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ERISA Fiduciary Governance

Who’s in Charge?

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ERISA requires a fiduciary

- Every employee benefit plan must “provide for one or more **named fiduciaries** who . . . shall have authority to control and manage the operation and administration of the plan.” ERISA § 402(a)(1).

- Congress’s Purpose: focus the responsibility, authority, and liability for proper plan operation and administration.

- Choosing a Named Fiduciary: one of the most important decisions for a plan sponsor; one of the least considered decisions.

- Every ERISA plan has a fiduciary, whether you know who it is or not.

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(c) ***Fiduciary Structure***:

(1) Except to the extent elected otherwise below, the Employer shall be the Administrator in accordance with Article 19 of the Basic Plan Document and the Investment Fiduciary as defined in Section 2.01(ee).

- **(A)** ☐ Name of Administrator (if not the Employer): ___________
- **(B)** ☐ Name of Investment Fiduciary (if not the Administrator): __________
- **(C)** ☐ Fiduciary duties shall be allocated as described on the Fiduciary Addendum.

(2) ☑ See Fiduciary Addendum for other applicable provisions.

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What is a fiduciary?

- A fiduciary is a person who is responsible for plan operations, and is responsible if something goes wrong
- Heightened responsibility – must act solely in the interest of participants
- Functional definition – a person is a fiduciary if they:
  - have or exercise any discretionary authority or responsibility in the administration of the plan, or
  - exercise discretionary authority or control with respect to the management of plan assets, or
  - render investment advice for any compensation regarding plan assets or has authority to do so
- May be personally liable to make the plan whole for losses resulting from a breach of fiduciary duty

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Typical fiduciaries for an ERISA plan

- Plan Sponsor (not necessarily a fiduciary)
- Plan administrator
  - Handles day-to-day operation of the plan
- Investment fiduciary
  - Makes investment decisions
  - May select investment options for participations or may invest plan assets
- Claims fiduciary
  - Determines participant eligibility for benefits
- Trustee
  - Holds and controls plan assets
  - May manage plan assets

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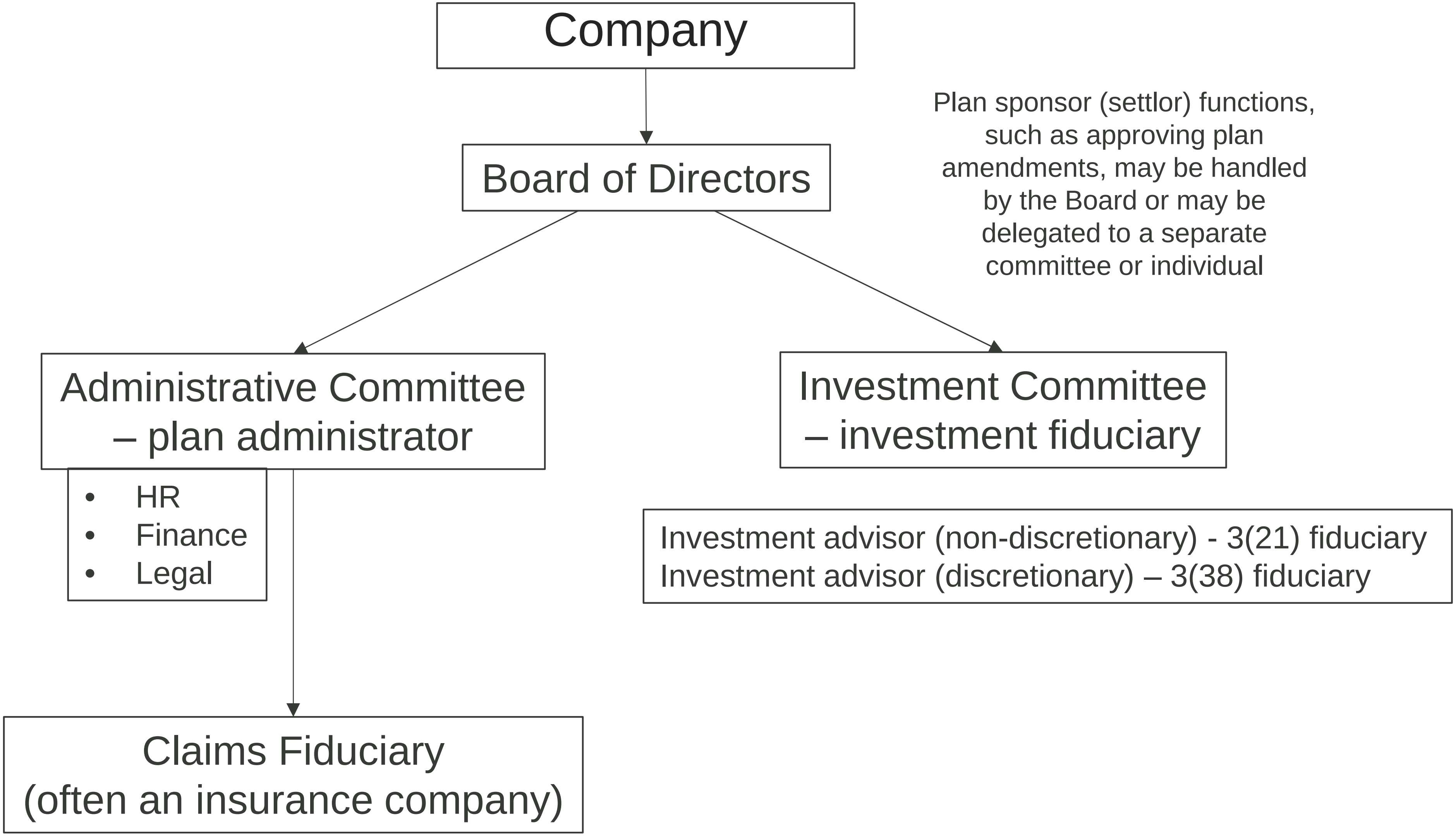
What is a fiduciary governance structure?

- The organizational management structure for the plan
  - Establishes who is responsible for what
  - Primary purpose: identify the fiduciaries and define their roles, and to ensure that the right people are designated as fiduciaries

- Typically, the board of directors appoints committees or individual people (often by job title) to serve as plan administrator and investment fiduciary, and delegates fiduciary responsibility


Company
Board of Directors
Plan sponsor (settlor) functions, such as approving plan amendments, may be handled by the Board or may be delegated to a separate committee or individual
Administrative Committee – plan administrator
• HR
• Finance
• Legal
Investment Committee – investment fiduciary
Investment advisor (non-discretionary) - 3(21) fiduciary
Investment advisor (discretionary) – 3(38) fiduciary
Claims Fiduciary (often an insurance company)

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Once you've implemented the governance structure and identified the fiduciaries

- Provide training to ensure fiduciaries understand
  - What they are responsible for (e.g., investments, administration)
  - The core fiduciary duties under ERISA
  - Two hats doctrine – when they are wearing their "fiduciary hat"
  - That fiduciaries may be held **personally liable** "to make good to a plan" any losses resulting from a breach of fiduciary duties.

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ERISA Fiduciary duties

- Duty of loyalty – Act solely in the best interest of participants' / beneficiaries'

- Duty of care ("duty of prudence") - Use the care, skill, prudence and diligence of a prudent expert in the prevailing circumstances

- Duty to diversify investments to minimize the risk of large losses

- Duty to follow the written terms of the plan document

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Satisfying Fiduciary Duties: Process and Documentation are Key

- The key to fulfilling most fiduciary duties under ERISA lies in adhering to a prudent process . . .
  - Fiduciaries will be judged on the quality of the process they followed in reaching a decision, rather than the outcome of the decision.
  - A prudent process is more likely to produce a good outcome and will also provide a solid defense against liability even where the outcome is bad.
- And documenting it – contemporaneous documentation (*e.g.*, meeting minutes) provides the best evidence of the process.

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Fiduciary duties and litigation

- Suits against ERISA fiduciaries have exploded
  - A single law firm pioneered retirement plan litigation (over $1.5B recovered)
  - Copycat suits: more than 200 ERISA class action lawsuits filed in 2020
  - Smaller plans now being targeted
- Common Claims:
  - Poor performing investment funds – 401(k) and 403(b) plans
  - High fees: administrative, recordkeeping, and investment – 401(k) and 403(b) plans
  - Outdated mortality tables used for actuarial conversion factors – Pension plans
  - Out of network reimbursement - Health plans
  - Benefit eligibility - Severance Plans
  - Cybersecurity next?
- Understanding the "hat" you are wearing: Tussey v. ABB
  - Fidelity Investments provided recordkeeping services to the 401(k) plan
  - Fidelity Investments provided corporate payroll services to ABB
  - Consultant (Mercer) told ABB it was overpaying for recordkeeping and appeared to be subsidizing the corporate services

Next steps

1. Identify named fiduciaries based on plan documents.

2. Identify fiduciaries based on functional definition.

3. Ensure alignment between plan document, operation, and desired governance structure.

4. Provide regular fiduciary training.

5. Ensure procedural documents are in place and followed (*e.g.*, committee charter, investment policy statement).

6. Review fiduciary insurance and indemnification provisions.

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Questions?

Verrill Employee Benefits & Executive Compensation Group
Blog: https://www.verrill-law.com/benefits-law-update/

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