

Fiduciary Responsibilities



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Who is a Fiduciary?

A

NAMED

- Every employee benefit plan covered by ERISA must expressly name one or more fiduciaries in the governing instrument
- Named Fiduciaries jointly or severally have authority to control and manage the operation and administration of the plan
- Often, the plan sponsor is the Named Fiduciary

B

TITLE

- Plan Trustees: Directed (subject to direction of another party, usually processing investment directions) or Discretionary (authority to manage and control the plan assets)
- Fiduciaries serving on retirement plan and/or investment committees
- Those identified or contracted under ERISA 3(16), 3(21) or 3(38)

C

FUNCTIONAL

- Status is based on functions performed under ERISA § 3(21), not solely on title or role
- Exercises discretionary authority or control over plan management
- Exercises any authority over plan assets
- Renders or has any authority or responsibility to render investment advice for a fee
- Exercises discretionary authority or responsibility over plan administration

What isn't a Fiduciary function?

SETTLOR

Actions that cannot be defended to be taken solely in the interests of plan participants and beneficiaries (vs. the interest of the company)

MINISTERIAL

Plan-related administrative actions not involving the exercise of discretion

OTHER SERVICES

- CPA Audits
- Legal Advice
- Consultant (not investment advice or discretionary)
- Recordkeeping Services
- Non-Discretionary Third-Party Administration
- Actuarial Projections

Settlor: Two Hat Doctrine

PLAN SPONSORS		
Settlor Functions		Fiduciary Functions
<ul style="list-style-type: none">• Instead of plan management or administration, addresses items like plan design• Often carried out by the same parties who also serve the plan in a fiduciary capacity	EXAMPLES	<p>Settlor decisions often give rise to fiduciary functions.</p> <p>Example: decision to terminate a DB plan is a settlor function.</p> <hr/> <p>↓</p> <p>Implementation of that decision involves fiduciary actions:</p> <ul style="list-style-type: none">• Communications• Selecting an Annuity Provider <p>Actions would be considered fiduciary acts under ERISA</p>
	<p>Sponsorship Decisions</p> <ul style="list-style-type: none">• Adopt a plan• Amend a plan• Terminate a plan <p>Other Decisions</p> <ul style="list-style-type: none">• Eligibility for Participation• Employer contributions (i.e. nonelective contributions or match)• Definition of compensation	

Ministerial Functions

“Ministerial” actions are certain plan-related actions that are carried out by people who have no power to make any discretionary decisions as to plan policy, interpretations, practices or procedures*

*DOL IB 75-8

Application of rules determining eligibility for participation or benefits

Calculation of benefits

Calculation of services and compensation credits for benefits

Processing of claims

Preparation of employee communications material

Orientation of new participants advising participants of their rights and options under the plan

Preparation of reports required by government agencies

Ministerial Functions?

QDRO

- Determining if a domestic relations order is a QDRO is a fiduciary function
- Who has discretion to determine whether the order qualifies as a QDRO or not?
- Has it been outsourced to a service provider or is it retained by the plan sponsor?
- Even if outsourced, the plan sponsor is responsible for monitoring the service provider

- Who is responsible for reviewing, approving the withdrawal requests?
- What is the standard used for determining a hardship? If the “safe harbor” reasons, the determination may be ministerial in nature and not fiduciary
- If discretion remains in determining financial hardship, likely a fiduciary matter
- SECURE 2.0 added a provision for employees to self-certify hardships, what is the potential impact for plan audits?

Hardships

Duty of Loyalty



Duty of Loyalty: Standard of Care



ERISA § 404(a) - Prudent Person Standard of Care

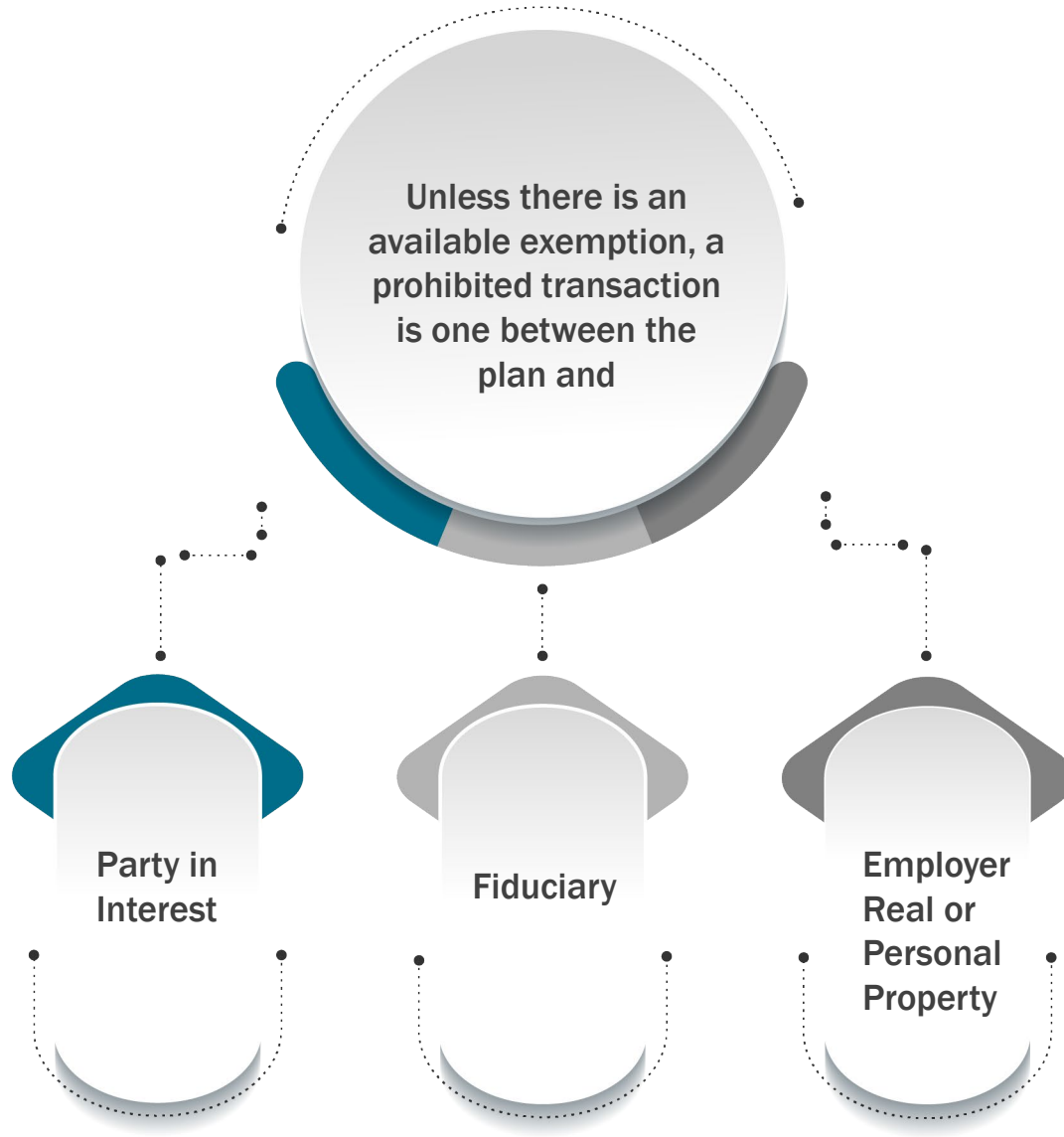
Exclusive Benefit Rule – ERISA 404(a)(1)(A)

A fiduciary shall discharge his (or her) duties with respect to the plan solely in the interests of the participants and beneficiaries and for the exclusive benefit of:

1. Providing benefits to participants and their beneficiaries; and
2. Defraying reasonable expenses of administration

Decisions of fiduciaries must be made without consideration of their personal interests or any other third party.

Prohibited Transactions – ERISA § 406



Parties in Interest

- Plan Fiduciaries
- Service Providers
- Employer
- Employee Organization (i.e. union)
- Owners*
- Employees, officers, directors
- Relatives of fiduciaries, service providers, employers or owners

The term “relative” means a spouse, ancestor, lineal descendant, or spouse of a lineal descendant.

Examples of Prohibited Transactions



Failure to
transmit
employee
contributions
in a timely
manner

Participant
loans that do
not satisfy
ERISA and IRS
requirements

Fiduciary
receiving
compensation
from the plan
(when already
receiving full-
time pay)

Trustee
receiving
administrative
fees and not
offsetting plan
expenses

Remedies of Prohibited Transactions

- Breach of Fiduciary duty
- DOL litigation risk from participants and beneficiaries
- IRS penalties under Section 4975
- Requirement to unwind transaction; restore losses or return ill-gotten gains
- Civil and / or criminal penalties
- Co-fiduciaries can be jointly and severally liable
- Disqualified from serving as a fiduciary in the future
- Plan disqualification

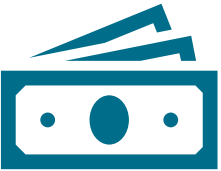


DOL Enforcement Statistics (2022)



CRIMINAL INVESTIGATIONS

- 164 criminal investigations
- 103 indictments



CIVIL INVESTIGATIONS

\$1.4 billion recovered, \$931 million through enforcement actions

- 907 civil investigations
- 595 monetary results
- 402 nonmonetary civil corrections
- 55 cases referred to litigation

The number of investigations as well as the recovery amounts were down for 2022, compared to prior years. Continued focuses include missing participants and cybersecurity.

Reasonable Fees

WHY SHOULD A PLAN FIDUCIARY CARE ABOUT PLAN FEES?

- ERISA 404(a)(1)(A)(ii) requires plan fiduciaries to act solely in the interest of plan participants and beneficiaries. This duty extends to defraying the “reasonable” expenses of administering the plan.
- ERISA generally provides that a fee payment from plan assets to a “party-in-interest,” such as a recordkeeper or trustee, is by definition a prohibited transaction. Without an exception, such fees would never be permitted. ERISA 408(b)(2) provides this exemption for service contracts or arrangements that are necessary for the operation of the plan and provide for reasonable compensation.

SHOULD YOU ALWAYS SELECT THE LOWEST-COST PROVIDER?

No. Plan sponsors should evaluate costs for “reasonableness,” and should understand the services received and the true value of the arrangement or contract.

HOW CAN YOU HELP ENSURE YOUR PLAN IS SATISFYING ERISA’S REQUIREMENTS?

Plan fiduciaries should periodically review the plan’s fee arrangements to ensure they understand both total plan fees and individual fee components. To facilitate comparisons, fiduciaries should benchmark fees and services against industry averages.

Permissible Expenses

(PARTIAL) LIST OF PERMISSIBLE PLAN EXPENSES

- Recordkeeper and/or TPA services
- Custodial services
- Legal fees (related to fiduciary functions, not settlor functions)
- Drafting required amendments
- Implementing a plan amendment or plan termination
- Trustee
- Plan accounting (including annual audit)
- Seeking IRS determination letter
- ERISA bond (for the plan)

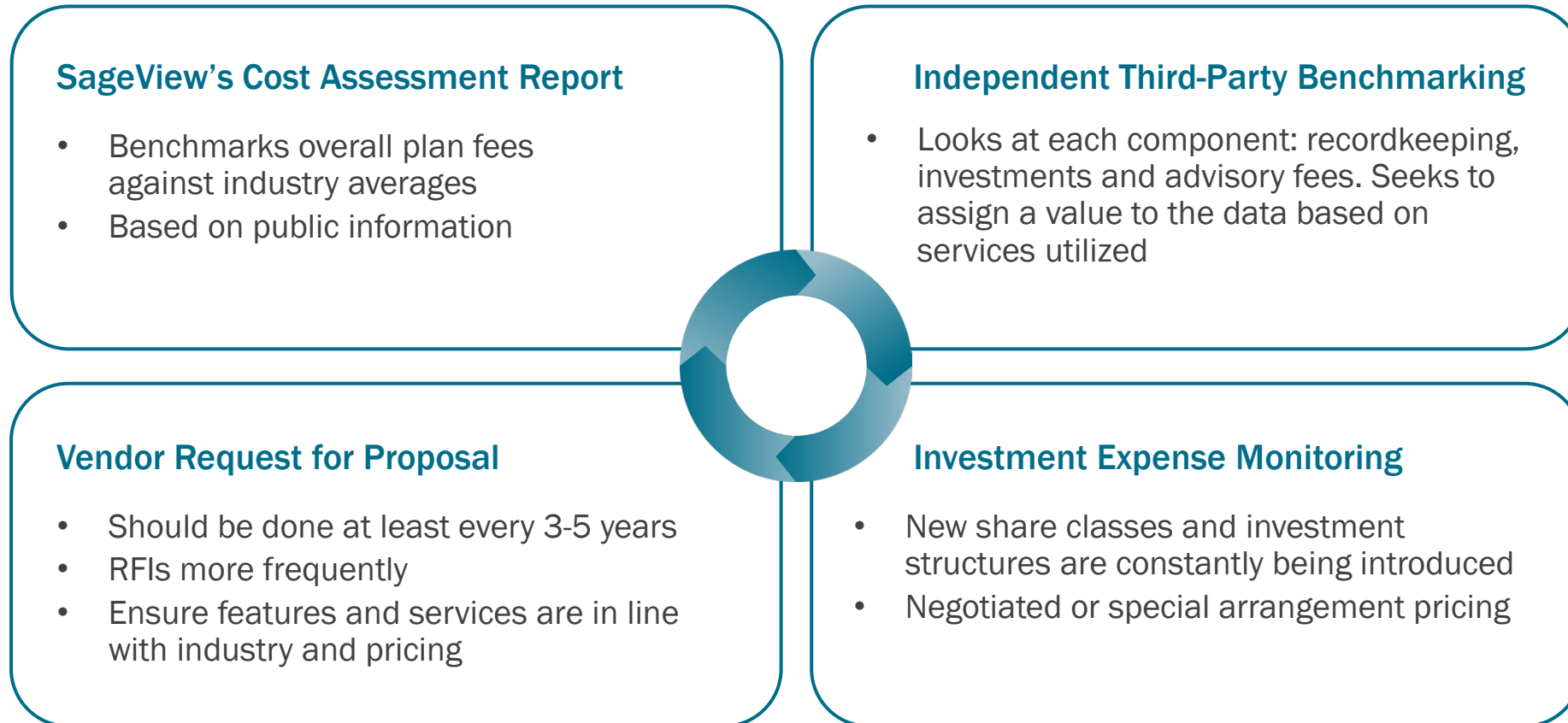
NOT PERMISSIBLE AS A PLAN EXPENSE

- Plan design studies
- Drafting discretionary plan amendments
- Legal and non-discretionary consulting fees to establish or terminate a plan
- Educational seminars (beyond plan)
- ERISA bond (for anyone other than the plan)
- Cost of correction under VFC Program
- Proxy proposal activity

Common Recordkeeper and/or TPA Services

- participant communications
- telephone voice response system
- electronic access to plan information
- website and online transactions
- participant education resources
- daily valuations
- investment related expenses
- routine non-discrimination testing
- required reporting (e.g. Form 5500)

Continuum of Fee Benchmarking



**Only applies to fees paid by the plan*

Types of Fee Arrangements



Revenue Sharing

A portion of the investment expense is returned to the administrator to pay for the costs of recordkeeping and administration.



Zero-Revenue / Institutional Share Classes

Utilizing share classes with little to no revenue paid back to the administrator. Fees are then assessed as a separate, explicit fee.



Revenue Rebating

Any revenue from the investments are returned to the participants invested in the funds that generated the revenue.

May be a combination of the above.

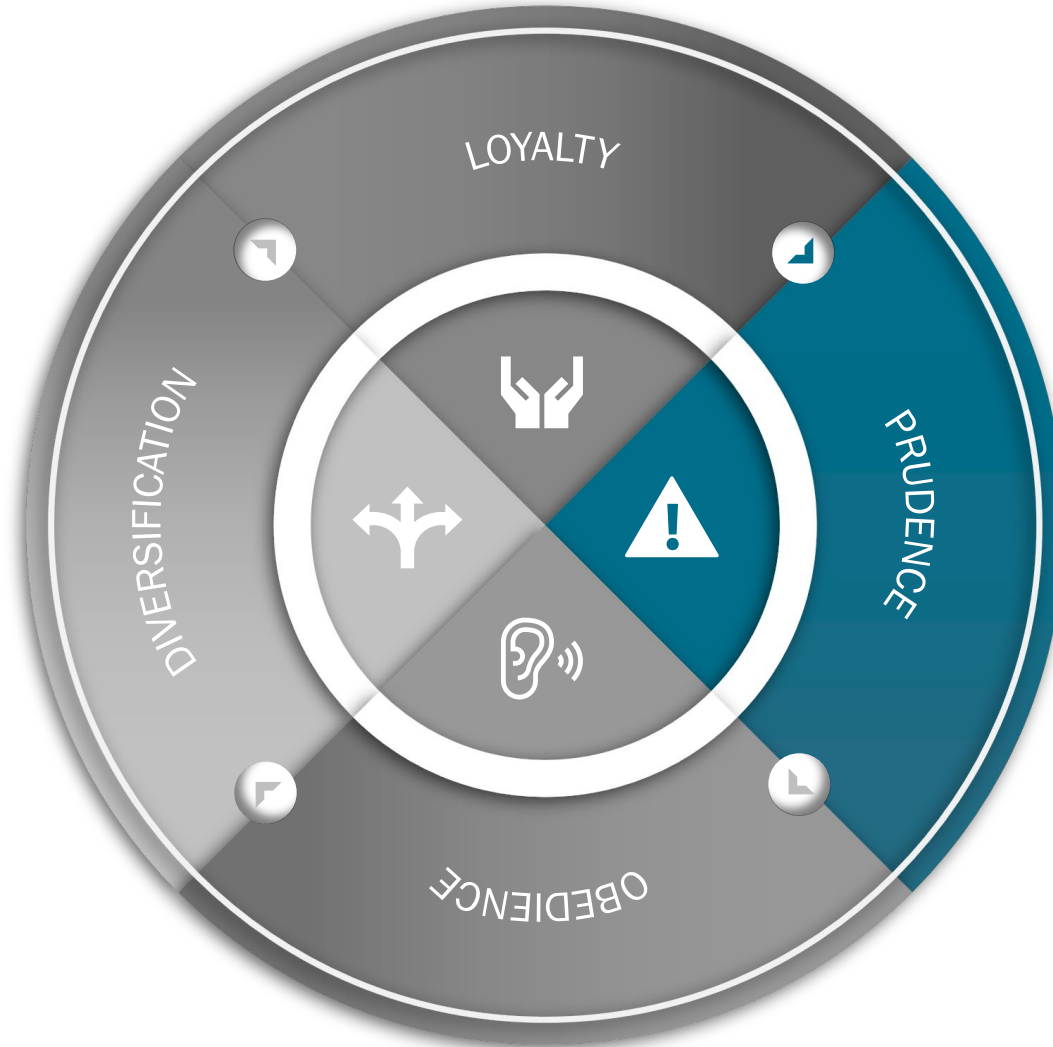
Over time, the use of revenue sharing to pay for plan-related expenses is becoming less common and often part of excessive fee complaints, especially for larger plans. More commonly today, plans that have revenue sharing in the plan is rebated.

Note: litigation has often focused on the use of revenue sharing investments, characterizing this as a “kickback scheme,” there are also examples in litigation alleging plan sponsors should have used a revenue sharing investment (instead of zero-revenue) based on a lower net cost, assuming any revenue retained by the recordkeeper is rebated to participants.

Duty of Loyalty: Next Steps

- 1 Identify your plan fiduciaries
- 2 Identify parties-in-interest for any potential prohibited transactions
- 3 Review and document payroll procedures for timeliness of contribution submission process
- 4 Review and understand outsourced functions to determine fiduciary responsibilities
- 5 If the plan has employer securities, review process for monitoring and consider third-party fiduciary
- 6 Review plan fees for reasonableness and take any necessary steps (e.g., RFP)
- 7 Review the plan's fee policy

Duty of Prudence



Duty of Prudence



ERISA § 404(a) - Prudent Person Standard of Care

“[A] fiduciary shall discharge his (or her) duties ...

With the *care, skill, prudence, and diligence* under the circumstances then prevailing that a *prudent person 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*”

Procedural

Concerned with the process involved in making fiduciary decisions for the plan

Prudence

Substantive

Concerned with the outcomes of the decisions made

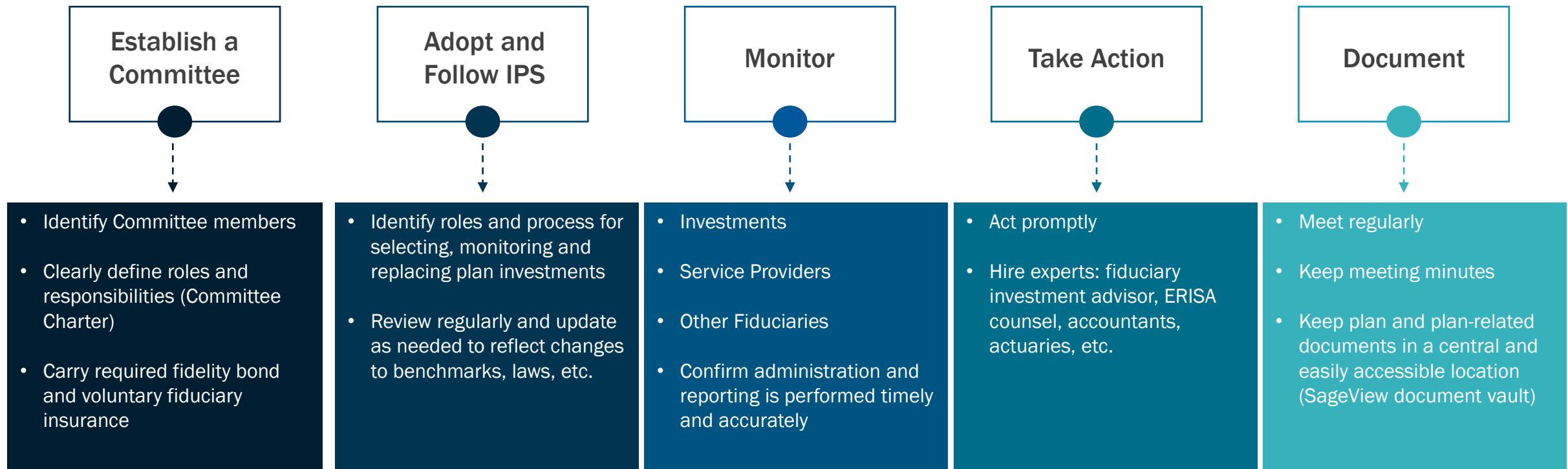
A good substantive result may protect against inadequate procedural prudence. But just because you can walk down the street with your eyes closed, doesn't mean you shouldn't open your eyes and see the sunny skies.

How to Satisfy the Standard

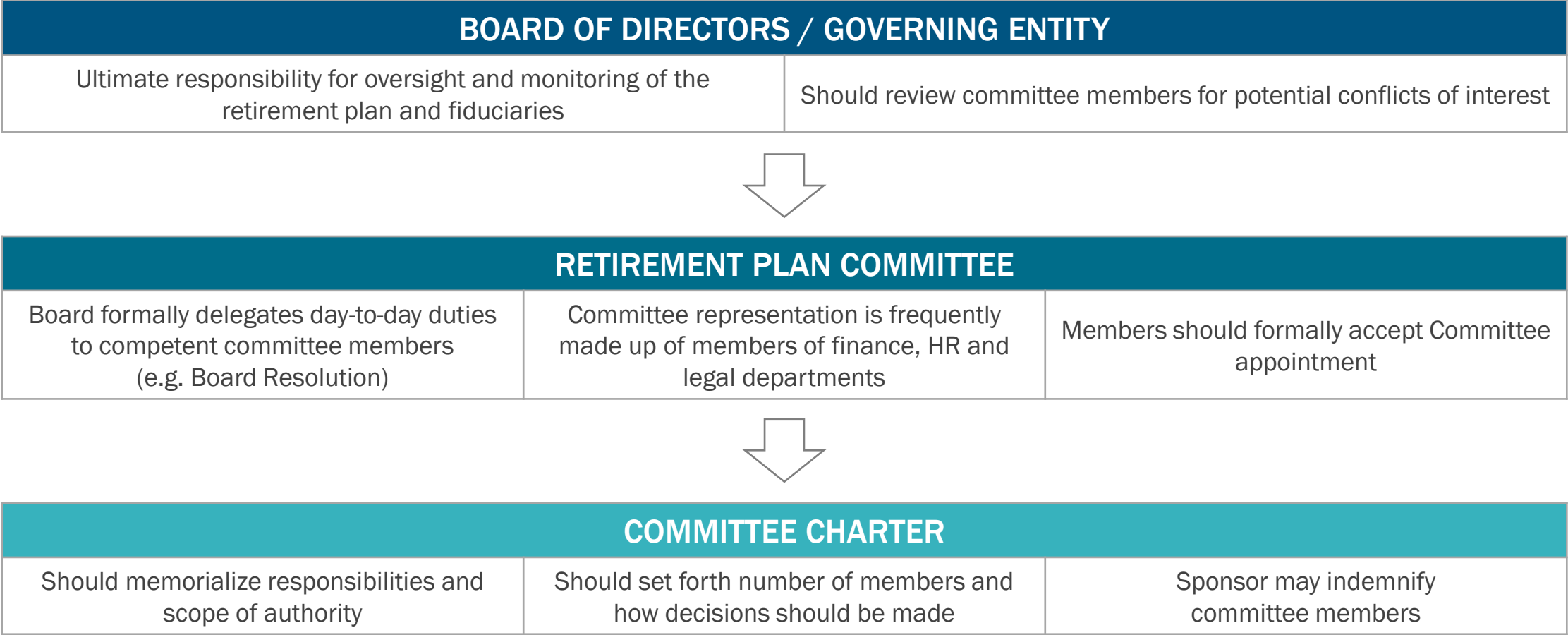
What does the prudent person standard look like?

Good faith is not enough. Ignorance is not a defense.

Fiduciaries must approach their decisions as a prudent expert would. If they do not have the requisite expertise, they should retain experts.



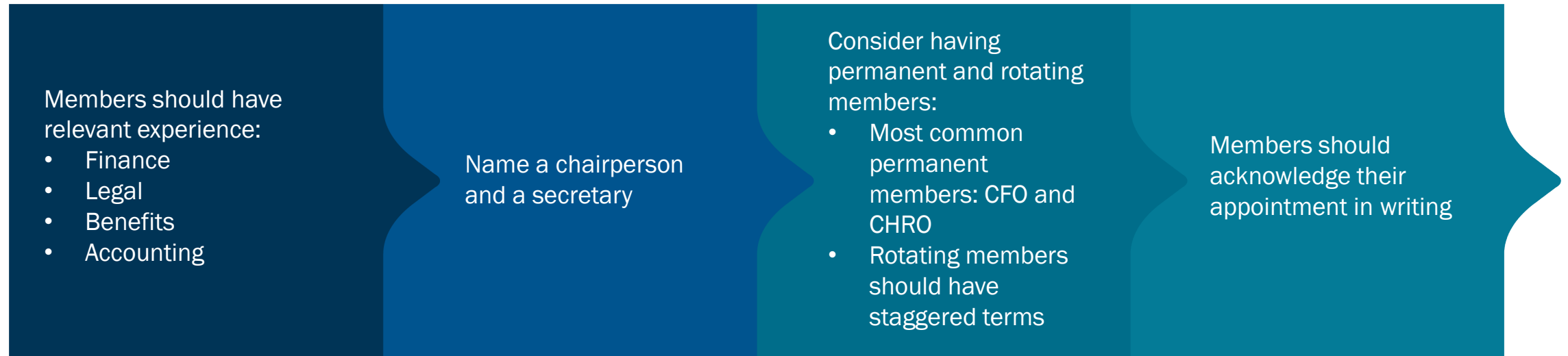
Step 1: Establish a Committee



Who should be on the Committee?

- Usually 3-7; larger committees often become unwieldy and ineffective
- An odd number is best to avoid stalemates
- Committee needs to be able to meet regularly
- Consider whether non-voting members could provide assistance to streamline information gathering and decision-making by fiduciary (voting) members

BEST PRACTICES FOR BUILDING A COMMITTEE



Fidelity Bond versus Fiduciary Insurance

FIDELITY BOND

- Required by ERISA
- Insurance intended to protect participants against losses caused by fraud or dishonesty
- Every person who handles funds or other property must be covered by the bond
- Coverage must be at least 10% of prior year plan assets, with a maximum of \$500,000 (\$1 million for plans with employer securities)

FIDUCIARY LIABILITY INSURANCE

- Not required by law
- Meant to protect against errors, omissions and breaches of fiduciary duty claims
- May be a rider to or a separate policy from directors and officers (D&O) or general liability policies
- Does not protect against fraud or theft
- Covers the legal expenses of defending against a claim
- Consult with risk management specialist regarding appropriate coverage level

Step 2: Investment Policy Statement

KEY FEATURES OF AN INVESTMENT POLICY STATEMENT (IPS)

PURPOSE	What is the employer's objective in offering a retirement plan? The document should explain the purpose of the plan and IPS.
PARTIES	Who are the parties and what are their responsibilities to the plan in discharging their fiduciary duties?
INVESTMENTS	What types of investments and asset classes should be included in the plan?
MONITOR	How are these investments to be evaluated? How are they to be monitored?
REPLACE	What is the criteria and procedure for replacing an investment?

- While not required by the Department of Labor, it is often one of the first requests during a DOL investigation
- An IPS is a balancing act: sufficiently specific to provide a useable framework for decision making, but broad enough to avoid being overly restrictive or difficult to carry out
- Should include quantitative and qualitative measures for monitoring investment options

Further reading: Investment Policy for Defined Contribution Plans (SageView White Paper)

Step 3: Monitor

INVESTMENTS

Follow terms of the IPS

Tibble v. Edison

- Plan made fund changes between 1999 and 2002; lawsuit filed in 2007
- ERISA statute of limitations covers 6-years
- Supreme Court determined the 1999 funds were subject to an ongoing duty to monitor, but damages were still subject to a 6-year window
- Reiterated in subsequent cases, including *Northwestern University*

SERVICE PROVIDERS

- Recordkeepers
- Administrators
- Custodians
- Advice Services
- Fiduciary Advisors
- Auditors

OTHER FIDUCIARIES

- Board should regularly review Committee's work and decisions
- Monitor the conduct of co-fiduciary you've appointed
- Monitor the conduct of co-fiduciary named or otherwise appointed
- Potentially liable for breaches of other fiduciaries, if known and fails to remedy. Trustees may be liable for failing to prevent a co-trustee from committing a breach

Step 4: Take Action

HIRE EXPERTS	MAKE TIMELY DECISIONS	TAKE ACTION!	ENSURE DECISIONS ARE IMPLEMENTED TIMELY
<ul style="list-style-type: none">• Attorneys• 3(21) or 3(38) advisors	<ul style="list-style-type: none">• Fund changes• Plan design changes• Provider changes• Responsibilities related to administration and required reporting	<ul style="list-style-type: none">• Communicate the changes to appropriate parties• Fund changes• Plan design changes• Provider changes	<ul style="list-style-type: none">• Fund changes and required notices• Plan design changes and timing

Before relying on expert’s work, plan fiduciaries still have the duty to monitor and review.

Step 5: Document

Document what? Agendas, meeting materials, meeting minutes (including ad hoc discussions)

MEETING MINUTES

- Best way to document discussion and decisions
- Allows Committee to track decisions and the process
- Be mindful: auditors, the DOL and plaintiffs may all request and review the minutes

MEETING MINUTE MINIMUMS

Date, Time and Location of the Meeting

Parties in Attendance

Matters Discussed

Decisions Made (or Deferred)

MEETING MINUTE BEST PRACTICES

Note any documents reviewed or referenced

Minutes should be reviewed and approved within a reasonable time of the meeting for accuracy

Important to include deliberation while not attributing statements to individuals or being overly detailed

Non-fiduciary items should be separated

FIDUCIARY VAULT

- Helps consolidate to a central location accessible by Committee members
- Serves as a repository in the event of staff turnover
- Maintaining in the cloud can ensure uninterrupted access

Duty of Prudence: Next Steps

- 1 Review Charter and IPS
- 2 Review fidelity bond and fiduciary liability insurance
- 3 Review documentation around monitoring service providers
- 4 Review process to ensure timely action on Committee decisions
- 5 Review meeting minutes for sufficiency

Duty of Obedience



Duty of Obedience



ERISA § 404(a) - Prudent Person Standard of Care

“[A] fiduciary shall discharge his (or her) duties ...

in accordance with the documents and instruments governing the plan insofar” as they are consistent with ERISA.

A duty to follow plan documents AND THE LAW

Who?

Named administrator, named fiduciaries, individuals interpreting plan documents, and service providers serving in a fiduciary capacity.

Obedience to What?

1

Committee Charter/Board Authorizing Resolution

2

Base Plan Document, Adoption Agreement and Amendments

3

Summary Plan Description (SPD)

4

Administrative Procedures Manual

5

Fee Policy and Loan Policy

6

Investment Policy Statement (IPS)

7

Minutes of Fiduciary Actions

8

Third-Party Contracts

Plan Documents: Pre-Approved Plans

BASIC PLAN DOCUMENT

- Contains the non-elective provisions for the plan (e.g. definitions)
- Does not allow for plan-sponsor specific elections through check boxes or blanks

ADOPTION AGREEMENT

- Contains blanks and elections for a plan sponsor to customize the document to their individual plan design
- Document where the adopting employer executes the plan document
- Superseding provisions amendment

AMENDMENTS

- Generally, the IRS will publish a notice of required amendments for qualified plans
- The notice usually permits plans a period of time (often the end of the 2nd year following notice)
- Generally, get incorporated into the basic plan and adoption agreement in the required 6-Year restatement cycle

Other Plan Documents

Summary Plan Description (SPD)

A Summary Plan Description (SPD) is a document that participants are automatically entitled to receive when becoming part of an ERISA-covered retirement plan or a beneficiary receiving benefits under such a plan. It tells participants, in basic terms, what the plan provides and how it operates.

- *SPD's should be re-distributed every 5 years if there are changes. If there are no changes, the SPD should be re-distributed every 10 years.*
- *The plan administrator is legally obligated to provide participants with the SPD within 90 days of benefit eligibility and within 30 days upon request by a participant or beneficiary.*

Summary of Material Modification (SMM)

ERISA requires that plans provide a Summary of Material Modification (SMM) to participants any time there has been material modification to the plan itself or any time there is a change to the information that is required to be provided in the Summary Plan Description (SPD).

- *SMM's should be distributed within 210 days.*

Summary Annual Report (SAR)

Each year, the plan administrator must automatically give participants a copy of the plan's Summary Annual Report (SAR), a summary of the annual financial report that is filed with the Department of Labor via Form 5500.

- *The SAR is due no later than September 30th or December 15th (for the prior plan year)*
- *Form 5500 is due July 31st or October 15th on extension (calendar year plans only)*

Third-Party Agreements

1

Recordkeeping and
Administration

2

Trust and
Custody

3

Consulting and
Advisory

4

Investment Specific
(e.g. CITs)

5

Advice Service
Agreements

Correction Programs

DOL

Delinquent Filer Voluntary Compliance Program (“DFVCP”)

- Allows a plan sponsor to file a late Form 5500 with a penalty

Voluntary Fiduciary Correction Program (“VFCP”)

- Program to correct specific prohibited transactions, such as late remittances of employee deferrals

ERISA 502(l) Civil Penalty of 20% of amounts recovered under settlement or court order

IRS

Employee Plans Compliance Resolution System (“EPCRS”)

1. Self-Correction

- Insignificant operational errors do not require IRS notice or fees
- Significant errors must be corrected prior to end of 2nd plan year following error

2. Voluntary Compliance Program (“VCP”)

- Prior to an IRS audit, the plan sponsor proposes a resolution
- If approved, IRS will issue a compliance statement
- IRS fee dependent on number of participants

3. Audit Closing Agreement Program (“CAP”)

- Issues discovered during an IRS audit
- Correction plus monetary sanctions negotiated with the IRS

Cybersecurity: Retirement and Benefit Plans

ERISA

Implicit in regulations pursuant to ERISA's disclosure requirements

29 CFR 2520.104b-1(c)(1)(i). Fiduciaries must take:

[A]ppropriate and necessary measures reasonably calculated to ensure that the system for furnishing documents ... [p]rotects the confidentiality of personal information relating to the individual's accounts and benefits (e.g., incorporating into the system measures designed to preclude unauthorized receipt of or access to such information by individuals other than the individual for whom the information is intended).



Steps Plan Sponsors Should Consider

1. Review and verify procedures used internally.
 - Mainly payroll, but review internal controls over participant and beneficiary information
2. Review and verify external procedures and systems.
 - Includes recordkeepers, auditors, advisors, etc.
3. Review Employee Communication and Education
 - Simple reminders about password security
4. Review insurance coverage.
 - How do you determine the risk?
 - How do you quantify the risk?

Duty of Obedience: Next Steps

- 1 Conduct a Plan Document Audit
- 2 Review timeliness of documents. Are all plan documents up to date?
- 3 Review consistency across document. Are the Adoption Agreement and SPD in agreement?
- 4 Review Operational Compliance. Especially evaluate eligibility, service, vesting, compensation and lesser-reviewed items like true up provisions
- 5 Take timely steps to implement corrective measures (i.e. plan amendments, self-corrections, VCP, etc.)

Duty of Diversification





ERISA § 404(a) - Prudent Person Standard of Care

“[A] fiduciary shall discharge his (or her) duties ...

by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so.”

*How do you comply with this requirement?
Is there any fiduciary relief?*

ERISA 404(c)

Section 404(c) of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) provides:

[I]f a pension plan that provides for individual accounts permits a participant or beneficiary to exercise control over assets in his account and that participant or beneficiary in fact exercises control over assets in his account, then the participant or beneficiary shall not be deemed to be a fiduciary by reason of his exercise of control and no person who is otherwise a fiduciary shall be liable for any loss, or by reason of any breach, which results from such exercise of control.

See separate 404(c) checklist specific to your administration.

QDIA Regulations

The Pension Protection Act (PPA) signed into law by President Bush in 2006 removed impediments to employers adopting automatic enrollment, including fears about legal liability for losses due to market fluctuations and the applicability of state wage withholding laws.

These impediments had prevented many employers from adopting automatic enrollment, or had led them to invest workers' contributions in low-risk, low-return "default" investments.

The PPA directed the Department of Labor to issue a regulation to assist employers in selecting a Qualified Default Investment Alternative ("QDIA") that best serve the retirement needs of workers who do not direct their own investments.

QDIA Regulations

THE FINAL REGULATION PROVIDES FOR FOUR TYPES OF QDIAs:

- 1 A product with a mix of investments that takes into account the individual's age or retirement date (an example of such a product could be a life-cycle or target retirement date fund);
- 2 An investment service that allocates contributions among existing plan options to provide an asset mix that takes into account the individual's age or retirement date (an example of such a service could be a professionally managed account)
- 3 A product with a mix of investments that takes into account the characteristics of *the group of employees as a whole*, rather than each individual (an example of such a product could be a balanced fund); and
- 4 A capital preservation product, but only for the first 120 days of participation (an option for plan sponsors wishing to simplify administration if workers opt-out of participation).

A QDIA must either be managed by an investment manager, plan trustee, plan sponsor or a committee comprised primarily of employees of the plan sponsor that is a named fiduciary, or be an investment company registered under the Investment Company Act of 1940.