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2024 Fiduciary Training Series, Part 3 Fiduciary Risk Management

Jennifer Doss: Hello, everyone, and welcome to the Fiduciary Training Series, Part 3, Fiduciary Risk Management. I would now like to introduce Lisa Keith, Senior Management and Retirement Plan Consultant at CAPTRUST. Lisa?

Lisa Keith: Thank you. Hi, and welcome to our quarterly fiduciary training webinar. We're on number seven. Can you believe that?

Time goes by really fast. Again, I'm Lisa Keith, Senior Manager in our Retirement Plan Consulting Team. I'm really excited to be here today, but I'm even more excited that we are being joined by these industry experts to talk about today's topic, Fiduciary Risk Management. Let's go ahead and start with some introductions.

Starting with Dan. Dan Aronowitz is the President of Encore Fiduciary, which is a leading fiduciary liability insurance underwriting company for employee benefit plans. Dan has over 30 years of experience in the professional liability industry as a coverage lawyer and underwriter. He is a widely recognized fiduciary liability expert, thought leader, and advocate for sponsors of employee benefit plans.

He is the author of many publications, including the Fiduciary Liability Insurance Handbook. He is a graduate of The Ohio State University and Vanderbilt University School of Law, and has achieved the RPLU Plus designation from the Professional Liability Underwriting Society. You may also remember Dan from one of our recent Revamping Retirement podcasts or one of his many speaking engagements.

Thank you and welcome Dan. Next is Sterling Perkinson. Sterling is a partner on the Employee Benefits, Executive Compensation, and Tax team of the Kilpatrick, Townsend, and Stockton law firm. As a Risk Counsel, Sterling collaborates with plan sponsors, fiduciaries, and plan service providers to help them achieve their objectives while reducing their risk.

He counsels on a wide range of employee benefit issues, including design and administration of retirement plans, retirement plan investment issues, fiduciary duties and prohibited transactions, IRS and DOL audits, pension de risking activities, and benefits in executive compensation aspects of mergers and acquisitions.

Welcome and thank you again, Sterling. Finally, but certainly not last, Jennifer Doss. Jennifer is a Senior Director and Practice Leader of CAPTRUST Defined Contribution Practice. She is responsible for the development of defined contribution services to address the needs of CAPTRUST clients. Jennifer has been with CAPTRUST since 2007.

She received a Bachelor of Science degree in Accounting with a concentration in Finance from North Carolina State University and holds the following designations. She is a Chartered Retirement Plan Specialist, a Qualified 401k Administrator, and a Tax Exempt and Governmental Plan Consultant. She is also a frequent co host of our Revamping Retirement Podcast.

And if you haven't heard her in the past, I definitely encourage you to listen to her. She's great. We do have a lot of information to cover today as indicated at the beginning of the webcast, we will not be taking questions during our broadcast, so we do encourage you to submit those questions in that chat box, so we will get back to you after our training today.

But let's go ahead and get started. Sterling, I'm going to go ahead And ask you what kind of risks are fiduciaries managing nowadays? And we're talking about all size plans, from the smallest plan to a jumbo plan. So thank you.

Sterling Perkinson: Certainly, Lisa. So I'll talk, if we go to the next slide, I'll talk about the risks that fiduciaries are managing.

And first of all, I'll talk about audit risks. You may have a Form 5500 audit on an annual basis where you've got a qualified accounting firm that's going to come in and they do testing of your plan to ensure it's in compliance. At the end of the audit, they issue a letter saying that in their opinion the financial statements are not materially misstated and then you can file your Form 5500.

That's one type of audit, but it's not the type of audit that I'm going to address now. I'm going to focus on IRS and DOL audits. These are regulatory audits that in some ways can be similar to the Form 5500 audit, but it's important to keep in mind that they can have different focuses, different areas of emphasis, and just because you're getting a clean audit on your Form 5500 audit, that

doesn't guarantee that there's not going to be issues in an IRS or Department of Labor audit.

So I'll talk a little bit about what kind of issues we may have there. First, I want to talk about how these audits come about. There's a couple of ways that audits can get initiated. One is just through a process of random selection. The IRS and Department of Labor are auditing plans like yours and at some point your number just gets called and there's very little you can do about that.

But another way is part of form 5500 reporting. You're reporting your form 5500 and the regulators are reviewing that and they're looking for issues. And so if they sense that there's some kind of compliance issues with the form 5500, it could lead to an audit. If you have a 401k plan where you're not depositing your employee contributions on a timely basis and they're seeing that's a recurring issue or not properly corrected, that could be the trigger of an audit.

Sometimes it's something else like they may be looking at the expenses that you're reporting and they may sense that there's an issue with your expenses and then they start an audit. They're going to be looking at everything in an audit. Although it may be a small thing that triggered the audits.

Audits, as you imagine, can be very expensive. If you get a letter saying you're under audit, it's going to have a document request and it's going to be asking for a laundry list of items. Audits, even clean audits, can take up a lot of your internal resources. They can require a lot of support from your record keeper, your TPA, and sometimes from your legal counsel as well.

And if there's items that are found in the audit, The regulators can require those things to be corrected. A lot of times there's really expensive correction costs involved with the audit. And sometimes there can be sanctions assessed for compliance issues. Now I want to emphasize that correcting things under audit can be very expensive.

There are alternatives under IRS and Department of Labor that both offer voluntary correction programs and they both encourage you to use those programs to ensure your compliance. The IRS's program, the Employee Plans Commission, Compliance Resolution System allows for corrections of most issues and with the Secure 2.

0 legislation that came out recently, most issues can be self corrected under the IRS's correction program. The DOL has other correction programs. They have a voluntary fiduciary correction program that can correct issues like deposits of

employee contributions for a 401k plan. But there's a number of other fiduciary breaches that can be corrected under the DOL program.

And if you correct under those programs, it really reduces your audit risk. I've had a situation where an auditor was auditing a client, but he told me that they had actually selected them for audit a couple of years before, but they put it off because they had done the fiduciary correction program. And once they did the audit, they took that issue off the table for the audit.

Because they wanted to encourage compliance through the use of these programs. So I'll just mention a little bit about the different focuses of these audits. The Department of Labor is the agency that really has the focus on the fiduciary processes with retirement plans. And so the Department of Labor audits tend to be focused on things like plan investments.

One of the first things that they ask for is your investment committee minutes. They're looking at how you make decisions, How you work with your investment manager. And so that's a big focus. They've had for a number of years a real focus on missing participants. Looking at what kind of steps are being taken to find your missing participants.

They want to match up people who are due benefits from the plans. The Department of Labor takes a really aggressive position as to what your responsibilities fiduciary for locating those participants and getting them into pay status. They're also concerned with things like plan expenses, making sure that all the expenses you pay through a plan are reasonable and that they're appropriate.

You're not charging a plan for things that shouldn't be charged to a plan, like expenses that you incur in a plan design activity. And then more recently, they've been looking at cybersecurity. They're looking at what plans are doing to protect employee data. What happens if there's a cyber security breach with one of your vendors and what steps you've taken to remedy that?

I will say that we've seen the Department of Labor focus more in the pension area to find benefit pension plans. One of the reasons for that is because out of a recent Supreme Court decision, pension plan participants generally don't have standing to sue the fiduciaries of the plan. Because the structure of a pension plan is that if Investments lose value.

The participants don't lose their benefits. It's just the employer has an obligation to make up that through additional funding. Whereas in the 401k plan area, you

have a lot of participant litigation. So the department of labor has seen that participants can't sue pension plan fiduciaries. And so they see as a matter of their resource allocation, that it's very important for them because they still see themselves as really the sole defender of participants of pension plans.

That's a matter of resource allocations. We can see those priorities change at any time, both from the IRS and Department of Labor. IRS audits tend to be more focused on things like compliance testing. They'll look at coverage testing, look at your ADP, ACP testing. They've had a recent focus on ESOPs, which define contribution plans that invest in employer stock.

And they're looking at kind of general plan compliance. Does your definition of compensation, the way you're administering that, is that consistent with what the plan says? So that's an overview of the kind of audit issues we're looking at. If we go to the next slide, I'll talk about what may be looming in your mind, even larger than the audit risk.

And that's the threat of litigation. Litigation, I'm sure as you all know, it's been a very big issue for at least the last 15 years for 401k plans. It started off with stock drop litigation, suits against plans that had employer stock that lost value. But then it's transformed into a focus on fees paid by retirement plans.

And these cases are arguing that fees Paid for record keeping services could be lower. That fees paid for investment funds should be a lot lower. But we're seeing a broadening of the type of claims that are being brought against fiduciaries and 401k plans. And so it's not just about expenses. It's not just about the multi billion dollar plans.

We're seeing these types of claims broadening, and we're seeing them go deeper into the market. At times, even targeting the sub billion dollar plans and even sub 500 million dollar plans. In this slide, I've listed a number of different types of claims that we've seen with 401k plans. I know that this can be a little bit overwhelming and that's by design, but there are a couple of takeaways that I want you to have from this.

Number one is that the best defense to almost all of these claims is that just you follow a prudent process and you've appropriately documented it. And generally to succeed in litigation, plaintiffs need to show that there was some sort of a defect in the fiduciary process that you followed. And so if you're following the right steps, and so if you're making sure those steps are appropriately documented, you're going to be in good shape.

We're going to talk a lot about that later. The other thing that I want to highlight here is that as fiduciaries, it's not just one thing you need to be concerned with. It's not just having a laser focus and keeping expenses low. There's a lot of different things that you need to be focused on as a fiduciary, and it's really more things than you alone could focus on.

And that's why it's really important that you have a good advisor. Who has a method for reviewing all of these things to look at all these things in a very structured methodical basis and to be able to document the review of these types of items. Not every one of these items may be an issue for you, but you want to make sure you've got a comprehensive process as a fiduciary for discharging your fiduciary duties.

ERISA's standard is often known as a prudent expert standard. That doesn't mean that you're expected to be an expert. What it means is that when you're not an expert, you're expected to go out and find experts who can advise you and because that's what it takes to discharge your fiduciary duties. I'm going to talk a little bit about a couple of cases that are important to keep in mind.

One thing I want to mention is that the last Supreme Court case looking at fee litigation was called Hughes v. Northwestern in 2022. It was one of a number of cases that plaintiffs brought against universities with their 403b plans. 403b plans for tax exempt employers are similar to 401k plans and are subject to the same sorts of fiduciary duties.

We were hoping that this Northwestern case, that the Supreme Court would limit what would be necessary for plaintiffs to do. to be able to advance the litigation and fee litigation. Really the objective from the plaintiff's firms is to be able to get past the early stages of litigation, the motion to dismiss the motion for summary judgment.

In those stages, the plaintiffs don't have to prove their claims. What they have to do is to be able to convince the judge that if what they were alleging were true, that they really have a claim. What we were hoping is that the Supreme Court would say would be able to bring those claims forward. The plaintiffs are going to really have to point to a specific defect in the fiduciary process.

Ultimately, the Supreme Court stopped short of that. Their holding in the case was just to say that in a retirement plan, fiduciaries are responsible for making sure that each option is prudent. It's not just appropriate to offer an array of investment options so that participants can make good choices among those options.

As a fiduciary, you have a responsibility for making sure that Each option is prudent. That's an important reminder, but it's not really groundbreaking. It's been really well established in advance of that. However, there was a silver lining in the Supreme Court's decision. I'm going to quote from the opinion here.

What the Supreme Court says is, at times the circumstances facing a fiduciary will implicate difficult trade offs and courts must give due regard to the range of reasonable judgments a fiduciary may make. Based on her experience and expertise. And so the significance of that is the Supreme Court is saying they're really expressing some level of empathy to fiduciaries.

They're saying we're going to look at what would be reasonable for fiduciaries, what reasonable decisions they can make under the circumstances given the choices that they had. So the court is telling the other courts, this is the Supreme Court who's whatever they say is binding on every other court in the nation.

It's telling them that you need to look at what would be a reasonable decision for fiduciaries and not really hold them to an impossible standard. So since this case in 2022, we've seen favorable decisions come out from other courts and we've seen some curtailing of the volume of litigation that we had seen compared to what we'd seen in the years prior.

But this decision has certainly not curtailed it entirely. There are a couple of other cases that I just want to mention that are important cases to keep in mind. One of which is cases involving the BlackRock Target Date Funds. BlackRock Target Date Funds are one of the most popular types of Target Date Funds in the marketplace.

They're passively invested funds, so they tend to be very inexpensive compared to other funds that have active management. What it is, what's key to keep in mind about this is the plaintiffs really tried to make a creative argument here. A lot of the litigation leading up to this has been about alleging that plaintiffs are offering funds that are too expensive.

In these cases, the plaintiffs are arguing you are so focused on offering inexpensive funds that you sacrifice the investment return and your participants suffered as a consequence of that. Most of these cases were not successful, but at least one case they were able to advance beyond a Dan, you've got some thoughts about what that is.

Daniel Aronowitz: Thank you,

Sterling.

There were 12 cases alleging that plan sponsors were chasing low fees and not caring about performance, but the lesson of the two cases that made it pass a motion to dismiss is that. Plaintiffs used the minutes of the plan and said that they didn't review the investment performance.

And so the lesson is that your plan minutes may need to be more robust than previously thought. When we look at the types of cases that Sterling has talked about, it can be very overwhelming, but we think they do fall into three categories. One is your record keeping fees are too high. Your investment fees are too high or your investment performance is too low.

And we do think that the cases are showing some lessons that we can learn from that. On the record keeping fee cases, the courts are allowing most of those to proceed, but we are seeing that as you get to be a larger plan, revenue sharing is something to look at. If you can eliminate revenue sharing, you eliminate some of the risk.

Because plaintiffs can. Use revenue sharing to look like your plan has a higher fee than it probably does because they're not going to give you credit for discounted, rebated fees. It's also very important to come up with some sort of cadence on benchmarking or RFPing your plan administration fees and at least trying to benchmark annually.

With respect to your investment fees are too high, The case has started with comparing active to passive funds and obviously passive funds are lower priced. With active funds, I think the lesson is to look at what cost each of the funds are and is there, have you reviewed the cost efficiency of the fund starting with the share class?

Are you in the lowest net fee share class? And obviously you need help from your investment advisor, that's one. what they're more qualified to do. On investment performance, those are more difficult cases because it's unclear whether something is underperformed. That's going to be very subjective. But the lesson that we're seeing is you need to set the correct benchmark that matches your investment strategy or objective.

Don't let the plaintiff lawyers choose your benchmark. They're going to choose in hindsight whatever did the best over the last 10 years. Document what your benchmark is and have it thoughtful and make sure that it meets your

investment objective. Many of these cases are challenging conservative investment options.

If you have a conservative investment option, which is, makes a lot of sense for your plan participants, make sure you have a benchmark that's documenting that there's some mitigation. What we're seeing is, it questions as to what is underperformance. And you need a watch list with your investment advisor.

And the question is, What is investment underperformance? I would have thought in the past that a one percent underperformance is not underperformance, but the plaintiff lawyers think that's the worst thing ever happened. So the cases are moving the guidance as to what you need to watch on a watch list and how long before you change an investment.

I would have thought in the past that most investments would be tracked over three, five, ten years because you're working for the long term. But the cases are pushing planned fiduciaries to consider replacing investments much more quickly. And we learn in some of the cases that you need to do extra diligence when it's on a watch list.

That, if you have something that's potentially underperformed, you need to document it more closely than anything else that you're doing. And that in the Boston College case where they did have additional due diligence. Also, we're seeing, we, Sterling mentioned the two cases that have got past the motion to dismiss in the BlackRock cases.

Planned minutes need to be more robust than we thought in the past. You need to document that you've reviewed every investment at every quarterly meeting, not just relying on your investment advisor's report. You need to document that you actually reviewed it and your investment policy statement needs to give you as much discretion as you possibly can do.

In the Genworth case, it was arguably too specific and that helped them get past a motion to dismiss. And so we're learning that you need to be agile and watch and learn and be students from the litigation. So that would be some thoughts I would add to what Sterling has put forth.

Lisa Keith: Alright I'm sure that everyone is a little scared right now.

I can't see our attendees, but I can see them squirming a little bit in their seats. Don't write your resignation letters yet. We have some ways that you can

manage that risk. So Dan, if you want to continue on with some ways that you can manage the risk, that would be great.

Daniel Aronowitz: I'd be pleased to.

ERISA, we're always told, and the lawyers tell us, and Sterling has told us, that ERISA is supposed to be a law of process. We're supposed to be judged by whether we had a objective, thoughtful, analytical process, and we're not supposed to be judged like Monday morning quarterbacking on the result. But pretty much every case that Sterling mentioned Is where plaintiff lawyers are saying.

I don't like the result that you had. I think your fees are too high or I don't like your investment result. So they're taking results and using circumstantial evidence to claim that your process wasn't thorough, objective, analytical, and most large plans do have a good thoughtful process and almost all of them have excellent investment managers and like CAPTRUST to help them.

So the problem you have is. How do you prove that you had a, an effective, prudent process? And so the cases have helped us. If you look at the American century case, It showed that American Century had a thoughtful long-term process, and the court talked about that they had fiduciary training in which they were looking at the investment policy statement, that they had periodic meetings, quarterly meetings that were productive, that were where the fiduciaries were active.

not just rubber stamping what their investment advisor says, that they had meeting prep, that they had investment reports from their investment advisor, and that the committee members looked at the and came prepared to the meetings, that they had watch lists, and that they had thorough meeting minutes.

These are some of the, this is where we can learn from the cases. Recently, the Milliman committee was accused of fiduciary malpractice, and they won their trial. And the court said that there were six hallmarks of fiduciary process. Like the American Century case, they met regularly with, to go over their planned investment options.

They evaluated the reasons for any investment underperformance. They retained an investment advisor. They reviewed the investment advisor's report. They didn't rubber stamp it. They had, the minutes show that they had probing questions for their investment advisor and that they were looking at all possible options.

So the point is that these are something that you can study to understand what a judge would see as a prudent fiduciary process. But ultimately, You are being second guessed if you are sued in one of these cases. Usually, they're unfair. You have to prove it. How do you prove it?

I like to say every company says they have a good culture. How do you prove that? You prove it through an employee surveys or whether your employees are leaving. There's objective things that you can do. We all say we have a prudent investment process, prudent fiduciary process. How do we prove it?

In the cases that have gone to trial, many plan sponsors have proved it. And how did they do it? They proved it with track record of changes and understanding that over the last 10 years investment fees have come down. And in plan administration fees have come down. And demonstrating that you have made changes as the times have changed.

In the Cornell case, they were sued and they hired CAPTRUST, the investment advisor you're looking at today. CAPTRUST did a whole analysis in 2013 and then 4 years later made drastic changes and the court credited that. They said the year you brought in the investment advisor and you made changes and that's proof positive that you have strong fiduciary management.

In the Yale case, The allegation was high record keeping fees and they proved and won the case by showing they did consolidate to two record keepers. It took a while but they did do it and that was proof positive. They show that they benchmarked every year and did periodic RFPs, and the E. B. Braun case, they removed underperforming investments, so they just weren't sitting on their hands, and they showed, and so the way to prove for the producer process is the changes you've made over a period of time.

So the next thing is beyond prudent process is there are things that you can go to your lawyer and help you in your plan document. You can look at your plan document and make sure you have every possible way to mitigate risk. Some plans have adopted venue selections. It's obviously better to be sued in Columbus, Ohio than it is the District of Massachusetts.

That's pretty clear. Now that, I think it's untested, but many company plans with participants and retirees across the country, we like arbitration provisions, but those aren't foolproof. And there are limitation provisions. There are ways, but these are not silver bullets. You still need to document a fiduciary process.

So hopefully that gets us started, Lisa, and I'm available to any follow up questions as well.

Sterling Perkinson: And I would just like to chime in, and I think out of these issues that the plan provisions that Dan raises, venue selection, I think can be very important. That it obviously if you're headquartered in Georgia, that you'd rather be sued in Georgia than being sued somewhere else.

That courts in Georgia can tend to be more employer friendly and so depending on where you are with a lot of class action litigation, you have a lot of venue shopping where plaintiffs are looking to file cases in the venue where they would like to go for those judges. There may be some ability to control that as part of these provisions.

If you say you can only sue us where we're located, where our headquarters are, where the plan is administered. The other thing about plan provisions I just want to mention is that many of you may have seen that there have been a lot of cases, more than a dozen cases, and more seem to be coming every day about the use of forfeitures in plan.

And this is one of those new novel cases that plaintiffs firms are bringing up. That generally IRS rules say that you can use forfeitures to either to fund your employer contributions, matching contributions, profit sharing contributions, other employer contributions, or you can use them to pay plan expenses.

And the claims that these cases are making is that when you have that choice in your plan that you have to make that decision in a fiduciary capacity, I'm not going to use those to fund contributions, or I'm not going to use these to pay expenses, and the argument is. is that if you're a fiduciary, you can only act in the interest of the participants.

You can't act in the interest of the employer. And so it's going to necessarily be a breach of fiduciary duty if you have that discretion and you're using that discretion to benefit the employer. That's another issue that looking at the planning document to see can we amend the plan to have a forfeiture provision, the use of forfeiture provision that makes it more clear that's something that the employer decides how those.

Contribution is going to be used in an employer deciding in a way that's clear. It's not going to be a fiduciary decision. It's going to be one of what we call set more functions. The decision employer makes as an employer. What type of

plan we're offering, what we're contributing to the plan should be something that's not subject to the fiduciary standards.

And so that's another example of looking at plan documents and how can we make these plan documents more protective of fiduciaries. Thank you, Dan. That was the point, and I just wanted to raise that in the plan documents.

Lisa Keith: Yeah, thank you. Sterling. Thank you, Dan. Jennifer, can you speak to some additional ways that you may be able to manage that risk?

Jennifer Doss: Yeah, if we want to go to the next page, I can continue on the risk mitigation front, which is probably what's most important to everybody. Because to your point, Lisa, there's a lot that you have to be mindful of. And, we get the question a lot when you saw that list of. Items that, we see lawsuits covering like managed accounts and stable value funds and fees and just feels like it's from every angle.

And we get asked the question a lot of what can we do? It is not surprising that we get asked how to reduce your fiduciary risk and all those things that Sterling and Dan just talked about are. Absolutely true and things that we help our clients with here at CAPTRUST in terms of, robust meeting minutes, making sure we're following a good fiduciary calendar good cadence of when we do certain activities like benchmarking, for instance.

But I'm going to cover two other primary ways that fiduciaries can reduce their fiduciary responsibility, both in the areas of investment selection and monitoring, and then also in plan administration. And then I'll move on to insurance coverage that can protect planned fiduciaries as well. So the first way is that you can reduce fiduciary liability is by engaging a 338 investment manager.

Now most plan sponsors on this call are probably familiar with engaging professional advisors more in a co fiduciary capacity or what they might call a 321 relationship. And the numbers that I'm throwing out here at 338 and 321 are actually references to sections of ERISA which define the fiduciary roles.

The 321 investment advisor that, again, you're probably used to engaging is an individual who renders investment advice to the plan in exchange for compensation. They assume co fiduciary liability with you. They have a fiduciary responsibility to deliver prudent investment advice to you as the planned fiduciary consistent with ERISA fiduciary standards.

They're liable for the investment advice that they provide. And you, as the planned fiduciary, though, retain the ultimate decision making power. And responsibility over those plan assets. In other words, you are not relieved of any fiduciary liability for selecting or monitoring the plan's investment options in that 321 context, but you are certainly being provided with, very prudent investment advice so the plans that you can make good investment decisions along the way.

Now, by contrast an ERISA 338 investment manager does assume sole fiduciary liability for the investment selection and monitoring decisions of the plan and the outcomes that are associated with those decisions. For example, the way this might play out is instead of an advisor coming to your committee and saying, I recommend that we replace this manager with XYZ manager.

And here are some alternatives that we're going to talk through and we can look at, but ultimately it is up to you, the plan sponsor, to make that hiring, firing decision and pick which manager that you want to replace that fund with. In a 338 relationship, the advisor might come to you and say something more we're firing this manager because of We're replacing them with this manager.

Here's why we're doing that in 60 days. Here's the supporting information for our decision. Let us know if you have any questions. We're happy to review that with you. And so you'll notice that's a very different relationship. Now hiring a 338 Investment Manager does offer the plan sponsor, again, the greatest, Protection you can from claims related to poor investment selection and monitoring decisions.

But I do want to emphasize that, your fiduciary protection provided under that 338 context is not absolute. You are still responsible as the plan sponsor for prudently selecting and monitoring the 338 investment manager. So you can never really completely, give away all the risk responsibility.

It's a really crucial step to not forget or misunderstand Just like in a 321 relationship I think Dan was saying, you can't just rubber stamp something, right? You can't just always take whatever your investment advisor gives you and say, yep, no questions, got it, understood. In a 338 relationship, you do still have to ask questions.

You have to understand the methodology that the 338 fiduciary is using to arrive at the decisions that they're making. So it's important to follow a prudent process when you are selecting an investment. 338 Investment Manager. You want to focus on, their experience doing that, their qualifications to perform the

role, the process that they're going to use to make decisions, personnel that are going to be involved, insurance, bonding coverage, and investment methodology that they're going to use.

And then on an ongoing basis, you're going to want to perform due diligence on your 338 Investment Manager, looking at, again, things similar to what I just said, which is process, changes in methodology, any firm level considerations. A way this might play out, for example, what we do for our clients at CAPTRUST for 338 is we proactively complete a annual RFI for them.

We answer questions proactively about changes to our investment philosophy, capital market assumptions, decision making personnel, any firm level updates that might be pertinent to the relationship. So that is how you could transfer some investment fiduciary liability. So if we move on to another way to transfer liability from the planned fiduciary to a third party is by hiring a 316 discretionary administrator.

Actually you can go back to the next page. Also defined under its section in ERISA. So it's a 316 administrator is responsible for the daily operation of the plan. It's identified in the plan document. And if the document does not specifically identify somebody, the plan sponsor is considered to be the 316 fiduciary.

Things that you would be responsible for as a 316 administrator include keeping the plan in compliance with ERISA guidelines, so things that you're probably used to doing, such as filing your government reporting, so your 5500s and signing off on that firing hiring your service providers distributing all your required participant disclosures, determining participant eligibility, overseeing contributions.

Compliance testing, signing off on audits looking at distribution of benefits, things like loans and hardships and quadros. The list is extensive of the responsibilities that you have as a 316 administrator. What you can do is hiring a 316 administrator. Administrator for to outsource some of that really allows the sponsoring employer to delegate some of those responsibilities to a third party expert and then therefore limits your fiduciary responsibility in those areas.

Again, a 316, just like I talked about in 338, it does not completely eliminate a plan sponsor's responsibilities. You still have to prudently select and monitor the 316 administrator under this relationship, just as you did with the 338. Now, 316 outsourcing is just a much less talked about role within the industry.

338 is a little bit more mainstream, so you might hear about that more often, but it is gaining traction as more planned fiduciaries are looking for ways to reduce their overall risk, is what we're talking about today, but also just to get time back in their day sometimes. Because this is a newer area, I think plan sponsors should be very careful to review all the services that a 316 administrator is taking responsibility for and any of those that they will not.

They all offer slightly different services, and some of them can be offered, a la carte, so maybe you can pick a couple of those things that I listed off that are particularly painful for you, and you can alleviate some of that. But you could also keep costs. By only adding a few services.

So some of the services I described earlier may not be a duty that your the 316 is willing to take on, for example. And I think you also want to be really careful reviewing whether you are actually transferring the fiduciary responsibility under the contract. Or whether somebody may be calling themselves a 316 is really just providing oversight of the functions without really taking on any of the legal liability associated with it.

There's a couple of ways that you can transfer the fiduciary responsibility, both on that investment. Selection side and monitoring with the 338 and then some of the administrative roles that you have with the 316. But again, can never completely eliminate your responsibility as the the plan fiduciary.

So before I move on to insurance, which is everybody's favorite topic Sterling, Dan, anything to add on those particular arrangements?

Sterling Perkinson: Yeah, I would just add that with the 316 or 321, Advisor versus a 338. There really is. In either case, there's still going to be responsibility from the plan fiduciary.

If you have a 321 advisor, you're responsible for making sure it's qualified advisor. You're making sure that if you get a recommendation and relying on that recommendation, that you understand the basis of the recommendation very thoroughly. You're expected to ask questions.

You're not expected to rubber stamp Rubber stamping it just is going to be a sign that you're not really taking your duties as seriously as you're expected to do. That doesn't mean that you need to reject reject the advice you're given because it's expert advice, you've hired an expert for this purpose, but it does mean that you need to be asking those questions.

And again, If you're asking these questions, you need to make sure that you're getting credit for what you've done by having that reflected in the minutes and the 338 on the other hand, it's still, you have to keep in mind the plaintiff's attorneys can still bring claims, say, a claim they would have brought to you as a fiduciary making the decision they can still bring similar claims to you.

So just saying, instead of you, you violated your fiduciary duties by making this investment, they can say you violated your fiduciary duties by not appropriately monitoring your investment manager. There's not a lot of case law on that, but the case law that I've seen so far suggests that the responsibility is much more limited if you have a 338.

And so it really is more making sure that the investment manager is doing what they're tasked with doing, but you still may have responsibilities for example, approving. The investment policy statement, making sure that you really understand those recommendations. And so it's important to note that none of these are set it and forget it solutions that any of them will still require an active role from you as a fiduciary.

Daniel Aronowitz: The number one question I get Jennifer in my fiduciary insurance world is if I retain a 330 advisor, will my fiduciary insurance be cheaper? Will I get a discount? And the answer that we give is most likely it does make a difference. You are demonstrating a thoughtful fiduciary process by hiring a qualified investment manager, but all 338 contracts are not the same.

And the key question is what Sterling alluded to If there is a lawsuit accusing you of some fiduciary breach, is the 3 38 indemnifying you and most likely not mo, most likely only indemnifying you if there is a finding of breach of fiduciary duty and most cases are settled, so most cases don't even get that far.

So Mo many of the lawsuits will include both you and the 3 38. So the main purpose of the 3 38 is to reduce. your work and have it done more competently and hopefully lessen the chance of anybody being sued. But it is not a, it is not a silver bullet. The final point is that the other reason that all 338s are not the same is that some 338s use the 338 to then use their own proprietary fund.

And the cases that we've seen recently, whether it's the Reeds case or the Malina Healthcare at Wood case, If you have proprietary investments, the 338 contract has almost no value to you, and so you want a 338 that has no proprietary funds, and I think that's the main lesson of recent litigation with respect to 338.

Jennifer Doss: Yep, those are both really good points. I appreciate you guys weighing in there. Again, I think 338 is a little bit more well known within the industry. It's becoming a little bit more mainstream, but 316 is coming up behind it. It is important to ask a lot of questions with regards to how somebody is performing those duties and to pay attention to your contracts as well.

All right I'm going to wrap up with just a coverage of some of the insurance and obviously, Dan I'll want you to weigh in on this as well because this is what you do. But one other way is bonding and insurance. We still get a lot of questions from planned fiduciaries about the difference between a fidelity bond and fiduciary liability insurance.

To be very clear, fidelity bond is required for all plans that are covered by ERISA. It's required for anyone who handles plan assets. Purpose is to protect the plan from losses due to fraud or dishonesty by individuals with that access to the plan. They can be obtained from insurers that are approved by the Department of Labor and you have to meet certain coverage amounts based on the size of your plan and whether you include company stock and things like that.

In a typical fidelity bond, the plan is going to be the name insured and then persons covered by the bond are individuals who handle funds of the plan. The plan can pay for the bond out of plan assets. That is a question that we also get. Now the bonding requirement is not limited to just plan fiduciaries.

So employees of the plan, the plan sponsor himself, it may also be required for some of these other persons that we were just talking about, such as service providers to the plan. If their duties involve access to the plan. to the plan funds or they have decision making authority that could give rise to a risk of loss through fraud or dishonesty.

So a 338 Investment Manager, a 316 Plan Administrator also a good question to ask in that regard if you're hiring one of those. Now fiduciary liability insurance, on the other hand, insures the fiduciaries and in some cases the plan against losses caused by breaches of fiduciary responsibilities. One is really loss and theft and, one is, hey, you breached your fiduciary responsibility.

A lot of what we were talking about in some of the cases today are, you did not fulfill your fiduciary responsibilities either by selecting appropriate funds or, monitoring it prudently or you didn't, monitor the fees. You didn't, I guess assume that they're, low enough.

This includes, it's not limited to, again, making imprudent investment and fee decisions, negligently handling plan assets. Negligently selecting service providers and while strongly recommended to protect plan fiduciaries, it is not required under ERISA and it certainly does not satisfy the bonding requirement that I just talked about.

Now, the reason it is strongly encouraged to protect plan fiduciaries is that ERISA imposes personal liability on plan fiduciaries who breach their duties. And this means that fiduciaries might have to personally pay for losses that they cause out of their own assets. And fiduciary liability insurance can be a really critical tool to help protect plain fiduciaries from litigation that we've talked about today and claims against them.

Now, the policy typically provides two important benefits. Defense and indemnity. The first is going to pay for your defense of defending yourself against any kind of accusations. And then the second is going to help indemnify you for the violations of duty or negligent administrative acts.

In the event of a settlement or judgment of liability. And again, the primary purpose of the fiduciary liability insurance is to protect the individual liability of the planned fiduciaries who are probably the folks that are on this call today. Now, just like a lot of the other items I've covered today, the services from insurance carrier to insurance carrier can really vary greatly and the devil's in the details there a little bit.

It's important to pay attention to what is covered, what your financial responsibility is in the event of claims or errors and what options you have. Again, different different policies are going to cover a lot of different things. Dan, at this point, I might turn to you and ask you anything you might want to add.

Certainly, this is your area of expertise. Anything else plan sponsors should be looking for when they are purchasing fiduciary liability insurance?

Daniel Aronowitz: Your summary of fiduciary insurance was quite excellent and I agree with everything you said. Fiduciary insurance is not practice insurance.

Doctors need malpractice insurance. Lawyers need malpractice insurance. Fiduciaries and plan administrators need fiduciary liability insurance. We are covering breach of fiduciary duty, claims negligence, and the administration of

the plan. The modern policies, just to circle back on where Sterling started the presentation, also cover voluntary correction programs.

And if the Department of Labor IRS audits you, insurance used to require some form of wrongdoing or allegation by the IRS that you did or DOL that you did something wrong. We now provide pre claim investigation service and the policy kicks in more closely for the voluntary corrections or audits of the IRS.

So it's a very comprehensive policy. The main difference from five years ago for fiduciary insurance is the fiduciary insurers are actively underwriting and trying to figure out if you have followed best fiduciary practice. And so there's now supplemental applications asking for your record keepers plan fee disclosure or participant fee disclosure.

And we are looking at your record keeping fee and your investment fees and whether you're reviewing investment performance. We don't often get to interview the planned fiduciary so we don't know your fiduciary process any more than the plaintiff lawyers know your fiduciary process. These cases are very expensive to defend and so fiduciary insurance has gone from a sleepy backwater unimportant coverage to a very prominent coverage much like your director's and officer's coverage which is protecting you from insider claims or fraud.

of public companies security claims and so you will see more requirements up front but we would tell you to please see that as a positive that you have an active fiduciary carrier that wants to provide quality coverage and you can advocate for yourself in those responses to questions get help from your insurance broker and your investment advisor to advocate for yourself that you have a quality 321 or 330 advisor things that you're doing to lower your risk that you did an RFP or you benchmarked.

And that you reviewed your investment performance or investment changes you made. I would use it as an opportunity to tell your insurance carrier that you should have a low premium and low retentions or deductibles because you're doing a very good job and would become a lower risk.

Sterling Perkinson: And just one other point on the, to tie together the two things in this slide, the outsourcing and the insurance coverage, that if you're hiring an advisor or if you're hiring a 316 plan administrator, they're taking on fiduciary responsibility when you're engaging them, you should be looking at what kind of insurance coverage they have, because if they're standing behind

their work as a fiduciary, you want to see that they're appropriately covered as well.

And that's an important, that's an important step to look at as part of the contracting policy process with them.

Lisa Keith: Okay thank you all very much. I can't believe this time has gone by so fast, but we're at the end of our time. So let's just go through some takeaways from our presentation today.

So as we heard, protect yourself with best in class plan design and prudent, fiduciary process. It's really important. Confirm that you are not uninsured in case things don't go as planned. And then finally, hire those experts to at least, to help at a minimum and consider adding a 338 or perhaps a 316 plan administrator.

So again, we want to thank the panelists for joining. Lots of great information today. We will answer your questions within the next few days, so thank you for all of our listeners and I appreciate your time and we'll see you in the next one. Thank you very much.

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