Fiduciary *responsibility*—an employer's guide

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Overview

A qualified retirement plan is a valuable benefit that helps both your employees and your business.

What should you know about managing your plan?

A qualified retirement plan can be a rewarding benefit for the employees of your company; however, the administration and management of the plan require certain actions on your part and the fulfillment of specific responsibilities under the Employee Retirement Income Security Act (ERISA). ERISA sets forth standards of conduct for those who manage such plans, known as fiduciaries. Under ERISA, fiduciaries must act solely in the interest of plan participants and their beneficiaries and for the exclusive purpose of providing benefits to them. Having a good understanding of your responsibilities under ERISA may help protect you from fiduciary liability.

How this guide can help your understanding of ERISA

This guide provides a high-level overview of what it means to be a fiduciary and describes four main areas of fiduciary responsibility and best practices that you should be aware of. In addition, we can provide the following collateral to help you fulfill your ERISA duty:

- Compliance and due diligence checklist
- 408(b)(2) compliance and service provider viewpoint
- 404(a)(5) compliance viewpoint
- 404(c) compliance viewpoint
- Participant disclosures and compliance calendar

Once you understand your fiduciary roles and responsibilities, you'll be in a better position to reduce your legal risk and help your employees reach their retirement goals.

Being a fiduciary doesn't have to be complicated, as long as you approach the role with prudence.

As helpful as these resources are, they don't constitute legal advice and shouldn't be solely relied on. To be certain that you follow your fiduciary responsibilities, be sure to check with your legal counsel. Your financial professional or third-party administrator (TPA) is also a great resource. These professionals can help you establish processes that may help you stay in compliance.

Benefits of a retirement plan

- Attract and retain talent
- Provide corporate tax deductions for employer contributions
- Provide participants with potential earnings on tax-deferred benefits
- Help employees prepare for retirement

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I. The basics

You're a fiduciary if you ...

- Have discretionary authority or control in respect to management of the plan or its assets
- Render investment advice for a fee or other compensation
- Have discretionary authority in the administration of the plan

You can become a fiduciary under ERISA either by functioning as a fiduciary or by being named as a fiduciary in the plan document. All fiduciaries, whether functional or named, are held to ERISA's standards of conduct.

Named fiduciary

A named fiduciary is a fiduciary named in the plan document or trust agreement, and designated by name or title, to have authority to control and manage the operation and administration of the plan. The named fiduciary is often the employer (i.e., the plan sponsor); in addition, the employer may also serve as the ERISA Section 3(16) plan administrator unless that role is otherwise delegated in the plan document or a committee charter to certain individuals or a retirement plan committee.

Functional fiduciaries

Functional fiduciaries could include your plan's service providers. For example, a third party who supports the named fiduciary by providing investment advice would be serving as an ERISA Section 3(21) fiduciary. In addition, the trustee of the plan, whether serving in a discretionary or directed capacity, would be considered a fiduciary.

Who usually serves as a fiduciary?

- Employer (e.g., board of directors)
- Retirement plan committee
- Individual or corporate trustee
- Third party serving as:
  - **3(16) plan administrator**
  - **3(21) investment advisor**
  - **3(38) investment manager**

Who usually doesn't serve as a fiduciary?

- Recordkeeper
- Third-party administrator (TPA)
- Outside ERISA counsel
- Plan auditor
- Employees of the plan sponsor who perform payroll and/or benefit tasks

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The D factor: understanding basic fiduciary duties and standards of conduct

ERISA sets out fiduciary duties that you must adhere to

- **Duty to act for the exclusive purpose of providing benefits and paying the reasonable expenses of the plan—**Fiduciaries must act solely in the interests of participants and beneficiaries.
- **Duty to act in accordance with the plan document—**Fiduciaries must strictly follow the terms of the documents governing the plan unless they're inconsistent with ERISA.
- **Duty to avoid engaging in prohibited transactions—**Fiduciaries must avoid causing the plan to engage in transactions with parties in interest and must also avoid transactions that involve self-dealing or conflicts of interest unless an exemption applies.
- **Duty to be a prudent expert (i.e., the prudent man rule)—**Fiduciaries must be more than well intentioned, they must perform their duties with care, skill, prudence, and diligence in each area in which they make decisions for the plan. The duty of prudence is generally satisfied if the fiduciaries, at the time a decision is made, consider facts and circumstances that are relevant to the particular decision and act accordingly; therefore, fiduciaries will generally be able to demonstrate that they acted prudently if they engage in a prudent process, meaning that they gathered all the information relevant to making a decision, reviewed the information, and consulted with a financial professional, if needed.
- **Duty to disclose—**The plan administrator is responsible for providing employees with various disclosures, such as a summary plan description (SPD), quarterly benefit statements, investment information, and 404(a)(5) notifications.
- **Duty to diversify plan investments—**ERISA provides that a fiduciary responsible for investment selection has a general duty to diversify the plan's investments to minimize the risk of large losses unless, under the circumstances, it's clearly prudent not to do so. For participant-directed plans, such as 401(k) plans, this duty generally doesn't apply to the investments that are directed by the participant, although to comply with 404(c), the plan sponsor must still select a broad range of investment alternatives from which employees can select. If the plan contains any investments that aren't directed by participants, however, the fiduciary will then generally have a duty to diversify.

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

Be diligent with your Ds

Not all plan decisions are fiduciary in nature. A plan fiduciary can wear two hats—one as a fiduciary and one as the employer.

For example, the decision to establish, amend, or terminate a plan is a business decision that a person can make in the capacity as the employer in what as known as a settlor function. A settlor is the person or legal entity that establishes and funds a trust. These types of decisions aren't governed by ERISA's fiduciary duties; however, the execution of business decisions regarding the plan is considered to be a fiduciary act, and compliance with ERISA's fiduciary duties is required.

The duties outlined under ERISA are basic fiduciary guidelines that must be followed. Not doing so has its consequences, yet many fiduciaries find themselves in situations in which they've breached their fiduciary responsibilities because they didn't have the right information or support. That's why it's important to understand your role as a plan fiduciary.

Noncompliance can have consequences

Breaching your fiduciary duties can result in:

- Personal liability for plan losses
- Possible civil penalties and, in certain circumstances, criminal prosecution, fines, and imprisonment
- Removal from your fiduciary role

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The four main areas of fiduciary responsibility

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Management of plan operations

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Service provider selection and monitoring

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Investment selection and monitoring

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II. Fiduciary responsibilities and best practices

Being a fiduciary doesn't have to be complicated or overwhelming, but it does involve being prudent about how the plan is managed in the same way that you're prudent about how your business is managed.

Regulators and the courts tend to focus on the how when determining whether you've met your fiduciary duties, meaning process matters more than outcome.

This section describes key fiduciary responsibilities and best practices to satisfy them. You can use the best practices as a guide to create, implement, and document your own fiduciary governance process.

1 Management of plan operations

Follow the plan document

The plan document describes the terms and conditions related to the operation and administration of a plan. Generally, it should contain the following information:

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

Both named and functional fiduciaries should be aware of the extent of their fiduciary duties so they can ensure compliance with the applicable terms of the plan and ERISA by establishing prudent procedures.

Develop due diligence procedures

Below are three ways fiduciaries can help ensure compliance with the plan document and their fiduciary duties, along with some best practices for your consideration, in consultation with counsel.

1 Establish procedures

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

2 Document decisions

Document actions in writing. As a general rule, meeting minutes should be taken whenever the plan is being discussed by those responsible for its management. These minutes can serve as important documentation to demonstrate that a prudent process was followed and that the plan was prudently managed.

3 Maintain a due diligence file

Leave a paper trail—maintain all documentation in a due diligence file. That way, if a legal issue ever arises, your documentation can help protect you (see Section III of this brochure).

You may also want to consider

having an independent third party perform periodic, in-depth operational or compliance reviews that focus on the implementation and application of documented procedures.

2 Service provider selection and monitoring

Seek expertise when needed

Under ERISA, plan fiduciaries are expected to act as prudent experts. Given the breadth of knowledge required to manage a plan, fiduciaries may want to consider partnering with a service provider that may have skill sets or expertise that the fiduciary doesn't.

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

- A 3(16) plan administrator can help you with certain plan management responsibilities.
- A 3(38) investment manager will select and monitor the investments for a plan.
- A 3(21) fiduciary can give you advice regarding the selection and monitoring of the investments for a plan.
- A financial professional can help you and your employees better understand the investment options available.
- A TPA can help you with plan audits and compliance testing.
- A recordkeeper can help you with your day-to-day plan administration.

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

Establish clear selection criteria

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

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

Advice vs. education

Generally, if a person provides investment advice to the plan or the plan participant regarding the investment of the assets in the plan or plan participant's account, respectively, then that person will be a fiduciary under ERISA; however, a person can provide investment education to either party without becoming a fiduciary.

Advice

Involves specific recommendations

Education

Involves providing general information and explanations about features, risks, costs, and suitability

Know what's required under 408(b)(2)

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

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

Questions to consider include:

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

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

DOL guidance on managing incomplete 408(b)(2) disclosures

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

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

If the information requested relates to future services and isn't disclosed promptly after the 90-day period, the DOL states that plan fiduciaries must "terminate the contract or arrangement as expeditiously as possible" but in a prudent manner.

Follow and document monitoring processes

Plan fiduciaries have an ongoing duty to monitor the provider's performance and to ensure that the provider's performance complies with the terms of the plan, ERISA, and any applicable contract.

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

Benchmark your plan

Benchmarking is a good way for plan fiduciaries to evaluate a provider's performance.

Common plan benchmarks include:

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

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3 Investment selection and monitoring

Offer diversified options

Selecting and monitoring investment options are one of the most important roles performed by plan fiduciaries. Generally, plan fiduciaries have an ongoing duty to select and monitor investments as well as to ensure that the plan has a well-balanced investment lineup.

There are three safe harbors available with respect to participant-directed plans that can help fiduciaries reduce their liability for losses resulting from investments.

1 ERISA

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

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

And they must provide employees with the ability to:

- Choose from a broad range of investment alternatives consisting of at least three core diversified investment options with materially different risk and return characteristics
- Enable participants to transfer between investment options at least once every calendar quarter, or more frequently if required by the investment's volatility

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

2 QDIA

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

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

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

Although a QDIA can provide a safe harbor for plan fiduciaries, it doesn't relieve them of their responsibility to prudently select and monitor the QDIA. You must adhere to the following two QDIA guidelines:

1. Provide participants and beneficiaries with the QDIA notice at least 30 days before they become eligible to participate in the plan or their money is initially invested in the QDIA and generally at least 30 days prior to the start of each plan year thereafter. Generally, the QDIA notice must contain a description of the QDIA as well as information about its performance, fees, and expenses
2. Provide participants and beneficiaries on whose behalf the investment in a QDIA is made with the opportunity to direct the investment of assets in their accounts

3 Qualified

If there are certain changes in investment options under a plan, such as when there's a change in the investment provider, plan fiduciaries may need to direct (map) a participant's or beneficiary's assets as they're being transferred from an existing investment option to another.

In such situations, plan fiduciaries may be able to rely on the mapping fiduciary relief offered under ERISA to limit their liability if they take the following measures:

- Ensure the plan satisfies all 404(c) requirements before the transfer.
- Ensure the new investments' characteristics (e.g., risk and rate of return) are reasonably similar to those of the existing investments.
- Ensure the participant or beneficiary is given:
  - **30-day advance notice of the change in investment options,**
  - **information regarding the existing and new investment options, and**
  - **an explanation that if they don't make an investment selection, the existing investment will be mapped into a reasonably similar investment.**

If the requirements of this safe harbor aren't satisfied, the fiduciary relief may not be available.

Consider an IPS

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

Generally, an IPS may:

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

Although not required under ERISA, an IPS can help fiduciaries demonstrate prudence with regard to how the investment options offered under a plan were selected and monitored. This could also prove to be advantageous if the plan is ever audited by the DOL down the road.

IPS guidelines

Implementation steps

Consider your employees' demographics, investment knowledge, and retirement horizon.

Determine the plan's investment options based on your participant base.

In doing so, consider if the plan's designated investment alternatives (DIA) provide:

- Diversified risk and return potential
- A variety of asset classes and investment styles
- Good management and performance

Ongoing monitoring steps

Monitor compliance with a plan's IPS by regularly reviewing all appropriate investment options based on your evolving employee demographics.

Monitor the performance of the underlying investment managers, and change the DIAs as required.

Modify the IPS, as needed, and maintain your documentation, including relevant reports and reasons for your decisions, in a due diligence file.

4 Participant communication

An important fiduciary consideration is plan health, defined, for example, as strong participation and deferral rates. To achieve this, you'll need to help your employees become engaged about their retirement by:

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

When a plan is committed to both communication and education, employees have a better-rounded picture of the plan's features and benefits and the resources available to help them take control of their retirement.

Meet mandatory disclosure requirements

Under ERISA, the plan administrator, usually the plan sponsor, must provide employees with certain disclosures and notifications about the plan, investment options, and related fees so that they have the information they need to make informed decisions.

The type of disclosures these plan fiduciaries must provide is dependent on circumstances. For example, 404(a)(5) plan and investment disclosures apply only to plans that have participant-directed accounts. Meeting 404(c) requirements applies only to plans with a fiduciary who wants to take advantage of the safe harbor it provides, while others, such as the provision of the SPD, apply to all plans.

As a plan fiduciary, it's important for you to be aware of the disclosures that you must provide and to provide them in accordance with ERISA.

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Examples of mandatory disclosures

- **SPD—**A document that explains how the plan works, including features, benefits, and employees' rights under ERISA
- **404(a)(5) plan and investment-related disclosures—**Disclosures that inform employees of the plan and investment-related information associated with the plan; plan administrators must furnish this information to eligible employees on or before the date they can first direct the investments in their account. Changes to the plan-related information must also be provided 30 to 90 days in advance
- **Participant quarterly statement—**Provides employees with information about the fees charged to their accounts, their account balances, and vested benefits
- **Summary annual report—**Summarizes what's in the plan's Form 5500 annual report
- **Blackout notice—**Notifies employees of a transaction freeze at least 30 days in advance of a change in recordkeepers or investment options

Provide value-added education and support

The use of an education policy statement (EPS), although not a fiduciary requirement, is a best practice. Just as an IPS documents your plan's investment objectives, an EPS can be used to document your plan's communication objectives.

It does so by including the following information:

- **Plan overview**
- **Education objectives—**Identifies the type of campaigns being rolled out to help employees better understand their retirement objectives and investment options
- **Education strategies—**Identifies how the education program will be rolled out and measured
- **Education calendar—**Outlines a year-long schedule for the various campaigns
- **Roles and responsibilities—**Identifies who will deliver and measure the education program
- **Results metrics—**Measures a campaign's effectiveness against predetermined metrics

Also, if used together, an IPS and EPS can complement each other. Consider including the following topics in an EPS:

- Financial planning and strategies, such as diversification principles
- Asset allocation concepts, such as target-date and risk-based investment options
- Relevance of performance versus returns
- Investment fees
- Retirement savings/planning calculators

If documented in an EPS, plan fiduciaries may be able to demonstrate the prudent steps they took to provide employees with the information and support they needed to help them make informed decisions.

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Benefits of offering communication and education

- Provides employees with a more complete picture of a plan's provisions and investment options
- Helps them better understand their plan and their retirement objectives
- Empowers them with the information and tools they need to take control of their retirement

Always follow these basic principles to manage the four main areas

1 Understand your fiduciary roles and responsibilities, and establish well-documented fiduciary processes around them.

2 Review and monitor your providers and investment decisions periodically.

3 Communicate, communicate, communicate. Disclose fiduciary-related matters to those who matter—your participants and beneficiaries.

4 Document, document, document. Be sure discussions, decisions, and outcomes are recorded and filed.

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III. Limiting fiduciary exposure

Below, we list three examples of additional ways to mitigate fiduciary risk. To determine what makes sense for your plan, consult a benefits professional, financial professional, or TPA.

1 Purchase of fiduciary liability insurance

ERISA permits the purchase of fiduciary liability insurance to cover liability or losses occurring by reason of a breach of fiduciary duty. It's generally recommended that the insurance be purchased by the plan sponsor or by the individual fiduciary. If the insurance is purchased with plan assets, the insurance policy must permit recourse. In other words, insurance must allow the insurer to try to collect any losses from fiduciaries if they've breached their duties.

2 Establishment of plan committees

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

- Plan governance
- Plan administration
- Oversight of the plan's investment options

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

Committee members can include senior executives and personnel from human resources, finance, and operations. They can also include the experts the plan has hired, such as a financial professional or TPA. Creating a formal charter that outlines the committee structure, purpose, and responsibilities can further document your fiduciary process.

All committee members should be aware that they have a fiduciary responsibility and liability under ERISA. When new members are added, they should also be trained to understand their fiduciary responsibility and liability.

3 Creation of due diligence file

When government agencies audit a plan, or in the event of a lawsuit, being prepared with evidence of fiduciary prudence is imperative.

This is why it's important to document and keep records of all communications (e.g., disclosures, meeting minutes, plan-related documents, reports, reviews, audit tests, assessments, and participant notices) that pertain to your plan in a dedicated and readily accessible due diligence file. Use the following lists to guide what you save in your file.

General materials

- Management of plan operations
- Plan document and amendments
- Plan testing
- Form 5500 filings
- Plan audits
- Service provider selection and monitoring
- 408(b)(2) disclosures
- Service agreements
- Selection and monitoring criteria and documentation
- Meeting discussions

Investment selection and monitoring materials

- IPS
- Prospectuses
- Selection and monitoring documentation
- QDIA documentation

Participant communication materials

- ERISA notice
- SPD
- Quarterly statements
- Other notices (blackout or QDIA)

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IV. What's next?

By reviewing this information, you're one step closer to fulfilling your fiduciary duty. And as you can see, the fiduciary standard of care is manageable—in many ways, it's similar to the care you take in running your business.

General fiduciary principles

- Understand your role.
- Establish and follow a well-documented fiduciary process.
- Review and monitor investments and providers.
- Communicate to your participants.
- Document, document, document.

And remember, you aren't alone

Although, as the plan fiduciary, you're responsible for the plan and accountable for your decisions and actions, you can enlist the services of retirement plan experts. From ERISA attorneys and accountants to financial professionals and TPAs, knowledgeable retirement plan professionals are available to help you.

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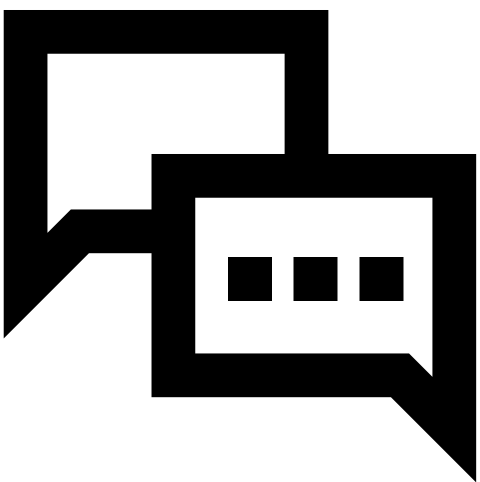

We’re here to *help*

We have many tools and resources aimed at helping you better manage your fiduciary responsibilities.

Contact your local representative to learn more.

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