USI CONSULTING GROUP

Fiduciary Governance

The purpose of this communication is to provide some general principles regarding the plan governance structure for retirement plans.

1. Fiduciary Duties under ERISA and Training

ERISA imposes four general requirements on fiduciaries, all of which are framed within an overarching command that the fiduciary discharge his or her duties with respect to a plan solely in the interest of the participants and beneficiaries: a duty of prudence, a duty to act for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan, a duty to diversify investments to minimize the risk of large losses except to the extent it is clearly prudent not to do so, and a duty to administer the plan in accordance with the plan's instruments insofar as such documents and instruments are consistent with the provisions of ERISA.

In addition to these general fiduciary standards, ERISA includes a list of absolutely prohibited transactions between an employee benefit plan and parties-in-interest, which are persons with a pre-existing relationship with the plan. Unless a specific exemption applies, a plan fiduciary that knowingly causes a plan to engage in a prohibited transaction is liable for any harm to the plan, regardless of whether the fiduciary's actions were prudent and made solely in the best interests of the participants.

A key to satisfying the fiduciary responsibilities of ERISA is to understand what those responsibilities are and how they apply. It is recommended that your plan fiduciaries receive regular training on ERISA's requirements and the fiduciary standards of care. This helps to reinforce plan governance and decrease exposure to fiduciary liability. The Department of Labor has focused attention on the need for adequate fiduciary training for committee members, and many plans offer occasional fiduciary training programs, especially when new members are added.

2. Who Should Be Selected as Named Fiduciary and Plan Administrator?

There are no hard fast rules as to who should serve on a plan administration committee, and who will act as the "plan administrator" and "named fiduciary" of an ERISA plan*. The only statutory rule of application prevents persons who have been convicted of various criminal offenses from serving as ERISA fiduciaries. Additionally, any individual, named or otherwise, having discretion in administering and managing a plan or controlling the plan's assets makes that person a fiduciary to the extent of that discretion or control.

In terms of other qualities, a candidate must be willing to exercise independent judgment -mere figurehead or persons who will rubber stamp the desires of the plan sponsor should be avoided. Fiduciary attributes would include strength of character, practical wisdom and mature judgment. The candidate must have adequate time to devote to plan matters and not have any conflict in serving as a plan fiduciary. Problems can arise when committees are too large and diffuse, and cannot meet on a regular basis. This stagnates the decision- making process. If the committee is not meeting frequently enough to consider certain recommendations or investment advice, this leaves the committee vulnerable to potential fiduciary liability for failing to take action or have a decision-making process regarding the issues that are presented to them.

It is therefore important to select committee members who are willing to be involved, to attend meetings, to review meeting materials in advance, to ask questions and engage in discussions and decisions. Members need to understand their duties and be committed to active participation, otherwise it becomes difficult for a committee to act prudently.**

Typically, the Board of Directors, or senior management select the members of the committee. In general a committee consists of three to five people, and there may be one or more nonvoting members, such as human resources personnel who serve as secretary or attend to provide additional information concerning delegated administrative duties. It is a common

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practice to have a single committee of plan fiduciaries responsible for overseeing all aspects of the plan, including both plan administration and plan investments. In some cases, plan sponsors create two committees: an administrative committee responsible for daily operations of the plan (plan reporting, plan interpretation and claims process, hiring service providers) and an investment committee responsible for investment selection and monitoring, the selection and monitoring of investment advisors, and the adoption of an investment policy statement.

3. Committee Operation

To satisfy an ERISA fiduciary requirement, committee members should acknowledge their fiduciary status in writing. This is typically accomplished through a board resolution with an acknowledgement by the fiduciary accepting the appointment in writing.

Plan committees should be governed by a charter that clearly delineates respective duties. The plan charter should define the committee structure and its responsibilities. Documentation may include the number of members, the required presence of members, the purpose of frequency of meetings, voting procedures and guidelines, as well as the procedure for generating minutes for each meeting.

Frequency of meetings is important, and it is common to require meetings at least quarterly. In addition, committees should call off-schedule meetings when necessary (e.g., in cases of extraordinary market or plan events). Documenting committee considerations and decisions in plan minutes is paramount for limiting fiduciary exposure. The ERISA prudence test focuses on the conduct of plan fiduciaries when making a decision, and not on the result. To take advantage of this, each committee meeting should be documented with minutes to be reviewed and approved by the committee. Copious detail is not required, but there should be a clear and concise record of who attended the meeting, high-level descriptions of issues discussed, and action items agreed upon.

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In conclusion, the importance of a formalized, well-thought out and well-organized fiduciary governance structure has become more and more clear in light of the numerous fiduciary lawsuits that have been brought in recent years. Commitee members should be aware that as fiduciaries they are potentially liable for the improper actions or inactions of their co-fiduciaries. For example, concealing the breach of another fiduciary or failing to correct a plan failure caused by another fiduciary.

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