

Retirement Plan Fiduciary Best Practices



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Fiduciary Headlines

Update On Enforcement

- Increased reviews of governmental retirement plans in 2016
 - 403(b) and 457(b) plans, in addition to “large case” plans and multiemployer plans have been chosen “for increased attention because they have a historical pattern of noncompliance and allow for greater coverage of the retirement plan participant universe”. (Tax Exempt and Government Entities Division)
 - Examples:
 - Excess annual pre-tax deferrals
 - Exclusion of eligible employees from plan and/or features
 - Plan loans
 - Hardships distribution failures

Litigation Themes

- Fees being charged are excessive relative to the market place
- Lack of participant disclosure regarding plan fees
- Fiduciaries engaged in prohibited transactions or self-dealing
- Float income issues
- Retirement plan subsidizing company operations or other benefit programs

Court Cases in the News

- Tibble v. Edison
 - Supreme Court ruled that a fiduciary has a duty to continuously monitor investments, in addition to prudently selecting them. Case is sent back to the 9th U.S. Circuit Court of Appeals to hear the case; did Edison's fiduciaries breach their fiduciary responsibility by keeping mutual funds that charged retail fees when lower cost versions of the same fund were available

Court Cases in the News

- Tussey v. ABB
 - A case where ABB's fiduciaries were being sued for violating their fiduciary duties by mapping plan investments to a higher cost mutual fund managed by the Plan's record keeper, Fidelity.
 - A federal judge rejected the plaintiff's claims for damages, even while finding that plan executives violated their fiduciary duty to participants
 - In short, the "mapping" constituted a fiduciary breach, but the plaintiff's method of calculating damages was flawed.

Additional Examples of Financial Liability

General
Dynamics
\$15.1MM

Lockheed
Martin
\$62MM

Caterpillar
\$16.5MM

Walmart
\$13.5MM

Kraft
\$9.5MM

What Did I Sign Up For?

Purpose of Committee

- Committee is acting for the County
- Oversight of Nationwide
- Investment selection and monitoring
 - Investment policy statement
 - Third party investment advisor (HPA)
- Monitoring plan fees and expenses
- Collaborate with service providers and monitors participant education initiatives and activities

Governmental Plan

- Fiduciary Standards– Trust Law
- State Law
- “Best Practices” –ERISA Compliance

Significance of Fiduciary Responsibility

- Why is this important?
 - Protection of participants and beneficiaries
 - Personal liability
 - State law compliance

You Are a Fiduciary If:

You

- Appoint other fiduciaries
- Have control over plan management
- Delegate or allocate responsibilities to other fiduciaries

You

- Select and monitor plan investments
- Provide investment advice to the plan for a fee

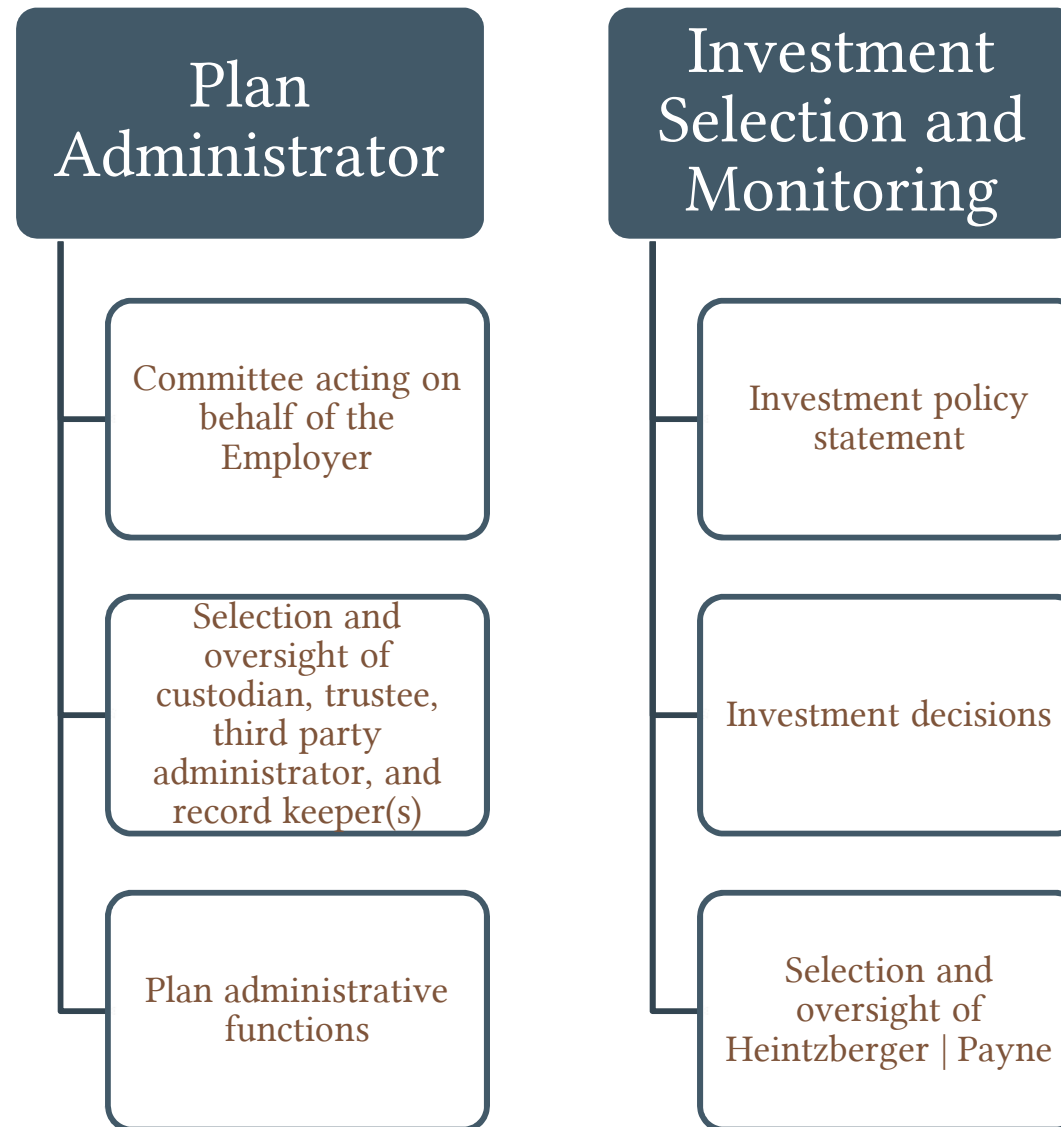
You

- Acquire or dispose of plan assets
- Interpret plan provisions
- Administer the plan with discretionary authority

Factors That Determine Your Status

- This is a functional definition: If you perform fiduciary functions then you are a *fiduciary*
- Formal acknowledgment or appointment is *not* necessary to be recognized as a fiduciary
- Exercise control or authority of the plan. *Title* is not the determining factor

Plan Fiduciary Duties



Plan Fiduciary Duties:

Monitoring Plan Fees and Expenses



ERISA 404(a)(5)

Are investment products
and participant fees
reasonable?

ERISA 408(b)(2)

Are service fees reasonable?

Benchmarking

RFI & RFP
Share class review
Fee Structure

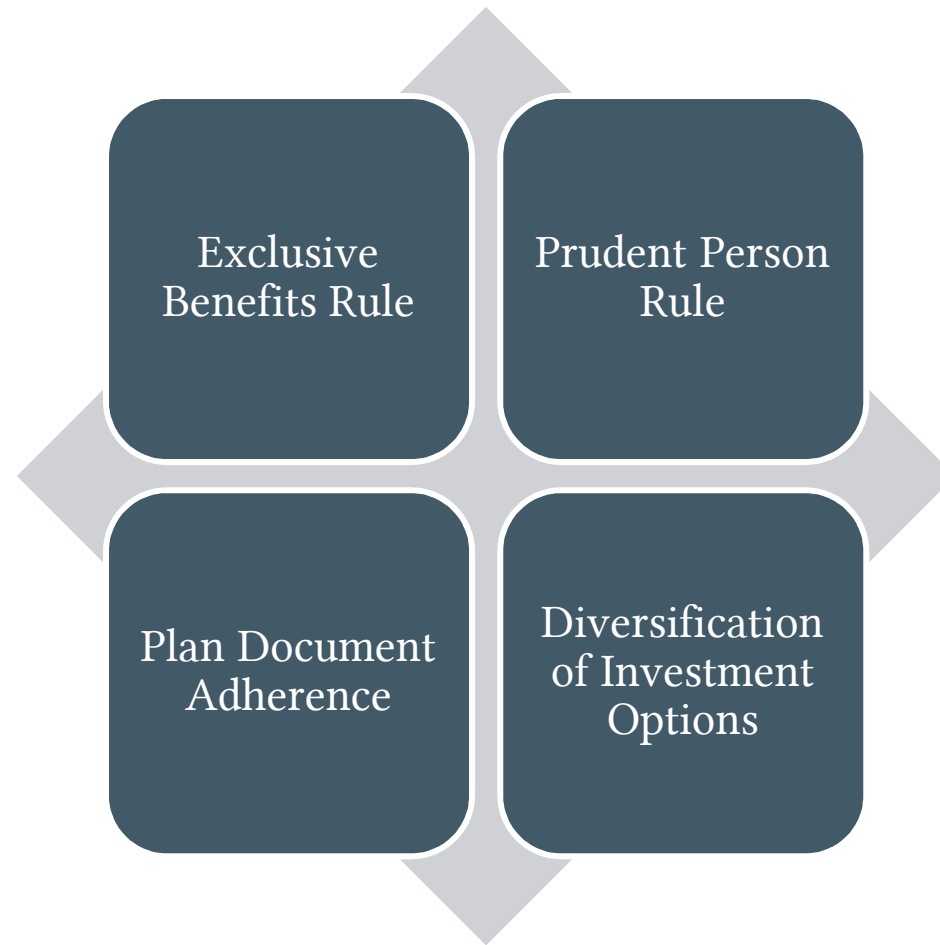
What's At Stake?

- ERISA provides that any person who is a fiduciary and breaches any of the responsibilities, obligations or duties imposed upon fiduciaries shall be *personally* liable
- A fiduciary may also be personally responsible for paying any civil penalties or excise taxes imposed on an employer by Court of Law

What are My Responsibilities

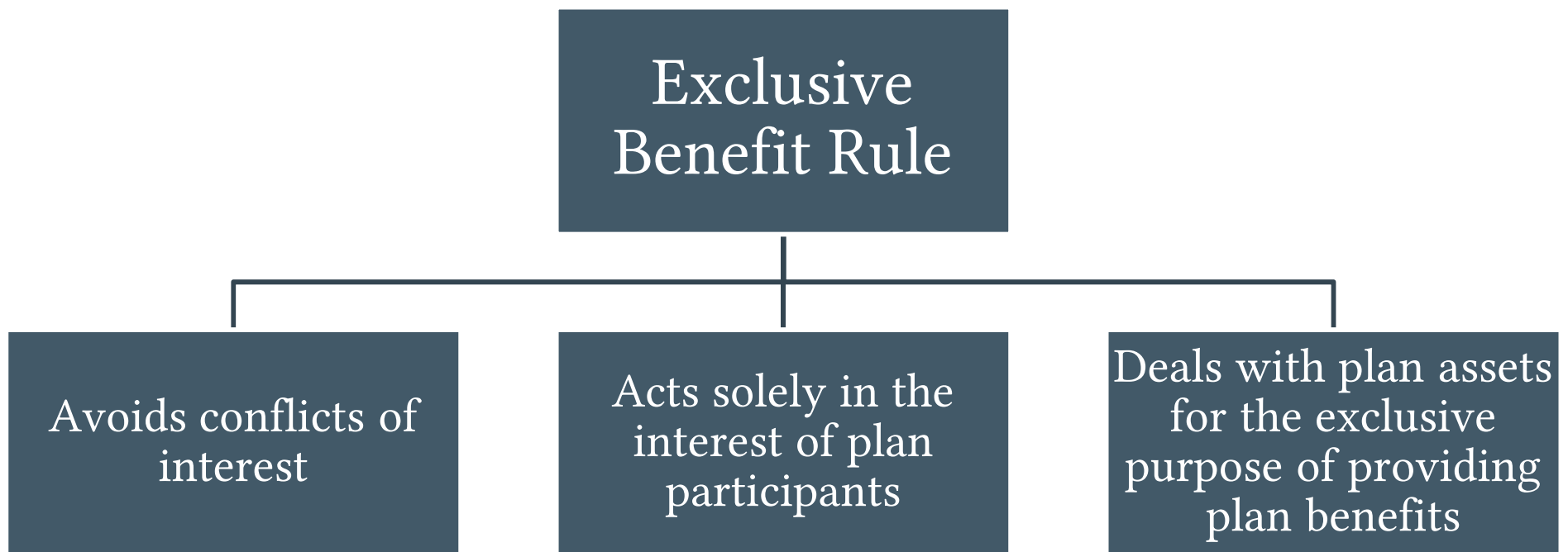
Welcome to the Fiduciary Club

Four Guiding Principals



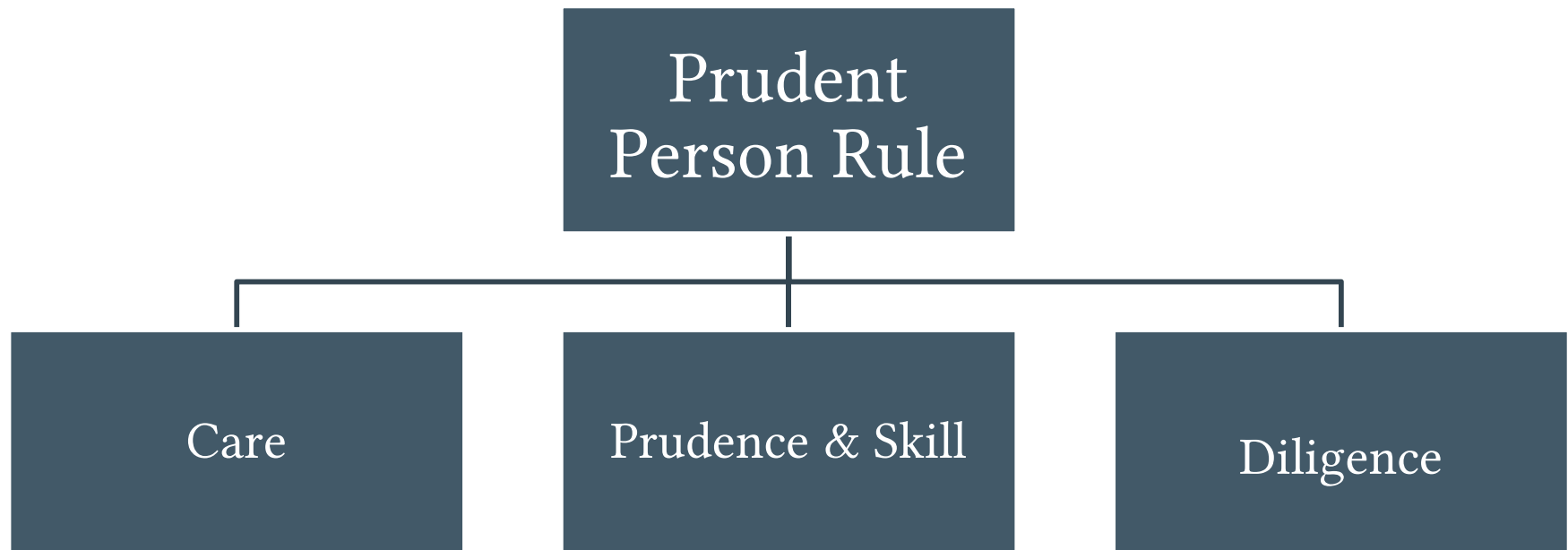
Build your policies and procedures to encompass these four critical principals

Roles and Responsibilities



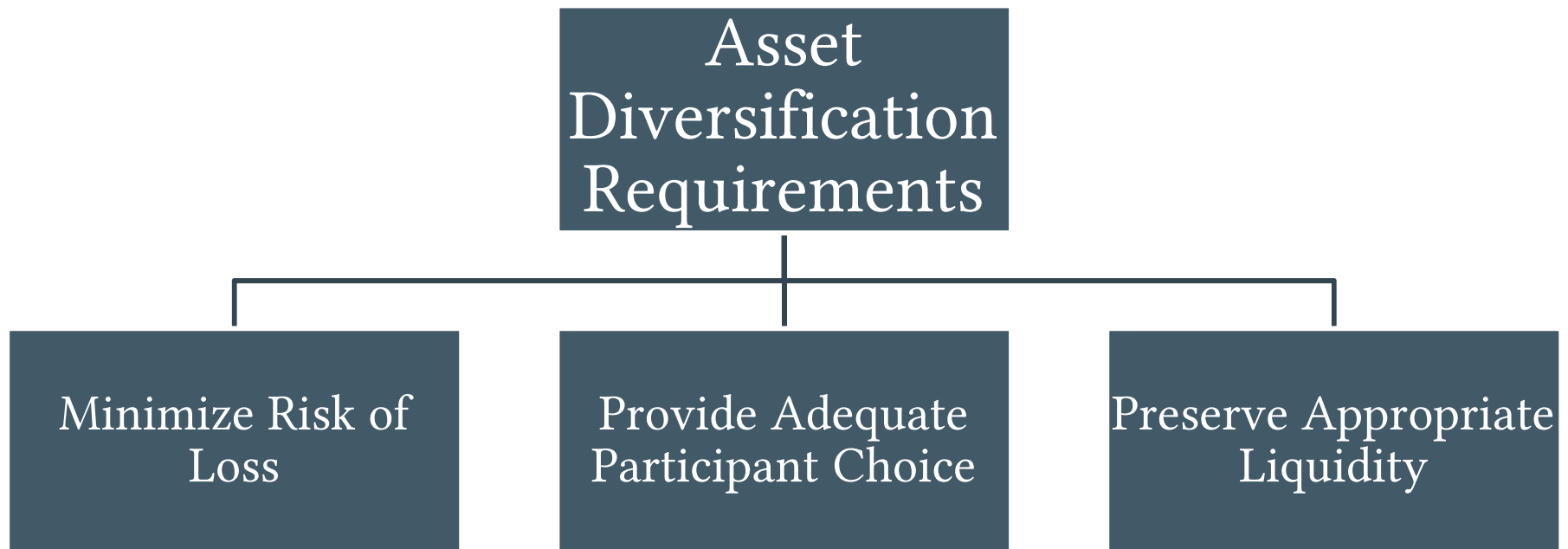
Exclusive Benefit Rule – The fiduciary must discharge duties with respect to the Plan for the exclusive benefit of the participant and their beneficiaries. 29 U.S.C. §1104 (a)(1)(A).

Roles and Responsibilities



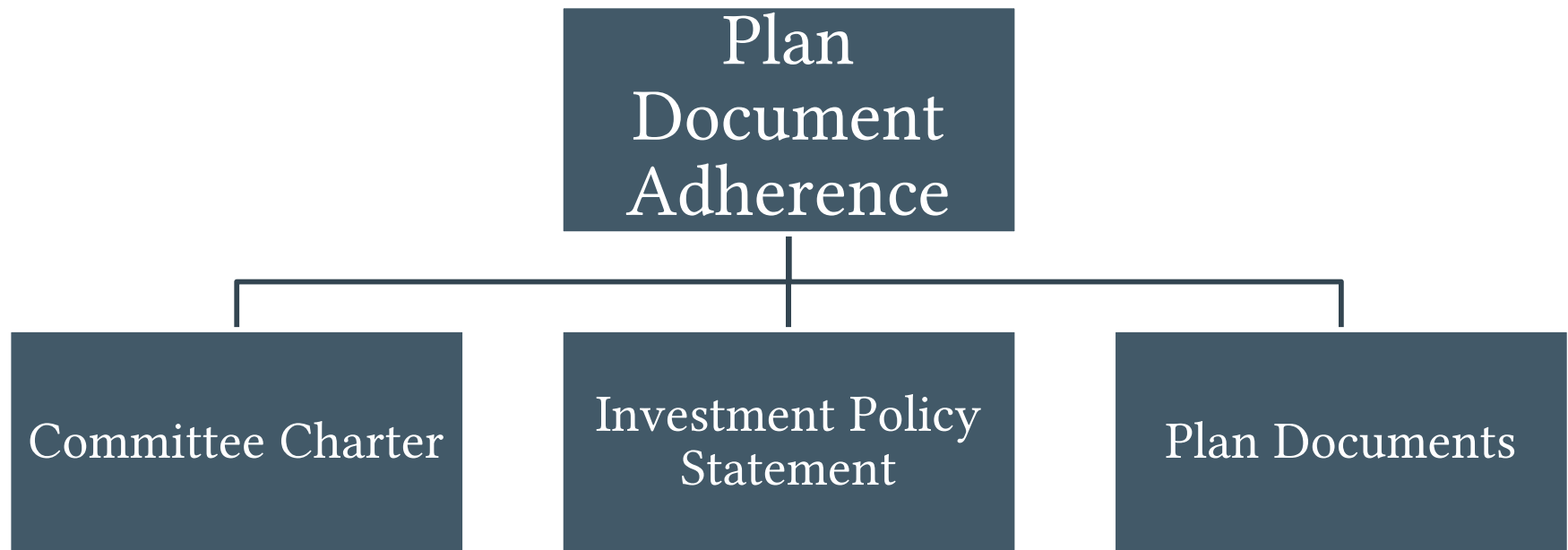
Prudent Man Rule – A fiduciary must act “with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity” would act. This rule is derived from the common law of trusts. This is an objective standard based upon how a person with experience and knowledge of a certain area would act in a given situation. If a fiduciary lacks the expertise for a certain area then the fiduciary must obtain expert help. 29 U.S.C. §1104 (a)(1)(B).

Roles and Responsibilities



Diversification Rule – A fiduciary must diversify investments in order to minimize risk of loss unless it would be considered prudent to not diversify investments. 29 U.S.C. §1104 (a)(1)(C).

Roles and Responsibilities



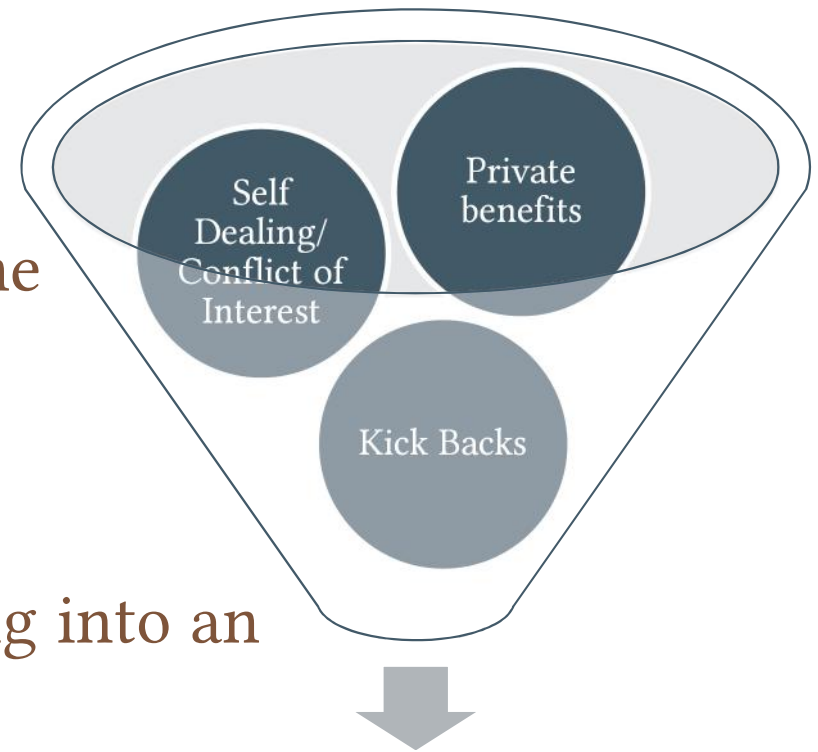
Plan Document Rule – A fiduciary must act in accordance with the Plan documents but only to the extent that the Plan is consistent with ERISA requirements. Thus, a fiduciary must know and act in accordance with the Plan and must have sufficient knowledge of the ERISA requirements. 28 U.S.C. §1104 (a)(1)(D).

What Not to Do

Transaction with party-in-interest; including sale, exchange, lease, or loan of plan securities or other properties

Any use of plan assets that is not in the best interest of plan participants

Under ERISA prohibited from entering into an agreement unless it is “reasonable”



Prohibited Transactions

A Fiduciary's Marching Orders

- Act in the best interest of plan participants
- Act in accordance with plan documents
- Attend investment committee meetings
- Review meeting minutes
- Diversify Plan investments
- Follow the guidelines of the investment policy statement
- Review, monitor, and control plan expenses

Committee Best Practices

Check List

- ✓ Identify all Plan fiduciaries
- ✓ Identify all service providers
- ✓ Develop procedures that clearly describe roles and responsibilities
- ✓ Develop plan decision and investment monitoring documentation process

Plan Sponsors have a fiduciary responsibility to carefully evaluate the reasonableness of the fees and the potential conflicts of interests that may exist

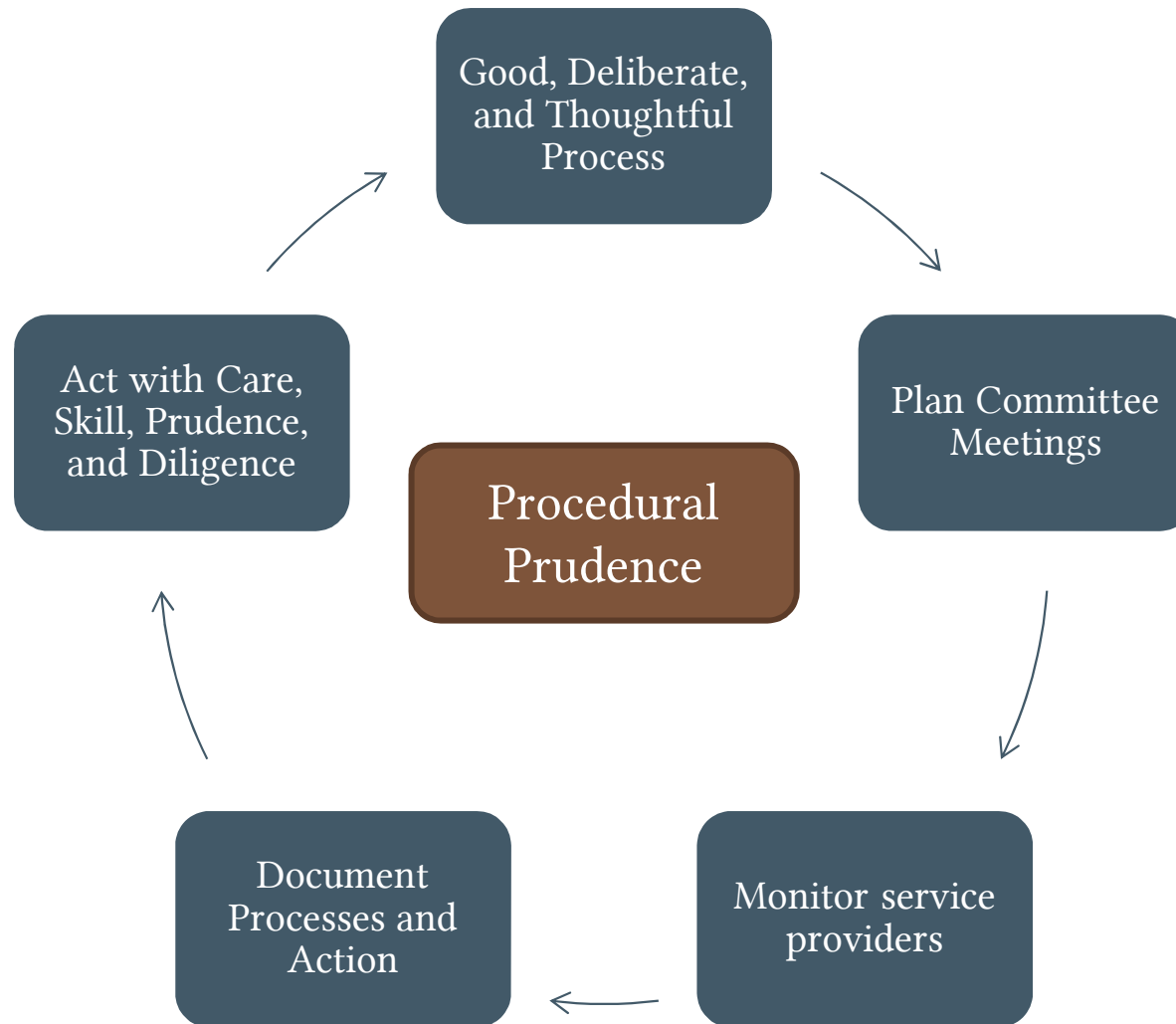
Common Misconceptions

- We allow employees to make all their own investment decisions, so we are eliminated from liability
- Our Fidelity Bond protects the fiduciaries from any exposure
- Our Directors & Officers Liability policy protects the fiduciaries from any exposure

Where Things Can Go Wrong

- Compliance with regulations (law)
- Conduct that would jeopardize the tax qualification of the plan
- Inconsistency between plan documents (e.g., Plan document, SPD, IPS, Charter, etc.)
- Distribution of participant disclosures
- Role distribution: Does everyone clearly understand their roles— both fiduciary and ministerial

Process, Process, Process



Best Practices

- ❑ Document your actions and processes
 - ❖ Policy statements
 - ❖ Charter
 - ❖ Education
 - ❖ Committee meeting minutes
- ❑ Hire competent, independent experts
- ❑ Provide your experts with accurate and up-to-date information
- ❑ Review service provider reports

Best Practices (cont.)

- ☐ Create written documentation of responsibility delegation
- ☐ Ensure your processes have reoccurring accountability reviews
- ☐ Hold regular, documented investment and plan committee meetings
- ☐ Monitor plan fees and costs regularly
- ☐ Participate in ongoing training and education

Best Practices (cont.)

- ☐ Annually review participant disclosures: Content accuracy and timeliness of delivery
- ☐ Monitor service providers
- ☐ Discuss fiduciary liability insurance
- ☐ Involve your legal staff or ERISA counsel

Best Practices (cont.)

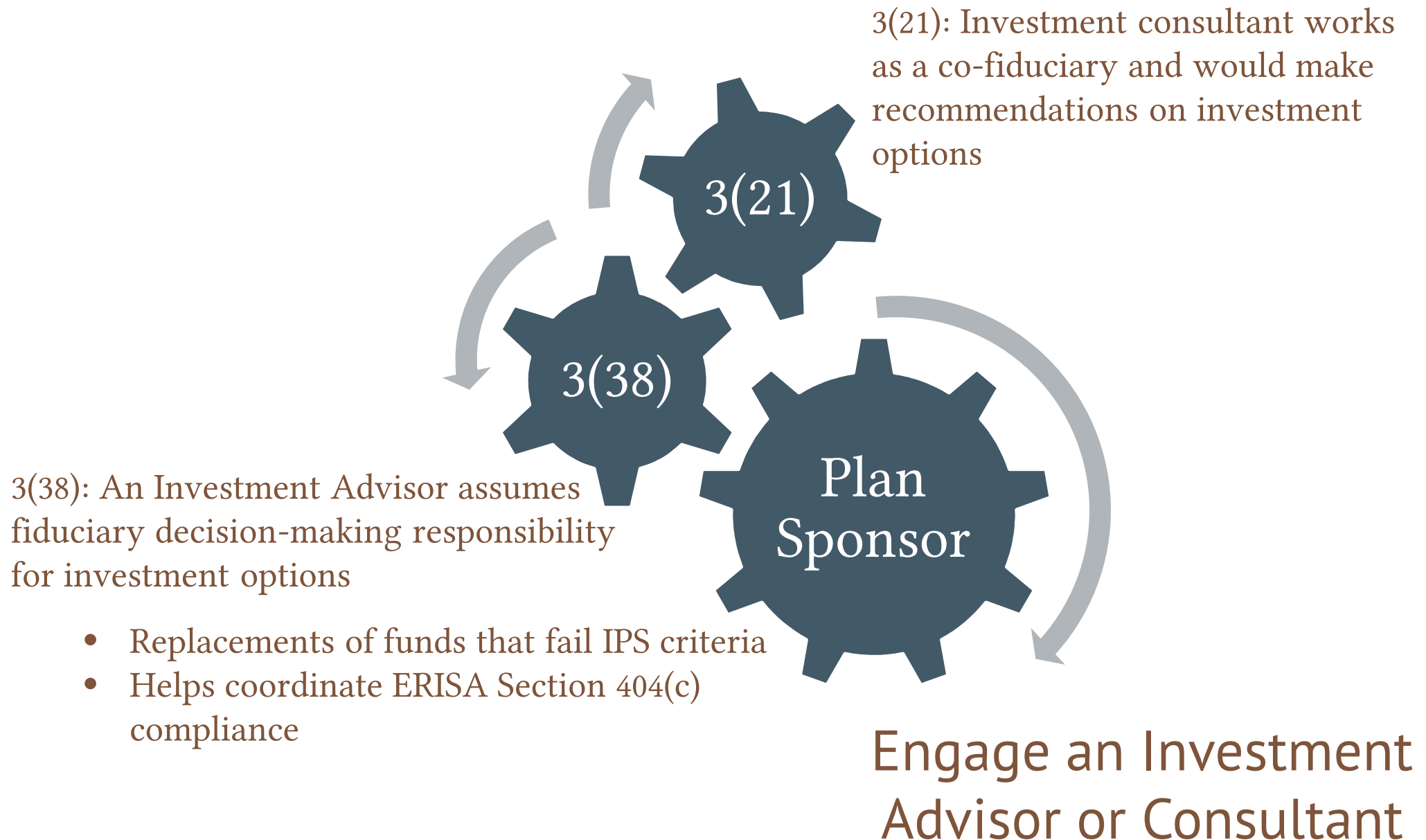
☐ Fiduciary Insurance

- ☐ Indemnification from employer

- ☐ Verify insurance is in place and that all appropriate individuals are covered (is coverage dependent on employment? If so, are retired committee members covered?)

- ☐ Check plan documents, bylaws, and trust document for fiduciary indemnifications

Protection through ERISA



Protection through ERISA

- ERISA Section 3(16)
 - Plan Administrator: Plan Operations
 - Interpretation of the plan document
 - Timely and accurate reporting of disclosures
 - SPD, quarterly statements, 404(a)(5) disclosures, etc.
 - Ensure filings with the federal government are timely
 - Annual filings, 5500, etc.
- ERISA Section 404(c)
 - Limitation of fiduciary responsibility for investments
 - Not liable for retirement plan account losses resulting from plan participants' investment decisions– subject to meeting certain disclosure requirements

Summary

- Act in the best interest of participants
- Seek guidance from experts
- Develop and adhere to prudent processes and procedures
- Document your actions
- Participate in ongoing training and education