



ACHIEVING 20/20 FIDUCIARY VISION

BY ALAN HAHN, ESQ. & GABRIELLE WHITE, ESQ. DAVIS & GILBERT LLP

The best athletes in the world often say they need to “see the whole field” to be effective. In professional football, for example, the quarterback takes a broad look at the playing field before starting play. In Major League Baseball, the batter takes a moment to survey the defensive positioning before stepping up to the plate. Similarly, in the business world, senior executives often move from job to job within an organization to get a sense of the whole picture. Plan fiduciaries, however, typically do not get to see the larger world of employee benefits, at least beyond the plan issues they are reviewing. In many cases this is as it should be, as committee members have regular jobs that they must attend to and do not have the time to become an employee benefits expert beyond their focus area. However, this can lead to blind spots, and a failure to ask the right questions at the right time about issues that may not be readily apparent. As a result, committee members should get perspective by asking for guidance from those members of the committee who have a broader view of the field of employee benefits, and ERISA counsel, to ensure they are seeing the whole field before taking action.

A good starting point for committee members is to consider the scope of the committee’s responsibilities. Most committees are responsible for more than just investments. They may also be an administrative committee—i.e., the Plan Administrator designated under ERISA and responsible for ensuring that the plan is administered in accordance with its terms. Even if committee members understand the need to meet this fiduciary standard, they may struggle to articulate how to go about ensuring that they actually provide the oversight called for by the terms of the plan and ERISA. To combat this myopia, legal counsel should ensure that committee members become familiar with the terms of the plan and the plan’s administrative procedures.

Additionally, many committees, by their terms, are responsible for more than just the qualified retirement plan sponsored by the organization. For example, a committee charter may actually reference the committee’s responsibility for providing oversight of other benefits plans sponsored by the organization, like health and welfare, non-qualified and even international plans. Thus, committee members may

need to ask themselves a fundamental question: Is my 401(k) committee really a Benefits Plan Committee? If so, do committee minutes reference a review of these other plans?

Even if a committee is narrowly charged to address only qualified retirement plans, the organization may be losing an opportunity to take lessons learned from the administration of the qualified plan and apply them across all of the organization’s plans. For example, if an organization struggles with offering 401(k) benefits to “temporary employees” and other contingent workers, it may make sense to expand a committee discussion to address other benefits issues that affect such workers, including those under the Affordable Care Act.

So, what is a committee member to do if he or she wants to get a sense of the broader field of employee benefits? Aside from consulting with counsel directly, here’s a quick checklist of areas that committees may want to examine, as part of their regular meetings:

1 CHARTER.

Fiduciaries of qualified plans need to understand what the committee charter provides. Are the responsibilities articulated in the charter limited to qualified plans only? If so, is it better for the organization to expand the committee's scope of oversight to other benefits?

2 CHECK THE PLAN DOCUMENT.

Many investment committees are also the Plan Administrator, as named fiduciary under the plan. If so, is some committee education necessary? For example, should legal counsel distribute plan provisions that specifically reference Plan Administrator responsibilities so committee members can become more familiar with their responsibilities under the plan?

3 PARTICIPANT CLAIMS.

ERISA fiduciaries are responsible for establishing and maintaining reasonable claims procedures. A portion of each committee meeting may need to be reserved for reviewing any and all inquiries and claims raised by participants. Legal counsel should address how those claims should be responded to under Department of Labor regulations.

4 ADMINISTRATIVE REVIEW.

Committees may want to schedule a portion of each meeting to address how the administration of the plan works, focusing on potential problem areas, such as timing of contributions, definition of compensation, and vesting and matching contribution calculations.

5 NONQUALIFIED PLANS.

Although most nonqualified deferred compensation plans are exempt from ERISA, to the extent the plan is not, plan fiduciaries would have similar duties as they have with respect to qualified plans. Moreover, even if the plan is not subject to ERISA fiduciary duties, many of the administrative issues that affect qualified plans will affect non-qualified plans too. And, ensuring that plans comply with the strict requirements of Code Section 409A may be appropriate for a committee as well.

6 INTERNATIONAL PLANS.

The plan sponsor may maintain retirement plans in other countries that require a level of oversight. Also, fiduciaries should be aware of special circumstances, such as Puerto Rico plans. A committee member may want to start asking whether the organization maintains a centralized list of plans that may require oversight.

7 GROUP HEALTH PLANS.

If the company sponsors a group health plan (as is likely), someone at the company is responsible for ensuring ERISA compliance. For example, plan fiduciaries must ensure that plan terms are adhered to, monitor service providers and ensure compliance with the Affordable Care Act. Additional care needs to be taken if a health plan is self-insured, the company offers retiree medical benefits or has funding vehicles like Voluntary Employees' Beneficiary Associations (VEBAs).

The bottom line is that the best committees will treat each meeting as a mini-compliance review of all aspects of the plan for which they are responsible. Even if all aspects of compliance cannot be addressed in the limited time allocated for meetings, the mindset of the committee may need to be expanded. Committees should look to their investment consultants and legal counsel to help make the most of their meetings, and should take care to see the whole field before taking action.