ERISA LITIGATION AND ENFORCEMENT:

THE ROLE OF THE INDEPENDENT FIDUCIARY AND BEST PRACTICES FOR FINANCIAL ADVISORS

Educational Webinar Recorded on April 8, 2015

Web Link to Audio Recording and Slides:
http://www.fi360.com/offers/webinars/erisa-litigation-and-enforcement

Speakers:

- Thomas Clark, Esquire – Counsel at The Wagner Law Group
- Dr. Susan Mangiero, AIFA®, CFA®, FRM®, PPC™ – Managing Director at Fiduciary Leadership, LLC
- Mitchell Shames, Esquire and Partner at Harrison Fiduciary Group

Description: ERISA litigation and enforcement increasingly involves allegations of conflicts of interest and imprudent decision-making on the part of advisors, consultants, banks and asset managers. In several recent matters, regulators and judges have made it clear that the use of an independent fiduciary would be interpreted as a reflection of procedural prudence and the absence of an independent fiduciary could hasten a decision of fiduciary breach.

Learning Objectives:

- Learn about relevant cases and regulatory actions that involve third parties such as financial advisors.
- Better understand some of the practices that could allow advisors, consultants, banks and asset managers to work more effectively in demonstrating procedural prudence.
- Hear about state trust law concepts and ERISA oversight activity and implications for advisors and consultants who work with non-ERISA trusts.

Introduction by Mr. J. Richard Lynch, AIFA®, President of fi360:

The presentation for today is entitled ERISA Litigation and Enforcement: The Role of the Independent Fiduciary and Best Practices for the Financial Advisors. My name is Richard Lynch. I am the president of fi360. Our presenters for today include (1) Dr. Susan Mangiero, Managing Director of Fiduciary Leadership (2) Thomas Clark, Counsel at The Wagner Law Group and (3) Mitchell Shames, Partner at the Harrison Fiduciary Group.

This educational presentation pertains to ERISA litigation and enforcement with a focus on allegations of conflicts of interest and imprudent decision-making on the part of advisors, consultants, banks, and asset managers. In several recent matters, regulators and judges have made it clear that the use of an independent fiduciary would be interpreted as a reflection of procedural prudence and the absence of an independent fiduciary could hasten a decision of fiduciary breach.

For continuing education ("CE") purposes, live attendance of this webinar makes you eligible to receive CE for your AIF, AIFA and PPC designations as well as for the CFP certification. You will receive an email in the coming days with additional details as to how to get credit for your CE. If you are listening to this session as a recording, make sure you follow the posted procedures before submitting your CE request.

Today's webinar is being run with the use of GoToWebinar software. We will be taking questions electronically throughout the session. Feel free to submit your questions using the GoToWebinar interface. We will save the questions for the end of the presentation. If there are any questions that we are unable to get to, and that does often happen, we will attempt to answer as many as possible in the coming days, both individually and in an upcoming blog post. Any additional questions can be submitted to resources@fi360.com.

Now, just a little bit about each of our speakers before I turn it over to Susan. Susan has provided testimony as well as behind-the-scenes forensic analyses, calculation of damages and rebuttal report commentary for various matters. Topic areas include, but are not limited to, the following: investment governance, investment performance, fiduciary breach, hedge funds, derivatives, investment committee, private equity funds, and fees, prudence, risk management and valuation. She is an independent consultant who has worked with regulators, defense counsel and plaintiffs' counsel, respectively. She has keynoted or led workshops for organizations such as the Stable Value Investment Association, Harvard Law School, the Florida Public Pension Trustees Association, and Financial Executives International. She is the lead contributor to www.pensionriskmatters.com and www.goodriskgovernancepays.com.

Tom Clark is Of Counsel for The Wagner Law Group, a law firm specializing in ERISA, and employee benefits, estate planning and employment, labor, and human resources law. Tom is also a well-seasoned ERISA litigator. Earlier in his career, he worked for the law firm of Schlicter, Bogard, & Denton. That work includes such landmark cases as Tibble versus Edison, which, as I think we all know, was heard by the U.S. Supreme Court just this past February. Tom is editor-in-chief of the Fiduciary Matters blog. He also teaches ERISA fiduciary law as an adjunct professor at the Washington University in St. Louis School of Law.

Finally, Mitchell Shames is the founder of the Harrison Fiduciary Group and a leading expert in fiduciary practices for domestic and global institutional clients. He was a general counsel for State Street Global Advisors, the global investment management unit for State Street Corporation. He established the Fiduciary Review Committee for the purposes of overseeing all fiduciary activities within SSgA. He is the lead contributor to a blog about fiduciary issues which is known as The Prudent Expert. We have three well-credentialed speakers today. I know you will enjoy hearing their comments. At this point, Susan, I'm going to turn the podium over to you.

Dr. Susan Mangiero:

Thank you, Rich. It's great to be here as part of this educational program. I want to set the stage with a few comments. Then Attorney Clark will speak. Then Attorney Shames will speak. I will follow thereafter with comments about risk management and governance considerations. If you go to the slide about the external fiduciary ecosystem, it shows that there are numerous types of organizations and persons with varying levels of skill and experience.

Based on my work both as a testifying expert and business intelligence analyst, I see clear evidence of a growing market to offer fiduciary consulting services to plan sponsors. I think we are seeing this trend in the United States and elsewhere around the world. However, like any product, whether intangible of otherwise, there is no free lunch. Numerous questions abound as to whom will do what, when, and for what price?

And when you have multiple fiduciaries, another key question is whether there is someone to coordinate the respective efforts of all parties involved and whether the coordination being done, if any, is effective. Another issue, particularly as this industry grows, is how best to benchmark the work of these external fiduciaries. How does an ERISA decision maker know when an outsourced fiduciary is doing a good job? This is a question that will, in my view, become even that much more important as additional disputes between ERISA plans and outsourced vendors make their way to court.

It is also the topic, in part, of what the ERISA Advisory Council looked at last year in their efforts to get a better understanding of contracting and industry norms with respect to outsourced fiduciary arrangements. Other questions address the role of plan counsel and timing of an engagement with a vendor. For example, how does the size of a plan impact the decision to outsource, or at the other end of that spectrum, to create an in-house operation and not use vendors at all for things like asset allocation or investment management?

What can be done preemptively to mitigate the risk of outsourcing to the extent that the law allows, and what happens when problems arise and disputes head to the court or are the subject of enforcement or both? These are some of the questions that we are going to talk about today.

Please turn to the slide about fiduciaries in the spotlight. You will see a long list, although it is a partial list, of hot button issues that are creating a lot of buzz. They are generating headlines too about fiduciary decisions and the decision-makers in charge of important make-or-break types of assessments about defined contribution plans, defined benefit plans, health care plans and hybrid arrangements. I have written a lot about some of these issues. You can find over 1,000 relevant articles by going to my blog, PensionRiskMatters.com or as Rich mentioned a moment ago, Tom's blog, Fiduciary Matters, or Mitch's blog, the Prudent Expert.

My point is that you have a lot of people who are calling significant attention to how fiduciaries are making decisions. A bad decision can have a domino effect. For example, a poor decision made at the plan level can adversely impact the corporate finance health of the plan sponsor or vice versa. This friction between company sponsor and plan participants has revealed itself more than once.

If you turn to the next slide about fiduciary outsourcing being on the rise, the point shown here is that, notwithstanding the hot-button issues that we just looked at, and also the notion that the idea of an expanded fiduciary standard is more a "when" as opposed to an "if," many individuals don't choose to be a fiduciary. Usually an individual is assigned the task. The risk/reward profile is asymmetric. When things go wrong, there can be a significant price to pay. When things go right, many of these individuals typically do not get a bonus or recognition for keeping things on an even keel.

Fiduciaries are exposed to personal and professional liability. This concept applies both to in-house as well as to outsourced fiduciaries, such as a financial advisor hired by a plan with a contractual or functional agreement to serve as a fiduciary. Basically, you have this idea of fiduciary fatigue and a lot of people wanting to outsource. For those people who are listening to the webinar today and seeking to expand their business by accepting the transfer of some of these fiduciary responsibilities, know that proper risk mitigation is essential. Without proper risk mitigation, there is likely to be trouble. Trouble can be both stressful and costly. On that somber note, I will turn the podium over to transaction and litigation attorney Tom Clark.

Attorney Thomas Clark:
Thank you, Susan. Yeah. My role today is going to be to give a brief overview of ERISA litigation trends. I want to make clear that there has always been litigation against fiduciaries since the very beginning when ERISA became law. In fact, many of the early cases from the late '70s and early '80s are still guideposts for us today in terms of what makes good process and good prudence. Lately the litigation has been, at times, very high profile.

So here is the overview. In the early 2000's, there was a lot of "stock drop" litigation. Then in 2006, my former law firm filed over a dozen very high-profile ERISA fiduciary breach cases that focused on excessive fees and allegations regarding mutual fund selection. The defendants have been mostly Fortune 100 companies. In the early days, these complaints were far reaching and broad. Many of these complaints did not do well in the courts because the judges that were hearing the cases could not sometimes connect with the allegations. The allegations did not make sense. They were confusing and based on the spaghetti approach, right? Throw everything against the wall. See what sticks.

Things changed in 2008/2009 when there was a case filed against Wal-Mart in the 8th Circuit. It was dismissed but then later overturned by the 8th Circuit. Among other things, the case alleged self-dealing and disclosure compliance with new Form 5500 rules. We have all heard rumors of the U.S. Department of Labor ("DOL") hiring a thousand new inspectors although my understanding more recently is that this hiring has to do with Affordable Care Act compliance and less to do with ERISA fiduciary breaches.

But I was recently at a conference with Phyllis Borzi and she filled us in on something that was interesting, namely a project known as the 21st-Century Initiative. If the DOL gets their way, new rules will materially expand the information that has to be presented on the Form 5500. I know this point seems to digress somewhat from the litigation focus but I will explain later how it relates. The 21st-Century Initiative is basically going to make the Form 5500 look a lot like the 408(b)(2) form in the sense that the kind of information that the DOL wants disclosed will start to be included on the 5500 and then uploaded online available immediately to anyone in the public who wants to see it.

Returning to my discussion about cases, let me talk about the Tibble versus Edison matter. When the decision came out three or four years ago, the idea was that fiduciaries could be liable for improper selection of mutual funds. This does not necessarily meant that one has to select the cheapest share class. I think there is some debate out there as to whether you need to choose the cheapest. However, that is not really what the court held.

At the end of the day, the court held that given the facts and circumstances in this case, to include paying for administrative costs, there was a question about why was excess revenue sharing being generated. We saw a similar claim be successful in the Tussey v. ABB matter, notably that the plan fiduciaries must ensure that there is a proper cost structure for all of the plan investments.

The second nearly settled issue is that of excessive recordkeeping fees. Settlement amounts are large. Recent settlements include numbers such as $30 million and $62 million.

So what should a fiduciary be doing? The fiduciary should absolutely be looking at these issues, with a focus on the 408(b) (2) regulations that relate to disclosures. The point is that, even if the lawsuits are not causing fiduciaries to take a further look at their actions, the regulations are.

The final nearly settled issue is the use of proprietary funds. Typically, such a lawsuit is filed against the financial company sponsor itself. Consider the Ameriprise case.

There are lessons to be learned from ERISA litigation. It is not simply gossip to look at how a company somehow managed to get sued and get themselves in trouble.

There is an outstanding motion to dismiss that is still to be decided against MassMutual in a lawsuit brought by its own employees. Just last month or the month before, there was another case filed against Transamerica by its own employees.

All right. Next slide please. So, with my brief time, most of the cases that were on that last page are ones that people have probably heard about. You have read many articles. There are a couple items that I want to highlight here because I think they are very interesting and maybe too because they are less familiar to webinar attendees.

The first one is Tatum versus RJR Pension Committee. This was a decision by the 4th Circuit. It is currently pending before the U.S. Supreme Court as to whether the U.S. Supreme Court will hear it. This review of the RJR matter is similar to what the U.S Supreme Court did when the Tibble plaintiffs filed their case and the defendants in the Dudenhoeffer versus Fifth Third. Specifically, the U.S. Supreme Court has asked for the opinion of the Solicitor General at the Department of Labor, and we have yet to have that filing. It will probably take many, many more months until they file. With a sample size of two (i.e. Dudenhoeffer and Tibble), my economist friend Susan will tell you that that this is probably not statistically significant. Yet in the end, the Supreme Court may end up taking this case if the Solicitor General supports them hearing it. So what happened in the RJR case? To start, this case is sort of a reverse stock-drop situation. After a split of RJR, you had the new plan, i.e. you had tobacco stock in the new plan that was no longer company stock, just the single security. You can read more about the facts on my blog if you want, or read many of the articles out there about this case. For now, let me say that fiduciaries had a meeting for one hour about this security.

During that meeting, there was no mention at all about the best interest of participants. All that was discussed was their own liability. Then they decided to dump the stock. They had received an email or a letter, something of the sort, from a plan participant who wrote, “Hey, I have a lot of money tied up in that stock, and everyone knows that in these types of situations, the value of the stock goes back up. It’s sort of artificially low at this point, but it will go back up. There is nothing else in the plan that’s going to offer me that type of return given the minimal risk, given that we know that it’s going to go back up. Please don’t sell the stock, and they said no, I’m sorry, we’re going to do it anyway.” And of course, that’s Tatum, right? He is the lead plaintiff in the lawsuit. What the 4th Circuit came down and said is they had no procedural process, right? So no procedural prudence, but then what does that mean about substantive prudence? So what we are talking about here is the notion of a blind monkey who throws a dart at a wall full of mutual funds and it hits the PIMCO Total Return fund. Well, a lot of people have the PIMCO Total Return fund. So did they do a good job? Did they actually breach their fiduciary duties?

You might have heard this as a “could have/would have” argument. Well, I recently had a conversation with the lawyer who brought this case to the U.S. Supreme Court on behalf of the plaintiffs. He provided me with an interesting insight. What the plaintiffs want to say is that if you questioned or surveyed one hundred fiduciaries, fifty-one of them would have likely acted as the RJR fiduciaries did. When the plaintiffs prove the absence of procedural prudence, the burden then shifts to the defendant. If a defendant proves that fifty-one out of one hundred fiduciaries would have done what RJR did, then fine, maybe there is no liability. Instead, what the RJR defendants want to do by their “could have” standard is to show one out of one hundred. I think this is a very interesting way of looking at the problem. Now, ultimately, it is for the U.S. Supreme Court to decide if they want to hear the case. I think this case will have a profound effect on procedural prudence. If the Supreme Court overturns it and adopts this “could have” or this one out of one hundred approach, there is the real potential for lessening why people would even go through certain processes, i.e. doing one’s homework, preparing, and getting right. No matter what the U.S. Supreme Court says, whether they take the case or not, there are a couple of key takeaways.

Next slide please. The real decision is about the fiduciaries not getting a free pass when they fail to perform. What happens to how fiduciaries should process and always have participants’ best interests in mind? In reality, this case will have very little effect on you if you are doing what should be done. The only time you are going to see this case thrown at you is if you are accused of doing something wrong. This then leads us to the next case, Blue Moon Fiduciary versus Hutcheson.

This is a case that has not gotten a lot of press. It is a fallout case from the embezzlement by Matt Hutcheson and relates to ERISA plans that he administered. There were a lot of defendants. A lot of people got sued. I want to focus on a little known fact and one that I feel is very important when talking about ERISA litigation. ERISA litigation is not just for fiduciaries. I know we are here on the phone talking about independent fiduciaries. But I think it is very important for people to not be lulled into false security that the only people that can be sued under ERISA are ERISA fiduciaries. As of 2001, this was not true. If you are a party-in-interest - and any plan sponsor, any service provider meets the party-in-interest rules, you can be sued under 502(a) (3) of ERISA. In that one U.S. Supreme Court case I just mentioned, it was because they were in receipt of tainted plan assets. They had received plan assets. They could trace the money. They had been sued. The point was that the court concluded that you can file lawsuits against those types of parties to get the money back.

Here there was allegations. None of this has been decided, but taking it all as allegations, the issue was that the recordkeeper had sort of helped along Matt Hutcheson's scheme by improperly reporting to the plan participants that they were invested in a bond fund that did not actually exist. Of course, that bond fund was related to a corporation that Matt Hutcheson started with his wife. They issued some sort of corporate debt and the money disappeared and so there were allegations against the plan's recordkeeper.

Well, the recordkeeper filed a motion to dismiss and the court denied it. They said no and applied the "You can be held liable for aiding and abetting" theory, if you will, by helping the fiduciary who does have allegations against him as a fiduciary. I was recently on a panel with a good friend of mine at a conference. We were talking about all of these different defenses, and again, at the end of the day, you could have every defense in the world, but you have to have the resources and treasure to defend them and prove to someone that they are correct.

The next slide please. So what does the future look like? Well, 408(b) (2) will continue going to be a ripe source of information for the plaintiffs' bar and the DOL equally. We are going to see more pressure on fiduciaries to do the right thing. We are going to see more cases. We are going to see more press releases from the DOL and their settlements and/or trials. Generally, all of the large plans have been picked over, and so we are going to see a movement to smaller plans. We have already seen that happen. I define "small" as a plan with below $250 million in assets although others may disagree.

The DOL is going to be going after plans from an enforcement lens. Finally, just to wrap up, the plaintiffs are found in these cases often through advertising. You may have had one or two plaintiffs in the beginning, but then to find more, you advertise for them. Here at the Wagner Law Group, we have heard of evidence of new advertisements happening now. So really all that means is this stuff is not slowing down. You know, we may not have a dozen filed on one day, but they have been trickling in with pretty good consistency. That's it. Mitch, you are up.

Attorney Mitchell Shames:
Okay. Thanks, Tom. Please go to the next slide. My goal this afternoon is to really do two things. One is to answer the question of why to hire an independent fiduciary and to provide a brief overview of some of the hot fiduciary issues.

Now turn to your in-house counsel and ask “Hey, does someone need to take a look at this issue or that issue?” Part of the goal today is to be able to surface issues to the real substantive experts.

Next slide please. Tom just gave a whirlwind overview of fiduciary litigation. There is a lot to say. There are ERISA conferences that are two days long. Actually, there is one next week just on ERISA litigation review. The DOL is very sophisticated in its understanding about how plans are structured. Sometimes we’ll discount the plaintiff’s bar as an annoyance. However, many of these are very, very sophisticated. They have turned their attention to the ERISA environment. It really supplements all of the securities litigation that many plaintiff law firms undertake.

One of the ways to mitigate potential fiduciary liability and exposure to liability to hire an independent fiduciary, delegate fiduciary duties to an outside third party whose core competence is serving as the fiduciary to carry out contracted duties such as managing the investment portfolio.

There is another reason too. I am sure that many of the participants on this call are fiduciaries in one capacity or another. Whether they know it or not, there is co-fiduciary liability under ERISA. Even though a fiduciary has been hired for a specific set of activities, they can be held liable and responsible for bad acts of professionals who can be deemed fiduciaries. So if you are a fiduciary to a plan, you know, as my graphic shows, the days of putting blinders on are over. One breach could give rise to another breach. If someone has knowledge of a breach and does nothing, that could be a problem too. The key takeaway is if an independent fiduciary is hired, it is relatively safe to assume that that fiduciary is bringing a particular set of skills to the engagement. This really cuts down on the potential exposure for co-fiduciary liability. Another takeaway is that, even without an independent fiduciary, if you are engaged in a transaction and you are uncomfortable, it is almost a gut check. If something does not feel right, bring it to the attention, again, of your in-house council or a compliance officer. So really the role of an independent fiduciary helps mitigate potential liability as well as cuts off the avenues of co-fiduciary liability.

Do we have the next slide? The term independent fiduciary gets tossed around a good deal. It is important to remember that the term independent fiduciary actually includes two different words, both of which have important meaning. First, you want to hire someone who is truly independent. I am going to go into further details in a minute. That firm also has to have fiduciary expertise.

If we go to the next slide, we will see that, in examining conflicts of interest, the absolute failsafe way for understanding conflicts is to follow the money. Tom referenced some of the fee litigation. It is critically important to know who it getting paid what, and how much, and what are the services. It is also important to understand the relationships of each service provider. Again, I am assuming a broad audience on today’s webinar, everyone from people who are in small, independent firms to professionals who are part of global multinationals.

It is critically important to understand not only the role that your firm might be providing but also to understand what services an affiliate of yours might be providing. Lastly, this is a relatively new issue that the DOL is very focused on and it really smacks up against the business practices of cross-selling. I raise this to heighten everyone's sensitivities. I am not saying it cannot be done but it needs to be structured very carefully and analyzed really by fiduciary experts.

A very simple example of where this comes up is in the ESOP world. For those of you who are an Employee Stock Ownership Plan ("ESOP"), a company in undertaking its own capitalization analysis and looking at its balance sheet can decide to use the services of an appraiser. However, the DOL has come out very strongly on its view that a valuation expert cannot provide services both to the plan sponsor as well as to the plan.

The second prong of being an independent fiduciary, and I am not going to spend a lot of time on this topic, is that of loyalty and prudence. These are the traditional fiduciary duties and obligations that I am sure many people on the webinar are familiar with. Tom referenced duties as well. Fiduciaries must act solely in the interest of plan participants. When they act, they must fulfill and discharge their responsibilities as a prudent expert, not as an ordinary man off the street, but rather what actions another expert in a similar situation, would have taken.

Now, Susan had a slide, fiduciary spotlights, where she listed types of fiduciary engagements. I am going to have a slide coming up in a minute which is also similar. The key here is what an independent fiduciary can be asked to do. One of the reasons it is so hard for fiduciaries to explain what they can do is because the possibilities are large. Our services and engagements can be crafted in a whole variety of ways. ERISA is very flexible in the way fiduciary obligations are allocated and designated.

So, as my slide shows, you can have very specific fiduciary duties such as overseeing the valuation of an asset such as real estate or company stock. You can sign off on the fees and expenses as reasonable. The duties become very explicit. There are what I will call "one-shot deals" but ERISA also allows for the opposite end of the spectrum too. In other words, a plan sponsor can engage an independent fiduciary to serve on an ongoing basis. Think back to the history of ERISA. No one really expected that widget manufactures were going to engage in being the fiduciaries of their plans. You know, the legislative history is pretty clear. A lot of tasks have been effectively outsourced to the insurance industry. Well, 40 years later, we have seen a very different world emerge. Next slide please.

For example, suppose an independent fiduciary will be engaged for valuation process purposes. There are even gradations as to how that engagement can be structured. The fiduciary can be hired simply as an advisor and asked to give a recommendation. When a fiduciary is hired merely in an advisory capacity, the plan sponsor really has maintained a significant level of fiduciary risk. They have not really mitigated it in the way that I outlined at the beginning of my comments. On the other hand, a broader delegation of fiduciary responsibility to the independent fiduciary often means that the plan sponsor effectively takes itself out of the loop of fiduciary responsibility. It instead has an obligation to monitor the fiduciary but it does not have a responsibility with respect to the specific transaction itself.

Next slide please. Here is my version of Susan's fiduciary spotlights. You see that there is a whole host of types of engagements where an independent fiduciary can be brought in. Next slide please.

Once you bring in a fiduciary, it is critical to document what their job will be. And again, regulators have been very clear here in trying to get plan sponsors to move away from the general concern that fiduciaries are brought in as mere rubber stamps. Instead, regulators want to be assured that the outside fiduciary will compile all of the data, review the reports, and the analyses, and other documentation provided by other service providers. The independent fiduciary has to ask questions and cannot just rubber stamp a decision. The independent fiduciary has to bring his professional expertise to bear.

If something does not make sense, the independent fiduciary has to ask questions, keep notes about his investigations and then provide the plan sponsor with a written report that includes all of the procedures that the fiduciary followed in discharging his responsibilities, a summary of all of its actions, a list of the experts, and any actions he may have taken. This include details about the process that was used in selecting experts, and then once again, document, document, document.

Moreover, because it is very timely, there is the issue of fiduciary regulation being discussed in the press. I am sure that everyone here has been aware of comments made both by the administration, the U.S. Department of Labor and the U.S. Securities and Exchange Commission with respect to the new proposed regulations concerning fiduciaries, particularly as they relate to brokers. This is only the tip of the iceberg. When these regulations pass in one form or another, it really is going to turn the financial services industry upside down.

In large part, I referred earlier to how vast some of these financial services firms are. They provide dozens of services across the board to various plan sponsors. Once the fiduciary high water mark has been raised, there will be an in-depth review by these types of financial services firms as to how they deliver their services to plan sponsors. Coincidentally, the *New York Times* today has an editorial about these new fiduciary regulations. When someone asks me what I do and I say that I am a fiduciary, as soon as you say the word fiduciary, their eyes glaze over. It is not often that what I do becomes a subject of a *New York Times* editorial but it shows the language surrounding fiduciary work is entering into the marketplace in a new and a robust way.

So, with that, I will ask Susan to add to our discussion.

Dr. Susan Mangiero:
Thank you very much, Mitch. I just want to make a few quick comments, acknowledging that I believe many people attending this program today are financial advisors who have aspirations or may already be serving as an outsourced fiduciary to their ERISA plan clients. One of the things that I hear from numerous conversations is that, as this outsourced fiduciary business grows, there are still some real questions about what exactly this service will look at, as provided by advisors. I say this because there seems to be a common theme, based on conversations I have had, that many plans are not quite ready yet to spend money - to write a check - to have something done preemptively. So the things that I am going to talk about in the next few minutes really focus on a prescription for mitigating risk whether you outsource or not. The point I am trying to make is that these prescriptions are only as good as the persons who execute them.

This assumes that they will be executed or that these activities and issues will be given emphasis. If they are not, then any attempt to outsource is really going to, in my view, increase the liability, not just for the plan sponsor, but also the party to whom the outsourcing has been transferred. I do not know if the two attorneys want to comment. All I am saying is that there are lots of ways to mitigate risk but you have to be focused on actually mitigating risk.

Attorney Mitchell Shames:
Right, and Susan, one thing I would add is that, very often, it is best practices for an independent fiduciary to be hired by the plan and not by the plan sponsor, and so that is one way of addressing the costs. Of course, with a defined benefit ("DB") plan, that just means that the contribution has to be bigger, but with a defined contribution ("DC") plan, it means that the participants in effect are bearing the cost. This makes sense. The participants should bear the cost because the independent fiduciary is working on their behalf.

Dr. Susan Mangiero:
Okay. Thank you, Mitch. Well, on this first slide, I address the conflict of interest issue. We have had this discussed already. Mitch talked about it at length. What I would add is that, based on my experience, there are situations where you may have, an entity that now is adopting, either functionally or by contract, a role as an outsourced advisor. When reviewing the universe of possible investment funds to include in a line-up, they consider their own proprietary investment funds. This could be seen as a serious conflict of interest. The second question here on this slide relates to how the consultant or advisor is being compensated It is noteworthy that in a recent *Pensions & Investments* article, several attorneys were quoted as pointing out that the issue of advisor or consultant compensation is now being given a lot of weight, not just by the U.S. Department of Labor, but also the U.S. Securities and Exchange Commission as well.

If you would go to the next slide, we can talk the issue of contracting that I alluded to earlier. I want to emphasize though that the key element here is this concept of an expectations gap. I have worked on several cases where much of the dispute focused on the parsing of key words that related to things such as risk taking or monitoring. So, to the extent that your contract is ambiguous, it could be problematic. If something happens such as underperformance or an outright investment loss, or some semblance of, let's say, fraud on the part of an investment manager that an outsource advisor has selected, there could be a serious problem. This is true whether the case goes to court, or arbitration, or some kind of legal venue. Questions will be asked about what those words mean.

This links back to my comment about benchmarking. How are you going to decide whether the outsourced fiduciary has done a good job? What are the kinds of reporting requirements that are presented as part of the contract? Is there a difference in what the buyer and the seller believe each party is tasked to do?

If you go to the next slide, derivatives and leverage, many times, we find that asset managers are using leverage of some type. It could entail the use of financial derivatives. It could involve the use of short-selling. There are lots of ways to manufacture financial and operational leverage. The bar is pretty high according to the DOL when it comes to due diligence requirements about derivatives and other types of leverage-related tools. This is true regardless of ERISA plan design.

The next slide relates to disclosure. Tom talked already about this new 21st-Century Initiative to add even more information to the Form 5500 about compensation. I just mentioned a moment ago that the DOL as well as the U.S. Securities and Exchange Commission focus not only on what the compensation looks like, but the extent to which it is being disclosed. Cases on which I have worked are very much centered on how much information has been provided to participants and whether that information has been provided in a timely fashion.

The next slide looks at investment performance such as diversification and also very importantly, how asset classes are categorized. For example, I have seen numerous situations where, let's say, a hedge fund may have been selected by an outside fiduciary and categorized as equity investment. Another investor in that same hedge fund may have categorized its money allocation as an alternative. The reason why the categorization of asset classes is so important in a procedural prudence sense is because diversification benefits have to be quantified. Comparing asset allocations across ERISA plans is challenging when the categorizations of the same investment differ.

There is so much to say with respect to prudence in the context of diversification and I know we are running short on time. Let me go briefly through the last several slides, one having to do with liquidity. This is, again, also a key question, more so I believe after the credit crisis of 2008. Measuring liquidity is a big deal. Asking important questions matters too. How much cash is in a plan? What is the impact of that cash in terms of the expected return? From a prudence point of view and a process point of view, who is monitoring liquidity, and also the frequency of monitoring, is yet another key issue. If a plan sponsor committee is thinking of engaging an outsourced fiduciary, liquidity monitoring, especially for a cash-strapped sponsor, should be part of the designated responsibilities.

Finally, a topic that is gaining tremendous traction in a regulatory and enforcement sense relates to the process of valuation. There was a case that was just recently announced by the SEC against a large family of private equity funds. Allegations relate to how values were derived and then disclosed to its limited partners. Keep in mind that the fiduciaries of the many ERISA plans that invest in private equity as an asset class are responsible for ensuring that reasonable fees are being paid to fund managers. If values are set too high, ERISA plan limited partners will arguably be paying too much in fees.

There are volumes of best practice recommendations and litigation lessons to be said about different elements of risk mitigation. I will stop at this hour mark by saying, again that an ERISA plan fiduciary can be disciplined or count on Lady Luck. If nobody is paying sufficient attention to these elements of what can be done ahead of time prescriptively to mitigate risk, expensive litigation may follow. Not addressing risk mitigation techniques can be very troublesome. Rich, let me ask you to close out the webinar.

Richard Lynch:
Okay. We do not have a whole lot of time for questions but we will try to get a couple in. At this point, I am thinking we will probably spend about five minutes getting to as many questions as we can, and then, as I mentioned at the beginning of the webinar, we'll follow up with the ones that we could not answer.

Editor's Note: No questions and answers are included in this edited transcript.

