CENTRAL VIRGINIA EMPLOYEE BENEFITS COUNCIL MEMBER MEETING

RETIREMENT PLAN INVESTMENTS AND ERISA FIDUCIARY OBLIGATIONS

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- **Who's a fiduciary with respect to investments?**
  - Duties: (1) prudence, (2) loyalty, (3) diversify, (4) follow plan documents, and (5) avoid prohibited transactions.
  - Liability is personal and penalties are substantial: restore to plan any losses resulting from breach and any profits made through use of plan assets; 20% DOL civil penalty for fiduciary breaches; 15% IRS prohibited transaction excise tax; claimant's attorney's fees; criminal penalties for egregious violations.
  - ERISA 402(a) named fiduciary – (usually) the employer.
  - ERISA 3(16) plan administrator – (usually) the employer, don't confuse with "TPA."
  - Trustee
  - ERISA 3(21) investment advisor – provides investment advice for a fee but has no discretionary authority.
  - ERISA 3(38) investment manager – if properly appointed, appointing fiduciary not liable for prudence of investment manager's decisions.
  - Particular positions: individual corporate directors and LLC managers; plan/investment/ administration committee members; individual officers and other employees delegated responsibility for plan matters.

- **Participant-Directed Investments**
  - ERISA 404(c) protection if you offer a broad range of alternatives sufficient to provide a reasonable opportunity to (1) materially affect potential returns and control risk, and (2) choose from at least three diversified alternatives with materially different risk and return characteristics. Disclosure obligations apply.
  - Qualified Default Investment Alternative (QDIA) protection for passive participants.
  - You are still on the hook for the plan lineup. Must monitor options and remove any that have become imprudent.
  - Self-directed brokerage <u>accounts</u> not a panacea.

- **Trustee Duties**
  - Begin and end with the plan document and trust agreement. *Plus* the service agreement.
  - Directed vs. discretionary trustee – know which you're getting.
    - *Discretionary trustees*: Full fiduciary responsibility for their areas of responsibility. Typically an individual who's an officer or other employee of the plan sponsor.
    - *Directed trustees*: Not subject to prohibited transaction, may be conflicted, not required to be loyal or function as an expert. Most banks and financial institutions.

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- **Investment Policy Statement (IPS)**
  - Roadmap for fulfilling fiduciary duties.
  - Not required, but a best practice.
  - ***Don't*** simply repurpose an IPS for an individual investor.
    - Points to cover: plan's purpose and whether it has special needs; how assets will be diversified; amount of risk that is acceptable; monitoring of investment performance and service providers; party responsible for voting proxies and voting guidelines.

- **Periodic Review by Trustees and/or Plan Committee**
  - Annual at a minimum.
  - Topics to cover: review and approve prior minutes; report from investment consultant; review IPS, if plan has one; assess investment performance and fees and adjust as appropriate; review service provider compensation; monitor service provider performance; review regulatory changes affecting responsibilities; demographic analysis (participation rates, elective deferral percentages, fund utilization by different populations), participant investment education, and participant communications.
  - ***Document*** analysis and conclusions.

- **DOL Fiduciary Rule** – Makes more service providers ERISA fiduciaries by expanding what constitutes investment advice; imposes higher standard of conduct and puts procedural protections in place for advisors compensated through commissions and similar incentives; extends coverage to IRAs.

  - Now in effect:
    - Broadened definition of investment advice.
    - Impartial conduct standard for commission-type compensation: (1) provide prudent advice that is in retirement investor's best interest, (2) charge no more than reasonable compensation, and (3) avoid misleading statements.

  - Delayed until July 1, 2019, subject to complying with impartial conduct standard:
    - *Best Interest Contract (BIC) Exemption* (allows commission-type compensation even though a fiduciary) – Enforceable written contract with IRA owners; policies and procedures that meet specified conflict-mitigation criteria; written warranty with IRA owners that the financial institution will comply with required policies and procedures; and other disclosures.
    - *Principal Transactions Exemption* (allows transactions involving a sale from or purchase for a financial institution's own inventory) – Written contract and policies and procedures mirroring BIC Exemption.
    - *PTE 84-24 amendments* (advisory transactions involving insurance and annuity contracts and mutual fund shares) – Effectively imposes BIC Exemption on transactions involving fixed annuity contracts and variable annuity contracts.

The foregoing is provided for general informational purposes only. It should not be relied upon as legal advice. ERISA is a technical law and contains numerous fact-specific exceptions and special provisions that may be triggered in particular circumstances.