

CENTER FOR DUE DILIGENCE

P.O. Box 8 • Western Springs, Illinois 60558
(630) 662-0284 • Fax (630) 662-0286

E-mail: CFDD@TheCFDD.com

Web: <http://www.TheCFDD.com>

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Subject: **ERISA vs. NON-ERISA FIDUCIARY STANDARDS**

PUBLIC EDUCATION, TAX-EXEMPT ENTITIES & CHURCH PLANS

Notwithstanding the use of possibly, maybe and perhaps, the legal community has discussed the fiduciary standards applicable to ERISA plans at length. The fiduciary standards applicable to non-ERISA plans are, however, in need of clarification.

Exempt public education plans, church plans, 457 governmental plans and tax-exempt entities - in which there are no employer contributions and/or control - are not subject to *federal* law, i.e., ERISA. Regarding the latter, the new IRS regulations are particularly problematic for non-ERISA 403(b) plans. Despite DOL guidance, many feel that non-ERISA tax-exempt 403(b) plans are on the path to extinction.

As noted by Marcia Wagner (Managing Director, Wagner Law Group), “The fiduciary standards applicable to ERISA and non-ERISA plans, particularly 403(b) plans, have been subject to a lot of heat, but very little light.” Ms. Wagner further noted that, “403(b) plan sponsors often foolishly assume their plans are not ERISA plans when they are often more than likely ERISA plans.”

ERISA fiduciary standards were not beamed down from Star Trek’s *Enterprise* ship. In addition to being among the highest standards known to law, they are rooted in the fiduciary standards applicable to trust and custodial relationships.

The aforementioned is very relevant to non-ERISA plans. As noted by Ms. Wagner: “**Even when *federal* ERISA fiduciary standards do not apply, non-ERISA plans may still be governed by *state* or *commonwealth* law, whose fiduciary standards are often similar to ERISA’s fiduciary standards.**”

If may not seem like it on the surface, but when compared to other fiduciary law, ERISA is quite protective of plan sponsors. Indeed, the typical rectification for breach of fiduciary duty under ERISA is to make the affected plan whole, i.e., restore the plan to the position it would have been in without the fiduciary breach. This restoration is in stark contrast to state and commonwealth law, often providing for compensatory, punitive or treble damages.

After analyzing the tradeoffs, **certain plan sponsors would be wise to consider converting their non-ERISA 403(b) plans to ERISA plans to avoid state laws.** Upon conversion, ERISA law would be applicable, including the Form 5500 filing. Regardless of whether a plan is governed by ERISA, adhering to the ERISA standards of fiduciary care is protective to both plan sponsors and participants.

GOVERNMENT SPONSORED 457 PLANS

Like 403(b) plans, government sponsored **457 plans are generally subject to state fiduciary laws regulating government pension fiduciaries.** When engaged, legal counsel typically advises public sector plan sponsors to manage their non-ERISA defined contribution plans as if they were covered by ERISA, since there is more guidance about ERISA standards.

According to Fred Reish (Partner, Drinker Biddle & Reath LLP), “Trustees of some 457 plans claim protection under the theory of sovereign immunity, i.e., government officials are not personally liable.” Others cast doubt on whether a trustee whose duty of loyalty is to plan participants, and not the government that appointed them, can be considered a “government official.” Regardless of one’s viewpoint, Fred Reish notes: “There is serious political risk in either case. The last thing a public official wants is to have their names in the media about how the employees are being ripped off by bad investments and/or high expenses.”

While sometimes excluded from state fiduciary laws, Herb Whitehouse (Fiduciary Consultant, Chief Fiduciary Officer & Partner, Public Employee Fiduciary Services) notes that like their 401(k) counterpart, 457 plans added to the IRC by the Revenue Act of 1978 must hold assets in trust for the exclusive benefit of participants and beneficiaries.

Many of these government entities offer DB plans and guaranteed benefits. As a result, there hasn’t been much challenging activity by participants, the legal community or the media, but that could change, particularly in situations where the participants are subject to investment risk.

In short, government officials are foolish to think that fiduciary oversight is not required or that waste and ineffective plans are not their problem. Beyond state pension laws, Internal Revenue Code requirements and applicable Treasury regulations, there should be a practical desire to avoid unnecessary public expenses and offer a plan that provides benefits for employees.

Through the elimination of waste, Herb Whitehouse, J.D. (Fiduciary Consultant, Chief Fiduciary Officer & Partner, Public Employee Fiduciary Services) will lead the CFDD ’12 session on *How Government Sponsored 457 DC Plans Can Increase Participant Benefits While Reducing Their DB Plan Contributions*. Mr. Whitehouse will also discuss the idea that a public sector fiduciary can no more be a "government official" than an ERISA fiduciary can wear his CFO or other corporate hat while acting as a fiduciary.

NONPROFIT PLAN GROWTH OPPORTUNITIES

Driven by regulations, the 403(b) market has changed significantly in the last few years. Given the transition from an individualized retail approach to an institutional environment, the opportunities for retirement plans specialists and other providers have increased significantly. The 403(b) markets are also less mature than the 401(k) market and growing rapidly, particularly the Healthcare segment.

Not surprisingly, the changes have reduced the number of providers serving the market, swelled the ranks of ERISA plans, reduced the number of multi-vendor providers per plan and increased the use of TPAs. The changes have also shifted the distribution dynamics, increased the use of mutual funds, open architecture providers and participant elected managed accounts.

The 403(b) market, higher education, healthcare, K-12, charitable organizations and church plans are all different. Given the uniqueness of each segment, particularly the K-12 market, specialized knowledge is required to succeed. Nevertheless, **the old guard is losing ground on all fronts and the nonprofit market opportunity is still very real.** Nonprofit companion DB and NQDC plans are also richer and more stable than their corporate counterparts.

403(b) plans represent the second largest DC plan segment and the nonprofit Healthcare industry is experiencing significant growth. **Given the potential to replace the inappropriate and non-competitive products still prevalent in the nonprofit market with institutional solutions, the nonprofit markets will continue as a sub-theme at the CFDD's 2012 Advisor Conference.** *Outcomes Based Consulting, Developing Higher Margin Business & Increasing Efficiency.* The unrecognized, but growing demand for participant elected managed accounts will also continue as a theme.

Consistent with the aforementioned, Marcia Wagner will deliver a CFDD '12 keynote on *ERISA vs. Non-ERISA Fiduciary Standards In The Nonprofit Markets*. Ms. Wagner will also conduct the session on *The Impact of Tax Code Changes*. As a Resource Contributor, advisors may interface with Ms. Wagner through the CFDD's *Ask An ERISA Expert* page at: <http://www.thecfdd.com/askanexpert/ERISA>.

Given that participant advisory services will play a major role in the consolidation of nonprofit business, CLS Investments will moderate a session on *The Distribution of Centralized Participant Elected Managed Accounts: Why, How & Where*. CLS will be joined by Fidelity Tax-Exempt, TIAA-CREF and/or other providers facilitating the delivery of these services.

Verity Asset Management will moderate a panel on *How To Evaluate RIAs Providing Participant Elected Managed Accounts Through IARs*. In addition to others, this session will include prestigious nonprofit plan sponsors. Joined by Orion, Verity will also participate in the technology-driven session on *Scalable Solutions For Participant Elected Managed Accounts*.

As a CFDD '12 sub-theme, a not yet populated session on *Scalable Solutions for 3(38) Investment Management Services* will complement the aforementioned breakout sessions.

NEW ERISA LITIGATION RESOURCE BY GROOM LAW GROUP

The CFDD is pleased to announce that **the Groom Law Group has become our ERISA Fee Litigation resource contributor.** To view the latest outline and summary chart, go directly to: <http://www.thecfdd.com/litigationupdate>. As a resource contributor, Michael J. Prame (Principal, Groom Law Group) will also direct their *ERISA Fee Litigation Update* presentation at the CFDD's 2012 Advisor Conference.

As noted by Groom, more than two dozen lawsuits have been filed in recent years regarding 401(k) plan fees and more specifically, "revenue sharing" arrangements with plan service providers. The lawsuits were initially brought by plan participants against plan sponsors and alleged that by allowing plan service providers to receive revenue sharing payments, the plan sponsors caused the participants to pay excessive fees, in breach of the sponsors' fiduciary duties to the participants. The focus of these lawsuits has evolved over time to include broader challenges, including the plan sponsors' selection of actively managed mutual funds as plan investment options.

In addition to the lawsuits against plan sponsors, lawsuits have been brought against 401(k) plan service providers. These cases typically were typically based on allegations that the service providers are "functional fiduciaries" under ERISA. The plaintiffs claim that in negotiating for and receiving revenue sharing, the service providers breached fiduciary duties and engaged in "prohibited transactions" under ERISA.

NEW RESEARCH, STRATEGIC ALLIANCES & CONFERENCE AUDIO FILES

To keep our content fresh and expand the breadth of our agenda, the industry's most prestigious research organizations - including Spectrem, Chatham Partners, LIMRA, Brightwork Partners and Ann Schleck & Company - will all provide leading edge content at the CFDD's 2012 Advisor Conference.

While many of these organizations offer far more than research, they have a large pool of current research to draw from, including plan sponsor and advisor-driven surveys as well as nonprofit plan surveys.

Chatham will deliver the presentation on *What The Voice Of The Customer Tells Us: Using Sponsor Insights To Drive Future Business*. Chatham's fresh content is valuable to advisors because it provides plan sponsor insight and it has NOT been available at other conferences.

Consistent with CFDD '12 sub-themes, Ann Schleck & Company will provide the presentation on *Managing An Efficient Practice For Improved Margins*. Dana Hartwell (Sr. VP, DCIO Sales, Natixis) will also participate in the session.

While Spectrem's conference presentation will focus on the nonprofit markets, the LIMRA and Brightwork presentations are still being determined.

In addition to including these prestigious research organizations as conference cornerstones, we are exploring strategic relationships to facilitate surveys with the CFDD's unmatched advisor audience. Our goal is to **provide our advisor clients with access to components of this exclusive, pertinent and expensive research, a resource not previously available.**

As another new major value add, the audio files of prior year CFDD Advisor Conference presentations are in the process of being uploaded to a secure area of the CFDD's website. **In addition to the presentation outlines, advisors will now be able to listen to the audio component of each presentation in a convenient manner.** As an unmatched library resource, the presentation outlines and the audio files will remain archived on the CFDD's website.

Access to new this new conference content, ongoing research and conference audio files will not only expand the audience for this exclusive research, but further enhance the CFDD's distinguished value proposition and distance us from our competitors. In addition to unmatched CE credits and advisor attendance, the unbiased *King of Content* is now the *King of Content, Value & Convenience*.

CFDD 2012 ADVISOR CONFERENCE

The CFDD's October 22-24, 2012 Advisor Conference, *Outcomes Based Consulting, Developing Higher Margin Business & Increasing Efficiency*, is **the premier education and networking event for the retirement plans advisory industry.** The two and one-half day must attend conference offers more VALUE, CONTENT, CONVENIENCE and specialized advisor ATTENDANCE than any other event.

Known as the *King of Content*, the CFDD's broad and diverse agenda remains at the top of the food chain. The *sixty* different breakout sessions are populated by the most sought after speakers as well as the industry's most accomplished advisors. **The industry's most prestigious research organizations, including Spectrem, Chatham Partners, LIMRA and Brightwork Partners will also participate in the agenda.** To facilitate advisor access to this exclusive research, we are also pursuing strategic alliances with these firms.

While retirement advisors are the key determinant to plan success, completing the transition from advisor to consultant is essential because **positive outcomes are the path to increased market share.** Given the weak economy, challenging investment markets, a mature retirement plans market, compliance burdens, increased competition, the inability to differentiate, margin pressure and looming tax code changes, **advisors MUST participate in consolidation, DIVERSIFY, develop higher margin business and improve efficiency through scalable solutions.**

In addition to the aforementioned, CFDD '12 will *Emphasize Investment Approaches With Pricing Power, Returns Beyond Performance, Model Portfolios, IAR Distribution Of Participant Elected Managed Accounts, ERISA Vs. Non-ERISA Fiduciary Standards, Who's Winning & Losing In The Nonprofit Markets, Products & Strategies Benefiting From Tax Code Changes, How To Evaluate Advice Providers, Success Metrics and Behavioral Finance.*

Hiring, training, succession planning and scalability remain the biggest business challenges facing advisors. Practices can't grow without staffing and they can't be monetized without succession planning. To enrich their practice, **advisors may bring one immediate team member at a discount.**

To add value and increase efficiency, the CFDD's Advisor Conference provides **a single source solution for unmatched core CE credits**, including IMCA, CFP, fi360, ASPPA, NIPA, IBF, CFA, SPARK, The American College, the College for Financial Planning and more. As an added bonus, attendees can **earn the Accredited Investment Fiduciary (AIF®) designation by attending fi360's discounted pre-conference training.**

Attendees further benefit from early registration discounts, a fiduciary insurance discount program, **a conference CD-ROM** and online **access to ALL prior year conference presentations, including the audio files of each presentation.** To access the 2011 conference presentations and Mp3 audio files, go directly to: <http://www.thecfdd.com/CFDDconf2011presentations>.

In addition to FREE wireless, the hotel's cell phone reception is excellent and spouses may attend the conference at NO additional cost. Spouses staying at the conference venue will also have access to a very developed spousal agenda at NO additional cost.

Complimentary food, beverages, snacks, cocktails and a **NASCAR themed Kick-Off Party are all included in the registration fee.** Sponsored by Allianz Global Investors, Simulated **Racecar Gameplay Competition** with meaningful **cash prizes** is also included.

NASCAR will be the marketing theme and feature a TIAA-CREF sponsored **Primary Grand Prize Box Seat Package To The Daytona 500**, including beachfront accommodations. A **Secondary Grand Prize Package To The Charlotte ALL-Star May Race** will also be offered, including a hot pit pass (access to everything except the race car) and **Buck Baker Racing School Classes** on the Charlotte Motor Speedway. To qualify for the grand prizes and the spousal agenda, registrants must stay at the conference venue, the convenient downtown Chicago Swissotel.

Recognizing the urgency to act now, CFDD '12 will provide **UNBIASED guidance and exclusive GROWTH SOLUTIONS** to elevate your practice. For more information on the CFDD's 2012 Advisor Conference, go to the conference homepage at: <http://www.thecfdd.com/CFDDconference2012>. To register early, **SAVE MONEY**, find out what is working from your peers and benefit from business building takeaways, register online by going directly to: <http://www.regonline.com/Register/Checkin.aspx?EventID=1026462>.

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