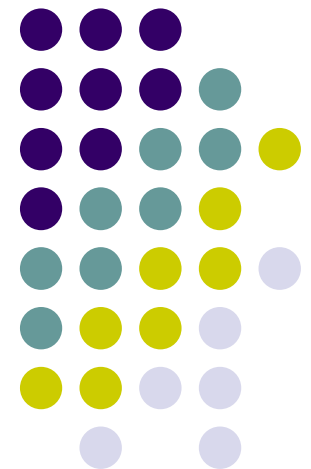


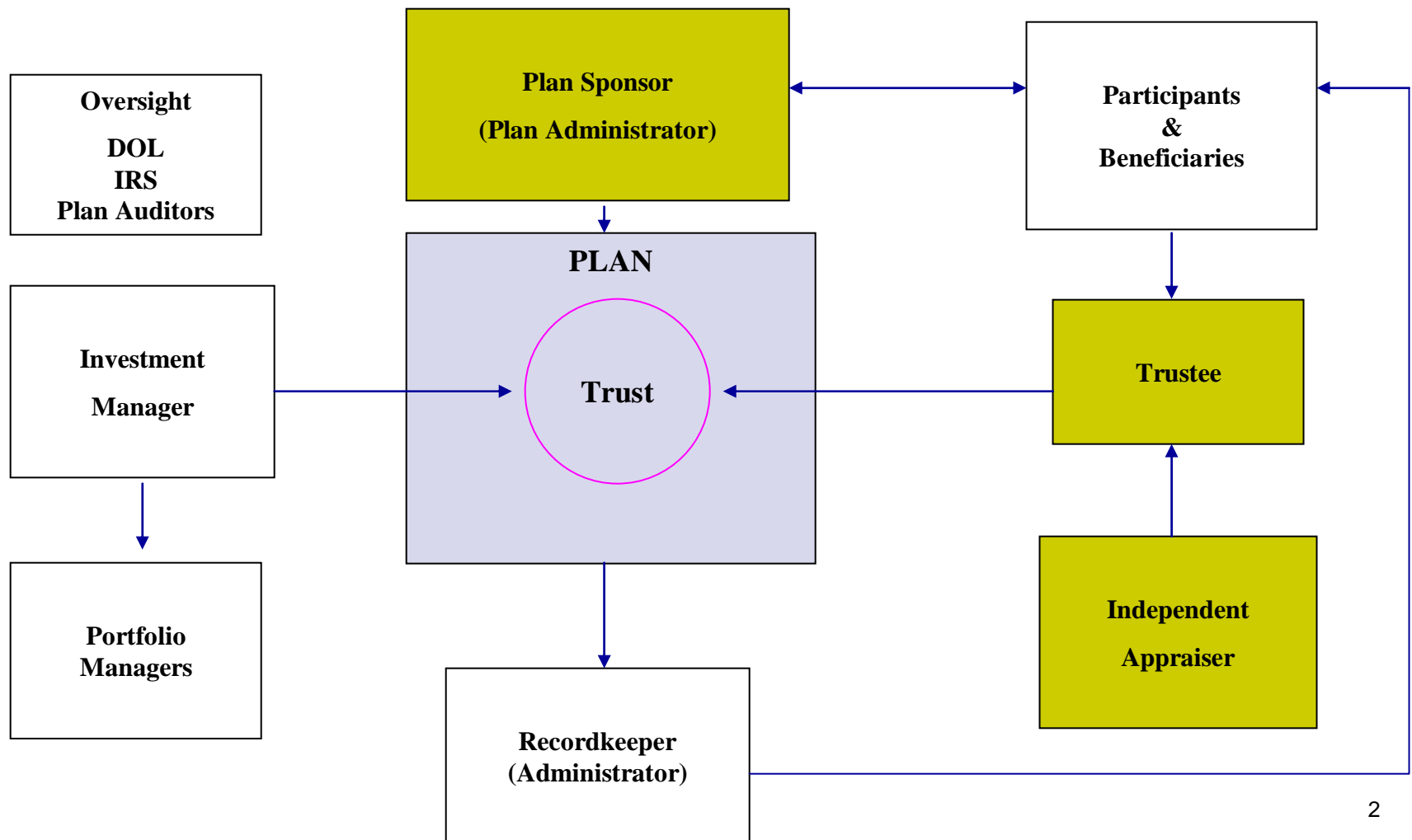
2010 Tri-State Regional Conference and Golf Tournament

“Getting Your ESOP On The Green”

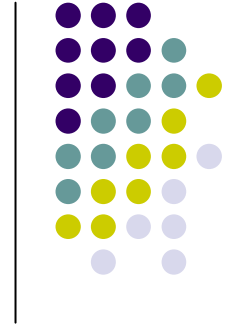
ESOP Fiduciary Liability-
Understanding the Risk and the
Protection Available



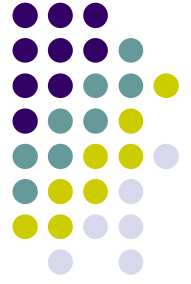
Who are the Fiduciaries?



ERISA Fiduciaries



- Only those persons who deal with an ERISA Plan
 - Definitional Fiduciaries
 - Functional Fiduciaries



Definitional Fiduciaries

- Persons who, by their title, are defined as fiduciaries of the plan
- Plan Document Requirements



Functional Fiduciaries

- Persons who are fiduciaries due to their actions
(Key = discretionary authority or control)
 - Management of the Plan
 - Management of Disposition of Plan Assets
 - Investment Advice for a Fee
 - Administration of the Plan

Fiduciary Act vs Ministerial Act



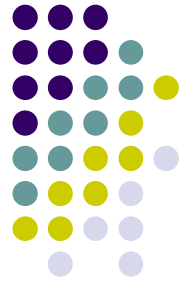
- Persons performing only ministerial duties are not fiduciaries if
 - Have no discretion to make decisions regarding plan assets or administration
 - Do not in fact exercise discretion regarding plan assets or administration

Fiduciary vs Settlor Functions



- Certain functions related to the plan are non-fiduciary but rather are settlor functions
- Investment decisions are always a fiduciary function
- Administration is only a fiduciary function if there is discretion

Problem Areas for ESOP Fiduciaries



- Arbitrary and Capricious Decision Making
 - Best Interest Test
 - Legal Requirements
- Duality of Service – The Problem of Wearing “Two Hats”
- Business Failures Become Plan Failures



Understanding Your Role

- Board of Directors
 - Fiduciary responsibility to shareholders vs. ESOP participants
 - ESOP Fiduciary Roles
 - Appoint the ESOP Committee
 - Duty to Monitor
 - ESOP Non-Fiduciary Roles
 - May give rise to corporate fiduciary duties
 - Decisions on corporate actions
 - Select officers
 - Compensation decisions

What Can a Fiduciary do to Prevent Claims that Result From Business Failures?



- Employee Buy-In
- Employee Education
- Employee Training

What Can a Fiduciary do to Prevent Claims that Result From Business Failures?



- Seek Professional Help
 - Attorneys
 - Financial Advisors
 - Valuation Advisors
 - Third Party Administrators
 - Independent Institutional Trustees

What Can a Fiduciary do to Prevent Claims that Result From Business Failures?



- PROCESS
- PROCESS
- PROCESS
- DOCUMENT
- DOCUMENT
- DOCUMENT



Procedural Prudence

Independent Transactional Trustee

- Independent Financial Advisor
- Trustees Legal Counsel
- Treat Transaction as if you were buying or selling the company (what would you want to know)
- Arms length negotiation
- Fairness Opinion



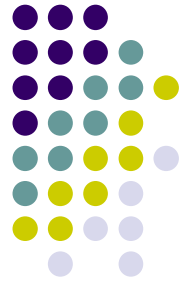
Procedural Prudence

Ongoing Directed Trustee

Pre-engagement for internal approval we review:

- Most recent valuation and most current financials since valuation
- With the financials, we pull their industry benchmarks off of First Research
- Plan document
- 5500s pulled off of FreeERISA
- We research information using the company's website if applicable
- Discussions with Co. including management, board composition, financial outlook

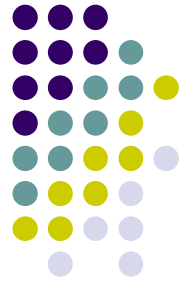
Procedural Prudence



Post-engagement we review:

- Most recent allocation report(s)
- Any loan documents, stock purchase agreements, etc.
- Any repurchase obligation studies
- Most recent trust statements
- Summary plan description
- Check for IRS determination letter
- More recent 5500s not available from FreeERISA
- Articles and Bylaws
- Collect stock certificates

Fiduciary Liability Insurance



Who/What is Covered?*

- The Plan(s)
 - ESOP
 - Other Retirement Plans
 - Health/Welfare Plans
- Plan Sponsor or Employer
- Individual Persons

** Not to be confused with the ERISA bond!*

Fiduciary Liability Insurance



Insured Persons (Fiduciaries) are:

- Directors
- Officers
- Partners
- Trustees
- Employees
- Outside Trustees (maybe)

Of the Plan Sponsor or Plan

Fiduciary Liability Insurance



What is covered?

- Alleged or actual violation of responsibilities or duties imposed on fiduciaries by ERISA
- Alleged or actual act, omission, error, breach of duty in the administration of the Plan.
- Any other matter or claims against any insured solely by reason of their status as a fiduciary

Fiduciary Liability Insurance



Typical Exclusions

- Any Insured gaining any profit or remuneration not entitled to.
- Fraudulent or criminal acts*
- Intentional non-compliance with any statute or regulation by an insured
- Prior or pending civil, criminal or administrative proceeding
- Bodily Injury, property damage, mental anguish, libel or slander
- Pollution
- Benefits paid or owed

*Exclusion applies only if adjudication determines acts did in fact occur.
Wrongful Act would not be imputed to other insured's

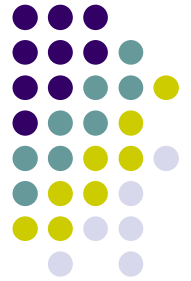
Fiduciary Liability Insurance



Considerations:

- I. “Claims Made” Form
- II. Waiver of Recourse Against Fiduciaries
- III. Policy Limits
- IV. Premiums
- V. Underwriting Requirements

Fiduciary Liability Insurance



I. The “Claims Made” Form:

1. Coverage Trigger: For a claim to be considered covered, it must be filed with the insurer while the policy is in effect or during the *Discovery or Extended Reporting Period* pertaining to a Wrongful Act occurring on or after the policy’s *Retroactive Date*, if any.
2. Prior Acts Coverage: Generally, policies will provide coverage for acts prior to the inception date of the policy. However, policy will not cover prior acts declared in the *warranty portion* of the policy application that could lead to a future claim on the policy.
Note: Renewal Applications will not include a *warranty question*.
(See item #4 “Coverage Continuity” on next slide)

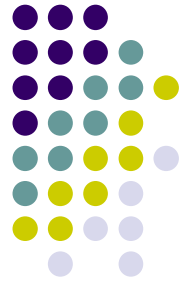
Fiduciary Liability Insurance



I. “Claims Made” Issues, cont.

3. Pending & Prior Litigation (P&P) Date: Will not cover any claims or litigation filed against insured prior to that date. Date will be shown on the Declaration Page of the policy.
4. Coverage Continuity: Addresses both Retroactive Date and Pending & Prior Litigation Date. If changing insurers, make sure the new insurer will adopt the same Retroactive Date, if any as well as the same P&P Date. Have new insurer accept a completed and signed “renewal application” or agree to waive the warranty questions on their main form application regarding previous claim activity.

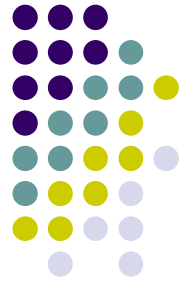
Fiduciary Liability Insurance



I. “Claims Made” issues, cont.

5. Extended Reporting or Discovery Period: If policy is ever cancelled or non-renewed for any reason, insured has the right to purchase from the insurer, an Extended Reporting Period. This allows an insured to file a claim after the policy has been cancelled or non-renewed during a specified time for a Wrongful Act which occurred prior to the date of cancellation or non-renewal. Extension usually is one, two or three years. Additional premium is required.
6. Change in Ownership: Should the insured be acquired, the policy will automatically go into the Extended Reporting or Discovery Period to cover claims involving the prior company or plans. New Company must purchase their own insurance.

Fiduciary Liability Insurance



II. Subrogation and Indemnification

- Review Insurance Policy language on Subrogation against Plan Fiduciaries. May depend on who paid the premium. “Waiver of Recourse” Purchased?
- Does the Plan Sponsor indemnify their Outside Trustee (if any)? Will the Plan Sponsor’s insurance respond? Does the Outside Trustee carry insurance?
- Who’s insurance is primary if there’s a claim from a plan participant or other source? The Outside Trustee’s or Plan Sponsor’s?

Fiduciary Liability Insurance



III. Policy Limits:

- No set formula widely used.
- Usually start at \$1,000,000
- Is policy limit combined with other coverage's such as D&O or EPLI?
- Keep in mind that defense costs (attorney fees) in most policies erode the limit of liability.

Fiduciary Liability Insurance



IV. Policy Premiums:

- Based on size of Plan Assets and Financial condition of Plan Sponsor.
- Number and type of Plans covered.
- Limit of Liability and whether it is shared with D&O and EPLI.
- Retentions- although not a significant factor in reducing (or increasing) premiums.

Fiduciary Liability Insurance

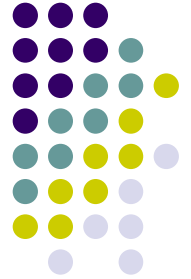


V. Underwriting Requirements:

1. Completed and Signed Fiduciary Application
2. Copy of most recently filed Form 5500
3. Copy of most recent Financial Statement
4. ESOP Questionnaire
5. Copy of Share Valuation Report

Note: 4 & 5 may not be required by all insurers

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