FIDUCIARY DUTIES – HOWARD COUNTY RETIREMENT PLANS

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What We'll Cover Today

- Who is a Fiduciary?
- What Are Fiduciary Responsibilities?
- Why Should You Care?

Who is a Fiduciary?

A person is a fiduciary to the extent the person:

- gives investment advice for a fee
- exercises discretionary authority or control over the Plan or its assets
- has discretionary authority over Plan administration

Two Categories of Fiduciaries

- Named Fiduciaries
- Functional Fiduciaries
    - Become plan fiduciaries by virtue of exercising discretion with regard to plan administration

PLAN FIDUCIARIES

- Named Fiduciaries:
  - County
  - Retirement Plan Committees
  - Trustee
  - Traditional Investment Managers
  - Investment Consultant
  - Disability Review Board

Named Fiduciary – Retirement Plan Committee

- Committees' Powers
  - Interpret Plan provisions
  - Maintain Plan records
  - Compute and authorize benefit payments
  - Monitor investments
  - Act on investment advisor recommendations

Named Fiduciaries – County Executive

- County's Powers
  - Fiduciary Functions:
    - Retain or discharge trustee
  - Not Fiduciary Functions
    - Amend Plan
    - Determine County contributions
- County Executive's Fiduciary Role
  - Appoint the Employee Representative

Functional Fiduciary (Potential) - Coordinator

Performs day-to-day ministerial functions as delegated by Committee.

Could be elevated to fiduciary status if ministerial functions evolve into discretionary functions.

Non-Fiduciaries

- Counsel - Whiteford, Taylor & Preston, LLP
- Actuary – Bolton Partners, Inc.
- Accountants – CliftonAllenLarsen, LLP
- Pension Oversight Commission
- Hedge fund, private equity and real estate managers

GOVERNING LAW

- ERISA Does Not Apply
  - As a governmental plan, plan is not subject to the Employee Retirement Income Security Act of 1974 (“ERISA”)
- Maryland Law Applies
  - Maryland law sets forth fiduciary standards that apply to the trustees of a public pension plan and other post-employment benefits held in trust – identical to ERISA standards

FIDUCIARY RESPONSIBILITY

- **Administer the Plan in compliance with the Plan document**
  - Avoid special treatment of certain participants
  - Correct any failures to follow terms of the Plan

FIDUCIARY RESPONSIBILITY

- Administer the Plan in compliance with the Plan document
- **Duty of loyalty**

FIDUCIARY RESPONSIBILITY

- Duty of Loyalty
  - to act solely in the interests of the Plans' participants and beneficiaries
  - to act for the exclusive purpose of:
    - providing benefits to participants
    - paying reasonable expenses of administering the plans

Fiduciary Responsibilities

- Loyalty for fiduciaries appointed to represent either the County or an employee group
  - Wear your "fiduciary hat"
  - Confidentiality issues

FIDUCIARY RESPONSIBILITY

- Administer the Plan in compliance with the Plan document
- Duty of loyalty
- **Prudent investor rule**

FIDUCIARY RESPONSIBILITY

- Prudent Investor Rule
  - to act as would a prudent person
    - acting in a like capacity
    - familiar with such matters
  - ". . . a pure heart and an empty head are not enough"
- Importance of investment advisor
- Importance of investment education

FIDUCIARY RESPONSIBILITY

- Administer the Plan in compliance with the Plan document
- Duty of loyalty
- Prudent investor rule
- **Diversify investments**

FIDUCIARY RESPONSIBILITY

Diversification

The investment policy statement (IPS) establishes target allocations and ranges.

Failure to comply with the target allocations and ranges in the IPS is a warning signal.

FIDUCIARY RESPONSIBILITY

- Administer the Plan in compliance with the Plan document
- Duty of loyalty
- Prudent investor rule
- Diversify investments
- **Avoid prohibited transactions**

FIDUCIARY RESPONSIBILITY

- Prohibited Transactions
  - using assets for the fiduciary's own interest or account
  - acting for a person whose interests are adverse to the plan or its participants
  - receiving consideration in connection with a transaction involving plan assets

PROHIBITED TRANSACTIONS

- Examples of Potential Prohibited Transactions
  - hiring investment advisor solely due to local or Committee connections
  - using Plan assets to invest locally, for example, buying County-owned property that will not sell on open market

FIDUCIARY RESPONSIBILITY

The Committees achieve risk mitigation by setting up prudent processes and procedures and following them consistently.

REMEDIES AND PENALTIES

- loss of tax exemption
- civil liability
  - personal liability for losses
  - removal from fiduciary position
  - barred from other fiduciary positions
  - requirement to disgorge profits

CRIMINAL PENALTIES

- San Diego Employees Retirement System (2006)
  - mail fraud, wire fraud
  - theft of honest services
    - Five members of the City of San Diego Retirement System indicted for approving special retirement benefit for one Committee member, improvement of pension benefits of all participants, then covering up plot to hide pension underfunding
    - Charges ultimately dismissed

CRIMINAL PENALTIES

- Maryland State Retirement System (2003)
  - Nathan Chapman – investment manager and Debra Humphries – System trustee
  - Chapman hired as manager of “fund of funds”
  - Invested retirement funds in his own company - eChapman.com – lost System $4.7M (.002 of total assets)
  - Chapman persuaded governor to appoint Humphries to State Retirement System Board of Trustees

CRIMINAL PENALTIES

- Maryland State Retirement System (continued)
  - Diverted funds from eChapman.com to buy gifts for Humphries, with whom he had a “personal relationship”
  - No disclosure of gifts by Humphries on ethics filings
  - Chapman - $5M restitution; 63 months prison
  - Humphries – pled guilty to perjury (lying on ethics disclosure forms and to grand jury); 6 months home detention

PREVENTION OF PERSONAL LIABILITY

- monitor co-fiduciaries
- obtain fiduciary insurance
- indemnity from the County and the Plans
- select competent advisors
- educate fiduciaries

FIDUCIARY RESPONSIBILITY – RECENT CASES

Held: Retirees under defined benefit plans have no standing to bring claim for breach of fiduciary duty if their benefit payments are unaffected because of

- Federal insurance backstop
- Oversight of Plans by U.S. Department of Labor

Neither is applicable to County's Plans

Thole v. U.S. Bank
June 1, 2020

FIDUCIARY RESPONSIBILITY – RECENT CASES

Held: Under trust law, a fiduciary has an ongoing duty to monitor investments and remove imprudent ones.

Tibble v. Edison

May 18, 2015

QUESTIONS?

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