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Date: January 12, 2010

Subject: **WHAT TYPE OF ERISA FIDUCIARY ARE YOU & WHY IT MATTERS:
Full Scope 3(21), 3(38) Investment Manager, Limited Scope 3(21),
3(16) Plan Administrator, Blah, Blah, Blah**

The CFDD's guide on "Evaluating Retirement Plan Advisors" notes that many advisors categorically refuse to acknowledge fiduciary status. Others ignore it and some remain ignorant of their ERISA obligations even though they may be functioning as a fiduciary.

The guide further noted that some advisors will acknowledge fiduciary status on a functional basis, but won't put it in writing. Other advisors will acknowledge fiduciary status in writing, but their contract may be structured to limit liability.

Contrastingly, **a select group of skilled retirement plan advisors will acknowledge ERISA fiduciary status in writing and accept liability for discretionary investment control.** A few have gone even further by advocating a Full-Scope "named fiduciary" role.

While the fiduciary status of advisors remains unsettled, it has a significant impact on retirement plans, sponsor liability, claims, conflicts and prohibited transactions, including self-dealing.

While non-specialists generally lack knowledge of the fiduciary duties and responsibilities imposed by ERISA, confusion surrounding the various fiduciary roles is also common among highly skilled professionals.

This confusion underscores the need for clarification of the distinctions between the different fiduciary roles and how those roles impact an advisor's practice as well as the services they render to a plan sponsor.

FIDUCIARY BASICS

Before discussing the more sophisticated nuances of the different fiduciary roles advisors could assume, it's worth noting that many fail to grasp the basic differences between a "named fiduciary" and a "co-fiduciary."

To clarify, individuals become fiduciaries through appointment or function. **The “named fiduciary” is the individual, committee or entity specifically appointed and identified in the plan document.** Although the “named fiduciary” retains authority to manage the plan, they may delegate their responsibilities to third parties which may or may not involve a fiduciary function.

Advisors, on the other hand, are “rarely” retained as “named fiduciaries,” a title more likely designated in the plan documents. In spite of this rarity, **service agreements that acknowledge fiduciary status often generate confusion.** Many advisors, B-Ds and E&O carriers believe such acknowledgement makes the advisor a “named fiduciary,” but that is not generally the case. Additionally, some advisors and B-Ds wrongly believe they are protected by the sponsor’s fiduciary insurance coverage.

While some advisor service contracts state that a sponsor must indemnify advisors from fiduciary claims, exculpatory contractual provisions which purport to relieve a fiduciary from responsibility or liability are void against public policy. In other words, **a plan cannot indemnify a fiduciary for their actions, but they could purchase insurance to indemnify the liability of the fiduciary.** In reality, sponsors rarely buy “third party” insurance coverage that indemnifies any fiduciary other than named fiduciaries or individuals “employed” by the plan sponsor to act in a fiduciary capacity.

In any event, plan sponsors willing to indemnify an outside advisor or entity for the advisor’s own negligence are in over their heads. As a result, specialists would be wise to sell against this type of contract language during the prospecting process.

3(21) vs. 3(38)

The terms “limited scope” and “full scope” have become popular within certain fiduciary circles. While these topics have been the subject of moderate debate, they do not appear to be referenced in any statute or regulation. In other words, what is becoming trendy industry nomenclature for some may not properly define the role of the advisor.

For the most part, individuals who endorse these invented titles through writing and blogging have developed business models that adopt their favored position. These business models are just that, i.e., business models. They are neither right nor wrong. Indeed, the model has always existed within the ERISA framework.

In addition to the creative nomenclature, another commonality among this group is support for the multiple-employer plan concept, the elimination of the participant’s discretionary control over their 401(k) account and a less than favorable view of the merits of 404(c).

These views represent a minority position within a mature industry that embraces customization, participant control and risk management strategies. Some advisors have no doubt positioned themselves to capitalize on the fiduciary fears of plan sponsors, but some feel this group has also been overly critical of the 3(21) approach.

The aforementioned positions may have merit, but it is important to note that they are still opinions. It is also important to note that **the sponsor is generally the primary target of litigation**. The sponsor's decisions, process and providers retained (fiduciaries) are always subject to examination. In short, while sponsors may limit their liability, it can't be eliminated.

FIDUCIARY DISTINCTIONS

The primary fiduciary distinctions, in order of importance, are as follows:

- **Full-Scope 3(21):** Someone who has been appointed with the authority to hire/fire investment managers and/or service providers. If the Full-Scope 3(21) has the skill set to act as an investment manager, they may do so or appoint someone. They may also give investment advice to the “named fiduciary,” participants or the investment manager. Typically, most “named fiduciaries” retain this responsibility.
- **Discretionary 3(38) Investment Manager:** A fiduciary who has full discretion for investment selection and monitoring. The presence of a 3(38) relieves the plan sponsor or Full-Scope 3(21) from the fiduciary liability for the investment selection and monitoring. The sponsor is, however, still liable for the prudent selection and monitoring of the 3(38).
- **Limited-Scope 3(21):** Someone who has been appointed by a “named fiduciary” with responsibility to render investment advice to the “named fiduciary” and/or participants. Such advice is acted upon at the discretion of the “named fiduciary” or participant.

A number of highly skilled advisors in the CFDD's network are positioning to market themselves as 3(38) Investment Managers. A much smaller group is considering the Full-Scope 3(21) “go to” approach in lieu of the 3(38) role. Generally, **those embracing the Full-Scope 3(21) approach question the need to incur the cost of an additional 3(38) fiduciary if they are capable of providing the investment management services.**

In a market dominated by look-through investments and participant direction, others in the network question both of the aforementioned approaches. They also question the demand for the broader fiduciary delegation. Additionally, while plan sponsors could do it, they wonder why any plan sponsor would want to delegate full authority to hire/fire service providers.

Skeptics of the broader delegation are willing to accept a Limited-Scope (3(21) fiduciary role for the advice provided and acted upon, but they are NOT willing to accept liability for breaches beyond their control. While they acknowledge the difference between the various fiduciary distinctions, they do not believe one is inherently superior to the other. They also question whether the multiple-employer plan approach with a Full-Scope 3(21) that exercises discretion to hire/fire service providers would prevail under scrutiny.

Like most things in life, there is rarely one best approach or right way to do things. As always, **plan sponsors should be receptive to the approach that supports their objectives.** Advisors would also be wise to develop business models compatible with their capabilities.

Given the evolving industry and confusion surrounding fiduciary roles, **it is time to thoroughly vet the various fiduciary distinctions as well as their subsequent impact on the advisor's practice.** As result, we have added *What Type Of ERISA Fiduciary Are You & Why It Matters* to the CFDD's Advisor Conference agenda. We have also added a session on *Multiple-Employer Plans: A Cost Effective Small Plan Solution*.

As always, the unbiased CFDD will hit the ball right down the middle. To find out where the stitched leather lands, join us at the fall conference.

TARGET DATE FUNDS UPDATE

Tom Idzorek's 4th Quarter Target Date Funds Update will be posted to the CFDD's dedicated website page at mid-week.

As noted by Tom (CIO/Director of Product Research & Development, Ibbotson Associates), "What a difference a year makes. At the end of 2008, Ibbotson reported that the average target maturity fund with at least one year of history lost 30.8%." Indeed, all 264 funds lost money. In contrast, the average target maturing fund gained 27.1% during 2009. The performance was also comparable to Morningstar's Lifetime Moderate Index and the S&P 500.

Additionally, we are pleased to note that Tom will present Going *Beyond Markowitz Mean-Variance* at the CFDD's 2010 Advisor Conference.

2010 CONFERENCE AGENDA: Developing Early

As noted above and to clear the air, we have added *What Type Of ERISA Fiduciary Are You & Why It Matters* to the CFDD's October 6-8, 2010 Advisor Conference agenda. The session will be populated by the individuals below.

- *What Type Of ERISA Fiduciary Are You & Why It Matters: Limited Scope 3(21), 3(38) Investment Manager, Full Scope 3(21), 3(16) Plan Administrator, Blah, Blah, Blah*
 - David Witz (Moderator), Managing Director, FRA/PlanTools
 - Jeff Gratton, Corporate Retirement Plan Consultant, SageView Advisory Group
 - Al Otto, Founder, OneFiduciary Group, LLC
 - Jason Roberts, Partner & Co-Chair Financial Services Group, Reish & Reicher

Given that many of the investment reporting solutions are standardized, off-the-shelf products with pre-designed reports and limited customization, we have re-organized the investment reporting sessions.

While the standardized products offer nuances in look, reports and some functionality, they all seem to populate their data via Morningstar with the exception of Lipper. Given that Lipper bought the PlanTools code, we have included Lipper and PlanTools on the same session.

Contrastingly, MPI, Zephyr, Direct & EnCorr are fully customized "insource" solutions, i.e., they do not have "templates" specific to qualified plan performance reporting.

MPI & Zephyr appear somewhat similar in that they both use Bill Sharpe's RETURNS-based analysis for fund evaluation and produce attractive reports. While Direct and EnCorr can do returns-based analysis, that is not their primary focus.

Direct focuses on providing access to all Morningstar's databases and information as well as HOLDINGS-based style analysis. On the other hand, EnCorr focuses on developing ASSET ALLOCATION policy, analyzing funds with returns-based analysis and constructing portfolios to implement the target asset allocation strategy.

- **Investment Reporting I: A Side-by-Side Comparison of Fi360, Advisor Workstation & FiRM**
 - Chad Gutner (Moderator), Retirement Sales Consultant, Commonwealth Financial Network
 - Sue Rose (*Fi360*), Managing Director-Investments, Oppenheimer & Co., Inc.
 - Troy Hammond (*FiRM*), President & CEO, Pensionmark
 - Rita Fiumara (*Advisor Workstation*), UBS
- **Investment Reporting II: A Side-by-Side Comparison of PlanTools, Newkirk & Lipper**
 - Gene Huxhold (Moderator), Sr. Managing Director, John Hancock Mutual Funds, DCIO
 - Kent Fitzpatrick (*PlanTools*), Asset Strategy Consultants-Boston
 - Lawrence Solomon (*Newkirk*), President & CEO, Alliance Benefit Group Consultants
 - Brett Howell (*Lipper*), Wealth Management Advisor, The Howell & Sharp Group At Merrill Lynch
- **Investment Reporting III: A Side-by-Side Comparison of MPI, Zephyr, EnCorr & Direct**
 - Angelo Auriemma(Moderator), Director of Investment Advisory Services, Plan Sponsor Advisors
 - Jon Chambers (*EnCorr & Morningstar Direct*), VP, Schultz Collins Lawson Chambers, Inc.
 - Mike Castner (*MPI*), Managing Partner, Castner Josephs Group, LLC
 - Brian Hubbell (*Zephyr*), Principal, Hubbell Consulting, LLC

CFDD 2010 ADVISOR CONFERENCE: The Fonz Lives

The CFDD's October 6-8 (Wednesday-Friday), 2010 Advisor Conference, *NEW AGE MARKETING: What Worked In The Past Is No Longer Effective*, will return to the downtown Chicago Fairmont - Millennium Park Hotel, Chicago, Illinois.

Given the evolving decision making process, the retirement industry must adapt to the new environment to maintain and increase market share. The CFDD's sole purpose centers on **helping specialists grow their retirement plans business and professionalizing the advisor selection process**. Given our mission, the new ERISA Advisor Evaluator program for plan sponsors will play a key role in the consolidation of retirement plan advisory services.

While CFDD '09 was another homerun, CFDD '10 is designed more intimately to facilitate enhanced learning and deeper networking. Specific education tracks will be threaded throughout the event and more advisor roundtables will be included in the program, including spirited after hour meetings.

To bridge the conference's educational demands and create a relaxed atmosphere, **CFDD '10 will feature a lively 50's theme**, including a Fonz look-a-like contest, hula hoop/twist contests, an Elvis impersonator, professional entertainers and major photo-ops for sponsors. Consistent with our theme, the conference will feature authentic 50's Attire Awards and a Grand Prize Trip to Graceland for two.

The '57 Chevy may be no more than a ghost, but cats & chicks can still roll up t-shirt sleeves, don retro sunglasses, poodle skirts, pony tails, ducktails and network in a fun & outreach friendly environment.

The Chicago Fairmont can only accommodate sixty exhibition booths and while more than half are already sold; all booth locations are equally traffic friendly. To facilitate increased networking, **all food and beverage will be served in the exhibition area.**

As a bonus, **the 2010 exhibition package includes complimentary advertising on the CFDD's website and in our email newsletter with a value up to \$25,000.** The website is currently experiencing more than 300,000 page visits per month and our newsletter reaches a highly targeted audience of over 35,000 retirement plan professionals.

The CFDD already offers more value, unbiased content, CE credits and attracts more accomplished retirement plan advisors than any other industry event. To add even more value, **join exhibitors who register early and benefit from banner ad exposure on the CFDD's entire website and our email newsletter for up to one year without additional cost.**

Our limited 2010 booth space will sell out early. To secure your space now, **benefit from extended complimentary advertising and exposure to the industry's most powerful database of retirement plan specialists**, exhibitors should click [HERE](#) to register.

Rather than continue to offer selective group discounts to large organizations, we are donning our Robin Hood hats and making the discounts available to all individual registrants. **To benefit from the maximum discount, you must register early.** To register early and save, individual advisors should click [HERE](#)

For more information on the conference, visit: <http://www.thecfdd.com/CFDDconference2010>.

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