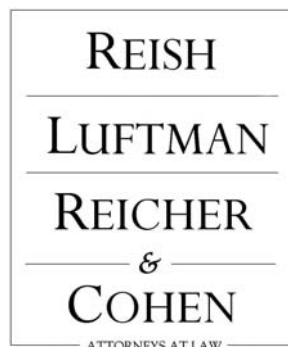


**Evaluation of the Full Service  
Discretionary Trustee Services  
Offered by  
The American National Bank  
of Texas  
Wealth Management Group  
Trust Division**

**A WHITE PAPER**

*by*

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**INTRODUCTION**

In this White Paper, we discuss the duties imposed on fiduciaries under the Employee Retirement Income Security Act (ERISA) and how the full service discretionary trustee services offered by The American National Bank of Texas, Wealth Management Group, Trust Division (ANB) can assist fiduciaries in satisfying those duties.

Our focus is on the fiduciary responsibility to:

- act for the exclusive purpose of providing benefits to participants and beneficiaries;
- engage in a prudent process when fulfilling those duties; and
- select and monitor the investments and service providers for the plan.

This White Paper provides a summary of the full service discretionary trustee services provided by ANB (referred to as the “Trustee Service”) and analyzes the extent to which such services help fiduciaries fulfill their responsibilities. Our conclusion is that ANB’s services offer material assistance to fiduciaries in fulfilling their duties under ERISA.

## SUMMARY

The individuals responsible for administering and investing retirement plans, known as fiduciaries, bear significant responsibilities under the Employee Retirement Income Security Act (ERISA). Their duties have been described as among the highest known to the law. Fortunately, fiduciaries can obtain assistance in satisfying their duties, in part by shifting certain responsibilities to third parties and in part by engaging experts to help them meet their obligations.

As discussed in this White Paper, ANB's full service discretionary trustee services can materially assist fiduciaries in meeting ERISA's requirements.

The following questions and answers summarize the fiduciary duties under ERISA and the ways in which the ANB Trustee Services can help.

### **What does ERISA generally require?**

ERISA Section 404(a) requires fiduciaries to satisfy the following duties:

- ***Exclusive Benefit Rule.*** Act for the exclusive purpose of providing benefits to participants and paying reasonable expenses.
- ***Duty of Loyalty.*** Discharge their duties solely in the interests of the employees who participate in the plan (that is, the plan participants).
- ***Prudent Person Rule.*** Fiduciaries must act with the care, skill, prudence, and diligence that a prudent, knowledgeable person would use in similar circumstances.

- ***Diversification Requirements.*** Fiduciaries must diversify the plan’s assets in order to reduce the risk of large losses, unless it is clearly prudent not to do so.

In making their decisions, fiduciaries must use a prudent process. That is, they must determine what information is material and relevant, obtain the information and then make an informed, reasoned decision based on the information obtained.

### **Can fiduciaries get help making decisions about the plan?**

Yes. Fiduciaries can get assistance making decisions about operating the plan. Additionally, fiduciaries can delegate their responsibilities among the plan’s fiduciaries. In order to do so, the plan document should specify the duties of each of the plan’s fiduciaries or a procedure for allocating those duties.

***How ANB Can Help:*** ANB will sign the plan document as Trustee and will be the plan’s Named Fiduciary and Plan Administrator. As a result, fiduciary duties will be allocated in the plan document to ANB. As the Trustee, Plan Administrator and Named Fiduciary, ANB will take on responsibility for both plan administration and plan investments. In so doing, it will relieve the plan sponsor and its employees of these responsibilities. The plan sponsor will retain only the obligation to prudently select and monitor the performance of ANB in its various roles.

### **What are fiduciaries required to do with respect to the administration of the plan?**

Fiduciaries are responsible for making sure the plan is operated properly. This includes prudently selecting and monitoring the plan’s service providers and investments. Additionally,

they must make decisions regarding the plan, such as interpreting the plan document, approving participant loans and hardship distributions and qualifying domestic relations orders.

***How ANB Can Help:*** As a fiduciary to the plan, ANB will interpret the plan document, oversee participant communications, approve participant loans and hardship distributions and qualify domestic relations orders. In conjunction with the third party administrator (TPA) and based upon census data provided by the plan sponsor, ANB will also confirm participation and vesting determinations.

### **What is required of fiduciaries when choosing service providers?**

Fiduciaries must use a prudent process for all of their decisions. This includes the determination as to which service providers the plan will use. Thus, fiduciaries should consider the plan's alternatives, gather information about each of these alternatives and then make a reasoned and reasonable decision based on this information. After service providers have been selected, fiduciaries are required to review their decisions periodically to determine whether they remain appropriate for the plan. This is referred to as the duty to monitor. If any of the plan's service providers cease to be appropriate for the plan, the fiduciaries are required to replace them.

***How ANB Can Help:*** ANB will select and monitor service providers, including the plan's third party administrator (TPA), the custodian of plan assets, investment providers/platforms, brokers or financial advisors and in the case of participant-directed plans, Registered Investment Advisors (RIA).

## **What are fiduciaries required to do with respect to the plan's investments?**

Fiduciaries are responsible for choosing the plan's investments. In performing these duties, fiduciaries must consider the relevant facts and circumstances, including the role each investment plays with respect to all of the other investments held by the plan. In making investment decisions, fiduciaries must consider modern concepts of investing. In accordance with these concepts, fiduciaries must select a broad range of asset classes necessary to achieve a balance of risk and return consistent with long term capital appreciation and preservation of capital.

Fiduciaries should then prudently select the investments to populate each of the asset classes, using both quantitative and qualitative criteria and appropriate benchmarks. These criteria should be used to regularly monitor the investments and evaluate whether they continue to be appropriate for the plan. If an investment ceases to be appropriate, the fiduciaries will need to remove and replace the investment. Fiduciaries should reduce this process to writing in an Investment Policy Statement.

In addition to choosing the investments for the plan, fiduciaries must allocate the plan's assets among the investment options. That is, the fiduciaries must decide how much of the plan's money to place in each investment. In participant-directed plans, participants generally decide how to allocate their accounts. Fiduciaries are not liable for any losses resulting from participant's investment choices if the plan complies with ERISA Section 404(c) and the related Department of Labor (DOL) Regulation. In order to comply with 404(c), fiduciaries need to satisfy 20-25 requirements including designating a fiduciary to serve as the 404(c) fiduciary.

***How ANB Can Help:*** ANB will select and monitor the investments and fund managers for each plan, including the default investment option for the plan, other than company stock and individual brokerage accounts (Company stock may be dealt with by ANB under specialized service agreements). ANB can also manage the plan assets in the case of pension plans and other non-participant directed plans. For participant-directed plans, ANB will serve as the 404(c) fiduciary and assure compliance with the DOL 404(c) regulation. ANB will also prepare an Investment Policy Statement for each plan.

**Is a plan required to have a plan committee?**

In the usual circumstance, the answer would be yes. However, in the case of the ANB Trustee Services, it should not be necessary for the plan sponsor to appoint such a committee. Thus, officials of the plan sponsor can devote their time and energies to running the business rather than undertaking fiduciary duties for which they make lack both the time and training to perform at the level required by ERISA.

***How ANB Can Help:*** ANB has undertaken the functions that would normally be handled by a plan committee. Further, ANB has appointed a Trust Retirement Committee comprised of senior officials of ANB and an ERISA Attorney, who are there for the specific purpose of representing the plan participants, that are responsible for the oversight and monitoring function that the committee would generally perform for the operation and investments of a plan. The members of this Committee are trained and specifically acknowledge their role as fiduciaries and provide a specific undertaking to act in accordance with the duties imposed by ERISA. The plan sponsor's role will, as noted, be limited to monitoring ANB as Trustee, Plan Administrator, Fiduciary and



service provider, a duty that can be performed at the Board level of the Plan Sponsor on at least an annual basis.

## **FACTUAL BACKGROUND**

We have reviewed materials regarding ANB's discretionary trustee services and discussed these services with ANB. Based on this information, we understand that ANB intends to serve as a full-service (or "discretionary") trustee to retirement plans that are subject to ERISA. In its capacity as a full-service trustee, ANB agrees to provide the following services:

- Sign plan documents as trustee.
- Serve as the fiduciary that interprets the plan document.
- Prepare an Investment Policy Statement for each plan.
- Select and monitor the investments and fund managers for each plan, including the default investment option for the plan, other than company stock or individual brokerage accounts (Company stock may be dealt with by ANB under specialized service agreements).
- Manage the plan assets in the case of pension plans and other non-participant directed plans.
- Serve as the ERISA section 404(c) fiduciary and assure compliance with the 404(c) requirements under Department of Labor (DOL) regulations for participant-directed plans.

- Approve loans and hardship distributions and qualify domestic relations orders.
- Select and monitor other service providers, including third party administrators (TPA), Custodians, Investment providers/platforms, Brokers or Financial advisors and in the case of participant-directed plans, Registered Investment Advisors (RIA).
- Oversee participant communications.
- In conjunction with the TPA, confirm participation and vesting (using the census data provided by the plan sponsor).

For plans that use an investment platform, recordkeeping and other services, including managed accounts, ANB will select and monitor the investments, select and monitor the investment managers who provide managed account services for a given plan and periodically monitor the decision to retain investment platform as a plan provider.

The list of services to be performed by ANB covers the full spectrum of administrative and investment duties of fiduciaries under ERISA. In essence, therefore, in its role as full-service trustee, ANB is taking on the full fiduciary role required by law and relieving the plan sponsor of those obligations – except for the obligation to prudently select and monitor ANB as the plan trustee.

## DISCUSSION

### *Fiduciary Responsibility for Retirement Plans*

The individuals responsible for administering retirement plans and managing their assets are referred to as fiduciaries under ERISA.<sup>1</sup> In order to ensure that the employer's promise to employees is fulfilled, ERISA requires fiduciaries to discharge their duties for the exclusive purpose of providing benefits to participants and paying only reasonable expenses.<sup>2</sup> Furthermore, ERISA holds fiduciaries to high standards when performing their duties. ERISA requires fiduciaries to act solely in the interest of participants.<sup>3</sup> Additionally, they must act using the "care, skill, prudence, and diligence" that a prudent person familiar with such matters would use in operating a participant-directed retirement plan.<sup>4</sup>

ANALYSIS: Fiduciaries are required to make decisions about the operation of the plan and management of the plan's assets. These requirements can seem burdensome for the average business person -- who may not have a lot of time to learn about managing a retirement plan in addition to managing a business. Most plan sponsors and their respective retirement/investment committee members have little or no training in fiduciary governance, analyzing investments, understanding and applying modern portfolio theory, or complying with the myriad technical legal rules that apply to retirement plans.

Companies that specialize in handling retirement plans, such as ANB, can provide significant assistance to fiduciaries in satisfying their obligations under ERISA. ANB will sign the plan document as trustee and will be the Plan Administrator and named fiduciary of the plan. As a result, fiduciary duties can be allocated in the plan document to ANB, thus

relieving the plan sponsor and its employees of those responsibilities.

ANB assists fiduciaries with both the plan's investments and the administration of the plan. ANB will confirm participation and vesting determinations in conjunction with the third party administrators (TPA) and based upon census data provided by the plan sponsor. As a fiduciary to the plan, ANB will interpret the plan document and oversee participant communications. It also approves participant loans and hardship distributions and qualifies domestic relations orders. ANB will select and monitor other service providers, including the plan's third party administrator (TPA), investment provider/recordkeeper and financial advisers.

### **Using a Prudent Process**

Fiduciaries must be able to demonstrate that they have acted as prudently as a knowledgeable person would under similar circumstances. Guidance issued by the DOL as well as court decisions have explained that this standard requires fiduciaries to engage in a prudent process. That is, fiduciaries must determine what information is relevant, obtain that information and then make a reasoned decision based on the obtained information.

**ANALYSIS:** A prudent process consists of: (i) investigating what information is relevant to the decision to be made; (ii) obtaining that information; (iii) analyzing the information and its implications for the decision to be made; and (iv) finally, making a reasoned decision based on the information gathered and the analysis the fiduciaries made. Fiduciaries who lack the expertise in retirement plan matters and long-term investment strategies are required by

ERISA to obtain assistance. Further, it is essential to document the prudent process in order to demonstrate that they acted prudently if their decision is later challenged.

ANB has represented that it will use a prudent process when acting as a fiduciary for the plan. Furthermore, ANB documents the steps it follows in carrying out all of its duties.

### *Duty to Investigate*

Courts have held that fiduciaries must conduct a thorough investigation in order to obtain the necessary information. 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.<sup>5</sup>

Similarly, the court in *Lanka v. O'Higgins*, explained the prudent process as follows:

[T]he prudent person standard has been determined by the courts to be an objective standard, requiring the fiduciary to (1) employ proper methods to investigate, evaluate and structure the investment; (2) act in a manner as would others who have a capacity and familiarity with such matters; and (3) exercise independent judgment when making investment decisions....This standard requires that the fiduciary's behavior be measured against the standards in the investment industry.<sup>6</sup>

### *Procedural and Substantive Prudence*

The ERISA prudence requirement consists of two parts, procedural prudence and substantive prudence. Procedural prudence relates to the investigation, evaluation and decision-making process. Substantive prudence refers to the duty to evaluate relevant information and make an informed decision based on that information. For example, the court in *Howard v.*

*Shay*<sup>7</sup> explained the emphasis that is placed on both conducting an investigation and making a reasoned decision based on that information, stating:

“To enforce [ERISA’s fiduciary duties], the court focuses [on both] the merits of the transaction, [and] on the thoroughness of the investigation into the merits of the transaction.”

In order to conduct a proper investigation, fiduciaries must take into account the “circumstances then prevailing.” This language implies that the fiduciaries should evaluate the plan’s options when making decisions.<sup>8</sup> For example, when selecting service providers, the fiduciaries would want to compare the companies that are available to provide services to their plans in order to choose the best choice for their plans.

DOL guidance indicates that fiduciaries must use the information gathered through procedural prudence and use it to make decisions in order to engage in substantive prudence. The DOL has issued regulations that provide that fiduciaries must give “appropriate consideration” to the information the fiduciary “knows or should know [is] relevant” and then “act accordingly” -- that is, make decisions based on that information.<sup>9</sup>

**ANALYSIS:** A prudent process includes both procedural and substantive prudence.

Procedural prudence involves investigating and evaluating information. Substantive prudence requires fiduciaries to make decisions that are informed by and based on what the fiduciaries learned during the procedural prudence phase.

Where the plan sponsor appoints a discretionary trustee, such as ANB, it (and company officials) is relieved of both the substantive duties under ERISA and the obligation to engage in a prudent process in running the plan. However, as noted, the plan sponsor will still need to use a prudent process to select and monitor ANB as the discretionary trustee. ANB will assist in

this process by providing annual reports to the plan sponsor of its activities and processes, showing how the plan assets are performing and, in the case of 401(k) plans, how well the employees are participating and deferring.

#### 1) Results Alone Are Not Enough

Fiduciaries are not responsible if the results of their choices later turn out to be imperfect, so long as they used a prudent process to make those choices. Courts have made it clear that results are not the key to measuring fiduciary conduct but rather the thoroughness of the examination of relevant information. As one court explained:

“ERISA § 404(a)(1)(B) requires only that [fiduciaries] vigorously and independently investigate the wisdom of a contemplated investment; it matters not that the investment succeeds or fails, as long as the investigation is ‘intensive and scrupulous and . . . discharged with the greatest degree of care that could be expected under all the circumstances by reasonable beneficiaries and participants of the plan.’ ”<sup>10</sup>

Thus, a prudent process to make choices will generally protect fiduciaries regardless of the outcome. Similarly, fiduciaries may not rely on the end result to relieve them of liability for an imprudent process. In this case, the ends do not justify the means. Without proper training and guidance plan sponsors, no matter how good their intentions, can make costly mistakes. In the case of ERISA fiduciary obligations, *it’s what you don’t know that you don’t know that can hurt you.*

### **Prudent Selection and Monitoring of Investments**

The DOL has provided interpretative guidance explaining the prudent process requirements for investment decisions. The DOL indicates the investment principles that must

be taken into consideration when decisions about a plan's investments are made. These rules do not replace the prudent process requirements, but instead explain what a prudent process requires in this context.

### *Use of Generally Accepted Investment Theories*

The first step for selecting the investments to be offered in a participant-directed plan is to decide which investment categories (or "asset classes") will be offered to participants. The investment categories should be selected in accordance with generally accepted investment theories. This refers to the principles underlying modern concepts of investing, such as modern portfolio theory. Modern portfolio theory provides that a portfolio should be made up of a variety of asset classes that are not highly correlated to one another (that is, that perform differently from one another). The idea is to enable participants to balance risk and return through the selection of different categories of investments.

The DOL specifically references generally accepted investment theories and modern portfolio theory in its guidance.<sup>11</sup> In Interpretive Bulletin 96-1, the DOL stated that "[s]everal commentators requested classification of the requirement that asset allocation models and interactive investment materials must be based on 'generally accepted investment theories...'" The DOL stated that it "included this requirement to assure that, for purposes of the safe harbors, any models or materials presented to participants or beneficiaries will be consistent with widely accepted principles of modern portfolio theory..." Additionally, the DOL explains in its regulations that a fiduciary will be considered to have given appropriate consideration if he determines that "the particular investment...is reasonably designed, as part of the portfolio to



further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) ...”<sup>12</sup>

The court in *Laborers National Pension Fund v. Northern Trust Quantitative Advisors, Inc.*, indicated that the language used in this regulation refers to modern portfolio theory. The court stated, “In general, the regulations provide that the fiduciary shall be required to act as a prudent investment manager under the modern portfolio theory rather than under the common law of trusts standard...”<sup>13</sup> The court also said that “Since 1979, [fiduciaries] have been held to the standard of prudence of the modern portfolio theory by the Secretary’s regulations.”<sup>14</sup>

a) Gathering and Evaluating Information About Investments

Once investment categories have been selected, the fiduciaries must obtain and evaluate relevant information about available investments for the plan. The DOL explains that:

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 ***are relevant to the particular investment or the investment course of action involved, including the role the investment or the investment course of action plays in that portion of the plan’s investment portfolio*** with respect to which the fiduciary has investment duties; and (ii) *has acted accordingly*.<sup>15</sup> (Emphasis added.)

Thus, fiduciaries are required to take the following steps:

- determine what facts and circumstances are relevant to each investment, including the role the investment will play in the plan when compared with the other investments offered by the plan,
- gather information regarding each investment that is relevant,

- evaluate the information on a comparative basis with other investment alternatives,
- and then take appropriate action (that is, “act accordingly”).

b) Selecting Investments

After gathering relevant information about available investments, the fiduciaries should evaluate this information to select the investments to be offered by the plan.

ANALYSIS: Fiduciaries are required to determine the investment categories to be used by the plan, gather information about available investments that fit the criteria for those investment categories, and then make reasoned decisions based on that information when selecting the plan’s investments.

Plans can allocate this responsibility to a discretionary trustee. ANB will manage the plan assets in the case of pension plans and other non-participant directed plans. It will also select and monitor the investments and fund managers for each plan, other than company stock and individual brokerage accounts. (Company stock may be dealt with by ANB under specialized service agreements.)

For participant-directed plans, ANB also oversees Registered Investment Advisors (RIA) and will select and monitor the default investment option for the plan. ANB will also prepare a written document that describes the plan’s investing approach, known as an Investment Policy Statement, for each plan.

c) Monitoring Investments

Fiduciaries are required to regularly monitor the investments offered by the plan to determine if they continue to be appropriate choices for the participants. As the court in *Harley v. Minnesota Mining and Manufacturing Company* explained, “ERISA fiduciaries must monitor investments with reasonable diligence and dispose of investments which are improper to keep.”<sup>16</sup>

The court went on to state:

“Once an investment has been made, a fiduciary has an ongoing duty to monitor the investments with reasonable diligence and remove plan assets from an investment that is improper.”<sup>17</sup>

Similarly, the DOL has indicated in Interpretive Bulletin 96-1 that fiduciaries must monitor service providers. Although this guidance addressed participant investment education and advice, the principles also apply to service providers and investments. The DOL explained:

“[A]ny designation of a service provider to a plan...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).”<sup>18</sup>

Thus, fiduciaries are required to use a prudent process when monitoring investments and service providers.

ANALYSIS: By periodically reviewing the relevant information about the investments held by the plan, fiduciaries will be able to determine whether the plan should continue to invest in a particular investment choice or select a replacement. Fiduciaries may use a discretionary trustee to assist them with their ongoing duty to monitor.

ANB will also monitor the investments and investment managers who provide managed account services. ANB will periodically monitor the decision to use a particular investment provider/recordkeeper.

### **Protection for Participant Investment Decisions**

For participant-directed plans, the allocation of the investments in a participant's account can be shifted to the participant if the plan complies with ERISA section 404(c). There are approximately 20 to 25 requirements under the DOL regulation that must be satisfied in order to obtain this relief. While many fiduciaries believe their plans comply with these requirements, plans frequently fail to meet all aspects of the rules. Without proper training and dedicated staff, it is difficult for the plan sponsor to ensure compliance.

Even if the plan satisfies all of the requirements under 404(c), the fiduciaries must still prudently select and monitor the investments to be offered to participants. 404(c) only provides protection for fiduciaries from the investment decisions made by participants regarding the allocation of their accounts among the investment alternatives offered by the plan. As a result, fiduciaries continue to be legally responsible for losses due to imprudently selected or monitored investments.

In the preamble to the final 404(c) regulation, the DOL confirmed that selecting plan investments is a fiduciary function, regardless of whether the plan complies with 404(c):

[T]he act of limiting or designating investment options which are intended to constitute all or part of the investment universe of an ERISA 404(c) plan is a fiduciary function which, whether achieved through fiduciary designation or

express plan language, is not a direct or necessary result of any participant direction of such plan.

Thus, fiduciaries will want to make sure that a prudent process is used when determining and reviewing the investment included in their plans.

ANALYSIS: Fiduciaries are responsible for the selection and monitoring of investments -- regardless of whether the plan complies with ERISA section 404(c). However, fiduciaries can be relieved of responsibility for participants' investment decisions if the plan complies with the DOL regulation under that section.

ANB through a prudent process, policies and procedures, training and a dedicated staff will assure compliance with the 404(c) requirements under DOL regulations and will serve as the ERISA Section 404(c) fiduciary. Thus, fiduciaries can be confident that they have 404(c) protection.

### **Allocation of Fiduciary Responsibility**

Pursuant to ERISA section 403(a), trustees have primary responsibility for a plan's assets. Section 403(a) states "the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan . . ." The only exceptions are:

to the extent that -

(1) the plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to this chapter, or

- (2) authority to manage, acquire, or dispose of assets of the plan is delegated to one or more investment managers pursuant to section 1102(c)(3) of this title.<sup>19</sup>

The U.S. Supreme Court has confirmed that the trustees have the responsibility for managing a plan's assets. In *N.L.R.B. v. Amax Coal Co.*, the Court stated "In sum, ERISA vests the 'exclusive authority and discretion to manage and control the assets of the plan' in the trustees alone, and not the employer or the union."<sup>20</sup> This is also supported by DOL guidance. In Advisory Opinion 77-70A, the DOL stated "The general rule regarding the management of plan assets [is] that it is solely the responsibility of the plan trustees unless properly delegated to others . . . ."

Fiduciaries only have responsibility for other fiduciaries, such as a discretionary trustee, under limited circumstances. ERISA provides that a fiduciary is liable for another's breach:

- (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;
- (2) if, by his failure to comply with [ERISA's fiduciary requirements] in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or
- (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.<sup>21</sup>

Thus, the fiduciaries for the plan would not have to oversee the decisions of a discretionary trustee unless they are aware of or have participated in the failure to satisfy ERISA's requirements.

ANALYSIS: By using a discretionary trustee, such as ANB, the fiduciaries of a plan can be relieved of the responsibility to manage the plan's investments and handle certain aspects of the plan's administration. Thus, the responsibilities typically borne by fiduciaries can be

shifted to a discretionary trustee.

## **CONCLUSION**

ERISA requires fiduciaries to prudently handle the administration of their plans and manage the plan's assets. This includes selecting and monitoring the investment options offered by the plans. In order to do so, the fiduciaries must engage in a prudent process. These requirements apply regardless of whether the plan complies with ERISA section 404(c).

Fiduciaries can, however, delegate most of these responsibilities allocated to a discretionary trustee. As a result, trustees like ANB can provide material assistance to fiduciaries by handling many of the functions that the plan sponsor or its officials are often responsible for. Fiduciaries can feel confident that these duties are being managed by a company who is in the business of serving as a fiduciary to retirement plans.



## ENDNOTES

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<sup>1</sup> ERISA § 3(21).

<sup>2</sup> ERISA § 404(a)(1)(A).

<sup>3</sup> ERISA § 404(a)(1). The term “participants” is used in this document to refer to both participants and beneficiaries.

<sup>4</sup> ERISA § 404(a)(1)(B).

<sup>5</sup> *Riley v. Murdock*, 890 F.Supp. 444, 458 (E.D.N.C. 1995) (citation omitted).

<sup>6</sup> *Lanka v. O’Higgins*, 810 F.2d 379, 387-88 (N.D.N.Y. 1992) (citing *Katsaros v. Cody*, 744 F.2d 270, 279 (2d Cir.), cert. denied sub nom., *Cody v. Donovan*, 469 U.S. 1072, 105 S.Ct. 565, 83 L.Ed.2d 506 (1984); *Jones v. O’Higgins*, No. 87-CV-1002, slip op. at 18-19, 1989 WL 103035; *Whitfield v. Cohen*, 682 F.Supp. 188, 194-95 (S.D.N.Y.1988)).

<sup>7</sup> 100 F.3d 1484, 1488 (9th Cir. 1996).

<sup>8</sup> See, DOL Regulation Section 2550.404a-1 in which the DOL stresses that fiduciaries must consider facts and circumstances they should know are relevant.

<sup>9</sup> 29 CFR § 2550.404a-1

<sup>10</sup> *Donovan v. Walton*, 609 F.Supp. 1221, 1238 (D.C.Fla. 1985 ) (citations and footnote omitted).

<sup>11</sup> DOL Interpretive Bulletin 96-1.

<sup>12</sup> 29 CFR § 2550.404(a)-1.

<sup>13</sup> *Laborers Nat’l Pension Fund v. Northern Trust Quantitative Advisors, Inc.*, 173 F.3d 313 (5th Cir.), cert. denied sub nom, *Laborers Nat’l Pension Fund v. Am. Nat’l Bank & Trust Co.*, 528 U.S. 967 (1999).

<sup>14</sup> *Id.* See also *Chao v. Moore*, 2001 WL 743204 (D Md), DOL Interpretive Bulletin 96-1; AO 2001-09A; Application for IPTE D-10897; Application for IPTE D-10720; Application for IPTE D-10319, all of which reference modern portfolio theory.

<sup>15</sup> 29 C.F.R. § 2550.404a-1.

<sup>16</sup> *Harley v. Minnesota Mining and Manufacturing Company*, 42 F.Supp.2d 898 (D.Minn. 1999).

<sup>17</sup> *Id.* at 906.

<sup>18</sup> 61 Fed. Reg. 29588 (June 11, 1996).

<sup>19</sup> ERISA § 403(a).

<sup>20</sup> *N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 333 (1981).

<sup>21</sup> ERISA § 405(a).