



April 12, 2011

Via E-Mail

To: EBSA's Office of Regulations and Interpretations
U.S. Department of Labor
e-ORI@dol.gov

Subject: Public Hearing on Definition of Fiduciary

JA Seed Associates, LLC is a regional Pension Consultant and Registered Investment Adviser (RIA) located in Richmond, Virginia. Founded May 2000, the firm provides qualified plan expertise and fiduciary resources to Clients sponsoring 401(k), profit sharing, and pension plans. I am the firm's Organizing and Managing Member, and have been working with ERISA covered retirements for more than 20 years.

As a smaller boutique business, we are able to conduct our affairs without many of the nuances larger firms face.

Commentary

My commentary is to describe some of issues facing the businesses sponsoring ERISA covered retirement plans – and their “named fiduciaries”.

A good percentage of the increase in “named fiduciary” responsibility is coming from industry's innovations, products, and other arrangements.

If a “named fiduciary” is seeking to delegate their investment responsibility to another ERISA fiduciary, a clear regulatory definition to easily spot this delegate in a crowded room (‘white hat’ clarity), with no wiggle room, is very supportive.

Today, “named fiduciaries” need to look beyond retail investment channels (broker-dealers, insurance agents, banks, mutual fund companies, and the overlapping

conglomerates) to locate persons that are able to accept this delegation and fulfill this investment responsibility in accordance with ERISA.

Generally, these ERISA fiduciaries are operating 'independent fiduciary' businesses, and/or are part of the Registered Investment Adviser (RIA) community.

The registered investment adviser (RIA) community is a good example for clarity.

The 1974 RIA community is quite different than today's RIA community.

How quickly can a "named fiduciary" identify which RIAs are ERISA fiduciaries?

Here are three subtleties for investment advisers operating only under the Investment Advisers Act of 1940, and the ones that are also operating under the Employee Retirement Income Security Act of 1974:

Subtlety #1: The use of the term fiduciary and co-fiduciary:

Under the Investment Advisers Act of 1940 ('40 Act), fiduciary is used to describe the relationship between a registered investment adviser (RIA) and its client. A fiduciary only under the '40 Act is not a fiduciary (co-fiduciary) under ERISA.

ERISA's fiduciary standard is much higher. For ERISA's purposes, only two or more ERISA fiduciaries are co-fiduciaries.

Subtlety #2: Varying business models:

A '40 Act Investment Adviser is able to have, for example, industry selling agreements, cross-selling opportunities, and affiliated company referral arrangements.

These are problematic for an ERISA fiduciary.

Subtlety #3: ERISA is a federal law. The first two fiduciary duties being the exclusive purpose rule and prudence standard:

There is no requirement for a '40 Act Adviser to conduct their advisory business in accordance with ERISA. It is only after a '40 Act Adviser is covered under ERISA does this law govern their fiduciary responsibilities.

Example: E-mail from a "national investment adviser":

"I wanted to introduce our firm to you. [ABC] is one of the largest independent retirement plan consulting practices in the country. Companies hire us to improve a plan's overall performance whether that be through cost and fee reductions or investment results as well as off-load fiduciary liabilities (meaning we can serve in a 3(21) co-fiduciary capacity or a 3(38) discretionary fiduciary). We perform fiduciary compliance services, fee benchmarking services, provider searches, investment due diligence and employee education services. We can perform these services on an ongoing basis or as a-la-cart services. We do not care what provider a plan sponsor uses ... we simply want to make a plan better."

If a "named fiduciary" is looking to delegate investment responsibility to another ERISA fiduciary, this just might catch their attention.

Yet, absent from their e-mail, in this Adviser's web-site under Participant Services there are Individual Financial Consulting services:

"Participants sit down with a licensed professional who conducts an extensive review of their financial profile with custom analysis on a range of financial needs including: retirement assets, 529 college planning, IRA rollovers, non-retirement money, term life insurance ..."

Bottom of the web page reads 'Securities are offered through' [ABC].

And, barely into the first leg of due diligence for an ERISA 'co-fiduciary', the "named fiduciary" will need to clarify a number of issues.

Closing Comment

It should not be a challenge for "named fiduciaries" to determine whether or not their investment adviser is an ERISA fiduciary.

I encourage EBSA to forge ahead and clarify ERISA's term for investment fiduciary.

Respectfully submitted: April 12, 2011,

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