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A Is for Agenda—the Importance of Good Retirement Plan Governance

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The article attempts to debunk some common misconceptions about certain fiduciary duties, namely plan

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governance and documentation of prudent processes, before the Department of Labor comes knocking.

Have you heard the one about how high-performing investments absolve retirement plan sponsors from risk and liability? Although adopted by many plan sponsors, that mentality creates a false sense of security and can still result in a civil lawsuit or Department of Labor (DOL) investigation. A recent analysis of the trend of plan investigation outcomes is alarming. The number of DOL Investigators is on the rise, and the percentage of investigations that result in an enforcement action often exceeds 65 percent {Employee Benefits Security Administration, *https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/fact-sheets/ebsa-monetary-results-2020.pdf*}. In our experience as retirement plan specialists, nearly all these cases are lacking two critical elements required by the Employee Retirement Income Security Act (ERISA) of 1974 {ERISA § 404]: Proper plan governance and documentation of a prudent process.

Working with clients, a financial advisor should aim to debunk several common myths related to the management of a retirement plan. We're going to examine a few to share our insights and experience as to what plan sponsors, advisors, and third party administrators (TPAs) can do to help manage risk and liability.

Myth One: I Can't Get into Trouble with the DOL Because the Investments in the Plan Are Doing so Well

Good performance of plan investments alone does not absolve a plan sponsor/investment fiduciary of all liability. Performance itself does little to provide evidence of a process to justify the choices that were made in the past and those that will be required in the future. Often times, it could have been sheer dumb luck, which is not proper governance. In the eyes of the DOL, proper plan governance always begins with the process. Positive investment results without process will still fall under scrutiny during an investigation or civil lawsuit. After all, a plan sponsor may be awfully proud of a 10 percent overall rate of return, but if other similar plans experienced an 18 percent overall rate of return, suddenly the 10 percent doesn't look so good. Comparison can be the thief of happiness, but in the case of fiduciary governance, it is the basis for prudent decisionmaking.

Selection of a plan investment lineup requires analyzing a multitude of factors. A written investment policy statement (IPS) outlining the criteria used in the selection, monitoring, and replacement of the investments offered in the plan demonstrates the highest level of investment oversight. In the event the plan investments come under scrutiny, a well-written investment policy statement will be a vital risk management tool. That said, if a plan sponsor has a wonderfully written IPS, but doesn't bother to read or follow it, it would be damaging to them in an investigation or civil lawsuit. For this reason, some advisors may recommend not having an IPS.

Myth Two: I am Not Worried About a DOL Investigation; We Meet on a Regular Basis to Review the Plan Investments

Recent lawsuits have taught plan sponsors that you can't just "set it and forget it." Plan investment reviews are an important part of the fiduciary oversight obligation, but they are not the only part. Good retirement plan governance goes beyond just funds and fees. While these are common targets for lawsuits, an investigation, or Internal Revenue Service (IRS) audit may dig deeper into issues such as the design of the plan and how it is administered. It is important to develop a well-rounded agenda for your plan review meetings and document your discussions.

We've discussed the importance of the process itself, but equally important is the documentation of your process to prove what a good job you have done in the review and the basis for the decisions made. This means structuring your agenda to address key areas of liability, preparing material to review each of these topics, and keeping detailed minutes of the discussion and any decisions made. When it comes to

Exhibit 1

[CLIENT NAME] 401(k) Plan Review **[CLIENT LOGO]**
[Full Meeting Date]
Attendees

[Client Attendees] — [Company Name]

[TPA / Recordkeeper Attendees] — [Company Name]

[Advisor Attendees] — Northwestern Mutual

I. Review Prior Meeting Minutes *(Advisor)*

II. Plan Review *(TPA & Advisor)*

A. Legislative Update *(TPA)*

B. Plan Design & Administration *(TPA)*

C. Plan Data Overview *(Advisor)*

III. Plan Expense and Design Benchmarking *(Advisor)*

A. Plan Expense Review *(Advisor)*

B. Plan Expense Benchmarking Profile (using third-party data) *(Advisor)*

C. Market Pricing Survey (every few years) *(Advisor)*

IV. Investment Benchmarking *(Advisor)*

A. Review Investment Policy Statement and Investment Monitoring Report *(Advisor)*

B. Review Investment Monitoring Report (using third-party data) *(Advisor)*

C. Target Date Fund Analysis (using third-party data) *(Advisor)*

V. Compliance Review *(TPA & Advisor)*

A. Fiduciary Review *(TPA & Advisor)*

B. Administrative Process Development *(TPA & Advisor)*

C. Cybersecurity Protocols *(TPA & Advisor)*

Exhibit 2

Client Name 401(k) Annual Plan Review Meeting Minutes

Client Logo

Meeting Date:
Plan Committee Representatives:
TPA / Recordkeeper Representatives:
Advisor Representative(s):

Agenda Items:

- **Review Prior Meeting Minutes**
- **Annual Plan Review**
- **Annual Compliance Review**
- **Investment Policy Statement**
- **Investment Monitoring**
- **Plan Expense Review**

Agenda Items discussion summary: *(Expanded documentation of each item. Tight, focused language. Goal is to add enough detail to help manage the plan. Embellishment is excluded. Opinions are excluded. Actions not helpful are excluded. Aspirations that could bring undue fiduciary liability/risk are excluded.)*

- **Review Prior Meeting Minutes (***What got done. What actions are still open and need to be completed or deleted.)*
- **Annual Plan Review (***Legislation, Plan Design, Recordkeeper Data.)*
- **Annual Compliance Review (***Including: Due Diligence Binder Cybersecurity protocols)*
- **Investment Policy Statement (***Is there one? Is it signed? Is it current?)*
- **Investment Monitoring** *(Process and Documentation. Status of each fund. Changes. Participant notification.)*
- **Plan Expense Review (***Detailed outline of all plan expenses. Detailed benchmarking.)*
- **Other** *(Freeform)*
- **Action Items (***What needs to be done?)*

Decisions Voted: *(Were there any decisions that required committee vote?)*

plan governance, it's as much about what you do as it is about how well you document why you did it. No one likes a "he said/she said" argument with the DOL or IRS.

The good news for plan sponsors is that this can be relatively simple to do with the assistance of a good advisor and TPA. If a plan sponsor doesn't have the knowledge, capacity, and/or capability to handle this on your own, seek out the guidance of a team of experts to help put a process in place. No one is expected to be an expert of all things.

Exhibit 1 and Exhibit 2 are examples of agenda and meeting minutes that can be adopted to ensure proper documentation.

Myth Three: I Won't Have Any Problems Because My Fees Are Low

This myth might resonate with plan sponsors and fiduciaries who have chosen all low-cost, index fund options or the cheapest service provider. Unfortunately, just having low fees and expenses doesn't absolve them from risk. It is also important to note that nothing in ERISA 408(b)(2), and the supporting Regulations, requires that the cheapest alternative be selected for everything. For anyone out there that has been burned by buying the cheap alternative only to have it fall apart in a matter of days, when the more expensive item would have lasted for years, you know what we're talking about.

Investments are just one piece of the risk puzzle. Plan sponsors need to ensure that all parties they have hired to assist with the management of the plan are being paid a fee that is reasonable based upon the services they are providing. It is required by the DOL that plan sponsors understand the fees that are being paid related to the plan (investments and services) and regularly benchmark them against the marketplace as part of the "reasonableness" analysis. As with most services, the lowest-cost option is not always the one that provides the most value. In many instances, the prudent decision could be to pay a higher fee if it results in significantly higher value to the plan and its participants. Those sort of intangible value factors can't be numerically balanced, so this is where the minutes come in handy so the plan sponsor can articulate why decisions were made.

Myth Four: I Have Hired an Advisor As My Fiduciary, so I No Longer Have Any Liability

This is another common misconception. It is the responsibility of the plan sponsor to select one or more individuals to serve as the ultimate decisionmaker(s) and named fiduciaries for the plan. The named fiduciary, in its discretion, may delegate some of its responsibilities to another service provider. For example, a financial advisor hired to serve as an investment fiduciary may accept some or all liability for the selection of the investments, but as we previously discussed, investments are just one piece of the puzzle. In addition, the plan sponsor must ensure a reasonable process was followed when hiring and monitoring that advisor, or liability may still exist.

Required oversight by the named fiduciary for the plan sponsor does not only apply to parties hired outside the company. Any employee of the company tasked with a role in administering the plan also requires oversight from the named fiduciary. For example, a business owner may delegate the responsibility of managing participant contributions to someone in payroll. An "out of sight, out of mind" mentality might cause the owner to lose track of whether the contributions are funded in a timely fashion. The reality is the DOL won't sanction the payroll specialist in the event of an investigation; the Investigator will come to the owner and named Plan Administrator as the one who's responsible for overseeing the payroll specialist.

Bringing It All Home

In summary, when it comes to retirement plan governance, many plan sponsors don't know what they don't know. Engaging with a team of qualified experts will help demystify plan management and bring structure, process, and proper documentation to help manage the risk when offering a retirement plan. Never discount the importance of good records! ■

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