



Fiduciary Best Practices

Presented by

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- Review of Best Practices
- Avoiding Litigation
- Steps to Take When Litigation Arises



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- We are seeing more formalized corporate governance structures to eliminate possible conflicts of interest
- Increased use of independent trustees
- Increased use of outside directors
- Conventional management is not enough



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- Increased use of board committees to delineate roles and responsibilities
 - Compensation, Nomination, Audit and Corporate Governance Committees)

- Proper Counseling and Advice
 - Attorneys
 - Financial Advisors
 - Valuation Advisors
 - Third-Party Administrators



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- Communication
 - Accurate and timely communications with employees
 - Consultation with legal counsel
 - Communication between Board of Directors, management, and fiduciaries

- Insurance (D&O and Fiduciary)

- Repurchase Obligation Study



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- Private causes of action likely to increase
- Must report lawsuits to Department of Labor (DOL)
- Disgruntled employees may also file complaints with DOL
- Department of Labor/IRS audits/investigations



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Civil Litigation

- Participant Claims
- Trustee Claims
- DOL/IRS Claims

Criminal Actions-DOL has criminal task force

Participant Suits- recovery of benefits, recovery of funds owed to the Plan or other equitable relief

Class Actions- Stock drop and Excessive Fees



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DOL

- Recovery of money due plan
- Equitable remedies
- Statutory penalties
 - \$110/day for reporting violations
 - 502(I) penalty for fiduciary breach; 20% of recovery amount
- Standing is not an issue
 - ERISA grants Secretary of Labor standing to sue
- Statute of Limitations
 - May be suspended under Tolling Agreement



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- DOL
- Broad subpoena and investigatory powers
- Can lead to criminal indictments in addition to civil penalties
 - Willful violation of ERISA reporting and disclosure requirements – up to \$5,000 in fines per individual, \$100,000 for any other entity, and possible 1 year imprisonment
 - Knowingly making false statements or concealing or failing to disclose any fact needed to prepare ERISA reports - \$10,000 fine, 5 years imprisonment, or both
- Often seeks removal of trustees
- Must report to IRS



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- Valuation
- Get current fair market value of underlying assets
- Careful and deliberate review of valuation report
 - Take notes
 - Ask questions
 - Challenge opinions when necessary
 - Document the process



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Recommendations

- ERISA-required Fidelity Bond
 - Protects against theft of assets
- Fiduciary Liability Insurance
 - Review policy for coverage gaps and restrictions, dollar limitations, etc.
- Indemnification Agreements
 - Advancement of legal fees



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- Results versus Process
 - Plaintiffs sue when stock declines in value
 - Trustee approves valuations that turn out to be wrong
 - Trustee holds stock that declines in value
 - Courts are increasingly concerned with Process
 - Fair market value
 - Good faith determination
 - Investigation



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What to Do Now?

- Check Insurance Coverage
 - Notify insurance carrier of Claim/Suit
- Issue Litigation Hold Memorandum and General Gag Order
- Look at Venue Issues
- Know the landscape if Multiple Parties Sued
- Seek Professional Guidance



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