

INTEGRATING ERISA INTO YOUR COMPLIANCE SYSTEMS

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INTEGRATING ERISA INTO YOUR COMPLIANCE SYSTEMS

I. Know the Applicable Rules (ERISA)

A. Fiduciary Responsibilities

The Employee Retirement Income Security Act of 1974, as amended (“ERISA”) is the federal law regulating all employee benefit plans, including popular tax-qualified retirement vehicles like 401(k) plans. In recognition of the fact that the plan sponsor and other plan fiduciaries have the authority and the power to make decisions which unilaterally impact the plan’s participants, ERISA imposes “great responsibility” on the plan’s fiduciaries. And with great responsibility, comes “great potential liability.” Not only can the plan sponsor be held personally liable for any fiduciary breaches, but fiduciary advisors as well as non-fiduciary service providers are potentially subject to the various liability and penalty provisions of ERISA.

Given the importance of these fiduciary duties and the related potential liability, it is important for advisors to plan clients to develop an awareness of the related rules.

B. Overview of Fiduciary Rules

Each plan subject to ERISA must have *at least one fiduciary* who ensures that the plan operates in accordance with the terms of the plan document, any trust agreement or insurance contract, and also with applicable laws and regulations. One individual or entity may function as a fiduciary for more than one plan.

A plan may also have more than one fiduciary.¹ For example, advisors who provide “investment advice” to a plan sponsor are also fiduciaries.² A fiduciary should be aware of others who serve as fiduciaries to the same plan, because all fiduciaries have potential liability for the actions of their co-fiduciaries.

Fiduciaries do not include any individuals who only perform ministerial functions and who do not have the power or authority to make decisions with respect to plan policy, interpretation, practices or procedures. For example, an individual who calculates benefits, processes claims, or makes recommendations about plan administration is not a fiduciary if the plan document does not give him the power or authority to make a decision about benefit payments or recommendations.³

C. Who is a “Fiduciary”?

ERISA fiduciaries are either named in the plan document or are identified by the function they perform for the plan. Since fiduciary status may be based on a person’s conduct rather than his title, it is possible to be a fiduciary without being aware of it.

¹ 29 CFR §2509.75-8, FR-12.

² ERISA §3(21).

³ 29 CFR §2509.75-8, D-2.

1. Named Fiduciary. Typically, the plan sponsor is specifically identified as the “named fiduciary” of the plan in the plan’s governing document, with principal responsibility for its oversight and management.

2. Functional Fiduciary. A fiduciary under ERISA also includes any person who:

- a. Exercises discretionary authority or control over the plan’s management;
- b. Exercises any authority or control over the management or disposition of the plan’s assets;
- c. Renders “investment *advice*” for a fee or other compensation with respect to plan funds or property; or
- d. Has discretionary authority or responsibility with respect to plan administration.⁴

The test for determining fiduciary status is a functional one. In other words, if a person or entity acts or possesses fiduciary-like powers, the person or entity will be deemed to be a fiduciary regardless of his title or official designation. Thus, if a person actually renders investment advice, as described above, for which he is compensated, he or she will be treated as a fiduciary.

D. Fiduciary Standards

All plan fiduciaries are subject to strict standards of conduct under ERISA.

1. Fiduciary Standard of Care Under ERISA

A fiduciary must act **solely** in the interest of plan participants and their beneficiaries and alternate payees:

- With the exclusive purpose of providing benefits to plan participants and their beneficiaries;⁵ and by

⁴ ERISA §3(21).

⁵ ERISA §404(a)(1)(A)(i).

- Carrying out his or her duties prudently;⁶
- Following the terms of the plan documents (unless the documents are inconsistent with ERISA);⁷
- Diversifying plan investments;⁸ and
- Paying only reasonable plan expenses.⁹

E. Focusing on Specific Duties

1. Carrying Out Duties Prudently

Fiduciaries must manage plan assets solely in the interest of participants and beneficiaries with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a similar situation and familiar with such matters would exercise.¹⁰ With regard to the duty of prudence and plan investments, the DOL and the courts measure prudence by analyzing the process used to select an investment (*e.g.*, the scope and diligence of the fiduciaries' evaluation of the investment), rather than focusing solely on investment performance.

2. Paying Reasonable Plan Expenses Only

ERISA requires plan fiduciaries to ensure that any fees paid by the plan to its investment or service providers are reasonable. Specifically, ERISA Section 404(a)(1) allows expenses to be “defrayed” with plan assets if they are reasonable.

Under a separate set of rules under ERISA, known as the prohibited transaction rules, a plan fiduciary ordinarily cannot use plan assets to pay for services. Fortunately, ERISA Section 408(b)(2) provides an exemption from these rules, allowing the use of plan assets to pay fees for services. However, the exemption applies strictly to a fiduciary’s “contracting or making reasonable arrangements” with the plan’s service provider for “services that are necessary” for plan operation, and only if no more than “reasonable compensation” is paid for them.

⁶ ERISA §404(a)(1)(B).

⁷ ERISA §404(a)(1)(D).

⁸ ERISA §404(a)(1)(C).

⁹ ERISA §404(a)(1)(A)(ii).

¹⁰ 29 CFR §2550.404a-1(a).

New 408(b)(2) Disclosure Regulations. The DOL recently finalized its regulations under section 408(b)(2) of ERISA interpreting the definition and requirements for “contracting or making reasonable arrangements.” Under the new regulation, service providers will be automatically obligated to make comprehensive fee disclosures to plan sponsors before they enter into service arrangements. The new rules are effective July 1, 2012, and providers will need to make the required fee disclosures to all existing plan clients before this effective date. These disclosure requirements are intended to help plan sponsors satisfy their existing duty to ensure that the plan pays no more than reasonable compensation to its service providers.

F. Prohibited Transactions

1. ERISA Section 406(a).

There are 2 types of prohibited transactions, as describe in ERISA Section 406(a) and (b), respectively. Under ERISA section 406(a), transactions between a plan and a “party in interest” are prohibited, unless a statutory or administrative exemption applies. A party in interest includes the plan sponsor and service providers and their affiliates. ERISA states that a plan fiduciary shall not cause the plan to engage in any transaction with a Party In Interest, like a sale of property or a transfer of plan assets to a party in interest. Due to the broad scope of the rule, just about any transaction involving plan assets (even routine transactions) are actually prohibited. These rules are designed to force you to find an exemption. For example, a plan sponsor’s decision to use plan assets to pay a service provider (which is a Party in Interest) is a prohibited transaction, but a regulatory exemption permits it if the arrangement is reasonable and fee disclosures are made (as required under the new 408(b)(2) rules effective July 1, 2012).

2. ERISA Section 406(b).

ERISA section 406(b) prohibits any type of self-dealing by the plan fiduciary. A plan fiduciary is prohibited from using the plan’s assets in their own interest or act on both sides of a transaction involving a plan. Further, fiduciaries cannot receive “kickbacks” or any other payments for their personal benefit from third parties in connection with performing their fiduciary duties on behalf of the plan. Unlike securities law where the applicable rules require the disclosure of certain types of conflicts of interest, ERISA Section 406(b) prohibits the transaction altogether (and mere disclosure is never enough to cure a self-dealing violation).

G. Fiduciary Liabilities and Penalties

ERISA permits the DOL, plan fiduciaries and participants to bring civil actions against a fiduciary who breaches his or her duty. The fiduciary is personally liable for any losses to the plan resulting from his or her breach(es) and any profits that the fiduciary obtains through the use

of plan assets must be restored to the plan. Furthermore, the fiduciary is also subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.¹¹

The DOL must assess a civil penalty equal to 20% of the applicable recovery amount in the event of any breach of fiduciary responsibility or violation by a fiduciary or knowing participation in such breach or violation by any other person.¹² The DOL may, in its sole discretion, waive or reduce the penalty

There is a separate set of excise tax penalties for prohibited transactions under the Internal Revenue Code. Code section 4975 is applicable to both ERISA plans as well as non-ERISA retirement accounts, such as IRAs. If a prohibited transaction is left uncorrected, a “first tier” penalty of 15%-per-year will be assessed on the amount involved. A “second tier” penalty equal to 100% of the amount involved is assessed if the prohibited transaction has not been corrected by the time the IRS has assessed its penalty.

H. Co-Fiduciary Liability

ERISA Section 405(a) provides that a fiduciary shall be liable for a breach of fiduciary responsibility of another fiduciary in the following circumstances:

- If he participates knowingly in an act of such other fiduciary, knowing such act is a breach;
- If, by his failure to comply with the fiduciary standard of care under ERISA Section 404(a)(1), he has enabled such other fiduciary to commit a breach;
- If he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

Thus, a fiduciary who becomes aware of other fiduciaries’ actions that might violate the standards for a fiduciary must take all reasonable and legal steps to prevent such actions.

I. ERISA Bonding Requirement

1. Coverage. ERISA Section 412 requires bonding for every plan fiduciary and every person that handles funds or other property of the plan. The bond must provide protection to the plan against loss by reason of acts of fraud or dishonesty on the part of

¹¹ ERISA §409(a).

¹² ERISA §502(l).

fiduciaries or plan officials handling plan funds or property. The Department of Labor (“DOL”) has clarified that plan fiduciaries must be bonded only if they “handle” plan funds.¹³ A person who renders investment advice to a plan in a fiduciary capacity, but does not exercise and does not have the right to exercise discretionary authority with respect to purchasing or selling securities is not required to be bonded unless that person is acting in some other capacity that constitutes “handling” plan funds.¹⁴

2. Amount of Bond. The bond amount must be 10% of plan assets with a minimum of \$1,000 and a maximum of \$500,000. Effective for plan years beginning after December 31, 2007, the maximum bond amount will increase to \$1 million for plan that hold employer securities. The increased maximum applies to every person required to be bonded, even if that person does not have any duties relating to employer securities.

3. Special Rule for Registered Brokers and Dealers. Entities that are registered as a broker or a dealer under Section 15(b) of the Securities Exchange Act of 1934 will be exempt from the bonding requirement, provided that they are subject to the fidelity bond requirements of a self-regulatory organization.

II. Understanding Retirement Plan Business – Basic Roles of Providers

A. Basic Roles – Role of Platforms

1. Three Key Players. The retirement plan business consists of three types of services: recordkeeping services, administrative services and investment-related services.

2. Role of Recordkeeping Platforms. Recordkeeping platforms provide recordkeeping services on behalf of 401(k) plans and other types of retirement plans. Platform providers are also frequently referred to as “recordkeepers,” because they maintain plan records at the participant level and they also process financial transactions, such as plan contributions, investments and distributions.

They also serve as “platforms” from which a plan client can access of thousands of different investment funds and options. For this reason, platforms may be affiliated with a mutual fund family, such as Fidelity or American Funds (Fund Platforms), or group annuity providers such as John Hancock or Great West (Insurance Platforms). Platforms can also be run by “third parties” that are unrelated to investment providers

¹³ Field Assistance Bulletin 2008-4, Q-7.

¹⁴ Field Assistance Bulletin 2008-4, Q-9.

such as Ascensus or Mercer (Third Party Recordkeeping Platforms), or payroll providers such as Paychex or ADP (Payroll Platform).

And just as a broker-dealer can rely upon the services of a clearing firm (such as Pershing or NFS), smaller recordkeeping platforms frequently rely upon the services of 401(k) trading and settlement platforms (such as SunGard or Matrix).

B. Third Party Administrators

Third party administrators (or TPAs) provide administrative services on behalf of plans. Administrative services may include plan document services, IRS nondiscrimination testing, ERISA and tax compliance support, the preparation of governmental filings (such as Form 5500 annual returns), and administering complex benefit transactions (such as qualified domestic relations orders or QDROs).

TPAs work closely with the recordkeeping platforms. Unfortunately, TPAs and recordkeepers are often confused for one another and the terms are used interchangeably sometimes. However, their services are distinct. Whereas a recordkeeping platform's services are largely automated, a TPA's services are heavily labor-intensive and require highly trained and specialized personnel. A recordkeeping platform by its nature must be a well-capitalized firm with significant investments in its systems, whereas a TPA may be a very small firm that relies on the expertise of its staff (rather than its systems).

Part of the reason for the blurring of the line between recordkeepers and TPAs is that, in certain instances, the platform will offer both TPA and recordkeeping services together as a "bundled service." However, in many cases, the recordkeeping platform will rely upon dozens (if not hundreds) of small independent firms to serve as the TPA for the various plans recordkept at the platform. Accordingly, TPA firms work closely with all types of platforms, including Fund Platforms and Insurance Platforms.

C. Advisors

In the case of the 401(k) marketplace, advisors customarily provide investment-related services to the plan sponsor. Their chief service is helping the plan sponsor select the designated investment options for the plan's menu. They will also help the plan sponsor select an appropriate recordkeeping platform. In many cases, an advisor will not only select a new plan menu on behalf of the plan sponsor, but the advisor will also help the sponsor transition to a new recordkeeper. In addition to assisting with the plan's selection of investments and a recordkeeper, the advisor may also help the plan sponsor carry out its fiduciary responsibilities under ERISA, which include discharging your fiduciary duties prudently. The advisor may also

provide consulting services relating to the plan's design or other fiduciary and compliance matters.

Advisors can also assist plan participants. They can assist plan participants indirectly by maintaining "model portfolios" that provide non-individualized guidance on how a conservative, moderate or aggressive investor might allocate their 401(k) plan assets across the plan's menu of investment options. They can also provide non-fiduciary education to participants. Although not all advisors do, they can of course also offer fiduciary advice to participants on how they should invest their 401(k) funds.

III. Understanding Retirement Plan Business – Types of Advisors

A. Definition of "Investment Advice" Fiduciary

Advisors can be categorized as either fiduciary advisors or non-fiduciary advisors. Any advisor who renders "investment advice" (within the meaning of ERISA) for a fee is automatically deemed a fiduciary, even if the advisor has not formally been appointed by the plan sponsor to serve as a fiduciary.

Under Section 3(21)(A) of ERISA, a person is deemed to be providing "investment advice" if his activities are described by both of the following requirements:

1. The advice relates to the value of securities or other property or constitutes a recommendation as to the advisability of investing in, purchasing, or selling securities or other property; and
2. Either
 - (i) The person has discretionary authority or control with respect to purchasing or selling securities or other property of the plan, or
 - (ii) The person renders advice to the plan on a regular basis under a mutual agreement or understanding (written or otherwise) that it will be a primary basis for investment decisions, and that it will consist of individualized investment advice to the plan based on its particular needs.

Thus, an Investment Advice Fiduciary can provide discretionary or non-discretionary advice.

Investment “education” or general advice relating to investment strategy, such as describing the asset classes that are consistent with long-term investing, does not fall within the definition of investment advice, because it is not geared to the particular needs of a plan. Thus, an advisor can avoid fiduciary status if it limits its guidance to investment education, and refrains from providing “investment advice” to the plan sponsor and participants.

B. Non-Fiduciary Advisors

Many broker-dealers do not intend to serve their plan clients as fiduciaries, but their activities can cause them to cross the line. Even if a broker-dealer does not intend to serve a plan client as a fiduciary, if it provides “investment advice” to a plan sponsor or plan participants, it would be deemed a functional fiduciary. For example, in Ellis v. Rycenga Homes, Inc., No. 1:04-cv-694, 2007 WL 837224 (W.D. Mich. 2007), periodic meetings between a broker and a plan trustee to review plan investments over the course of a 20 year relationship which was the plan’s only source of investment advice and which resulted in the plan’s consistently following the broker’s suggestions led to the court’s holding that the broker and its broker-dealer were fiduciaries.

In certain instances, the broker-dealer will have a division or an affiliate that provides TPA services. Alternatively, the individual broker at a broker-dealer may have his or her own TPA firm, where the registered representative is also the plan’s TPA (even though the broker-dealer and the TPA firm are technically unrelated to each other). In these types of arrangements, the plan’s TPA services are closely tied to the plan’s investment services, and the TPA is sometimes referred to as a “Producing TPA”. Producing TPAs are typically eligible to earn special forms of compensation from platform providers, especially Insurance Platforms.

C. Types of Fiduciary Advisors

It is now fairly common to hear advisors and consultants in the retirement space talk about “3(21) fiduciaries” and “3(38) fiduciaries” under ERISA. These labels are somewhat confusing, because the term “fiduciary” as defined under Section 3(21) of ERISA refers to all types of fiduciaries. However, a “3(21)” fiduciary is customarily used to refer to an advisor who provides non-discretionary advice to plan clients. For example, an advisor who makes recommendations to a 401(k) plan sponsor concerning changes to the investment menu would be viewed as a 3(21) fiduciary. Since the plan sponsor has ultimate discretion over whether the recommendation should be followed, the plan sponsor remains responsible for all fiduciary investment decisions.

On the other hand, a “3(38) fiduciary” is a provider of discretionary investment advice. A 3(38) fiduciary is an advisor that has been appointed by the plan sponsor to serve as the plan’s

“Investment Manager” within the meaning of Section 3(38) of ERISA. Only certain types of persons or firms may serve as a 3(38) fiduciary. Specifically, to be an Investment Manager, the advisor generally must be a registered investment adviser (“RIA”), a bank or an insurance company. The advisor must acknowledge in writing that it is a plan fiduciary and it must also have investment discretion over the plan’s assets. For example, a 3(38) fiduciary to a 401(k) plan typically has the right to make unilateral changes to the 401(k) plan investment menu.

There is great benefit to the plan sponsor with a 3(38) fiduciary, since the plan sponsor is not responsible for the individual acts or omissions of the advisor. Instead, the plan sponsor only remains responsible for the initial appointment and the ongoing decision to use the Investment Manager.

IV. Understanding Retirement Plan Business – Types of Compensation

A. Compensation for Recordkeeping Platforms and TPAs

1. Platform Compensation

Many recordkeepers receive a combination of direct and indirect compensation. “Direct compensation” refers to the fees that the recordkeeping platform directly invoices and charges to the plan sponsor. The plan sponsor can pay these charges directly, or it can charge these amounts to the plan or participant accounts.

“Indirect compensation” refers to product-based compensation. These amounts are typically payable from the plan’s investments, such as mutual funds or group annuities. With regard to a plan’s mutual fund investments, a recordkeeper may receive 12b-1 fees, sub-transfer agency fees, shareholder servicing fees and revenue sharing payments from fund managers. With regard to a plan’s group annuity investments, a recordkeeper may receive maintenance charges and other types of revenue sharing payments from the annuity itself or the annuity provider.

In certain instances, a recordkeeping platform’s compensation may exclusively consist of product-based compensation only, thereby creating the impression to plan sponsors that their services are “free” since no amount is actually invoiced to the plan sponsor.

2. TPA Compensation

TPAs typically receive direct compensation for their services. In certain arrangements, they may also receive indirect compensation from investment providers.

For example, a producing TPA may receive override compensation from an Insurance Platform for transitioning new plan clients to such Insurance Platform.

B. Compensation Payable to Advisors

Different types of advisors receive different types of compensation. Non-fiduciary brokers and their broker-dealers customarily only receive indirect compensation. In the case of plan clients investing in mutual funds, the broker-dealer typically receives 12b-1 fees and revenue sharing from fund managers. In the case of plan clients investing in group annuities, the firm receives commission payments as well as revenue sharing from the annuity provider.

On the other hand, a RIA firm customarily receives direct compensation only. Typically, the compensation is stated in the form of an asset-based fee (with or without breakpoints). In light of the recent wave of 401(k) fee litigation and the 408(b)(2) fee disclosure rules, many investment firms and investment professionals are considering moving to a fee-based model.

Dual registrants (which are both registered as broker-dealers and RIAs) typically receive both direct and indirect compensation. For example, a dual registrant firm may charge an asset-based fee, which in turn is offset and reduced for any 12b-1 fees and revenue sharing from the plan's mutual funds.

C. ERISA Restrictions on Variable Compensation

Under the prohibited transaction rules of ERISA Section 406(a), a fiduciary advisor may not engage in any form of self-dealing. If a fiduciary advisor receives any type of variable compensation, where the advisor can increase its compensation by steering the plan client to certain investments, such advisor would be in violation of the prohibited transaction rules. The mere existence of a variable compensation arrangement is sufficient to result in a violation of ERISA. Unfortunately, even if an advisor were able to demonstrate that its actions were taken in good faith, its advice would be automatically tainted because of the variable compensation and the penalties for violating the prohibited transaction rules would apply. (As discussed earlier, the penalties include making the plan whole, excise taxes, civil penalties and other available equitable relief for the plan.)

As a result of these rules, broker-dealers receiving 12b-1 fees, commissions and revenue sharing at varying rates from a plan client's investments must always ensure that it does not provide any "investment advice" that could cause it to be viewed as a functional fiduciary. On the other hand, a RIA with level compensation would have the flexibility to provide fiduciary or non-fiduciary services to its plan clients.

D. 408(b)(2) Regulations

The DOL has finalized its regulations under ERISA Section 408(b)(2), which requires covered service providers to automatically provide comprehensive fee disclosures to plan sponsors before they enter into service arrangements. The new rules are effective July 1, 2012, and providers will need to make the required fee disclosures to all existing plan clients before this effective date. Recordkeeping platforms, TPAs and both fiduciary and non-fiduciary advisors, as well as certain other providers, are subject to these fee disclosure obligations.

With regard to advisors, the fee disclosures must state, if applicable, that the advisor will be providing services to the plan as a fiduciary within the meaning of ERISA or as an investment adviser under the Investment Advisers Act of 1940. The disclosures must also describe the services rendered on behalf of the plan as well as a description of the direct and indirect compensation. The compensation generally must be expressed as an amount or formula, with sufficient detail so that the plan sponsor may evaluate the reasonableness of such compensation. The covered service providers must also disclose all the direct and indirect compensation that the covered provider's affiliate or subcontractor expects to receive from the plan. The disclosure must include a description of the manner in which the compensation will be received, such as whether it will be billed or deducted directly from participants' accounts.

Due to the detailed nature of the required fee disclosures under ERISA Section 408(b)(2), advisors have yet another reason to confirm that their compensation arrangements are in compliance with the requirements of ERISA and the prohibited transaction rules.

V. **Firm Infrastructure To Support The Business**

A. Interaction of Firm Functions

1. Compliance
2. Product Development
3. Operations

B. Support For Retirement Business (Advisors)

VI. **ERISA Policies, Procedures and Internal Controls**

A. Identification of Retirement Accounts

B. Qualifications for FAs Offering Fiduciary Advice

Due to the heightened fiduciary standards under ERISA, broker-dealers may wish to adopt policies with regard to whether any financial advisors (“FAs”) are permitted to advise plan clients in a fiduciary capacity. Additionally, if the broker-dealer does allow such advice, it should consider adopting internal standards to ensure that the FA is indeed qualified to render fiduciary advice to plan clients.

In light of the prohibitions against the receipt of variable compensation in the case of fiduciary advisors, the broker-dealer (assuming it is dual registered as a RIA) should ensure that the FA is in fact an IAR of the broker-dealer’s corporate RIA. This will allow the FA to service the plan client under a level fee arrangement, where only a level direct fee is charged (or where any indirect compensation offsets and reduced the direct fee). Of course, this would necessarily mean that only FAs that have met all state law requirements to act as an IAR (*e.g.*, Series 65 or Series 7/66) would be eligible to serve as plan fiduciaries.

C. Suggested Criteria for FAs Offering Fiduciary Advice

To discourage FAs who are not genuinely committed to the retirement space from taking on any fiduciary responsibilities under ERISA, the firm should also consider imposing a minimum in plan assets and/or a minimum number of plan clients. For example, a firm may require a FA to have at least 10 plan clients and a minimum of \$25 million of plan client assets before allowing the FA to hold himself out as a provider of fiduciary services. Thus, a FA with only 1 or 2 plan clients would be prohibited from providing fiduciary advice to the plan client (if for some reason the FA or the plan client suggests that fiduciary advice be rendered).

The firm may also wish to consider requiring that the FA have a professional designation and that he or she remain in good standing with the applicable granting authority. By way of example, professional designations in the retirement area may include: (1) the Chartered Retirement Plans Specialist (CRPS) designation granted by the College for Financial Planning, (2) the Accredited Investment Fiduciary (AIF) designation granted by Center for Fiduciary Studies, and (3) the PLANSPONSOR Retirement Professional (PRP) designation granted by PLANSPONSOR Institute.

In addition, the firm may also wish to consider developing internal education and training resources that must be completed before FAs may hold themselves out as providing fiduciary advice to prospective plan clients.

D. Fee Leveling

E. New Account Inception (and 408(b)(2) Fee Disclosures)

F. Education and Training

To the extent that an advisor (*i.e.*, a broker-dealer, RIA or dual registrant) provides any plan services, it is essential that the firm provide some basic education and training to its personnel on ERISA and the implications of serving as a plan fiduciary.

Broker-dealers that receive any form of variable compensation should ensure that its registered representatives understand that they must not provide any fiduciary “investment advice” to plan clients. They should also be made aware of the potential penalties that may apply.

RIAs and other advisors that provide fiduciary services should also be providing education and training for their investment adviser representatives (“IARs”). The fiduciary duty of prudence under ERISA is largely a procedural requirement, and one of the simplest and most effective ways of demonstrating that the firm’s personnel is servicing plan clients prudently is with a structured and deliberate education and training program. Such program does not need to be overly complex, and it can be based on the content provided in this Legal Outline.

VII. Does ERISA Apply to Your Firm? You Might Be Surprised?

A. 401(k) Plans Maintained At Platforms

B. Brokerage Account Plans

1. IRA / Keogh Plan Accounts
2. Small Profit-Sharing Plans
3. Defined Benefit Plans

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