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Monitoring the Activities of a Plan Fiduciary Committee: Recommendations to a Board of Directors

by Eric D. Altholz on March 17, 2025

It is axiomatic that a person who has fiduciary responsibility with respect to an ERISA benefit plan must monitor the performance of any plan service provider or other person to whom it has delegated fiduciary duties on an ongoing basis. This obligation is inherent in the core "duty of prudence" under ERISA, as developed by courts and agency guidance, and it existed in some form even before the Supreme Court formally articulated the requirement 10 years ago in the famous *Tibble* case.[1] So if a retirement plan fiduciary committee engages an investment manager to oversee the investment of plan assets, the committee must evaluate the investment manager's job performance on a regular and ongoing basis, and must make sure that the investment management fees and expenses are reasonable. But what steps should a board of directors (or comparable governing body) take to monitor the activities of a plan fiduciary committee to which it has delegated some or all fiduciary duties with respect to an ERISA benefit plan?

Fiduciary duties of the board—the point of origin

Either by default or as a consequence of an action taken with respect to an ERISA plan, the board of directors of the plan sponsor can be found to have fiduciary duties under ERISA. The board may be directly classified as a fiduciary by default in cases where the plan document identifies the employer as the "plan administrator" (as many pre-approved retirement plan documents seem to do) or in the absence of any other "named fiduciary" of the plan. Alternatively, the board may affirmatively accept a more limited scope of fiduciary responsibility if it formally delegates some or all fiduciary duties to one or more persons or committees (such as a plan administrative committee). In fact, this is what we and most employee benefits professionals routinely recommend for the purpose of interposing, for the benefit of board members, a layer of protection against liability for breaches of

[1] Tibble vs. Edison Int'l, 575 U.S. 523 (2015). As a reminder, the Tibble case required the Court to determine the proper application of the statute of limitations under ERISA. The Court found that the limitations period did not end six years after an expensive, poorly performing mutual fund was originally selected as an investment option in a retirement plan. Instead, the limitations period essentially began anew each year because the Court found that the fiduciary committee had an ongoing obligation to monitor the performance of the fund.

fiduciary duty. Specifically, in most cases, we recommend that the board: (1) formally establish a committee composed of executives and senior managers who have the expertise and capacity to fulfill the fiduciary duties assigned to the committee; (2) describe, in the establishing resolutions, the duties delegated to the committee with respect to plan administration, plan investments, or both; and (3) direct the committee to adopt a written charter affirming the acceptance of the delegated duties and describing the manner in which the committee will conduct its affairs.

Establishing a committee to which fiduciary duties are delegated is itself a fiduciary act, and the manner in which that act is carried out is subject to the fiduciary standards of ERISA. So, having interposed a layer of protection against fiduciary liability in the form of the fiduciary committee, how can the board fulfill its obligation to monitor the activities of the committee?

Reporting up—a second layer of process and documentation

Another axiom in ERISA fiduciary compliance is that a sound process and documentation of that process are the keys to complying with the duty of prudence. These twin disciplines form the basis of everything that a good fiduciary committee will do to fulfill the duties delegated to it by a board, and they also should form the basis of actions taken by the board to monitor the activities of the committee. Note that the board's goal need not, and should not, be to second-guess decisions made by the committee. The goal should be to remain informed about the committee's activities and, if desired, get more information. This goal can be achieved by having the committee report to the board annually regarding its activities and accomplishments in the prior plan year. The report could be delivered in person by the chair or other committee representative (with the substantive content captured in the minutes of the board meeting), or it can be delivered in writing.

From a documentation standpoint, it's hard to beat a written annual report that summarizes major committee activities like RFPs to select service providers, fiduciary training sessions, investment fund changes, review of or modifications to the Investment Policy Statement, and the information regarding any IRS or DOL audit that may have been initiated or concluded. If the committee is authorized to adopt certain plan amendments (e.g., amendments to ensure that the plan continues to comply, in form and operation, with the requirements of applicable law), the annual report should summarize any plan amendments adopted by the committee within the scope of its authority. The minutes of committee meetings should also be attached, along with significant supporting materials that the committee may have relied upon to make important decisions. These things will put the board in a position to get a clear picture of what the committee is doing, ask followup questions if necessary, and demonstrate compliance with its own fiduciary duty to monitor the activities of the committee to which it has delegated fiduciary duties.

Finally, it is important to note that if the board learns of a breach of fiduciary duties by a fiduciary committee (for example, an act or omission that rises to the level of a breach of the duty of loyalty), the board could be exposed to liability as a co-fiduciary if it fails to make "reasonable efforts under the circumstances to remedy the breach." *See* ERISA Section 405(a)(3). Board members should be alert to this risk when they review the activities of any fiduciary committee to which they have delegated authority.

If you have questions regarding the fiduciary standards under ERISA or need assistance in assessing the status of your ERISA fiduciary governance practices, please contact a member of Verrill's Employee Benefits & Executive Compensation Group.

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