



Best Practices for Retirement Plan Fiduciaries to Mitigate the Risk of Litigation

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Agenda

- Litigation Landscape
- Establishing (and running) a retirement plan committee
- Selecting, monitoring and replacing investments
- Selecting, monitoring and replacing vendors
- Communicating with participants
- Reporting to the Board
- Question/Answer

Historical Perspective

1974 – Employee Retirement Income Security Act (ERISA) enacted.

2002 – Stock drop claims brought against ENRON and WorldCom related to employer securities in their defined contribution retirement plans.

2015 – A wave of litigation commences targeting mutual fund companies that put their own investment products in their workers' 401(k) plans.

2016 – Twelve higher education institutions accused in court filings of breaches of their fiduciary duty related to their defined contribution plans.

1963: Studebaker Corp collapses. Workers receive 15 to 20 cents on the dollar for retirement benefits.

1998 – Federal judge certifies the first ERISA class-action lawsuit when participants of IKON Office Solutions alleged that their investment in company stock was imprudent

2006 – Schlichter, Bogard & Denton begins the first in a wave of actions against fiduciaries challenging service provider and investment-related fees.

2016 – Class action claims target plans using money market in low interest environment.

Success Breeds Imitation

Defendant	Total Settlement	Attorney Fees/Costs	Other Settlement Terms
Lockheed Martin Corp	\$84.3M	\$22.3M	<ul style="list-style-type: none"> Competitive bidding process for recordkeeping services
Boeing	\$57M	\$20.8M	<ul style="list-style-type: none"> Obtain opinion and recommendation on how to provide participants access to technology sector strategy as core option
Bechtel	\$26.2M	\$7.7M	<ul style="list-style-type: none"> No retail mutual funds as investment option Recordkeeping fees may not be based on percentage of plan assets Competitive bidding process for recordkeeping services
International Paper	\$41.5M	\$11.5M	<ul style="list-style-type: none"> RFP for recordkeeping services Continue to permit investment in employer stock One passively managed investment option Fees for recordkeeping cannot be set as a percentage of assets
General Dynamics	\$20.9M	\$5.7M	<ul style="list-style-type: none"> Outside consultant will review service provider agreements over \$250,000
Kraft	\$14.2M	\$4.7M	<ul style="list-style-type: none"> No retail mutual funds as investment options Limit amount of cash in company stock fund Fees for recordkeeping services will not be based on percentage of assets
Novant Health	\$32M	\$10.8M	<ul style="list-style-type: none"> Independent consultant shall benchmark and audit existing investment options, recordkeeping fees, and services, and review list of existing service providers and their compensation

Litigation Landscape

University 403(b) Plan Litigation Cases

Vellali, et al. v. Yale University, et al

Sacerdote, et al. v. New York University

Doe v. Columbia University, et al. and Cates, et al. v. Trustees of Columbia University, et al.

Cunningham v. Cornell University, et al

Sweda, et al. v. The University of Pennsylvania, et al.

Clark, et al. v. Duke University, et al.

Kelly, et al. v. Johns Hopkins University

Cassell, et al. v. Vanderbilt University, et al.

Divane, et al. v. Northwestern University, et al

Munro, et al. v. University of Southern California, et al.

Henderson, et al. v. Emory University, et al

Claims include (but are not limited to):

- Multiple recordkeepers resulted in higher fees
- Too many total investment options
- Duplicative investment options
- Revenue sharing arrangements that led to excessive fees to service providers or as “kickbacks” to the sponsor company
- Plan utilized the TIAA Traditional Annuity, which had severe restrictions and penalties for withdrawal
- Plan utilized actively managed funds (rather than passively managed) with no performance benefit but higher fees
- Index funds with higher fees, rather than similar index funds with lower fees, were utilized by the plan
- Retail share classes with higher fees were utilized when institutional share classes were available
- Plan did not engage in a competitive-bidding process for third-party service providers
- Options that historically underperformed should have been removed from the plan

Annual Fiduciary Program

Quarter 1 - Fiduciary Governance

- Review of minutes of previous quarterly meeting of Committee and reports on action items
- Quarterly investment review
- Review of asset class coverage
- Review of Investment Policy Statement (if applicable)
- Review of Charter for Committee (if applicable)
- Fiduciary education
- Other business

Quarter 2 - Vendor Fees and Services

- Review of minutes of previous quarterly meeting of Committee and reports on action items
- Quarterly investment review
- Annual review of insurance and bonding (as prepared by Risk Management and reported to Committee)
- Annual review of fee disclosure notices
- Annual review of costs and services to evaluate reasonableness
- Fiduciary education
- Other business

Quarter 3 - Engagement

- Review of minutes of previous quarterly meeting of Committee and reports on action items
- Quarterly investment review
- Review of participant utilization and demographic data (as prepared by third-party service provider and report to Committee)
- Participation
- Contributions
- Investment performance
- Retirement readiness
- Review of participant education and advice offerings
- Review of required participant disclosures and notices (as prepared by Human Resources and reported to Committee)
- Fiduciary education
- Other business

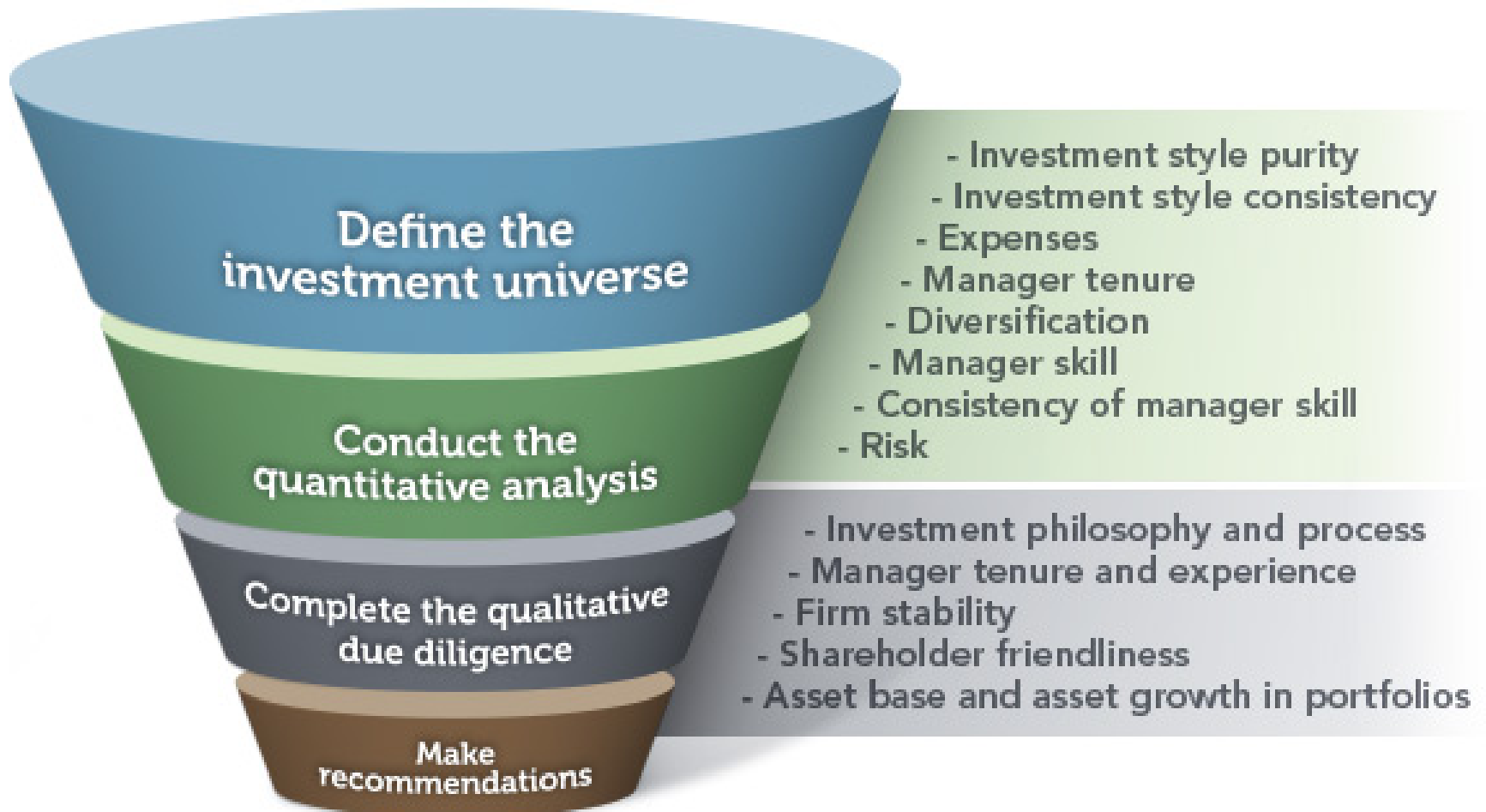
Quarter 4 - Plan Operations

- Review of minutes of previous quarterly meeting and reports on action items
- Quarterly investment review
- Review of 404(c) compliance procedures (as prepared by Human Resources)
- Regulatory update
- Review of plan testing results (if applicable)
- Review of government filings and audit (as prepared by Benefits and reported to Committee)
- Review of any year closing amendments to the Plan
- Annual review of claims and appeals, participant inquiries, issues, and complaints (as prepared by Human Resources and reported to Committee)
- Review of proposed annual report to Board on activities during the year
- Fiduciary education
- Other business

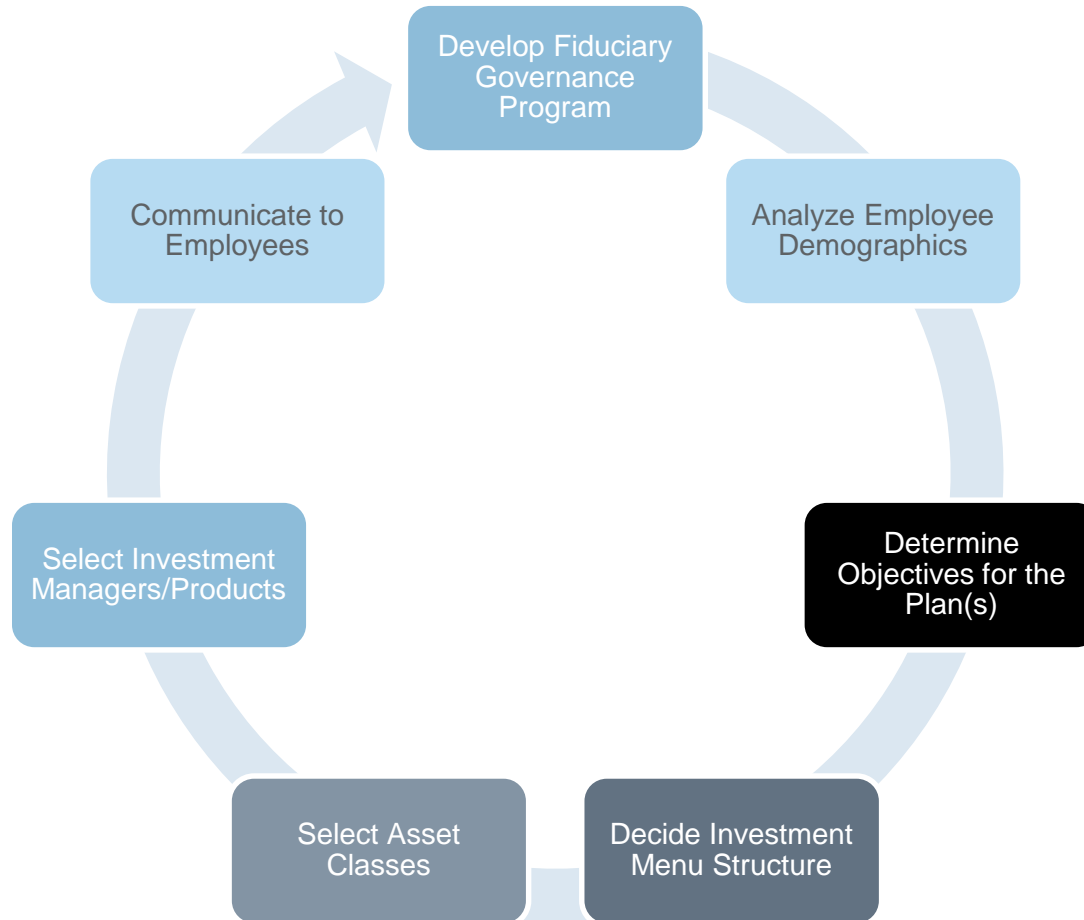
Establishing (and Running) the Committee

- How will the Retirement Plan Committee's membership be determined?
 - *Best Practice: Consider the participant population and ensure that you have a representative cross-section while simultaneously assembling a Committee that can fulfill its obligations under applicable law.*
- What specific delegations of responsibility will be made to the Retirement Plan Committee? Will the Retirement Plan Committee act in a fiduciary or advisory capacity and how will this status be captured?
 - *Best Practice: Consider using a Charter to articulate roles and responsibilities. Provide the executed Charter to all new committee members.*
- How frequently will the Retirement Plan Committee meet and what will be discussed at meetings?
 - *Best Practice: Consider meeting quarterly. Prior to the meeting, set an agenda. Memorialize the meeting in the form of minutes that will be approved by the committee.*
- Who will keep minutes and document the activities of the Committee?
 - *Best Practice: Appoint a secretary of the Committee and/or engage a knowledgeable retirement plan consultant to assist with documentation of the meetings.*

Selecting, Monitoring and Replacing Investments



Selecting, Monitoring and Replacing Investments



Selecting, Monitoring and Replacing Vendors

- Who are the service providers to the plan? Is there documentation as to the hiring of each service provider?
 - *Best Practice: Hiring a service provider is a fiduciary function. Check the fiduciary file to ensure there is documentation as to (1) who are the plan's service providers and (2) the decision to hire each service provider.*
- The plan's service providers need to be monitored over time. When was the last time that the service providers were evaluated? Has the retirement plan committee reviewed a fee benchmarking report?
 - *Best Practice: Fiduciaries will want to understand the fees and expenses charged and the services provided. While the law does not specify a permissible level of fees, it does require that fees charged to a plan be “reasonable.” After careful evaluation during the initial selection, the plan's fees and expenses should be monitored.*
- In addition to fees, has the retirement plan committee reviewed the service provider's services, performance, etc.?
 - *Best Practice: Monitoring service providers requires periodic evaluation of: (1) services, (2) policies and practices, (3) follow-up on any participant complaints.*

Communicating with Participants

- Under ERISA, plan sponsors must provide certain disclosures (for example, quarterly and annual participant disclosure under 404(a)(5)).
- Plan Sponsors should also be prepared to respond to questions from participants related to:
 - Fees and expenses (and who pays them?)
 - Plan features and benefits (who can participate in the plan and when?)
 - Administrative questions (how to obtain loans and initiate distributions, for example)
 - Investment-related questions (why isn't a specific investment available/can it be added?)
 - Who is a “fiduciary” to our plan?

Communicating with Participants

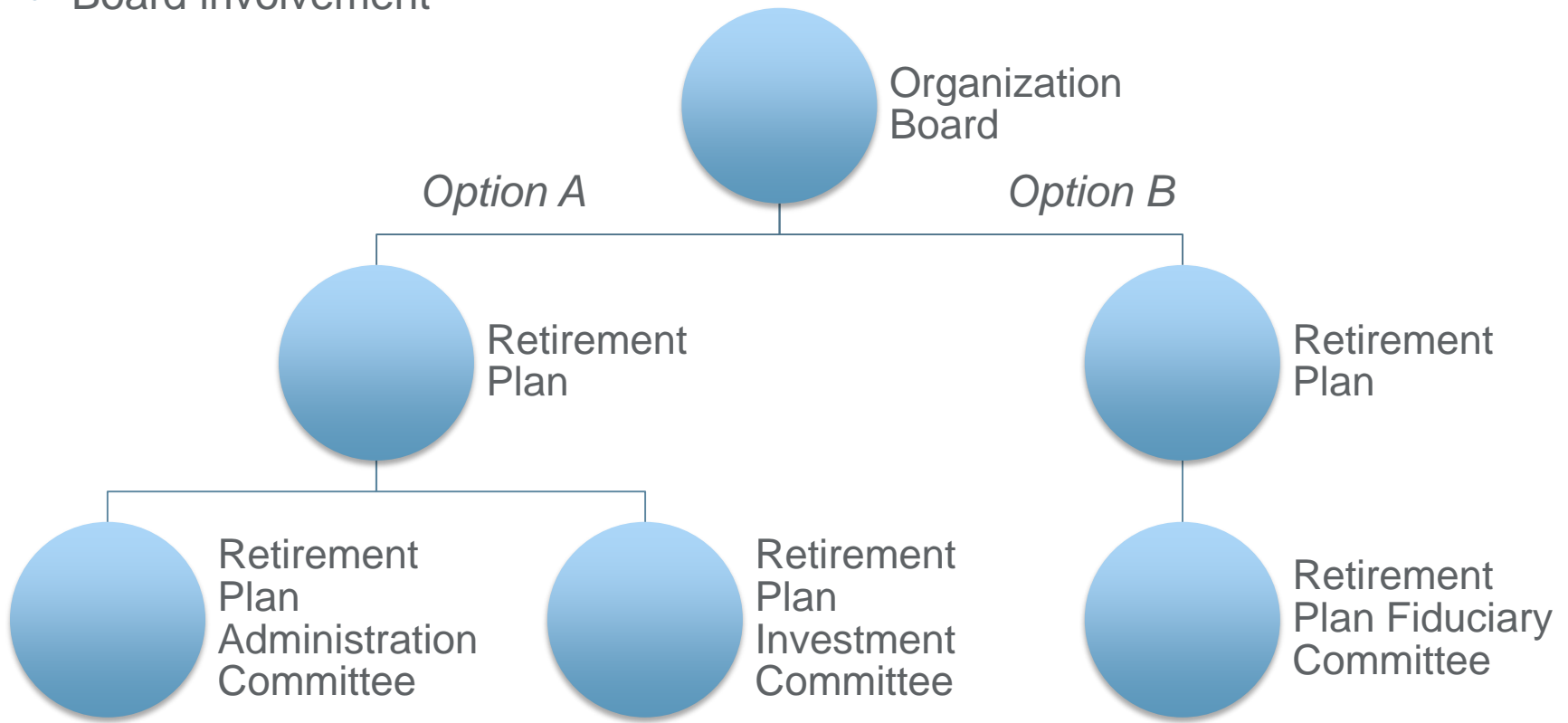
Consider the following as you prepare your retirement plan committee:

- Who is the designated individual(s) to answer questions related to the plan?
 - *Best Practice: Designate a person or team of individuals to formulate responses to participant inquiries; establish specific deliverables for participants (e.g. fact sheets, FAQs); and identify a timeline for responses.*
- How will participant inquiries be escalated when the designated individual is unable to answer the inquiry?
 - *Best Practice: Plan sponsors should identify a second-line of contact in the event that the first contact person is unable to resolve the participant's question(s). For example, some complex inquiries may require elevation to senior management, in-house counsel, or outside counsel.*
- How will decisions be documented and for how long will documents be retained?
 - *Best Practice: All complaints, questions and requests for information from participants should be documented in writing and retained for six years.*
- How will the plan monitor the success of resolving participant inquiries?
 - *Best Practice: Regular monitoring and review of complaints and questions should be conducted periodically to identify issues, trends and opportunities for improvement.*

Reporting to the Board

Issues:

- Indemnification
- Demonstration of delegation oversight
- Membership development and training
- Board involvement



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