

Best Practices in Trustee Processes and Oversight

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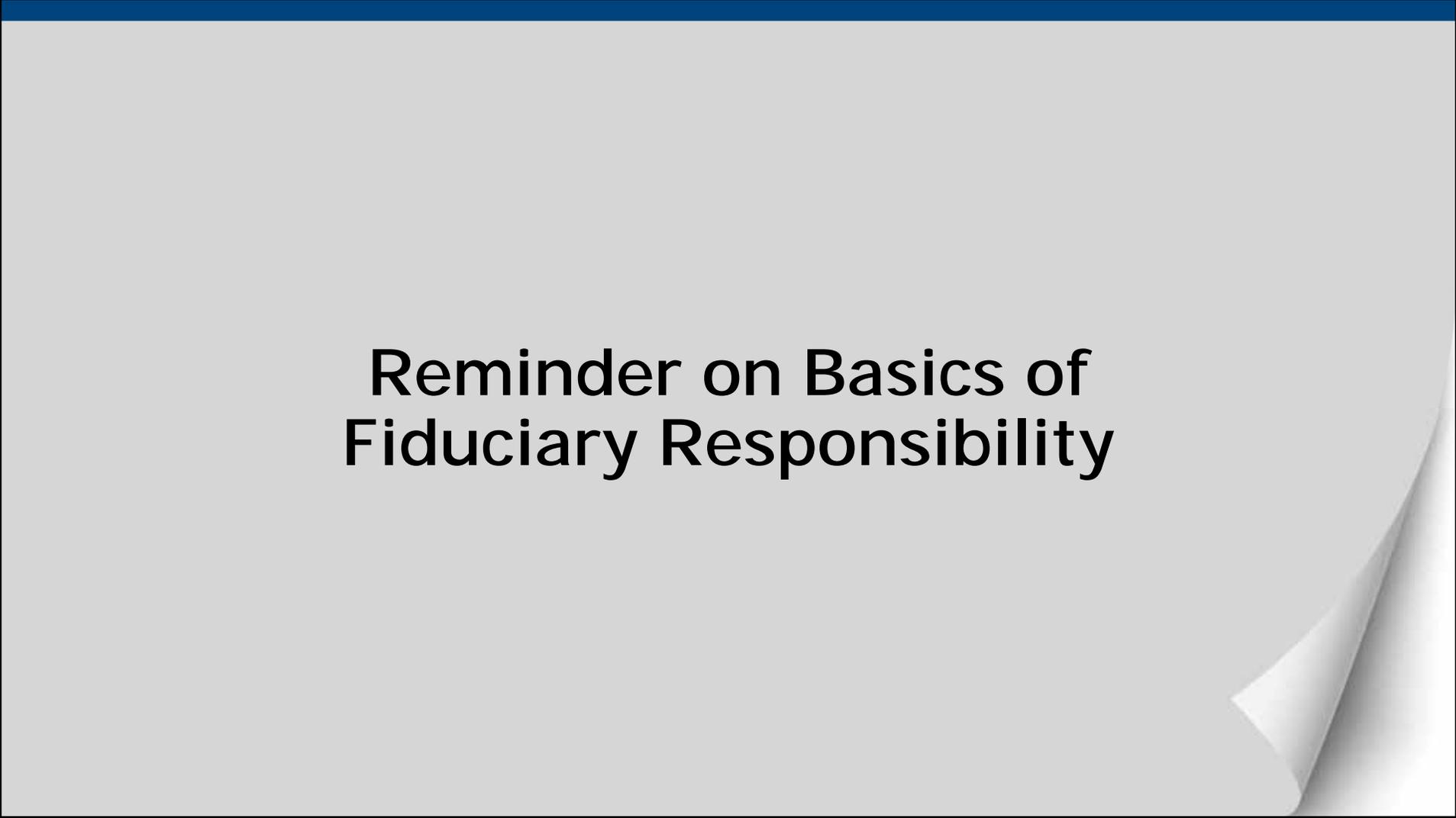
International Foundation
OF EMPLOYEE BENEFIT PLANS 

Agenda

- Reminder on Basics of Fiduciary Responsibility
- Evolution of Fiduciary Responsibility
- Conflicts of Interest and Prohibited Transactions
- Areas Vulnerable to Breach
- Oversight of Professionals, Investments and Fees

Before We Start

- Attorney-client privilege generally
- Fiduciary exception
- Be careful of what you put in writing!



Reminder on Basics of Fiduciary Responsibility

Applicable Law

- Internal revenue code
 - Provides tax breaks for benefit plans
 - Income deferral vs. exclusion
 - Numerous limits and restrictions
- ERISA
 - Sets forth a comprehensive scheme to protect employee benefits
 - Happy 50th birthday!
- State law

Who Is a Fiduciary?

- Functional Test—A person is a fiduciary to the extent he or she:
 - Exercises discretionary authority or discretionary control respecting management of the plan
 - Exercises any authority or control respecting management or disposition of plan assets
 - Renders investment advice for compensation with respect to plan assets
 - Has any discretionary authority or discretionary responsibility for plan administration

Basic Duties

- The exclusive purpose rule
- Avoidance of prohibited transactions
- The prudent man standard
 - Process is key
- Diversification
- Following the terms of the plan

Basic Duties

- Settlor vs. fiduciary functions
- Special DC plan rules
 - 404(c)
 - QDIAs
- Delegating duties
 - To fiduciaries or to non-fiduciaries
- Personal liability/insurance/indemnification

Evolution of Fiduciary Duties

How Have Fiduciary Duties Evolved?

- Shift to DC plans has changed landscape
- Litigation has exploded
 - Fee cases
 - Proprietary funds
 - Investments
 - Medical plan fiduciary issues
 - ESG
 - Forfeiture accounts
 - Actuarial assumptions

How Have Fiduciary Duties Evolved?

- Formal DOL guidance becoming rare
 - Regulations often overturned
 - Chevron deference eliminated
 - Prohibited transaction exemptions rarely granted
 - Sub-regulatory guidance expanded

How Have Fiduciary Duties Evolved?

- DOL audit activity has accelerated
 - Late contributions
 - Missing participants
 - Cybersecurity
 - MHPA
 - ESG
 - Crypto and digital assets



Conflicts of Interest, Prohibited Transactions and Areas Vulnerable to Breach

Conflicts/Prohibited Transactions (PTs)

- Two main types of PTs
 - Party in interest transactions
 - Self-dealing transactions
- Identifying parties in interest
- Common examples of prohibited transactions
- Common exemptions

How to Manage Conflicts

- Ethics policies and disclosure
- Recusal
- Use of independent consultants
- Use of investment managers/QPAMS
- Engage independent fiduciary

Areas of Vulnerability

- Failing to address conflicts
- Not paying attention to detail and to delegates
- Not documenting your efforts
- Going outside the herd
- Not communicating properly with participants
- Cyber, cyber, cyber...
- Fees, fees, fees!

Oversight of Professionals, Investments and Fees

Common Types of Service Providers and Oversight

- Retirement plans
 - Directed trustee/custodian/recordkeeper
 - Investment managers, private funds, mutual funds, CITs, consultants
 - Auditor, actuary, attorney
- Health plans
 - Insurers
 - TPAs
 - PBMs

Investments

- IPS review
- Performance review
- Investment fee and share class review
- Investment structure review
- QDIA review
- Recordkeeping review
- Revenue sharing audit

Non-Investment Service Providers

- Periodic market testing for fees and services
- Comfortability
- Review contracts regularly
- Required disclosures
- Fiduciary training
- Insurance and bonding coverage review
- **DOCUMENT EVERYTHING!**

Key Takeaways

- Stay down the middle
- Be vigilant on fees
- Use outside experts when needed
- Document everything you do...
- But, be careful about privilege issues!

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