



FIDUCIARY PLAN GOVERNANCE, LLC

THE WORLD INSIDE THE CAFE

Presented by:

Edward M. Lynch, Jr., AIFA®, RF™
Lynne McAuley, CPA, CEBS, AIFA®
Donald K. Jones, AIFA®, PRP, RF™

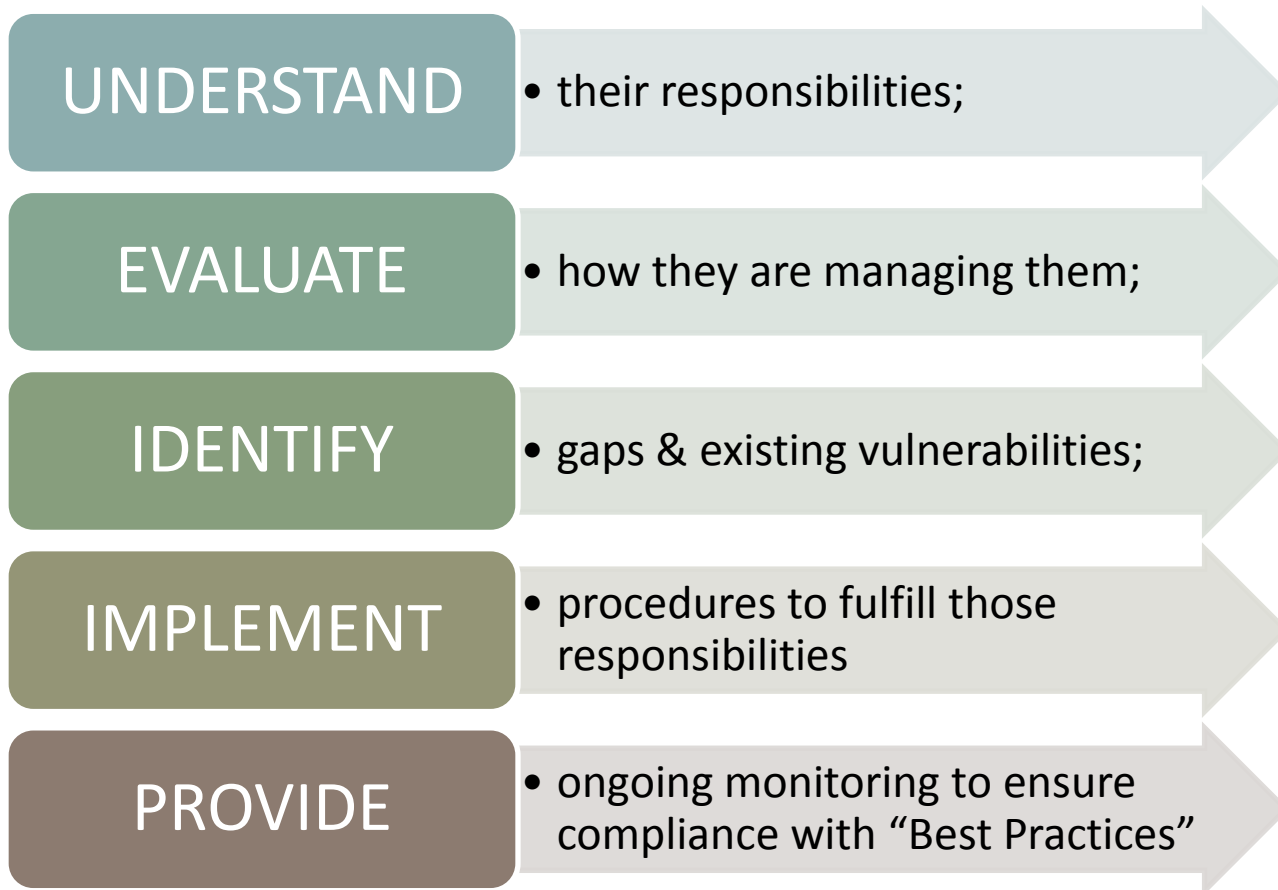


BOSTON | LOS ANGELES | PHOENIX | WASHINGTON, D.C.

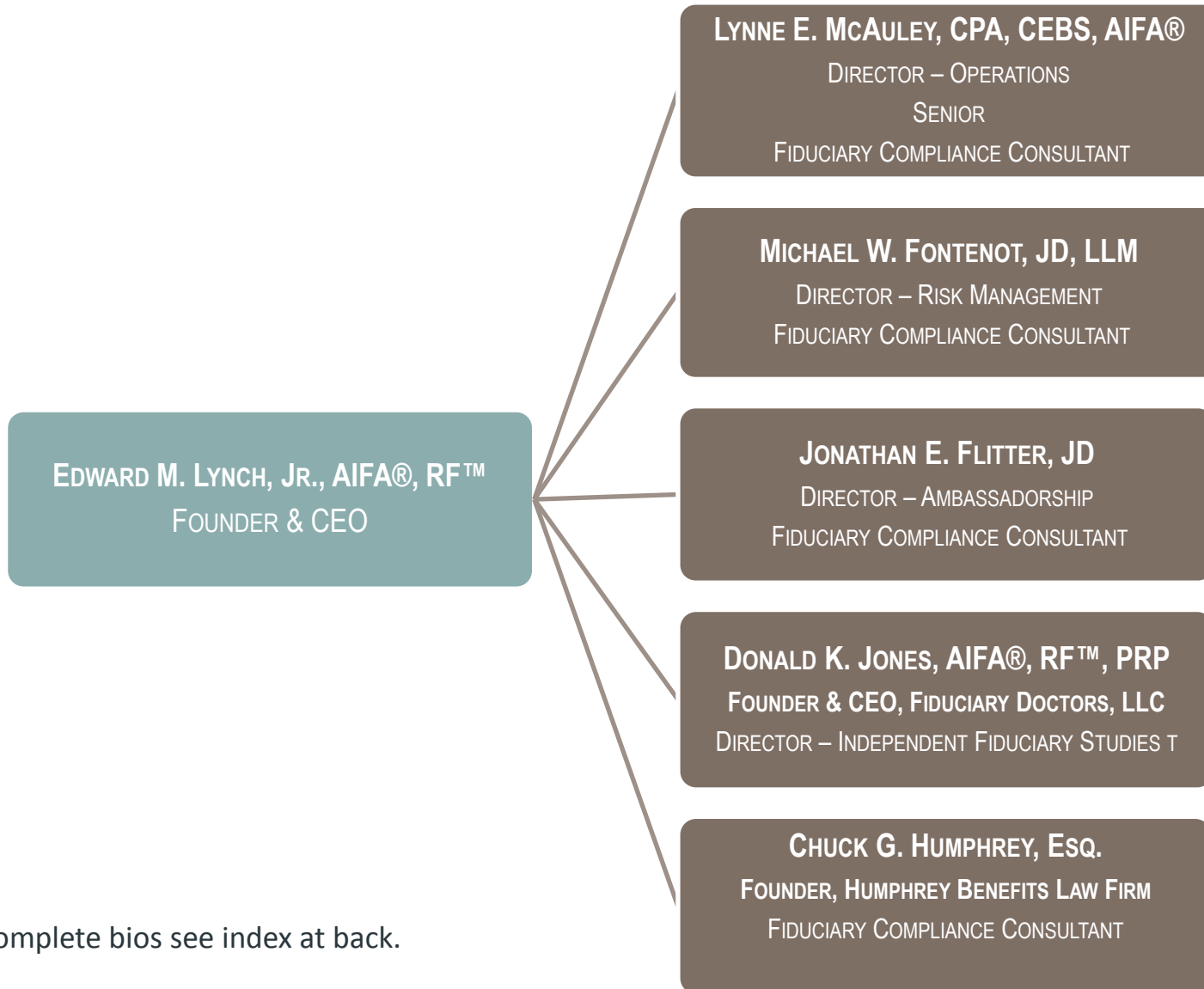
888.918.8386 | www.fiduciaryplangovernance.com

Fiduciary Plan Governance, LLC

- ❖ Exists because fiduciaries desperately want unbiased expert help and advice
- ❖ Our unique approach helps retirement plan sponsors:



Fiduciary Compliance Team



*For complete bios see index at back.

"The First Rule for Fiduciaries Is to Put Their Interests Last"

An Advisor's Dilemma

- How does an AIFA[®] use the Investment Steward CAFE as a value-add for his/her clients?
- A true story about what one AIFA[®] did after recognizing his limits.



Fi360's Approach Was Visionary

❖ Prudent Practices for Investment Stewards (PPIS) and the CAFE were breakthroughs:

A unified standard

Standards & principles not rules & exceptions

Quality management system provided structure & clarity

Plan sponsors just waking up to fiduciary implications after ENRON

Grounded clearly in law & regulations

Linked “fiduciary responsibilities” with “management competence”

FPG

Fig360's Approach Was Visionary

- Comparing clients' existing practices to PPIS made it easier to demonstrate what, at best, most only sensed;
- Educated clients about the IPS, investment due diligence criteria and how to monitor investments properly;
- CAFE approach broadened scope of client relationships;
- ISO Audit Approach useful in establishing priorities and in providing feed back even when plan conforms to standards



Outside of Competence Zone

- Many PPIS standards and CAFE questions outside of competence zones for most AIFs/AIFAs
- Different skill set and temperament needed to evaluate Investment Steward's plan than to provide investment advice
- May lure advisors & clients into false security
- May create additional exposure for advisor



Outside of Competence Zone

Of the 22 Practices:

13 = Number of Investment Questions in CAFE (includes IPS and monitoring issues) within Advisor Competence;

9 = Number of Fiduciary Structure, Conflict of Interest and Regulatory Issues in CAFE (includes Safe Harbor questions) and likely Outside of Advisor Competence

60% Competence



Definitely Beyond the Scope

- Are investments managed in accordance with applicable laws [and] trust documents...?
- Are the roles and responsibilities of all ...fiduciaries & non-fiduciaries defined, documented, and acknowledged?
- Is there no indication that fiduciaries and parties in interest are involved in self-dealing?
- Are service agreements and contracts...written without provisions that conflict with fiduciary standards of care?
- Are assets within the jurisdiction of appropriate courts? Are they protected from theft and embezzlement?
- Are applicable “safe harbor” provisions followed (when elected)?
- Are control procedures in place to periodically review policies for best execution, “soft dollars,” and proxy voting?
- Are fees for investment management consistent with...with all applicable laws?
- Is there a process to periodically review the organization’s effectiveness in meeting its fiduciary responsibilities?



May Be Beyond the Scope

- Is the investment strategy implemented in compliance with the required level of prudence?
- Is a due diligence process followed in selecting service providers, including the custodian?
- Are “finder’s fees” or other forms of compensation that may have been paid for asset placement appropriately applied, utilized, and documented?



Outside of Competence Zone

Does the Steward:

Undertake adequate measure to ensure investments are managed in accordance with the applicable laws, trust documents and IPS?

Apply adequate policies/procedures to help ensure that all within the organization who serve in a fiduciary capacity understand their fiduciary responsibilities?

Apply adequate policies/procedures to avoid self-dealing, prohibited transactions and conflicts of interests?

All of the above are very broad



Alert: Different Skills Needed

Assumes that AIF/AIFA can figure out what adequate measure/policies/procedures for a wide range of investment stewards under various circumstance.

- CAFE has good suggestions
- Most AIFs/AIFAs have expertise in investments, sales and marketing
- Requires regulatory and investigative mindset
- What happens if the type of evidence suggested is not there?



Alert: Different Skills Needed

❖ Does AIF/AIFA:

Determine by
interview
primarily?

Evaluate if IPS
reflects what is in
trust document,
does trust
document reflect
current law?

Review contracts &
reports prepared
by service
providers /
investment
steward to
compare the
investments to
trust documents
and IPS?



Alert: Different Skills Needed

Difficult to evaluate if Investment Steward takes sufficient measures* to make sure that investments are managed based on the law & trust documents.

- What is a sufficient measure?
 - An action taken by a small employer with 25 employees might be considered sufficient under ERISA but may be seen as lacking for larger employer

*See Investment Steward CAFÉ, Q 4.



ERISA Definitions

ERISA 3(21)

Encompasses ALL fiduciaries. A person is a fiduciary under ERISA *to the extent* that:

- He/she exercises discretionary authority concerning plan management or managing/disposing of plan assets;
- Exercises authority with respect to managing/disposing of underlying assets of an entity in which plan invests that are considered plan assets;
- Renders investment advice for a fee or other compensation, direct or indirect, concerning any money or other property of the plan or has any authority to do so, and;
- Has any discretionary authority or responsibility in the administration of the plan



ERISA Definitions-Parties-In-Interest

Parties In Interest

Any fiduciary

Service providers

An employee organization

A relative

A corporation, partnership, trust or estate (at least 50% owned by any entity above)

An employer (including any direct or indirect owner of 50% or more of employer)

Officers, directors, ten-percent shareholders and employees of entity described above except a fiduciary or a relative

A ten percent-or-more partner or joint venture with any individual or entity described above except a fiduciary or a relative



ERISA 404(a)-Exclusive Benefit and Prudence

A fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries, and:

- To provide benefits to participants and beneficiaries; and (ii) defraying reasonable expenses of administering the plan;
- With the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
- By diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
- In accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with ERISA



ERISA 406-Prohibited Transactions

Prevents fiduciaries from causing an ERISA plan to engage in five types of transactions between a plan and a party-in-interest.

A direct / indirect sale, exchange or leasing of any property;

Lending money or other extension of credit;

Furnishing of goods, services or facilities;

Transferring of plan assets to a party in interest or use of plan assets by (or for the benefit of) a party in interest; and

Sale on behalf of the plan of employer securities and employer real property

ERISA 406-Self-Dealing Provisions

Prohibits three general types of self-dealing transactions between ERISA plans & fiduciaries, even if done on an arms-length basis:

Dealing with a plan's assets in its own interest

Acting on behalf of a party whose interests are adverse to the plan's interests in any plan transaction

Receiving any consideration for itself from any party dealing with the plan in connection with a transaction involving plan assets (kick-backs)

Examples of Common Industry Practices

❖ Non-fiduciary broker and Fiduciary Vendor

- A broker has an excellent relationship with Plan sponsor that has \$350 million in a 401(k) plan. The broker obtains the plan by using National Vendor A, who agrees to serve as the plan's investment advisor, per ERISA Section 3(21)(A)(ii). This agreement is in writing
- Vendor selects and oversees the fund menu for approval by Plan sponsor.
- Plan sponsor's Investment Committee retains discretion about choice of investments.
- The broker is paid strictly from 12(b)(1) fees. The level of compensation agreed upon between the vendor and the broker is the 25 basis point 12(b)(1) fees. To facilitate these payments, the vendor recommends only funds that pay 25 basis point trails.



Examples of Common Industry Practices

❖ Conflicted Advice to Sponsor

- A large bank offers qualified plan services to its clients. Within the plans offered by the bank are many of the bank's own mutual funds.
- Gold Spas is one of the bank's 401(k) customers.
- A bank representative visits quarterly with Gold Spas to review investments and recommends changes based upon the advice of a bank subsidiary, a Registered Investment Advisor.
- The bank representative actually recommends firing one bank fund for not meeting due diligence screens.
- The bank offers lifestyle funds that are funds of funds using exclusively the bank's own mutual funds for the underlying portfolio and charging a "wrapper" fee of 25 basis points. The bank serves as a directed trustee and does not have discretion over plan investments.



Examples of Common Industry Practices

❖ TPAs and Revenue Sharing

- ***Situation A: Non-Producing TPA.*** The first is a “non-producing” TPA that serves as a non-fiduciary contract administrator. It does not sell investments or provide investment advice. The TPA accepts revenue sharing payments from qualified plan vendors, typically as: sub-transfer agency fees; and basis point payments directly from a provider based on plan assets; or a commission or commission override from an insurance company. *The TPA accounts and reports actual amounts of compensation received.*
- ***Situation B: Producing TPA.*** This TPA has a sister company that performs investment advisory services. It operates much like in the first example by accepting revenue sharing payments from insurance companies and other vendors. The TPA gives a one-line disclosure to the effect that it may receive such compensation from various vendors but the disclosure does not name the vendor or the compensation amount. The client receives no annual reconciliation of the compensation and does not receive information about the actual dollar or percentage amounts of compensation.



Examples of Common Industry Practices

❖ The Open Architecture Broker

- Broker works with a TPA that performs daily valuation recordkeeping and offers several thousand mutual funds via its trading partner.
- The mutual funds include both load and no load funds.
- The broker operates on a full disclosure model. He offers clients the choice of working with him on strictly a fee basis, but says that, “My clients prefer to have the mutual funds pay me directly.”
- The broker has a list of load funds that he uses to construct the investment menus for his clients. Using the fund list, each of which generally pays a 20 basis point 12(b)(1) fee, he recommends investment menus for his clients and helps them monitor the funds. His broker/dealer receives the 12(b)(1) fees and passes them on to the broker.



Challenges for AIFs/AIFAs

Requires a lot of analysis & evidence



At times, the questions asked are adversarial



Statutory & class exemptions create numerous exceptions



Changing regulatory environment



Issues that AIF/AIFA Must Evaluate

- AIF/AIFA must evaluate party-in-interest relationships at plan sponsor and service provider level. Service providers that the fiduciary conducts business with are generally parties-in-interest or fiduciaries
- AIF/AIFA must evaluate what function is being performed and in what capacity everyone is acting. AIF/AIFA must evaluate if he/she or firm is engaging in prohibited transactions or self-dealing. Transactions normally conducted in business could create problems when acting as a fiduciary
- Financial services industry mantra that vendors and service providers are not fiduciaries. Premise-Simply selling product or performing ministerial functions and designed fee arrangements accordingly.
- Service providers are multi-dimensional—mixing administrative work with product sales, participant advice and plan level investment guidance. Often functional fiduciaries.



Resolving the “Advisor’s Dilemma”

- Team approach
- Combining investment advisor skill set with regulatory mindset
- Investment advisor handles the more technical investment related questions
- Fiduciary structure questions and self-dealing questions handled by former DOL investigators and other consultants with legal, compliance background in ERISA
- AIF/AIFA handles the relationship aspect of the engagement
- Good cop / bad cop elements work best with clients



Managing Fiduciary Responsibilities & Plan Investing

Reporting & Disclosure

Evaluating Fidelity Bonds Against DOL Provisions

Employee & Employer Contributions

Eligibility

Benefit Distributions

Benefit Claims Process

404(c) Compliance

408(b)(2) Readiness



Fiduciary Plan Governance | Fiduciary Success

“The first rule for fiduciaries is to put their interests last.”

Fiduciary Plan Governance, LLC is not an investment advisor and does not provide any investment-related services. We are an expert resource actively engaged in supporting broker/dealers, registered representatives, registered investment advisors and plan fiduciaries in effectively meeting their responsibilities.

Please contact us for further information on how we can strengthen and broaden your professional services. Our team is looking forward to working with you.

BOSTON | LOS ANGELES | PHOENIX | WASHINGTON, D.C.

888.225.8386

www.fiduciaryplangovernance.com



Edward M. Lynch, Jr., AIFA[®], RF[™]

Founder & CEO

Ed Lynch has worked with ERISA-qualified plan sponsors and designated fiduciaries in most aspects of plan development and maintenance since the early 1980s.

In 2003, Ed became one of the first practitioners in the United States to complete the Accredited Investment Fiduciary Analyst (AIFA[®]) program of advanced studies at The Center for Fiduciary Studies (Joseph Katz School of Business, University of Pittsburgh).

In September 2008, Dietz & Lynch Capital, formerly 401(k) Advisors Group, became “[one of] the first Investment Advisors globally” to successfully complete the Centre for Fiduciary Excellence (CEFEX) independent certification process. The CEFEX certification “provides assurance to investors, both institutional and individual, that Dietz & Lynch Capital has demonstrated adherence to the industry’s best fiduciary practices...indicating [it’s] interests are aligned with those of investors.”

In 2009, Ed was voted by his peers as one of the 40 “Most Influential Retirement Plan Advisors” in the United States in a national survey conducted by the 401(k) Wire, the 401(k) Exchange and The Boston Research Group. Based on over 100,000 votes from the industry, business metrics and input of an editorial board, the top 300 and top 40 were recognized for their business success, and their influence on retirement plans, their fellow advisors and retirement plan providers.

Ed has served as an Expert Witness in ERISA-plan related litigation and is a graduate, *summa cum laude*, of Gordon College in Wenham, Massachusetts.



Lynne E. McAuley, CPA, MPA, CEBS, AIFA®

Former Senior Investigator, US DOL/EBSA

Director – Operations, Senior Fiduciary Compliance Consultant

From 1990 to 2004, Lynne served as an auditor for the United States Department of Labor's Employee Benefits and Security Administration (EBSA) in the Boston Regional Office where, over her tenure, she investigated over 200 qualified retirement plans and welfare plans.

The primary focus of her investigations during her years with the Department was the conduct of plan sponsors and other fiduciaries relative to the prudence of their investment selection and monitoring process. She assessed the practices of employee benefit service providers, and evaluated if plan sponsors and other fiduciaries complied with the reporting and disclosure provisions of ERISA and other related Federal laws.

She is a CPA, an Accredited Investment Fiduciary Analyst (AIFA®), and Certified Employee Benefits Specialist (CEBS). She has a Master of Public Administration (MPA) from Kentucky State University and a Bachelor of Arts degree from Drew University.



Donald K. Jones, AIFA[®], PRP, RF[™]

Founder & CEO, Fiduciary Doctors, LLC

Director – Independent Fiduciary Studies & Training, Fiduciary Compliance Consultant

Don has been in the retirement and financial industry for 40 years now. He wrote his first retirement plan in 1973, one year before ERISA, and since that time has been involved in thousands of retirement plans.

Don was a successful third party administrator for nearly 20 years, an expert witness for ERISA litigation and mediation, and was the national sales manager for two national retirement plan organizations. To improve the efficiency and results of retirement plans, Don has spent a great deal of time in helping the financial industry and plan fiduciaries understand the proper use of ERISA management and fiduciary governance in these plans.

He has pioneered such tools and research papers as: ***"Qualified Plan University Studies (Q-PLUS)"***: A comprehensive 9 month, 18 hour C.E. study class for investment professionals on how to obtain, manage and keep qualified plans, ***"ERISA Management & Fiduciary Governance in Qualified Retirement Plans Today"***: How to improve retirement plan results in each and every plan, ***"What If We Are Wrong: Investing Money in Retirement Plans Today"***: This research paper was written in 2003 and been prophetic as the rest of the 2000's have unfolded and **A Leader in the Development of a National Record-keepers Online Fiduciary Selection and Monitoring Tool for "CORE" Investments in an ERISA-Qualified Plan**: A comprehensive tool that is considered one of the best in the industry.

