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White paper

An employer's guide to establishing and operating a qualified retirement plan

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Key highlights

- The decisions to establish a plan
- The roles of the employer
- The fiduciary positions
- The mechanics of establishing a plan
- Decisions relating to plan characteristics and participant demographics
- Decisions related to the trustee position
- Decisions related to plan administration
- Maintaining appropriate plan records

I. Introduction

The decision by an employer to establish and operate a qualified retirement plan (defined below) for its employees carries with it significant legal, administrative, and cost considerations. The purpose of this paper is to provide the employer with some basic information that will assist it in its decision-making process.

II. The decision to establish a plan

Tax incentives. Currently, there is no government mandate that an employer provide a retirement plan benefit for its workforce. Employers are incentivized through the Internal Revenue Code ("Code") to establish and maintain "qualified retirement plans." A "qualified retirement plan" or "plan" is one that meets the requirements of Code section 401(a), which provides certain tax incentives to the employer sponsoring the plan and the employees who participate in the plan. The first tax incentive associated with a qualified retirement plan is that of an up-front, above-the-line deduction (within limits) for the employer's contributions. Secondly, the amounts contributed to the plan's qualified trust, along with earnings, accumulate tax-free. The last major tax incentive associated with qualified retirement plans relates to the ability of participants and beneficiaries to structure distributions in ways that will minimize the tax impact thereof. When Congress added subsection (k) to Code section 401 in 1978, thereby creating a cash or deferred arrangement (commonly referred to as "401(k) plans"), employees were given the option of making pre-tax salary deferral contributions. As part of the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA"), generally effective for tax years beginning after December 31, 2001, Congress authorized employees to make so-called Roth deferrals, which are after-tax contributions that accumulate tax-free and that are not taxed upon distribution if certain conditions are met.

Employer's objectives. An employer's objectives regarding the establishment and maintenance of a qualified retirement plan are unique to each employer and tend to vary among employers. For example, if the employer is a family-owned, closely-held business, the employer may wish to find legal ways to push as much of the contributions and benefits in favor of certain employees who have contributed to the growth and success of the employer over the years. On the other hand, the objectives of a publicly-traded company with respect to its qualified retirement plan may focus more on the use of the plan as a tool to attract and retain a talented workforce. Virtually all employers agree that a primary purpose of a plan is to help the employees transition into a financially secure and dignified retirement at a reasonable age. Some older employees try to hang on to their job as their age advances and their health deteriorates simply because they can't afford to retire. This is why it is so important to have the right kind of plan in place, so that older employees will have the necessary financial resources to retire with dignity or to keep on working, if they so choose.

Cost considerations. The decision to implement a plan carries with it significant cost considerations, of which the employer should be aware. The lifecycle of a plan consists of four phases, as follows: (i) establishment; (ii) funding; (iii) administration; and (iv) termination. Each phase carries with it a certain cost for any professional advice that the employer may seek to help it properly implement and operate its plan. In the establishment phase, the employer is faced with legal and other issues for which professional advice may be required. The funding phase involves a determination of the amount of contributions to be made and the investments to which the contributions are allocated. In this phase, the guidance of a professional financial advisor may prove to be most helpful. The administration phase is ongoing and typically requires the assistance of an outside consulting firm, commonly referred to as a third party administrator. When the time comes to terminate the plan, triggered by an event such as the merger of the employer with another entity or financial hardship of the employer, professional guidance will most likely be required to successfully wind down the plan and distribute the assets.

III. The roles of the employer

In general. Employers that sponsor plans that are subject to the Employee Retirement Income Security Act of 1974 ("ERISA") can act in both a nonfiduciary capacity as the plan sponsor and in a fiduciary capacity as either a named fiduciary or functional fiduciary to a plan. ERISA makes it clear that employers assume fiduciary status only when and to the extent that they function in the capacity of a plan fiduciary or are named as such in the plan document. When an employer acts in the establishment of a plan, this is not considered to be a fiduciary act. When an employer undertakes activities that involve the administration of a plan, it becomes a fiduciary by virtue of its discretion in those activities that concern duties owed to participants and beneficiaries under ERISA.

Employer acting in the nonfiduciary role of plan sponsor. Decisions concerned primarily with the operation of the employer's business are not deemed to be taken in a fiduciary capacity even if they have a direct effect on the employee benefit plan. Under ERISA, purely business decisions made by an employer that sponsors a plan subject to ERISA are not subject to the fiduciary standards. An employer assumes fiduciary status only when it functions as a fiduciary and not when it is conducting business not regulated by ERISA. "Settlor functions," relating to the formation, design, and termination, but not the management or administration, of plans are not fiduciary activities.[1] The functions of plan establishment, amendment, and termination fall into the "settlor" category, and when an employer undertakes any of these functions, it is acting in its role of plan sponsor, which is nonfiduciary in nature. "ERISA's concern is with the administration of benefit plans and not with the precise design of the plan."[2]

Employer acting as a named fiduciary. Many plan documents make the employer a named fiduciary of the plan, unless the employer takes steps to appoint one or more individuals in that capacity. As the named fiduciary of the plan, one of the duties of the employer is to appoint and remove the trustee (or insurer) and the administrator from time to time as it deems necessary for the proper administration of the plan to ensure that the plan is being operated for the exclusive benefit of the participants and their beneficiaries in accordance with the terms of the plan, the Code, and ERISA.

IV. The fiduciary positions

In the process of establishing a plan, the employer has to be aware that ERISA, in section 3(21)(A)(i), (ii), and (iii) recognizes the following fiduciary positions: (i) named fiduciary[3]; (ii) administrator[4]; (iii) trustee[5]; (iv) investment advice fiduciary[6]; and (v) investment manager[7].

The named fiduciary position. ERISA section 402(a) requires that every plan be established and maintained pursuant to a written instrument and that such instrument provide for one or more named fiduciaries that jointly or severally shall have authority to control and manage the operation of the plan. Under ERISA section 402(a), the term "named fiduciary" means a fiduciary who is named in the plan document, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary by the employer. Named fiduciaries may include the employer, the administrator, the trustee, and any investment manager or investment advisor appointed by the trustee.

Specimen plan document language authorizing named fiduciary. The following language is taken from an IRS-approved volume submitter plan document and serves to illustrate how a plan document can deal with the named fiduciary position.

> The "named fiduciaries" of this plan are: (i) the employer; (ii) the administrator; (iii) the trustee (if the trustee has discretionary authority as elected in the adoption agreement or as otherwise agreed upon by the employer and the trustee); and (iv) any investment manager appointed hereunder. The named fiduciaries shall have only those specific powers, duties, responsibilities, and obligations as are specifically given them under the plan including, but not limited to, any agreement allocating or delegating their responsibilities, the terms of which are incorporated herein by reference. In general, the employer shall have the sole responsibility for making the contributions provided for under the plan; and shall have the sole authority to appoint and remove the trustee and the administrator; to formulate the plan's "funding policy and method"; and to amend the elective provisions of the adoption agreement or terminate, in whole or in part, the plan. The administrator shall have the sole responsibility for the administration of the plan, which responsibility is specifically described in the plan. If the trustee has discretionary authority, it shall have the sole responsibility of management of the assets held under the trust, except those assets, the management of which has been assigned to an investment manager or administrator, who shall be solely responsible for the management of the assets assigned to it, all as specifically provided in the plan. Each named fiduciary warrants that any directions given, information furnished, or action taken by it shall be in accordance with the provisions of the plan, authorizing or providing for such direction, information or action. Furthermore, each named fiduciary may rely upon any such direction, information or action of another named fiduciary as being proper under the plan, and is not required under the plan to inquire into the propriety of any such direction, information or action. It is intended under the plan that each named fiduciary shall be responsible for the proper exercise of its own powers, duties, responsibilities and obligations under the plan. No named fiduciary shall guarantee the trust fund in any manner against investment loss or depreciation in asset value. Any person or group may serve in more than one fiduciary capacity.

The trustee position. ERISA section 3(21)(A)(i) describes the trustee fiduciary position as someone who exercises any authority or control respecting the management or disposition of plan assets. ERISA section 403(a) provides that, except in the case of a plan where all the assets are invested in insurance contracts, all assets of the plan must be held in trust by one or more trustees. The trustee(s) is/are either named in the plan document or appointed by the employer (in its fiduciary capacity) pursuant to a procedure in the document.

The administrator position. The administrator position is a fiduciary position, as described in ERISA section 3(21)(A)(iii) as being a person or entity with any discretionary authority or discretionary responsibility in the administration of the plan. ERISA section 3(16) states that the administrator is the person or entity designated by the terms of the instrument under which the plan is operated, or if not so designated, the employer.

The fiduciary investment manager position. ERISA section 3(21)(A)(i) provides that a person is a fiduciary with respect to a plan to the extent that he or she exercises any discretionary authority or discretionary control respecting the management of the plan or exercises any authority or control respecting the management or disposition of plan

assets. This normally describes the role of the trustee; however, the trustee may appoint an investment manager, as defined in ERISA section 3(38), to take on that role from the trustee.

The fiduciary investment advisor position. Often the trustee or other named fiduciary with responsibility for investment decisions related to the plan's assets will seek the assistance of an investment professional. ERISA section 3(21)(A)(ii) provides that someone who provides investment advice to a plan, plan fiduciary, plan participants, and/or IRA owner for a fee, direct or indirect, is a fiduciary.

V. The mechanics of establishing a plan

Nonfiduciary act. The employer's act of establishing a plan is a nonfiduciary business decision that falls under the category of "settlor functions." "Settlor functions" are those that relate to the formation, design, and termination, but not the management or administration, of plans, and are not considered to be fiduciary activities.[8] Thus, a business decision will not be a fiduciary act merely because it affects an ERISA plan.

Action by employer's governing body. The governing body of an employer must take the necessary action to establish a plan. If the employer is organized as a corporation, then its board of directors establishes the plan. The partners of a partnership act to establish a plan. If the employer is structured as a limited liability company, the members will take the necessary action to establish the plan.

Employer as a named fiduciary of the plan. As part of the process of establishing the plan, the employer is typically one of the named fiduciaries. The following language from an IRS-approved volume submitter plan document describes the duties of a named fiduciary assigned to the employer.

> *Appointment of trustee (or insurer) and administrator.* In addition to the general powers and responsibilities otherwise provided for in this plan, the employer shall be empowered to appoint and remove the trustee (or insurer) and the administrator from time to time as it deems necessary for the proper administration of the plan to ensure that the plan is being operated for the exclusive benefit of the participants and their beneficiaries in accordance with the terms of the plan, the Code, and the Act. The employer may appoint counsel, specialists, advisers, agents (including any nonfiduciary agent) and other persons as the employer deems necessary or desirable in connection with the exercise of its fiduciary duties under this plan. The employer may compensate such agents or advisers from the assets of the plan as fiduciary expenses (but not including any business (settlor) expenses of the employer), to the extent not paid by the employer.
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> *Funding policy and method.* The employer shall establish a "funding policy and method," i.e., it shall determine whether the plan has a short run need for liquidity (e.g., to pay benefits) or whether liquidity is a long run goal and investment growth (and stability of same) is a more current need, or shall appoint a qualified person to do so. If the trustee (or insurer) has discretionary authority, the employer or its delegate shall communicate such needs and goals to the trustee (or insurer), who shall coordinate such plan needs with its investment policy. The communication of such a "funding policy and method" shall not, however, constitute a directive to the trustee (or insurer) as to the investment of the trust funds. Such "funding policy and method" shall be consistent with the objectives of this plan and with the requirements of Title I of the Act.
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> *Appointment of investment manager.* The employer may appoint, at its option, an investment manager, investment adviser, or other agent to provide investment direction to the trustee (or insurer) with respect to any or all of the plan assets. Such appointment shall be given by the employer in writing in a form acceptable to the trustee (or insurer) and shall specifically identify the plan assets with respect to which the investment manager or other agent shall have the authority to direct the investment.
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> *Review of fiduciary performance.* The employer shall periodically review the performance of any fiduciary or other person to whom duties have been delegated or allocated by it under the provisions of this plan or pursuant to procedures established hereunder. This requirement may be satisfied by formal periodic review by the employer or by a qualified person specifically designated by the employer, through day-to-day conduct and evaluation, or through other appropriate ways.

VI. Decisions relating to plan characteristics and participant demographics

Employer's objectives. The type of plan and its characteristics will necessarily be determined by the employer's objectives. For example, if the employer is structured as a closely-held, family-owned business, the employer's primary objectives in establishing and operating the plan might be focused on maximizing the tax deductibility of contributions and skewing the contributions and benefits offered under the plan in favor of the owners and key employees, to the extent legally permissible under the applicable regulations. If, on the other hand, the employer is a public company, the overriding employer objectives might be centered around cost efficiencies and maximization of contributions and benefits to attract and retain the desired workforce.

Defined benefit vs. defined contribution. A basic decision an employer faces when first considering offering a retirement plan for its employees is whether to go with a defined benefit or a defined contribution plan type. A defined benefit plan is characterized by a benefit formula that provides participants with a guaranteed retirement income that cannot be outlived. The formula can take into account factors such as a participant's age, years of service, and compensation. The defined benefit plan's actuary determines the funding requirements for the plan and the employer makes the necessary contributions in accordance with the actuary's directions. Participants do not have the ability to make investment decisions in the case of a defined benefit plan and the employer bears the responsibility for any investment losses or reaps the benefits of any investment gains. The wealth accumulation formula of a defined contribution plan may be summarized, as follows: (i) participant contributions, plus; (ii) employer contributions, plus; (iii) investment gains, minus; (iv) investment losses, minus; (v) fees and expenses taken from the affected participant's account, plus; (vi) allocation of forfeitures from other participants' accounts, minus; (vii) forfeitures taken from the affected participant's account. An employer might be more inclined to offer a defined contribution plan over a defined benefit plan for a number of reasons, such as: (i) the ability to control costs more effectively; (ii) the risk of investment loss is borne by the participants; (iii) participants have the ability to direct their own investments, if the plan is so configured; (iv) the defined contribution plan design is more readily understood by participants; and (v) participant contributions may be combined with employer contributions to increase the overall wealth accumulation in the plan.

Participant demographics. Another factor for the employer to consider in deciding what type of plan to offer is the composition of its workforce, broken down by characteristics such as age, education, compensation, and retirement readiness. If the workforce contains a relatively large percentage of workers who are older (say age 45 and up) and if the employer has not previously offered a plan to its employees, the employer may wish to consider a defined benefit plan, as this type of plan would facilitate a greater potential retirement benefit for the older employees, given that an important factor in wealth accumulation potential in a defined contribution plan is the time period over which wealth can accumulate. The education level of the employer's workforce also affects the plan design in that a more educated workforce can take advantage of advanced plan design techniques and more sophisticated investment options and strategies. The compensation of an employer's workforce is another factor to consider in creating a workable plan design. For example, if the majority of the employees is just getting by or living paycheck-to-paycheck, then it would not make sense to offer a 401(k) plan with employee salary reduction contributions, as those employees might feel as though they have insufficient discretionary income to make a meaningful contribution. By contrast, if the majority of employees are relatively highly compensated, a plan design that contemplates employee contributions, coupled with robust employer matching contributions, might be more appreciated by the workforce. Finally, the employer should consider the retirement readiness of its employees and, working within its financial constraints, develop a plan design that best prepares the workforce to retire with dignity in a financially secure manner.

Coordinated offering of a nonqualified deferred compensation ("NQDC") plan. One technique that many employers use to enhance the contributions and benefits available to its group of highly compensated employees is to offer a NQDC plan in conjunction with the base 401(k) plan available to the entire group of employees. This approach has a couple of distinct benefits, as follows: (i) with proper design, the need to return contributions to highly compensated employees in the event of a

failed actual deferral percentage ("ADP") test can be mitigated by directing those excess deferrals into the NQDC plan; and (ii) highly compensated employees who might wish to defer more than the current limit for 2017 ($18,000 or $24,000 for those age 50 and over) are able to do so.

401(k) plan special features. When it comes to the design of a 401(k) plan, a couple of special features need to be considered by the plan sponsor; namely, automatic enrollment and automatic escalation. The automatic enrollment feature is sometimes referred to as a "negative election" enrollment, meaning that if a newly-eligible employee does not take affirmative action to not enroll in the plan when first made available to him/her, then he/she will automatically be enrolled and will have a specified percentage of his/her compensation automatically deducted and contributed to his/her 401(k) plan account. The automatic escalation feature raises the amount taken from the affected participant's compensation and contributed to his/her 401(k) plan account by one percentage point each year until it reaches a predetermined maximum percentage of compensation (typically 10 percent of compensation). The affected participant may opt out of the automatic enrollment or escalation features, but this requires affirmative action on the part of the participant. These two features are helpful in making sure that eligible employees become enrolled in the 401(k) plan when first eligible and that they contribute regularly toward their retirement income security.

VII. Decisions related to the trustee position

Trustee characteristics. The role of the trustee is to hold legal title to the plan's assets for the benefit of the participants in the plan and to manage the assets of the plan. Please note that the trustee may outsource the asset management responsibilities to an investment manager,[9] which will be discussed later in this section. Trustees may be classified as being either institutional or individual. The employer that sponsors the plan may not serve in the role of trustee. An institutional trustee is a bank or trust company with trust powers under applicable state law. Alternatively, the plan sponsor (acting as a named fiduciary) may appoint one or more individuals to serve as trustee. Individuals appointed to serve as trustee usually come from the owners or the key employees of the employer sponsoring the plan. Trustees may also be identified as being either discretionary or directed. A discretionary trustee makes investment decisions with respect to the plan's assets, sometimes with the help of an investment adviser.[10] A directed trustee, on the other hand, has another named fiduciary (often the employer) directing it as to the composition of the plan's assets.

Participant direction of investment. In the case of defined benefit plans, there is no ability of participants to direct the investment of contributions made to the plan. This is so because there is no individual account established for a participant because the assets are maintained as a pool; i.e., the employer is responsible for funding the plan to the level necessary to provide the benefits promised to the participants under the plan's benefit formula. The premise of a defined contribution is different than that of a defined benefit plan. Under a defined contribution plan, the contributions made to the plan by both the employer and participants are limited according to rules found in the Code. The amount of benefit ultimately derived from a defined contribution plan by any participant is determined by the previously-described wealth accumulation formula for defined contribution plans. There is no rule in place that makes it mandatory that participants be allowed to direct the investment of assets in their respective defined contribution accounts; however, with today's typical 401(k) plan design, most plan sponsors will allow participants to direct the investment of assets in their respective accounts attributable to their own salary deferral contributions and many plan sponsors will allow participants to direct the investment of all the assets allocated to their respective accounts.

ERISA section 404(c). If a plan fiduciary decides to allow participants in a defined contribution plan to direct the investment of some or all of the assets allocated to participants' accounts, the fiduciary should be aware of ERISA section 404(c) and the Department of Labor ("DOL") regulations implementing it. Under the DOL regulations pertaining to ERISA section 404(c), if the plan fiduciary: (i) provides a diversified investment lineup; (ii) allows participants to make investment changes at least quarterly; and (iii) provides certain written notices to the participants, the plan fiduciary can transfer the liability for the outcomes of investment decisions from the plan fiduciary to the affected participants. The DOL regulations implementing ERISA section 404(c) are substantially more complicated than just summarized, and it behooves a plan fiduciary to fully understand the regulations

before allowing participants to direct their own investments. It is not a legal requirement that a plan fiduciary who allows participants to direct the investment of assets allocated to their respective accounts comply with ERISA section 404(c), but it is a recommended "best practice" of plan design and operation. The consequence of not complying with the ERISA section 404(c) regulations is that the plan fiduciary will be responsible for the investment outcomes obtained by participants who direct their own investments, even though the fiduciary had nothing to do with making the investment selections. The choice, then, for a plan fiduciary dealing with the question of whether or not to allow participants to direct their own investments is to have the trustee make all the investment decisions or to comply with the ERISA section 404(c) regulations if the participants are going to be making investment decisions related to their respective accounts.

Outside assistance with investment decisions. The trustee normally bears the sole responsibility for making investment decisions relative to the plan's assets. If the trustee is a directed trustee, as described above, the trustee will receive direction from another named fiduciary or participant as to investment decisions. Assuming that the trustee is a discretionary trustee, then the trustee can choose from two alternatives in terms of assistance with investment decisions: (i) investment adviser[11]; or (ii) investment manager[12]. If the trustee chooses to employ the services of an investment adviser, the trustee will be entering into a co-fiduciary relationship with the adviser. The investment adviser will be responsible as a fiduciary for the investment advice imparted to the trustee and the trustee will be responsible as a fiduciary for acting or not acting on that advice. Some trustees prefer to delegate the fiduciary responsibility of making investment decisions with respect to the plan's assets to an outside fiduciary, in this case an investment manager. An investment manager is a bank, trust company, insurance company, or registered investment adviser ("RIA") who accepts the responsibility to manage all or a portion of the plan's assets in an agreement with the trustee. The trustee is responsible for prudently selecting and monitoring the investment manager, but is not responsible for each investment decision that the investment manager makes.

VIII. Decisions related to plan administration

Role of the administrator. As described above, the role of the administrator as a fiduciary of the plan is to administer the plan. This generally encompasses all non-investment operational aspects of the plan. In this capacity, the administrator is responsible for hiring and monitoring various other service providers to the plan. The administrator position is typically filled by the employer that sponsors the plan or one or more employees of the employer. It has become more common in the last couple of years for the employer, in its role of named fiduciary of the plan, to appoint an outside professional services firm to occupy the role of administrator. This has the benefit of transferring the fiduciary obligations associated with the administration of the plan to an outside party. The named fiduciary that appoints an outside administrator will, however, still be responsible for prudently appointing and managing the administrator.

Third Party Administrator ("TPA"). The TPA role is typically a nonfiduciary one. The administrator appoints a TPA to assist it with nonfiduciary, ministerial tasks. These could include: (i) keeping track of employees' hours of services and other census-type information; (ii) data gathering and preparation of the Form 5500 annual return; (iii) maintaining the vested status of participants' accrued benefits; (iv) administering the participant loan and hardship withdrawal programs; and (v) such other ministerial tasks as the administrator directs. In summary, the TPA, working under the supervision of the administrator, performs all ministerial aspects of plan administration other than those related to the plan's assets; however, the administrator retains fiduciary responsibility and liability for the overall administration of the plan. There are some TPAs who agree with a named fiduciary of the plan to assume the role of the administrator [ERISA section 3(16)], as mentioned in the preceding paragraph.

Recordkeeper. Today's defined contribution plans all employ the services of a recordkeeper, which may be a bank, trust company, insurance company, or other financial services provider with the expertise necessary to keep track of the investments allocated to each participant's account. Example — assume that a plan has 100 participants and that the plan has made available to the participants 15 different mutual

funds from which to make their investment allocation decisions. Instead of establishing 100 individual accounts with the mutual fund companies that issue the various funds, the trustee (or other plan fiduciary in charge of the plan's investments) will employ the services of a recordkeeper and that recordkeeper will only establish 15 mutual fund accounts (one for each of the 15 funds) in the name of the plan. The recordkeeper will then update the interest of each affected participant in the respective mutual funds owned by the plan on a daily basis.

Contracts with service providers. The ERISA prohibited transaction rules[13] forbid payments to service providers out of plan assets for services rendered to the plan unless the services are necessary for the administration of the plan and the amount paid out of plan assets for the services are "reasonable" in amount.[14] The DOL has issued regulations implementing ERISA section 408(b)(2) and those regulations impose responsibilities on the service providers to make certain disclosures (including, but not limited to) of: (i) their compensation; (ii) fees and expenses associated with any investment products that the service provider recommends; and (iii) their status as a fiduciary or not. The responsible plan fiduciary (i.e., the plan fiduciary that hires and monitors the service provider) then has to make a decision as to whether the amount of compensation to be paid to the fiduciary out of plan assets is reasonable or not. Compensation can be paid without triggering a prohibited transaction only if the responsible plan fiduciary determines that the amount of compensation to be paid to the affected service provider out of plan assets is reasonable.

Required disclosures by the administrator to participants in a plan where participants direct their own investments. The regulations[15] impose an affirmative duty on the administrator to disclose both plan-related and investment-related information to the participants and beneficiaries in order to satisfy the general fiduciary requirement of disclosure. This fiduciary requirement of disclosure applies to a "covered individual account plan," which is defined as any participant-directed individual account plan within the meaning of ERISA section 3(34). The details of this disclosure requirement will not be discussed in detail here. If more information on this subject is desired, please see the author's white paper[16] covering the required disclosures by the administrator to participants in a plan where participants direct their own investments.

IX. Maintaining appropriate plan records

The items listed in this section are taken from a standardized DOL letter requesting production of documents related to the plan in the process of a DOL investigation of the plan and its fiduciaries. This is a good checklist for the plan sponsor and fiduciaries to establish appropriate procedures for recordkeeping documents related to their plan.

Documents pertaining to the plan and trust

- Plan and trust document, including all amendments
- Adoption agreement (if plan is a prototype document), including all amendments
- If the plan is funded by means of insurance and/or annuity contracts, then copies of those contracts (including any amendments)
- The most recent summary plan description ("SPD"), including documents sufficient to show the effective date of the SPD and the way the SPD is distributed to participants
- Annual report — Form 5500 (signed copies), including all schedules, attachments, financial statements, notes to the financial statements, independent qualified public accountant reports (if applicable), management representation letters, and audit work papers with all attachments
- IRS determination letters
- Summary annual report ("SAR"), including documents sufficient to show the way the SAR is distributed to participants
- Fidelity bond, including the declaration page and loss pay over rider identifying the plan as a named insured, and specifying the amount of coverage, the policy period, and the name of the surety company. Additionally, if there was a claim filed on the bond, the EBSA may ask about the reason for the claim and the date the claim was filed.

Plan sponsor records

- Documents relating to the establishment of the plan and trust, including the minutes of all meetings by the board of directors or other governing body (if the plan sponsor is other than a corporation), that appoint the plan trustee(s), administrative committee or plan administrator, investment committee, or other plan committee
- If the plan sponsor is a corporation,

documents sufficient to identify all directors, officers and shareholders of the plan sponsor, including any predecessors, successors, affiliates, or parent companies, its officers and directors
- If the plan sponsor is not a corporation, then similar documents appropriate to the form of business of the sponsor
- Documents relating to the plan sponsor's ongoing role in the funding and operation of the plan, including any correspondence of the plan sponsor relating to the plan and trust

Named fiduciary records

- Documents sufficient to identify all named fiduciaries of the plan, including, but not limited to: (i) the trustee(s); (ii) the plan administrator [ERISA section 3(16)]; (iii) any investment manager [ERISA section 3(38)]; and (iv) any investment adviser to the plan's trustee(s) [ERISA section 3(21)(A)(ii)]. Included in the records will be the named fiduciary's appointment and acceptance. Such named fiduciaries will be asked to produce records appropriate to their administration of the plan and trust.
- Documents sufficient to identify the plan administrator and/or all members of the administrative committee, investment committee or other plan committee, or any other persons with discretionary authority or control over the plan and the disposition of its assets, including their dates of service, their respective responsibilities or duties, and their compensation

Records pertaining to the operation of the plan

- Documents sufficient to identify all "parties in interest" to the plan, as defined by ERISA section 3(14), including the name, title, and job description of these individuals, including their relationship to the plan and any responsibilities or duties pursuant thereto
- A sample document of the most recent individual benefit statement, including documents sufficient to show the way the individual benefit statements are distributed to participants

Records pertaining to service providers

- Documents sufficient to show all service providers to the plan, including but not limited to: (i) the name, address, and telephone number of any such service provider; and (ii) the name, telephone number, and email address of the plan's point-of-contact or representative at any such service provider. The service providers referred to herein include but are not limited to: (i) accountants; (ii) actuaries; (iii) administrators; (iv) attorneys; (v) brokers; (vi) consultants; (vii) contract administrators; (viii) insurance companies; (ix) investment advisers; (x) investment managers; (xi) recordkeepers; (xii) third party administrators; and (xiii) valuation appraisers
- Documents relating to and including, all service provider agreements, or other such agreements relating to the provision of services to the plan, executed by and between the plan, the plan sponsor and/or the plan trustee(s), and any identified service provider, including but not limited to: (i) the services to be provided; (ii) the duties, responsibilities and obligations of all contracting parties; and (iii) the fee or compensation schedules
- Documents relating to and including, all contractual agreements executed between any identified service provider and any other third party (not previously referred to herein) providing service to, or involving assets of, the plan, such as, but not limited to, any fee sharing agreement between such parties, including but not limited to, the services to be provided, the duties, responsibilities and obligations of all contracting parties, the fee or compensation schedules, as well as all documents relating to any fees, commissions or other compensation received directly or indirectly by any such service provider
- Documents relating to and including, all reports prepared by any identified service provider, including but not limited to, actuarial reports, consultant reports, contract administrator reports, investment advisory reports, and investment management reports
- Documents relating to all plan expenses, fees, and liabilities, including but not limited to, all invoices or other such billing records sufficient to show the expenses, fees, and liabilities assessed against the plan, and all documents relating to the payment of such expenses, fees, and liabilities
- Documents relating to the selection of all plan service providers, including but not limited to, bid specification letters, requests

for proposals, responses to requests for proposals, marketing and sales literature, presentations of services, evaluations, and reviews of responses to bid specification letters and requests for proposals, and all communications related to the negotiations with any such service provider referred to herein
- Documents relating to the review and evaluation of all plan service providers, including but not limited to, an assessment of the fees and of the quality of service
- If the DOL is investigating a plan that has been terminated, documents relating to the termination of the plan, including all correspondence with the IRS, plan participants, and any other third party related to the plan's termination, distribution election letters, benefit payments to plan participants, including copies of cancelled checks and bank statements reflecting debits of such benefit payments, and all correspondence and minutes of any meetings, such as those of the board of directors, shareholders, plan trustees, plan administrator or administrative committee, investment committee, or other plan committee related thereto

Financial records of the plan
- Documents relating to and including, all plan accounting records, or such records relating to the value of assets, liabilities, income, and expenses of the plan, including but not limited to, the most recent balance sheet, income statement, general ledger, and statement of assets and liabilities, as well as all audited and unaudited financial statements
- Documents relating to, and including, all plan valuation reports showing the account balances of individual participants
- Documents relating to and including, all plan participant census reports showing participants' names, addresses, Social Security numbers, account balances, and if applicable, dates of termination of employment
- Documents relating to employee contributions and loan repayments, including but not limited to, all summary pages of payroll registers showing the total amount of employee contributions and loan repayments withheld for each payroll period
- Documents relating to and including, all trust statements or other documents sufficient to show the receipt of employee contributions and loan repayments by the plan's trust for each payroll period
- Documents relating to mandatory employer contributions (if applicable), including but not limited to, all summary pages of payroll registers showing the total amount of mandatory employer contributions forwarded to the plan for each payroll period
- Documents sufficient to identify where all plan assets are held on deposit, including but not limited to, the name and address of the institutions, the plan's account number, and the names of all individuals, with respect to each account, who have the authority to authorize distributions or withdrawals therefrom
- Documents relating to all bank accounts maintained by, or in the name of the plan, such as checking accounts, savings accounts, certificates of deposit, and money market accounts, including but not limited to, all account statements or other documents sufficient to show the value of plan assets held in any bank account, and any transactions pursuant thereto
- Documents relating to all trust or custodial accounts maintained by, or in the name of the plan, including, but not limited to, all account statements or other documents sufficient to show the value of plan assets held in any trust or custodial account, and any transactions pursuant thereto
- Documents relating to all monies paid, submitted, or transferred to the possession of any third party by, for, on behalf of, or in the name of the plan, including but not limited to, the amount of such monies, the source of such monies, the means through which such monies were paid, submitted or transferred to the possession of any such third party, the reason such monies were paid, submitted or transferred to the possession of any such third party, and the disposition of such monies once they were paid, submitted or transferred to the possession of any such third party
- Documents relating to the forfeiture of participants' accounts and the reasons for such forfeitures
- Documents relating to any funds still existing

in the plan, rolled over to an IRA, or removed from the plan in some other manner because the plan participant is unable to be located or where mailings sent to the plan participant have been returned as undeliverable
- Documents relating to and including, any uncashed distribution checks, including but not limited to, the amount, date, and number of such distribution checks, and the name, address, and Social Security number of the plan participants to whom they were issued
- Documents relating to the plan's procedures for locating missing participants. The term "missing participant" refers to a plan participant whose employment has been terminated, who maintains an active account balance in the plan, and whose address or whereabouts are currently unknown.

Investment records of the plan's trust
- Documents sufficient to show all plan investments and the value of such investments, including, but not limited to, the plan's investment portfolio and all statements or reports of assets
- Documents relating to all plan assets paid, submitted or transferred to any investment vehicle, such as a mutual fund, a common or collective trust, stocks, corporate notes, bonds, or any other security, including but not limited to, the amount of such monies, the source of such monies, the means through which such monies were paid, submitted or transferred, the reason such monies were paid, submitted or transferred, and the disposition of such monies once they were paid, submitted or transferred
- Documents relating to and including, all account statements or other documents sufficient to show the value of plan assets held in any investment vehicle identified in response to the previous requests for investment records
- Documents relating to and including all reports describing the performance of plan investments, including but not limited to, end-of-year statements and prospectuses for mutual funds, stocks, and other securities, and documents relating to corporate notes, bonds, and any other investments held by the plan

Special categories of trust investments
- Joint Ventures and Limited Partnerships. Documents relating to joint venture and/or limited partnership interests held or acquired by the plan, including offering memoranda, subscription agreements, investment holdings, the value of the plan's interests (including all documents, reports or analyses related thereto) and all correspondence with the persons or entities managing or controlling such joint ventures and/or limited partnerships
- Real Property. Documents relating to real property held or acquired by the plan, including a description of the property, such as location of street address, the acquisition date and from whom the property was acquired, the value at acquisition, the current value, information on debt financing (including the amount financed, the current balance or date paid in full, the identity of the lender, the interest rate(s), the payment terms and the due date), the use made of the property and by whom, the sources and amounts of income on any income-producing property, the disposition date, if applicable, and the details of the disposition, including the identity of the purchaser, their relationship to the plan, the terms of the sale, the value received, and the financing involved
- Loans. Documents relating to loans (including participant loans and those secured by mortgages) made, held, or acquired by the plan, including the promissory note, the loan application, the mortgage documents, the amortization or repayment schedule, identification of the collateral along with all applicable recorded documents (such as UCC-1 filings, deeds of trust, etc.). Also include documents sufficient to show the date of the acquisition by the plan (for any loans/mortgages not originated by the plan), from whom the loan/mortgage was acquired, the identity of the originator, if different, the value at acquisition and the cost paid by the plan. (Note: If the loan/mortgage was contributed to the plan by the plan sponsor, EBSA requires a statement to that effect, along with the date and value of the contribution)

Revenue sharing

"Revenue sharing" for this purpose is defined as payments received from a product or fund sponsor, including 12b-1 fees, finder fees, sub-transfer fees, and mutual fund support fees, in exchange for providing a benefit, including market access, marketing efforts, recordkeeping or brokerage services.

- Documents sufficient to show all service revenue sharing payments relating to the plan including: (i) the amount of the revenue sharing paid; (ii) the date the revenue sharing was paid; (iii) the payee of the revenue sharing payment; (iv) the date that the revenue sharing payment was cashed, negotiated, or if not by draft, otherwise processed; and (v) the name of the bank or financial institution and the account number into which the revenue sharing payment was deposited
- Documents relating to the class or type of investment held by the plan for which revenue sharing was paid, including: (i) the amount of the revenue sharing paid; (ii) the date the revenue sharing was paid; (iii) the payee of the revenue sharing payment; (iv) the date that the revenue sharing payment was cashed, negotiated, or if not by draft, otherwise processed; and (v) the name of the bank or financial institution and the account number into which the revenue sharing payment was deposited
- Documents sufficient to identify the share class of the plan's investment in mutual funds as either retail or institutional
- Documents sufficient to identify the plan's investment in stable value funds, including whether any participant has paid a redemption fee (if so, then please provide the name of the participant, the amount paid, the date of the payment, and the name of the fund involved) and whether the fund was illiquid at any time
- Documents sufficient to identify all rebates paid to the plan, the plan sponsor, and all parties in interest to the plan, for plan administrative expenses, including all 12b-1 fees, finder's fees, subtransfer account fees, mutual fund support fees, and other such payments received from a product or fund sponsor in exchange for providing a benefit, including market access, marketing efforts, recordkeeping or brokerage services

X. Concluding observations

The decision on the part of an employer to establish and operate a qualified retirement plan is a significant one. Each plan can be broken down into the following three elements: (i) legal; (ii) investments; and (iii) administration. The plan sponsor needs to make sure that it understands its obligations around those three elements. The acts of establishing a plan, signing documents, and making fiduciary decisions are legal in nature. The investment element of the plan is, perhaps, the most critical element in terms of whether or not the plan will accomplish its main goal of providing a successful retirement experience for the employees who participate in the plan. No plan can be operated successfully without a good administration program. The plan sponsor and fiduciaries will have to carefully hire and monitor the necessary service providers to ensure compliant administration.

[1] See *Lockheed Corp. v. Spink*, 517 U.S. 882, 20 EBC 1257 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 18 EBC 2841 (1995).

[2] Nazay v. Miller, 949 F.2d1323, 1329 (3d Cir. 1991).

[3] ERISA sec. 402(a).

[4] ERISA sec. 3(21)(A)(iii) and sec. 3(16).

[5] ERISA sec. 3(21)(A)(i) and sec. 403(a).

[6] ERISA sec. 3(21)(A)(ii).

[7] ERISA sec. 3(21)(A)(i) and sec. 3(38).

[8] *Akers v. Palmer*, CA-6 (1995), 71 F3d 226. The facts of this case involved an employee stock ownership plan (ESOP). The court concluded that the employer's board simply did not qualify as a fiduciary, and determined that the employer's decision to establish an ESOP and to fund it with newly-issued stock was the act of a settlor, immune from scrutiny under Title I of ERISA.

[9] ERISA sec. 3(38).

[10] ERISA sec. 3(21)(A)(ii).

[11] ERISA sec. 3(21)(A)(ii).

[12] ERISA sec. 3(38).

[13] ERISA sec. 406(a)(1).

[14] ERISA sec. 408(b)(2).

[15] 29 C.F.R. 2550.404a-5(a).

[16] See NFM-13668AO.2 (07/17).

This material is not a recommendation to buy, sell, hold or rollover any asset, adopt an investment strategy, retain a specific investment manager or use a particular account type. It does not take into account the specific investment objectives, tax and financial condition, or particular needs of any specific person. Investors should work with their financial professional to discuss their specific situation.

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NFM-16994AO.1 (02/18)