



FIDUCIARY FITNESS PROGRAM™

MODULE 1: FIDUCIARY DUTIES AND RESPONSIBILITIES

The purpose of this module is to assist you in identifying the various individuals who are considered plan fiduciaries and to describe the duties and responsibilities those individuals have under ERISA.

FIDUCIARY DEFINED

<i>A FIDUCIARY IS</i>	<i>A FIDUCIARY IS NOT</i>
- Any individual or entity that has or exercises discretionary control over the management of the plan or the plan's assets - A plan may have: - More than one fiduciary - An individual serving in more than one fiduciary capacity	- Anyone who performs ministerial functions and does not have the authority to make decisions with respect to plan policies, procedures, etc. - Example: individual who calculates benefits or processes claims

NAMED FIDUCIARIES

- Each plan must have one "named fiduciary" (Named in or identified with a procedure prescribed in the plan document)
- May be the plan sponsor, officer, board of directors, board of trustees, member of the management team or committee
- Can allocate responsibilities to others if plan document permits

FUNCTIONAL FIDUCIARIES

- The fiduciary test is a functional one
- You are a fiduciary if:
 - No expressed appointment or delegation of fiduciary authority but functionally in control or in possession of authority over the plan's management, assets or administration
 - Example: members of the employer's board of directors or board of trustees with power to exercise discretion and control
 - + May include non-board and non-voting members

FIDUCIARY VS. SETTLOR DUTIES

<i>FIDUCIARY DUTIES</i>	<i>SETTLOR DUTIES</i>
- Implementing plan-related decisions - Carrying out processes and procedures in regard to plan management - Acts carried out on behalf of the plan - Selection of provider, investments or investment manager	- Decision to establish a plan - Include plan features - Terminate a plan

CO-FIDUCIARIES

- Co-fiduciaries are those to whom named fiduciaries delegate their responsibilities in an effort to better manage the plan
- Fiduciaries are not liable for the acts and omissions related to those delegated responsibilities but do have the duty to monitor the co-fiduciaries' performance of the delegated responsibilities

BOARD OF DIRECTORS OR BOARD OF TRUSTEES

- Board of directors or Board of trustees are fiduciaries only to the extent that they function as fiduciaries (i.e., exercise discretion and control)
 - If delegate authority, responsibility and liability are limited to selection and retention of fiduciaries unless individual becomes liable under co-fiduciary rules
 - Must monitor performance of co-fiduciaries

BENEFIT AND INVESTMENT COMMITTEES

- Benefit and Investment Committees are fiduciaries if delegated fiduciary responsibilities
- Best practices to adopt Committee Charter
- Written meeting minutes should describe issues discussed, action taken and how each member voted
- Members can resign in protest to a fiduciary breach of another member on the committee
 - Resignation may not be sufficient to discharge reasonable efforts to remedy duties; other steps may be necessary



ACTION STEP

- **PREPARE BOARD RESOLUTIONS DELEGATING FIDUCIARY RESPONSIBILITY TO COMMITTEES OR INDIVIDUALS**
 - Adopt a Committee Charter
 - Solicit acknowledgment of committee members' appointment resignation forms
- **KEEP A COPY OF ALL COMMITTEE-RELATED DOCUMENTS (RESOLUTIONS, CHARTER, ACCEPTANCES) IN YOUR FIDUCIARY FILE**

TRUSTEES AS FIDUCIARIES

- Trustees are fiduciaries due to management and control of plan assets
- Discretionary trustee has authority and discretion for the management and control of plan assets
- Directed trustee is subject to the direction of a plan fiduciary, other than the trustee only a fiduciary to the extent of its discretion which is generally limited
- Written meeting minutes should describe issues discussed, action taken and how each trustee voted
- Trustees can resign in protest to a fiduciary breach of another co-trustee
 - Resignation may not be sufficient to discharge reasonable efforts to remedy duties; other steps may be necessary

INVESTMENT ADVISERS

- An investment adviser is a fiduciary if adviser meets ERISA section 3(21) requirements.
 - Exercises discretionary authority or control over the management of the plan
- Renders investment advice for a fee
- New regulations to become effective in 2017 expand historical definition

INVESTMENT MANAGERS

- An investment manager is a fiduciary if manager meets ERISA Section 3(38) requirements
 - Must be a bank, insurance company or investment adviser registered under the Investment Advisers Act of 1940
 - Manager must acknowledge being a fiduciary in writing
- Generally, a discretionary trustee for a retirement plan is also an investment manager

ATTORNEYS, ACCOUNTANTS, ACTUARIES, CONSULTANTS AND EMPLOYEES

- Generally these professionals performing their usual professional functions are not fiduciaries
- They are considered a fiduciary, however, if they have discretionary authority or control over the management of the plan or render investment advice for a fee
- Consultants, attorneys and third party administrators may become fiduciaries when plan fiduciaries rely on their advice when making fiduciary decisions
- Employees are generally not plan fiduciaries, but can be depending on individual facts and circumstances

INDIVIDUALS PROHIBITED FROM FIDUCIARY ROLE

- Individuals are prohibited if they have been convicted of or been imprisoned as a result of said conviction for:

ROBBERY	KIDNAPPING	A FELONY INVOLVING ILLEGAL SUBSTANCES
BRIBERY	BURGLARY	VIOLATION OF §302 OF LABOR-MANAGEMENT RELATIONS ACT
EXTORTION	ARSON	CRIMES BARRING INDIVIDUAL FROM SERVING AS AN INVESTMENT ADVISER
FRAUD	RAPE	VIOLATION OF ANY ERISA PROVISION
EMBEZZLEMENT	MURDER	VIOLATION INVOLVING KICKBACKS FROM PUBLIC WORKS
GRAND LARCENY		VIOLATION OF FEDERAL MAIL PROHIBITIONS



ACTION STEP

COMPLETE THE “LIST OF FIDUCIARIES” TO IDENTIFY ALL FIDUCIARIES AND THEIR RESPONSIBILITIES

ERISA SECTION 404(A) FIDUCIARY RESPONSIBILITIES

DUTY OF LOYALTY

- A fiduciary must act solely in the interest of the plan participants, their beneficiaries and alternate payees
- In doing so, a fiduciary must:
 - Carry out duties prudently
 - Follow the terms of the plan document (unless the documents are inconsistent with ERISA)
 - Diversify plan assets
 - Pay only fair and reasonable expenses

DUTY OF PRUDENCE

- When acting on behalf of the plan, exercise the care, skill, prudence and diligence that a prudent person familiar with such matters would exercise in similar circumstances
- With regards to investments, give “appropriate consideration” to the facts and circumstances that they know or should know are relevant to the investment or investment course of action involved
- The fiduciary’s actions are considered prudent if the fiduciary exercises ordinary care based on the facts and circumstances
- **Note: The Department of Labor (DOL) and courts measure prudence by analyzing the process used to select an investment or course of action**

APPROPRIATE CONSIDERATION: DEFINED

- Appropriate consideration includes:
 - Determination that a course of action is reasonably designed to further the purposes of the plan
 - Consideration of the risk of loss and opportunity for gain associated with a course of action
 - With regards to investments
- Composition of the portfolio(s) with regard to diversification
- Liquidity and current return relevant to plan’s anticipated cash flow needs
- Portfolio’s projected return relative to funding objectives

FOLLOW THE TERMS OF THE PLAN DOCUMENT

- Be familiar with the plan documents
 - Plan/trust documents
 - Summary plan descriptions
 - Administrative procedures
- Carefully review documents periodically to ensure they are legally compliant
- Review plan administration to ensure plan is operating in accordance with the terms of the plan document, ERISA and the Internal Revenue Code (“Code”)

DIVERSIFY PLAN INVESTMENTS

- Fiduciaries are tasked with the responsibility to help minimize risk of large losses, unless it is clearly not prudent to do so
- Take the following into consideration:
 - The purpose and size of the plan
 - Economic and market conditions
 - The type and geographic dispersion of the investment

RELYING ON INFORMATION FROM OTHERS

- A fiduciary may rely on information provided by individuals or other entities performing ministerial functions for the plan
 - But must exercise prudence in selecting or retaining such individual or other entities

APPOINTING TRUSTEES OR OTHER FIDUCIARIES

- Do not appoint fiduciaries based on the position they hold within the organization
 - Appoint based on expertise and experience; title alone is not a qualifier
- Fiduciary terms are indefinite; they serve until retirement, termination or resignation
- Plan fiduciaries must monitor performance routinely
 - Identify all fiduciaries, outline responsibilities, measure performance and review any complaints
 - Utilize a documented process
 - Annual reviews are recommended
- Immediate corrective steps must be taken for fiduciary deficiencies and termination

REPORTING AND DISCLOSURE REQUIREMENTS

- Fiduciaries must comply with ERISA's reporting and disclosure requirements
- Reporting requirements can be met both electronically and non-electronically; special attention to be paid to DOL requirements for electronic delivery
- Delivery system should result in actual receipt of information and protect confidentiality

FIDELITY BOND

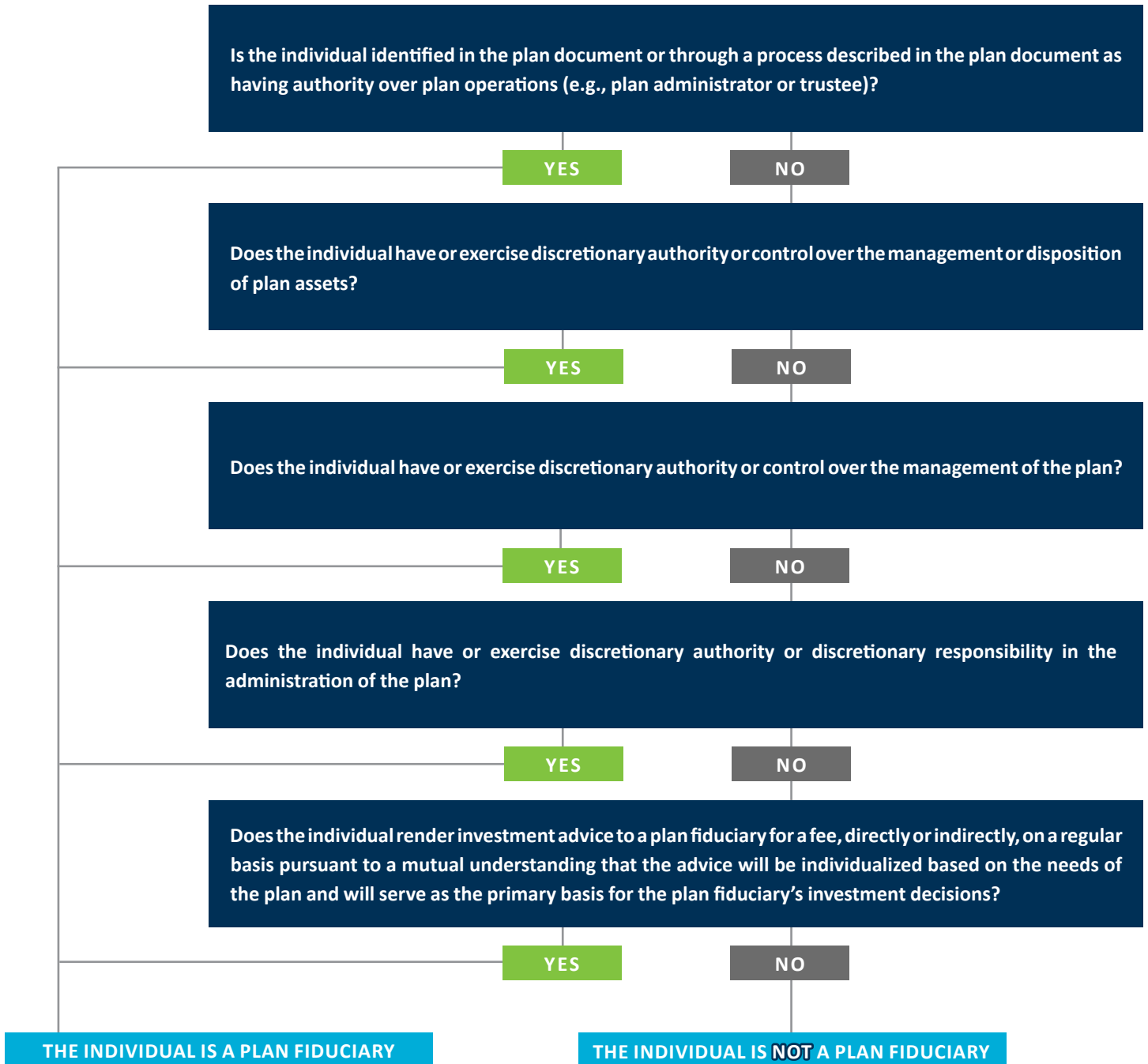
- Every fiduciary and anyone who handles plan funds or property must be bonded, unless subject to an ERISA Section 412 exemption
- Bond must cover at least 10 percent of the amount handled by the individual
 - May not be less than \$1,000 or greater than \$500,000 (\$1,000,000 for plans holding employer securities)



ACTION STEP

- ESTABLISH A PRUDENT PROCESS TO COMPLY WITH ERISA DUTIES.
- CONDUCT ADMINISTRATIVE AUDIT TO CONFIRM PLAN OPERATING IN COMPLIANCE WITH PLAN DOCUMENTS AND APPLICABLE LAW.
- CONFIRM APPROPRIATE FIDELITY BOND IN PLACE.

CONCLUSION - DETERMINING IF AN INDIVIDUAL IS A PLAN FIDUCIARY



MODULE 2: STRATEGIES TO HELP MINIMIZE FIDUCIARY LIABILITY

This module describes the various forms of liability fiduciaries are subject to, and actions that can help minimize that liability.

FIDUCIARY LIABILITY EXPLAINED

- In addition to criminal penalties, ERISA permits participants and beneficiaries to bring civil actions against a fiduciary who breaches duty
- The fiduciary is personally liable for any losses resulting from a breach
 - Any profits realized as a result of a breach must be restored to the plan
 - Any losses suffered by the plan must be made whole
- With the exception of the named fiduciary, a plan fiduciary's personal liability to the plan is limited to the functions the fiduciary performs, or for which the fiduciary is responsible

{ THE DOL MAY ASSESS A CIVIL PENALTY EQUAL TO 20 PERCENT OF THE APPLICABLE RECOVERY AMOUNT IN THE EVENT OF A BREACH. }

DEPARTMENT OF LABOR PENALTIES

- The Department of Labor (DOL) may assess a civil penalty equal to 20 percent of the applicable recovery amount in the event of a breach
- The DOL may, at its discretion, waive or reduce a penalty if it determines that the following occurred:
 - The fiduciary or individuals involved acted in good faith
 - It is unreasonable to expect the fiduciary or individuals involved to restore all losses without experiencing severe financial hardship
- Reduced penalties may apply if fiduciary files application with DOL under the Voluntary Fiduciary Compliance Program

CO-FIDUCIARY LIABILITY

- Any fiduciary who is aware of other fiduciaries' actions that may violate legal standards must take all reasonable and legal steps to prevent such actions
- If a fiduciary takes all of the reasonable and legal steps to prevent a fiduciary breach but does not succeed in preventing the breach, then such fiduciary should not incur liability for the other fiduciaries' actions if reasonable efforts to remedy the breach are undertaken

BREACHES BEFORE OR AFTER BEING A FIDUCIARY

- A fiduciary cannot be held liable for a breach of fiduciary duty committed before becoming a fiduciary or after being a fiduciary
- Even though a fiduciary may not be liable for a breach, the fiduciary must take steps to remedy the situation if aware of the breach
 - Failure to do so might be considered a subsequent independent breach of fiduciary duty by the fiduciary

INDIVIDUAL FIDUCIARY LIABILITY

- Named fiduciary is not liable for designated fiduciary's acts and omissions carrying out fiduciary responsibilities
 - However, a named fiduciary would be liable if the named fiduciary fails to monitor designated fiduciary's activities
- Develop procedures for monitoring such individuals or entities based on the needs for each plan
 - Make procedures flexible enough to be modified in the event of any changes affecting the plan

TERMINATING A FIDUCIARY

- Must follow plan procedures to terminate responsibilities
- Must make sure another is prepared to assume those responsibilities
- It is recommended that both the plan sponsor and the terminated fiduciary document the termination process, actions taken and steps to ensure smooth transition to the new fiduciary

FIDUCIARY LIABILITY INSURANCE

- An insurance policy covering plan sponsor's directors, officials and fiduciaries
 - Must specifically cover ERISA claims
- Not the same as a fidelity bond—a fidelity bond protects the plan
- Fiduciary insurance protects fiduciaries and their personal assets from lawsuits alleging breaches of fiduciary responsibility
- Review or purchase policy that provides broad coverage

DRAFT INVESTMENT POLICY STATEMENT

- Draft a written statement that provides the fiduciaries who are responsible for plan investments with set guidelines and general instructions about various types or categories of investment management decisions
- An investment policy generally does not include directions about the purchase or sale of a specific investment
- If hiring an outside consultant, condition such appointment on the implementation of an investment policy



ACTION STEP

- REVIEW OR PURCHASE FIDUCIARY LIABILITY INSURANCE
- ADOPT A WRITTEN INVESTMENT POLICY STATEMENT

INDEMNIFY FIDUCIARIES

- The plan sponsor may offer to indemnify employees who are fiduciaries with respect to fiduciary suits that may arise under ERISA
- Examples of permitted indemnification agreements are:
 - Indemnification of a plan fiduciary by:
 - An employer, any of whose employees are covered by the plan, or an affiliate of such employer or
 - An employee organization, any of whose members are covered by the plan; and
- Indemnification by a plan fiduciary of the fiduciary's employees who actually perform the fiduciary services.

EDUCATION AND DOCUMENTATION

- Plan fiduciaries need to understand their responsibilities and obligations under ERISA
 - Create and implement fiduciary training program
 - Develop worksheets to document and monitor roles and responsibilities
- Fiduciaries must follow written procedures that can demonstrate compliance with ERISA's fiduciary standards

HIRE TRUSTEES AND INVESTMENT MANAGERS

- Fiduciaries and trustees may look to hire outside professional trustees and investment managers to make plan decisions
 - Potential liability exposure may be limited through this course of action
- Fiduciaries and trustees must carefully monitor professional trustees and investment managers



ACTION STEP

- PROVIDE FIDUCIARY EDUCATION TO ALL FIDUCIARIES

HIRE INVESTMENT ADVISER

- Fiduciaries may hire an investment adviser to provide recommendations related to investment options
 - Investment adviser considered a co-fiduciary
- Fiduciaries must routinely monitor investment advisers

HIRE LAWYERS, CONSULTANTS AND ADMINISTRATORS

- Lawyers, consultants and third party administrators (TPAs) might assist their clients with the practical implications of the plan sponsor being a fiduciary by doing the following:
 - Helping plan sponsor understand its responsibilities
 - Assisting with hiring a professional trustee or investment manager
 - Recommending the indemnification of certain fiduciaries
 - Recommending the purchase of fiduciary liability insurance

ESTABLISH PARTICIPANT-DIRECTED ACCOUNTS

- In general, fiduciaries are not liable for any losses due to a participant's investment choices if they are deemed to be compliant with ERISA Section 404(c) and regulations promulgated thereunder

CONDUCT PERIODIC AUDITS

- Conduct periodic self-audits to ensure that the plan is being administered in accordance with the terms of the plan document, ERISA and the Internal Revenue Code
- Be aware of the warning signs that indicate when a self-audit would be appropriate
- Annual financial audits should not be viewed or relied upon as comprehensive compliance audits



ACTION STEP

- HIRE AND MONITOR APPROPRIATE OUTSIDE CONSULTANTS
- ESTABLISH PARTICIPANT-DIRECTED ACCOUNTS
- CONDUCT PERIODIC AUDITS

MODULE 3: SELECTING AND MONITORING SERVICE PROVIDERS

The selection and monitoring of service providers is a fiduciary duty. This module describes the various service providers typically engaged by a plan to assist with plan administration. It also describes suggested best practices to ensure that such service providers are independent and objective professionals.

PLAN FIDUCIARY RESPONSIBILITIES WITH RESPECT TO SERVICE PROVIDERS

- Prudently select and monitor all plan advisers, providers, auditors and all other service providers
- Must have a documented process
- Monitor service providers by conducting plan benchmarks every three to four years
- Ensure all parties' fees are fair and reasonable

DEPARTMENT OF LABOR (DOL) GUIDANCE

- The DOL published a recommended list of specific questions plan fiduciaries should ask and have answered by these parties
- The DOL, in its audit process, requests information from plan fiduciaries about these providers including:
 - ✓ **THEIR NAME, ORGANIZATION AND LOCATION;**
 - ✓ **COPIES OF ALL ENGAGEMENT AGREEMENTS;**
 - ✓ **ALL PARTIES' FEE SCHEDULES.**

PROCEDURAL BEST PRACTICES

- First focus on the service provider's ability to provide the necessary services to support the plan
- Next focus on the service provider's experience and expertise
- Focus conversation around how to engage the service provider
- Ensure plan expenses are "fair and reasonable" this does not mean the cheapest, but is interpreted to mean competitive to market

PLAN ADVISERS

- Plan advisers are professional consultants hired by the plan fiduciary to assist with the management of the plan
- Typically they perform fiduciary services around:
 - Investment due diligence and selection
 - Provider selection and plan benchmarking
 - Committee meetings
- Plan advisers are generally financial registered representatives or investment advisers
- Services vary greatly from plan adviser to plan adviser. Make certain comparisons are accurate.



ACTION STEP

- **REVIEW AND COMPLETE THE SELECTING AND MONITORING PLAN CONSULTANTS DOCUMENTATION MODULE**

PROVIDERS

- Providers are individuals or entities hired to provide administrative services to the plan
- Typically these providers are:
 - Recordkeepers
 - Third party administrators
 - Investment management companies
- Depending on services provided, these providers may or may not function as a fiduciary



ACTION STEP

- REVIEW AND COMPLETE THE SELECTING AND MONITORING PROVIDERS DOCUMENTATION MODULE AND PERIODICALLY CONDUCT A B3 PROVIDER ANALYSIS™

AUDITORS

- Employee benefit plans with 100 or more participants are required to have an audit as part of their obligation to file an annual return/report (Form 5500)
 - Small plan exception if less than 120 participants and filed as a small plan the previous year
- Plan sponsor, in conjunction with the plan administrator, should hire an independent qualified public accountant
- Audit helps protect the assets and the financial integrity of the employee benefit plan and ensure the necessary funds will be available to pay for retirement benefits



ACTION STEP

- REVIEW THE SELECTING AND MONITORING AUDITORS DOCUMENTATION MODULE
- IMPLEMENT AND COMPLETE A DOCUMENTED PROCESS TO SELECT AND MONITOR ALL PLAN SERVICE PROVIDERS