

# Shielding Your Agency's 457(b), 401(a), or 403(b) Retirement Plan from Fiduciary Lawsuits

*California Municipal Treasurers Association  
Annual conference, Newport Beach. CA*

*Marcus Wu, April 27, 2017*

# Overview

- Defined contribution plans
- Fiduciary duties
- Recent lawsuits
- Practical Steps
- ERISA 404(c)



# Defined Contribution Plans

# DC Plans = Account Balance Plans

- Defined-contribution plans are “account balance plans”
- Participant’s interest is based exclusively on employer/employee contributions plus forfeitures, adjusted for earnings/loss

# Retirement Plan Types

## Defined Benefit Plans

Pension plans

Cash balance plans

VS.

## Defined Contribution Plans

457(b) plans

401(a) plans

403(b) plans

401(k) plans

Retiree Health Savings Plans

# Investment Structure of DC Plans

## Employer-directed

Employer selects investments for participant's assets

VS.

## Participant-directed

Employer selects funds offered under plan's investment menu, including default fund

Menu may include self-directed brokerage account

Participants direct the investment of their plan account among funds on the menu

If no participant direction, amount is allocated to default fund

# Fiduciary Duties

# California Constitution

- ERISA, a federal law governing employee benefit plans, applies to nongovernmental entities but not to public agencies
- But California law imposes fiduciary standards identical to ERISA under California Constitution, Article 16, Section 17



# Summary of Fiduciary Duties



# Who is a Fiduciary

## Settlor Functions

Benefit design decisions  
Plan adoption  
Plan amendments

VS.

## Fiduciary Functions

Exercises discretionary authority or control over plan management  
Exercises discretionary authority or control over plan assets  
Has discretionary authority or responsibility over plan administration  
Provides investment advice for compensation

# Potential Consequences of Breaching Fiduciary Responsibilities

- Range of potential damages under California law
- Contrast with federal law, which generally limits damages to benefit losses

# Recent Lawsuits

# Recent Lawsuits

- Wave of recent litigation involving nongovernmental 401(k) plans
- The lawsuits have recently seeped over to 403(b) plans: Yale, MIT, NYU, Johns Hopkins, Duke, University of Pennsylvania, Vanderbilt, Emory, and others
- Allege employers violated fiduciary duties w/r/t
  - plan investments
  - plan fees

# Recent Settlements

- *Abbott v. Lockheed Martin*: \$62 million
- *Beesley v. International Paper*: \$30 million
- *Spano v. The Boeing Company*: \$57 million

# Common Themes

Allegations	ABB	Edison	Lockheed	International Paper	Boeing
Excessive recordkeeping costs	x		x	x	x
Using “retail” or expensive share classes	x	x	x	x	x
Failure to follow the plan’s IPS when selecting or removing investments	x				
Improper investments			x	x	x
Using plan assets to benefit the company	x			x	
Delayed deposits of participant salary deferrals	x			x	

# Practical Steps



# Establish Committee

- “Retirement Board” under California Constitution
- Members of committee
- Tasked with fiduciary responsibilities

# Delegate Fiduciary Functions Where Appropriate

- **When to keep it?**  
vs.  
**When to appropriately delegate it?**
- **Hire experts**
- **Can you delegate it?**  
Delegating task, not responsibility

# Follow Best Practices

- Comply with Federal/State laws
  - Current laws
  - New legislation
- Develop investment policy
- Procedure for selecting and removing
  - Vendors / Vendor Representatives
  - Investments
- Require periodic audit
  - Independent Financial Audit
  - Compliance Audit of Contractors

# Institute Periodic Review of Fees and Investments

- Establish performance monitoring procedure
  - Benchmark indices
- No less than annually
- Quarterly is best
- Consider using investment consultant

# Apply Reasoned Decision-Making Process

- Due process to resolve disputes
- Make consistent decisions
- Process is key
  - Facts
  - Deliberation
  - Decision
    - 20/20 hindsight not required
    - Decisions judged by prudence of the process

# Consider Fiduciary Liability Protection

- Defense of public employees by the public employer
- Indemnification of public employees by the public employer
- Potentially no punitive damages
- Fiduciary Liability Insurance

ERISA § 404(c)

# Government Code § 53213.5(b)

- Section 53213.5(b) incorporates ERISA 404(c) rule
- Compliance with 404(c) shields the agency from liability for participants' poor investment decisions



# Safe Harbor Requirements

Meet Minimum ERISA 404(c) “safe harbor” requirements:

- Offer three+ diverse investment Options
- Vary risk & return characteristics
- Provide investment decisions discretion
- Allow periodic investment change
- Communicate information
- Monitor investment performance
- “Default” funds should satisfy QDIA requirements

# Distinguish 404(c) and Fund Selection

- Employer selects plan's fund menu
  - not protected by 404(c)
- Participant invests account among funds on menu
  - covered by 404(c)