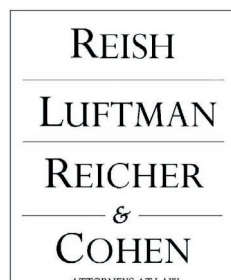


**The Fiduciary Duty to Administer A Successful Plan:
Ameriprise Retirement Services' BluePrint DesignSM**

A WHITE PAPER

by

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The Fiduciary Duty to Administer A Successful Plan: The Ameriprise BluePrint Design Model

1.0 INTRODUCTION

In this White Paper, we evaluate the BluePrint Design model in terms of the assistance it provides to plan fiduciaries in performing their duties under the Employee Retirement Income Security Act (ERISA).

We use the phrase “a successful plan” to describe a retirement plan that satisfies the objectives of the plan sponsor, the covered employees and the governing law – ERISA. In doing that, we assume that the objectives of the sponsor are to provide a plan that is valued by the employees and that assists in the recruiting and retention of employees. We assume that the objective of employees is to retire with an amount of benefits which, when combined with Social Security (and possibly other savings and investments), will be adequate to provide a decent standard of living in retirement (i.e., an appropriate income replacement). And, in terms of ERISA’s objectives, we assume that the plan fiduciaries (for example, the committee members) want to fulfill their legal responsibilities, to achieve the law’s goal of providing benefits for the employees and to minimize any exposure to liability for themselves and the plan sponsor.

The design and operation of a successful plan requires a coordinated effort by the sponsor and the fiduciaries. The sponsor, as the plan's "settlor" or founder, is not a fiduciary (and may act in its own best interest) when deciding whether to have a plan, how to design the plan, and whether to terminate it. However, as a practical matter, employers must compete for employees, and the vast majority of employers value their employees and work conscientiously to provide them with competitive compensation and benefit packages. Fiduciaries, on the other hand, are responsible for implementing the sponsor's decisions in a manner that satisfies ERISA's legal requirements and, as a practical matter, that accomplishes the sponsor's goals.

This White Paper focuses primarily on the legal responsibilities of the fiduciaries (such as the plan committee members and other officers with discretion and authority over the plan) in administering the plan and managing its assets. That is because, while the conduct of fiduciaries is highly regulated, by and large neither ERISA or other laws regulate the employer decision-making about retirement plans. However, our analysis would not be complete if we did not point out, where appropriate, how employer design decisions can help accomplish the employer's objectives and also help the fiduciaries better fulfill their legal responsibilities.

Within that context, this White Paper first discusses ERISA's requirements in terms of the basic fiduciary duties, including the duties to:

- act for the exclusive purpose of providing benefits to participants and beneficiaries;
- engage in a prudent process, including conducting an investigation of the issues and information relevant to providing benefits; and
- monitor the investments and service providers selected by the fiduciary.

We then summarize the services provided by Blueprint Design. Finally, we conclude by addressing how Blueprint Design will help fiduciaries fulfill their duties.

Our conclusion is that the services provided by Ameriprise Retirement Services through its Blueprint Design model offer substantial benefits to plan sponsors in achieving their goals and material assistance to fiduciaries in prudently fulfilling their legal responsibilities, including the duty to act for the exclusive purpose of providing retirement benefits.

2.0 EXECUTIVE SUMMARY

The Employer Retirement Income Security Act (ERISA) imposes a number of legal duties on fiduciaries. However, those duties may be summarized by one overarching responsibility – to operate a successful plan. By "successful," we mean a plan that provides adequate benefits for participants, that is, benefits that enable employees to have a reasonable standard of living in retirement. To achieve this, fiduciaries must ask themselves: what would a prudent and knowledgeable fiduciary do to assist the eligible employees in reaching that goal? This White Paper discusses the steps that fiduciaries should take to satisfy their legal duties and to operate a successful plan.

However, a successful plan is most easily achieved where the plan sponsor, in its role as the plan's settlor – a non-fiduciary role – coordinates with the fiduciaries. For example, the sponsor is responsible for the design of the plan and may make design decisions in its own best interests – while fiduciaries are obligated to act in the best interests of the participants. But, the sponsor can assist the fiduciaries in the development of a successful plan through thoughtful and focused design decisions, such as timing of eligibility, timing and structure of matching contributions, and use of "automatic" features, such as automatic enrollment and automatic deferral increases.

ERISA mandates that fiduciaries act for the *exclusive purpose* of providing benefits to participants. In fulfilling that responsibility, fiduciaries must periodically monitor the plan's services and investments to ensure that the plan is working, that is, that the

quality of those investments and services is adequate and, perhaps even more importantly, that they are effective, *i.e.*, that they are producing results. And, if the investments and services are not working, the fiduciaries must take steps to improve the plan's services and investments.

In the past, the selection and monitoring of investments has captured most of the attention of 401(k) fiduciaries – perhaps because of concerns over personal liability and because of the impact of high profile events, like the Enron 401(k) losses and litigation. However, **when viewed from the perspective of retirement benefits for employees, the selection of the investment options is less important, and in some cases much less important, than other issues, such as participation (through making deferrals), the level of deferrals, the asset allocation behavior of participants, and so on.** As 401(k) plans become the primary provider of retirement benefits and as ERISA further develops (for example, through court decisions and DOL guidance), we believe that the focus of fiduciary responsibility will shift to whether an appropriate level of benefits being provided by the plans.

In the context of participant-directed 401(k) plans, the success of the fiduciaries in operating a plan can be tested using the following standards:

1. The percentage of eligible employees who are deferring into the plan, that is, whether the fiduciaries have taken the appropriate steps to communicate with and educate eligible employees on the importance of participating in the plan.
2. The percentage of pay the employees are deferring, that is, whether the fiduciaries have taken prudent steps to assist participants in understanding and contributing at the level needed to obtain adequate retirement benefits.
3. The quality of participant investing, that is, whether the fiduciaries are prudently supporting the participant investment needs relative to the objective of providing adequate income replacement.

Individually, however, these measurements provide only a partial picture of plan success. Indeed, it is entirely possible for a plan to achieve some goals related to improving performance in these areas, but fall short of providing benefits that enable the eligible employees to have adequate standards of living in retirement. Taken together, and in combination with other data about employee age, tenure in the plan, salary, etc., fiduciaries are able to better evaluate the success of the plan based upon the use of replacement income across the employee population as the primary measurement of success.

The plan sponsor, in its “settlor” or non-fiduciary capacity, can also have a significant effect on the success of the plan. While plan design is in the exclusive province of the sponsor, it nonetheless can affect the level of benefits provided under the plan – and, therefore, the success of the plan. The BluePrint Design model contemplates consulting and planning on plan design as well as fiduciary issues. BluePrint Design sees plan success as a product of focusing the elements of plan design – the employer's responsibility – and on investment selection, financial education, and communication – which are fiduciary responsibilities. The path to success is most easily navigated if the sponsor and the fiduciaries share responsibility and coordinate their activities.

Determining whether a plan is meeting the needs of the participants or is falling short requires the fiduciaries to periodically gather information and compare the information to appropriate benchmarks, but this is no easy task. For example:

- Studies have shown that, on average, roughly 70% to 75% of eligible employees elect to defer some of their pay into their employer's 401(k) plan. Some employers have higher participation rates, some are lower, and employers in some industries generally do better than others. If the percentage of participation by eligible employees at a company is lower than its industry average, the fiduciaries need to question why and consider whether they – and the plan's provider – are doing enough to educate the participants on the importance of participating in the plan. Even if the participation exceeds the industry average, the fiduciaries need to evaluate

the plan and its services to determine if it covers an adequate percentage of the employees and whether participation in the plan can be improved. Plan sponsors can also make plan design changes to affect participation. For example, adding or increasing a properly structured match and implementing automatic enrollment are remedies that typically result in significant increases in the level of participation.

- The average rate of employee deferrals also varies from plan to plan and from industry to industry. To have a successful plan, fiduciaries need to understand how much money employees need for retirement and how their plan compares to the deferral rates of comparable employers. If deferral rates are inadequate when compared to those standards, fiduciaries need to take prudent and reasonable steps to address the problem. For example, the financial education provided to the participants (at enrollment meetings and on an ongoing basis) may not adequately (and individually) explain the amounts that need to be deferred to fund adequate retirement benefits.
- The quality of participant investing is an essential part of providing adequate retirement benefits. Unfortunately, industry studies show that many, and perhaps most, participants are making serious mistakes. For example, one study has shown that over a third of the participants invest in only one or two asset classes – hardly enough to constitute prudent and diversified investment portfolios. Studies also show that participants often over-invest in money market accounts, stable value and company stock. In those cases, fiduciaries can reasonably question whether their investment education programs are effective. As a first step towards solving the problem, fiduciaries should consider offering appropriate services for participants who lack investment knowledge or who lack the desire to gain that knowledge. For example, the fiduciaries may select an array of professionally designed lifestyle (risk-based) or lifecycle (age-based) funds and educate the participants on the value of selecting such funds. Then, fiduciaries should monitor the usage of these solutions to ensure that they are being properly explained to,

and used by, the participants. Fiduciaries should also consider using these professionally designed portfolios as default investments for participants who fail to provide investment instructions. Alternatively, plan sponsors, in their settlor role, may amend their plan documents to provide for such default investments.

- Measuring replacement income as the overall result of participating, deferring and diversifying participant investments is the answer to the question of plan success. Industry research indicates that large numbers of participants suffer from two fundamental problems: they do not have a realistic understanding of their replacement income needs in retirement and they have not established a retirement goal. Fiduciaries should measure overall plan health and gain an understanding of the replacement income needs of their employee population and plan participants – at the individual level – in order to devise the solutions (and to target solutions) needed for a successfully managed plan. In designing solutions, plan sponsors and fiduciaries should be aware of those portions of the population of eligible employees – or employee segments – that need the most improvement and target their efforts towards those segments. This approach allows plan sponsors and fiduciaries to apply the “cure” to the areas of greater need.

These are just examples of the steps fiduciaries can take, and in many cases must take, under ERISA to fulfill their legal responsibility to successfully manage their plan. This White Paper discusses those fiduciary responsibilities in more detail, citing the legal authorities underlying those duties.

We have reviewed materials provided to us by Ameriprise Retirement Services designed to assist fiduciaries in fulfilling these responsibilities. The BluePrint Design materials outline a process that gives employers and fiduciaries the information, benchmarks, procedures and tools needed to manage a successful plan. The BluePrint Design process uses a three-step approach:

- Establishing a *foundation* of specific goals and

objectives for achieving success using analyses of items such as employee behaviors, investment selection, plan design considerations, fee structure, service expectations and the like. Additionally, plan data is analyzed to provide a diagnostic that identifies key statistics and problems across specified employee segments.

- Creating a *framework* – an action plan – for reaching the identified goals and objectives, including recommended plan design changes, investment changes, new products or services, targeting employee education approaches to the appropriate segments of employees and other steps that in combination will help change participant behavior and provide an environment for success.
- A *building and refining* stage that monitors the implementation of the specific steps and how well they are working to meet the plan's goals and objectives.

Based on our review of the BluePrint Design process, and our understanding of ERISA's provisions, we believe that it materially assists fiduciaries in fulfilling their duties under ERISA. **More specifically, the BluePrint Design model offers material assistance to fiduciaries in fulfilling their responsibilities to engage in a prudent process to administer the plan, to manage its assets, and to satisfy ERISA's duties, including the duty to act for the exclusive purpose of providing retirement benefits.** In addition, the BluePrint Design model offers substantial benefits to employers in their quest to enhance their efforts to retain employees and to enhance employee satisfaction with their plan.

3.0 DISCUSSION

Overview of Discussion of Fiduciary Responsibilities

As explained earlier in this White Paper, employers who sponsor 401(k) plans, and fiduciaries who manage those plans, share a common goal of a successful plan and a common responsibility for the success of the plan. However, the employer's results are measured in the marketplace by the competition for employees, while the fiduciaries' performance is measured by ERISA's fiduciary responsibility rules. While a business may be helped or hurt by the success of its efforts to attract, retain and motivate employees, fiduciaries may be personally liable if the "failure" of a plan is due to a fiduciary breach.

This portion of the White Paper reviews the most important of ERISA's fiduciary duties – the Exclusive Purpose Rule, the Prudence Standard, the Duty to Investigate, the Duty to Monitor and Reliance on Experts – evaluates their meaning in the context of a successful plan, and discusses their impact on the corporate officers, managers and directors who serve as ERISA fiduciaries.

ERISA Fiduciary Duty

ERISA describes the primary legal duties of fiduciaries as follows:

- *The Exclusive Purpose Requirement:* Fiduciaries must act for the exclusive purpose of providing benefits to participants and defraying reasonable expenses of administration;¹
- *The Duty of Loyalty:* Fiduciaries must discharge their duties solely in the interest of the participants;²
- *The Prudence Standard of Care:* Fiduciaries must act with the care, skill and diligence of a prudent and knowledgeable person charged with the responsibility for operating a retirement plan – this is the standard of care for fulfilling the exclusive purpose requirement and the duty of loyalty;³

- *The Prevailing Circumstances Test:* In acting prudently, fiduciaries must take into account the circumstances “then prevailing,” which may change over time.⁴ (In fact, circumstances, including the services available to plans, have changed dramatically over the years, and it appears that the rate of change is not slowing down; indeed, it may be increasing.)

ERISA fiduciaries are held to high standards when performing their duties, which include such tasks as administration of the plan and selection and monitoring of services, service providers and investments. As one court has said – and many have repeated: “The fiduciary obligations of the trustees [and other ERISA fiduciaries] to the participants and beneficiaries of the plan are . . . the highest known to the law.”⁵

The ultimate goal of an ERISA fiduciary is to operate a “successful plan.” By “successful,” we mean a plan that provides adequate benefits, that is, benefits that enable the eligible employees to have a reasonable standard of living in retirement by replacing part of their working income through retirement benefits. However, this statement begs the questions of, what amount of benefits is adequate and how can that “replacement ratio” be accomplished? Almost by definition, fiduciaries cannot embark on the journey to a successful plan unless and until (i) the fiduciaries and the participants have an understanding of the goal (*i.e.*, adequate income replacement), (ii) the fiduciaries have established a general target for that goal for all of the eligible employees, and (iii) the employees are given the information needed to establish their own personalized goals and to develop a strategy to achieve those goals.⁶

Once those goals are established, the operation of a “successful plan” may, from a fiduciary perspective, be measured by the following metrics:

1. The percentage of eligible employees who are deferring into the plan.
2. The percentage of pay the employees are deferring.

3. The quality of participant investing.

Of course, fiduciaries will need to monitor the implementation of the plan or program and will need to make mid-course adjustments where required.

To prudently monitor, fiduciaries need to establish their baseline (or current plan performance), develop both benchmarks (or long-term goals and intermediate targets), and measure their ongoing status for the overall base of eligible employees, as well as for key segments of eligible employees. Fiduciaries, working with their providers, need to develop the data to measure the actual performance of the 401(k) plan. For example, if the fiduciaries determined that the average participant needed to defer 12% of pay to accumulate adequate retirement benefits, the current rate of deferrals would be the baseline, 12% would be the ultimate goal, and intermediate targets would be set to measure the improvement. A segmented strategy would then be developed by the fiduciaries, in consultation with their providers, to achieve those benchmarks through targeting individual participants and key groups whose behavior could be improved.

The requirements that ERISA imposes on fiduciaries are discussed in the following pages.

Exclusive Purpose Rule

The exclusive purpose rule requires that fiduciaries act for the “exclusive purpose” of providing retirement benefits for participants. The standard for measuring the fiduciaries’ performance in implementing the exclusive purpose requirement, commonly referred to as the prudent person, or prudent expert, standard, is found in section 404(a)(1)(B) of ERISA.

Under the exclusive purpose rule, fiduciaries must act for the exclusive purpose of: (1) providing benefits to participants and their beneficiaries, and (2) defraying reasonable expenses in the administration of the plan.⁷ Thus, a fiduciary’s primary duty is to further those interests, and if a fiduciary acts with a primary purpose for other than providing benefits or defraying reasonable expenses of the plan, that act is a violation of ERISA’s fiduciary standards.

While the law is not well-developed in this area, that is, there has not yet been a significant amount of litigation on this rule, a reasonable reading requires that a fiduciary consider what income participants will need in retirement. As a result, and as a practical matter, **before the selection of investments and service providers, a fiduciary should focus on the services needed to satisfy the objective of providing retirement benefits which adequately replace the working income of participants when they retire.** For example, fiduciaries need to rely on the services of their providers to give them data about the current operations of the 401(k) plan, information about reasonable targets and benchmarks for improvement, recommendations about programs to improve in those targeted areas, and data about the effectiveness of those programs in achieving the goals.

The Prudence Standard

In acting for the exclusive purpose of providing benefits for the participants, ERISA fiduciaries are held to the standard of a knowledgeable prudent person as provided in section 404(a)(1) of ERISA:

“... a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and...
(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...”⁸

Section 404(a)(1)(B) measures the conduct of fiduciaries by the standard of a hypothetical person who is knowledgeable about the issues involved in the operation of a participant-directed retirement plan – the so-called “prudent person” standard. In discussing the prudence standard, the court in *Donovan v. Cunningham* explained “a pure heart and an empty head are not enough.”⁹ Another court noted that ERISA’s prudence standard “is not that of a prudent layperson, but rather that of a prudent fiduciary with experience dealing with a similar enterprise.”¹⁰ Because of comments like these, the prudent person rule is sometimes called the “prudent expert” rule. However, fiduciaries are not required to be experts in

these matters; instead, they may rely on the expertise of their advisors and providers. But, in that case, they must ask for that help and may only rely on advisors and providers who have the requisite expertise.

In addition, the prudent person rule requires that fiduciaries engage in a prudent process when selecting and monitoring a plan’s investments,¹¹ services, and providers. Engaging in a prudent process involves both substantive and procedural prudence – that is, the fiduciaries should determine what information is material and relevant to their task; they should examine and understand that information; and then they should make an informed and reasoned decision.¹²

The U.S. Department of Labor (DOL) has provided guidance on how a fiduciary may meet the duty for the prudent selection and monitoring of investments. As explained in DOL Regulation Section 2550.404a-1:

“With regard to an investment or investment course of action taken by a fiduciary of an employee benefit plan pursuant to his investment duties, the requirements of section 404(a)(1)(B) ... are satisfied if the fiduciary (i) *has given appropriate consideration to those facts and circumstances that, given the scope of such fiduciary’s investment duties, the fiduciary knows or should know that are relevant to the particular investment or the investment course of action involved, including the role the investment or the investment course of action play in that portion of the plan’s investment portfolio with respect to which the fiduciary has investment duties; and (ii) has acted accordingly.*”¹³ [Emphasis added]

Although the regulation specifically addresses a fiduciary’s investment duties, the guidance in the regulation has also been applied by courts to evaluate whether fiduciaries engaged in a prudent process for other purposes. In *Riley v. Murdock*, the court explained:

“Courts have articulated two ways in which to measure a fiduciary’s use of prudence in carrying out their duties. The first is whether the fiduciary

employed the appropriate methods to diligently investigate the transaction and the second is whether the decision ultimately made was reasonable based on the information resulting from the investigation.”¹⁴

Additionally, courts have indicated that fiduciaries will be evaluated on the process they use and not the outcome of their decisions. As the court in *Bevel v. Higgonbottom* stated:

“The prudence standard is objective, and is based on how a person with experience or familiarity with the matter or transaction at hand would act. The prudence standard does not look to the success or failure of a fiduciary’s conduct but, rather, only to the prudence of his conduct and the procedures he utilizes. It is the court’s task to inquire whether the fiduciary employed the appropriate methods of investigation.”¹⁵

Since ERISA fiduciaries must engage in a prudent process in the performance of their duties they must be mindful of their overarching fiduciary responsibility – to provide retirement benefits for participants. By extension, the requirement to engage in a prudent process for the purpose of providing retirement benefits requires that a fiduciary focus on the four factors used in evaluating the success of a plan: (1) the level of participation; (2) the level of deferrals; (3) the quality of participant investing; and (4) the development and monitoring of programs and services for improving those in targeted areas.

Fiduciary Responsibilities: Factors and Example

Participation: For the purpose of this White Paper, we define participation as the act of deferring compensation into a 401(k) plan. Thus, an eligible employee who is deferring is participating, while an eligible employee who is not, is not. In this context, fiduciaries have, among others, the duties to:

- Prudently select and monitor the providers of the communications with eligible employees concerning the importance to their futures of participating in the 401(k) plan
- Prudently developing and implementing forms and procedures which facilitate and encourage participation
- Prudently overseeing the distribution of summary plan descriptions and similar materials

NOTE: Fiduciaries should be aware that low levels of participation – particularly at levels below other companies in the employer’s industry, may indicate inferior or inadequate communication or enrollment services. In that case, fiduciaries need to consider improving those services and/or replacing the provider.

NOTE: While automatic enrollment is an employer, or settlor, decision, fiduciaries should consider evaluating its benefit to the plan and, if appropriate, recommend to the employer that it be adopted. In many cases, automatic enrollment will help the fiduciaries satisfy their ERISA duties related to the level of participation.

Level of deferrals: While employees will not have any retirement benefits if they do not defer – unless the employer sponsors another plan or provides profit sharing contributions – they are unlikely to accumulate adequate retirement benefits if they do not make substantial deferrals. In this context, fiduciaries have, among others, the duties to:

- Prudently select and monitor the providers of the plan’s enrollment services and financial education services

- Review and monitor the communications regarding the adequacy of retirement benefits, the needed income replacement ratios, and the requisite rates of deferrals

NOTE: Some employers have adopted programs that automatically increase the rate of deferral each year for participating employees, e.g., by 1% per year. This is a settlor decision, but will provide material assistance to the fiduciaries in satisfying their ERISA responsibilities concerning appropriate rates of deferral.

Quality of investing: Fiduciaries are responsible for the prudence of participant investing, unless the 401(k) plan satisfies the 20 to 25 requirements in the DOL's 404(c) regulation. Even if a plan satisfies all of those requirements, fiduciaries continue to have, among others, the following investment responsibilities:

- If a plan offers investment education, as most do, the fiduciaries have the duty to prudently select the investment education provider and to monitor the quality and effectiveness of its services¹⁶
- While it is not clear in the law, it is at least arguable that the prudent man rule requires that, if the participants are not investing prudently, the fiduciaries have a duty to investigate, determine the cause of the problems, and take steps to correct those problems.

NOTE: Some sponsors have decided to automatically place participants in age-appropriate investment vehicles, e.g., age-based lifecycle funds or managed accounts, and have amended their plans to accomplish that goal. As with other automatic plan features, employers can provide valuable help to the fiduciaries by including such provisions in their plans.

Duty to Investigate

How does a fiduciary fulfill the responsibilities discussed in this White Paper, including the requirement to prudently select and monitor the plan's providers and services? The requirement to act prudently in selecting and monitoring investments and services has two parts: the *conduct* required of the fiduciaries and the *results* they are expected to achieve.

The dual obligations under the prudence requirement were perhaps best described in an opinion written by then Circuit Judge, now Supreme Court Justice Antonin Scalia; "In short," he said, "there are two related but distinct duties imposed upon a trustee: to investigate and evaluate investments, and to invest prudently."¹⁷ Stated another way, the requirements consist of "*procedural prudence*," which is the *process* of conducting the investigation, evaluating the data and making decisions, and "*substantive prudence*," or the duty to make a reasoned decision – that is, a decision reasonably based on the relevant facts. The proper investigation informs the fiduciaries and enables them to make prudent investment decisions.

The cornerstone to procedural prudence is the duty to engage in an independent investigation. The courts have stated this duty in the clearest possible terms:

"It is by now black-letter ERISA law that 'the most basic of ERISA's investment fiduciary duties [is] the duty to conduct an independent investigation into the merits of a particular investment.' *In Re Unisys Savings Plan Litig.*, 74 F.3d 420, 435 (3rd Cir 1996)."¹⁸

In addition to considering the process used in making a decision, the courts also look at the quality of the fiduciaries' decisions. As one court said:

"To enforce [ERISA's fiduciary duties], the court focuses not only on the merits of the transaction, but also on the thoroughness of the investigation into the merits of the transaction."¹⁹

Thus, in order to fulfill their responsibility to successfully operate the plan, fiduciaries must

conduct an “*independent investigation*”²⁰ of the investments, services and costs – a quantitative and qualitative analysis of how the plan is currently performing against how it should be performing, and of what services their plan is currently providing compared with what is available in the marketplace; and make an informed and reasoned decision based on this information. As stated by the court in the leading case of *Liss v. Smith*:

“At the very least, trustees have an obligation 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 matches the fund’s needs and financial situation.”²¹

Included in the evaluation process is a duty to take into account “the circumstances then prevailing,” and an implied corresponding duty to make comparisons. The duty to take into account the circumstances then prevailing has two aspects: (i) the fiduciary must understand where the plan is today; and (ii) the fiduciary must understand how the plan’s current investment options and services compare to what is available to the plan in the marketplace. When combined, these dual duties impose an obligation on fiduciaries to evaluate the plan’s investments and services *and also* to know other alternatives that are available – this portion of the rule creates the obligation to conduct an independent investigation and to periodically review the marketplace to determine if circumstances have changed.

The obligation to know and evaluate the competitive investments and services in the marketplace creates a special burden for the fiduciaries charged with managing the plan. Therefore, based on a fiduciary’s duty to act for the exclusive purpose of providing benefits for the participants and beneficiaries, fiduciaries should focus their investigative efforts on whether a particular investment or service provider will assist in providing benefits that enable the eligible employees to have adequate income to support a reasonable standard of living in retirement.

For example, fiduciaries should focus on what services

their providers offer to encourage plan participation and enrollment. In this respect, the fiduciaries will need to work with the plan’s provider or other advisors to develop benchmarks against which to measure success; the provider’s will need to develop the information about the plan’s operations compared to those benchmarks; and the providers will need to offer tools, such as educational materials, on-line or in-person advisory services, life style or life cycle funds and the like, to use in order to make the appropriate decision.

Duty to Monitor

In addition to the fiduciary duties of investigation, an equally important duty is the fiduciary duty to review the investments and services offered by the plan. Often referred to as the “duty to monitor,” this duty encompasses the fiduciaries’ obligation to make changes to the plan investments or services when needed. As one court explained, “ERISA fiduciaries must monitor investments with reasonable diligence and dispose of investments which are improper to keep.”²²

The DOL has applied the on-going duty to monitor to the appointment and retention of service providers, including fiduciaries. In a DOL interpretive bulletin regarding participant investment education, the DOL considered the fiduciary role in the selection and monitoring of advisors and educators:

“As with any designation of a service provider to a plan, the designation of a person(s) 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).”²³

Thus, the DOL advises fiduciaries that the duty to act prudently and for the exclusive purpose of providing retirement benefits for the participants and the beneficiaries does not end after the appointment

of a provider, but is an on-going duty to ensure that the investments continue to be prudent and that the providers continue to be appropriate for the plan. The logical extension of this DOL guidance would require a fiduciary to prudently monitor the service providers to ensure that they are performing their duties in accordance with the exclusive purpose of providing benefits for the participants and beneficiaries. **That monitoring process needs at the least to consider the following issues: Are the providers delivering the necessary services? Are the services of reasonable quality? Are they producing results in terms of improved participant behavior, that is, are they effective?**

Determining whether or not a plan is meeting the needs of the participants requires the fiduciaries to periodically gather information and compare the information to appropriate benchmarks. Part of the ongoing duty to monitor encompasses a corresponding duty to act when service providers or investments are no longer meeting the needs of the plan, and more particularly, to act when they are no longer the best options for providing adequate retirement benefits for the participants and beneficiaries.

Monitoring Responsibilities: Factors and Examples

Studies have shown that, on average, roughly 70% to 75% of eligible employees elect to defer some of their pay into their employer's 401(k) plan.²⁴ Based on this statistic, on average, anywhere from 25% to 30% of eligible employees are not participating (that is, not making deferrals) into the plan. Thus, in order to operate a "successful" plan the fiduciary should address how to encourage greater participation among employees. In order to effectively oversee the enrollment and education efforts related to participation by the eligible employees, the fiduciaries need to identify the eligible employees (25% to 30% of the workforce in our example) who are not participating in the plan. Through identifying the different categories of issues causing those employees to fail to participate, the fiduciaries can work with their service providers to improve their communications and educational efforts. Such targeted efforts may be essential to the development of a successful plan.

Achieving a successful plan is only possible if fiduciaries periodically monitor their plan's operations and make changes or adjustments to keep it on course. This means reviewing the performance of the plan's investment options – which is, of course, critically important – and also the participation and deferral levels to see if the plan's service providers (e.g., investment and financial education providers) are being effective in their efforts to help the participants. Encompassed in the duty to monitor is the obligation of the fiduciary to address any deficiencies uncovered. For example, if the fiduciaries determine that many of their employees – who are deferring – are failing to defer at levels that are adequate to produce reasonable retirement benefits, the fiduciaries need to investigate the reasons for that failure. To the extent that those reasons can be addressed, fiduciaries should work with the service providers to offer solutions. As an example, it may be that many of the participants are not aware of the level of deferrals that are needed to provide an adequate retirement benefit. With regard to those participants, the fiduciaries and service providers can focus on education concerning the level of benefits needed for retirement (that is, to adequately replace their working income) and on the

level of deferrals that are needed to accumulate that retirement benefit.

Part of this evaluation should focus on whether or not the plan's service providers are educating the eligible employees on the terms of the plan and the benefits of participating in the plan. As a first step, the fiduciaries would need to understand why some eligible employees are not participating (*i.e.*, are not deferring). The reasons are likely to vary. In all likelihood, some of those reasons can be addressed by plan design and targeted services, while others may not. Once the probable reasons and the needed services have been identified, the next step is for the fiduciaries to investigate and analyze what their plan is currently providing compared to what is available in the marketplace.

In addition, the fiduciaries have an ongoing duty to prudently monitor whether the providers are offering, and effectively delivering, the services need to achieve the appropriate levels of participation and deferrals. (One method, perhaps the best, for fiduciaries to manage this process is to establish goals for the particular activity – in this case, levels of participation and deferrals – and then develop a program for the service providers to work towards those goals.) In making this assessment, fiduciaries should focus on (1) whether or not the enrollment services are working (*i.e.*, is the plan meeting or exceeding prudent rules for participation, keeping in mind that the plan must be operating for the exclusive purpose of providing retirement benefits) and (2) are the education services working (*i.e.*, do the plan participants know how much they need to defer in order to adequately provide for their retirement.)

In addition to the concerns of participation and participant deferrals, fiduciaries must also be concerned with how well the participants are employing the investment options offered under the plan. Thus, fiduciaries should monitor whether participants' accounts are adequately diversified and whether the participant accounts are invested in a manner consistent with generally accepted investment practices, such as the modern portfolio theory.²⁵ For example, are the participants combining multiple categories of investments in a manner reasonably

designed to balance risk and reward? Does the plan provide lifecycle or lifestyle funds for participants who lack investment knowledge? If so, are the participants using such investments properly, that is, do participants who use lifestyle or lifecycle funds invest their entire account balance in the manner intended by investing their entire account balance in a single lifecycle or lifestyle funds? These are, of course, only a few of the issues the fiduciaries should address.

Reliance on Experts

Not everyone who becomes a fiduciary is an expert in running a retirement plan or selecting investments. ERISA recognizes this fact and permits fiduciaries (indeed, sometimes requires them) to rely on third parties, who may include both experts that are fiduciaries and providers that are not fiduciaries, in fulfilling their duties. As one court said, the law “does not impose a rule that fiduciaries be ‘experts’ on all types of investments they make.”²⁶ Nonetheless, a fiduciary is held to the prudent person rule in which the standard “is not that of a prudent layperson, but rather that of a prudent fiduciary with experience dealing with a similar enterprise.”²⁷

In the authors' experience, it is difficult for most employers and fiduciaries to conduct, without help, meaningful investigations of the deficiencies in the operation of their 401(k) plans, to evaluate the information developed in the investigation, and to determine the solutions for the problems that are identified. The DOL, as well as a number of courts, has taken the position that, if the fiduciaries are not adequately qualified to fulfill certain of their duties, they are required to seek help. The DOL stated, “Unless they possess the necessary expertise to evaluate such factors, fiduciaries would need to obtain the advice of a qualified, independent expert.”²⁸ Soon after ERISA was enacted, the DOL discussed whether a fiduciary could properly discharge its duties if it relied on others to provide it with information. In approving this practice, the DOL stated:

“A plan fiduciary may rely on information, data, statistics or analyses furnished by persons

performing ministerial functions for the plan, provided that he has exercised prudence in the selection and retention of such persons. The plan fiduciary will be deemed to have acted prudently in such selection and retention if, in the exercise of ordinary care in such situation, he has no reason to doubt the competence, integrity or responsibility of such persons.”²⁹ [Emphasis added]

Consistent with the requirement that fiduciaries use outside advisors where needed, courts give credit to fiduciaries who use advisors. As stated in *Martin v. Feilen*, “courts should look closely at whether the fiduciaries investigated alternative actions and relied on outside advisors before implementing a challenged transaction.”³⁰ In the case of *Bisceglia v. Bisceglia*, the court stated, “Although reliance on an adviser will not immunize a trustee’s [or other fiduciary’s] actions, it is a factor to be weighed in determining whether a trustee breached his or her duty.”³¹

Fiduciaries are not required to have the same level of expertise as their consultants or to duplicate their work. As one court has said, “we would encourage fiduciaries to retain the services of consultants when they need outside assistance to make prudent investments and do not expect fiduciaries to duplicate their advisers’ investigative efforts. . . .”³² However, the courts make it clear that the fiduciaries have an obligation to continue to exercise judgment and may only rely on an expert that is qualified. Indeed, the fiduciaries must still reasonably review, understand and approve the advice:³³

“Fiduciaries...are entitled to rely on the advice they obtain from independent experts. *Those fiduciaries may not, however, rely blindly on that advice.* In order to rely on an expert’s advice, a ‘fiduciary must (1) investigate the expert’s qualifications, (2) provide the expert with complete and accurate information, and (3) make certain that reliance on the expert’s advice is reasonably justified under the circumstances.’”³⁴ [Emphasis added]

And in another case, the court found that a fiduciary

“is not justified . . . in relying wholly upon the

advice of others, since it is his duty to exercise his own judgment in light of the information and advice which he receives.”³⁵

As such, a fiduciary may rely on benchmarking and demographic data prepared by a provider regarding whether or not the plan is being operated in a successful manner, that is, whether the participants are on track to reach their income replacement goals. However, before relying on such information, the fiduciary must investigate the expert’s qualifications, provide accurate information to the expert and make certain that reliance on the expert’s advice is appropriate under the circumstances. Similar considerations apply to recommendations developed by providers to assist fiduciaries in achieving their goals for the plan.

4.0 THE AMERIPRISE FINANCIAL BLUEPRINT DESIGN MODEL

Description of the Service

We have reviewed materials provided to us by Ameriprise Retirement Services which describes their BluePrint Design process and the model it provides for assisting fiduciaries in fulfilling these responsibilities under ERISA. Ameriprise Retirement Services has explained the services provided in BluePrint Design as a retirement plan services model that consists of traditional metrics combined with a deeper analysis of demographic and benchmarking data that, taken together, “help a plan sponsor know whether or not employees are on track toward their income replacement goals needed in retirement—and, ultimately, spell out what the plan is delivering to management and shareholders.”

The BluePrint Design materials outline a client relationship model and process that gives employers and fiduciaries the information, benchmarks, procedures and tools needed to manage a successful plan, and gain more certainty about that level of success.

The BluePrint Design process uses a three-stage approach: Establishing a *Foundation*; Creating a *Framework*; and a *Building and Refining* stage.

The Foundation stage involves working with a plan sponsor and its officers who serve as plan fiduciaries (such as the plan committee members) to define their vision of success for the plan and the goals and objectives for making that vision a reality. The analysis in the Foundation Stage can include plan metrics, employee behaviors, investment selections, plan design considerations, fee structure, service expectations, and more. Ultimately, the work done in the Foundation stage results in the creation of an individual Success Plan for the plan. The Success Plan provides the standard for attaining the desired success for the plan and the covered employees.

After a Success Plan is established, Ameriprise works with the plan sponsor to research and analyze plan data to create a Retirement Strategy for the plan. This stage, called the Framework stage, includes recommendation that can affect plan measures – which can include changes in plan design, investments and services, as well as targeted employee education. Using a Retirement Plan Diagnostic Management Report created specifically for each client, BluePrint Design provides a detailed analysis of a client's retirement plan data to identify segments in the employee population where savings decisions can and should be influenced. By focusing on changing behavior in the targeted areas, participant retirement readiness can be improved and the overall success of the retirement plan can be enhanced. The data and analysis are used to create the Retirement Strategy for achieving the goals in the Success Plan.

Finally, the Building and Refining stage combines the Foundation and Framework stages to implement the Retirement Strategy.

Throughout this three-stage process, Ameriprise Retirement Services measures implementation of the Retirement Strategy and compares it to the relevant benchmarks. Factors such as participation, deferrals and diversification are measured. These factors make up a “Plan Health Index” which gives sponsors an indication whether “their employees are making smart

choices, and are on track to be financially prepared for retirement.” In addition this information allows plan sponsors to evaluate their progress relative to their goal and objectives, and to make necessary adjustments over time. In this manner BluePrint Design becomes an ongoing, circular process in the building and refining stage.

How BluePrint Design Helps Fiduciaries

The process used by the BluePrint Design, as described above, helps fiduciaries meet their obligation to act for the exclusive purpose of providing benefits for the participants and beneficiaries in a number of ways:

- Analyzing plan metrics including employee behavior, investment selection, plan design, fee structure, and service expectation.
- Developing a plan that sets the standard for achieving the goals and objectives of the retirement plan.
- Analyzing plan data and creating a strategy to achieve the goals outlined in the “Success Plan.”
- Monitoring participation, deferral, and diversification in the plan.
- Presenting the plan sponsor and fiduciaries with reports which compare the plan's data against relevant benchmarks.

While BluePrint Design does not replace the fiduciaries' independent judgment nor relieve them of the obligation to make informed and reasoned decisions, the processes used in BluePrint Design and the reports and data produced under the program materially assist fiduciaries in satisfying their ERISA duties. For example, in order to engage in a prudent process, fiduciaries must demonstrate that they determined the issues and information that were relevant to the fiduciary decision; they evaluated that information; they then made an informed and reasoned decision; and they prudently implemented that decision. Once the decision is implemented, fiduciaries must then monitor its results and make changes as appropriate. The type of analysis and documentation provided by the BluePrint Design model is essential to fiduciaries fulfilling their ERISA

mandate to act for the exclusive purpose of providing retirement benefits.

While ERISA does not explicitly require that fiduciaries develop a written plan to manage investments (i.e., an investment statement or IPS) or a written plan to operate their 401(k) plan to provide adequate retirement benefits, both types of written plans or programs provide valuable assistance to fiduciaries in fulfilling their duties under ERISA. For example, written programs provide evidence that the fiduciaries have addressed significant issues in a thoughtful and thorough way, which serves as proof of a prudent process for fulfilling important fiduciary duties. In addition, **written programs (such as an IPS or a plan for the successful operation of a plan) are generally considered to be fiduciary best practices, because they are generally acknowledged to improve the probabilities of success – in decision-making, implementing and monitoring.** Finally, a program designed to assist a 401(k) plan in providing adequate benefits also supports the objectives of the sponsor, e.g., employee retention and satisfaction.

replacement in retirement. To accomplish these goals, BluePrint Design helps fiduciaries to better understand the investment goals of the plan and the behavioral goals of the participants, and by giving the fiduciaries the information needed to devise strategies for achieving those goals. These services also assist the fiduciaries in fulfilling their duty to monitor the plan's performance in achieving these goals. By focusing on the ultimate objectives of the plan – whether its success in helping the participants achieve their retirement goals – Ameriprise Financial has designed a program that helps fiduciaries meet or exceed their obligations under ERISA. Further, the program helps plan sponsors in their quest to design their plans in a way that assists the fiduciaries in accomplishing those goals and that will result in greater employee satisfaction with the plan.

5.0 CONCLUSION

Based on our review of the BluePrint Design model, we believe that it will materially assist fiduciaries in fulfilling their most important duties under ERISA: The duty of loyalty to the participants and beneficiaries; the duty to act for the exclusive purpose of providing retirement benefits; and the duty to act with the care, diligence, skill and prudence of a person who is knowledgeable about administering and investing retirement plans. Conversationally stated, it supports fiduciaries in their job of operating a successful plan.

For example, it assists fiduciaries in fulfilling their duty to operate the plan for the exclusive purpose of providing retirement benefits by giving them the information, concepts and programs needed to improve the rate of employee deferrals, the level of participation in the plan, and the prudence of participant investing – the critical components of providing benefits that result in adequate income

DISCLOSURES

The opinions expressed herein are those of the authors and not of Ameriprise Retirement Services. The information and opinions in this report are provided by a third party and have been obtained from sources believed to be reliable, but accuracy and completeness cannot be guaranteed by Ameriprise Financial. It is given for informational purposes only and is not a solicitation to buy or sell the securities mentioned. The information is not intended to be used as the sole basis for investment decisions, nor should it be construed as advice designed to meet the particular needs of an individual investor.

BluePrint Design is a Service Mark of Ameriprise Retirement Services and has a patent pending.

Ameriprise Retirement Services is a service group of Ameriprise Financial Services, Inc. and Ameriprise Trust Company. Ameriprise Financial Services, Inc., Member NASD, offers registered investments and financial planning services. Ameriprise Trust Company offers retirement plan related services and provides collective funds.

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ENDNOTES

¹ERISA §404(a)(1)(A)

²ERISA §404(a)(1)(A)(i)

³ERISA §404(a)(1)(B)

⁴ERISA §404(a)(1)(B)

⁵*Donovan v. Bierwirth*, 680 F.2d 263, 272 (2d Cir. 1982)

⁶See, for example, DOL Interpretive Bulletin 96-1, 29 C.F.R. 2509.96-1, and the Preamble to the Final Bulletin, 61 F.R. 29586 (June 11, 1996)

⁷ERISA §404(a)(1)(A)

⁸ERISA §404(a)(1)

⁹716 F.2d 1455, 1467 (5th Cir. 1983), cert. denied, 467 U.S. 1251 (1984)

¹⁰*Marshall v. Snyder*, 572 F.2d 894 (2d Cir. 1978)

¹¹*Bevel v. Higgonbottom*, 2001 WL 1352896, at *15 (E.D. Okla. 2001) (See also, *Donovan v. Cunningham*, 716 F.2d 1455, 1467 [5th Cir. 1983], cert. denied, 467 U.S. 1251 [1984])

¹²See, e.g., 29 C.F.R. 2550.404a-1(b)

¹³29 C.F.R. 2550.404a-1

¹⁴*Riley v. Murdock*, 890 F.Supp. 444, 458 (E.D.N.C. 1995) (citation omitted)

¹⁵*Bevel*, 2001 WL 1352896, at *15 (E.D. Okla. 2001) (citations omitted)

¹⁶DOL Interpretive Bulletin 96-1.

¹⁷*Fink v. National Savings and Trust Company*, 772 F.2d 951, 962 (DC Cir 1984)

¹⁸*Liss v. Smith*, 991 F. Supp. 278, 297 (S.D.N.Y. 1998).

¹⁹*Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996)

²⁰*Donovan v. Cunningham*, 716 F.2d 1455 at 1467

²¹*Liss*, 991 F.Supp. at 300

²²*Morrissey v. Curran*, 567 F.2d 546, 548-49 (2d Cir 1977)

²³29 C.F.R. 2509.96-1

²⁴Hewitt and Associates study of 401(k) Investing. To conduct its study, Hewitt examined the saving and investment behavior of more than 2.5 million employees in 2003. Hewitt's study shows that 401(k) plan participation rose to nearly 70 percent in 2003 from 68 percent in 2002. Nonetheless, nearly a third of eligible employees (30 percent) still did not participate in their 401(k) program at all. And, on average, only 45 percent of workers ages 20-29 participated. <http://was4.hewitt.com/hewitt/resource/newsroom/pressrel/2004/05-24-04.htm>

²⁵DOL Interpretive Bulletin 96-1

²⁶*Harley v. Minnesota Mining and Manufacturing Company*, 42 F.Supp. 2d 898, 907 (D. Minn. 1999)

²⁷*Marshall v. Snyder*, 572 F.2d 894 (2d Cir. 1978)

²⁸29 C.F.R. 2509.95-1(c)(6)

²⁹29 C.F.R. 2509.75-8, Q&A FR 11

³⁰*Martin v. Feilen*, 965 F.2d 660, 671 (8th Cir. 1992)

³¹*Bisceglia v. Bisceglia*, 17 F.3d 393 (9th Cir. 1994)

³²In re *Unisys Sav. Plan Litig.*, 74 F.3d 420, 435 (3d Cir. 1996)

³³See, e.g., *Reich v. Valley National Bank of Arizona*, 837 F.Supp. 1259 (SDNY 1993)

³⁴*Bussian v. RJR Nabisco, Inc.*, 223 F.2d 286, 300-01 (5th Cir. 2000)

³⁵*Donovan v. Mazzola*, 716 F.2d 1226 (9th Cir. 1983)



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