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Happily Ever After?

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

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This is the second article in our five-part serialization of a treatise chapter by Dechert LLP partner Andrew Oringer. The chapter describes – clearly, comprehensively and with citations to a range of authority that would be immensely time-consuming to compile independently – the ERISA provisions of primary relevance to private funds. Private fund managers need to understand ERISA if they market to private funds, and we have yet to encounter a more pithy and pointed route to understanding relevant ERISA concepts (and excluding extraneous concepts) than this chapter. This second article in the series focuses on fiduciary duty considerations, including delegation, allocation of investment opportunities, varied interests of fund investors, indemnification and insurance, investments in portfolio funds, enforcement-related matters and diversification requirements.

Certain General Fiduciary Considerations (continued)

Delegation to Other Investment Managers

Delegation issues may arise in a Plan Assets Fund context where investments by the Plan Assets Fund in other entities result in there being additional fiduciaries with respect to the Plan Assets Fund, and as a result, with respect to its plan investors as well. For example, if a Plan Assets Fund makes an equity or quasi-equity investment in another Plan Assets Fund, those with discretion over the downstream Plan Assets Fund and those who provide investment advice with respect to the downstream entity's assets may be fiduciaries of the plans that invest in the upstream Plan Assets Fund.

One way of addressing additional downstream delegation issues when a Plan Assets Fund makes an equity or quasi-equity investment in another entity is to ensure that the vehicles below are not themselves Plan Assets Funds (i.e., that they satisfy an exception under the Plan Assets Regulation or another applicable exception). However, as suggested in the introductory portion hereof, the collective investment of assets subject to ERISA is becoming increasingly common, and multilayered investment in Plan Assets Funds may be an intended result.

Alternatively, the manager of the top-tier Plan Assets Fund may be designated as a named fiduciary of the investing plan. That designation could be effected by a procedure contemplated by Section 402(a)(2)(A) or (B) pursuant to which the manager of the downstream Plan Assets Fund would become an investment manager of the plan that has invested in the top-tier Plan Assets Fund.[1]

DOL Advisory Opinion 77-69/70A[2] confirms that such an approach is acceptable. In response to a concern that the parenthetical phrase, "other than a trustee or named fiduciary," in Section 3(38) might somehow prevent an investment manager from doubling as a named fiduciary, the DOL stated, "We are of the view that the parenthetical expression 'other than a trustee or named fiduciary' does not prohibit a named fiduciary from serving as an investment manager for plan assets, but rather that the parenthetical expression is intended to clarify the circumstances under which a person is an investment manager." Thus, Advisory Opinion 77-69/70A clarifies that an investment manager, which by virtue of that status will offer insulation from acts-and-omissions liability to a named fiduciary who appoints the investment manager, may also be a named fiduciary itself, and by virtue of that status will in turn have such insulation itself with respect to the appointments it makes of other investment managers. DOL Advisory Opinion 77-69/70A then goes on to indicate that named-fiduciary status may indeed be necessary to achieve this latter level of insulation when the named fiduciary proceeds to make second-level appointments; Advisory Opinion 77-69/70A states:

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> Under the statutory scheme . . . an investment manager as such does not have named fiduciary or trustee powers to allocate or designate its investment management function for plan assets to other persons (unless the investment manager is explicitly appointed as a named fiduciary with respect to such assets pursuant to section 402(a)(2) of ERISA with power to allocate and designate under section 405(c)(1) of ERISA) . . . [3]

But is it correct that the party directly appointing investment managers must be a named fiduciary in order for its delegatees to be investment managers, as Advisory Opinion 77-69/70A suggests? The answer appears to be "maybe not." In particular, a subsequently issued Advisory Opinion[4] casts some doubt over the question of whether named-fiduciary status is necessary to insulate one who delegates responsibility to an investment manager where the party making the delegation has been appointed by a named fiduciary.

In DOL Advisory Opinion 82-30A, the general partners of a certain Plan Assets Fund had the right to and did retain an independent investment manager to select and manage the Plan Assets Fund's investments on a discretionary basis. The manager acknowledged that it was a fiduciary of the plan investors in the Plan Assets Fund. Brochures for the Plan Assets Fund described the manager and the services it performed, and the manager also entered into an agreement with each investing plan under which the manager acknowledged that it was a registered investment adviser and fiduciary with respect to that plan.

On those facts, the DOL considered the question of "whether . . . a named fiduciary of a plan participating in the Fund would be considered to have delegated authority to the Fund's investment manager to manage, acquire, or dispose of plan assets in accordance with section 403(a)(2) of ERISA." The DOL stated:

> Section 405 of ERISA sets forth, among other things, procedures for allocating and designating fiduciary duties. Under section 405(c)(1), a plan may establish procedures for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan. Section 405(c)(3) defines "trustee responsibility" for purposes of section 405(c) as any responsibility provided in a plan's trust instrument to manage or control the assets of the plan. Specifically excluded from the definition of "trustee responsibility" is a power of a named fiduciary under a trust instrument to appoint an investment manager. Thus, a named fiduciary's authority to select an investment manager is a responsibility that may be properly delegated to another fiduciary. . . .
>
> [I]t is the opinion of the Department that the named fiduciary of a plan participating in the Fund [at issue in Advisory Opinion 82-30A] would have delegated authority to the Fund's investment manager to manage, acquire, or dispose of plan assets in accordance with section 403(a)(2) of ERISA.[5]

DOL Advisory Opinion 82-30A suggests that the person making a direct appointment did not need to be a named fiduciary in order to make an effective delegation to an investment manager. However, a question may arise regarding how broadly Advisory Opinion 82-30A can be applied (assuming that the result therein is the correct one). For example, it is unclear whether the direct disclosure to and agreements with the plan investors in the facts discussed were necessary conditions to the favorable result reached by the DOL. In this regard, however, the rationale quoted above from Advisory Opinion 82-30A appears to be extremely broad in scope and does not seem to rely expressly on the parties' direct disclosure and agreements.[6]

<u>Allocation of Investment Opportunities</u>

Managers should be aware that ERISA's exclusive benefit rule and rules on prohibited transactions under Sections 404 and 406(b)(1) and (2) can raise issues for Plan Assets Funds regarding whether investment opportunities available to the manager are being permissibly allocated among the various funds and accounts of the manager. Similar issues can arise under other laws,[7] and there have been indications that these types of issues may also arise in the ERISA context.[8] In very general terms, it appears that a consistent and fair internal policy regarding allocation may well pass scrutiny under ERISA's standards, although comfort levels may be somewhat higher with increasing levels of specificity.[9]

Varied Interests of Fund Investors

It is possible that, in theory, the disparate interests of different investors within a fund could create conflicts under ERISA Sections 404 and 406(b)(1) or (2). While varying investment interests are often inherent to collective investment and arguably should not raise per se conflict concerns under ERISA, in the case of difficult fact patterns it may not always be possible to dismiss this type of concern out of hand.[10] Similar conflict concerns could arise where the manager is a partner in the Plan Assets Fund or otherwise a co-investor with plan investors.[11]

Indemnification and Insurance

Under ERISA Section 410(a), a fiduciary generally cannot be exculpated from liability for a breach of fiduciary duty imposed by ERISA.[12] For example, if an agreement purports to relieve a fiduciary other than in the case of the fiduciary's gross negligence, as may be customary in various non-ERISA contexts, that agreement may be of no force or effect with respect to a fiduciary of a Plan Assets Fund to the extent of the fiduciary's own negligence.

While ERISA Section 410(a) would not foreclose a fiduciary from being indemnified by the plan sponsor or purchasing its own insurance,[13] a Plan Assets Fund would be subject to constraints regarding the purchase of insurance for its fiduciaries. In particular, Section 410(b)(1) does not contemplate a plan's purchase of fiduciary insurance that would cover a breach of the fiduciary's obligations.

If more extensive coverage is desired, and if the cost of fiduciary insurance is to be paid or reimbursed by a Plan Assets Fund, the manager could, for example, purchase what some call a "nonrecourse rider" from the insurance company that would extend to the fiduciary's breaches,[14] without having the Plan Assets Fund pay or reimburse for the cost of such rider.[15] This approach arguably would be consistent with Section 410(b)(1), which expressly permits a plan to "purchas[e] insurance for its fiduciaries or for itself to cover liability for losses occurring by reason of the act or omission of a fiduciary, if such insurance permits recourse by the insurer against the fiduciary in the case of a breach of a fiduciary obligation by such fiduciary."

In addition, ERISA Section 410(a) generally does not foreclose indemnification from a third party in the absence of a breach.[16] Such indemnification is viewed as the equivalent of insurance.[17] Thus another way that a manager could, at least in theory, obtain additional protection is through indemnification from a person other than the plan, such as the plan sponsor. As a practical matter, however, it may sometimes be difficult for the manager to persuade the sponsor of a plan investing in a fund to provide the extra layer of indemnification in the case of the manager's own breach, regardless of the extent to which such protection is customary in the non-ERISA context.[18]

Certain Issues Relating to Investments in Portfolio Funds

A Plan Assets Fund, particularly if it is a fund of funds, may be faced with issues if a fund or other entity in which it invests is itself trying to satisfy the "significant" participation test in the Plan Assets Regulation (the "Significant Participation Test").[19] If the Plan Assets Fund is not subject to ERISA, investment therefrom can possibly help the downstream entity satisfy the test. However, if the Plan Assets Fund is a "benefit plan investor," the Plan Assets Fund will count in whole or in part against the downstream entity as it seeks to satisfy the Significant Participation Test. As a result, a Plan Assets Fund may find itself constrained as a practical matter from making certain investments that, aside from ERISA issues, might have been desirable.[20]

One related practical issue that may arise involves how much of the Plan Assets Fund should be considered "plan assets." Section 3(42) now clarifies that "[a]n entity shall be considered to hold plan assets only to the extent of the percentage of the equity interest held by benefit plan investors."[21] It is possible, therefore,[22] that a downstream entity might ask an investing Plan Assets Fund[23] for assurances regarding the percentage of its assets that might be considered "plan assets."[24] Without such assurances, the downstream entity might as a practical matter have to take the Plan Assets Fund into account as being 100% "plan assets."[25]

Certain Enforcement-Related Matters

By becoming a fiduciary subject to ERISA, the manager of a Plan Assets Fund may expose itself to a wider group of potential plaintiffs and enforcement agencies. Under ERISA Section 502, plan participants, other fiduciaries, and the

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DOL will be subject to an additional 20% civil penalty under Section 502(l) (reduced by certain other penalties and taxes) unless the penalty is waived or reduced.

Diversification Requirements – A Red Herring, at Least in Part?

Section 404(a)(1)(C) of ERISA, where applicable, requires that a fiduciary diversify a plan's assets to reduce risks of large losses. There is arguably some confusion regarding the application of that rule to a fund into which only a portion of a plan's assets are invested. For example, suppose that a plan wanted to invest 5% of its portfolio in aggressive equities and that such investment formed an appropriately diversified portion of the plan's overall portfolio. Clearly, it would seem, investment to that same extent by that same plan in a plan-assets fund that is by design 100% invested in equities with precisely the same characteristics, instead of directly in the aggressive equities themselves, would under those facts not run afoul of the diversification rule merely by virtue of having gone through a fund. Thus, the complete concentration of investment in aggressive equities in this example is potentially acceptable. The correct analytical framework, it is suggested here, are the general prudence rules,[28] and the key is how the investment fits into the plan's overall portfolio, which is a matter not for the fund manager but rather for the plan's own fiduciary.[29] On the other hand, whether the fund's investments in aggressive equities are appropriately diversified in respect of the potential pool of such equities may indeed possibly raise potentially valid diversification issues.

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[1] General delegation and other fiduciary issues could also arise regarding the services of members of a fund's board of directors (or other similar governing body) and of other personnel associated with a fund who could be deemed to have discretionary authority relating to fund assets that might rise to the level of fiduciary discretion.

[2] DOL Adv. Op. 77-69/70A (Sept. 16, 1977).

[3] Id.

[4] DOL Adv. Op. 82-30A (July 7, 1982).

[5] Id.

[6] Assessing whether a delegation is valid as a general matter is distinct from determining whether an appointee, even if not a §3(38) investment manager or otherwise a proper delegatee, nevertheless can serve as a "qualified professional asset manager" under Proh. Trans. Class Exempt. 84-14. (Proh. Trans. Class Exempt. 84-14 is discussed generally below. See "Happily Ever After? – Investment Funds that Live with ERISA, For Better and For Worse, (Part Three), nn.10-23 and accompanying text.)

[7] See, e.g., 15 U.S.C. §80b-6(4) (calling for rules of Securities and Exchange Commission (SEC) regarding "acts, practices, and courses of business as are fraudulent, deceptive, or manipulative"); SEC Inspection Manual 29 (1980) ("All investment advisers should have some formula for allocating securities among clients. This formula should set forth a fair and equitable basis for distributing investments among clients. Moreover, it should be applied on a consistent basis."); In re The Dreyfus Corp. & Michael L. Schonberg, Advisers Act Rel. No. 1870, May 10, 2000, at 6 ("Reasonable investors would consider allocation practices that had the overall effect of favoring [an aggressive growth fund] . . . as significantly altering the total mix of information available." (citations omitted)). See generally Douglas L. Hammer et al., Other Trade Allocation Issues, U.S. Regulation of Hedge Funds §13.9 (ABA Section of Business Law 2005).

[8] Cf. SMC Capital, Inc., SEC No-Action Letter Ref. No. 95-176-CC, Fed. Sec. L. Rep. ¶ 77,049 at n.14 (Sept. 5, 1995) (relating to certain allocation and aggregation procedures and expressly not addressing "any issues regarding the aggregation of orders that may arise under [ERISA], such as whether aggregating trades for proprietary accounts with trades for ERISA accounts violates the exclusive benefit rule of section 404(a) of ERISA, or constitutes a prohibited transaction under Section 406 of the Act"); see also DOL Adv. Op. 86-21A (Aug. 29, 1986) ("[T]he Department is not addressing issues relating to a fiduciary's allocation of investment opportunities among accounts over which he has discretion."); DOL Adv. Op. 99-16A (Dec. 9, 1999) (one of several other advisory opinions to similar effect).

9] See, e.g., DOL Field Assistance Bulletin 2006-01 (Apr. 19, 2006) (in deciding on an allocation method with respect to the allocation and distribution of mutual-fund settlement proceeds to participants, the plan fiduciary may weigh certain competing interests and the various effects of allocation methods, "provided a rational basis exists for the selected method and such method is reasonable, fair and objective"); Prop. Proh. Trans. Ind. Exempt. D-7764, 55 Fed.

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Reg. 3273 (Jan. 29, 1991), proposed amendment, Prop. Proh. Trans. Ind. Exempt. D-11167, 68 Fed. Reg.55,993, 55,995 (Sept. 29, 2008) ("UBS Realty represents that it has procedures in place that provide a system of fair and equitable allocation of investments to the Accounts."); cf. DOL Notice, "Cross-Trades of Securities by Investment Managers," 63 Fed. Reg. 13,696, 13,701 (Mar. 20, 1998) (soliciting information with respect to discretionary cross-trading regarding, inter alia, whether it's possible for discretionary cross-trading to be utilized to "[a]llocate favorable cross-trade opportunities to certain client accounts to benefit the manager's ultimate compensation"); 67 Fed. Reg. 6,613, 6,632 (Feb. 13, 2002) ("While it appears to the Department that a pro rata basis of allocation [of cross-trade opportunities] would be the method least subject to scrutiny, the Department recognizes the validity of other workable objective systems. However, the Department cautions that such systems may not permit the exercise of discretion by the manager."); see also Richard K. Matta, ERISA for Securities Professionals: 2008 Update, 10 J. Inv. Compliance 4, 24 (2009) ("ERISA does not dictate any particular procedure, as long as it is applied fairly and consistently so as to avoid favoring one client over another.").

[10] See, e.g., Prop. Proh. Trans. Ind. Exempt. D-8510, 58 Fed. Reg. 32,365 (June 9, 1993) (discussing matters where multiple types of investors participate in various real estate transactions), granted, Proh. Trans. Ind. Exempt. 93-49, 58 Fed. Reg 41,849 (Aug. 4, 1993); Prop. Proh. Trans. Ind. Exempt. D-9341, 58 Fed. Reg. 53,565 (Oct. 15, 1993) (discussing matters relating to various "shared" real estate investments), granted, Proh. Trans. Ind. Exempt. 94-51, 59 Fed. Reg. 33,550 (June 29, 1994); cf. DOL Adv. Op. 2000-10A (July 27, 2000) ("[I]f a divergence of interests develops between an IRA and the fiduciary (or persons in which the fiduciary has an interest), the fiduciary must take steps to eliminate the conflict of interest in order to avoid engaging in a prohibited transaction."). While some might also have worried that acquisitions and redemptions might raise issues under ERISA Section 406(a) between limited partners in a Plan Assets Fund, where the Plan Assets Fund is a partnership, DOL Advisory Opinion 2000-10A (July 27, 2000) could arguably dispel this concern.

[11] See, e.g., 55 Fed. Reg. 38,874, 38,877 n.2 (Sept. 21, 1990) ("[I]t is the view of the Department that the mere investment of the assets of a plan on identical terms with a fiduciary's investment for his or her own account in the equity interests of a shared real estate investment would not, in itself, cause the fiduciary to have an interest in the transaction that may affect his or her best judgment as a fiduciary. herefore, such an investment would not, in itself, violate section 406(b)(1) which prohibits a fiduciary from dealing with the assets of a plan in his or her own interest or for his or her account. In addition, such shared investment, pursuant to reasonable procedures established by the fiduciary, would not cause the fiduciary to act on behalf of (or represent) a party whose interests are adverse to those of the plan. Therefore, such an investment would not, in itself, violate section 406(b)(2) which states that a fiduciary may not act in any capacity in a transaction involving the plan on behalf of a party whose interests are adverse to the interests of the plan."); see also DOL, Info. Ltr., Citizens Nat'l Bank of Leesberg (Nov. 10, 1983) (relating to the purchase of a second mortgage where the plan sponsor holds the first mortgage); DOL, Info. Ltr., UA Local No. 467 Pension Fund (July 10, 1980) (relating to the purchase of a second mortgage where the plan fiduciaries are investors in underlying development). Technical issues could also arise under ERISA §406(a) where a manager is, for example, a general partner in a Plan Assets Fund, and the manager's partnership interest is to be redeemed (i.e., as a transaction between a plan and a party in interest); however, §406(a) arguably should not be interpreted so as to be a structural impediment to a manager serving as a Plan Assets Fund's general partner, since the Plan Assets Regulation could thereby become a provision that effectively bars rather than regulates customary arrangements that make use of plan-assets vehicles. Cf. DOL Adv. Op. 92-08A (Feb. 20, 1992) (ruling favorably, albeit on other issues, where a particular Plan Assets Fund was organized as a partnership). One possible approach could be that ordinary-course issuances and redemptions between the general partner (or other manager) and the fund should not be viewed for these purposes as sale or exchange transactions with plan investors, notwithstanding the general look-through status of a Plan Assets Fund, if effectively the issuances and redemptions merely implement or are otherwise ancillary to the underlying co-investment arrangement.

[12] While not arising in the ERISA context, the Mercer/Alaska situation, where a major consulting and actuarial firm exited a market because of liability concerns, illustrates the potential significance of a possible inability to limit liability by contract. See, e.g., Douglas Appell, Mercer Creates $240 Billion Vacuum, Pens. & Invs. (Oct. 18, 2010) ("In actuarial consulting, it's been possible in recent years to contractually limit a service provider's liability, but Securities and Exchange Commission guidelines don't allow similarly clear limits for investment consulting contracts, . . . said [sources familiar with the Mercer/Alaska situation].").

[13] General public-policy or insurance-law issues with fiduciary insurance may arise if the purported scope of the insurance could be viewed as overbroad (for example, if it extends to willful misconduct).

[14] See also supra n.13. It is noted that the DOL has expressly identified "whether [a prospective service provider] has fiduciary liability insurance" as being among the items that need to be considered when a service provider is selected. DOL, "Meeting Your Fiduciary Responsibilities."

[15] If an insurer would be willing to provide broad coverage at affordable rates but for ERISA's constraints, one might think that it could be possible to procure an affordable nonrecourse rider. See generally Samuel W. Halpern, Fiduciary Liability: Getting It and Keeping It on Reasonable Terms, 15 Emp. Benefits J. 7, 8 (June 1990). But see John R. Cornell & James J. Little, Indemnification of Fiduciary and Employee Litigations Costs Under ERISA, 25 B.C. L. Rev. 1, 4 n.15 (Dec. 1983) (suggesting that the cost of such coverage could be prohibitive).

[16] DOL Adv. Op. 77-66/67A (Sept. 9, 1977) (holding, among other things, that certain indemnification provisions do not contravene ERISA §410(a) and that certain payments pursuant thereto will not contravene §410(a) if made after the obtaining of a written, independent legal opinion that "the acts of the fiduciary . . . do not constitute a breach of a fiduciary obligation."). In addition, common features in some indemnification provisions relating to advance payments may generally be permissible. See DOL Adv. Op. 77-64/65A (Sept. 2, 1977) (holding that certain reimbursements and payments pursuant to certain contractual indemnification provisions are not prohibited transactions under §406(a)(1)(A) and (D) "to the extent that the current reimbursement or payment . . . does not exceed amounts allowed under section 408(c)(2)," and adding that §408(c)(2) and the regulations thereunder "provide, in pertinent part, that nothing in section 406 shall be construed to prohibit any fiduciary from receiving reasonable advances for, compensation for, or reimbursement of expenses properly and actually incurred in connection with the performance of his duties for the plan, provided that the provisions of 29 CFR 2550.408c-2 are satisfied"); see also Adv. Opn. 2002-08A (Aug. 20, 2002) ("The Department does not believe that, in and of themselves, most limitation of liability and indemnification provisions in a service provider contract are either per se imprudent under ERISA section 404(a)(1)(B) or per se unreasonable under ERISA section 408(b)(2)."); Part Four, nn.29-31 and accompanying text (relating to expense reimbursement generally).

[17] "[I]ndemnification provisions which leave the fiduciary fully responsible and liable, but merely permit another party to satisfy any liability incurred by the fiduciary in the same manner as insurance purchased under section 410(b)(3) [relating to insurance purchased by an employer or an employee organization to cover potential liability of a fiduciary], are . . . not void under section 410(a)." 29 C.F.R. §2509.75-4.

[18] Indeed, the investing plan could seek reduced levels of indemnification even when the fund in which it invests is not a Plan Assets Fund. Cf. 51 Fed. Reg. 41,262, 41,267 (Nov. 13, 1986) ("A plan fiduciary is obligated under ERISA to consider all relevant information in making investment decisions. . . . Thus, whether the underlying assets of an entity include 'plan assets' is one factor that a plan fiduciary should consider in making a decision to invest in an entity.") (footnote omitted).

[19] 29 C.F.R. §2510.3-101(f).

[20] There may be any number of reasons that a party might not wish to deal with a Plan Assets Fund or other entity subject to ERISA. See, e.g., Part One, n.20 and accompanying text.

[21] ERISA §3(42).

[22] This discussion assumes that the Plan Assets Fund is not affiliated with any manager or provider of investment advice to the downstream fund. See 29 C.F.R. §2510.3-101(f)(1) (second sentence). As indicated in Part One, n.18, the issues surrounding when a fund satisfies the Significant Participation Test are beyond the scope of the discussion herein.

[23] Similar issues are faced in the case of investment from the general account of an insurance company. See generally 59 Fed. Reg. 43,134, 43,136 n.4.

[24] The downstream entity would have to monitor satisfaction of the Significant Participation Test at the time of each transfer of an "equity interest" (as defined in 29 C.F.R. §2510.3-101(b)(1)). The DOL takes the position that for these purposes, redemptions are transfers. See DOL Adv. Op. 89-05A (Apr. 5, 1989).

[25] Where a fund is seeking to satisfy the Significant Participation Test, and proposed investment by a Plan Assets Fund may jeopardize satisfaction of the applicable 25% test, some might suggest that the Plan Assets Fund acquire a "total return swap" (in respect of the target fund) or similar interest from a third party, which might in turn hedge its obligation with an investment in the target fund. Extreme caution should generally be exercised before a Plan Assets Fund (or such a third party) proceeds with such an approach.

[26] See also Reorganization Plan No. 4 of 1978, 3 C.F.R., 1978 Comp. 332 (coordinating certain matters between the DOL and the IRS).

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[27] As a result of fiduciary status, the attorney-client privilege may, as a practical matter, be unavailable in ERISA fiduciary litigation. See generally Andrew L. Oringer, Navigating Murky Waters: Ethics for the ERISA Lawyer, ERISA Litigation 2010 (Practicing Law Institute 2010), §III(A).

[28] See 29 C.F.R. § 2550.404a-1(b)(1)(i) (requiring a fiduciary to give "appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role the investment or investment course of action plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties"), (b)(2) ("[A]ppropriate consideration shall include, but is not necessarily limited to (A) a determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio (or, where applicable, that portion of the plan portfolio with respect to which the fiduciary has investment duties), to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action, and (B) consideration of the following factors as they relate to such portion of the portfolio: (i) the composition of the portfolio with regard to diversification; (ii) the liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan; and (iii) the projected return of the portfolio relative to the funding objectives of the plan.").

[29] Cf. 29 C.F.R. § 2550.404a-1(b)(3) ("An investment manager . . . to manage all or part of the assets of a plan, may, for purposes of compliance with the provisions of paragraphs (b)(1) and (2) of this section, rely on, and act upon the basis of, information pertaining to the plan provided by or at the direction of the appointing fiduciary, if – (A) such information is provided for the stated purpose of assisting the manager in the performance of his investment duties, and (B) the manager does not know and has no reason to know that the information is incorrect.").