



Fiduciary Responsibility, Delegation & Oversight

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About the Presenter

Amy Barber is the Chief Compliance Officer and Director of Technical Services for Multnomah Group. She is responsible for the development, implementation and oversight of the firm's regulatory compliance program. Amy provides guidance to plan sponsors on plan design, fiduciary governance, and vendor services.

Before joining Multnomah Group in 2012, Amy worked as an attorney in private practice with a focus on providing regulatory compliance advice and services to both SEC and state registered advisers. Prior to that, Amy was the Director of SEC Compliance and Investment Consultant for another SEC registered investment advisory firm.

Amy earned her J.D. and Federal Tax Law Certificate from Lewis and Clark Law School in Portland, Oregon.

Agenda

Fiduciary Overview

- *ERISA's Current Standards*
- *Determining Fiduciary Status*
- *Specific Fiduciary Responsibilities*
- *Consequences of Fiduciary Breach*
- *Proposed Fiduciary Rule*

Fiduciary Governance – Delegation and Documents

- *Charter Delegation to a Retirement Plan Committee*
- *Investment Policy Statement*

Fiduciary Governance – Administration and Oversight

- *Oversight of Internal Staff/Departments*
- *Oversight of Vendors*

Planning for Sponsors

- *Limiting Fiduciary Liability*
- *Action Items*

Fiduciary Overview – ERISA Standards

The Employee Retirement Income Security Act of 1974 (ERISA) imposes 4 fiduciary duties which retirement plan fiduciaries are expected to adhere:

- *Duty of Loyalty*
- *Duty of Care*
- *Duty to Diversify Investment Options*
- *Duty of Obedience*

ERISA's fiduciary standards are considered to be among the highest standards of care in American law

Fiduciary Overview – ERISA Standards

Duty of Loyalty:

Requires fiduciaries to operate a plan *solely* in the best interests of plan participants and their beneficiaries, and discharge duties for the *exclusive purpose* of providing benefits or defraying reasonable expenses

- The plan must not pay excessive compensation to investment and service providers
- Do not act in a manner that gives rise to a direct or indirect conflict-of-interest laden prohibited transaction
- Parties-in-interest include plan fiduciaries, service providers, certain officers and directors, certain relatives of individuals who are parties-in-interest, and certain related entities and organizations
- Limited prohibited transaction exemptions exist

The *Duty of Loyalty* is an overriding theme of all fiduciary duties

Fiduciary Overview – ERISA Standards

Duty of Care:

Fiduciaries are required to act with the same care, prudence, skill and diligence that a knowledgeable person would use

- Fiduciaries are not always experts with regard to all aspects of plan management.
- Compliance with this standard may require the hiring of experts such as attorneys, accountants, consultants and investment managers

This is known as the “prudent expert” standard

- An objective standard based upon how a person with experience and knowledge of a certain area would act in a given situation
- If a fiduciary lacks the expertise for a certain area then the fiduciary must obtain expert help
- Flexible and evolving standard of care

Fiduciary Overview – ERISA Standards

Duty to Diversify Investment Options:

A fiduciary must diversify investments in order to minimize risk of loss, unless it would be considered prudent to not diversify investments

- Offer a diverse range of investment options to participants
- Include investment options with materially different risk and return characteristics and investment objectives
- Evaluate, select, and monitor available plan investment options using a documented diligence process

Fiduciary Overview – ERISA Standards

Duty of Obedience:

A fiduciary must act in accordance with the plan documents - but only to the extent that the plan is consistent with ERISA requirements

- Deviation from the plan document's provisions typically constitutes a fiduciary breach
- Levy the document's provisions consistently, regardless of sympathetic circumstances

Fiduciary Overview – Determining Fiduciary Status

Who is a fiduciary?

- Anyone specifically named in the plan document as a fiduciary
- Persons performing certain discretionary functions on behalf of the plan, including administrative and investment functions
- Persons exercising control over plan assets
- Any person rendering investment advice in exchange for a fee or other compensation
- Any person who specifically accepts fiduciary responsibility in a services contract or otherwise

Types of Fiduciaries

- “Appointing fiduciaries” are fiduciaries with respect to appointment, monitoring, and removal of other fiduciaries
- Limited-purpose fiduciaries are appointed and monitored by named fiduciaries

Fiduciary Overview – Determining Fiduciary Status

Who is not a fiduciary?

Certain activities related to the plan are non-fiduciary. “Settlor activities” can be made based on company’s business interests, for example:

- Establishing a plan
- Choosing plan design and plan features
- Amending or terminating a plan

In addition to settlor activities, the following are *generally* not considered fiduciaries:

- Anyone performing ministerial or administrative services for the plan without discretionary authority
- Providing services within a framework of policies, interpretations, rules, practices and procedures made by other persons will usually not constitute fiduciary activity
- Attorneys, actuaries, accountants, recordkeepers, third-party administrators, and consultants who do not specifically accept fiduciary responsibility in their service contracts

Fiduciary Overview – Determining Fiduciary Status

However, ERISA provides a functional test for fiduciary:

- ERISA permits fiduciaries to wear two hats (but not at the same time)
- You will be a fiduciary when you are performing specified fiduciary functions under ERISA
- You will be a fiduciary “to the extent” you are performing fiduciary functions
- It is possible to be a named fiduciary or a *de facto* fiduciary

Specific responsibilities that may present fiduciary implications include:

- Following the document’s provisions
- Ensuring that participants have information about the plan and available investments necessary to make informed decisions
- Remitting contributions in a timely manner
- Purchasing and maintaining an appropriate fidelity bond
- Retaining and evaluating service providers
- Selecting and monitoring the performance of available investment options
- Making decisions required to comply with applicable law

Fiduciary Overview – Consequence of Breach

ERISA imposes personal liability on a fiduciary who breaches fiduciary duties. In event of a loss due to breach, the fiduciary must make the plan whole

- Obligation to restore profits
- Additional penalties

In the event of a fiduciary breach, established correction methods are available through the Department of Labor and IRS

Fiduciary breaches that remain uncorrected may give rise to personal financial liability and/or penalties

Fiduciary Overview – Consequence of Breach

ERISA provides that a provision of a plan that attempts to relieve a fiduciary from fiduciary duties is void. *However*, a plan can maintain fiduciary liability insurance coverage for the plan and all of the fiduciaries

- Plan documents (and often corporate organizational documents) typically indemnify plan fiduciaries for actions taken in their fiduciary capacity
 - No indemnification for willful misconduct, fraud, bad acts
- Corporate umbrella liability insurance policies often provide (directly or through a rider) liability insurance for fiduciary activities
- ERISA requires plans to maintain a fidelity bond to cover fiduciaries and other individuals who “handle” plan assets

Fiduciary Overview – Proposed Fiduciary Rule

On April 20, 2015 the Department of Labor published the proposed rule: Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice

- Requires putting the client’s best interest first, by expanding the types of advice covered by fiduciary protections
 - Any individual receiving compensation for providing advice that is individualized or specifically directed to a plan sponsor, participant, or IRA owner
 - Impartial advice must be provided in the client’s best interest and
 - Payments creating conflicts of interest must not be accepted - unless they qualify for an exemption
- Preserves access to retirement “education”
 - *General education* may be provided without triggering fiduciary duties
- Non-fiduciary activities
 - Order-taking
 - Sales pitches to plan fiduciaries with “financial expertise”

Fiduciary Overview – Proposed Fiduciary Rule

Best Interest Contract Exemption

- Commits the firm and adviser to providing advice in the client's best interest
- Firm has adopted policies and procedures designed to mitigate conflicts of interest
- Clearly and predominantly disclose conflicts of interest

What happens now?

- Current proposed rule is subject to a 75 day notice and comment period
- Public hearing will be scheduled after notice and comment period
- Eventually may lead to a final rule

Fiduciary Governance - Delegation

Typically, the Board of Directors/Trustees is the *de facto* administrator

Fiduciary responsibility may be delegated by the employer's governing Board to a Retirement Plan Committee.

- Committee members typically have decision making authority, rendering them fiduciaries
- The Board may choose to indemnify Committee members from fiduciary liability
 - Usually, except in the case of gross negligence or willful misconduct

The complexity of the structure and size of a Committee typically reflects the complexity and size of the plan.

- Larger plans may create more than one committee, such as a Retirement Plan Investment Committee and a Retirement Plan Administration Committee
- Smaller plans typically create one Retirement Plan Committee
- Generally, Committee membership is limited to as few as 4 and as many as 10 people, including a chairperson

Fiduciary Governance - Delegation

Committee Structure/Membership

- What committees will be established and maintained (administrative, investment, settlor)
- Who should be on the fiduciary committee
- Who should be responsible for appointing committee members and monitoring their activities

Committee Operation

- Documents governing committee actions:
 - Committee charter/operating rules clarify how the committee functions
 - Investment policy statement/guidelines sets forth investment strategy, identifies what investments can and cannot be offered in the plan, describes how investments are evaluated, etc.

As important as it is to have good governance documents, it is critical to follow them. Not adhering to the docs can be worse than not having them at all; a failure to follow may be *prima facie* evidence of imprudence

Fiduciary Governance - Delegation

Conduct of meetings

- Agenda and list of topics to address
- Review reports from fund providers and investment managers, key vendors, consultants
- Keep minutes to document activities and confirm exercise of procedural prudence
- Avoid overlap of fiduciary and settlor activities

Fiduciary Governance - Documents

Committee Delegation Charter

- Retirement Plan Committees are established and governed by a Charter, which is adopted by resolution of the Board of Directors/Trustees
- Delegates responsibilities related to the overall management of the plan to a Committee
- Defines the Committee's membership, typically by title, and each member's term
- Indicates each Committee member's specific responsibilities
- Describes the frequency with which the Committee will meet (generally quarterly or semi-annually), and how meetings will be run (i.e. meeting invitees, quorum constitution, meeting minutes requirements, etc.)

Investment Policy Statement

- Describes process and procedures for evaluating, selecting, monitoring, and terminating investment options
- Describes process for investment direction
 - Participants directing the investments of their accounts
 - Intention to comply with ERISA section 404(c)
 - Designating a qualified default investment alternative (QDIA)

Fiduciary Governance – Administration and Oversight

Internal Administration and Oversight

Fiduciary responsibility may be administered by the employer's internal staff/departments

- Helps to ensure the full and timely discharge of all duties that arise from plan sponsorship
- Monitor internal staff carefully

External Administration and Oversight

Fiduciary responsibility may also be administered by external services providers

- Hiring external service providers that are experts in a particular aspect of plan management will help a plan sponsor meet ERISA's prudence standard
- Select and monitor external service providers carefully
- Depending on the circumstances, service providers may or may not become fiduciaries to the plan.

Planning for Sponsors – Limiting Liability

Adhere to ERISA's standards when discharging fiduciary duties

- Follow plan and governance documents
- Avoid prohibited transactions
- Document decisions and actions
- Engage in procedural prudence

Create Good Plan Governance

- Properly distinguish between fiduciary functions and settler functions
- Identify and correct discrepancies between plan terms and actual governance structure and decision-making processes

Assemble your Team of Advisers

- Recordkeepers, investment consultants, attorneys, accountants, etc., as needed

Planning for Sponsors – Action Items

Formalize a Retirement Plan Committee

- Ensure that Committee members understand their duties and responsibilities
- Ensure that the Committee meets regularly and documents any decisions or actions

Develop an Investment Policy Statement

- Document the investment decision making process
- Document investment fee reasonableness and renegotiate fees regularly

Service Provider Due Diligence

- Review and understand all vendor service agreements
- Collect and manage information held by all plan investment providers and recordkeepers
- Regularly monitor all vendors providing services to the plan
- Review vendor disclosures for reasonableness in light of services being received

Planning for Sponsors – Action Items

Participant Communications

- Provide important plan and investment information to participants
- Document materials delivered to participants

Ensure Compliance with Applicable Laws and Regulations

- Review applicable disclosure rules and requirements
- Monitor and understand new regulations affecting the plan

Maintain Stringent Internal Controls

- Review timing of contribution deposits
- Engage an independent plan auditor (if an audit is required)
- Assume your plan will be examined by the DOL, IRS, or both
- Decisions, strategies, and actions should always be documented and kept on file for at least 7 years

Planning for Sponsors – Action Items

Insurance

- Obtain required fidelity bonding
- Consider purchasing optional fiduciary liability insurance
- Confirm that employer's own indemnification provisions are aligned with the terms of its ERISA fiduciary, E&O and D&O policies
- Confirm that employees are protected by indemnification and the terms of insurance policies

Annual Fiduciary Audit

- Review authorizing board resolutions, plan documents, summary plan descriptions, committee charters, records/minutes of fiduciary actions, and third-party contracts
- Where inconsistencies are identified, amendments and/or corrective actions should be adopted

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