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Happily Ever After?

Investment Funds that Live with ERISA, For Better and For Worse (Part One of Five)

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The Employee Retirement Income Security Act of 1974, as amended (ERISA) [1] is a reactive and remedial statute which has been described as setting forth a "comprehensive and reticulated"[2] scheme to regulate the provision of employee benefits. It can be extremely complex at times, sometimes even seeming to operate counterintuitively in an attempt to achieve its protective goals,[3] prompting some to surmise that "ERISA" may really stand for "every ridiculous idea since Adam."[4] ERISA's basic goals,[5] however, are generally laudable, and it can be useful to understand what ERISA is trying to accomplish as to any given matter so that any difficulties in applying the rules can be understood in the context of their possible overbreadth. Without that context, the rules may tend to be perceived as more impenetrable, possibly exacerbating difficulties in understanding and frustration in pursuing compliance obligations.

There may have been a time when various investment professionals commonly disdained taking investments from pension plans subject to ERISA. The notion of having to comply with ERISA, of all things, in the case of someone who is not charged with addressing human-resources concerns or other benefits-related matters can be an extremely foreign concept. Only as investment capital has become increasingly concentrated in pension plans have investment professionals more broadly realized that dealing with ERISA might be necessary or even preferable.

Pension assets,[6] including assets held under plans subject to ERISA,[7] have been referred to as "the biggest lump of money in the world."[8] Like investment funds, pension funds hold pools of investment capital not for devotion to operations but for deployment in investment portfolios pending benefit distributions. As a result, the appetite for accepting ERISA plans into investment vehicles has grown, at least to the extent that investments are limited and do not cause the fund and the manager to become subject to ERISA.[9]

At the same time, various collective, commingled, and other pooled investment strategies have proliferated and have become increasingly entrenched in the market. Such strategies facilitate diversification, generate economies of scale, and allow increased access to desired expertise. Indeed, an emerging trend has developed for multiple layers of collective investing, often with the use of a "fund of funds" to invest in still other downstream collective vehicles. [10] The rise of collective investing, together with a greater appreciation of the value of managing ERISA plan assets, has prompted managers to accept ERISA plan investments even if ERISA-related compliance obligations would be triggered.[11] It is in this context that ERISA's application to funds subject to ERISA or the corresponding provisions of the U.S. tax code (Plan Assets Funds) arises.

A growing number of investment funds may be willing to subject themselves to full ERISA regulation. Indeed, while certain changes made by the Pension Protection Act of 2006 made it easier for an investment fund to avoid the application of ERISA altogether, other changes made thereby may conversely have made it easier for a fund to comply with ERISA as a fund subject thereto. [12] Thus increasing numbers of managers seem to be willing to consider having themselves be subject to the full panoply of ERISA regulations and to structure their funds as ERISA-compliant. In effect, "let's just go with 'no plans'" has often migrated to "show me the money."[13]

All of these trends focus attention on how the various rules under ERISA are brought to bear when a fund is deemed under the so-called "Plan Assets Regulation" of the U.S. Department of Labor (DOL) and ERISA Section 3(42). [14] Generally speaking, where there is any impact, one might expect the collective-investment context to exacerbate the ERISA issues and make things worse. For example, potential conflicts of interests may arise for a number of plans and related parties.[15] However, as explored below, resulting issues may ultimately be manageable,[16] and, in some cases, things may even be better, as compliance in certain respects can actually be facilitated rather than mpeded by a collective-investment approach.[17] Regardless, once it is decided that the compliance burden is a toll charge worth paying for proceeding

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with a fund subject to ERISA, the ERISA gauntlet will need to be run.

The discussion herein does not generally address ERISA's generally applicable underlying rules. Instead, the following discussion will address the particular application of ERISA's fiduciary rules to multi-investor funds actively managed by a third-party adviser registered under the Investment Advisers Act of 1940, as amended (Advisers Act), and intentionally operated from the outset to hold plan assets and thereby be subject to ERISA.[18]

ERISA "Plan Assets" Rules

Assume for a moment that a particular fund is not understood to be subject to ERISA. The manager could easily be frustrated to learn that the fund in fact is subject to ERISA and that the manager might be an ERISA fiduciary merely because some of the investors in the fund are ERISA-governed plans. Likewise, a counterparty dealing with an ostensibly nonplan entity could be oblivious to ERISA concerns, only to discover that the entity is governed by ERISA and that the counterparty could be subject to substantial excise taxes[19] and other possible sanctions and remedies.[20] Unfortunately, the fundamental question of when a party is managing or dealing with the assets of a plan emerged quickly after ERISA's enactment[21] as a deceptively nuanced question.[22]

In 1986, after proceeding down a circuitous path,[23] the DOL issued a regulation on how to identify "plan assets."[24] In 2006,[25] the concept became enshrined in the statute itself, in Section 3(42) of ERISA. The concept of "plan assets" is a critical one because it serves as a gateway to the general application of ERISA's fiduciary scheme, which imposes responsibilities that have been described as "the highest known to law."[26] Under the Plan Assets Regulation, unless an exception applies,[27] a plan's equity or equity-like investment in another entity will cause the entity's assets to be considered plan assets.[28] Essentially, the entity deemed to be holding "plan assets" becomes a look-through entity, subject to ERISA.[29]

The statutory ERISA rules that fundamentally apply to plans also, in turn, generally apply to look-through vehicles.[30] In some cases, efforts have been made to modernize the rules to keep pace with emerged and emerging trends toward collective investing,[31] and in other cases those efforts seem to lag. [32] Regardless, the sponsor of and investors in a Plan Assets Fund will need to navigate through the rules, making judgments as to how those rules apply in varying contexts.[33]

Once a manager decides to proceed with a Plan Assets Fund and accept fiduciary status,[34] it is helpful as a basic matter for the manager to understand where it is acting in a fiduciary capacity and where it is not. For example, negotiating the fund terms and exercising one's own rights under the applicable contractual provisions may be fundamentally nonfiduciary acts. The issue is relevant because fiduciary acts, unlike nonfiduciary acts,[35] are subject to, among other things, "exclusive purpose" and "prudence" requirements under ERISA Section 404(a) and self-dealing prohibitions under ERISA Section 406(b).[36]

Certain General Fiduciary Considerations

Delegation

In General

ERISA identifies responsible fiduciaries and provides rules for the delegation and allocation of fiduciary responsibility.[37] Where delegation is proper, the delegator's responsibility is limited to the selection, retention, and monitoring of the delegatee.[38] However, an improper delegation would, at a minimum, leave the putative delegator liable for the acts and omissions of the putative delegatee.[39]

There are a variety of reasons to be concerned about proper delegation. Most fundamentally, the delegator may want the insulation that comes with a proper delegation. In addition, the delegatee might desire for its own reasons to be properly appointed. For example, the business relationship between the delegator and the delegatee could be jeopardized if the delegator believes that insufficient attention has been paid to structuring the delegation properly and protecting the delegator.

Continued on next page

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www.hflawreport.com Volume 7, Number 33 September 4, 2014

A number of ERISA provisions are applicable with respect to delegations of fiduciary responsibility, including the following:

Section 402(a) provides:

> (1) [Each plan's] written instrument . . . shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.
> (2) . . . [T]he term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

Under Section 402(b)(2), every plan must:

> describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 405(c)(1)).

Under Section 402(c), a plan may provide:

> 1) that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan . . . ;
> (2) that a named fiduciary, or a fiduciary designated by a named fiduciary pursuant to a plan procedure described in section 405(c)(1), may employ one or more persons to render advice with regard to any responsibility such fiduciary has under the plan; or
> (3) that a person who is a named fiduciary with respect to control or management of the assets of the plan may appoint an investment manager or managers to manage (including the power to acquire and dispose of) any assets of a plan.

Under Section 3(38), an "investment manager" is a fiduciary, "other than a trustee or named fiduciary," the foregoing phrase being contained in a parenthetical phrase in Section 3(38), who (i) "has the power to manage, acquire, or dispose of any asset of a plan "; (ii) is an investment adviser, bank, or insurance company described in Section 3(38)(B); and (iii) "has acknowledged in writing that he is a fiduciary with respect to the plan."

Section 403(a) provides:

> [With certain exceptions specified] in subsection (b), all assets of an employee benefit plan shall be held in trust by one or more trustees. . . . [T]he trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that–
>
> (1) the plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to [ERISA], or
> (2) authority to manage, acquire, or dispose of assets of the plan is delegated to one or more investment managers pursuant to section 402(c)(3).

Section 405(c) provides:

> (1) The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.
> (2) If a plan expressly provides for a procedure described in paragraph (1), and pursuant to such procedure any fiduciary responsibility of a named fiduciary is allocated to any person, or a person is designated to carry out any such responsibility, then such named fiduciary shall not be liable for an act or omission of such person in carrying out such responsibility except to the extent that–
>
> (A) the named fiduciary violated section 404(a)(1) [(setting forth certain basic general prudence-related and other fiduciary duties)] . . . -
>
> (i) with respect to such allocation or designation,
> (ii) with respect to the establishment or implementation of the procedure under paragraph (1), or
> (iii) in continuing the allocation or designation; or
>
> (B) the named fiduciary would otherwise be liable in accordance with subsection (a).

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(3) For purposes of this subsection, the term "trustee responsibility" means any responsibility provided in the plan's trust instrument (if any) to manage or control the assets of the plan, other than a power under the trust instrument of a named fiduciary to appoint an investment manager in accordance with section 402(c)(3).

Section 405(d)(1) provides:

If an investment manager or managers have been appointed under section 402(c)(3), then, notwithstanding subsections [sic] (a)(2) and (3) and subsection (b), no trustee shall be liable for the acts or omissions of such investment manager or managers, or be under an obligation to invest or otherwise manage any asset of the plan which is subject to the management of such investment manager.

Under these rules, for the manager of a Plan Assets Fund to offer to appointing plan fiduciaries the insulation and other protection that comes with the manager's status as an investment manager under Section 3(38) of ERISA, the manager (1) if not a bank or insurance company, will need to be registered under the Advisers Act or under state law, as contemplated by Section 3(38); and (2) will need to acknowledge in writing its status as a fiduciary. Historically, the need to register has dissuaded some managers from operating their funds as Plan Assets Funds. However, the elimination of registration exemptions under amendments to Title IV of the Dodd-Frank Wall Street Reform and Consumer Protection Act[40] has led more managers to register.

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{1] Unless otherwise indicated, all section references herein are to sections of ERISA. In addition, unless otherwise indicated, references herein to provisions of ERISA governing prohibited transactions (and to "parties in interest" under Section 3(14)) should be deemed to extend to the corresponding provisions of Section 4975 of the Internal Revenue Code of 1986, as amended (Code) (and to "disqualified persons" under Section 4975(e)(2) of the Code). See also infra n.30.

[2] Nachman Corp. v. Pens. Ben. Guar. Corp., 446 U.S. 359, 361 (1980); see also Mertens v. Hewitt Assocs., 508 U.S. 248, 262 (1993) (referring to ERISA as "enormously complex and detailed"). See generally Rossina Barker & Kevin O'Brien, "The ERISA Common Law and the Limits of Reticulation," 14 Benefits L.J. 1, 1-2 (2001) (explaining what the courts mean when they say that ERISA is "comprehensive and reticulated").

[3] See, e.g., infra nn.19-28 and accompanying text; "Happily Ever After? – Investment Funds that Live with ERISA, For Better and For Worse (Part Three)," nn.2-8 and accompanying text; Part Five, nn.27-31 and accompanying text. See generally Andrew L. Oringer, "A Regulatory Vacuum Leaves Gaping Wounds - Can Common Sense Offer a Better Way to Address the Pain of ERISA Preemption?" 26 Hofstra Lab. & Empl. L.J. 409 (Spring 2009), edited ver. reprinted in NYU Rev. of Empl. Bens. and Exec. Comp., Ch.10 (Lurie, ed., 2009). A degree of ERISA's arguably counterintuitive application, at least in the area of remedies, would seem to have been addressed to a significant extent by Amara v. CIGNA, 563 U.S. 131 S. Ct. 1,866 (2011). See generally Andrew Oringer, "What Does Amara CIGNA-fy?" Bloomberg BNA Pension and Benefits Blog (June 2011).

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[4] Precise original credit for this backronym seems unclear. See, e.g., Jayne Elizabeth Zanglein, " Employee Benefits For General Practitioners: Ten Rules That Every Attorney Should Know About ERISA," 26 Tex. Tech L. Rev. 579, 580 (1995) ("[A]t least according to legend, ERISA is an acronym for Every Ridiculous Idea Since Adam."); Robert Stowe England, "The Last Great Untapped Source of Capital," PlanSponsor (April 1993) ("'Bert Lance once told Jimmy Carter that ERISA really stands for Every Ridiculous Idea Since Adam,' says Joseph Simone . . . ."); 150 Cong. Rec. 24,146 (Nov. 19, 2004) ("I ran a small business . . . , and I thought the better title for the bill was "Every Ridiculous Idea Since Adam." (statement of Sen. Nickles)).

[5] Section 1(b) states: "It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts."

[6] The reference in text is to ERISA §3(2) "pension plans." Although ERISA §3(3) covers "employee benefit plans," and in theory, "welfare plans" as defined in ERISA §3(1) are also relevant, as a practical matter the majority of invested assets would seem to come from pension plans. See, e.g., DOL, Report to the GAO, "Opportunities Exist for Improving Management of the Enforcement Program," GAO-02-232 (Mar. 2002), p.7 (including at Figure 3 a bar chart illustrating that the overwhelming majority of employee benefit assets is held in pension plans (as opposed to welfare plans)).

[7] ERISA compliance raises a host of concerns, given ERISA's singular application to a broad range of plans throughout the United States, comprehensive remedies (including remedies directly applicable to parties in interest), federal enforcement, comparatively more extensive developed law and practice, and potentially high-profile exposure. However, non-ERISA plans raise legal obligations as well, and in some cases there are issues that may be more troubling in the non-ERISA context than under ERISA. For example, disclosure issues on non-ERISA funds have caused funds to turn their back on investment capital from state plans. See, e.g., Arleen Jacobius, Sequoia Tells University: Leave Venture-Cap Fund, PENS. & INVS., Aug. 4, 2003. This in turn has caused some state legislatures to reevaluate their disclosure rules. See, e.g., Arleen Jacobius, Disclosure Exemption, PENS. & INVS., Apr. 5, 2004; Editorial, Putting an End PENS. & INVS., Mar. 21, 2011 (states are investigating pay-to-play scandals regarding the use of placement agents in connection with investments from state plans).

[8] White Paper: "The Biggest Lump of Money in the World" (NBC television broadcast July 27, 1985).

[9] See 29 C.F.R. §2510.3-101(f); see also ERISA §3(42).

[10] See, e.g., Joseph G. Nicholas, Hedge Fund of Funds Investing: An Investor's Guide 8 (Bloomberg Press 2004) ("[F]und of funds growth has actually outpaced hedge fund industry growth.").

[11] See 29 C.F.R. §2510.3-101(f); see also ERISA §3(42).

[12] See Andrew L. Oringer, Ancillary Provisions of the Pension Funding Bill May Contribute to the Evolution of ERISA, 33 Pens. & Ben. Rep. (BNA) 1,829 (Aug. 18, 2006).

[13] Jerry Maguire (TriStar Pictures 1996) ("Show me the money!" repopularized (albeit not coined) therein by Rod Tidwell, played by Cuba Gooding, Jr.).

[14] See also John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86 (1993) (seminal case relating to general accounts of an insurance company); ERISA §401(b)(2), (c) (statutory provisions relating to "guaranteed benefit policies" and general accounts of insurance companies).

[15] See Part Three, nn.4, 14-15 and accompanying text.

[16] See, e.g., Part Five, nn.1-31 and accompanying text.

[17] See, e.g., Part Three, nn. 16-18, 44 and Part Five, nn.4, 42 and accompanying text. While not the focus hereof, bank collective investment funds and insurance company pooled separate accounts potentially allow less stress to be placed on a number of ERISA concerns in the case of investment through those types of collective vehicles by virtue of Prohibited Transaction Class Exemption 91-38 and Prohibited Transaction Class Exemption 90-1, respectively. See infra n.18; see also ERISA §408(b)(8) (statutory exemption for certain matters relating to bank common or collective trusts or pooled investment funds, and insurance company pooled investment funds); Proh. Trans. Class Exempt. 95-60 (relating to insurance company general accounts).

[18] A broad range of structuring issues therefore fall beyond the scope of the discussion herein, including, for example, (i) how to satisfy the "significant" participation test, 29 C.F.R. §2510.3-101(f); (ii) issues that may arise in the case of a conversion or transfer from a fund whose assets do not constitute "plan assets" to a Plan Assets Fund; (iii) how to qualify as a "venture capital company" or a "real estate operating company," 29 C.F.R. §2510.3-101(c), (d); (iv)

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how to avoid "plan assets" treatment in the case of an essentially single-investor fund, 29 C.F.R. §2510.3-101(h); (v) issues that may arise for "plan assets" feeders; and (vi) where a feeder entity is used, how "plan assets" issues may manifest themselves at the feeder level. See Steven W. Rabitz & Andrew L. Oringer, "Is That Your (Interim) Final Answer? New Disclosure Rules Under ERISA to Impact Many Hedge Funds," The Hedge Fund Law Report, Vol. 3, No. 33 (Aug. 20, 2010) (discussing a variety of then-current ERISA issues that may arise for hedge funds). The stakes can be quite high in a decision to be subject to ERISA, particularly in the case of potential qualification as a venture capital operating company (VCOC) or a real estate operating company (REOC), where a failure to qualify early could result in an inability ever to be VCOC or REOC. See Andrew L. Oringer & Jeffrey A. Lieberman, The Sun Never Sets on ERISA: ERISA Implications for Foreign Investment Funds, 4 ERISA & Benefits J. 77 (1996).

[19] See I.R.C. §4975(c)(1)(A)-(D).

[20] See, e.g., ERISA §405(a); Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238 (2000).

[21] See, e.g., Treas. Reg. §2509.75-2.

[22] In a number of situations, the status of an investor as being subject to ERISA is not obvious from reviewing the name of the counterparty. For example, a plan may be holding through a nominee, see Part Five, n.3, a plan may be operating through a subsidiary, or a fund with plan investors may be a Plan Assets Fund.

[23] See 44 Fed. Reg. 50,363 (Aug. 28, 1979); 45 Fed. Reg. 38,084 (June 6, 1980); 50 Fed. Reg. 961 (Jan. 8, 1985); 50 Fed. Reg. 6362 (Feb. 15, 1985); 51 Fed. Reg. 4262 (Nov. 13, 1986).

[24] While the Plan Assets Regulation purports to address the "definition" of "plan assets," its text does not contain an actual definition of that term.

[25] Pension Protection Act of 2006 §611(f).

[26] See, e.g., Henry v. Champlain Enters., 334 F. Supp. 2d 252, 270–72 (N.D.N.Y. 2004) (citations omitted), vacated and remanded, 445 F.3d 610 (2d Cir. 2006); Henry v. U.S. Trust Co. of Cal., 569 F.3d 96, 100 (2d Cir. 2009); Donovan v. Bierwirth, 680 F.2d 263, 272 n.8 (2d Cir. 1982); Jones v. American Gen. Life & Accident Ins. Co., 370 F.3d 1065, 1071 (11th Cir.), reh'g en banc denied, 116 F. App'x 254 (2004); ITPE Pension Fund v. Hall, 334 F.3d 1011, 113 (11th Cir. 2003); Herman v. Nationsbank Trust Co., 126 F.3d 1354, 1368 (11th Cir. 1997). In some cases, the desire to avoid coverage by ERISA can be so strong that there is a willingness to take the step of registering under the Investment Company Act of 1940, as amended (the 1940 Act), in order to get the benefit of the ERISA exception. See ERISA §401(b); 29 C.F.R. §2510.3-101(a)(2), (h)(1); DOL Adv. Op. 2009-04A (Dec. 4, 2009). Depending on the details surrounding a particular offering, this approach can raise questions as to whether the registration is effective under the 1940 Act (and, therefore, for ERISA purposes) if the registration is ultimately viewed as not having been required by the 1940 Act. See 29 C.F.R. §2510.3-101(a)(2), (b)(2) (providing for an exception in the case of "publicly-offered securities").

[27] A Plan Assets Fund intentionally operated so as to be subject to ERISA is not endeavoring to avail itself of any such exception.

[28] See 29 C.F.R. §2510.3-101(a)(2). While this expansive and inclusive approach may be seen as consistent with ERISA's remedial underpinnings, the result can be to capture as "plan assets" entities a range of vehicles that might not intuitively seem to be look-through entities.

[29] In addition, apart from the basic look-through question, it will not always be clear, particularly in the case of certain financial transactions, which assets are generally subject to ERISA. For example, ERISA considerations for futures contracts are not straightforward. See DOL Adv. Op. 82-049A (Sept. 21, 1982); Letter regarding Proh. Trans. Class Exempt. App. No. D-3006 from Elliot I. Daniel, U.S. Dept. of Labor, to Mary L. Schapiro, Futures Industry Association (Aug. 16, 1985); A. Richard Susko & Bronislaw E. Grala, Considerations Under ERISA and the CEA Regarding the Use of Futures Contracts by Employee Benefit Plans, 2 Pension Plan Investments: Confronting Today's Legal Issues (Practicing Law Institute 1991).

[30] I.R.C. §4975 also applies to plan assets. See 29 C.F.R. §2510.3-101(a)(1); Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47,713 (1978), 3 C.F.R. (1978) Comp. 332, §102(a) (transferring certain authority under I.R.C. §4975 to the Secretary of Labor). There are several differences between ERISA and corresponding provisions of I.R.C. §4975. For example, (i) unlike in the corresponding provisions of I.R.C. §4975(c)(1), there is a "knows or should know" standard in ERISA §406(a), see Part Three, n.8; (ii) there is no analog in

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I.R.C. §4975 to ERISA §406(b)(2), see Part Four, n.43, nor ERISA §406(a)(1)(E) (relating to employer securities); (iii) unlike the corresponding provisions of ERISA §3(14), I.R.C. §4975(e)(2)(H) and (I) (relating to certain parent relationships) do not refer to subparagraph (B) (relating to service providers) of I.R.C. §4975(e)(2); and (iv) ERISA §3(14)(H) refers to an "employee," whereas I.R.C. §4975(e)(2)(H) refers to a "highly compensated employee."

[31] See Part Three, nn.16-20 and accompanying text.

[32] See Part Five, nn.5-31 and accompanying text.

[33] While ERISA's fiduciary rules generally apply both to plans and plan-asset vehicles, fiduciaries of plan-asset vehicles may not see themselves as ERISA fiduciaries to the same extent as would fiduciaries employed at the level of the plan sponsor and other more direct plan fiduciaries. Indeed, fiduciaries of certain plan-asset vehicles may be the very same persons who, in other contexts, are facing plans (as investors, counterparties, sponsors of vehicles that are not Plan Assets Funds, etc.) and who may find themselves resisting various demands and requests made on behalf of plans in furtherance of efforts to pursue ERISA compliance. These same persons may now find themselves needing to adopt perspectives that may be contrary to those in which they may have developed over the course of time in their businesses. For example, in one context, the sponsor of an entity that is not a Plan Assets Fund might resist providing certain assurances relating to ERISA, while as a plan assets investor, that same party might seek those same assurances. Ultimately, it is critical for the manager as ERISA fiduciary to focus on ERISA's rules from the perspective of a party that is itself subject to the rules.

[34] As a practical matter, multi-investor, actively managed funds may be relatively more likely to be operated as Plan Assets Funds where comprehensive ERISA regulation may be more manageable. In the case of a hedge fund, for example, the investment strategy may be focused on publicly traded securities, c.f., e.g., H.R. Rep. 93 1280, 93rd Cong., 2d Sess., 307 (1974) ("In general, it is expected that a transaction will not be a prohibited transaction . . . if the transaction is an ordinary 'blind' purchase or sale of securities through an exchange where neither buyer nor seller (nor the agent of either) knows the identity of the other party involved."), and fee structures are sometimes relatively more straightforward, and, in the case of a fund of funds, the likelihood of certain ERISA issues arising regarding the acquisition and disposition of portfolio investments may be lower and, again, fee structures may be relatively more straightforward. In contrast, investment strategies involving non-public direct investments and private equity fee structures may generally be less conducive to the use of a Plan Assets Fund. In addition, in a number of cases, it is becoming increasingly difficult to pigeon-hole a fund into a specified category. So, for example, a hedge fund might make private equity investments, a real estate investment trust may devote a portion of its investment capital to publicly traded securities, a securitization vehicle may hold fund interests to be securitized, and so forth. In such cases, it can be even more difficult to categorize and compartmentalize the various required analyses, and issues across a broader spectrum may need to be considered.

[35] See, e.g., Useden v. Acker, 947 F.2d 1563 (11th Cir. 1991) (bank that loans money to a plan and exercises its rights as lender does not thereby become fiduciary of plan), cert. denied, 508 U.S. 959 (1993); see also Ershick v. United Mo. Bank, 948 F.2d 660 (10th Cir. 1991) (declining to conclude that a prohibited transaction occurred where a bank was trustee of an employee stock ownership plan and a major secured lender of the sponsoring company); 75 Fed. Reg. 65,263, 65,267-68 (Oct. 22, 2010) (discussing proposed regulation relating to the definition of "investment advice"); Board of Trustees of the AFTRA Ret. Fund v. JPMorganChase Bank, 09 Civ. 686 (SAS) (S.D.N.Y. Aug. 5, 2011) (". . . [The defendant was not acting in a fiduciary capacity when it extended repo financing . . . , selected . . . 'best' assets as collateral, and seized that collateral [upon default]"), later dec., 1:09-cv-09333-BSJ-DCF (S.D.N.Y. Mar. 27, 2013); cases cited in Part Four, n.2; cf. DOL Adv. Opn. 2013-01A (Feb. 7, 2013) ("We assume that . . . the parties understand that the Clearing Member will not be acting in a fiduciary capacity with respect to the actions taken in liquidating and closing out an account. . . . It appears that a Clearing Member would be acting . . . to protect itself, the CCP and the clearing process, when exercising such rights . . . . [I]t is the Department's opinion that a Clearing Member acting pursuant to the Agreement negotiated with the plan fiduciary would not be . . . a plan fiduciary within the meaning of section 3(21)(A)(i) solely by reason of liquidating the swap contracts in a plan's account and selling any collateral posted as margin in order to pay off losses suffered by such account."); DOL Adv. Op. 2011-07A (Apr. 25, 2011) ("[T]he Wrapper is not negotiating on behalf of the plan. Instead the Wrapper is negotiating the terms of the investment parameters to reduce its own exposure under the wrap contract."). A number of issues relating

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relating to fiduciary status could become substantially more complicated depending on the manner in which the proposed ERISA §3(21) regulation, Prop. Reg. §2550.3-21, may be finalized. See also DOL News Rel. 11-138-NAT (Sept. 19, 2011) (stating that the Section 3(21) regulation will be reproposed before being finalized).

[36] See 29 C.F.R. §2509.75-8 (Q&A FR-16) ("The personal liability of a fiduciary who is not a named fiduciary is generally limited to the fiduciary functions, which he or she performs with respect to the plan."); cf. 29 C.F.R. §2550.3-21(c)(2) ("A person who is a fiduciary . . . by reason of rendering investment advice . . . , or having given authority or responsibility to do so, shall not be deemed to be a fiduciary regarding any [other] assets of the plan . . . .").

[37] See, e.g., ERISA §402(a)(1) (providing for named fiduciaries "to control and manage the operation and administration of the plan"), §402(b)(2) (providing for allocation procedures), §402(c) (permitting multiple roles and the use of additional advisors and managers), §403(a)(1), (2) (relating to trustee authority and discretion where there are named fiduciaries and investment managers), §405(c)(1) (allowing certain allocations and delegations); 29 C.F.R. §2509.75-5, -8 (covering, among other things, a variety of appointment, responsibility and delegation issues); see also DOL Field Assistance Bulletin 2008-01 (Feb. 1, 2008) ("[I]n accordance with [ERISA's] statutory framework . . . , authority over a plan's assets subject to the trust requirement of section 403(a) of ERISA, including a plan's legal claim for delinquent contributions, must be assigned to (i) a plan trustee with discretionary authority over the assets, (ii) a directed trustee subject to the proper and lawful directions of a named fiduciary, or (iii) an investment manager. . . . Thus, although a fiduciary may enter into a trust agreement under which a particular trustee is not responsible for monitoring and collecting contributions, if no trustee or investment manager has this responsibility, the fiduciary with authority to hire the trustees may be liable for plan losses due to a failure to collect contributions because the fiduciary failed to specifically allocate this responsibility. . . .").

[38] Ordinarily, the appointing fiduciary, even in the case of a proper delegation, will always have ERISA §404 selection and monitoring obligations with respect to its appointments. See 29 C.F.R. §2509.75-8 (Q&A FR-17), §2509.08-2(1) ("The fiduciary's duties . . . require that the named fiduciary appointing an investment manager periodically monitor the activities of the investment manager with respect to the management of plan assets . . . ."), §2550.404a-5(f) (expressly providing that satisfying certain rules regarding the making available of investments in participant-directed individual-account plans are not "intended to relieve a fiduciary from its duty to prudently select and monitor providers of services to the plan or designated investment alternatives offered under the plan"); see also Leigh v. Engle, 727 F.2d 113, 135 (7th Cir. 1984) ("[Fiduciaries] were obliged to take prudent and reasonable action to determine whether the administrators were fulfilling their fiduciary obligations."), on remand, 619 F. Supp. 154 (N.D. Ill. 1985), 669 F. Supp. 1390 (N.D. Ill. 1987), aff'd, 858 F.2d 361 (7th Cir. Ill. 1988), cert. denied sub nom. Est. of Johnson v. Engle, 489 U.S. 1078 (1989); Reich v. Hosking, 20 Empl. Benefits Cas. (BNA) 1,090 (E.D. Mich. Mar. 7, 1996) (stating that a fiduciary has a duty to be apprised of a plan's investments and be reasonably assured that those investments are prudent and legal, notwithstanding a delegation of investment decisions); cf. ERISA §405(d)(2) ("Nothing in this subsection [(which generally provides that a plan trustee is not liable for the acts and omissions of certain investment managers)] shall relieve any trustee of any liability under [Part 4 of Subtitle B of Title I of ERISA] for any act of such trustee."); see also Part Two, nn.28-29 and accompanying text (discussing diversification).

[39] See generally 29 C.F.R. §2509.75-8 (Q&As FR-13, FR-14). Based on traditional common-law principles, an improper delegation could result in strict liability for the putative delegator. See, e.g., Jerome J. Curtis, Jr., The Transmogrification of the American Trust, 31 Real Prop., Prob. & Tr. J. 251, 270 (Summer 1996) ("But what of otherwise proper actions by those to whom nondelegable powers had been given? Suppose a trustee relinquished all investment decisions to a stockbroker, and, although the broker exercised the highest degree of care in selecting investments, the portfolio suffered a loss. The traditional rule in America as well as in England would hold the trustee strictly accountable for the losses in such circumstances."). Even assuming that an improper delegation effectively could give rise to strict liability under common law, ERISA, while in some respects derived from the common law of trusts, see e.g., Beck v. Pace Int'l Union, 551 U.S. 96, 101 (2007) (stating that when an employer is determining whether it is in the role of plan sponsor or plan administrator that "inquiry . . . is aided by the common law of trusts which serves as ERISA's backdrop.")

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(citations omitted), ultimately provides its own structural paradigm, see Marshall v. Glass/Metal Assoc. and Glaziers and Glassworkers Pens. Plan, 507 F. Supp. 378, 383 (D. Haw. 1980); Marshall v. Teamsters Loc. 282 Pens. Tr. Fund, 458 F. Supp. 986, 990 & n.8 (E.D.N.Y. 1978), which is focused on the identification of responsible parties and arguably less directed toward ascribing ultimate liability merely on account of a failed delegation.

[40] Dodd-Frank Wall Street Reform and Consumer Protection Act §410, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

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