investment program for compliance with the IPS
- Avoiding conflicts of interest and prohibited transactions

✓ ***In itself, the act of delegating responsibility to others is a fiduciary act!***

Use Prudent Experts and Document Due Diligence

ERISA 404(a) provides a (voluntary) safe harbor for the delegation of investment decisions to prudent experts (investment managers) who are:

- Selected by following a due diligence process
- Given discretion over the assets, and
- Acknowledged fiduciaries

✓ ***Fiduciaries have a duty to monitor the activities of the prudent experts to assure that the expert is properly performing the agreed upon tasks using the agreed upon criteria.***

Monitor the Activities of Prudent Experts



Control and Account for Investment Expenses

- Investment manager selection criteria should include considerations for fees and expenses
 - Monitor investment manager fees and expenses on a periodic basis
 - Monitor fees and expenses from service providers and other vendors on a periodic basis
 - Put contracts for service providers out to bid periodically
- ✓ ***Fiduciaries are charged with determining that costs and fees are “reasonable”.***

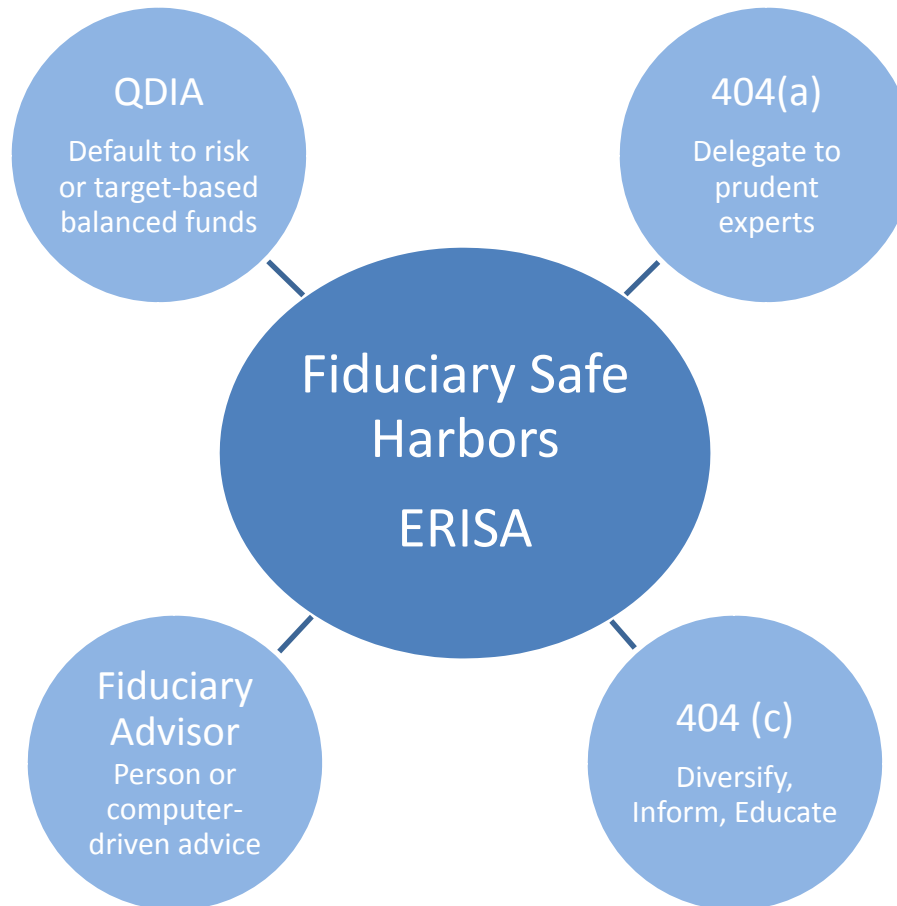
Avoid Conflicts of Interest and Prohibited Transactions

- Conduct investment decisions at “arms-length”
 - Responsibility to employ an objective, independent due diligence process at all times.
 - Ask yourself: “Who benefits most from the investment decision?”

- Have policies and procedures for overseeing and managing potential conflicts of interest.
 - Annual review and acknowledgement of the organization’s code of ethics
 - Disclose potential conflicts of interest on an annual basis, in writing

✓ ***Avoid self-dealing transactions which are a breach of fiduciary duty.***

Fiduciary Safe Harbors (ERISA)



Fiduciary Safe Harbors Offer Protection From Liability

If elected, ERISA safe harbor provisions offer relief from liability associated with certain investment-related decisions and acts.

- ERISA 404(a) safe harbor:
 - Delegation of investment decisions to a prudent expert
 - ERISA 404(c) safe harbor:
 - Diversification, information and education (participant-directed plans)
 - ERISA Fiduciary Advisor safe harbor :
 - Changes in the new proposed regulations
 - ERISA Qualified Default Investment Alternative (QDIA) safe harbor:
 - Default to risk-based or target date balanced funds (participant-directed plans)
- ✓ ***ERISA safe harbor election is voluntary and, if elected, requires demonstrated compliance with requirements.***

ERISA Safe Harbor Requirements: Committee-Directed Plans

When investment decisions are committee-directed, there are five generally recognized “safe harbor” requirements:

- Investment decisions must be delegated to a “prudent expert” (registered investment advisor including mutual funds, bank, or insurance company)
- The fiduciary must demonstrate that the prudent expert(s) was selected by following a due diligence process
- The prudent expert(s) must be given discretion over the assets
- The prudent expert(s) must acknowledge their co-fiduciary status in writing (prospectus serves as acknowledgement for mutual funds)
- The fiduciary must monitor the activities of the prudent expert(s) to ensure that the expert(s) is properly performing the agreed upon tasks using the agreed upon criteria

ERISA Safe Harbor Requirements: Participant-Directed Plans

When investment decisions are participant-directed, there are nine generally recognized “safe harbor” requirements (1-5 are the same as committee-directed):

- Investment decisions must be delegated to a “prudent expert” (registered investment advisor including mutual funds, bank, or insurance company)
 - The fiduciary must demonstrate that the prudent expert(s) was selected by following a due diligence process
 - The prudent expert(s) must be given discretion over the assets
 - The prudent expert(s) must acknowledge their co-fiduciary status in writing (prospectus serves as acknowledgement for mutual funds)
 - The fiduciary must monitor the activities of the prudent expert(s) to ensure that the expert(s) is properly performing the agreed upon tasks using the agreed upon criteria
 - Plan participants must be notified in writing that the plan sponsor intends to constitute a 404(c) plan, and seek liability relief through safe harbor procedures
 - Participants must be offered at least three investment options with materially different risk/return profiles
 - Participants must receive information and education on the different investment options
 - Participants must be provided the opportunity to change their investment strategy/allocation with a frequency that is appropriate in light of market volatility.
- ✓ ***Plan fiduciaries are not relieved of their responsibilities in participant-directed plans.***

New/Proposed Regulations by the Department of Labor (DOL)

Expanded definition of fiduciary investment advice - ERISA 3(210(A)(11)

- Appraisals or a fairness opinion concerning the value of securities or other property, or
- Advice or recommendations regarding purchasing or selling securities or other property ,or
- Advice or recommendations regarding the management of securities or other property

✓ ***Proposed expanded definition would bring in appraisers, accountants and others previously not considered a fiduciary under ERISA.***

New/Proposed ERISA Regulations

Service Provider and Plan Participant Disclosure Rules - ERISA 408(b)(2)


- Requires an initial and annual disclosure of the plan and investment components to all eligible participants (including retired and beneficiary participants)
 - General Plan Information – Any changes to the plan must be disclosed to participants **30-90 days in advance** of the changes. This includes changes to investment options, and administrative and individual expenses.
 - Investment-Related Information – For each investment option, provide name, type, performance, fees, appropriate benchmark, glossary. **Updated annually.**
 - Supplemental information on a website must be **updated quarterly** - Objectives and goals, principal strategies and risks, portfolio turnover, performance and fees
- Requires **all fees and compensation be disclosed to plan participants** on a quarterly basis including administrative and individual fees, and whether there is an offset of plan fees.
- Requires written contract disclosures from service providers regarding services, fiduciary status, and compensation.
- ✓ ***Recent/proposed ERISA regulations derived from DOL enforcement/litigators who grew tired of losing cases and not from policy as they typically do.***

Plan Checklist For Fiduciaries


PLAN CHECKLIST

To help in auditing your plan and avoiding liability.


PLAN ADMINISTRATION

	Do you have an IRS-approved plan document?
	Do you have a Summary Plan Description (SPD) updated for all plan design changes and distributed to all participants?
	Evaluate investment strategy, process and portfolio
	Do you have a documented file on IRS changes to regulations affecting retirement plans and how they may affect your plan?
	Have you made a definite list of all the fiduciaries associated with the plan?
	Have all named fiduciaries received training?
	Does the plan cover the "right" employees and not exclude anyone who may be entitled to participate in the plan?
	Do you review the process for collecting participant contributions and loan repayments, forwarding them to the service provider and investing them in a timely manner?
	Do you have a detailed analysis on file showing how you selected your current plan provider(s) and a comparison of other provider(s)/products you looked at during the selection process? Do you conduct an annual review of all provider(s) and document the review?
	Do you review fees of all provider(s), both direct and indirect, to ensure complete understanding of all costs and services associated with those fees?
	Have you checked that the fidelity bond provides an appropriate coverage amount and that it covers fiduciaries and other employees, third parties and provider(s) involved with the plan? ERISA requires a minimum of \$1,000.00 - a best practices amount is 10% of plan assets up to \$500,000.00
	Do you have a comprehensive annual report of vital plan statistics such as participation rates, investment dispersion among asset classes, loans, distributions and customer service inquiries, as well as investment performance?

PLAN INVESTMENTS

	Do you have a documented investment selection process, showing how investment options were originally chosen to be included in your plan?
	Do you have an Investment Policy Statement, documenting due diligence criteria for evaluating the funds in your plan on an on-going basis?
	Does the plan maintain a diversified investment line-up consistent with the Investment Policy Statement?
	Do you have a quarterly/annual investment due diligence report on file, showing you are fulfilling your fiduciary responsibility to monitor investment performance?
	If the plan includes an automatic enrollment feature, have you confirmed that the default investment option is selected in a prudent process consistent with ERISA standards?

PARTICIPANT COMMUNICATIONS

	Do you have a documented employee education and information strategy on file?
	Do you have a resource available to participants to help guide them through investment decisions and other pertinent issues surrounding the plan?
	Do you have regularly scheduled employee meetings to update participants of changes to the plan and investment options, as well as educate them on fundamental investment strategies, such as asset allocation?