

FIDUCIARY & LEGAL CONSIDERATIONS

COMPLIANCE IS ABOUT DEVELOPING PRUDENT PROCEDURES AND THEN IMPLEMENTING, MONITORING AND DOCUMENTING THEM.

Section 409(a) of ERISA, 29 U.S.C. § 1109(a), provides, "Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable."

The most fundamental duty of ERISA plan fiduciaries is a duty of complete loyalty, under 29 U.S.C. § 1104(a)(1)(B), to insure that they discharge their duty "solely in the interests of the participants and beneficiaries," and to "exclude all selfish interest and all consideration of the interests of third persons." *Id.* Fiduciaries must discharge their duties with respect to the plan "solely in the interest of the participants and the beneficiaries," i.e., "for the exclusive purpose of (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan." What 29 U.S.C. imposed on fiduciaries by ERISA is avoidance of conflicts of interest.

Second, the fiduciary must meet a "prudent man" standard under 29 U.S.C. § 1104(a)(1)(B), to act "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" and "with single-minded devotion" to these plan participants and beneficiaries, according to the Department of Labor, 29 C.F.R.

In determining compliance with ERISA's prudent man standard, courts objectively assess whether the fiduciary, at the time of the transaction, utilized proper methods to investigate, evaluate and structure the investment; acted in a manner as would others familiar with such matters; and exercised independent judgment when making investment decisions. " [ERISA's] test of prudence ... is one of conduct, and not a test of the result of performance of the investment. The focus of the inquiry is how the fiduciary acted in his selection of the investment, and not whether his investments succeeded or failed." Thus, the appropriate inquiry is "whether the individual trustees, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment."

REGARDING INVESTMENT COSTS: FIDUCIARIES MUST BE AWARE OF ALL PAYMENTS AND POTENTIAL CONFLICTS AND MUST EVALUATE THEM

"After having reviewed the total expenses of the mutual fund, the fiduciaries also need to understand which service providers are receiving payments from the mutual fund and to evaluate the reasonableness of those payments, as well as the potential conflicts of interest. All in all, the payments for the broker and broker-dealer to provide advice, recommendations and other services to the plan and its participants are probably money well spent, if the advice materially assists in the initial selection and ongoing monitoring of high quality 401(k) investments." *How You Are Paying What You Don't Know: A Primer on Indirect Mutual Fund Payments February 21, 2008 Reish Luftman Reicher & Cohen LLC (one of the countries leading ERISA Firm)*

"Indirect Compensation includes all other compensation received from any other parties... Implication for Bundled Arrangements. A bundled service provider, such as Vanguard, may aggregate direct compensation and any indirect compensation that will be received by the service provider. Bundled providers are not required to break down compensation among the individual services provided within the bundle with the exception of any fees that are separately charged against the plan's investments (i.e., the expense ratio for a fund) or charged on a transaction basis (e.g., a loan fee)." *Vanguard Regulatory Brief May 2008*

“The bad news is that if you are a plan fiduciary -- which in this instance translates into any officer, director or other person who is responsible for monitoring investments and plan-related expenses -- you can be held liable for the losses sustained by a plan if a court concludes that the plan paid unreasonable expenses. Investment related expenses should be of particular interest to plan fiduciaries... The good news is that a plan sponsor -- and the officers and directors responsible for monitoring plan expenses -- can protect themselves, and in doing so, can protect their employees' retirement accounts. For a fiduciary to be held liable under ERISA for paying unreasonable expenses, **it isn't enough to show that the plan might have found ways to pay lower expenses.** Rather, the court would have to find that the fiduciary failed to engage in a prudent process of selecting investment options and investigating the fees associated with those investment options. **The key to both avoiding liability, and protecting your employees, is therefore to engage in that prudent process.** Fiduciaries should--perhaps with the assistance of a consultant -- analyze the fees and expenses currently being charged to their plans, and compare them with fees offered through other service providers. The entire process should be diligently documented, and periodically repeated. The key to avoiding litigation in connection with monitoring a retirement plan's fees and expenses just also happens to be the right thing to do by your employees. *Joe Faucher (chairman of ERISA litigation department and specializes in ERISA litigation and claims against employee benefits service providers.)*

“In light of current litigation activity, it should come as no surprise that participants have decided to seek enforcement of those rights established by ERISA. **For the fiduciary that has established a documented process of fiduciary prudence, litigation is an inconvenient** and costly way to prove adherence to ERISA's fiduciary standards of care. However, for fiduciaries that have been remiss in their fiduciary duties the courtroom becomes the forum for exposure and judgment.” *ERISA Compliance & Enforcement Library report from the ERISA Advisory Council. Vol 8 No 6 June 2008 Section 408(b)(2) Proposed Regulations and ERISA's General Fiduciary Obligations David J. Witz, Fiduciary Risk Assessment LLC*

“Third and Seventh Circuits largely rejecting judicial inquiry into the reasonableness of rates and focusing on the sufficiency of disclosure by fiduciaries as the proper touchstone for analysis.” *Sutherland LEGAL ALERT May 30, 2008*

FIDUCIARY SUMMARY

In the current environment we, as fiduciaries, want to make sure we protect ourselves.

- use a Trust company
- document all procedures
- document all monitoring
- secure a Co-fiduciary RIA
 - What RIA will provide
 - Fiduciary Responsibilities/Liabilities
 - Co-fiduciaries on the plan
 - Keeping the plan compliant
 - Calendar yearly trustee meetings at a minimum
 - On-going education meetings for participants
 - Provide the prudent process for monitoring of investment options
 - Provide prudent process for fee transparency
 - No conflict of interest
 - Licensed Advisor
 - Unbiased Opinion