

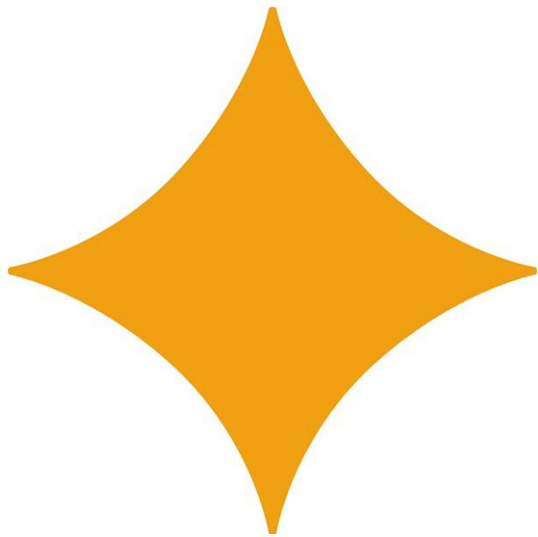
Today's Webinar will begin shortly

Please register today for our next Trucker Huss Webinar:

Deferred Compensation Plans for Tax Exempt Organizations — The Tricks and Treats of 457 Plans

Date: October 31, 2023– 10:00 AM PT / 1:00 PM ET

Section 457 Plans sponsored by tax exempt organizations can be tricky if not designed and operated correctly. However, they don't have to be scary and when done right they can be a treat for executives of such organizations. This webinar will explore the unique rules and considerations when designing and operating these types of plans, as well as areas where organizations could make costly errors. Both "eligible" 457(b) plans and "ineligible" 457(f) plans will be discussed.



Fiduciary Governance of Retirement Plans

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October 17, 2023

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PART I: WHAT IS FIDUCIARY GOVERNANCE AND WHY DOES IT MATTER?

What is Fiduciary Governance and Why Does it Matter?

- ♦ What is fiduciary governance?
 - > An established framework for management of fiduciary responsibility and oversight of a retirement plan
 - This established framework helps identify fiduciaries, outline responsibilities, and provide guidelines for how processes and documents are maintained and monitored

What is Fiduciary Governance and Why Does it Matter? (cont'd)

★ Why does fiduciary governance matter?

- > ERISA is a process driven statute. Compliance is demonstrated through process. A strong governance framework helps by
 - Identifying fiduciaries
 - Preventing unnecessary spread of fiduciary responsibility
 - Ensuring fiduciary responsibilities are fulfilled at regular/appropriate intervals
 - Evidencing authority to governmental entities
 - Remaining compliant and preventing costly mistakes – for the plan, the participants, and the personal liability of the fiduciaries
 - Creating a record repository

What is Fiduciary Governance and Why Does it Matter? (cont'd)

♦ Who are the key players?

- > Named Fiduciary – Named in plan document, has the authority to control the operation and administration of the plan
- > Plan Administrator – Named in plan document, has the authority and responsibility for day-to-day administration of the plan
- > Plan Trustee – Named in the trust instrument, manages the plan assets
- > Investment managers / advisors – Either manage plan investments in a discretionary capacity, or provide fiduciary investment advice recommendations with respect to plan investments for a fee

What is Fiduciary Governance and Why Does it Matter? (cont'd)

♦ Who Are the Key Players?

- > Functional fiduciaries – Anyone who carries out the responsibilities of a fiduciary:
 - Control of operation or administration of the plan
 - Day-to-day administration of the plan
 - Management of plan assets
 - Management of plan investments or provision of investment advice for a fee
- > will be deemed a fiduciary, and subject to fiduciary responsibility

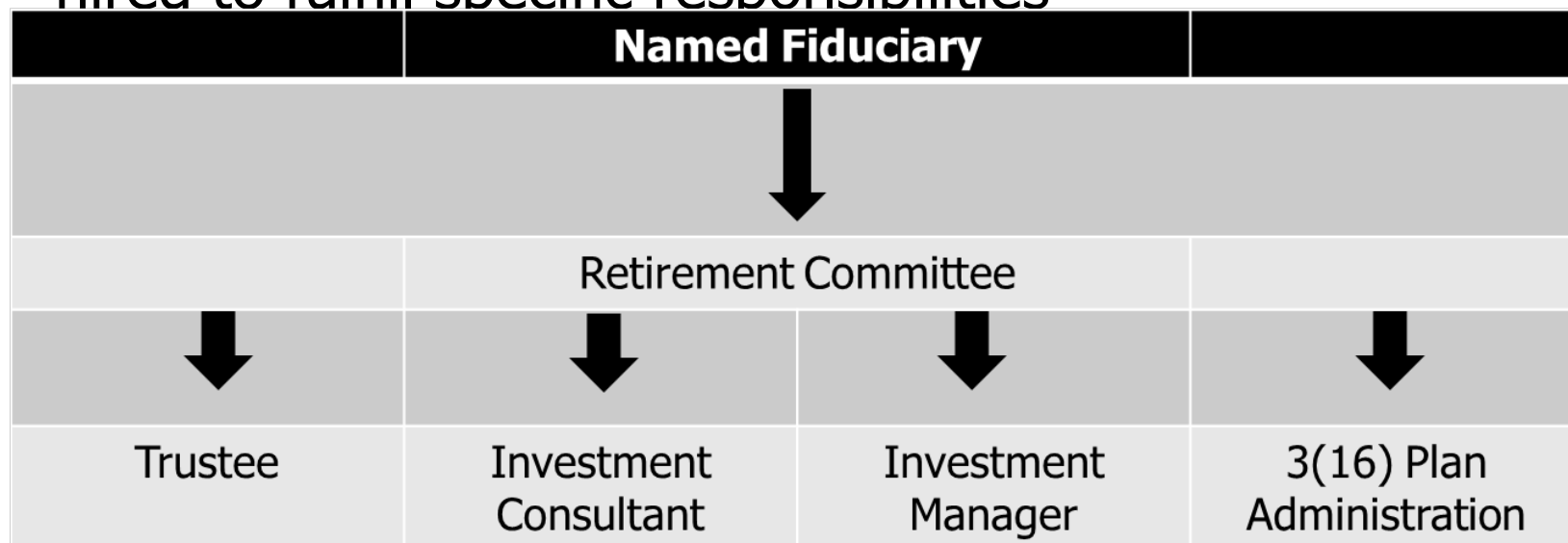
PART II. THE GOVERNANCE FRAMEWORK

The Typical Fiduciary Governance Framework

- ✦ The fiduciary governance framework begins with the Named Fiduciary
 - > The Named Fiduciary is listed in the Plan document. Typically, this is the company sponsoring the plan or the board of trustees
- ✦ The Named fiduciary authorizes establishment of a Retirement Committee and delegates Plan Administrator responsibilities.
 - > Retirement Committee acts as Plan Administrator within the parameters of the delegation from the Named Fiduciary. The parameters are normally established in a **Committee Charter**.

The Typical Fiduciary Governance Framework (cont'd)

- ♦ The Retirement Committee selects and delegates responsibilities to other fiduciaries as it deems appropriate, including the trustee, investment managers/consultants, and outside plan administrators hired to fulfill specific responsibilities

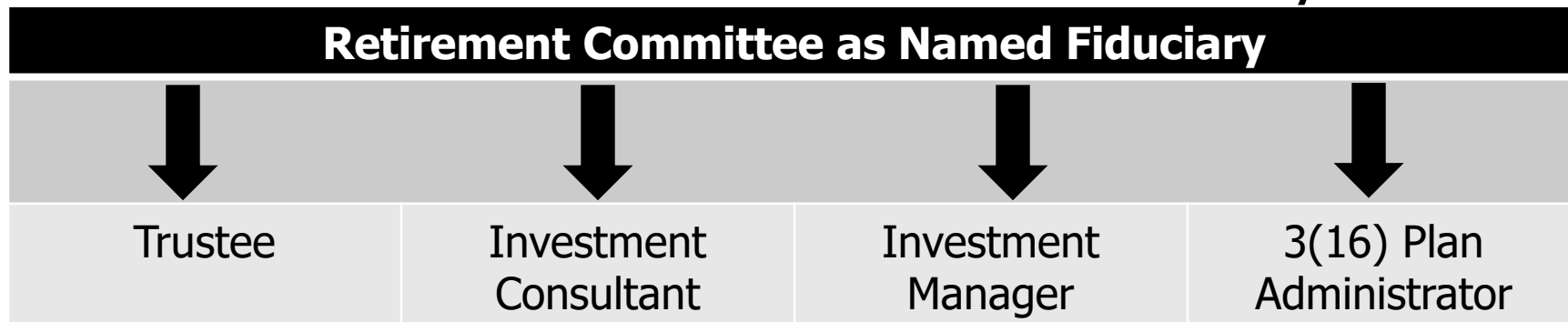


The Typical Fiduciary Governance Framework (cont'd)

- ✦ What goes down must come up
 - > Any delegated fiduciary responsibility, including Plan Administrator responsibilities by the Named fiduciary must be monitored by the delegating fiduciary
 - > Having a strong governance framework helps clarify who has monitoring responsibilities, and who has related reporting responsibilities.
 - > Failure to monitor can result in a fiduciary breach

The Typical Fiduciary Governance Framework, (cont'd)

- Some entities choose to simplify their fiduciary governance framework by having the Retirement Committee serve as the Named Fiduciary



The Typical Fiduciary Governance Framework (cont'd)

- ✦ Pros and cons of a simplified structure
 - > Fewer fiduciaries
 - > Less administrative complexity
 - > Ultimate fiduciary responsibility is housed with those routinely carrying out fiduciary duties
 - > Lack of Board control over fiduciary functions, but retention of ability to exercise settlor functions
 - > Requires careful delineation to avoid inadvertent fiduciary status

PART III. DOCUMENTING THE FIDUCIARY GOVERNANCE FRAMEWORK

Governing Documents Generally

- ✦ Plan document and Trust Agreement
- ✦ Retirement Committee Charter (or “Bylaws”)
- ✦ Resolutions / Certificates of Delegation
- ✦ Investment Consultant Agreements
- ✦ Investment Management Agreements
- ✦ Investment Policy Statements
- ✦ (Optional) Expense Policy
- ✦ (Optional?) Cybersecurity Policy

Plan Document and Trust Agreement

- ✦ Plan document must name the Named Fiduciary
- ✦ Plan document will also generally name the Plan Administrator, but will often contain a delegation caveat
- ✦ Plan document usually lists general responsibilities of the Plan Administrator
- ✦ Trust Agreement will name the trustee(s)

Retirement Committee Charter

- ★ The Retirement Committee Charter outlines the fiduciary duties of the Retirement Committee as Plan Administrator, with any reservations for the Named Fiduciary
- ★ Retirement Charters can vary in design, but generally contain the following components:
 - > Purpose
 - > Membership
 - > Meetings, Records and Procedures
 - > Responsibilities
 - > ERISA Compliance

Retirement Committee Charter (cont'd)

♦ Purpose should include

- > the plan or plans for which the Retirement Committee has authority and responsibility
- > a summary of the source of the Retirement Committee authority (when was it established, and how?)
- > a statement regarding the generality of the Charter
- > a reference to adherence to applicable law

Retirement Committee Charter (cont'd)

- ✦ Membership should identify the Committee composition
 - > It may be useful to avoid listing specific names, or specific titles, as such designations may ultimately require amendment to the Charter, potentially slowing progress of Retirement Committee activity
 - Consider listing just certain key titles, and then a minimum and maximum number of members. Consider including language for appointment of delegates by key titles.
 - Broad spectrum representation on Retirement Committees has increased. Common members include representatives from Human Resources, Finance, Payroll, Recruiting

Retirement Committee Charter (cont'd)

- > Membership should include a process by which Retirement Committee Members are appointed and removed.
 - Often this is done by the Named Fiduciary.
 - If the Retirement Committee is the Named Fiduciary, it should be a self-appointing Committee (appoint its own members). Appointment by another entity (such as the Board) would give that entity de facto control, creating fiduciary liability that was intended to be avoided.
 - Remember to include a process for removal/resignation and instructions as to what happens if a member who is in a key role undergoes a title change.

Retirement Committee Charter (cont'd)

♦ Membership should include

- > The ability to appoint officers, including:
 - A Chair. The Chair may be responsible for calling meetings, and for reporting to the Named Fiduciary (if applicable)
 - A Vice-Chair. The Vice-Chair will fulfill the Chair's duties in the Chair's absence
 - A Secretary. The Secretary oversees the drafting of minutes and other documents

Retirement Committee Charter (cont'd)

♦ Membership should include

- > A process for inviting guests.
 - Outside attendees should only attend at the invitation of the Committee. Developing a process for invitation of guests will help clarify who is entitled to attend meetings, help the fiduciaries focus on fiduciary responsibility, and help shield guests from unintended fiduciary liability.

Retirement Committee Charter (cont'd)

- ✦ Meetings, Records and Procedures should include
 - > How meetings are announced (to ensure fiduciary awareness and involvement)
 - > Frequency of meetings
 - Provide flexibility! “Four times per year” is better than “quarterly”
 - > Rules on Quorum
 - Both presence and voting rules

Retirement Committee Charter (cont'd)

- > Rules on tie-breakers
 - General standard is a tie vote is a nay vote (motion fails)
- > Guidelines on action by unanimous written consent in lieu of meetings
- > A statement on the retention of minutes
- > A statement on discretion to establish other policies to facilitate meetings

Retirement Committee Charter (cont'd)

♦ Responsibilities should include

- > Investment Duties
 - Include the review process, cadence, and responsibility for retention and termination
- > Administrative duties
 - Review the Plan document responsibilities of the Plan Administrator for alignment
 - Clarify Committee responsibilities with respect to ERISA claims and appeals
 - Clarify Committee responsibilities with respect to vendor selection, retention, termination
 - Clearly outline any items held-back for Named fiduciary (if applicable)
 - Clearly state the ability to delegate (if applicable)

Retirement Committee Charter (cont'd)

- ★ Responsibilities should also include
 - > Periodically reviewing the Charter
 - Reflect process for amending or recommending amendment (if not self governing)
 - > Periodically updating the Named Fiduciary on activity (as appropriate)
 - > A statement of flexibility to act generally in accordance with the Charter

Retirement Committee Charter (cont'd)

- ★ ERISA compliance should
 - > Clarify that the Committee members will adhere to ERISA fiduciary responsibilities with respect to the fiduciary functions they fulfill (avoiding fiduciary standards for settlor functions)

A Note on Drafting Minutes

- ★ Start with the basics
 - > Who was in attendance? When was the meeting? Where was it held (including virtual)
- ★ Sometimes less is sometimes more
 - > The meeting minutes should summarize the events of the meeting, that discussions were held, and any action items, but they do not need to recount every comment
- ★ Vote items should include resolutions and approvals
 - > Describe the action approved and the approval motion
 - > Brief resolutions in minutes can ease the process of evidencing approvals down the road

Resolutions / Certificates for Governance Structure

- ✦ Authority of a Retirement Committee needs to be documented. A Committee Charter without proper approval creates risk, governance gaps, and potentially invalidates actions taken.
- ✦ If stepping into a governance exercise mid-stream, consider whether a ratification may be appropriate
- ✦ Resolutions approving a Retirement Committee is an appropriate place for indemnification authorization

Investment Consultant and Investment Management Agreements

- ♦ All investment consultant agreements should contain fiduciary acknowledgments.
 - > Fiduciary acknowledgment should be carried out through fiduciary appointment and acceptance language.
 - > Scope of fiduciary responsibility should also be identified

Cybersecurity Policy Statement

- ✦ In 2021, the DOL released a cybersecurity best practices package for plan fiduciaries
- ✦ Shortly after, the DOL began examining cybersecurity framework during routine DOL investigations
- ✦ DOL has emphasized that service provider cybersecurity policies are not sufficient to demonstrate a cybersecurity framework
 - > Plan fiduciaries either need to consider developing a cybersecurity statement or integrate plan cybersecurity with the overall corporate cybersecurity framework.
 - > Contracting with vendors to acknowledge / adhere to policies

PART IV – FINAL THOUGHTS

Final Thoughts

- ✦ Understand fiduciary duties
- ✦ Understand the roles and responsibilities of fiduciaries
- ✦ Understand and document your fiduciary framework
- ✦ Ensure all fiduciaries receive periodic fiduciary training
- ✦ Actively fulfill fiduciary duties at regular intervals (i.e., at regularly scheduled committee meetings)
- ✦ Prudent processes to oversee plan administration and monitoring fees all start with good governance

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