ICI MUTUAL **RISK MANAGEMENT STUDY**

ERISA Liability

A Guide for Investment Advisers and Their Affiliates

ICIMutual
A Risk Retention Group

ERISA Liability

Introduction

Investment advisers to mutual funds, and affiliates of advisers, play an important and highly visible role in the U.S. retirement system. Of $15.6 trillion in U.S. retirement assets as of September 2009, nearly $4 trillion was held in registered investment companies. Advisers to mutual funds also manage other investment vehicles that hold retirement assets, and fund advisers and their affiliates provide a broad array of services to retirement plans, plan sponsors and plan participants. In addition, advisers and their affiliates often sponsor and provide services for "in-house" retirement plans established for their own employees.

Advisers and their affiliates that operate in the retirement plan arena face specialized liability risks that derive in large part from the federal Employee Retirement Income Security Act of 1974 ("ERISA"). ERISA imposes complex obligations and prohibitions on a broad array of entities and individuals associated with retirement plans and retirement assets, and the potential exposure created by ERISA for violating these obligations and prohibitions can be substantial.

These facts have not gone unnoticed by the plaintiffs' securities bar—i.e., that loose confederation of lawyers who specialize in pursuing large-scale recoveries on behalf of investors against financial institutions and other large corporations. The plaintiffs' bar has targeted fund advisers and their affiliates, among others, as defendants in recent ERISA-based litigation.

If litigation risks under ERISA are not always fully appreciated, the reasons are readily understandable. More than three decades after its enactment, ERISA remains an area of the law that defies easy comprehension. The intricacies of ERISA are not readily parsed, and the statute's requirements and prohibitions can prove challenging even to federal judges responsible for applying them in the context of civil litigation.[1]

Registered investment companies and fund independent directors are not subject to the obligations and prohibitions established by ERISA, or to the litigation exposures created by the statute. Accordingly, this guide is *not* directed towards the independent director community (although individual directors with an interest in the subject matter may find it a useful resource).

Rather, this guide is directed primarily towards senior management and legal and compliance personnel who seek a general introduction to ERISA and to ERISA-based litigation risks faced by fund advisers and their affiliates. The guide is intended to facilitate discussion between such personnel, on the one hand, and ERISA counsel and other ERISA specialists, on the other, and thereby to assist investment advisers and their affiliates in developing and implementing techniques and procedures for reducing and managing ERISA-based litigation risks.

Towards that end, this guide is structured as follows:

- **Part I** provides an overview of the retirement plan area, retirement plan services, and ERISA.
- **Part II** discusses public and private enforcement of ERISA, with a focus on large-scale civil litigation initiated by private (i.e., non-governmental) parties. Part II also analyzes four key areas of ERISA-based

litigation risk and how these risk areas may impact fund advisers and their affiliates.

- The **Appendix** lists selected ERISA-based lawsuits involving fund advisers and their affiliates—designed as a resource for readers wishing to review particular cases and/or to conduct additional research.

While this guide focuses on ERISA, it should be noted that state laws and/or contractual provisions may impose obligations and prohibitions identical or similar to those imposed by ERISA. Violations of such state laws and/or contractual provisions may therefore give rise to liability risks analogous to the ERISA liability risks discussed in this guide.

The observations in this guide are derived from ICI Mutual's interviews with investment management personnel, from consultations with ERISA counsel and other experts, and from ICI Mutual's examination of publicly available information on ERISA-based civil litigation and related issues.

As an introduction for the non-specialist, this guide necessarily generalizes as to the legal and operational issues discussed. It should not be construed or relied upon as legal advice (for which interested parties should look to their own counsel).

Part I: Fundamentals

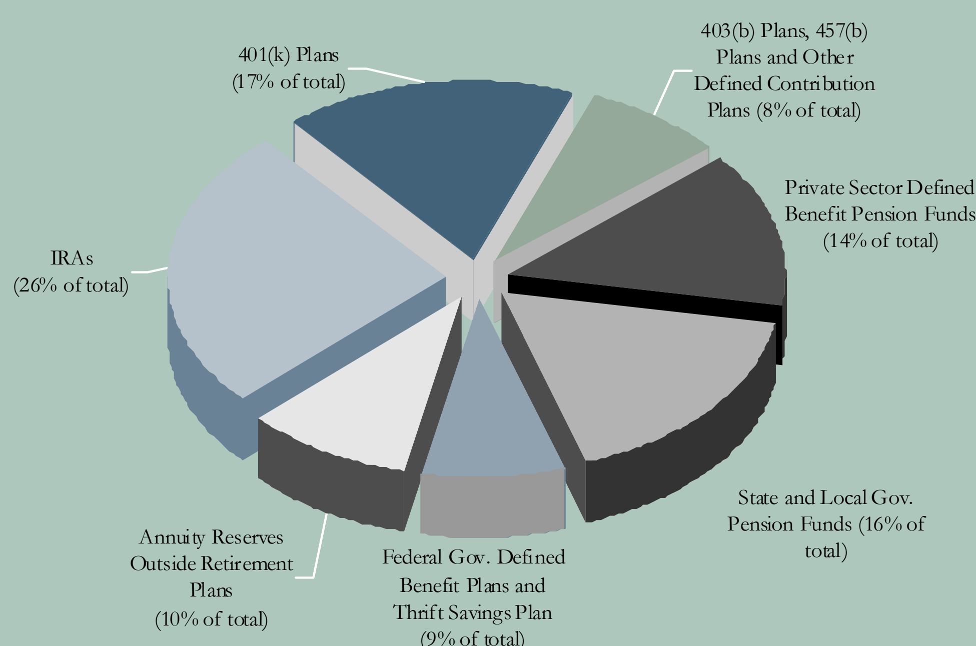
Retirement Plans—In General

Since the enactment of ERISA in 1974, assets earmarked for the use of Americans in retirement have grown over forty-fold, totaling approximately $15.6 trillion (35% of all household financial assets) as of September 2009.[2] These retirement assets are held in various types of tax-advantaged arrangements commonly referred to as "retirement plans."[3]

TYPES OF RETIREMENT PLANS

There are numerous types (and sub-types) of retirement plans. Differences among them include: (1) the constituencies for which the plans are designed (e.g., the self-employed; employees and/or management of private sector, for-profit employers; employees of local, state or federal governmental entities; union members; or employees of tax-exempt entities); (2) the sources of contributions to the plans (e.g., individual plan participants; private sector, for-profit employers; government agencies or other public sector employers; labor unions; or tax-exempt entities); (3) the entities or individuals who bear responsibility for investment decisions and investment risks with respect to assets in the plans (see discussion of defined benefit and defined contribution plans on pages 6-7); and (4) the specific statutory, regulatory and tax requirements to which the plans are subject.

U.S. Retirement Assets:
$15.6 Trillion as of September 30, 2009



Source: Investment Company Institute, The U.S. Retirement Market, Third Quarter 2009 (Feb. 2010).

Defined Benefit and Defined Contribution Plans

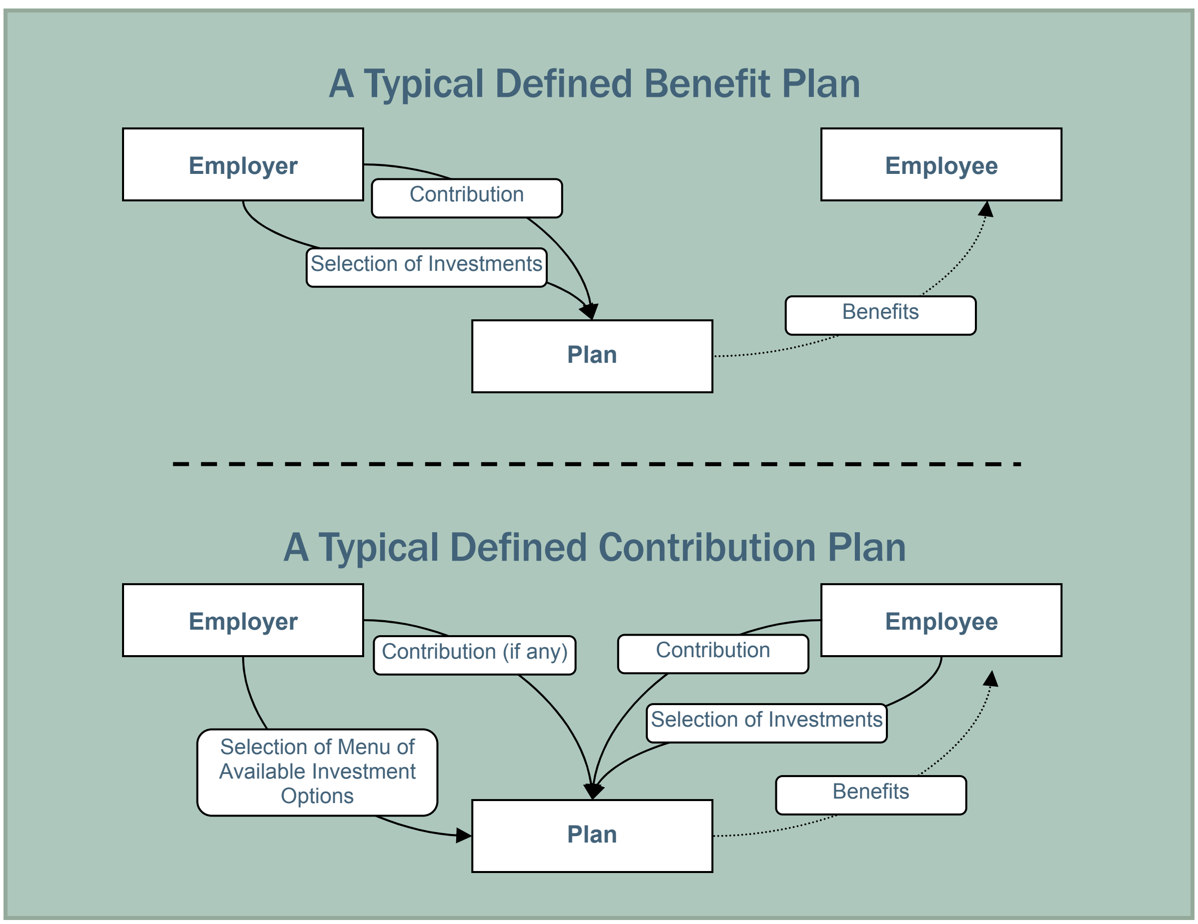
Regardless of their specific type, retirement plans can be placed into two broad categories:

Defined benefit plans entitle plan participants to fixed benefit amounts that become due to them upon their retirement. A participant's benefit amount is generally calculated under a preset formula that takes into account factors such as the participant's length of employment and salary. Responsibility for funding, contributing, and investing plan assets to meet the promised retirement benefit amount rests with the plan "sponsor" (typically, the participant's employer, or in the case of the public sector, a governmental entity), rather than with the individual participant.

The sponsor of a defined benefit plan typically bears both *investment risk* (i.e., the risk that the investment returns on the plan's assets will not be adequate to meet the fixed benefit amounts that will become due to the participant upon retirement) and *longevity risk* (i.e., the risk that the participant will outlive his or her expected lifespan, so as to require unanticipated additional benefits to be paid).[4] Employees in defined benefit plans do, however, bear the risk that the plan sponsor will freeze funding for a plan or terminate it.

So-called "employer pension plans" and the Federal Employees Retirement System ("FERS") are examples of defined benefit plans.

Defined contribution plans, by contrast, do not entitle plan participants to fixed benefit



amounts upon retirement. Rather, a participant's benefit amount upon retirement depends upon the contributions made over time by the participant (and/or his employer) and upon the investment returns that the participant achieves on these contributed assets. Responsibility for investing assets contributed on behalf of an individual participant commonly rests with the participant, rather than with the sponsor, although the sponsor typically selects a "menu" of investments from which plan participants may choose. Investment selections available to individual participants typically include professionally managed investment vehicles, including mutual funds; participants may also be permitted to invest in individual securities of their own selection or in the stock of their employers. The individual participant in a defined contribution plan typically bears both the *investment risk* and *longevity risk*.

401(k) plans and the federal government's Thrift Savings Plan ("TSP") are examples of defined contribution plans.

Over the decades since ERISA's enactment, there has been a shift away from defined benefit plans and towards defined contribution plans.[5] In 1974, defined benefit plans dominated the U.S. retirement landscape: approximately two-thirds of total retirement assets were then held in such plans, and defined contribution plans accounted for a minimal share.[6] Today, by contrast, defined contribution plans account for approximately 25% of retirement plan assets.[7] Individual retirement accounts ("IRAs")—which are closely analogous to defined contribution plans, in the sense that an IRA represents a tax-advantaged arrangement for retirement savings under which the individual typically remains responsible for investment selection and bears the investment and longevity risk—account for another 26%. Private-sector defined benefit plans account for only 14%. (The remaining retirement plan assets are distributed among state and local government plans, federal government plans, and annuities, as shown in the chart on page 5.)[8]

The increased share of retirement assets held in 401(k) plans, other defined contribution plans, and IRAs represents a shift in decision-making responsibility, investment risk, and longevity risk away from employers and towards individual participants.[9] With this shift has come growth and innovation in retirement products and services designed to assist these individual participants. As key providers of investment products and services, the fund industry has participated in this growth and innovation. The fund industry has also become a greater area of focus for the plaintiffs' bar, including those who specialize in ERISA actions.

401(k) Plans and IRAs

401(k) plans and IRAs are the two most common and best-known types of retirement plans.

401(k) plans—the "401(k)" being a reference to the relevant section of the Internal Revenue Code (the "Code")—are typically sponsored by private sector employers, and are often structured to permit employers to "match" all or part of their employees' own retirement contributions to the plan (or, in some cases, to permit employers to contribute to the plan a portion of the employers' own net profits).

401(k) plans are usually participant-directed, with plan participants themselves responsible for selecting individual investments from a menu of investment options made available to them.[10] These menus often include an array of mutual funds, with approximately $1.4 trillion (54%) of 401(k) plan assets held in mutual funds as of September 2009.[11]

Participants in 401(k) plans are also sometimes permitted to invest in individual securities, including securities made available through "brokerage windows." Historically, participants in many 401(k) plans have also been permitted to invest in their employer's stock, although the percentage of participants permitted to do so has declined substantially over the years.[12]

As discussed in this guide (see "Organization and Administration of ERISA Plans" on the next page), employers with 401(k) plans typically make arrangements with professional providers, including fund advisers and their affiliates, to provide various services to 401(k) plans and to plan participants.

IRAs are also participant-directed, and may be established for various reasons (e.g., to provide tax-advantaged retirement savings for employees without employer-sponsored plans; to supplement retirement savings in employer-sponsored plans; or to "roll over" assets in employer-sponsored plans upon changes in employment). Mutual funds are also a common investment choice for holders of IRAs. As of September 2009, over 46 million American households held approximately $4.1 trillion in IRAs, with approximately $1.9 trillion (46%) of IRA assets held in mutual funds.[13]

APPLICABILITY OF ERISA

Many—but by no means all—retirement plans are subject to the provisions and prohibitions of ERISA. Moreover, certain provisions and protections established by ERISA reach beyond assets held directly by such plans.

Retirement Plans Subject To ERISA

As a general rule, ERISA governs private sector retirement plans, but not public sector plans. Thus, for example, 401(k) plans, plans established by tax-exempt entities, and plans administered by union-management trustees are subject to ERISA; by contrast, the TSP, FERS, and state and local government retirement plans are not.

There are, however, exceptions to this general rule—as, for example, IRAs, which are not generally subject to ERISA, and so-called "403(b)" plans offered by public schools and certain tax-exempt organizations, some of which are subject to ERISA and some of which are not. The term "ERISA plan," as used in this guide, refers to a retirement plan whose assets are subject to the full provisions and proscriptions of that statute.

It is important to note that while state and local government plans typically are exempt from ERISA, there may be requirements and protections comparable to ERISA established by state law or state constitutions, and/or as a matter of contract.[14]

Types of Retirement Plans

	ERISA Plans	Non-ERISA Plans
Defined Contribution	• Private sector 401(k) plans • Some 403(b) plans • Others (e.g., employee stock ownership plans, profit-sharing plans, and some Keogh plans)	• Federal government Thrift Savings Plan • Some 403(b) plans • 457(b) plans • IRAs • Some Keogh plans
Defined Benefit	• Private sector defined benefit pension funds • Retirement plans administered by union-management trustee (Taft-Hartley plans) • Retirement plans established or maintained by tax-exempt entities	• Federal government defined benefit plans (e.g., the Civil Service Retirement System and Federal Employees Retirement System) • State and local government pension funds

Plan Assets Subject To ERISA

Investment vehicles that are not themselves ERISA plans may in certain circumstances be deemed to be holding "plan assets," such that their managers and service providers may find themselves subject to ERISA's fiduciary obligations and transaction prohibitions (discussed on pages 16-17). In order to assess whether a non-plan investment vehicle is itself holding "plan assets," ERISA "looks through" the assets of the non-plan investment vehicle to the underlying source of those assets.[15]

ERISA's look-through provisions are complex, but as a general rule, if more than 25% of a non-plan investment vehicle's assets are held by ERISA plans, the non-plan investment vehicle will itself be deemed to be holding "plan assets." There are important exceptions to this general rule, however, with two being of particular importance to fund advisers and their affiliates.

First, certain types of non-plan investment vehicles (e.g., bank common or collective trust funds and most insurance company separate accounts) do not enjoy the protection of the 25% test, such that these non-plan vehicles are deemed to hold "plan assets" if any of their assets are held by ERISA plans or certain other "benefit plan investors."[16]

Second, ERISA's look-through provisions do not apply to registered investment companies (such as mutual funds).[17] Thus, registered funds are generally not deemed to hold "plan assets" regardless of the number of fund shares owned by ERISA plans or plan participants.[18]

As a result, mutual fund advisers are not at risk of being subject to ERISA's fiduciary obligations and transaction prohibitions *solely* by virtue of their management of registered funds.[19] That being said, where fund advisers and/or affiliates also provide services to, and/or sponsor, ERISA plans (or other assets subject to ERISA), they may thereby be subject to ERISA's fiduciary obligations and transaction prohibitions, so as to be at risk for ERISA liability.

Organization and Administration of ERISA Plans

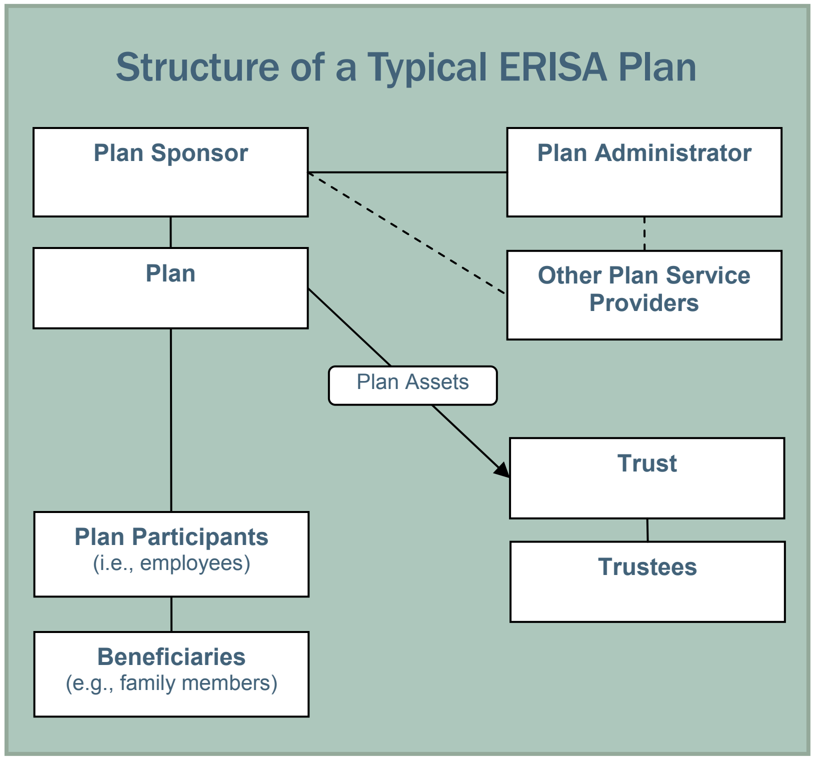
ERISA plans are programs designed to permit the tax-advantaged accumulation and distribution of retirement assets.

PLAN DOCUMENTS

The term "plan documents" commonly refers to two writings (which may be combined): the plan agreement (sometimes known as the plan instrument), and the trust instrument.

Plan Agreement: An employer typically "creates an ERISA plan with a written instrument called a 'plan agreement.'"[20] The plan agreement identifies the "named fiduciaries" who are authorized to control and manage the administration and operations of the plan. The plan agreement describes certain features that are mandated by ERISA or the Code (i.e., procedures for plan funding, plan amendments, and allocation of operational and administrative responsibilities, along with specifics on the basis for plan contributions and payments).[21] The plan agreement also generally includes certain features that are "optional" under ERISA (i.e., authorization for plan "fiduciaries" to serve in more than one fiduciary capacity, and authorization for named fiduciaries to employ consultants and appoint investment managers for plan assets).[22]

Trust Instrument: The trust instrument establishes the separate legal vehicle, or "trust," in which, as a general matter, assets of the plan must be held.[23] Either the trust instrument or the plan agreement generally identifies those parties who will be legally responsible for administration and oversight of the trust (e.g., the "trustees").



KEY PARTIES

A number of different parties are typically involved in the organization and administration of an ERISA plan. The roles and responsibilities of these parties are established (1) by ERISA itself, (2) by plan documents, (3) by contracts between and among the parties, (4) by custom and practice, and/or (5) by some combination of the foregoing.

Most commonly, these parties include:

Plan Sponsor: Under ERISA, each plan must have a "plan sponsor." The plan sponsor is usually the employer of the participants for whose benefit the plan is established. (However, the plan sponsor may sometimes be an employee organization or representatives of one or more employers and/or employee organizations.)

The plan sponsor is often a "named fiduciary" under the plan instrument,[24] although it may not always act in a "fiduciary" capacity for purposes of ERISA. For example, a plan sponsor typically acts in a non-fiduciary capacity (as a so-called "settlor") in making the original determination as to whether to establish a plan and an associated trust, and in making a number of decisions with respect to the plan's *non-investment* features (e.g., employee eligibility and vesting requirements, loan programs, and employer contributions). By contrast, a plan sponsor typically acts as a fiduciary in making decisions with respect to a plan's *investment* features (e.g., selecting the menu of investment options and making investment advice available to plan participants).[25]

The sponsor's functions are often performed by committees of individuals from the management of the sponsor. Such committees may take the form of "investment committees" (responsible for selecting investment options offered to participants) and "administration committees" (responsible for overall plan administration).[26]

Sponsors may employ consultants and appoint investment managers for plan assets. Plan sponsors also frequently contract with third parties to provide various services to plans and plan participants.

For ease of reference in this guide, the term "plan sponsor" may variously refer, as the context requires, to the plan sponsor itself, or to the individual(s), committee(s), and/or the administrator that perform the plan sponsor's functions as a fiduciary.

Plan Administrator: Under ERISA, each plan must have a "plan administrator." The responsibility for plan administration defaults to the plan sponsor, unless another party is otherwise designated by the plan instrument.[27] In many cases, the plan sponsor (or a committee established by the plan sponsor) serves as the designated plan "administrator," but engages a third party to perform various types of day-to-day administrative services (a role sometimes referred to as a "third-party administrator").

Trustee(s): Most ERISA plans must hold plan assets in trust, and responsibility for administration and oversight of the trust rests with one or more trustees. ERISA provides that trustees have exclusive authority and discretion over the management and control of plan assets, unless (1) the authority has been delegated to an investment manager, or (2) the plan expressly provides that the trustee(s) will be subject to the direction of a named (non-trustee) fiduciary (in which case the trustee(s) is usually referred to as a "directed trustee").[28]

Investment Manager: Under ERISA, each plan may, but is not required to, have an "investment manager." An investment manager, if retained, serves as a plan fiduciary and has the "power to manage, acquire, or dispose of any asset of a plan."[29] ERISA permits an investment manager to be an investment adviser registered under the Investment Advisers Act of 1940, a state-registered investment adviser, a bank, or an insurance company.

Record Keeper (Defined Contribution Plans Only): 401(k) plans and other defined contribution plans commonly employ record keepers to track contributions, transactions, and expenses with respect to individual accounts of plan participants. A record keeper typically has other responsibilities as well, including monitoring various requirements affecting individual accounts (such as vesting requirements or loan eligibility requirements). Record keepers are often the primary point of contact for plan participants. Record keeping is often performed by third-party administrators or bundled service providers (discussed on the next page), but may in some cases be performed by the employer itself.

Actuary (Defined Benefit Plans Only): Fiduciaries to defined benefit plans typically retain actuaries to help ensure, among other things, that the plans are appropriately funded, given the expected value of future benefits.[30] In evaluating funding requirements, an actuary typically considers a range of economic assumptions (e.g., salary increases, interest rates, and inflation) and demographic assumptions (e.g., expectations with respect to the retirement age, longevity, and likelihood of disability of plan participants).

Custodian: A custodian typically provides services for settlement of securities transactions effected by the plan, safe-keeps plan assets, and may price plan assets. A custodian may also maintain records with respect to plan assets and transactions. If a plan has an institutional trustee, that trustee typically provides custodial services.

Other Service Providers: Plans and plan fiduciaries also commonly engage various other service providers, including:

- *Consultants*, to provide advice to plan sponsors and plan fiduciaries with respect to certain of their responsibilities;
- *Lawyers*, to assist in compliance with ERISA and other applicable requirements and in contract review; and
- *Accountants*, to audit a plan's financial statements.

The extent to which plan services are outsourced by sponsors to third-party service providers varies, depending on the circumstances involved. Some sponsors (e.g., fund groups, banks, insurance companies, and large corporations) may have the capabilities and expertise to provide (either directly or through affiliates) an array of plan services to their own "in-house" plans, without extensive use of third-party providers. Other sponsors (e.g., smaller companies outside the financial institutions sector) may outsource many plan services, and may further rely heavily on consultants and lawyers to assist them in understanding and fulfilling their obligations under ERISA.

BUNDLED VS. UNBUNDLED ARRANGEMENTS

Sponsors may enter into so-called "bundled" or "unbundled" arrangements with third-party service providers.

Bundled Arrangements: In "bundled" arrangements, plan sponsors enter into agreements with single third-party service providers, who accept responsibility for providing the plans with a range of specified services (e.g., record keeping, custodial, and trustee services). The third-party service providers—sometimes referred to, in this context, as "platform providers"—may provide these various services either directly or through other service providers.[31] The third-party service providers' compensation arrangements with the plans and/or plan sponsors may reflect an aggregate fee for all of the bundled services provided.[32]

Unbundled Arrangements: In "unbundled" arrangements, by contrast, plan sponsors engage third-party service providers on a service-by-service basis. This typically necessitates that the sponsors arrange for separate contracts and separate compensation arrangements with the various service providers. Unbundled arrangements break out the cost of each individual service, as well as the role of each provider. But they may require greater expertise and experience on the part of the plan sponsors to seek out and enter into contracts with individual service providers, and may complicate sponsors' efforts to comply with their administrative responsibilities, including the responsibility to monitor the performance of the individual service providers.

ROLES AND RESPONSIBILITIES OF FUND ADVISERS AND THEIR AFFILIATES

Fund advisers and their affiliates that operate in the retirement plan arena have varying roles and responsibilities in the organization and administration of ERISA plans. The specific roles and responsibilities of a particular adviser/affiliate necessarily depend on various factors, including the adviser/affiliate's expertise, client base, and business model, as well as the nature of the plan.

In the context of ***third-party retirement plans*** (i.e., plans established for the benefit of employees of unaffiliated entities), and regardless of how their roles are formally labeled, the responsibilities commonly taken on by fund advisers and their affiliates can be broadly characterized as follows:[33]

Advisory Services: Fund advisers, of course, frequently manage mutual funds that are used as investment vehicles in retirement plans. In addition, fund advisers or their affiliates may manage other types of underlying vehicles (e.g., collective trust funds) that are available to plan participants as investment options. Fund advisers may also directly manage all or some portion of assets held by defined benefit plans or certain defined contribution plans.

Administrative Services: Affiliates of fund advisers may assist sponsors in establishing or terminating ERISA plans. Affiliates of fund advisers also regularly provide record-keeping services to ERISA plans, with some industry surveys of defined contribution plans finding a significant role for such affiliates in providing such services.[34] Affiliates of fund advisers also sometimes serve as trustees for ERISA plans, although in doing so, they typically seek to limit their role to that of a "directed trustee."

Regulatory/Compliance-Oriented Services: Affiliates of fund advisers sometimes serve as consultants to plan sponsors, assisting them in structuring and overseeing ERISA plans (e.g., assisting with the development of plan documents, the selection and monitoring of service providers, and the creation and monitoring of "menus" of investment options). Affiliates may also test plans for compliance with tax qualification requirements (e.g., "non-discrimination" testing), and may assist plan sponsors and administrators in complying with ERISA's reporting and disclosure obligations.

Participant-Focused Services: Affiliates of fund advisers may provide various services directly for participants in defined contribution plans. These services may include providing telephone or online assistance to plan participants (e.g., responding to inquiries regarding plan materials or plan services). Affiliates may also provide investor education, including generalized asset allocation advice, to plan participants,[35] and/or offer brokerage "windows" to permit participants to invest in individual securities.

In addition to providing the types of services described above to third-party retirement plans, fund advisers and their affiliates may also provide these services to ***in-house retirement plans*** (i.e., plans established for the benefit of their own employees). Fund advisers or their affiliates may also serve as sponsors and/or administrators of in-house plans.

* * *

As discussed in Part II of this guide, significant liability risks may attach to parties who are deemed to be acting as "fiduciaries" under ERISA in providing plan services. In some cases, the fiduciary status of a plan provider may be clear, whereas in others, that status may be open to debate and may be a key point of contention in civil litigation.[36] In such instances, resolution of the issue may require a fact-intensive analysis of the service provider's responsibilities both under ERISA and under relevant plan documents, and of the activities in which the provider is actually engaged.

ERISA—The Statutory and Regulatory Framework

After "more than a decade of investigations into the affairs of pension and employee benefit plans conducted by Congress, presidential commissions, and the Departments of Labor, Justice and Treasury,"[37] Congress enacted ERISA in 1974 in order "to promote the interests of employees and their beneficiaries in employee benefit plans."[38]

ERISA addresses two separate and distinct types of employee benefit plans. "***Employee pension plans***" provide retirement benefits or deferred compensation; "***employee welfare plans***" provide, among other things, medical, accident, sickness, death, and unemployment benefits. This guide focuses on retirement plans (i.e., employee pension plans that provide retirement benefits).

In designing ERISA, Congress intended to protect plan participants and beneficiaries against two types of risk that were of particular concern prior to the statute's enactment:[39]

Administration Risk is the risk that those charged with plan administration will fail to act honestly and prudently in investing and managing plan assets, and in paying benefits and claims. With respect to retirement plans, administration risk may be an issue for both defined benefit plans and defined contribution plans.

Default Risk is the risk that an employer, by reason of insolvency or otherwise, will default or otherwise fail to meet its obligation to pay benefits to plan participants and beneficiaries when the benefits become due. Default risk is more likely to be an issue for defined benefit plans, where decades may pass between the time a participant first earns the right to the future retirement benefits and the time that the benefits become payable by the employer.

Various ERISA requirements and provisions (such as those relating to funding, vesting, benefit accrual, and insurance) have substantially reduced default risk.[40] Administration risk, however, remains an issue and is hence the focus of this guide.

STATUTORY STRUCTURE

ERISA is, in the words of the U.S. Supreme Court, a "comprehensive and reticulated statute."[41] It comprises four major sections, or ***"titles."***

Title I contains detailed requirements relating to ERISA plans, including requirements on reporting and disclosure, and standards for participation, vesting, accrual of benefits, and funding of plans. Of particular significance to this guide, Title I includes stringent provisions relating to the conduct of "fiduciaries" and of other "parties in interest" to ERISA plans, and to civil and criminal enforcement of these and other provisions of ERISA.

Title II amends federal tax law (i.e., the Code) to mirror or complement various provisions of Title I, and sets forth tax incentives to encourage employers to maintain—and employees to participate in—employee benefit plans that meet certain requirements.[42] These requirements relate to limits on plan contributions and benefits, nondiscrimination provisions for plan participation, and rules for distribution of plan assets (e.g., plan loans, early withdrawals, and rollovers).

Title III addresses jurisdictional issues among the federal agencies charged with oversight and enforcement of ERISA, and promotes coordination among them. (These agencies, and their general responsibilities, are discussed on the next page).

Title IV establishes federal insurance arrangements guaranteeing benefits for participants in private-sector defined benefit (i.e., pension) plans.[43] Title IV also established the Pension Benefit Guaranty Corporation ("PBGC"), the independent government agency providing such guarantees.

GOVERNMENT OVERSIGHT

Several different government agencies are responsible for administration and regulatory enforcement of ERISA. The ***U.S. Department of Labor*** ("DOL") and the ***Employee Benefits Security Administration*** ("EBSA"), a separate office in the DOL, have primary responsibility for administering and enforcing the provisions of Title I, and for conducting civil and criminal investigations of potential ERISA violations. (As discussed at page 21, ERISA also authorizes certain private parties—including plan participants—to bring civil lawsuits to enforce ERISA provisions.)

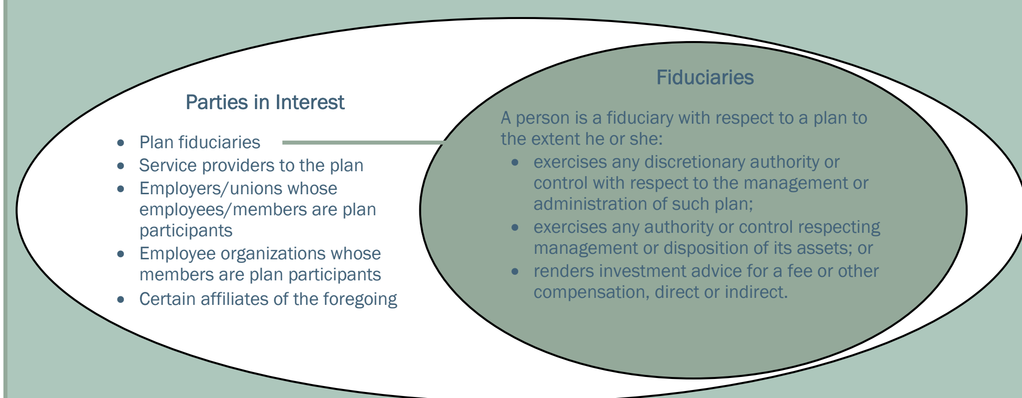
The ***U.S. Department of the Treasury*** ("Treasury Department") and the ***Internal Revenue Service*** ("IRS"), a separate agency within the Treasury Department, have primary responsibility for administering the tax and qualification provisions of Title II. They also oversee and enforce compliance with Code requirements relating to participation, vesting, and funding standards applicable to ERISA plans. As noted above, the PBGC administers the insurance arrangements established under Title IV.

FOCUS ON FIDUCIARIES AND OTHER PARTIES IN INTEREST

ERISA addresses administration risk by providing for detailed oversight and regulation of entities and individuals who are associated with the investment of retirement plan assets, the administration of plan affairs, and the provision of services to plan participants and beneficiaries.[44]

These entities and individuals, as well as certain of their affiliates, constitute ***"parties in interest,"*** a term broadly defined in ERISA.[45] Some, but not all, parties in interest also qualify as ERISA ***"fiduciaries,"*** a term that is likewise broadly defined in the statute.[46]

Party in Interest or Fiduciary?



See ERISA §§ 3(14), 3(21)(A) (codified at 29 U.S.C. §§ 1002(14), 1002(21)(A) (2006)).

The U.S. Supreme Court has held that ERISA "abounds with the language and terminology of trust law." Indeed, the legislative history of ERISA "confirms that the Act's fiduciary responsibility provisions are designed to 'codif[y] and mak[e] applicable to' ERISA fiduciaries certain basic principles derived from that body of common law."[47] It is not surprising, then, that judicial treatment of fiduciaries under ERISA draws heavily from the treatment of trustees under common law.[48]

More specifically, ERISA subjects fiduciaries to heightened scrutiny, more rigorous responsibilities, more stringent prohibitions, and increased liability relative to other parties in interest.[49] Presumably, this is because fiduciaries—by virtue of their access to, and ability to manage and/or control, plan assets—can more readily act to the detriment of plan participants and beneficiaries than can other parties in interest.

As noted above, a plan agreement must identify the plan's "named fiduciaries." But as the courts have recognized, named fiduciaries "are not … the only individuals who are considered fiduciaries under ERISA."[50] ERISA defines a "fiduciary" largely by reference to whether an entity or individual *possesses or exercises authority or control* with regard to plan assets, management, or administration, or *provides investment advice for a fee*, rather than by reference to the specific *position* held by such entity or individual.[51] Indeed, a party may be deemed a "fiduciary" with respect to certain of its activities, but not others.[52]

This definitional approach leaves little or no doubt as to the fiduciary status of certain entities and individuals (e.g., investment advisers to defined benefit plans), but has created debate as to the circumstances, if any, under which certain other entities and individuals (e.g., consultants) should be so viewed. Fiduciary status is often a key threshold issue in civil litigation under ERISA.

Fiduciary Responsibilities

ERISA holds fiduciaries to high standards of conduct, and requires them to discharge their duties "solely in the interest of the [plan's] participants and beneficiaries."[53] Broadly speaking, ERISA requires fiduciaries:

(1) to act for the exclusive benefit of plan participants and beneficiaries;

(2) to exercise the care and diligence of a "prudent expert";

(3) to ensure appropriate diversification of plan investments; and

(4) to comply with governing plan documents (to the extent such documents are consistent with the provisions of ERISA).[54]

As discussed in Part II, a fiduciary that violates these obligations is at risk for regulatory and civil liability, including personal liability for plan losses and restoration of any profits made by the fiduciary through misuse of plan assets. Non-fiduciary "parties in interest" associated with such violations may also find themselves at risk.[55]

Prohibited Transactions

Separate and apart from the affirmative responsibilities assigned to fiduciaries, ERISA also places express prohibitions on fiduciaries with regard to plans and plan assets. These "prohibited transactions" can be divided into two categories:

Prohibited Transactions Between Plans and Fiduciaries: ERISA imposes prohibitions on fiduciaries in the areas of self-dealing, conflicts of interest, and "kickbacks."[56] Broadly speaking, ERISA prohibits a fiduciary from:

(1) dealing with plan assets in its own interest or for its own account;

(2) acting in any transaction involving the plan on behalf of a party whose interests are adverse to those of the plan or of its participants or beneficiaries; and

(3) receiving any consideration for its own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

Prohibited Transactions Between Plans and Parties in Interest: ERISA broadly prohibits fiduciaries from causing a plan to engage, whether directly or indirectly, in the following types of transactions involving parties in interest:[57]

(1) sales, exchanges, or leases of property between a plan and a party in interest;

(2) lending of money or other extensions of credit between a plan and a party in interest;

(3) furnishing of goods, services, or facilities between a plan and a party in interest;

(4) transfers of any plan assets to, or use of any plan assets by or for the benefit of, a party in interest; and

(5) acquisition and retention by a plan of employer securities or employer real property in violation of ERISA.

Note that the prohibitions in this second category—i.e., prohibitions on "party in interest transactions"—apply, by their terms, to *fiduciaries*, rather than to all parties in interest. Thus, potential liability for violation of party in interest transactions lies, in the first instance, with ERISA fiduciaries themselves. Nonetheless, *parties in interest* who are not otherwise ERISA fiduciaries are not themselves immune from risk. Non-fiduciary parties in interest may be liable for excise taxes on the amounts involved in prohibited transactions, and may be required in litigation to disgorge fees received in connection with prohibited transactions.[58]

Statutory and Administrative Relief

ERISA's provisions are so broad as to severely limit the ability of fiduciaries and parties in interest to provide otherwise necessary and appropriate services to retirement plans, absent a statutory exemption or other relief.

Statutory Exemptions: In recognition of this fact, ERISA itself contains statutory exemptions from the prohibited transaction provisions. Of particular relevance to fund advisers and their affiliates are statutory exemptions that permit:

(1) fiduciaries and other parties in interest to provide legal, accounting, and other services "necessary for the establishment and operation" of an ERISA plan, subject to certain conditions (and to a DOL regulation that leaves this exemption inapplicable to the prohibited transactions between plans and fiduciaries described above);[59]

(2) fiduciaries and other parties in interest to engage in "blind" securities transactions with ERISA plans on securities exchanges (and, in certain situations, through alternative trading systems, electronic communications networks, and similar execution systems or trading venues);[60] and

(3) non-fiduciary parties in interest to engage in certain transactions (including sales, exchanges or leasing of property, loans or other extensions of credit, and certain transfers or uses of plan assets) with ERISA plans, subject to certain conditions."[61]

Administrative Exemptions: In addition to statutory exemptions, ERISA authorizes the DOL to grant administrative exemptions to the prohibited transaction provisions. Administrative exemptions typically take the form of either "individual" exemptions or "class" exemptions.

Individual exemptions address *specific transactions* for which affected participants are seeking individualized relief, and may not be relied on by other parties. ***Class exemptions***, by contrast, tend to focus on particular *types* of transactions or entities, and may generally be relied on by any parties meeting the conditions of the relevant exemptions.

Of particular relevance to fund advisers and their affiliates are class exemptions that permit:

(1) a plan fiduciary of a third-party plan to invest assets in a mutual fund managed by that same

fiduciary or its affiliates, subject to certain conditions;[62] and

(2) a plan fiduciary of an in-house plan to invest assets in a mutual fund managed by that same fiduciary or its affiliates, subject to certain conditions.[63]

Two other class exemptions—the so-called QPAM and INHAM exemptions—have also traditionally been important to the fund industry. These two class exemptions permit "investment funds" (e.g., insurance company separate accounts or bank common or collective trust funds) managed by QPAMs[64] or INHAMs[65] (i.e., "qualified professional asset managers" or "in-house asset managers," respectively) to engage in otherwise prohibited transactions with parties in interest, subject to certain conditions.[66]

DOL Guidance: The DOL also issues ***advisory opinions*** (which apply ERISA to a specific set of facts), ***information letters*** (which call attention to ERISA interpretations or principles without applying them to specific factual situations), ***field assistance bulletins*** (which, as part of the DOL's compliance assistance program, are designed, among other things, to assist employers, service providers, and others in complying with particular ERISA provisions), and ***interpretive bulletins*** (which set forth the DOL's views on particular topics).[67]

Thus, for example, in a series of advisory opinions, the DOL has interpreted the prohibited transaction provisions of ERISA to permit certain service providers to receive fees from mutual funds available as investment options in the plan, subject to certain conditions.[68]

* * *

The issue of whether a fiduciary has breached its obligations under ERISA is frequently contested in civil litigation and can be a fact-intensive inquiry. The inquiry may often require a detailed understanding of relevant decisions, interpretations, and guidance that have been provided by governmental agencies (i.e., the DOL, and, in some cases, the IRS) and the courts.

Part II: ERISA Litigation

ERISA Enforcement—In General

ERISA's "comprehensive civil enforcement scheme"[69] provides for "a panoply of remedial devices."[70] The remedies and sanctions established under ERISA largely supersede (rather than supplement) fiduciary-based exposures to which plan sponsors and plan service providers might otherwise be subject under state law or federal common (i.e., court-created) law.[71]

ERISA's remedies and sanctions are themselves robust. Plan sponsors and plan service providers can be at substantial financial risk where loss or diminution of retirement assets can be traced to their actual or alleged failure to adhere to the broad responsibilities and prohibitions placed on them by the statute.

PUBLIC AND PRIVATE ENFORCEMENT OF ERISA

The DOL spearheads ***public enforcement*** of ERISA. The statute provides the department with broad enforcement authority, and each year the DOL—acting on its own or along with other governmental authorities (e.g., the IRS, U.S. attorneys' offices, the SEC)—pursues several thousand investigations into potential civil (and in some cases, criminal) violations.

Most of these DOL investigations are ultimately closed "with results"—i.e., with monetary recoveries obtained for plans and/or with other corrective action being taken.[72] Although the DOL often is able to achieve its results through voluntary compliance by plan sponsors and fiduciaries, civil litigation is initiated in a relatively small number of cases.

These DOL investigations include proceedings to correct violations of ERISA's prohibited transaction provisions. Such proceedings are commonly resolved through unwinding the offending transaction and/or a payment by the responsible entity or individual (i.e., the party in interest and/or the ERISA fiduciary).

ERISA also permits ***private enforcement*** (i.e., non-governmental enforcement) of its provisions. Specifically, the statute authorizes plan participants, plan beneficiaries and ERISA fiduciaries to initiate litigation in federal courts for breaches of duty by ERISA fiduciaries, along with other violations of ERISA and of the terms of ERISA plans.

Since 2000—and in the aftermath of WorldCom, Enron, and other events that have had dramatic impacts on values of employer stock and other plan investment options—ERISA has generated a significant amount of private civil litigation. By one estimate, over 2,400 ERISA-based lawsuits were filed during the period 2005-08 alone.[73] Such lawsuits can involve significant financial exposure for the defendants involved, with settlements in the eight figures (or higher) not uncommon.[74]

TYPES OF PRIVATE CIVIL LITIGATION UNDER ERISA

Broadly stated, there are two types of private civil litigation under ERISA: (1) participant benefits and rights litigation and (2) fiduciary litigation.

Each type of litigation presents risks for those who may be named as defendants. From the perspective of fund advisers and affiliates, however, the more serious type of civil litigation under ERISA is fiduciary litigation, which, as discussed below, generally involves greater potential exposure. This guide focuses on fiduciary litigation.

Participant Benefits and Rights Litigation

In this type of litigation, participants generally seek to recover benefits due to them, or to enforce their rights, under the terms of their plans. For example, plaintiffs may charge that (1) their retirement benefits have been improperly calculated based on erroneous information regarding their years of service or final salaries; or (2) defendants have failed to effect requested transactions for their participant accounts.

Lawsuits of this type are typically brought by plan participants (or beneficiaries) against plan administrators or, in certain cases, other plan providers.[75]

Fiduciary Litigation

In this type of litigation, defendants, in their purported roles as plan "fiduciaries," are charged with failing to meet one or more of the various fiduciary obligations placed upon them by ERISA.

Fiduciary lawsuits are typically brought (1) on behalf of plan participants against plan sponsors, administrators, trustees, and/or plan service providers; or (2) by plan sponsors, administrators or trustees against "outside" investment managers or other plan service providers.

Fiduciary litigation typically seeks monetary relief (in the form of "make whole" damages) from defendants, and can itself be subdivided into two categories:

Challenges to Management of Plan Assets: Here, plan sponsors, administrators, investment managers, and/or other plan service providers are charged with failing to meet their fiduciary obligations with regard to the investment of plan assets and/or the offering of plan investment options. Examples include (1) so-called "stock drop" lawsuits, in which plan participants allege, following a decline in the price of an employer's stock, that plan fiduciaries knew or should have known that employer stock was an imprudent investment option,[76] and (2) recent "credit crisis" lawsuits, in which providers of investment management services to funds offered as investments in ERISA plans have been charged with failure to act prudently when investing plan assets in various types of securities.[77]

Challenges to Plan Administration: Here, plan sponsors, administrators, investment managers, and/or other plan service providers are charged with failing to meet their fiduciary obligations with regard to plan administration. Examples include recent "revenue sharing" lawsuits (described on pages 29-30), in which plan sponsors, trustees, and/or other service providers have been charged with violating their obligation to act for the exclusive benefit of plans and plan participants by making available investment options with "excessive and unreasonable" fees and costs.[78]

ROLE OF THE PLAINTIFFS' BAR

Fiduciary litigation under ERISA is often brought by *plan participants* (and/or beneficiaries), acting either as representatives of a "class" of like-situated individuals or on behalf of the plan as a whole. As in the case of shareholder class action lawsuits brought under the federal securities laws against issuers (including mutual funds), counsel to participants and beneficiaries in fiduciary litigation under ERISA tend to be associated with the plaintiffs' bar.

As a practical matter, in these lawsuits, it is often plaintiffs' counsel, and not the affected participants or beneficiaries, who initiate and control the litigation. (For a description of today's plaintiffs' bar and its role in federal securities class action litigation, see ICI Mutual's publication *Mutual Fund Prospectus Liability: Understanding and Managing the Risk* (2010).)

The complexity and uncertainty of ERISA can themselves be "a potent weapon" for plaintiffs in fiduciary litigation.[79] There are also other specific reasons—including procedural differences between ERISA litigation and litigation under the federal securities laws—that explain ERISA's appeal to the plaintiffs' bar.[80]

Indeed, over the past decade, the plaintiffs' bar has played an instrumental role in the emergence of "a new ERISA litigation industry."[81] These lawyers have been initiating fiduciary lawsuits under ERISA as stand-alone litigation, or, as has become common in recent years, as "companion" litigation to shareholder class action lawsuits brought under the federal securities laws.[82]

This trend by the plaintiffs' bar towards pursuing parallel litigation attacks against issuers and associated "deep pocket" defendants—i.e., attacks under both the federal securities laws and under ERISA—has affected not only operating companies, but the fund industry as well. Thus, for example, in the aftermath of market timing regulatory actions in 2003 and 2004, more than twenty fund groups became the targets of large numbers of civil lawsuits. Many of these fund groups were required to defend not only against class action and derivative lawsuits brought on behalf of fund shareholders under the federal securities laws and/or common law, but also against "companion" lawsuits under ERISA brought on behalf of participants in the in-house 401(k) plans offered by the advisers, the advisers' parent companies, and/or their affiliates.[83]

INSTITUTIONAL PLAINTIFFS

Fiduciary litigation under ERISA is also initiated by *plan fiduciaries*—typically, plan sponsors, plan administrators, and/or plan trustees. These plan fiduciaries are usually institutions (or individuals associated with institutions), and tend to be "sophisticated litigants."[84] Although these institutional plaintiffs sometimes utilize counsel from the plaintiffs' bar, or otherwise adopt strategies and techniques used by the plaintiffs' bar,[85] they nevertheless often retain substantial control over the litigation effort.

As one observer has noted, these institutional plaintiffs "are conservative business litigants using plaintiffs' tools seeking to recoup significant losses." As institutional plaintiffs, they "may be unlikely to accept quick compromises, and, mindful of their own fiduciary obligations, may well be unwilling to accept any compromise that does not represent a very significant percentage of the losses."[86]

Why Fiduciary Litigation Sometimes Settles

Because of the fact-intensive nature of various of the issues in fiduciary litigation (see generally pages 24-27), the issues may be difficult to resolve in a defendant's favor on a motion to dismiss or otherwise at a pre-trial stage of the litigation process. As a practical matter, this increases the risk of "deep pocket" plan service providers being named as defendants in fiduciary litigation, particularly in cases involving employer collapses or similar catastrophic events.

If a lawsuit survives a defendant's pre-trial challenges, the prospect of protracted litigation can provide a defendant plan service provider with a disincentive to proceed to a trial on the merits, and a negotiated settlement of the litigation may result. The relative strength or weakness of the evidence marshaled by plaintiffs and defendants on various relevant issues, as well as the risk (however remote) of substantial potential liability, may factor into their assessments of the overall settlement value of the lawsuit.

Contested Issues in Fiduciary Litigation

While it may seem self-evident, it is nevertheless important to appreciate that a fiduciary lawsuit under ERISA "is not a securities suit." Rather, it is "an action against fiduciaries of a pension plan" that is governed under ERISA's independent legal framework.[87]

In order to establish liability on the part of defendants in such a lawsuit, plaintiffs generally must demonstrate that (1) the plaintiffs have a legal right (i.e., "standing") to pursue the litigation, (2) the defendants are plan "fiduciaries," and (3) the defendants violated (i.e., "breached") their fiduciary duties under ERISA, causing harm to the plaintiffs.[88]

Defendants frequently contest some or all of these issues. Federal court decisions on these issues have, in turn, generated considerable debate and commentary, reflecting the complexities that can arise when courts must resolve these basic issues in the context of litigation. Although a detailed discussion is outside the scope of this guide, this section is designed to provide an introduction to these issues, and to provide some observations regarding the nature of the debate and commentary around them.

STANDING

Among the stated purposes of Congress in enacting ERISA was to provide "for appropriate remedies, sanctions, and ready access to the Federal courts."[89] Yet ERISA does not provide would-be litigants with unlimited access. Rather, ERISA's own text, through "carefully integrated civil enforcement provisions,"[90] dictates who has the legal right to bring lawsuits under the statute (i.e., standing), and on what basis.[91]

Plaintiffs who pursue fiduciary lawsuits under ERISA typically claim authority to do so under:

(1) **Section 502(a)(2)**, which authorizes participants, beneficiaries, and fiduciaries to pursue private (i.e., non-governmental) lawsuits to *enforce* section 409 of ERISA (which, in turn, *creates* personal liability for fiduciaries who breach their fiduciary duties),[92] and/or

(2) **Section 502(a)(3)**, a "catchall" provision which authorizes participants, beneficiaries, and fiduciaries to pursue lawsuits for violations of "any" provision of ERISA or of the terms of individual ERISA plans.[93]

Historically, section 502(a)(2) has been interpreted by the courts to permit plaintiffs to obtain ***monetary relief*** (i.e., "make whole" damages), but only where the defendant's breach of its fiduciary obligations causes harm to *the plan itself*.

Meanwhile, section 502(a)(3) has for some years been interpreted to permit plaintiffs to seek relief for *individualized* harm caused by a defendant's breach of its fiduciary obligations. But plaintiffs proceeding under section 502(a)(3) may secure only appropriate ***equitable relief*** (i.e., relief that is typically non-monetary, such as reinstatement of benefits, etc.).

These two provisions date back to ERISA's enactment in an era of *defined benefit plans*, and courts in recent decades have wrestled with how, if at all, these provisions limit the rights of participants in *defined contribution plans* to pursue lawsuits under ERISA. In 2008, the U.S. Supreme Court resolved certain remaining disagreements among the lower courts on this issue.[94] The Court held that participants in 401(k) and other defined contribution plans have the legal right to sue plan fiduciaries for monetary relief under section 502(a)(2). The Court reaffirmed that section 502(a)(2) requires harm "to a plan" itself, but reasoned that harm to an individual participant account is sufficient to establish harm to the plan.[95]

The Supreme Court has thus clarified that individual plan participants have standing to pursue "make whole" monetary recoveries in fiduciary litigation under ERISA. The Court's decision has thereby underscored the potential financial exposure faced by sponsors and plan service providers—including fund advisers and their affiliates—in the current litigation environment. Indeed, a federal appellate court relied heavily on the Court's decision in concluding that former employees who had cashed out of in-house 401(k) plans sponsored by fund groups had standing to pursue market timing-related ERISA fiduciary litigation against various fiduciaries of the plans.[96]

Notwithstanding the recent Supreme Court decision, certain other legal questions remain unresolved under section 502(a)(2), such as the extent to which participants can pursue their lawsuits as class actions.[97] These unresolved questions have significant potential implications for ERISA fiduciaries involved in litigation brought by participants in 401(k) (and other defined benefit) plans.

There also remain unresolved legal questions with regard to section 502(a)(3)—including whether, and under what circumstances, private litigants may sue for *monetary* relief.[98] This issue, too, has implications for litigation (although these implications may be of lesser practical importance, at least in the defined contribution plan arena).

FIDUCIARY STATUS

As discussed above, section 409 of ERISA creates personal liability for those who qualify as "fiduciaries" under the statute. More specifically, section 409 provides that fiduciaries who breach "any of the responsibilities, obligations, or duties imposed upon fiduciaries" by ERISA shall be personally liable "to make good" any losses to a plan resulting from their breach, and to restore any profits made by the fiduciaries through their use of plan assets. In order for a plaintiff to *enforce* section 409 in fiduciary litigation, the plaintiff must typically establish that the defendant is, in fact, a "fiduciary," as that term is defined in ERISA.[99]

Other Sources of Potential Liability

Under certain circumstances, plan service providers may be at risk of civil liability (1) for the fiduciary breaches of others and/or (2) for knowingly participating, even as a non-fiduciary, in an unlawful act:

- *Co-Fiduciary Liability:* A plan service provider that is itself deemed to be acting as a fiduciary may be liable for fiduciary breaches by *other* plan fiduciaries (so-called "co-fiduciary" liability) under section 405(a) of ERISA.[100] Such co-fiduciary liability may attach if (1) a fiduciary knowingly participates in or conceals a breach of another fiduciary; (2) the fiduciary's failure to comply with its own fiduciary obligations enables another fiduciary to commit a breach; or (3) the fiduciary knows of a breach by another fiduciary, but does not make reasonable efforts to remedy the breach.[101]
- *Liability of Non-Fiduciaries:* A plan provider that is *not* itself a fiduciary may nevertheless be liable if it knowingly (in either an actual or constructive sense) participates in an action prohibited under ERISA.[102] As a practical matter, in fiduciary litigation naming a plan service provider among the defendants, a claim that the provider breached its fiduciary duties is likely to be coupled with an alternative claim alleging that the provider, even if not a fiduciary, was a knowing participant in an act unlawful under ERISA.

As discussed on page 16, plan fiduciaries may encompass both "named" fiduciaries and "functional" fiduciaries.[103] There may be little or no doubt, in some cases, as to the fiduciary status of particular defendants. In other cases, however, the issue may be less clear. For example, certain types of "administrative" and "consulting" activities have generated disputes over fiduciary status in recent litigation. Indeed, in the words of one observer, "the federal district courts continue to grapple with the issue" of when a "defendant service provider qualifies as an ERISA fiduciary."[104]

In making determinations of fiduciary status, courts often focus heavily on the particular facts involved—e.g., the wording of the particular plan document(s) at issue, the nature of the directions received by the defendant (by contract or otherwise), and/or the defendant's actual activities.

PLAN LOSSES RESULTING FROM BREACH OF FIDUCIARY DUTY

If plaintiffs have standing to pursue their lawsuit, and if a defendant is deemed to be acting as an ERISA fiduciary, plaintiffs seeking "make whole" monetary relief in fiduciary litigation must further demonstrate that the defendant fiduciary is *liable*.

Fiduciary liability under ERISA is created primarily by section 409 of the statute. Although section 409 does not "contain the exclusive set of remedies for every kind of fiduciary breach,"[105] fiduciary litigation of greatest concern to fund advisers and affiliates generally requires satisfaction of the section. The section sets forth three criteria that must be met in order for liability to attach: (1) breach of fiduciary duty, (2) losses to the plan and/or ill-gotten profits to the fiduciary, and (3) causation.[106]

Breach of Fiduciary Duty

Section 409 provides that a defendant fiduciary must violate (or "breach") one or more of "the responsibilities, obligations, or duties" (collectively, "duties") that are imposed upon fiduciaries by ERISA. Assuming that a duty does clearly exist (and this may be a contested issue[107]), whether defendants have in fact violated that duty is an issue that is typically disputed by the parties.

Given the broad and generalized nature of these duties (as discussed in Part I), it is rarely difficult for plaintiffs in fiduciary litigation to *allege* that defendants have violated one or more of them. That being said, *allegations* of breach of duty are one thing, while *evidence* sufficient for plaintiffs to meet their burden of proof on the issue is another.[108]

As a practical matter, in motions to dismiss and other pre-trial legal challenges (e.g., motions for summary judgment), it may be difficult for defendants to "disprove" allegations of breach of duty so as to convince a court to terminate a lawsuit. Thus, for example, at the motion to dismiss stage, procedural rules require courts to assume the truth of the plaintiff's factual allegations, and allow dismissal only if the complaint nevertheless fails to state a valid claim as a matter of law.

In determining whether a fiduciary has in fact violated one or more of its duties, many courts have drawn on trust law considerations.[109] Thus, as a general matter, a fiduciary must be personally at fault, in the sense of acting negligently or intentionally, although in some cases simple mistakes may be sufficient to trigger a violation.[110]

Losses to the Plan and/or Ill-Gotten Gains

Section 409 further provides that there must be "losses to the plan" and/or ill-gotten profits to the fiduciary.

In order to survive pre-trial challenges on this issue, plaintiffs must establish at least a "prima facie case" of plan loss or ill-gotten fiduciary profits.[111] It is not sufficient for plaintiffs to provide mere conjecture as to the possible existence of loss to a plan (and in such cases, defendants may be entitled to have the litigation terminated on a pre-trial motion to dismiss).[112]

As discussed above (see pages 24-25), prior to a recent Supreme Court decision, the courts had not definitively resolved the issue of whether losses to individual participant accounts in 401(k) and other defined contribution plans constitute losses "to a plan." It now appears that fiduciary liability may attach under section 502(a)(2)—and, by extension, under section 409—in such circumstances.[113]

Losses to a plan can include lost profits, since "make whole" relief under section 409 is designed to restore a plan to the position it would have had if no breach of fiduciary duty had occurred. Calculation of loss is rarely straightforward, and typically depends on a number of variables, including assumptions regarding how the plan would have performed absent the fiduciary's breach.[114]

Causation

Finally, section 409 provides that the plan losses and/or the fiduciary's ill-gotten profit must "result from" the fiduciary's breach of duty.

As a result, unless there is a breach of duty, a plan loss is not itself sufficient to establish monetary liability on the part of the fiduciary. Similarly, unless there is a plan loss (or an ill-gotten profit), a breach of duty is not itself sufficient to establish monetary liability on the part of the fiduciary.[115]

Moreover, even where there is both a breach of fiduciary duty and a plan loss (or an ill-gotten gain), fiduciary liability exists "only to the extent" that the breach is the "proximate cause" of such loss (or ill-gotten gain).[116] By implication, if a loss would have occurred whether or not a breach had occurred, the fiduciary generally will not be held responsible for such loss.[117]

Courts remain divided on the question of whether plaintiffs or defendants have the burden of proving causation.[118] In some courts, defendants bear the burden of demonstrating that their breach did not cause the loss or ill-gotten gain (or that there was no such loss or ill-gotten gain).[119] In other courts, the burden rests with plaintiffs.[120]

Safe Harbor Under Section 404(c)

Where, as is often the case, fiduciary litigation involves defined contribution plans, defendants frequently seek to rely on the so-called "safe harbor" established by section 404(c) of ERISA.

Section 404(c) exempts investment managers and other plan fiduciaries from liability for loss which results from a plan participant's (or beneficiary's) "exercise of control" over the assets in his or her individual account.[121] The DOL's implementing regulation for section 404(c) establishes detailed conditions and criteria that must be met in order for the safe harbor to attach.[122] The question of whether those conditions and criteria have been satisfied is frequently disputed by litigants.

Some courts have found that section 404(c) is an affirmative defense and not viable grounds for termination of a lawsuit on a motion to dismiss.[123] Accordingly, it may be difficult for defendants to invoke the safe harbor at early stages of the litigation process.

Key Areas of Litigation Risk

Outside the ERISA context, the most significant potential exposures for fund advisers and their affiliates in civil litigation tend to involve allegations of (1) inaccurate or incomplete disclosure; (2) improper receipt of fees or other compensation; (3) mismanagement of assets; or (4) other failures to adhere to fiduciary and/or contractual responsibilities. Fund shareholders or other plaintiffs may pursue such allegations under one or more provisions of the federal securities laws and/or state law.

Fund advisers and affiliates named as defendants in fiduciary litigation under ERISA tend to face these same basic types of allegations. Although the standards and criteria for civil liability under these parallel regimes—federal securities laws and state law, on the one hand, and ERISA, on the other—are similar in various respects, they are by no means identical.

The following discussion is designed to provide an overview of the basic obligations and attendant litigation risks that attach under ERISA to plan sponsors and plan service providers in each of these four areas, and to provide examples of some of the legal issues that arise in the context of litigation. The Appendix to this guide identifies selected fiduciary lawsuits involving fund advisers and their affiliates.

DISCLOSURE

Over the last decade, the plaintiffs' bar has initiated numerous shareholder lawsuits under the federal securities law challenging the adequacy of mutual fund disclosure.

Disclosure also features in fiduciary litigation under ERISA. More specifically, the question of whether a fiduciary has a duty to disclose—and, if so, the related questions of what should be disclosed and whether the defendant has in fact failed to make proper disclosure—are often contested in fiduciary litigation. Moreover, plaintiffs commonly invoke disclosure as an additional, or alternative, theory of legal recovery in fiduciary lawsuits alleging mismanagement of assets or improper receipt of fees.

Disclosures to Plan Participants

- *Summary Plan Description ("SPD"):* The SPD must, among other things, provide an explanation of plan features and benefits, information about the plan administrator and trustees, and a summary of the eligibility requirements to participate in the plan and to receive benefits. ERISA requires that the SPD be "written in a manner calculated to be understood by the average plan participant" and be "sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan."[124]
- *Plan's Annual Report:* Plan participants must be provided with a summary of the latest annual report (Form 5500 Series) filed by the plan with the DOL, and are entitled to examine or receive a copy of the full report.[125] The annual report includes, among other things, the plan's financial statements, as well as disclosure regarding fee and compensation arrangements of plan service providers. Revisions to applicable DOL rules have increased required disclosure regarding fees and compensation received by plan providers from various sources (including mutual funds available as investment options under the plan).[126]
- *Plan Documents:* Plan participants are generally entitled to receive or examine copies of plan documents, as well as certain other materials relevant to plan operations (e.g., insurance contracts and collective bargaining agreements).[127]
- *Fund Disclosure (404(c) Plans Only):* As described above, certain plans rely on the "safe harbor" established by section 404(c) of ERISA. Such plans are required to provide plan participants with information about available investment alternatives, including prospectuses, financial statements, annual reports, and expense information.[128] (A proposed DOL regulation would, if adopted, require participant-directed contribution plans (whether or not the plans rely on the section 404(c) safe harbor) to disclose, or make available, similar information to plan participants.[129])

ERISA provides a "comprehensive set of 'reporting and disclosure' requirements" describing information that must be provided or made available to plan participants.[130] The requisite information is typically contained in the documents described in the sidebar above.

Courts have generally been reluctant to interpret the fiduciary provisions of ERISA (discussed above on page 16) as imposing an affirmative obligation on plan fiduciaries to disclose additional information beyond that required under the statute's "explicit disclosure requirements."[131] Thus, for example, some courts have rejected arguments that fiduciaries must disclose actuarial valuation reports, or that they must disclose proposed (but not yet implemented) changes to plan benefits.[132]

That being said, it is clear from U.S. Supreme Court precedent and from decisions by the lower courts "that *if* an ERISA fiduciary communicates information to plan participants, the fiduciary must be truthful," and that the fiduciary may not lie to participants or otherwise materially mislead them.[133] Apart from this broad prohibition on active misrepresentations, however, the Supreme Court has not provided definitive guidance in this area, and the Court has expressly declined to address "whether ERISA fiduciaries have any fiduciary duty to disclose truthful information on their own initiative, or in response to employee inquiries."[134]

As a result, the law remains unsettled as to whether a fiduciary may face civil liability for failures to disclose information that may be viewed by plan participants as material, where such information is not otherwise specifically required to be disclosed under the statute.[135] While some courts have found "an affirmative duty" on the part of an ERISA fiduciary "to inform when [it] knows that silence might be harmful,"[136] others have determined that this duty attaches only to information about plan *benefits,* and not to information about plan *investments*—i.e., not to "financial information about companies in which participants may invest."[137]

RECEIPT OF FEES AND COMPENSATION

In recent years, the plaintiffs' bar has initiated numerous shareholder lawsuits under the federal securities laws challenging the receipt by fund advisers and affiliates of fees and compensation. To date, the plaintiffs' bar has had limited success in these efforts.

Perhaps in the hope that ERISA will prove "a more viable route to pursue civil remedies … than the securities laws,"[138] the plaintiffs' bar has likewise in recent years initiated numerous fiduciary lawsuits under ERISA challenging fees and compensation. Brought as class actions on behalf of participants in 401(k) and other defined contribution plans, these lawsuits have charged plan sponsors and various plan service providers (including fund advisers and affiliates) with breaching their duties as fiduciaries under ERISA by permitting their plans to pay unreasonable (i.e., excessive) fees.

These lawsuits attack both payments made directly, in the form of fees paid by plans to service providers, and indirectly, in the form of "revenue sharing" (i.e., the receipt by plan service providers of compensation from mutual funds included as plan investment options and/or from affiliated entities serving as investment advisers to such funds).[139]

ERISA's exclusive benefit provision (see page 16) requires that a fiduciary act "solely in the interest" of plan participants and beneficiaries, and that the fiduciary act "for the exclusive purpose" of "providing benefits" to them and "defraying reasonable expenses of administering the plan." This provision is generally considered to mean that plan fiduciaries may permit only "reasonable" fees to be paid by the plan to plan service providers.[140]

ERISA's broadly worded prohibited transaction provisions (see pages 16-17) may also limit the ability of plan fiduciaries, and affiliates of fiduciaries, to provide services to ERISA plans (or underlying investment vehicles for plans). It follows that these provisions may likewise limit the ability of fiduciaries and affiliates to receive compensation for such services.

Statutory and administrative exemptions under ERISA and DOL advisory opinions, however, have enhanced the ability of fund advisers and affiliates to provide services to ERISA plans and their underlying investment vehicles, and thus to receive compensation for these services. Certain of these exemptions are described above on pages 17-18.

In recent "revenue sharing" litigation, these exemptions and opinions have not tended to be at issue. Rather, the focus has been largely on whether defendants adequately considered "revenue sharing" payments when establishing "reasonable" fees with plan service providers.

PRUDENT MANAGEMENT OF ASSETS

Unlike the federal securities laws, which do not generally permit *direct* actions against advisers for alleged mismanagement of assets,[141] ERISA expressly contemplates that plan fiduciaries may be *directly* sued for mismanagement of assets under their control—i.e., for failure to adhere to their duty of "prudent management." Numerous fiduciary lawsuits charging imprudent investment have been initiated in recent years, in the aftermath of corporate accounting scandals (e.g., Enron, WorldCom), subprime events, and the credit crisis.

These lawsuits have been brought both as participant class actions against plan sponsors and various plan service providers, and as direct actions by plan fiduciaries (e.g., sponsors and administrators) against "third party" plan service providers (e.g., investment managers). Fund advisers or their affiliates have found themselves named as defendants in both types of lawsuits.

The duty to invest prudently encompasses two related fiduciary duties under ERISA:

(1) the duty to act with the "care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims"—sometimes referred to as the "prudent expert" standard;[142] and

(2) the duty to "diversify[] 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."[143]

Prudence

In considering whether a fiduciary has invested prudently, courts focus on the "primary question" of whether a fiduciary, "at the time [it] engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment."[144] In assessing whether a fiduciary has employed "appropriate methods" of investigation, courts look to the particular facts and circumstances involved, and may look to industry practices to help guide their decisions.[145]

Under relevant regulations adopted by the DOL, a prudent fiduciary must also (a) give "appropriate consideration" to the role of the proposed investment in the portfolio as a whole (or, if appropriate, in that portion of the portfolio for which the fiduciary is responsible); and (b) act accordingly. Factors relevant to such an "appropriate consideration" include:

(1) "the role the investment or investment course of action plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties;"

(2) the risk of loss;

(3) the opportunity for gain; and

(4) other factors, including liquidity and diversification.[146]

Diversification

As a general matter, and with certain exceptions for ERISA plans that require or permit investments in employer stock,[147] ERISA's "duty to diversify prohibits a fiduciary from investing disproportionately in a particular investment or enterprise."[148] However, no bright-line test for assessing whether plan investments are adequately diversified has been established by ERISA, the courts, or the DOL.

To the contrary, courts have recognized that "ERISA's duty to diversify is not measured by hard and fast rules or formulas," and that diversification must be assessed in light of various relevant factors, including:

(1) the purposes of the plan;
(2) the amount of plan assets;
(3) financial and industrial conditions;
(4) the type of investment;
(5) geographic distribution;
(6) industry distribution; and
(7) dates of maturity.[149]

In assessing whether a fiduciary meets this duty, courts appear to consider both the adequacy of diversification of individual investment vehicles, and the overall adequacy of diversification of all investment vehicles within the segment of a plan for which the particular fiduciary (e.g., an investment manager) has responsibility.[150]

ADMINISTRATIVE AND CONSULTING SERVICES

The federal securities laws do not generally permit *direct* lawsuits against advisers for breach of fiduciary duty, and lawsuits must typically be structured as derivative actions under applicable state law.[151] By contrast, ERISA expressly contemplates that plan service providers—to the extent that they are fiduciaries within the meaning of ERISA—may be sued directly in federal courts for violating any of their broad-ranging fiduciary duties.

Plan service providers typically offer different types of "administrative" and "consulting" services to ERISA plans and plan participants. In providing many of these services, plan service providers frequently view their roles as ministerial and non-discretionary in nature, and they may therefore believe themselves to be acting in a non-fiduciary capacity. Yet providers of such services, as available "deep pockets," have been named as defendants in fiduciary litigation, and plaintiffs have sought to hold them accountable as ERISA fiduciaries.

Menu Selection

Affiliates of fund advisers may act as consultants, assisting plan fiduciaries (e.g., plan sponsors or administrators) to select investment options to be made available to plan participants. In many instances, the consultant's role is limited to identifying a menu of proposed investment options for the sponsor or administrator, and final authority to select the plan's particular investment options remains with the sponsor or administrator.

In fiduciary lawsuits initiated in the aftermath of investment losses, plaintiffs have included consultants as named defendants, alleging that the consultants acted as fiduciaries by effectively "selecting" plan investments. Courts in such cases have assessed the fiduciary status of consultants (including at the motion to dismiss stage of litigation[152]) through a fact-intensive review of relevant plan documents (including the consultant's contractual arrangements) and of the consultant's actual activities.[153] The assessment of a consultant's fiduciary status may also be affected in the future by a contemplated DOL rule that would, if adopted, treat certain persons, including pension consultants and financial asset appraisers, as fiduciaries.[154]

Directed Trustees

It is not uncommon for affiliates of fund advisers to serve as "directed" trustees to ERISA plans. ERISA recognizes that trustees may act in a limited (or "directed") role, but requires that they be "subject to the direction of a named fiduciary," and be "subject to the proper instructions of such fiduciary … made in accordance with the terms of the plan and … not contrary to ERISA."[155] Directed trustees typically do not independently review purchase or sale transactions for a plan (other than for ministerial purposes) or second-guess directions or instructions that appear on their face to be proper.[156]

In past years, directed trustees, as potential "deep pockets," have been named as defendants in fiduciary lawsuits, particularly in the aftermath of employer collapses or other substantial plan losses.[157] In such cases, plaintiffs typically alleged, among other things, that the directed trustee should not have permitted investments in the employer's stock. Courts tended to assess a directed trustee's fiduciary status through a fact-specific examination of the terms of the trust instrument, the nature of the directions received, and/or the activities conducted by the directed trustee.[158]

In 2004, the DOL issued guidance on the fiduciary status of directed trustees. The DOL acknowledged that the responsibilities of directed trustees are "significantly narrower" than those of "discretionary" trustees. Yet the DOL also stated its views on the circumstances under which directed trustees may be obligated to inquire into, or question the prudence of, certain directions or instructions.[159]

Since the DOL issued its guidance, it appears that there has been no further litigation naming directed trustees as defendants. Nonetheless, a directed trustee may remain at risk of liability as a fiduciary if it is found to have followed directions that are not proper or that are contrary to the terms of the plan or to ERISA,[160] or if the directed trustee has discretionary authority.

Insurance Considerations

Broadly speaking, there are two basic types of ERISA-related insurance: fiduciary liability coverage and ERISA fidelity bond coverage.

- *Fiduciary Liability Coverage:* Section 410 of ERISA voids as against public policy any contractual provision that "purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty [under ERISA]."[161] However, the same section permits the purchase of fiduciary liability coverage to cover an ERISA plan or a fiduciary for losses resulting from breaches of fiduciary duty.[162]

  Broadly defined, "fiduciary liability" coverage insures against liabilities arising out of third-party claims brought against company-sponsored employee benefit plans, sponsoring companies themselves, and/or administrators or other providers to such plans, by reason of their breach of fiduciary duties under ERISA (and/or common and other statutory law) in providing plan services.

  Historically, "fiduciary liability" coverage has been viewed as separate and distinct from other types of liability coverages, including both "directors and officers" (D&O) coverage and "errors and omissions" (E&O) coverage.[163] Indeed, in the corporate arena, fiduciary liability coverage is often offered as a separate insurance product, and D&O and E&O coverages have traditionally reinforced this separation through use of express ERISA exclusions.[164] Nevertheless, D&O/E&O policy forms may themselves sometimes encompass one or more elements of fiduciary liability coverage.[165]

- *ERISA Fidelity Bonds:* Unlike fidelity liability coverage, which is not required under ERISA, the statute (at Section 412) generally mandates that plan fiduciaries and persons who handle plan funds or property be bonded.[166] Broadly speaking, ERISA bonding is intended to protect a plan from the risk of loss resulting from fraud or dishonesty by such entities and individuals.[167] ERISA coverage is typically provided either as a separate stand-alone bond or by supplementary coverage to other fidelity bonds.[168]

Appendix: Case List

This appendix lists selected lawsuits identified by ICI Mutual that, during the ten-year period ending December 31, 2009, were filed and/or resulted in a judicial disposition of an ERISA-based claim against a fund adviser and/or an affiliate. This list is not exhaustive. It generally omits (a) lawsuits against large corporations with in-house investment advisers, and (b) lawsuits against banks, insurance companies, or other large financial institutions whose investment adviser affiliates offer mutual funds.

The fourth column ("*Nature of Parties*") is intended to provide a summary description of the plaintiffs and the defendants in each lawsuit. Unless otherwise noted, a fund adviser or affiliate is listed as a "provider" for purposes of this column.

Case Name	*Venue*	*Filed*	*Nature of Parties*	*Subject*	*Disposition (as of Mar. 15, 2010)*
Blyler v. Agee	D. Ida.	1997	Participants v. sponsor & providers	prudent investment, directed trustee	settlement approved by court (Aug. 2004)
Franklin v. First Union Corp.	E.D. Va.	1999	Participants v. sponsor & providers	fees and compensation	settlement approved by court (June 2001)
Devlin v. Scardelletti	S.D.N.Y.	2000	Participants v. sponsor & providers	prudent investment	case dismissed by stipulation (Apr. 2000)
Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.	M.D. Fla.	2000	Fiduciary v. providers	disclosure	dismissal (Sept. 2001) affirmed by Eleventh Circuit (July 2002); certiorari denied by Supreme Court (Oct. 2002)
Haddock v. Nationwide Fin. Servs., Inc.	D. Conn.	2001	Fiduciary v. provider	fees and compensation; menu selection	motion to dismiss denied (Sept. 2007)
In re Broadwing, Inc. ERISA Litig.	S.D. Ohio	2002	Participants v. sponsor, fiduciaries & providers	directed trustee	settlement approved by court (Oct. 2006)
Lalonde v. Textron, Inc.	D. R.I.	2002	Participants v. sponsor, fiduciaries & providers	directed trustee	motion for summary judgment granted (Mar. 2006); appeal voluntarily dismissed (Nov. 2006)
In re Mirant Corp. ERISA Litig.	N.D. Ga.	2003	Participants v. sponsor, fiduciaries & providers	directed trustee	settlement approved by court (Nov. 2006)
Ogden v. AmeriCredit Corp.	N.D. Tex.	2003	Participants v. sponsor, fiduciaries & providers	directed trustee	motion to dismiss granted (June 2005)

Case Name	*Venue*	*Filed*	*Nature of Parties*	*Subject*	*Disposition (as of Mar. 15, 2010)*
In re Admin. Comm. ERISA Litig.	N.D. Cal.	2004	Participants v. sponsor, fiduciaries & providers	directed trustee	case dismissed by stipulation (July 2006)
In re Mut. Funds Inv. Litig. (Judge Blake)	D. Md.	2004	Participants v. sponsor & fiduciaries	prudent investment	motion to dismiss granted in part and denied in part (as to one subtrack) (Dec. 2005)
In re Mut. Funds Inv. Litig. (Judge Davis)	D. Md.	2004	Participants v. sponsor & fiduciaries	prudent investment	motion to dismiss pending
In re Mut. Funds Inv. Litig. (Judge Motz)	D. Md.	2004	Participants v. sponsor & fiduciaries	prudent investment	motion to dismiss granted in part and denied in part (as to several subtracks) (Feb. 2006)
Beary v. Nationwide	S.D. Ohio	2006	Sponsor v. provider	fees and compensation	motion to dismiss granted (Sept. 2007); affirmed by Sixth Circuit (Feb. 2010)
Hecker v. Deere & Co.	W.D. Wisc.	2006	Participants v. sponsor, fiduciaries & providers	fees and compensation; disclosure; menu selection	dismissal (June 2007) affirmed by Seventh Circuit (July 2009); certiorari denied by Supreme Court (Jan. 2010)
Kanawi v. Bechtel Corp.	N.D. Cal.	2006	Participants v. sponsor, fiduciaries & providers	fees and compensation; menu selection	case dismissed without prejudice pursuant to settlement (Apr. 2009); appeal to Ninth Circuit dismissed pursuant to stipulation (July 2009)
Kennedy v. ABB	W.D. Mo.	2006	Participants v. sponsor, fiduciaries & providers	fees and compensation; menu selection	trial held (Jan. 2010); court ruling pending
Phones Plus, Inc. v. Hartford Fin. Servs., Inc.	D. Conn.	2006	Sponsor v. provider	menu selection	motion to dismiss (as to provider) granted by court (July 2009)
Columbia Air Servs., Inc. v. Fid. Mgmt. Trust Co.	D. Mass.	2007	Fiduciary v. provider	menu selection	motion to dismiss granted (Sept. 2008)
In re State Street Bank and Trust Co. ERISA Litig.	S.D.N.Y.	2007	Fiduciary v. provider	prudent investment	settlement approved by court (Feb. 2010)
Martin v. Caterpillar Inc.	C.D. Ill.	2007	Participants v. sponsor, fiduciaries & providers	fees and compensation; prudent investment; menu selection	motion for preliminary approval of settlement pending before court (Nov. 2009)
Renfro v. Unisys Corp.	E.D. Penn.	2007	Participants v. sponsor, fiduciaries & providers	fees and compensation; menu selection	motion to dismiss pending

Case Name	*Venue*	*Filed*	*Nature of Parties*	*Subject*	*Disposition (as of Mar. 15, 2010)*
Ruppert v. Principal Life Ins. Co.	S.D. Iowa	2007	Fiduciary v. provider	fees and compensation; menu selection	motion for judgment on pleadings granted (Nov. 2009); motion to reconsider order pending
IATSE Local 33 Section 401(k) Plan Board of Trustees v. Bullock	C.D. Cal.	2008	Fiduciary v. providers	fees and compensation	ERISA claims dismissed with prejudice (Jan. 2009); state law claims dismissed without prejudice (Jan. 2009)
In re Honda of Am. Mfg., Inc. ERISA Fees Litig.	S.D. Ohio	2008	Participants v. sponsor, fiduciaries & providers	fees and compensation; disclosure; menu selection; prudent investment	motion to dismiss granted (Oct. 2009)
Williams v. Regions Fin. Corp.	N.D. Ala.	2008	Participants v. sponsor & providers	menu selection	motion to dismiss granted (Aug. 2008)
Board of Trs. of the Carpenters Labor Mgmt. Pension Fund v. State Street Bank & Trust Co.	S.D.N.Y.	2009	Fiduciaries v. fiduciary (adviser as plan manager)	prudent investment	motion to dismiss pending
In re Regions Morgan Keegan Securities, Derivative and ERISA Litig.	W.D. Tenn.	2009	Participants vs. sponsor & providers	prudent investment	motion to dismiss not yet filed
St. Vincent Catholic Med. Ctrs. v. Morgan Stanley Inv. Mgmt.	S.D.N.Y.	2009	Fiduciary v. fiduciary (adviser as plan manager)	prudent investment	motion to dismiss pending

Endnotes

1 *See* Turner v. Turner, 672 S.E.2d 242, 254-55 (W. Va. 2008) ("the unfathomable morass called ERISA"); York v. Ramsay Youth Servs., 313 F. Supp. 2d 1275, 1280 (M.D. Ala. 2004) ("the morass that is ERISA law"); Nichols v. Se. Health Plan, 859 F. Supp. 553, 558 (S.D. Ala. 1993) ("Given the complexity of the ERISA statutory and regulatory scheme …."). One federal appellate judge—in an oft-quoted analogy—has characterized the struggle of lower courts to make sense of one particular ERISA provision as a "descent into a Serbonian bog," invoking the quagmire of legend between Egypt and Palestine where, in the words of the poet John Milton, "armies whole have sunk." DiFelice v. Aetna U.S. Healthcare, 346 F.3d 442, 454 (3d Cir. 2003) (citation omitted).

2 *See* BD. OF GOVERNORS OF THE FED. RES. SYS., FLOW OF FUNDS ACCOUNTS OF THE UNITED STATES: 1965-1974, at 90 (2009), *available at* http://www.federalreserve.gov/releases/z1/Current/annuals/a1965-1974.pdf, at 90 ($367.5 billion of pension fund reserves in 1974); Inv. Co. Inst., *The U.S. Retirement Market, Third Quarter* 2009, RES. FUNDAMENTALS, Feb. 2010, at 1 [hereinafter *U.S. Retirement Market 2009*].

3 Unless otherwise noted, this study uses the term "retirement plans" to refer to both retirement plans, such as 401(k) plans, and to retirement accounts, such as individual retirement accounts.

4 *See generally* Faircloth v. Lundy Packing Co., 91 F.3d 648, 661-62 (4th Cir. 1996) (Michael, J., concurring in part and dissenting in part) (describing differences between defined benefit plans and defined contribution plans).

5 *See* William G. Gale et al., *The Shifting Structure of Private Pensions*, *in* THE EVOLVING PENSION SYSTEM: TRENDS, EFFECTS, AND PROPOSALS FOR REFORM 51, 56 (William G. Gale et al. eds., 2005); Samuel Estreicher & Laurence Gold, *The Shift from Defined Benefit Plans to Defined Contribution Plans*, 11 LEWIS & CLARK L. REV. 331, 332-33 (2007).

6 Estreicher & Gold, *supra* note 5, at 331-32; *see, e.g.*, *U.S. Retirement Market 2009*, *supra* note 2, at 14 (in 1985, defined contribution plan assets and defined benefit plan assets were approximately $500 billion and over $800 billion, respectively; by the third quarter of 2008, defined contribution plan assets and defined benefit plan assets were in excess of $3.9 trillion and $2.1 trillion, respectively).

7 *See U.S. Retirement Market 2009*, *supra* note 2, at 14. A full discussion of reasons for the decline of defined benefit plans is beyond the scope of this guide. Some industry observers have cited, among other things, changes in the composition of the labor force, shifts in the U.S. economy, and regulatory developments. *See, e.g.*, Gale et al., *supra* note 5, at 62-65.

8 *See U.S. Retirement Market 2009*, *supra* note 2, at 14.

9 *See* Estreicher & Gold, *supra* note 5, at 334.

10 Less commonly for some 401(k) plans, the plan trustee or other named fiduciary is responsible for investing some or all of the plans' assets. Approximately 87% of 401(k) plans (representing over 90% of both plan participants and plan assets) are participant-directed. U.S. GEN. ACCOUNTABILITY OFFICE, PRIVATE PENSIONS: CHANGES NEEDED TO PROVIDE 401(K) PLAN PARTICIPANTS AND THE DEPARTMENT OF LABOR BETTER INFORMATION ON FEES, PUBL'N NO. GAO-07-21, at 5 (2006); *see also* William J. Wiatrowski, *401(k) Plans Move Away from Employer Stock as Investment Vehicle*, MONTHLY LAB. REV., Nov. 2008, at 3-4, *available at* http://www.bls.gov/opub/mlr/2008/11/art1full.pdf (noting that, as of 2005, 91% of 401(k) plans permitted employees to direct the investment of *employee* contributions, but only 76% of such plans permitted employees to direct the investment of *employer* contributions); DOL, REPORT OF THE WORKING GROUP ON PARTICIPANT BENEFIT STATEMENTS, *available at* http://www.dol.gov/ebsa/publications/AC-1107c.html (last visited Feb. 9, 2010) (noting that some 401(k) plans may be partially participant-directed).

11 *See U.S. Retirement Market 2009*, *supra* note 2, at 10.

12 As of 2005, slightly over 20% of plan participants were permitted to invest in employer stock. *See* Wiatrowski, *supra* note 10, at 5-6.

13 *See U.S. Retirement Market 2009*, *supra* note 2, at 5-6. The remaining assets in IRAs are primarily securities held directly through brokerage accounts; bank and thrift deposits; and annuities issued by life insurance companies. *See id.*

14 *See* U.S. GEN. ACCOUNTABILITY OFFICE, STATE AND LOCAL GOVERNMENT PENSIONS PLANS, PUBL'N NO. GAO-08-983T, at 12-13 (2008), *available at* http://www.gao.gov/new.items/d08983t.pdf (testimony before the Joint Economic Committee) (describing constitutional and statutory protections provided by various states); *see also, e.g.*, FLA. STAT. §§ 112.60-112.67 (known as the "Florida Protection of Public Employee Retirement Benefits Act").

15 *See* ERISA § 3(42) (codified at 29 U.S.C. § 1102(42) (2006)); 29 C.F.R. § 2510.3-101 (2009). *See also* Richard K. Matta, Groom Law Group, ERISA for Securities Professionals, Dec. 2008, at 3-4, http://www.groom.com/media/publication/439_ERISA%20for%20Securities%20Professionals%20December%202008%20final.pdf (describing look-through provisions).

16 *See* 29 C.F.R. § 2510.3-101(h) (2009).

17 *But see Fiduciary Role Looms for Target-Date Managers*, PENSIONS & INVESTMENTS, Dec. 14, 2009, http://www.pionline.com/article/20091214/PRINTSUB/312149976 (discussing possible future legislation regarding the application of ERISA to advisers of certain target-date funds).

18 *See* ERISA § 401(b)(1) (codified at 29 U.S.C. § 1101(b)(1) (2006)) (providing that fund assets are not plan assets solely by reason of a plan's holding of a security issued by such fund); ERISA § 3(21)(B) (codified at 29 U.S.C. § 1001(21)(B) (2006)) (providing that fund assets are not plan assets "except insofar as such [fund] or its investment adviser or principal underwriter acts in connection with an employee benefit plan covering employees of the [fund], the investment adviser, or its principal underwriter").

19 *See* Matta, *supra* note 15, at 3-4.

20 In re Citigroup ERISA Litig., No. 07 Civ. 9790, 2009 U.S. Dist. LEXIS 78055, at *19 (S.D.N.Y. Aug. 31, 2009).

21 *See* ERISA § 402(b) (codified at 29 U.S.C. § 1102(b) (2006)).

22 *See* ERISA § 402(c) (codified at 29 U.S.C. § 1102(c) (2006)).

23 *See* ERISA § 403(a) (codified at 29 U.S.C. § 1103(a) (2006)). Certain assets (e.g., insurance contracts or policies) and plans (e.g., plans consisting of certain IRAs) are exempt from the requirement of ERISA § 403(a). *See* ERISA § 403(b) (codified at 29 U.S.C. § 1103(b) (2006)).

24 *See* ERISA § 3(16)(B) (codified at 29 U.S.C. § 1002(16)(B) (2006)).

25 *See* Lockheed Corp. v. Spink, 517 U.S. 882, 890-91 (1996); *see also* U.S. Gen. Accountability Office, Private Pensions: Fulfilling Fiduciary Obligations Can Present Challenges for 401(k) Plan Sponsors, Publ'n No. GAO-08-774, at 12 n.15 (2008).

26 *See* TOWERS PERRIN, QUALIFIED RETIREMENT PLAN GOVERNANCE: 2008 SURVEY FINDINGS 4 (2008) (noting that, of the companies surveyed, 47% have a single committee that handles administration and investment functions, 46% have separate administration and investment committees, and 1% have no committees).

27 *See* ERISA § 3(16)(A) (codified at 29 U.S.C. § 1002(16)(A) (2006)).

28 *See* ERISA § 403(a) (codified at 29 U.S.C. § 1103(a) (2006)).

29 *See* ERISA § 3(38) (codified at 29 U.S.C. § 1102(38) (2006)).

30 *See* Am. Acad. of Actuaries, Fundamentals of Current Pension Funding and Accounting for Private Sector Pension Plans 3-5 (2004), http://www.actuary.org/pdf/pension/fundamentals_0704.pdf.

31 *See* DOL, Reasonable Contract or Arrangement under Section 408(b)(2) – Fee Disclosure, 72 Fed. Reg. 70,988, 70,991 (proposed Dec. 13, 2007) [hereinafter Reasonable Contract Release].

[32] *See id.* Under ERISA, a platform provider is not generally required to break down the aggregate fee on a service-by-service basis or to disclose compensation to affiliates or subcontractors. A DOL proposal may, however, depending on the final rules, require a bundled service provider to provide separate disclosure of certain fees (e.g., a mutual fund advisory or distribution fee charged directly against the plan's investment that is reflected in the net value of the investment). *See id.* In addition, under Schedule C of Form 5500, a bundled service provider is required to disclose certain fees. *See* DOL, Annual Reporting and Disclosure, 72 Fed. Reg. 64,710 (Nov. 16, 2007); DOL, Revision of Annual Information Return/Reports, 72 Fed. Reg. 64,731 (Nov. 16, 2007).

[33] *See, e.g.*, Inv. Co. Inst., The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2008, at 4 (2009) (describing broad categories of services to 401(k) plans) .

[34] *See 2009 PlanSponsor Recordkeeping Survey: Picking the Best Provider*, PLANSPONSOR, June 2009, *available at* http://www.plansponsor.com/MagazineArticle.aspx?id=64424562868 (indicating that at least two-thirds of the top ten record keepers for defined contributions plans were fund advisers or adviser affiliates); DELOITTE LLP, DEFINED CONTRIBUTION/401(K) FEE STUDY 10 (2009), *available at* http://www.ici.org/pdf/rpt_09_dc_401k_fee_study.pdf (over 50% of defined contribution plans surveyed used fund advisers and affiliates for record keeping services).

[35] In recent years, there have been proposals—which have not yet been adopted—that would permit service providers to provide more individualized investment advice to plan participants without being treated as fiduciaries or otherwise engaged in prohibited transactions. The Pension Protection Act of 2006 (the "PPA") amended ERISA and the Code to facilitate the provision of investment advice to plan participants and beneficiaries. As amended by the PPA, ERISA permits investment advice to be given either (1) through the use of a computer model (certified to be unbiased) or (2) through an adviser compensated on a level-fee basis, and subject to certain additional requirements (e.g., disclosure requirements). DOL rules under the PPA's provisions have yet to be implemented.

[36] A plan provider's own assessment as to its fiduciary status is not necessarily conclusive. One proposed DOL regulation would require each service provider to an ERISA plan to disclose information to assist the plan fiduciary responsible for selecting or monitoring that service provider with assessing both (1) the reasonableness of the compensation or fees paid for the service provider's services to the plan and (2) the potential for conflicts of interest that may affect the service provider's performance of services. *See* Reasonable Contract Release, *supra* note 31, at 70,991. The proposed rule would also require a service provider's contract to identify whether the service provider would act or provide services to the plan *as a fiduciary*. The proposed rule does not, by its terms, purport to broaden the scope of the term "fiduciary" under ERISA. At the same time, however, under the proposed rule, the DOL (and presumably a court) would *not* view as dispositive the contractual statement as to whether a service provider is or is not a fiduciary. Rather, consistent with its historical "functional" approach to the question of fiduciary status, the DOL would continue to take the position that "fiduciary status depends on a factual analysis of a person's activities with respect to a plan." *Id.* at 70,991 n.11.

[37] John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in* Russell*,* Mertens *and* Great-West, 103 COLUM. L. REV. 1317, 1321-22 (Oct. 2003); *see also* Michael S. Gordon, *Overview: Why Was ERISA Enacted?, in* THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: THE FIRST DECADE (Special Comm. on Aging, U.S. Sen. ed., 1984); DOL, HISTORY OF EBSA AND ERISA, *available at* http://www.dol.gov/ebsa/aboutebsa/history.html (last visited Feb. 9, 2010) [hereinafter HISTORY OF EBSA AND ERISA] (discussing federal regulation of retirement plans prior to ERISA).

[38] *See* Shaw v. Delta Airlines, Inc., 463 U.S. 85, 90 (1983).

[39] *See* Langbein, *supra* note 37, at 1322 (describing these two broad types of risk); Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 720 (1984) ("Among the principal purposes of … [ERISA] was to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans. Congress wanted to guarantee that 'if a worker has been promised a defined pension benefit upon retirement – and if he has fulfilled whatever conditions are required to obtain a vested benefit – he actually will receive it.'") (citations omitted).

[40] *See* Langbein, *supra* note 37, at 1322.

[41] Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 361-62 (1980).

[42] *See, e.g.*, 26 U.S.C. §§ 404 (providing employer with deduction for contributions to an employees' trust or annuity plan and compensation under a deferred-payment plan), 501(a) (exempting retirement plan trusts from taxation).

[43] *See generally* HISTORY OF EBSA AND ERISA, *supra* note 37.

[44] As one court has stated, ERISA has "a raft of provisions designed to protect plan participants against negligent or malfeasant plan managers." *See DiFelice*, 346 F.3d at 454.

[45] Under ERISA, "parties in interest" of a plan include plan fiduciaries, service providers to the plan, employers whose employees are plan participants, employee organizations whose members are plan participants, and certain affiliates thereof. ERISA § 3(14) (codified at 29 U.S.C. § 1002(14) (2006)). ERISA prohibits certain transactions between a plan and a party in interest. *See* ERISA § 406(a) (codified at 29 U.S.C. § 1106(a) (2006)).

[46] ERISA § 3(21)(A) (codified at 29 U.S.C. § 1002(21)(A) (2006)) provides, in relevant part, that "a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan."

[47] *See* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110-11 (1989).

[48] At the same time, the Supreme Court has cautioned, "trust law does not tell the entire story," such that "the law of trusts often will inform, but will not necessarily determine the outcome of, an effort to interpret ERISA's fiduciary duties." *See* Varity Corp. v. Howe, 516 U.S. 489, 497 (1995)

[49] *See, e.g.*, ERISA § 404(a)(1) (codified at 29 U.S.C. § 1104(a)(1) (2006)).

[50] *See, e.g.*, In re Citigroup ERISA Litig., No. 07 Civ. 9790, 2009 U.S. Dist. LEXIS 78055, at *19 (S.D.N.Y. Aug. 31, 2009).

[51] *See* ERISA § 3(21)(A) (codified at 29 U.S.C. § 1002(21)(A) (2006)).

[52] *See* Hecker v. Deere & Co., 556 F.3d 575, 581 (7th Cir. 2009) ("Thus, even if the Fidelity defendants were fiduciaries for some purposes, they were not fiduciaries for the purpose of making plan investment decisions."), *cert. denied* 175 L. Ed. 2d 973 (U.S. 2010).

[53] ERISA § 404(a)(1) (codified at 29 U.S.C. § 1104(a)(1) (2006)).

[54] *Id.*

[55] *See* Matta, *supra* note 15, at 32 (noting that courts have found non-fiduciary parties in interest to be subject to claims for equitable relief).

[56] *See* ERISA § 406(b) (codified at 29 U.S.C. § 1106(b) (2006)). The Code includes similar prohibitions. *See* 26 U.S.C. § 4975 (2006).

[57] *See* ERISA § 406(a) (codified at 29 U.S.C. § 1106(a) (2006)).

[58] *See* 26 U.S.C. § 4975 (2006).

[59] ERISA § 408(b)(2) (codified at 29 U.S.C. § 1108(b)(2) (2006)); 29 C.F.R. § 2550.408b-2(a) (2009). Note, however, that "[c]ourts have diverged over whether [the referenced DOL] regulation accurately interprets the statute." Dupree v. Prudential Ins. Co. of Am., No. 99 Civ. 8337, 2007 U.S. Dist. LEXIS 57857, at *135 (S.D. Fla. Aug. 7, 2007) (citations omitted).

60 The exemption for blind transactions effected on securities exchanges was not expressly provided for in the statute, but arose from the DOL's interpretation of ERISA's legislative history, which states: "In general, it is expected that a transaction will not be a prohibited transaction (under either the labor or tax provisions) if the transaction is an ordinary 'blind' transaction purchase or sale of securities through an exchange where neither buyer or seller (nor the agent of either) knows the identity of the other party involved. In this case, there is no reason to impose a sanction on a fiduciary (or party-in-interest) merely because, by chance, the other party turns out to be a party-in-interest (or plan)." H.R. REP. NO. 93-1280, at 307 (1974), *cited in* DOL Advisory Opinion 92-23A (Oct. 27, 1992). The PPA appears to have both codified the DOL's interpretation and extended the exemption to cover blind transactions effected on alternative trading systems, electronic communications networks, and similar execution systems or trading venues. *See* ERISA § 408(b)(16) (codified at 29 U.S.C. § 1108(b)(16)).

61 ERISA § 408(b)(17) (codified at 29 U.S.C. § 1108(b)(17) (2006)).

62 *See* Prohibited Transaction Class Exemption 77-3, 42 Fed. Reg. 18,734 (Apr. 8, 1977).

63 *See* Prohibited Transaction Class Exemption 77-4, 42 Fed. Reg. 18,732 (Apr. 8, 1977).

64 *See* Prohibited Transaction Class Exemption 84-14, 49 Fed. Reg. 9,494 (Mar. 13, 1984).

65 *See* Prohibited Transaction Class Exemption 96-23, 61 Fed. Reg. 15,975 (Apr. 10, 1996).

66 *See* Matta, *supra* note 15, at 20-21.

67 *See* ERISA Procedure 76-1 for ERISA Advisory Opinions, 76 Fed. Reg. 25,168 (Aug. 26, 1976), *available at* http://www.dol.gov/ebsa/regs/aos/ao_requests.html (describing purpose of advisory opinions and information letters; EMPLOYEE BENEFITS SECURITY ADMINISTRATION RELEASES FIELD ASSISTANCE BULLETIN ON ANNUAL REPORTING BY 403(B) PLANS (Jul. 20, 2009), *available at* http://www.dol.gov/ebsa/newsroom/2009/ebsa072009.html (providing description of role of field assistance bulletins). *See generally* 29 C.F.R. § 2509 (providing interpretive bulletins relating to ERISA).

68 *See* Op. DOL 97-15A (1997) ("Frost" letter); Op. DOL 97-16A (1997) ("Aetna letter"); Op. DOL 2003-09A (2003) ("ABN-AMRO letter").

69 Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987).

70 Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146 (1985).

71 *See, e.g.*, *Pilot Life*, 481 U.S. at 56 (civil enforcement scheme codified at section 502(a) is not to be supplemented by state-law remedies).

72 *See, e.g.*, DOL, Fact Sheet: EBSA Achieves $1.36 Billion in Total Monetary Results in Fiscal Year 2009, *available at* http://www.dol.gov/ebsa/newsroom/fsFYagencyresults.html (last visited Mar. 15, 2010) (noting that, in fiscal year 2009, EBSA closed nearly 3,700 investigations, with approximately 77% of the closed investigations yielding monetary results for the plans or other corrective action).

73 *See* PENSION GOVERNANCE INC. & THE MICHEL-SHAKED GROUP, ERISA LITIGATION STUDY (2009), *available at* http://www.pensionriskmatters.com/uploads/file/PLD%20ERISA%20Litigation%20Study%20041509%282%29.pdf (noting that over 2,400 ERISA cases were filed between Jan. 1, 2005 and Aug. 31, 2008).

74 *See* Samuel Estreicher & Kristina Yost, Measuring the Value of Class and Collective Action Employment Settlements: A Preliminary Assessment, N.Y.U. Law Sch. Pub. Law Res. Paper No. 08-03, Jan. 23, 2009, at 8 *available at* http://ssrn.com/abstract=1080567; SEYFARTH SHAW LLP, 2010 ANNUAL WORKPLACE CLASS ACTION LITIGATION REPORT 7 (2010) (full report on file with ICI Mutual; press release describing report available at http://www.seyfarth.com/ClassActionReport/ (follow "View press release" hyperlink)) (reporting that, in 2009, settlement payments in the ten largest ERISA class action lawsuits totaled nearly $500 million).

75 These lawsuits are often brought under section 502(a)(1) of ERISA (codified at 29 U.S.C. § 1132(a)(1) (2006)), which addresses wrongful denial of plan benefits and information (e.g., annual reports), and authorizes participants and beneficiaries to pursue lawsuits to recover benefits or to obtain information.

76 *See, e.g.*, Alexander v. Wash. Mut. Inc., No. 07 Civ. 01905 (W.D. Wash. Mar. 18, 2007); In re Morgan Stanley ERISA Litig., No. 07 Civ. 11285 (S.D.N.Y. filed Dec. 14, 2007).

[77] *See* Kevin LaCroix, *Subprime Litigation Wave Hits State Street*, THE D&O DIARY, Jan. 6, 2008, http://www.dandodiary.com/2008/01/articles/subprime-litigation/subprime-litigation-wave-hits-state-street/.

[78] *See* Sean M. Murphy et al., *Securities Plaintiffs Turn to Class Actions Under ERISA*, REV. OF SECS. & COMMODITIES REG., at 15, Sept. 3, 2008, *available at* http://www.milbank.com/NR/rdonlyres/A877583C-CD17-4DB1-9520-7F95F8EB8184/0/090308_Securities_Plaintiffs_Turn_to_Class_Actions_Under_ERISA.pdf.

[79] James P. Baker & Alan S. Miller, *Making Employer Stock Safe for Your 401(k) Plan: Managing the Risk*, JONES DAY PUBL'NS, Feb. 2007, http://www.jonesday.com/files/Publication/bfab9891-dfca-4dd0-8335-9c238ed2d172/Presentation/PublicationAttachment/da8c26eb-ae23-456b-804c-749d15dfe809/Making%20Employer.pdf, at 3.

[80] This appeal may stem, in part, from:

- *Certain procedural advantages in litigation:* Unlike class action litigation brought under the federal securities laws, *see* section 27(b) of the Securities Act of 1933 (codified at 15 U.S.C. § 77z-1(b) (2006)); section 21D(b)(3) of the Securities Exchange Act of 1934 (codified at 15 U.S.C. § 78u-4(b)(3) (2006)), ERISA-based lawsuits are not subject to a suspension, or "stay," on the discovery (i.e., fact-finding) phase of litigation pending a decision by a court on a defendant's motion to dismiss.
- *Difficulty in resolving litigation on motions to dismiss:* Although ERISA lawsuits can be—and in some cases are—terminated on defendants' pre-trial motions to dismiss, many turn in part on issues (such as a defendant's status as a "fiduciary") that may be fact-intensive and difficult for courts to resolve at this early stage of the litigation process. (See, for example, the discussion of lawsuits relating to administrative and consulting services at pp. 31-32.)
- *Prospects for settlements:* According to one observer, "a slew of generous settlements" in the ERISA area are among the factors that have "conditioned the plaintiffs' bar to demand settlements" in ERISA lawsuits that "are hard to justify on a litigation risk basis." *See* Charles C. Jackson & Christopher A. Weals, *The Pro-Fiduciary Trial Ruling in* DiFelice v. US Airways*, and What It Means for ERISA Stock Litigation*, PLUS J., at 1, Sept. 2006, *available at* http://www.morganlewis.com/pubs/Pro-FiduciaryTrial_sept2006.pdf.

[81] Baker et al., *supra* note 79, at 1.

[82] *See* Kevin LaCroix, *Defense Prevails in Tellabs ERISA Stock Drop Case*, THE D&O DIARY, Jun. 18, 2009, http://www.dandodiary.com/2009/06/articles/erisa/defense-prevails-in-tellabs-erisa-stock-drop-case/ ("A frequent securities class action lawsuit accompaniment is a companion ERISA stock drop lawsuit brought on behalf of employee participants in the defendant company's benefit plan. These ERISA lawsuits have in recent years resulted in a string of impressive settlements…."); *see also* James O. Fleckner, Current Developments in ERISA Litigation, Goodwin Procter LLP Presentation to Strafford Teleconference, Apr. 7, 2009, at 3, http://media.straffordpub.com/products/erisa-class-action-lawsuits-on-the-rise-2009-04-07/presentations.pdf.

[83] *See, e.g.*, ICI MUT. INS. CO.*,* INVESTMENT MANAGEMENT LITIGATION NOTEBOOK 67-73 (5th ed. 2007) (describing ERISA litigation that accompanied market timing litigation primarily brought under the federal securities laws).

[84] *See* LaCroix, *supra* note 77.

[85] *See, e.g.*, In re State Street Bank and Trust Co. ERISA Litig., No. 07 Civ. 8488 (S.D.N.Y. filed Oct. 1, 2007) (plaintiffs' counsel include both "Wall Street" law firms and firms normally associated with the plaintiffs' bar).

[86] *See* LaCroix, *supra* note 77.

[87] *See* Rogers v. Baxter Int'l Inc., 521 F.3d 702, 705 (7th Cir. 2008).

[88] *See, e.g.*, Jenkins v. Yager, 444 F.3d 916, 924 (7th Cir. 2006).

[89] ERISA § 2(b) (codified at 29 U.S.C. § 1001(b) (2006)).

[90] Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146 (1985).

[91] In addition to standing requirements established under ERISA, there are also constitutional standing requirements, which include a showing that any potential plaintiff has suffered an "injury in fact." *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (describing three elements of constitutional standing in U.S. Supreme Court jurisprudence: injury in fact, causation, and judicial redressability).

[92] *See* 29 U.S.C. § 1132(a)(2) (2006).

[93] *See* 29 U.S.C. § 1132(a)(3) (2006); Varity Corp. v. Howe, 516 U.S. 489, 512 (1996) (describing section 502's "overall structure"). As discussed *supra* note 75 and accompanying text, a third enforcement provision of ERISA, section 502(a)(1) (codified at 29 U.S.C. § 1132(a)(1) (2006)), can also implicate fund advisers and their affiliates, although the liability risks associated with lawsuits under this section tend to be less pronounced, given the section's purpose and scope.

[94] *See* LaRue v. DeWolff, Boberg & Assocs., 552 U.S. 248 (2008). Some observers saw *LaRue* as a revolutionary development, "open[ing] the door to a new category of ERISA lawsuits." *See, e.g.*, *Supreme Court Addresses the Remedies Available for Fiduciary Breach Under ERISA*, MONDAQ BUSINESS BRIEFING, Feb. 29, 2008, http://www.highbeam.com/doc/1G1-175684720.html (quoted above); Kevin LaCroix, *The* LaRue *Decision: ERISA Liability and Insurance Issues*, THE D&O DIARY, Feb. 21, 2008, http://www.dandodiary.com/2008/02/articles/erisa/the-larue-decision-erisa-liability-and-insurance-issues/. Other observers viewed the decision as simply confirming a pre-existing trend in the lower courts. *See, e.g.*, Thelen LLP, *Supreme Court Holds that ERISA Authorizes Individual Suits for Lost-Profits Damages in Defined Contribution Plan Caused by Breach of Fiduciary Duty*, CLIENT ALERT, Feb. 28, 2008, http://www.thelenreid.com/index.cfm?section=articles&function=ViewArticle&articleID=3371&filter=.

[95] The Court stated that section 502(a)(2) (codified at 29 U.S.C. § 1132(a)(2) (2006)) permits "recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account." *LaRue*, 552 U.S. at 256 (2008).

[96] *See* In re Mut. Funds Inv. Litig., 529 F.3d 207, 216 (4th Cir. 2008) ("In short, we conclude that participants in defined contribution plans controlled by ERISA have colorable claims against the fiduciaries of their plan when they allege that their individual accounts in the plan were diminished by fraud or fiduciary breaches and that the amounts by which their accounts were diminished constitute part of the participants' benefits under the plans.").

[97] For a discussion of class certification issues, see Mark A. Perry & Paul Blankenstein, *The Inapplicability of Rule 23(b)(1) to ERISA Class Actions*, 6 WORKPLACE L. REP. 47, at 1571-75 (2008), *available at* http://www.gibsondunn.com/publications/Documents/Perry-Blankenship-ERISAClassActions.pdf. The U.S. Court of Appeals for the Seventh Circuit is currently reviewing *LaRue*'s effect, if any, on the grant by district courts of class certification in two ERISA "stock drop" lawsuits and two ERISA "excess fee" lawsuits. *See* Howell v. Motorola Inc., No. 07-3837 (7th Cir. Aug. 17, 2009) (consolidation order); Lingis v. Dorazil, No. 09-2796, (7th Cir. Aug. 17, 2009) (consolidation order); Spano v. Boeing Co., No. 09-3001, (7th Cir. Aug. 17, 2009) (consolidation order); Beesley v. Int'l Paper Co., No. 09-3018, (7th Cir. Aug. 17, 2009) (consolidation order).

Other unresolved questions include (1) whether plan participants must exhaust administrative remedies before initiating their lawsuits, and (2) whether plaintiffs are entitled to jury trials. *See generally* COVINGTON & BURLING LLP, *Notable Recent Decisions in ERISA Litigation*, Nov. 2008, http://www.cov.com/publications/?Practices=f0bd8f37-1599-4ca5-bf37-33f44e100bd0&search=1 (follow "Notable Recent Decisions in ERISA Litigation" hyperlink) (noting that courts have not uniformly required exhaustion of administrative remedies in lawsuits alleging breaches of fiduciary duties); Brief for the United States as Amicus Curiae, Amschwand v. Spherion Corp., 505 F.3d 342 (5th Cir. 2007) (No. 07-841) (noting conflicting decisions by district courts regarding availability of jury trials in breach of fiduciary duty cases under ERISA).

[98] *See generally* Langbein, *supra* note 37 (describing recent ERISA jurisprudence regarding the meaning of "other appropriate equitable relief" under section 502(a)(3)).

[99] Indeed, a "threshold question" in "every case charging breach of ERISA duty" is whether the defendant "was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." Pegram v. Herdrich, 530 U.S. 211, 226 (2000).

[100] *See* ERISA § 405(a) (codified at 29 U.S.C. § 1104(a) (2006)).

[101] *See id.*

[102] *See* Harris Trust & Sav. Bank v. Salomon Smith Barney Inc., 530 U.S. 238, 251 (2000) (holding that a non-fiduciary service provider to a plan can be liable under section 502(a)(3) of ERISA for participating in a prohibited transaction where the service provider "had actual or constructive knowledge of the circumstances that rendered the transaction unlawful" and where "the *plan fiduciary*, with actual or constructive knowledge of the facts satisfying the elements of a [prohibited transaction between a plan and a party in interest], caused the plan to engage in the transaction") (emphasis in original).

[103] *See* ERISA § 3(21)(A) (codified at 29 U.S.C. § 1002(21)(A)); In re Citigroup ERISA Litig., No. 07 Civ. 9790, 2009 U.S. Dist. LEXIS 78055, at *20-21 (S.D.N.Y. Aug. 31, 2009) (discussing named and functional fiduciaries).

[104] *See* Groom Law Group, Chartered, *401(k) Fee Litigation Update*, Oct. 6, 2008, http://www.groom.com/assets/attachments/CourtsDividonFiduciary_Statusof401kServiceProviders.pdf.

[105] *See* Varity Corp. v. Howe, 516 U.S. 489, 511 (1996).

[106] ERISA § 409(a) (codified at 29 U.S.C. § 1109(a) (2006)).

[107] Thus, for example, while some courts have found a duty to disclose certain information to plan participants where such disclosure is not otherwise mandated by ERISA, the courts have disagreed on the circumstances that would trigger the duty. *See generally* Vartanian v. Monsanto Co., 131 F.3d 264, 268-72 (1st Cir. 1997) (summarizing approaches taken by various courts to issue of when an employer must notify employees of proposed changes in a plan).

[108] But as the victory of defendants at trial in an ERISA stock drop lawsuit demonstrates, "there is a vast difference between making conclusory allegations and proving a fiduciary violation at trial." Jackson and Weals, *supra* note 80, at 3.

[109] *See Varity*, 516 U.S. at 496 (recognizing that fiduciary duties under ERISA "draw much of their content from the common law of trusts"). Although ERISA does not explicitly incorporate all of the duties developed in the common law of trust, courts have often "import[ed] a variety of the subrules of trust administration that Congress did not spell out in the statutory text." *See generally* Langbein, *supra* note 37, at 1326-27 (noting, for example, that courts have imported "the duty to inform beneficiaries about significant aspects of trust administration; the duties to collect, segregate and earmark, and protect trust property; and the duties to enforce and defend claims").

[110] *See* Leckey v. Stefano, 501 F.3d 212, 224 (3d Cir. 2007) ("Ordinarily a trustee does not commit a breach of trust if he does not intentionally or negligently do what he ought not to do or fail to do what he ought to do. In other words, he does not commit a breach of trust unless he is personally at fault.") (citing RESTATEMENT (SECOND) OF TRUSTS § 201 cmts. a-c (1959)).

[111] The term "loss" in section 409 is not defined in ERISA. One court has suggested in this regard: "The Act's legislative history, however, indicates that Congress' intent was 'to provide the full range of legal and equitable remedies available in both state and federal courts.'" Donovan v. Bierwirth, 754 F.2d 1049, 1052 (2d Cir. 1985) (citing H. Rep. No. 533, 93d Cong., 2d Sess., reprinted in 1974-3 U.S. Code Cong. & Ad. News 4639, 4655).

[112] *See* Haddock v. Nationwide Fin. Servs., 570 F. Supp. 2d 355, 366 (D. Conn. 2008) ("It is not sufficient, however, to state a claim by conjecturing that 'to the extent' there was harm to the Plans, the Trustees are liable. Put simply, to survive a motion to dismiss, a plausible claim for breach of fiduciary duty must allege some type of actual harm or loss to the Plans.").

[113] *See* LaRue v. DeWolff, Boberg & Assocs., 552 U.S. 248, 256 (2008).

[114] *See, e.g.*, Donovan v. Bierwirth, 754 F.2d 1049, 1056 (2d Cir. 1985) (comparing how much a plan earned from an imprudent investment to how much it would have earned had the funds been available for other purposes), 1058 (discussing factors affecting calculation of loss, including, for example, the choice of starting and ending dates of the comparison period, as well as market conditions and abnormalities affecting the price of the improperly purchased stock); *see also* In re Boston Sci. Corp. ERISA Litig., 254 F.R.D. 24, 31 (D. Mass. 2008) ("[P]articipants can only recover if they can show that the value of the investments would have been greater had the fiduciary fulfilled its duty."); RESTATEMENT (SECOND) OF TRUSTS § 205(b) (1959) (requiring a trustee who commits a breach of trust to restore the trust to the value that it would have had if no breach of trust had been committed).

[115] *See Donovan*, 754 F.2d at 1052 n.3.

[116] *See, e.g.*, Willett v. Blue Cross & Blue Shield, 953 F.2d 1335, 1343 (11th Cir. 1992); Friend v. Sanwa Bank Cal., 35 F.3d 466, 469 (9th Cir. 1994) (citing Brandt v. Grounds, 687 F.2d 895, 898 (7th Cir. 1982)).

[117] *See* RESTATEMENT (SECOND) OF TRUSTS § 205 cmt. f (1959) ("If the trustee commits a breach of trust and if a loss is incurred, the trustee may not be chargeable with the amount of the loss if it would have occurred in the absence of a breach of trust.").

118 *See generally* Chao v. Trust Fund Advisors, No. 02-559, 2004 U.S. Dist. LEXIS 4026, at *17-18 (D.D.C. Jan. 20, 2004) (discussing approaches taken by different courts to the issue).

119 *See* Roth v. Sawyer-Cleator Lumber Co., 16 F.3d 915, 920 (8th Cir. 1994).

120 *See* Silverman v. Mut. Benefit Life Ins. Co., 138 F.3d 98, 104 (2d Cir. 1998); *Willett*, 953 F.2d at 1343.

121 *See* ERISA § 404(c) (codified at 29 U.S.C. § 1104(c) (2006)).

122 29 C.F.R. § 2550.404c-1 (2009) requires, among other things, that participants in a 404(c) plan have the opportunity to invest in a "broad range of investment alternatives" and receive information about participant transactions and associated fees and about investments in employer stock. Participants are also entitled, upon request, to receive other information about available investment alternatives, including prospectuses, financial statements, annual reports, and expense information.

123 *See, e.g.,* Spano v. Boeing Co., No. 06 Civ. 743, 2007 WL 1149192 (S.D. Ill. Apr. 18, 2007) (court finds that section 404(c) is an affirmative defense and not a viable ground for termination of the lawsuit on a motion to dismiss).

124 *See* ERISA §§ 101-102 (codified at 29 U.S.C. §§ 1101-1102 (2006)); 29 C.F.R. § 2520.102-3 (2009).

125 *See* ERISA § 103 (codified at 29 U.S.C. § 1103 (2006)).

126 On November 16, 2007, the DOL's Employee Benefits Security Administration published final form revisions and a final regulation providing new requirements. *See* DOL, Annual Reporting and Disclosure, 72 Fed. Reg. 64,710 (Nov. 16, 2007); DOL, Revision of Annual Information Return/Reports, 72 Fed. Reg. 64,731 (Nov. 16, 2007). As revised, Schedule C of Form 5500, which plan administrators file with the DOL (and the IRS), requires increased disclosure of service provider fees and other compensation. These revisions are generally effective for plan years beginning on or after January 1, 2009, with the first filings to be made on the revised form in 2010.

127 *See* 29 C.F.R. § 2520.102-3(t)(2) (2009).

128 *See* 29 C.F.R. § 2550.404c-1 (2009).

129 *See* DOL, Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans, 73 Fed. Reg 43,014 (proposed July 23, 2008).

130 *See* Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 83 (1995).

131 *See, e.g.*, Board of Trs. of CWA/ITU Negotiated Pension Plan v. Weinstein, 107 F.3d 139, 147 (2d Cir. 1997) ("[It] is inappropriate to infer an unlimited disclosure obligation on the basis of general provisions [in ERISA] that say nothing about disclosure."); In re Citigroup ERISA Litig., No. 07 Civ. 9790, 2009 U.S. Dist. LEXIS 78055, at *65 (S.D.N.Y. Aug. 31, 2009).

132 *See* Ehlmann v. Kaiser Found. Health Plan of Tex., 198 F. 3d 552 (5th Cir. 2000) (plan fiduciaries not required to disclose physician compensation or reimbursement plans); Board of Trs. of CWA/ITU Negotiated Pension Plan v. Weinstein, 107 F. 3d 139 (2d Cir. 1997) (plan fiduciaries not required to disclose actuarial valuation reports); Faircloth v. Lundy Packing Co., 91 F.3d 648 (4th Cir. 1996) (plan fiduciaries not required to provide plan's fidelity bond, appraisal reports regarding plan sponsor's financial status and operations, or IRS determination letter showing that the plan was tax-qualified). *See also* Hecker v. Deere & Co., 496 F. Supp. 2d 967, 974 (W.D. Wis. 2007) ("Where as here Congress has by statute and related regulation, created detailed rules governing disclosure requirements, it would be inappropriate to ignore and augment them using the general power to define fiduciary obligations.").

133 *See, e.g.*, Varity Corp. v. Howe, 516 U.S. 489, 506 (1996) ("[L]ying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in [ERISA]"); Edgar v. Avaya, Inc., 503 F.3d 340, 350 (3d Cir. 2007); *Citigroup*, 2009 U.S. Dist. LEXIS 78055, at *62 (quoted in text) (emphasis in original).

134 *See Varity*, 516 U.S. at 507.

135 *Compare* Bins v. Exxon Co. U.S.A., 220 F.3d 1042, 1045 (9th Cir. 2000) (holding that "[i]n the absence of an employee inquiry … the employer-fiduciary does not have an affirmative duty to volunteer information about any changes prior to their final adoption") *with* Hecker v. Deere, 556 F.3d 575, 585 (7th Cir. 2009) (citing a Seventh Circuit decision before *Varity* for the proposition that a fiduciary may breach its duty through a "material omission"), *cert. denied* 175 L. Ed. 973 (2010). *See generally* Joseph E. Czerniawski, Comment, Bins v. Exxon*: Affirmative Duties to Disclose Proposed Benefit Changes in the Absence of Employee Inquiry*, 76 NOTRE DAME L. REV. 783 (2001).

[136] *See, e.g.*, Bixler v. Cent. Penn. Teamsters Health & Welfare Fund, 12 F.3d 1292, 1300 (3d Cir. 1993); Krohn v. Huron Mem. Hosp., 173 F.3d 542, 548 (6th Cir. 1999).

[137] *See* In re Citigroup ERISA Litig., No. 07 Civ. 9790, 2009 U.S. Dist. LEXIS 78055, at *68 (S.D.N.Y. Aug. 31, 2009) (noting that to require such disclosure by fiduciaries "would transform fiduciaries into investment advisors, and … fiduciaries do 'not have a duty to 'give investment advice' or 'to opine on' the stock's condition.'") (citation omitted).

[138] *See* Murphy et al., *supra* note 78.

[139] *See id.*; *Hecker*, 556 F.3d at 578, 584-86. It is worth noting that the term "revenue sharing" as used here does not have the same meaning as in the securities law context. *See* Murphy et al., *supra* note 78, at 187 ("While revenue sharing traditionally refers to an arrangement pursuant to which a mutual fund family agrees to pay a broker/dealer a fee in return for certain marketing benefits, in the context of retirement plans, revenue sharing generally refers to investment managers 'sharing' asset-based revenues with administrative service providers that provide services directly to retirement plans.").

[140] ERISA permits a plan fiduciary to arrange for a party in interest to provide "services necessary for the establishment or operation of the plan," provided that both the arrangement and the compensation for such services are "reasonable." *See* ERISA § 408(b)(2) (codified at 29 U.S.C. § 1108(b)(2) (2006)); 29 C.F.R. § 2550.408b-2(a) (2009). As described above, *see* Reasonable Contract Release, *supra* note 31, at 70,991, in 2007, the DOL proposed regulations under section 408(b)(2) that would require service providers to provide certain disclosure about compensation, services, and potential conflicts of interest.

[141] Notwithstanding this fact, over the past decade the plaintiffs' bar has frequently used class actions under the Securities Act of 1933, formally couched in terms of disclosure, to wage thinly veiled attacks on management of funds. The plaintiffs' bar has also sought, in some cases, to frame mismanagement claims as securities fraud actions under the Securities Exchange Act of 1934. *See generally* ICI MUT. INS. CO., MUTUAL FUND PROSPECTUS LIABILITY: UNDERSTANDING AND MANAGING THE RISK 6-14 (2010).

[142] *See* Matta, *supra* note 15, at 9-10. In a somewhat different formulation, *The Restatement (Third) of Trusts* suggests that ERISA "has been interpreted to create not a standard of a 'prudent expert' but one of prudence fitting the particular trust." § 227 general notes (2007). Regardless of the formulation, ERISA appears to hold plan fiduciaries to a higher standard than a mere "prudent *man*" standard.

[143] *See* ERISA § 404(a)(1)(c) (codified at 29 U.S.C. § 1104(a)(1)(C) (2006)).

[144] *See* Calif. Ironworkers Field Pension Tr. v. Loomis Sayles & Co., 259 F.3d 1036, 1043 (9th Cir. 2001); Donovan v. Mazzola, 716 F.2d 1226, 1232 (9th Cir. 1983).

[145] *See Loomis Sayles*, 259 F.3d at 1044 (affirming lower court's ruling that ERISA fiduciary adequately investigated use of inverse floaters, where the financial analysis system used by the fiduciary "was the tool prevalently used in the industry").

[146] *See* 29 C.F.R. § 2550.404a-1 (2009).

[147] *See generally* ERISA § 407 (codified at 29 U.S.C. § 1107 (2006)).

[148] *See, e.g.*, In re Unisys Sav. Plan Litig., 74 F.3d 420, 438 (3d Cir. 1996).

[149] *Id.* (citing factors described in the legislative history of ERISA set forth in H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S. Code Cong. & Admin. News 5038, 5085); *see also* RESTATEMENT (SECOND) OF TRUSTS, § 228 cmt. a (1959).

[150] *See Unisys*, 74 F.3d at 438 ("ERISA's legislative history, however, indicates that a fiduciary's performance of the duty may be measured by the diversity it has achieved in a particular investment vehicle and, where the management of a plan's investments is distributed among several managers, in the segment of the plan for which it has responsibility."). *But see* Farm King Supply, Inc. Integrated Profit Sharing Plan & Trust v. Edward D. Jones & Co., 884 F.2d 288, 294 (7th Cir 1989) (suggesting that a person who provides "individualized investment advice regarding 'investment policies or strategy, overall portfolio composition, or diversification of plan investments'" (citing 29 C.F.R. § 2510.3-21(c)(1)(ii)(B) (2009)) should have knowledge of the entire composition of the plan's portfolio).

151 *But see* 15 U.S.C. § 80a-35(b) (2006) (codifying section 36(b) of the Investment Company Act of 1940) (permitting a fund shareholder to sue an investment adviser for breach of fiduciary duty with respect to the adviser's receipt of fees).

152 *Compare*, *e.g.*, Hecker v. Deere & Co., No. 06 Civ. 719 (W.D. Wis. June 21, 2007) (granting motion to dismiss) *with* Kennedy v. ABB, Inc., No. 06 Civ. 4305 (W.D. Mo. Feb. 11, 2008) (denying motion to dismiss); Phones Plus, Inc. v. Hartford Fin. Servs. Group, Inc., No. 06 Civ. 1835 (D. Conn. Oct. 23, 2007) (denying motion to dismiss).

153 *See, e.g.*, *Hecker* (alternative ground for dismissal).

154 *See* DOL, *Fact Sheet, Definition of Fiduciary Regulation (Investment Advice)* (2009) (noting the DOL's intention "to publish a proposed regulation in June 2010 to amend the current regulatory definition of 'fiduciary' to include more persons, such as pension consultants, as fiduciaries"), *available at* http://www.dol.gov/ebsa/regs/unifiedagenda/ebsafall2009/1210-AB32fs.html.

155 *See* ERISA § 403(a) (codified at 29 U.S.C. § 1103(a) (2006)).

156 *See* DOL, Field Assistance Bulletin 2004-03 (Dec. 17, 2004), *available at* http://www.dol.gov/ebsa/regs/fab_2004-3.html [hereinafter FAB 2004-03].

157 *See, e.g.*, Kemper v. Enron Corp., No. 01 Civ. 4089 (S.D. Tex. filed Dec. 3, 2001) (naming former directed trustee of Enron 401(k) plan as a defendant); Blyler v. Agee, No. 97 Civ. 332 (D. Idaho filed July 18, 1997) (naming directed trustees of the Morrison Knudsen ESOP and 401(k) plans, respectively, as defendants).

158 *See* Maniace v. Commerce Bank of Kan. City, 40 F.3d 264 (8th Cir. 1994); *see also* Arakelian v. Nat'l W. Life Ins. Co., 755 F. Supp. 1080, 1082 (D.D.C. 1990). By contrast, the DOL has taken the position that a directed trustee is, "by definition, always" a fiduciary (albeit one with "significantly limited" responsibilities). *See* FAB 2004-03, *supra* note 156.

159 *See* FAB 2004-03, *supra* note 156.

160 *See, e.g.*, Afridi v. Nat'l City Bank, No. 03-cv-7663, 2007 U.S. Dist. LEXIS 63356, at *19-*20 (N.D. Ohio Aug. 28, 2007) (citing FAB 2004-03, *supra* note 156, for the proposition that "a directed trustee is liable for investing pursuant to an instruction that it knew or should have known was not made 'in accordance with the terms of the plan' or that it was 'contrary to' ERISA"). *See also* Kling v. Fid. Mgmt. Trust Co., 270 F. Supp. 2d 121, 2003 (D. Mass. 2003) (denying motion to dismiss because the directed trustee "may still be found liable if a jury determines that [it] followed directions that were contrary to the Plan or ERISA"); In re Sprint Corp. ERISA Litig., 388 F. Supp. 2d 1207 (D. Kan. 2004) (noting that it is difficult to conclude at an early stage of the litigation that the fiduciary instructions followed by a directed trustee are proper and consistent with ERISA and the plan).

161 *See* ERISA § 410(a) (codified at 29 U.S.C. § 1110(a) (2006)).

162 *See* ERISA § 410(b) (codified at 29 U.S.C. § 1110(b) (2006)).

163 Broadly stated, D&O coverage is generally designed to insure against financial losses that *individuals* may sustain in claims alleging that errors or omissions were committed by them in their capacities as directors or officers. By contrast, E&O coverage (sometimes referred to as "entity" coverage) is generally designed to insure against financial losses that insured *entities* may *themselves* sustain in claims alleging that errors or omissions were committed by them (or by persons for whose errors and omissions the entity is legally responsible) in their provision of professional services.

164 *See, e.g.*, JOHN ALAN APPLEMAN, APPLEMAN ON INSURANCE 2D § 146.6 (2d ed.) ("Professional liability policies frequently exclude from coverage claims based upon [ERISA]."); Hous. & Redev. Ins. Exch. v. Lycoming County Hous. Auth., 58 Pa. D. & C.4th 321 (2001) (noting that ERISA exclusion precluded coverage for former employee's claims for violations of the Comprehensive Omnibus Budget Reconciliation Act of 1985, which amended ERISA), *aff'd*, 809 A.2d 1096 (Pa. Commw. Ct. 2002).

[165] Even if fiduciary liability coverage is not expressly provided, D&O/E&O policy forms may nevertheless be viewed as including some degree of fiduciary liability coverage, depending on the wording of the policy form and on whether the form includes an express ERISA exclusion. Thus, for example, D&O/E&O policies may provide explicit coverage for "breach of duty," a term which has been interpreted by some courts as encompassing breach of *fiduciary* duty. *See, e.g.*, Citizens First Nat'l Bank of Princeton v. Cin. Ins. Co., 200 F.3d 1102 (7th Cir. 2000) (construing the policy definition of "Wrongful Act," which included, inter alia, breach of duty, as encompassing a breach of fiduciary duty).

[166] *See* ERISA § 412 (codified at 29 U.S.C. § 1112 (2006)). Section 412 of ERISA provides some exemptions from these fidelity bond requirements. For example, a bank or insurance company (or director, officer, or employee thereof) that satisfies certain criteria is not required to be bonded. A broker-dealer (or a director, officer, or employee of such broker-dealer) that is subject to the fidelity bond requirements of a "self-regulatory organization" (as defined in section 3(a)(26) of the Securities Exchange Act of 1934 (codified at 15 U.S.C. 78c(a)(26) (2006))) is also not required to be bonded. In addition to the statutory exemptions, the DOL has provided exemptions to certain other institutions (e.g., various banking institutions and trust companies that are not exempted by the statute).

[167] In its guidance on ERISA fidelity bonds, the DOL has advised that fraud and dishonesty include, among other things, larceny, theft, embezzlement, misappropriation, and forgery, and do not require that the wrongdoer have realized any personal gain from the fraud or dishonesty. *See* DOL, Field Assistance Bulletin 2008-04, at Q-1 (Nov. 25, 2008), *available at* http://www.dol.gov/ebsa/regs/fab2008-4.html.

[168] *See, e.g.*, Richard G. Clarke, *Fiduciary Liability: Obtaining Effective Insurance*, INS. J., Feb. 21, 2005, http://www.insurancejournal.com/magazines/midwest/2005/02/21/features/52285.htm.

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