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What the Fiduciary Are you Talking About?

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The following article recently appeared in the Connecticut Business and Industry Association's (CBIA) 13th edition of the Annual Benefits Survey Report.

Background

Since the passage of ERISA in 1974, plan sponsors, both for-profit and non-profit, have been wrestling with who is and who is not a fiduciary of their retirement benefit plans. Let's start with ERISA and its definition. Section 3(21) of ERISA defines a fiduciary as anyone who:

Exercises any discretionary authority or discretionary control over the management of the plan or exercises any authority or control over the management or disposition of plan assets.

Provides, or has any authority or responsibility to provide, investment advice for a fee or other compensation, direct or indirect, with respect to plan assets.

Has discretionary authority or discretionary responsibility in the administration of the plan.

In addition, a plan must have at least one fiduciary named in the plan document. Either a named person or entity (or persons or entities) must have the authority to manage and control the operation of the plan. The definition seems harmless enough, and it seems straightforward. However, the closer you examine administration and operation of the plan, the more complicated it becomes.

Who is a fiduciary?

Certain individuals are typically always fiduciaries, for example: the trustee; investment advisors; the plan administrator; all members of the retirement or administrative committee; and those who appoint committee members. In addition, anyone exercising discretion or control over the plan or its assets would also be considered a fiduciary.

The plan document and trust agreement will provide answers to many of the questions with respect to who has responsibilities and discretion for the plan administration and investment of the assets. You will often be enlightened (and sometimes surprised) when you re-read those sections in the plan document and trust agreement.

Who isn't?

Accountants, attorneys, actuaries, and other consultants are generally not fiduciaries as long as they are acting in their professional capacities. These individuals do not ordinarily exercise discretion and control over the plan.

However, they may become fiduciaries if they are hired to take on any of the responsibilities identified above and exercise discretion and control over the plan.

“Gray Areas of Fiduciary”

It is sometimes difficult to determine where the Fiduciary Responsibility (FR) lies. However, a thoughtful (dare we say logical) assessment of the situation should give you the appropriate answer. For example,

- 1. Fund Replacement:** If an advisor shows you a single option to replace a poorly performing fund, the advisor has the FR. With multiple options, you have the FR.
- 2. Level of Sophistication:** If you, the client, are deemed to be “sophisticated,” you have the FR.
- 3. Range of Services:** If an advisor is hired for a single task, you retain the FR. If the advisor is on full retainer and responsible for the full scope of services, the Advisor has the FR.
- 4. Determination of the Riskiness of a Fund Option:** If the makeup of the client (blue collar, professional, etc.) determines the riskiness, you likely retain the FR. If the Advisor recommends the same fund regardless of the client, the Advisor retains the FR.

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You’ve just discovered you are a fiduciary; what does that mean?

One of the primary responsibilities under ERISA is the duty to act prudently, because the fiduciary is acting on behalf of the participants and their beneficiaries. The most important aspect of being prudent is to establish, document and focus on the process for making decisions. The decisions you make center around the responsibilities that you now have as a fiduciary, which include but are not limited to:

1. Acting prudently, meaning with the care, skill and due diligence that a prudent person acting in a like capacity and familiar with such matters would use. This rule, sometimes referred to as the “prudent person rule,” bestows a great deal of responsibility on the fiduciary. The fiduciary does not need to be an expert on everything but does need to:
 - a. Engage in a documented prudent process that gathers the important information and evaluates it in order to make a decision.
 - b. Use a process to select investments, service providers, experts and other fiduciaries.
 - c. Oversee the service providers and experts and consider their advice.
2. Acting solely in the interest of plan participants and their beneficiaries. This includes but is not limited to:
 - a. Avoiding conflicts of interest.
 - b. Using assets to only benefit the participants.
 - c. Investing employer or employee contributions quickly.
3. Diversifying plan investments (another important role of a fiduciary). For example, focus on:
 - a. Minimizing the risk of large losses.
 - b. Considering each plan investment and its role in the entire portfolio.
 - c. making sure that there is a wide range of investments available to employees with respect to a defined contribution plan.
4. Paying only reasonable plan expenses. When monitoring expenses the fiduciary should make sure to:
 - a. Evaluate expenses periodically.
 - b. Consider the level of services provided.
 - c. Consider the quality of services provided.

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