Today’s Presenter

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- National Practice Leader – Gallagher Retirement Services
- President GBS Investment Consulting, LLC
- Gallagher has more than 1600 Clients nationally with more than $46.9 Billion of assets under care.
- Our Expertise is specialized across 401(k), 403(b), Defined Benefit and 457 plans
Agenda

• Committee Risk Trends
• ERISA vs. Non ERISA and what it really means
• Managing Risks for Committees
• Committee Standards for Procedural and Substantive Prudence
Amount Spent Worldwide On

- A. Home Furnishings
- B. Cell Phones
- C. Take-out Coffee
- D. Fine Art

In $ Billions

<table>
<thead>
<tr>
<th>Year</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>2.5</td>
<td>3.5</td>
<td>4.0</td>
<td>6.3</td>
<td>9.2</td>
<td>8.2</td>
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</tbody>
</table>
Metropolitan areas ranked by:

A. 1-yr decline in median home price
B. 3-yr decline in newspaper circulation
C. 5-yr decline in tourism
D. 10-yr decline in motor vehicle fatalities
$ Spent on:

A. Bank Bailouts
B. Senate Earmarks
C. ERISA Class Action Settlements
D. Grande Lattes

Source: Fiduciary Counselors
What does this chart show?

A. QE1  
B. QE2  
C. GRS Retirement Plan Assets  
D. DoL ERISA Monetary Recovery

Source: US Department of Labor, EBSA
Number of:

A. Per Capita Foreclosures
B. Financial Institution Closings
C. ERISA Civil Lawsuits
D. Big Macs sold in Billions

Source: www.PACER.gov
Securities Litigation on the Rise

![Bar Chart: Securities Suits Filed]

- **2007**: 845
- **2008**: 965
- **2009**: 1171
- **2010**: 1196

*Source: 2010 a Record Year for Securities Litigation: An Advisen Quarterly Report*
Types of Security Suit Filings - 2010

- Breach of Fiduciary Duty: 33%
- Derivative Action: 11%
- Other: 16%
- Securities Class Action: 6%
- Securities Fraud: 34%

Source: 2010 a Record Year for Securities Litigation: An Advisen Quarterly Report
Committees Risk Trends in Retirement Plans

- Size of market
  - $9.3 trillion in Retirement Plan Assets
- Defined Benefit Plan Underfunding
- Financial Pressures on Religious Entities
- Committee Concerns
  - Solely in the interest of participants and beneficiaries
  - Free of Conflicts of Interest
- Legislative & Litigious environment
  - Media Attention
  - Committees and Liability
- Aging US Population and the lack of adequate retirement savings
<table>
<thead>
<tr>
<th>Economy/Markets</th>
<th>Business Environment</th>
<th>Legislation/Regulation</th>
<th>Retirement Plan Design/Issues</th>
</tr>
</thead>
<tbody>
<tr>
<td>National / International Government Debt</td>
<td>Increased Merger and Acquisition Activity</td>
<td>Lifetime Income Disclosure Act</td>
<td>Defined Benefit Plan Underfunding</td>
</tr>
<tr>
<td>Future Individual State and Federal Tax increases</td>
<td>Efficiency and Scale for Survival</td>
<td>401(k) Fair Fee Disclosure Act</td>
<td>Increased DoL Audits: 401k/ Non Qual/ 403b</td>
</tr>
<tr>
<td>Personal Debt/ Consumer Spending</td>
<td>HR Staff Decreases</td>
<td>Retirement Fairness Act</td>
<td>Automatic Enrollment</td>
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<tr>
<td>Unemployment – U3 vs. U6</td>
<td>Age Wave Evolution – Grey Tsunami</td>
<td>Investor Protection Act</td>
<td>Excessive Fee Lawsuits</td>
</tr>
<tr>
<td>Housing Market/ Foreclosures</td>
<td>Increased Taxes</td>
<td>Dodd-Frank Wall Street Reform and Consumer Protection Act</td>
<td>C&quot; level &amp; Risk Managers: decision makers – HR: Day to Day operations</td>
</tr>
<tr>
<td>Commercial Real estate</td>
<td>Need for Proactive Consulting, not just Information Delivery</td>
<td>Defined Contribution Plan Fee Transparency Act</td>
<td>Fiduciary Duties, Responsibilities, Liabilities</td>
</tr>
<tr>
<td>Small Business Volatility</td>
<td>Not for Profits – Donation Pressure</td>
<td>12b1 Fees regulations</td>
<td>Life Model/Style/Target Date Fund Issues</td>
</tr>
<tr>
<td>Fed Interest Rates</td>
<td>Pressure on Margins and Profits for corporations</td>
<td>ERISA 408(b)(2)</td>
<td>Participant Education, Communication Strategy</td>
</tr>
<tr>
<td>Inflation vs. Deflation</td>
<td></td>
<td>EBSA Definition of Fiduciary Regulation/ SEC Fiduciary Standard</td>
<td>Participant Fee Disclosures</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Target Date Fund/ QDIA Legislation</td>
<td>Plan running in compliance with plan documents</td>
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</table>
ERISA VS. NON ERISA AND COMMITTEE DUTIES
Definition of a Fiduciary

• Under ERISA, a fiduciary is anyone who:
  – Has any discretionary authority or control over the plan’s management
  – Has any discretionary authority or responsibility in the administration of the plan
  – Has discretionary authority or control over the management of plan assets
  – Provides investment advice for a fee
  – Is identified as a fiduciary in the plan document

A fiduciary is determined by actions not by title

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1 Employee Retirement Income Security Act (“ERISA”)
Religious Entities are at Risk

- Religious entity plan Trustees/Committees are at risk of fiduciary claims from a wide range of parties alleging improper use of retirement plan assets:
  - Plan participants (Individuals)
  - Class Action
  - Beneficiaries
  - Former employees
  - State Attorney Generals
  - Arch Diocesan Chancellors (Daughters of St. Paul vs. Archdioceses of Boston)
3 Categories of Church Plans

- Qualified Plans
- 403b Plans
- Non Qualified plans

Not subject to ERISA unless the church elects to have the plan covered under ERISA (which is rarely done). That's the Code section 410(d) election.
May not be ERISA but Fiduciary Duties within ERISA Still apply as per the courts

Courts may apply ERISA Fiduciary Standards to qualified church plans

- Code section 401(a)(2) - **the exclusive benefit rule** - there are Revenue Rulings that show that compliance with ERISA's exclusive benefit rules (ERISA 403 and 404) would ensure compliance with Code section 401(a)(2)

- Code section 503(b) - **self-dealing rules** (not exactly the same as prohibited transaction rules) where the plan transacts business with a "related party"

- State law preemption - Church plans are not subject to ERISA 514 which preempts state law. **State statutory or common law** that deal with trusts and nonprofit corporations can affect the fiduciary rules. The primary items here deal with the **duty of loyalty** and the **duty to follow the investment provisions** of a statute or trust.
MANAGING RISKS FOR COMMITTEES
Best Ways for Plan Sponsors to Create Fiduciary Liability Protection and Risk Mitigation

- Purchase a Fiduciary Liability Insurance Policy
- Hire a Named Fiduciary
- Hire a 3(38) Investment Manager
- Have your plan comply with 404(c)
- Procedural and Substantively Prudent Processes
Managing Risks for Committees

- Fiduciary Liability Insurance Policy
- 404(c) Protection
  - A long list of requirements
  - Relieves liability for participant decisions
  - DoL does not agree with this protection
- Discretionary Advisor (Named Fiduciary or 3(38) Investment Manager)*
  - Sponsor must relinquish control of plan investment decisions
  - Has the duty to monitor and benchmark the advisor

- Procedurally and Substantively Prudent Processes

* A committee can not completely offload their responsibility. They always have the duty to prudently select and monitor service providers.
Coverages

• E&O/ D&O
• Fidelity Bonding
• Fiduciary Insurance Policies cover:
  • Breach of fiduciary duties Legal Fees
  • Negligent errors and omissions
  • Imprudent choice of service providers
  • Receipt of improper legal advice
  • Improper plan amendments
COMMITTEE STANDARDS FOR PROCEDURAL AND SUBSTANTIVE PRUDENCE
Procedural Prudence

• Duty is described in terms of how a committee must act, and not by the results a fiduciary must obtain.
• The result of prudent behavior is not generally as important as the process by which the committee arrived at the result.
• Courts have measured a committee's use of prudence in carrying out their duties*:
  1. Whether the committee employed the appropriate methods to diligently investigate
  2. Whether the decision ultimately made was reasonable based on the information resulting from the investigation

*Source: Riley v. Murdock
Committee Standards for Procedural and Substantive Prudence

- The Key to mitigating Risk is Procedural and Substantive Prudence
  - Create
  - Document
  - Follow
  - Review
  - Benchmark
Committee Documentation

- Establish Procedural and Substantive Prudent Procedures
- Board Resolution establishing a Plan Committee
  - Committee By Laws
  - Select the appropriate Members
  - Committee member acknowledgement of Fiduciary Role, Duties, Obligations and Liabilities
- Regular Meetings & Minutes
  - Investment Review
  - Discussion/Action Items
  - Recommendations
  - Consistent Diligent Documentation
Fiduciary Risk Mitigation Process

- Fiduciary Overview
  - Fiduciary Obligations

- Plan committees
  - Establishing a Retirement Plan Committee
  - Proper precautions in committee meetings

- Bonding and Insurance
  - Bonding and Liability Insurance

- Timelines and reporting
  - Year end review
  - Compliance Calendar

- Sample Documents
  - IPS Board Resolution
  - Plan Committee By Laws
  - Committee Acknowledgement of Duties Letter
  - Summary of Committee Responsibilities
  - Committee Meeting Minutes

- Checklists
  - 403(b) Compliance Checklist
  - Fiduciary Readiness Checklist
  - Bonding computation worksheet
  - Committee checklist
  - Committee Member checklist
  - Liability insurance checklist
  - E&O and D&O policy checklists
HR Question

• Do you have the following in place?
  – Written Plan Document
  – Investment Policy Statement
  – Committee Bylaws
  – Committee Audit Process
  – Fiduciary Acknowledgement Letters

• When was the last time you reviewed your E&O, D&O, Fidelity Bonding and Fiduciary Liability Insurance policies?

• What processes have you implemented to audit/benchmark your service providers and Fees?
Questions/ Contact Information

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