Fiduciary Training: ERISA Duties & Obligations
Why Do We Care?

• Fiduciary status creates litigation risk
• Fiduciary duties affect the plan decisions you make
  - decision making process
  - narrower range of acceptable alternatives
Who are the Plan Fiduciaries?

• Identified as a fiduciary in the plan
• “To the extent” has any discretionary responsibility for plan administration
• “To the extent” exercises discretionary authority or control over plan assets
• Provides investment advice for a fee
Key Requirements – Designation of Named Fiduciary for the ERISA Plans

• ERISA “Named Fiduciary” Requirement
  – A named fiduciary must be specified in the plan or pursuant to plan procedure
  – The named fiduciary has the “authority to control and manage the operation and administration of the plan”
    ▪ can designate another person as a fiduciary
    ▪ can appoint an investment manager
Who are the Plan Fiduciaries?

- Committee and its members
- Plan trustee
- Investment Managers
- Others who exercise discretionary authority or control
Non-Fiduciary Plan Sponsor Functions

- plan adoption, amendment terminations
- participating employers
- merger
- designation in plan document of governance structure

Employer

Committees

Administrative Fiduciary Functions

- responsible for ERISA disclosure and reporting requirements
- named fiduciary responsible for plan administration matters such as:
  - plan interpretation
  - claims appeal
  - matters with respect to plan administration that require the exercise of discretion
  - selection of platform provider in terms of plan administration and recordkeeping
  - monitoring service provider expenses

Investment Fiduciary Functions

- named fiduciary responsible for:
  - selecting and monitoring funds
  - maintaining investment policy statement and establishing funding policy
  - retention of investment consultant and selection of platform provider in terms of available investment alternatives
  - monitoring expense ratio and revenue sharing structure

Board of Directors

- appoints (and has power to remove) Committee members (a fiduciary function)

Annual report to

Staff Administrative Function

- Nondiscretionary day-to-day administrative contact with EE’s and interface with service provider
  - role in selection of service providers in terms of administrative input
  - will refer to the BC any discretionary decision needed with respect to issue or question outside of standard administrative practices
  - provide information as needed by the BC
New Fiduciary Definition

• DOL issued final regulations in 2016 providing a new test for when someone provides “investment advice for a fee”
• In 2017, the DOL issued guidance delaying the effective date for this new definition.
New DOL Definition
“Investment Advice For A Fee”

• Fiduciary status exists if person/entity:
  • Provides a “recommendation”
  • To a plan, plan fiduciary, plan participant or IRA owner
  • For compensation (direct or indirect)
  • and the person/entity:
    – Acknowledges fiduciary status OR
    – Directs advice to a specific recipient(s) regarding the advisability of a particular investments or management decision regarding securities or other investment property OR
    – Renders advice pursuant to an agreement, arrangement or understanding that the advice is based on the particular investment needs of the recipient
Fiduciary Status Does Not Result

- **General Communication** – e.g., general marketing or general market data
- **Platform Providers** solely providing record-keeping and related non-discretionary, objective, services
- **Investment Education** – essentially consistent with current DOL authority as to general investment information about available investment options (e.g., their objectives and characteristics), asset allocation models and interactive materials
- **Employees whose job function includes providing support to plan fiduciaries or interaction with participants but with no specific investment advice function.**
Fiduciary Status Does Not Result

- Other DOL Exemptions or Exceptions in the Regulations Also May Apply
- Key Factor – Can the communication’s context, content and presentation reasonably be viewed as a suggesting the taking (or refraining from taking) of a particular course of action
  - The more individually tailored a communication, the more likely it is a recommendation
What are the ERISA Fiduciary Duties?

• Exclusive Benefit Duty
• Prudent Expert Duty
• Diversification Duty
• Plan Adherence Duty
What are the ERISA Fiduciary Duties?

• Exclusive Benefit Duty
  – You must act for the exclusive purposes of providing benefits and defraying reasonable plan expenses
  – Actions taken to advance Company goals may violate duty
What are the ERISA Fiduciary Duties?

• The Prudent Expert Duty

• You must use the level of care that a “prudent person knowledgeable about such matters” would use in the same situation.

• Procedural Prudence: A fiduciary’s conduct is evaluated according to the result of a decision as well as the process used to make the decision.
What are the ERISA Fiduciary Duties?

Procedural Prudence means:

• identify factors relevant to decision-making process;
• identify necessary fact-finding steps and background information;
• identify required expertise; when necessary, consult with outside experts (e.g., accountant, legal counsel);
• evaluate relevant criteria;
• monitor ongoing performance; and
• document the evaluation, decision and monitoring in writing
How to Implement Procedural Prudence

- Selection of Providers
- Request competing bids from service providers
- Evaluate credentials and capabilities
- Evaluate fees
- Evaluate contract terms
- Check references
How to Implement Procedural Prudence

• Investments
• Maintain and follow written investment guidelines
• Select investment funds/managers as described
• Regularly monitor and adjust when appropriate
What are the ERISA Fiduciary Duties?

The Diversification Duty

- The fiduciary must diversify a plan’s investments to minimize risk of large losses
What are the ERISA Fiduciary Duties?

The Adherence-to-Plan Duty

• Your actions must be in accordance with the plan language, unless following the plan would violate ERISA.
Which Hat Are You Wearing?

It is important to know which hat you are wearing because:

Decisions in your fiduciary role are subject to ERISA’s requirements.

Decisions in your role as an employee/officer of are not.
### Which Hat Are You Wearing?

<table>
<thead>
<tr>
<th><strong>Settlor</strong></th>
<th><strong>Fiduciary</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>• Plan Design</td>
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</tr>
<tr>
<td>• Amendment or Termination</td>
<td>• Implementation of Amendment/Termination</td>
</tr>
<tr>
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</tr>
<tr>
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</tr>
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**Settlor**
- Plan Design
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**Fiduciary**
- Plan Administration
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- Participant Communications
- Attorney Client Privilege may not apply
Delegating ERISA Fiduciary Duties

- Pursuant to the plan document
- Satisfy fiduciary duties when choosing the delegate
- Satisfy fiduciary duties when monitoring the actions of the delegate
ERISA’s Prohibited Transaction Rules

- ERISA prohibits a fiduciary from entering into the following transactions:
  - Transactions between the plan and a “party in interest”
  - “Self-dealing” transactions
- Liability can apply even if the plan suffers no harm
Party in Interest Transactions

A fiduciary may not cause a plan to engage in the following transactions with a party in interest, unless an exception applies:

• Sale, exchange or lease of property
• Loans or other extension of credit
• Furnishing of goods, services or facilities
• Transfer of plan assets
• Acquisition on behalf of the plan of any employer security
Who is a Party in Interest?

• Any plan fiduciary, counsel or employee
• Other service providers to the plan
• Plan sponsor/employer (and certain affiliates)
• Employees of the above
Self-Dealing Transactions

- Using plan assets for personal purposes
- Receiving consideration from a third party in a transaction involving plan assets
- Acting in a transaction with the plan on behalf of a party whose interests are adverse to those of the plan
Prohibited Transaction Exemptions

Reasonable arrangements with a party in interest for services “necessary” for the operation of the plan:

• no more than reasonable compensation may be paid
• contract must permit termination by the plan without penalty on reasonably short notice under the circumstances
• Does not apply to self-dealing transactions
Payment of Plan Expenses

• Duty to follow plan documents
• Duty of prudence
• Exclusive benefit rule
ERISA - Take it Seriously

• Liability: Fiduciaries face personal liable for breach of duty/plan loss.
• Co-Fiduciary Liability: Fiduciaries liable for acts of co-fiduciary (including one with delegated authority) if the fiduciary:
  – Knowingly participates;
  – Does not take reasonable efforts to remedy breach upon discovery; and
  – Enables breach through its own failure to act prudently.
• Civil Penalties: may be assessed against fiduciary or co-fiduciary:
  – 20% of amount recovered in court or DOL settlement.
• Also, Excise Taxes: Imposed on parties in interest in prohibited transactions:
  – 15% of amount involved for each year;
  – 100% of amount involved if transaction not corrected in taxable period; and
  – Unwind prohibited transaction.
ERISA - Take it Seriously (Cont.)

• Legal / Equitable Remedies:
  – Make the plan whole and disgorge profits;
  – Injunctions against prohibited behavior and rescission of contracts;
  – Constructive trust on funds; and
  – Removal of fiduciary.
Not to Mention:
ERISA - Take it Seriously (Cont.)

• Employee Relations Impact;
• Reputational and Communal Impact;
• Increased Class Action Litigation Exposure:
  – Plaintiff may recover legal fees; and
  – “Revenue Sharing” cases as an example (discussed later).
Managing Fiduciary Liability

• Respect allocations of responsibilities and delegations of authority
• Document prudent decision making processes
• Monitor providers
• Secure Company indemnification
• Maintain fiduciary liability insurance
Questions?