

perspective

ERISA for Money Managers: A Practical Workshop

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Fiduciary Duty and Status
New York, New York
April 17, 2008



Fiduciary Status

- ERISA mandates fiduciary conduct to:
 - Protect participants and beneficiaries
 - Eliminate self-dealing and promote “arms-length” transactions
 - Identify persons with responsibility for the plan

Who is an ERISA Fiduciary?

- Investment discretion or authority
- Investment advice for a fee
 - Individualized
 - Regular basis
 - Mutual understanding (written or oral) that advice will be relied upon as primary basis for decisions
- Discretion in plan administration

Who is an ERISA Fiduciary?

- ERISA provides a *functional test*.
 - Performing specified fiduciary functions under ERISA
 - “To the extent” performing fiduciary functions
 - Title not dispositive (other than named fiduciary, trustee, investment manager) – de facto test

Consequences of Fiduciary Status

- Heightened fiduciary duty
- Prohibited transactions
- Bonding
- Severe penalties and other consequences

Fiduciary Duties – Advisers Act

- Section 206 of the Advisers Act imposes fiduciary duty on advisers by operation of law
- Duty of care
 - Affirmative duty of utmost good faith
- Duty of loyalty
 - Obligation to act in the best interests of the client
 - Full and fair disclosure of all material facts, particularly where the money manager's interests conflict with those of its client
- Compare with ERISA

Fiduciary Duties - ERISA

- Loyalty
 - Exclusive purpose/ solely in the interest/ “eye single”
 - Incidental benefit rule
- Prudence
 - Prudent expert
 - Procedural prudence
 - Modern portfolio theory

Fiduciary Duties - ERISA

- Diversification
 - Purpose of plan
 - Minimize large losses
 - Special rules for employer securities
- Adherence to Plan Documents (unless contrary to ERISA)
 - Plan document
 - Trust document
 - Investment policy/guidelines
 - Investment manager/advisory agreements
 - Collective/group trust documents

Prohibited Transactions

- Prohibited transaction rules apply to ERISA plans and IRAs
 - Not governmental or certain church plans
- Prohibited transaction rules apply to “parties in interest” and fiduciaries
- Parties in interest include:
 - Fiduciaries
 - Employers
 - Unions
 - Service providers

Prohibited Transactions

- Party In Interest Transactions (§ 406(a))
 - Sales and exchanges/leasing of property
 - Lending and extensions of credit
 - Furnishing of goods, services or facilities
 - Use of “plan assets”
- Fiduciary Transactions (§ 406(b))
 - Self-dealing
 - Conflict of interest
 - Kickbacks

Prohibited Transactions

- Statutory exemptions
- Class exemptions
- Individual exemptions

Bonding

- Fiduciaries
- Plan officials
- Exempt entities
- Maximum and minimums
- Employer securities

Penalties and Other Consequences

- Excise taxes on parties in interest, and related reputational risk
- Effectively insuring the underlying transaction
- Rescission and other equitable relief
- Return of fees