

Investment Committee Bylaws

One of your primary responsibilities as a plan fiduciary is to document the decision-making process of selecting and monitoring investment options for the plan. It is best practice for plan sponsors to create a “procedural and substantive prudent process” through the creation of an investment committee who then formally records all decisions made by that committee on behalf of the plan. To help achieve this status, this guide will discuss the establishment an investment committee and drafting the investment committee bylaws.

What should be included in your investment committee bylaws?

There are several items that should be included in your investment committee bylaws. Below is a list of items to consider along with brief samples of what should be contained in each section of the bylaws.

- Who should be on the committee
- Purpose and function of the committee
- Definition of fiduciary duties
- Disclosure of conflicts of interest
- Establishment of officers of the committee
- Attendance requirement of committee members
- Potential voting process
- Process for adding/removing/ or resigning committee member(s)
- Documenting meeting minutes
- Fiduciary acknowledgement by committee members of duties

Who should be on the committee

Investment committee members are fiduciaries, making fiduciary decisions on behalf of the plan, and these decisions carry duties, obligations, responsibilities, and liability. Because of this responsibility, careful selection of committee members is critical. Qualities such as experience, knowledge, and intellect play a major role, as well as a spotless background with ERISA.

We have found that many plan sponsors like to have different areas of their organization represented (such as marketing, sales, manufacturing, operations, and/or accounting), but keep in mind that just because someone wants to serve on the investment committee does not mean they are qualified to do so. Investment experience, expertise, understanding of ERISA rules and regulations, as well as any investment training and certifications are the type of qualifications you should look for in an investment committee member.

This guide is designed to help you form an Investment committee and document your decision-making process.

Background checks for all committee members are a necessity. Any person who has an ERISA Section 411 violation is precluded from servicing an ERISA plan or committee member in any way. Under ERISA Section 411, no person who has been convicted of certain crimes can serve, or be permitted to serve in certain capacities, for any employee benefit plan for a period of no less than 13 years after conviction or the end of imprisonment, whichever is later. The positions in which a felony conviction disqualifies an individual from employment or providing services to an employee benefit plan include:

- Administrator, fiduciary, officer, trustee, custodian, counsel, agent, employee, or representative in any capacity of an employee benefit plan;
- Consultants or advisors to an employee benefit plan, including but not limited to any entity whose activities are in whole or substantial part devoted to providing goods or services to an employee benefit plan; or
- In any capacity that involves decision-making authority or custody or control in the monies, funds, assets, or property of any employee benefit plan.

How many investment committee members should you have? Regardless of how many members you decide upon, an odd number of committee members is recommended to help break tie votes. For example, with an even number of committee members, you could have a tie vote on a decision. Since everyone gets one vote, an odd number of committee members (3, 5, or 7) avoids the tie vote situation.

Purpose and function of the committee

This section outlines what the committee will accomplish. It is somewhat of a mission statement. This needs to be crafted in a way that will state the purpose and can be understood by many audiences, such as employees, regulators, auditors, etc.

One sample of this could be:

The retirement plan committee has been formed to deliver decisions via procedural and substantive prudence processes and standards for the oversight of the investment options offered through XXX defined contribution retirement savings plans. Investment options are selected to allow participants to diversify their accumulated retirement balances and build portfolios that reasonably cover the risk/return spectrum.

Definition of fiduciary duties

A fiduciary is typically defined as a person who has the legal and/or implied moral responsibility to manage the assets of another person, acting “solely in the best interest” of that person or partner. The committee is subject to certain duties and responsibilities, including, but not limited to:

- Know the standards, laws, and trust provisions that impact the investment process of the Investment decisions
- Prudently diversify the investment lineup to a specific risk/return profile (or in the case of a participant-directed retirement plan, to make sufficient asset classes available so that a participant can prudently diversify his or her portfolio)
- Prepare, execute, maintain and follow an investment policy statement
- Have investment decisions made by prudent experts
- Control and account for all investment-related expenses and determine reasonableness of such expenses
- Monitor the activities of all investment-related service vendors
- Avoid conflicts of interest and prohibited transactions

Disclosure of conflicts of interest

Notwithstanding any provision of law, no committee member shall vote or participate in a determination of any matter in which the committee member shall receive a special private gain. Committee members have a duty of loyalty that precludes them from being influenced by motives other than acting in the best interest of the retirement plan and accomplishing the purposes of the plan. Committee members, in the performance of their duties, must conform and act pursuant to the documents and instruments establishing and governing the retirement plan.

If a committee member is also a participant (which generally is the case), a beneficiary, or alternate payee under a plan, he or she shall not exercise his or her authority as a committee member with respect to any matter specifically affecting his or her individual benefit under a plan (as distinguished from the interests of all participants, beneficiaries, or alternate payees).

Publicly traded companies have to be aware of additional conflicts of interest especially where employer stock may be a part of the plan’s investment lineup.

Due to insider information, officers of the publicly traded company who are also members of the investment committee must mitigate any conflicts that could place their personal gain or the company's gain ahead of the interests of plan participants. This is especially true if the CFO is part of the investment committee.

Establishment of officers of the committee

The committee should typically approve a chairperson and a secretary.

The chairperson is responsible for the conduct of all investment committee meetings and typically has voting rights the same as any other committee member (one vote per committee member). The chairperson shall perform such other duties as the committee may assign, and may be the designated agent for service of legal process.

The chairperson usually has the following duties and responsibilities:

- Oversee the committee
- Schedule and call meetings
- Establish meeting agendas
- Provide guidance to other committee members regarding specific plan provisions and past practice
- Report the committee's actions and decisions to the plan participants at least annually

The secretary is typically responsible for keeping minutes of committee transactions and is the official custodian of records for the committee. The secretary, together with the chairperson, may execute all official contracts of the committee. The secretary may also compile committee agendas. The chairperson and secretary are usually authorized by the committee to execute any instruments necessary for the committee to conduct business.

The secretary usually has the following duties and responsibilities:

- Maintain records of the materials distributed in advance of (and during) committee meetings
- Take meeting minutes
- Distribute meeting minutes to members
- Maintain copies of all approved minutes
- Give notice of meetings as required by these bylaws

Any officer may temporarily delegate any of his or her duties and responsibilities.

Attendance requirement of committee members

Meetings are usually held at a place designated by the chairperson and held at least quarterly. Meetings are often attended in person, via conference call, via video conference, or any other electronic means. Additional meetings may be called at any time by the chairperson or by any majority of current members. Ad hoc business may be conducted, as needed, via email or any other electronic means.

Meetings are held upon reasonable advance notice. The meeting agenda and materials should be sent by the secretary to committee members in advance of the meeting date.

If a committee member attends less than 50 percent of the meetings in any calendar year or misses four consecutive meetings, the chairperson may schedule a meeting with such member to discuss improving participation or possible resignation from the committee.

Potential voting process

A majority of the members in office constitutes a quorum for the transaction of business. A meeting at which a quorum is initially present may continue to transact business notwithstanding the withdrawal of members after the meeting begins, if any action taken is approved by at least a majority of the committee. Decisions are made based on a majority of votes. Email decisions require approval by a majority of the current members. Each committee member has one vote.

Process for changing committee members

Documentation of the process for adding, removing, or allowing a committee member to resign needs to be designed, stated, and adhered to at all times. Also, all committee members should be reconfirmed with background checks and sign the fiduciary acknowledgement on an annual basis. Here is an example:

Any member of the committee may resign by delivering his or her written resignation to the committee's chairperson (if no chairperson is appointed, then such notification may be delivered to all committee members). The resignation shall be effective as of the date it is received by the chairperson (or all committee members, if applicable) or such later date as is specified in the resignation notice. _____ may

remove any member of the committee at any time and for any reason. Any member appointed to the committee shall automatically cease to be a member of the committee, effective on the date that he or she dies, or ceases to be employed by the company or any of its subsidiaries unless approves otherwise in writing. Vacancies in the committee arising by resignation, death, removal, or otherwise shall be filled by _____.

Documenting meeting minutes

The secretary needs to document each meeting in writing. Here is a sample Investment committee Meeting Minutes outline:

[Date]
Meeting called to order at [Time] at the [Location] by [Name]. Quorum was established.
Members present: First Last, Title First Last, Title First Last, Title First Last, Title First Last, Title First Last, Title First Last, Title
Members absent: First Last, Title
Approval of last meetings minutes Motion: Approve minutes from [Date of last meeting] committee meeting Vote: Motion carried Resolved: Minutes from the [Date of last meeting] approved without modification
Items discussed: Motion: Vote: 7 in favor, 0 opposed, 0 abstained Resolved: Motion carried Motion: Vote: 2 in favor, 5 opposed Resolved: Motion failed Motion: Vote: 6 in favor, 1 opposed Resolved: Motion carried
Meeting adjourned at [Time] by [First Last, Title]

When documenting the meeting minutes it is important to summarize the topics discussed during the meeting. The priority is to capture enough information so that the key points of the meeting are documented.

Fiduciary acknowledgement by committee members of duties

The last step of the procedural and substantive prudent process is typically the creation, delivery, and execution of the investment committee and the bylaws. This includes the actual sign off by each committee member acknowledging their fiduciary duties, obligations, responsibilities and liabilities in writing and accepting them with their signature. Fiduciaries have important responsibilities and are subject to standards of conduct because they act on behalf of participants in a retirement plan and their beneficiaries. These responsibilities should be outlined in the Committee Member Fiduciary Acknowledgement and should include:

- Acting solely in the interest of plan participants and their beneficiaries and with the exclusive purpose of providing benefits to them
- Carrying out their duties prudently
- Following the plan documents (unless inconsistent with ERISA)
- Diversifying plan investments
- Paying only reasonable plan expenses
- Avoiding conflicts of interest
- A signature and date

By establishing this depth and breadth of procedural and substantive prudence, plan sponsor fiduciaries can better manage and mitigate their fiduciary risk and help avoid large adverse claims. The key is execution. You must follow your process, benchmark it, and review it. Best practice is to review all members and documents of the bylaws on an annual basis.

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Mesirow Fiduciary Solutions helps the retirement plan community achieve their intended investment objectives through our institutional 3(21) and 3(38) fiduciary partnership services, fiduciary technology and reporting, and customized default solutions.

Source: fi360, Section 1: Formation of the Investment Committee

Source: US Department of Labor, Meeting Your Fiduciary Responsibilities, 2017

Note: These procedures demonstrate best practices only. For specific advice regarding investment committee Bylaws, please contact your ERISA Counsel.

This is a potential structure for an Investment committee, however there may be other alternatives. Mesirow does not provide legal advice. Please consult with your attorney prior to constructing a committee. Mesirow refers to Mesirow Financial Holdings, Inc. and its divisions, subsidiaries and affiliates. The Mesirow name and logo are registered service marks of Mesirow Financial Holdings, Inc. © 2023 Mesirow Financial Holdings, Inc. All rights reserved. Some information contained herein has been obtained from sources believed to be reliable, but is not necessarily complete and its accuracy cannot be guaranteed. Any opinions expressed are subject to change without notice. Advisory Fees are described in Mesirow Financial Investment Management, Inc.'s Form ADV Part 2A. Mesirow does not provide legal or tax advice. Advisory services offered through Mesirow Financial Investment Management, Inc. an SEC-registered investment advisor. Securities offered by Mesirow Financial, Inc., member FINRA and SIPC.

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