Retirement plan governance: Understanding the role of a benefit plan committee

Prepared by The Wagner Law Group | White Paper

Retirement plan sponsors and other plan fiduciaries face harsh consequences if they fail to satisfy the stringent standards mandated by ERISA. The best way for fiduciaries to meet their responsibilities and to defend against the severe penalties imposed for ERISA violations is to develop a clear awareness and understanding of what those fiduciary responsibilities are. With knowledge of what they are charged to do, fiduciaries may then be vigilant in ensuring that the plan operates consistent with the high standards of ERISA. As explained below, the benefit plan committee is the party whose actions are critical for minimizing potential exposure to fiduciary violations that could lead to U.S. Department of Labor ("DOL") enforcement actions and/or private litigation.

What's inside

Fiduciary authority and responsibility

Who is a fiduciary?

A person becomes a fiduciary to a plan – and therefore has fiduciary responsibilities to that plan – if he or she (i) exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) has any discretionary authority or discretionary responsibility in the administration of such plan.[1]

In short, a fiduciary is anyone who is authorized to use his or her own judgement to make important decisions about the plan, whether that be about how the plan is administered or what investments it makes.

A fiduciary owes to the plan the highest duty of care imposed by law. A fiduciary must: (i) act for the "exclusive purpose" of the plan, (ii) act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in like capacity and familiar with such matters would use under the circumstances; (iii) "diversify" plan investments, and, (iv) act in accordance with the "terms of the plan," unless contrary to ERISA.[2]

A fiduciary may be held personally liable for breaching the fiduciary duties owed to a plan.[3] A fiduciary may be required to pay for any losses suffered by a plan because of his or her breach, be forced to restore any profits made by using the plan assets and is subject to a host of fines and penalties.

Who is the Named Fiduciary?

The fiduciary with the authority to control and manage the operation and administration of the plan must be named or identified in the plan's written document.[4] This "Named Fiduciary," which has primary fiduciary authority over the plan as well as control over plan investment matters, does not need to be the employer sponsoring the plan. As a practical matter, many plan sponsors are inclined to retain control over the plan's operation so the plan document frequently names the employer as the Named Fiduciary.[5]

The Named Fiduciary generally has the very important responsibility of appointing all service providers to the plan. This decision must be made carefully, with due consideration of the services to be performed, the qualifications of the provider and the fees to be charged. Responsibilities do not end with the sound selection of a provider. The Named Fiduciary has the ongoing duty to monitor the activities of all providers to ensure that they are fulfilling both their commitments to the plan and are doing so in a manner the meets the requirements of ERISA.

Many employers prefer to have the comfort of knowing that their plans have the attention of a dedicated team of trusted employees. The plan document may provide a process to identify an internal committee made up of officers and employees to act as the Named Fiduciary. Even when Named Fiduciary status is retained by the plan sponsor, it may delegate those responsibilities to a committee whose members will themselves be fiduciaries.

Who is the Plan Administrator?

It is customary in traditional arrangements for the plan document to also name the plan sponsor as the plan's "Administrator" as defined under ERISA Section 3(16). As defined, the Administrator is the designated fiduciary that is responsible for key reporting and disclosure responsibilities under ERISA. The Administrator is responsible for the plan's annual regulatory filings on Form 5500 including the plan's audited financials as necessary.[6] The Administrator is also responsible for providing summary plan descriptions and other required disclosures to participants.

The Administrator alone is subject to statutory penalties for any violation of ERISA's reporting or disclosure requirements, even if it relies on a third-party provider to help it discharge its reporting and disclosure duties.[7]

As in the case of the responsibilities of a Named Fiduciary, the Administrator's responsibilities may be delegated to a committee. Many plan sponsors will serve as both the Named Fiduciary and Administrator. Thus, they will be responsible for the overall management of the plan and its investments, and for the plan's regulatory filings and participant disclosures under ERISA.

1. Section 3(21)(A) of ERISA.
2. Section 404 of ERISA.
3. Section 409 of ERISA.
4. Section 402(a)(1) of ERISA.
5. For purposes of this guide, all references to a "plan sponsor" are generally references to a plan sponsor that has assumed the role of the plan's Named Fiduciary.
6. Section 2520.103-1 of DOL regulations.
7. Section 502(c) of ERISA.

Plan committee organization

Committee membership

Plan sponsors must seriously consider the structure and personnel of a committee that oversees a plan and undertakes the functions of a Named Fiduciary. ERISA includes provisions intended to avoid the situation where members of a plan committee cannot be identified and so escape responsibility and liability. Thus, either the specific persons who are members of the committee must be named in the plan document or the means by which the members will be selected must be clearly stated.

The first matter that should be decided is the nature of the committee's workload and whether more than one committee should be established to handle it. Investment matters (including the structure of the investment menu for plans that permit participant-directed investments, the development of an investment policy statement and the monitoring of investment performance) are sometimes assigned to a separate committee populated with officers and employees of the plan sponsor who have financial expertise. This group may also be responsible for hiring and evaluating the performance of other plan vendors, such as the recordkeeper, investment professional and other service providers.

The general management and operation of the plan are committee functions that may also extend to oversight of government reporting as well as employee communications and education. The responsibilities of a committee overseeing these matters may also entail establishing uniform policies and procedures, as well as rules for determining benefit eligibility. It might oversee the plan's claims procedure and loan programs. Certain committees may also have the function of identifying any need for technical, clarifying or legally required plan amendments and must adjust plan procedures as needed.

The membership of the committee (or committees) should be large enough to handle the assigned workload but not so large as to make it unmanageable. A committee consisting of three to seven members is often considered to be the most efficient.

It is usually inadvisable to name specific individuals to the committee, since their resignation or death would create a vacancy and impede the committee's work if the vacancy is not filled. Accordingly, the plan document sometimes designates plan committee members by the function they perform for the plan sponsor. For example, the heads of the employer's Finance, Human Resources and Legal divisions would automatically assume committee membership. Alternatively, a process for appointing committee members may be stated in the plan document. Some plan sponsors designate plan committee members by title, taking the position that this is a settlor function rather than a fiduciary function. Arguably, however, appointing required committee members is sufficiently similar to hiring a service provider, which is seen as a fiduciary function.

A view that seems to be gaining more adherents is that committee members should have term limits. Rotating committee membership has the advantage of bringing fresh perspectives to committee deliberations. However, an effort to retain continuity and institutional knowledge should be made by staggering terms so that experienced members are always part of the mix. Training materials should be made available to new members to apprise them of fundamental fiduciary principles and key issues faced by the committee.

Committee charter

To ensure the committee understands its role, it would be useful to formalize its mission, as well as its structure, in a plan committee charter. The statement of the committee's duties should be flexible enough to allow it to fulfill any additional responsibilities as may be delegated to it from time to time by the plan sponsor, its board of directors or the plan's Named Fiduciary, if the committee is not itself designated as the Named Fiduciary.

A charter can also state the rules for committee governance by stipulating that regular committee meetings be held at intervals that are either stated in the charter or determined in some other manner authorized by the charter, such as at the direction of the committee chair. A charter can also establish the rules for establishing a quorum and may clarify whether members may participate in a meeting by means of electronic communication.

Records of meetings

Written records should be kept of committee meetings and fiduciary-related decision-making, such as the reason for hiring any investment professional or other service provider. This supports the critical requirement that the committee exercise procedural prudence under ERISA.

A charter can ensure that this writing requirement is part of the committee's basic operating procedures. Although a committee charter is often very helpful, keep in mind that it is also a document under which a plan operates, so it must be carefully followed.

Committee meetings

As noted, a plan committee should meet on a regular basis. The meetings should be used to not only address immediate issues but also as a way to meet the plan's long-term goals. Therefore, meeting agendas should be set in advance to cover specific administrative issues of the day as well as long-term strategic questions, such as the plan's role in the plan sponsor's overall compensation structure, the effectiveness of its design, retirement readiness of participants, and efficient utilization of available investment products and services.

To maximize the usefulness of committee meetings, the agenda should be distributed to committee members and their staffs in advance of the meeting. This will also facilitate documenting the matters to be discussed at the meeting. It is a best practice for certain topics, such as investment performance, to be addressed on a regular basis such as quarterly or at least semi-annually.

Representatives from the plan's various service providers may be invited to attend those meetings that focus on their areas of expertise, and they should be prepared to answer questions from the committee members. For example, outside accountants, lawyers, recordkeepers, third-party administrators, investment professionals and benefits consultants should participate in meetings where their work for the plan will be considered. It is not a common practice to include these outsiders on the committee. The scope of the committee's questions should extend to developments in the disciplines of the plan providers attending the meeting that have the potential to affect the plan. This will provide the committee with a sense of the potential issues that will need to be addressed in the future and enable it to set an agenda for the coming year. For example, legal specialists and accountants can provide their knowledge about issues likely to be the focus of a DOL, PBGC, or IRS audit and the materials that should be maintained to meet document requests by investigators from these agencies, as well as new regulatory guidance and issues arising from fiduciary litigation.

The committee's interaction with service providers is also a good way to sort out which provider is responsible for various plan duties. Committee members will need to understand the terms and benefit formulas of the plans for which the committee is responsible so that they can determine what needs to be done and by whom. A table suggesting a list of agenda items, as well as periods to review those actions, follows below.

Investment committee meeting suggested agenda items

Each meeting

(not every action must be conducted at every meeting but the Committee should confirm, via appropriate reports, that each action has taken place each quarter)

- Review and approve minutes of last meeting
- Review quarterly plan investments performance report (presented by financial professional, if available)
  - Review performance of each investment
    - Rate of return over not less than 1-, 3- and 5-year periods
    - Compare to appropriate benchmark and peer funds
    - Monitor for style drift
  - Discuss any significant developments such as change in ownership or fund manager, disciplinary actions
  - Confirm that each option is consistent with Investment Policy Statement criteria
  - Evaluate investments on watch list, if any, and add any new investments
  - Review investment menu for offering a properly diversified array of options
- Review custodian's account statement and compare to financial professional's report; resolve any differences
- Vote proxies for shares of investments
- Review fee computations for accuracy
- Review plan operations
  - Confirm that all contributions are deposited timely and correctly
  - Confirm that all distributions are correct and were properly authorized
  - Review numbers and status of plan loans and hardship withdrawals
- Plan agenda for next Committee meeting

At least once per year

(these actions may be scheduled for specific meetings throughout the year)

- Conduct fiduciary and investment education for Committee, which may include information about the plan; general financial, investment, retirement information; asset allocation models; and interactive investment materials. Focus at least on fiduciary standards, duties and responsibilities
- Review all fees for reasonableness and compliance with service providers' contracts
- Confirm that all services contracted for are being performed
- Confirm that ERISA bond, fiduciary liability insurance, Directors' and Officers' Liability insurance is in place with appropriate limits
- Review approach for how costs are allocated among participant's accounts
- Confirm that no payment has been made from plan assets for settlor services (i.e., consulting about amending the plan, terminating the plan or creating a new plan)
- If 404(c) relief is sought, confirm that plan complies with requirements
- Confirm receipt of financial professional's Form ADV; review conflicts of interest (including additional sources of compensation), trading practices, best execution, and disciplinary actions
- Confirm receipt, review of and proper filing of any investment prospectuses, statements of annual report, annual reports
- Review proxy voting record of each investment option
- Welcome new Committee members and conduct orientation

Periodically

- Issue new requests for proposals for service providers
- Evaluate success of participant education programs
- Evaluate participants' readiness to retire

Selecting plan providers

Establishing reasonableness

Plan committees acting as or on behalf of the plan's Named Fiduciary typically have the duty to hire, monitor and fire those who provide any services to the plan. This includes any investment professional appointed to help the committee, the recordkeeper, any third-party administrator, the custodian of the funds, and anyone else who is paid from plan assets.

ERISA prohibits a fiduciary from approving any contract to provide services to a plan unless it first determines that the service is necessary for the establishment or operation of the plan, the contract for the service is reasonable, and no more than reasonable compensation is paid for the service.[8]

Plan committees need extensive information to meet these requirements. Only then can a committee meet its duty to determine whether the investment itself and the fees charged for it are reasonable. The DOL implemented a landmark rule in 2012, generally making any contract for plan services per se unreasonable unless the service provider makes extensive disclosures describing the services to be provided, the compensation to be charged, and whether it will be acting as a fiduciary.[9]

Named after the section of ERISA which requires them, the disclosures concerning services and fees are known as the "408(b)(2) disclosures." This information is extensive and can be complex. A plan committee may need the help of its financial professional to interpret them and explain their significance.

Settlor services

The DOL routinely examines plan sponsors in regard to their use of plan assets for the payment of fees and other expenses, and these examinations may also focus on the expenses associated with any plan "settlor" services. Due to its technical nature, this examination issue can pose a significant trap for the unwary.

ERISA is based on legal concepts developed over time about how trusts should operate. Included among them is the principle that the creator of a trust, called the "settlor," has his or her own purposes for establishing the trust that are unrelated to operating that trust for the benefit of its beneficiaries. Under general trust principles, the settlor must pay its own expenses when establishing the trust and cannot charge those expenses against trust assets.

8. Section 2550.408b-2(a) of DOL regulations.
9. Section 2550.408b-2(c)(1) of DOL regulations.

Over the years, the DOL has issued advisory opinions and other guidance for plans in this area.[10] In short, a plan sponsor is deemed to be acting for its own business needs when **creating or designing a plan**, such as the need to attract and retain employees. Hence, expenses such as legal and consulting fees arising from designing the plan, making benefit design changes, or terminating a plan, must be paid by the employer at its own expense.

Only fees relating to the **ongoing and necessary maintenance** of a plan and its tax-qualified status may be charged against plan assets. When non-settlor administrative expenses actually benefit plan participants, they can be paid from plan assets which must otherwise be used to pay benefits only. Permitted administrative expenses include reporting and auditing costs, third-party administrator fees, legal and other fees for plan amendments required for tax-qualification, and investment-related services.

Plan committees are cautioned to seek competent legal advice to guide them about what charges can be assessed against their plans and what are in fact settlor expenses. Unknowingly permitting plan assets to be charged for what are the employer's own costs is a serious breach of fiduciary duty and can lead to significant penalties.

Selecting plan investments

Investment policy statement

One of a plan committee's principal duties is to select and review the plan's investments or, in the case of a defined contribution plan with participant direction of investments, select the plan menu. It is a common and best practice to follow the guidelines laid out in the plan's investment policy statement ("IPS").

An IPS is a written statement designed to further the purposes of the plan by providing a set of principles to guide the plan's fiduciaries in managing the plan's investments.[11] According to the DOL, maintaining an IPS is consistent with a plan sponsor's fiduciary obligations under ERISA, including the "duty of loyalty" under ERISA Section 404(a)(1)(A) and the "duty of prudence" under ERISA Section 404(a)(1)(B). It is highly recommended that a plan sponsor formulates an IPS and periodically revise it to fit changing circumstances. Financial professionals who work with plan sponsors should strongly recommend that they do so and be prepared to render assistance in developing guidelines meeting each plan's particular needs.

There are no definitive rules about the content of an IPS. An IPS customarily addresses: (1) the plan's investment objectives, (2) the roles and responsibilities of particular plan fiduciaries, (3) guidelines for selecting, monitoring and changing investment options, and (4) participant communications and investment education. With respect to the asset classes of investments covered by the plan's menu, the IPS should contemplate a broad range of investment categories that satisfy the fiduciary requirements discussed below.

In creating an IPS, a plan committee should consider only those factors that relate to the economic interest of plan participants and the demographics of the overall plan population. Determining the terms of an IPS is itself an exercise of fiduciary responsibility and, as such, the IPS should take into account the duty of prudence and other fiduciary requirements under ERISA.[12]

Since an IPS is part of the "documents and instruments governing the plan" for purposes of ERISA Section 404(a)(1)(D), plan fiduciaries are obligated to follow the terms of the IPS in order to meet their duty to comply with the plan documents. Therefore, plan fiduciaries must comply with the provisions of the IPS insofar as the policy directives or guidelines are consistent with the requirements of ERISA. Because of this, financial professionals should make sure the IPS's provisions are reasonably flexible, providing sufficient "wiggle room" about when and how any required investment course of action must be taken under the IPS.

10. DOL Field Assistance Bulletin 2003-3; DOL Advisory Opinion 2001-01A; and DOL Advisory Opinion 1997-03A.

11. DOL Interpretive Bulletin 2016-01, Interpretive Bulletin Relating to the Exercise of Shareholder Rights and Written Statements of Investment Policy, Including Proxy Voting Policies or Guidelines, 29 CFR § 2509.2016-01.

12. Ibid.

IPS guidelines should also incorporate a review of the plan's investment fees. In recent years, plan fees have been attacked by the plaintiffs' bar, which has brought numerous legal claims against sponsors and providers. These suits generally allege that a lack of transparency and awareness contributed to the payment of excessive investment and recordkeeping fees by the plan and plan participants.

Excessive fees have become subject to heightened scrutiny by Congress, the DOL and the media. As a result of these concerns, it is the best practice to include guidelines in the IPS for evaluating the reasonableness of the fees and expenses charged by the plan's investment funds and recordkeeper and to adopt a formal Fee Policy Statement.

When commencing a new relationship with a plan client, an investment professional should discuss the importance of the plan's IPS with the plan committee. Before recommending any changes to the plan's investments or investment menu, the financial professional should verify that any new investment must the guidelines of the IPS.

When considering and approving any recommended changes to the IPS, it should be recalled that the act of changing the terms of the IPS may, in and of itself, be an exercise of fiduciary responsibility, and that the committee will be obligated to follow all of the terms of the IPS.

If the plan does not have an IPS or if the existing IPS is inconsistent with the plan's investment needs and objectives, the financial professional should work with the committee to establish a new IPS.

Diversifying plan investments

It is critical to consider the "duty to diversify" under ERISA Section 404(a)(1)(C) whenever a plan committee selects plan investments. This duty requires the plan fiduciary to diversify the investments of the plan so as to minimize the risk of large losses, unless under the circumstances then prevailing, it is clearly prudent not to do so. Note that this does not require that a fiduciary eliminate all risk or avoid all losses, but it is charged to "minimize the risk of large losses" to the plan. This principle recognizes that different asset classes perform differently at different times and that any investment may lose money. A properly diversified portfolio minimizes the risk that all adverse conditions will occur at the same time, resulting in large losses.

This duty has a special application to 401(k) plans, which by their nature, divide investment responsibilities between the plan sponsor and the plan participants. The sponsor is responsible to maintain a proper menu of investment alternatives, and participants are responsible to make individual allocation decisions for their accounts. Naturally, the sponsor remains responsible for any investment losses that are the result of a flawed menu. For example, if a sponsor were to establish a limited menu of investment options in a narrow range of asset categories, making it impossible for participants to create a diversified portfolio, the sponsor would be in breach of its fiduciary duty to diversify.

As a practical matter, the duty to diversify requires plan fiduciaries to ensure the plan's investment menu covers a sufficient number of asset classes and categories (e.g., cash and cash equivalents, large-cap and small-cap equities, fixed-income securities, etc.). Even if the range of investments available through the plan's provider in certain asset categories is limited, plan fiduciaries should ensure that at least one investment option is included in the menu for each desired asset category. The plan menu should not have any impermissible gaps in its coverage of asset categories. Accordingly, fiduciaries should consider the full range of investments available to the plan through its provider in each desired asset category, including both actively managed funds and passively managed funds, ETFs and collective trusts.

Financial professionals should work with plan committees to determine whether a plan's investment portfolio or – in the case of a 401(k) plan, its investment menu – is sufficiently diversified. However, committees should be warned to avoid overreacting by concluding that the more investment options on a menu, the better.

Offering a very large number of investment options may actually confuse participants or may otherwise be counterproductive.

The trend has been to reduce the number of a plan's investment options. For example, a plan fiduciary may deem a menu with 10 to 20 investment alternatives sufficient to meet the diversification requirement. This range should be reflected in the plan's IPS.

Offering a broad range of investment alternatives

Section 404(c) of ERISA is the statutory provision which makes 401(k) plan participants solely responsible for their investment allocation decisions. A plan sponsor has no responsibility for investment losses resulting from a participant's allocation decision, but only to the extent the plan satisfies the conditions of ERISA Section 404(c). To be eligible for 404(c) protection, the plan must include "a broad range of investment alternatives" that is sufficient to provide participants with a reasonable opportunity to: (1) materially affect the potential investment return of their accounts, (2) choose from at least three alternatives with materially different risk and return characteristics, and (3) diversify the investments in their accounts so as to minimize the risk of large losses. Financial professionals should integrate the "broad range of investment alternatives" requirement into their advice when making recommendations about the number and range of investment options for a 401(k) plan menu.

In addition, in order to qualify for relief under Section 404(c), the plan generally must provide participants with an opportunity to exercise control over their accounts and to obtain sufficient information to make informed decisions regarding the plan's menu. The related 404(c) disclosure requirements are detailed and technical in nature. To meet the Section 404(c) requirements, many 401(k) plans include summary investment information in the enrollment kits for new participants (e.g., an investment brochure and fund fact cards). Prospectuses and summary prospectuses are also frequently included in these kits or mailed separately following the participant's initial investment in a fund. Participants must also receive an explanation that the plan is intended to constitute a Section 404(c) plan and that plan fiduciaries may be relieved of liability for plan losses as a result.

The prudence requirement

Each investment option on a 401(k) plan menu should be selected in accordance with the duty of prudence under ERISA, which requires a fiduciary to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." Courts have interpreted this duty as requiring plan fiduciaries to conduct a proper investigation of the merits of a plan's proposed investment before proceeding.[13]

Accordingly before an investment may be approved, a 401(k) plan committee must conduct an adequate due diligence review and carefully evaluate the potential benefits and risks of any proposed investment option. In the context of a 401(k) plan, the committee must conduct its own independent evaluations to determine which investment options may be prudently included in the plan menu and which must be removed as imprudent options.[14] Appropriate consideration should be given to all relevant factors concerning a particular investment fund, including the role the investment fund will play in the plan's investment menu and a consideration of the risk of loss and the opportunity for gain.[15]

If the committee lacks investment knowledge or experience, it would be consistent with its ERISA duties to engage a financial professional to provide it with expert advice.[16] As a practical matter, when recommending an investment fund for the plan menu, the financial professional should also provide the committee with all relevant information concerning the fund, highlighting both the merits and possible drawbacks. By considering each fund's opportunity for gain and risk of loss, as well as all other relevant information, the committee will be able to ensure its investment decisions are made prudently.

The test for prudence is procedural in nature, and it is not simply a question of how an investment fund performs once it has been selected. Plan committees should be made aware that ERISA's duty of prudence requires that they undertake an "investigative" process of information gathering before arriving at any investment decisions.

Considering investment fees

There has been an explosion in the number of fee-related lawsuits filed claiming that 401(k) plan sponsors imprudently selected funds with excessive fees or improper share classes and have paid excessive recordkeeping fees.

These excessive fee challenges are generally made in 401(k) plans or other defined contribution plans where there are participant-directed accounts. In the case of defined benefit

13. See, e.g., *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286 (5th Cir. 2000).).
14. *Hughes v. Northwestern University*, 142 S. Ct. 737 (2022).
15. Section 2550.404a-1(b)(1) of DOL regulations.
16. *Liss v. Smith*, 991 F. Supp. 278, 387 (S.D.N.Y. 1998).

plans, these charges cannot be made where the plan is fully funded. Even when the plan is not fully funded, these complaints are less frequently made.

The early lawsuits set the template for many to follow,[17] and the U.S. Supreme Court ultimately confirmed that plan fiduciaries have a duty under ERISA to ensure that every investment option in the plan menu is a prudent investment for participants.[18] The results of the entire body of litigation has been mixed, with many defendants ultimately settling for multiple millions of dollars and a few escaping on motions to dismiss. The common themes, however, include allegations that the plan committees failed to implement appropriate due diligence procedures or had procedures but failed to adequately follow them or that the plan failed to provide sufficient disclosures about fees and expenses so that participants could make sound investment choices for themselves.

A committee's strongest protection is to meet regularly, follow a prudent process to exercise due diligence, provide full and fair disclosure and to keep a written record of its decision-making.

Some of the lawsuits claimed that inadequately disclosed revenue sharing payments made from the plan's funds or fund managers to service providers are evidence of excessive compensation which has been inappropriately authorized by the plan fiduciary. In light of this risk, the financial professional should provide the sponsor comprehensive information concerning the fees charged by an investment fund, as well as disclosures concerning any revenue sharing payments made by the fund manager and any similar payments made by the fund (e.g., 12b1 fees, shareholder servicing fees, sub-transfer agency fees) to the plan's service providers. This information is described in the 408(b)(2) disclosures and the prospectuses for the investments.

A committee may wish to benchmark providers' services to ascertain the prevailing investment fees for a comparable group of plans. The objective of benchmarking is to confirm whether the chosen provider's fee is within a range for comparable services, and not be an outlier. Before selecting a benchmarking service provider, the committee should seek clarification of how the benchmark group of plans is determined, the quality of the underlying data, the scope of plan services and fees covered by the benchmarking analysis. The committee should also determine how the benchmarking results will be presented and explained.

Financial professionals can assist the committee in selecting a qualified provider of benchmarking services, and they can also help the committee evaluate the benchmarking results in their proper context. A committee should make investment decisions based on all relevant factors – and never based on an isolated review of fees or benchmarking results alone. If any portion of the plan's investment fees is utilized to pay for administrative services to the plan, the evaluation of the investment fees should also consider the quality of these services.

Monitoring investments

A fiduciary's duties do not end with prudently selecting a fund. Plan committees responsible for investment selection have a duty to monitor their plan's investments or investment menu choices at regular intervals to ensure that each investment remains prudent.[19] Compliance with this duty of prudence requires proper documentation of the investment review process.[20] All investment reviews should follow the guidelines in the IPS and any decisions resulting from this process should be put into writing. And just as the plan's menu is reviewed, the IPS itself should be reviewed on an ongoing basis and revised as necessary.

At each investment review meeting, the plan fiduciaries should confirm that the menu continues to provide a "broad range of investment alternatives" for ERISA purposes. It should evaluate the investment performance, volatility, style, fees and other relevant data for each investment fund. If the plan experiences a significant increase in the number of participants or growth in plan assets, the plan committee should pay particular attention to the continuing appropriateness of an investment fund's share class and the related 12b-1 fees and other expenses. It may find that the growth provides access to better priced funds or share classes which may be more prudent choices for the growing plan.

If during the review process the committee becomes dissatisfied with a particular investment option or finds that it no longer meets the guidelines of the IPS, the committee must decide if further action should or must be taken. One way of making this determination is by putting the challenged fund on a "watch list," which would typically require enhanced monitoring during a probationary period (e.g., reviewing performance more frequently and using investment analytics to dissect performance). If the fund does not improve or the committee otherwise decides to eliminate the investment, the challenged fund may be replaced by a new investment alternative.

17. See e.g., *Hecker v. Deere and Company*, cert denied 130 S.Ct. 1141 (2010), *Spano v. Boeing Company,* 633 F.3d 574 (7th Cir. 2011), , *Will v. General Dynamics,* 2010 WL 4818174 (S Dist. IL 2010).
18. *Hughes v. Northwestern University,* 142 S. Ct. 737 (2022).
19. Ibid.
20. DOL Interpretive Bulletin 2016-01; and DOL Interpretive Bulletin 75-5, FR10. See, also, *Wildman v. Am. Century Servs., LLC,* 362 F.Supp.3d 685 (W.D. Mo. 2019) (finding no fiduciary breach where investment decisions were reasoned and made at well-documented meetings).

Resolving benefit claims

The plan committee is ultimately responsible for resolving participant benefit claims through the plan appeals process whenever it acts as the plan's Administrator as defined in ERISA Section 3(16). This is true even if the initial determination on benefits eligibility is handled by in-house staff or an outside vendor.

Only a plan fiduciary may exercise discretion over the administration of a plan. For this reason, only an authorized fiduciary, such as a plan committee serving as Administrator, should determine claims upon appeal. The terms of the plan document must be strictly followed during this process so it becomes important that at least one committee member has a working knowledge of the various benefit programs that might be reviewed. If a disputed benefit claim is presented on appeal, it is essential that the committee expeditiously affirm or reverse the initial benefit determination within the time limits set by the plan and the Department of Labor's claim review procedures.

Mitigation of risk

Remember that a fiduciary who breaches its responsibilities under ERISA is personally liable for any losses to the plan resulting from the breach and must disgorge related profits. Fiduciaries can also be subject to civil penalties for breaching their duties. A fiduciary might also be held responsible for the misconduct of co-fiduciaries and service providers.[21]

The committee should review the adequacy of their fiduciary liability insurance coverage amount at regular intervals. Although such coverage is not required by law, a plan committee is well-advised to take steps to have fiduciary liability insurance coverage for all plan fiduciaries, including the committee's own members. It should periodically assess whether the coverage has sufficient limits and arrange for additional coverage if needed.

Waiting until the last minute to investigate insurance coverage can be a costly mistake, since it is often too late to develop a strategy to minimize a plan fiduciary's potential exposure, once a significant failure relating to a fiduciary breach occurs or is alleged. It should be noted that any ERISA fidelity bonds that are required for plans[22] are designed to protect the plan and not fiduciaries. Although a plan may not purchase fiduciary liability insurance for a fiduciary, the fiduciary itself or the plan sponsor may do so.[23] Purchasers of fiduciary liability insurance should ensure that their policy contains the appropriate coverages, including protection against liability for breaches of fiduciary duty, negligent advice regarding benefits eligibility, defense costs, punitive damages, civil penalties under ERISA, and sanctions imposed under DOL, PBGC and IRS enforcement programs. Some insurers interpret exclusionary language in their policies very aggressively to their own advantage. Plan committees would do well to work with brokers who specialize in fiduciary coverage. These specialists can be attentive to when exclusions will be applied and what coverage gaps might be closed.

Furthermore, plan sponsors often indemnify fiduciaries who are employed for all actions or omissions done in reasonable good faith.

Conclusion

Plan committees are responsible to oversee a broad array of plan investment and administrative functions. In this role, they are acting in a fiduciary capacity, which requires them to implement processes that gather all the relevant information for each issue faced, which must then be evaluated to arrive at a reasoned and documented decision. This approach will result in effective plan governance that eliminates much of the fiduciary risk and ultimately facilitates the plan's delivery of benefits to its participants and beneficiaries.

Exhibit A is offered as a checklist for how a plan sponsor may assess its readiness for meeting these important responsibilities.

21. Section 409 of ERISA.
22. Under Section 412 of ERISA, every person who handles plan funds must be bonded under an ERISA fidelity bond, unless an exception applies.
23. Section 410(b)(2) of ERISA.

Exhibit A

Plan sponsor self-assessment and checklist

			Yes	No
1	Named Fiduciary and Plan Administrator duties	**Proper delegation of responsibilities** • If the plan sponsor has retained the title of Named Fiduciary or Plan Administrator, have the duties of these fiduciary positions (e.g., investments, government reporting and participant disclosures) been properly delegated in writing to one or more plan committees? • If a Named Fiduciary or Plan Administrator other than the sponsor will be appointed, has the appointment been made pursuant to the process described in the plan document?*	☐	☐
2	Structure and duties of plan committee	**Committee charter** • Has a plan committee charter been adopted to delineate committee composition and duties? • Is committee membership limited to a workable number (e.g., 3 to 7 members)? • If term limits are used for committee membership, have the terms been staggered so as to retain institutional knowledge and continuity?	☐	☐
3	Plan committee meetings	**Schedule and agenda for meetings and minutes** • Are plan committee meetings being held on a regular periodic basis? • Are meetings conducted pursuant to an agenda prepared and circulated in advance of the meeting that focuses on immediate and long-term goals? • Do outside consultants and experts attend committee meetings and respond to questions about agenda issues, as well as report on new developments? • Are written minutes of plan committee meetings and deliberations being maintained?	☐	☐
4	Investment policy statement	**Development and implementation of IPS** • Has the committee overseen the development of an investment policy statement (IPS) appropriate to the needs of the plan? • Is the IPS periodically reviewed and revised? • Are the committee's investment decisions being made in accordance with the guidelines set forth in the IPS?	☐	☐
5	ERISA section 404(c) qualification	**Range of investment options** • Is the range of plan investment options sufficiently broad to enable participant decisions to materially affect investment returns? • Do the investment options enable participants to diversify investments so as to minimize the risk of large losses? • Does the investment menu include at least three investment options from different points on the risk/return spectrum? • Are investment options limited to a number that will not overwhelm participants or result in dilution of the plan's bargaining power with investment providers?	☐	☐
6	Plan investment menu	**Process for selecting investment options** • If committee members lack investment knowledge or experience, has the committee engaged an investment expert to provide advice? • Have all the relevant facts about a potential investment option (not just performance) been considered? • Has the committee considered each investment's fees and expenses? • Has the committee considered engaging benchmarking services to help evaluate investment performance, as well as fees and expenses?	☐	☐
7	Ongoing investment reviews	**Monitoring** • Is the committee reviewing the performance of investment options on the plan investment menu at regular periodic intervals and at least annually? • Do the committee's reviews include fees of investment and service providers? • Is indirect compensation to investment and service providers being monitored? • If an investment is put on a watch list, does the committee follow through by removing the investment from the plan menu if it does not improve?	☐	☐
8	Review of benefit decisions	**Appeals of benefit denials** • Do committee members have a working knowledge of plan benefits and the terms for benefit eligibility? • Are participant appeals being handled expeditiously and without unusual delays?	☐	☐

*A well-drafted plan document provides: (1) how the committee members are appointed, or (2) that they shall be appointed pursuant to the committee charter.

About Marcia Wagner and The Wagner Law Group

Marcia Wagner is the founder of The Wagner Law Group, one of the nation's largest and most highly regarded law firms specializing in ERISA, employee benefits and executive compensation, and has practiced employee benefits law for over 30 years.

She is an authority on qualified and non-qualified plans, fiduciary issues, deferred compensation, and welfare benefit arrangements, with experience in plan design and drafting, compliance, tax planning and consultation on all aspects of ERISA and the Internal Revenue Code. Ms. Wagner also serves as an expert witness in ERISA litigation.

Ms. Wagner specializes in Title I of ERISA, and has obtained advisory opinions, information letters and prohibited transaction exemptions from the DOL. She handles fiduciary matters impacting plan sponsors, investment and other fiduciary committees, investment managers and financial professionals, recordkeepers, broker-dealers, banks, and other financial services firms. Ms. Wagner advises clients on the avoidance and rectification of prohibited transactions, the development of compliance programs, and investment policies. She is a renowned expert in issues concerning pension plan investments and fiduciary issues, and her opinion has been sought by noted authorities in the employee benefits area, including governmental agencies.

She was appointed Chair of the Employee Plans subcommittee of the IRS Tax Exempt & Government Entities Advisory Committee and received that agency's highest honor. She is a Fellow of the American College of Employee Benefits Counsel and is the recipient of more than 50 professional honors.

Ms. Wagner has written hundreds of articles and 15 books. She is a highly sought after lecturer, is widely quoted in financial journals and has been a guest on Fox, CNN, Bloomberg, and NBC.

All investments involve risk, including loss of principal.

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