

Why have an advising fiduciary?

An answer to the problem of overseeing investment operations.

The board of trustees of a pension or welfare fund—technically the plan's "named fiduciaries" under ERISA¹—are legally responsible for supervising and integrating all aspects of their plan's investment-related activities, and for doing so prudently and in the best interest of the plan's participants and beneficiaries. Although named fiduciaries are usually not themselves investment professionals, regulatory and judicial trends over recent years require them to oversee the plan's investment-related activities with a high degree of financial expertise and independence—on pain of personal financial liability. More specifically, the named fiduciaries are obligated to prudently oversee the plan's investment managers, brokers, custodian/master trustee and insurance carriers; to act on the advice received from lawyers, actuaries, accountants and consultants; to proactively and safely employ its assets; and to carefully control expenses.

In most situations where named fiduciaries are responsible for prudently fulfilling their obligations, they hire other fiduciaries (such as investment managers, master trustees and others) for professional assistance. Yet curiously, named fiduciaries have not, to date, hired any other fiduciary specifically to help them oversee the plan's investment-related activities, and the community of plan professionals has generally not offered a fiduciary vehicle to perform that role.

Given the demand for expertise and independence in the oversight function and the serious legal exposure of named fiduciaries, this article concludes that many plans would benefit from professional assistance from another fiduciary which specializes in overseeing investment-related activities and is legally accountable as an ERISA fiduciary for prudently performing that role. This overseer would not replace the named fiduciaries or plan professionals (such as investment managers, master trustees and custodians, brokers, insurers, lawyers, actuaries and others), but rather would help the named fiduciaries fulfill their legal obligation to prudently supervise and integrate the plan's investment-related operations, including, for instance, asset allocation, trust and custody functions, soft dollar arrangements, securities transactions, and evaluation and employment of new investment opportunities and techniques. This, in short, is the role of an "advising fiduciary."

If properly employed, the advising fiduciary could help trim the plan's expenses, enhance the productivity of its assets, and provide participants and named fiduciaries alike an added measure of protection.

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This article proceeds in three steps. First is a fuller explanation of the supervisory duties which ERISA imposes on named fiduciaries. Next are highlights of converging trends which underscore the need for expertise, independence and accountability in the oversight role. And finally is an explanation of the functions of an advising fiduciary and the practical advantages of retaining such a fiduciary.

"Named fiduciaries"

ERISA defines a "named fiduciary" as a fiduciary who is either named in the plan instrument or, pursuant to a procedure specified in the plan, is identified as a fiduciary by the plan sponsor (employer, union or both). For example, a named fiduciary could be a person whose name actually is stated in the plan document, a person who occupies an office specified in the document (such as company treasurer) or, in the case of a Taft-Hartley plan, the joint board of trustees.²

Congress' purpose for requiring every plan to designate one or more named fiduciaries was "so that responsibility for managing and operating the Plan—and liability for mismanagement—are focused with a degree of certainty."³ In short, the named fiduciary is where the buck stops.

Named fiduciaries are ultimately responsible for prudently monitoring all other fiduciaries and service providers whom they have selected, including investment managers, custodians, actuaries and others. In

other words, delegating a particular function to another fiduciary (such as an investment manager or trustee) does not entirely insulate the named fiduciaries from responsibility for prudently monitoring performance of that function. For instance, if an investment manager improperly receives "soft dollar" payments from a broker or otherwise misuses the plan's brokerage commissions, the named fiduciaries may be liable for failing to detect and correct such abuse.⁴ Or, if the manager over-concentrates a portion of the plan's portfolio in speculative stock, the named fiduciaries may be liable for failing to prudently monitor the manager and correct the imprudent investment.⁵ Or, if the named fiduciaries assign to other fiduciaries responsibility for leasing plan property, the named fiduciaries will still be liable for losses arising from those leases if the delegation is flawed or the named fiduciaries imprudently rely on those other fiduciaries.⁶

On the other hand, hiring an advising fiduciary for assistance in monitoring the plan's investment-related activities may go a long way in fulfilling the named fiduciaries' duties, as discussed more fully below.

Converging trends

Since ERISA's enactment in 1974, a number of judicial and regulatory trends have underscored that named fiduciaries must rigorously monitor all aspects of their plan's investment-related activities. Falling into three overlapping categories, these trends include the ever-increasing demand for (a) expertise in the oversight function; (b) independence in the oversight function; and (c) protection from legal exposure arising from the oversight function. An advising fiduciary can provide named fiduciaries the needed expertise, independence and protection.

Increasing Need for Expertise. Many developments over recent years have imposed an increasing need for sophistication and expertise in overseeing the investment-related activities of pension and welfare plans. To mention but a few examples:

"Procedural Prudence." Emerging from the Labor Department's prudent man regulation and court decisions, this requirement means in

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essence that the manner in which fiduciaries make their decisions is just as important (if not more so) than the substantive result they achieved. The requirement to observe reasonable procedures in decision-making applies in all investment-related matters, from whether and how to select a particular insurance policy for funding benefits⁷ to whether and how to make a construction loan,⁸ from properly allocating assets among stocks, bonds and real assets⁹ to determining the plan's liquidity needs.¹⁰

If named fiduciaries do not themselves have the necessary knowledge or experience to meet this standard, they must hire experts who do.¹¹ Neither good faith nor lack of understanding is a defense; "a pure heart and an empty head"¹² are not enough. Thus, if a trustee does not know how to monitor his investment managers, custodians, insurers and brokers, he must hire someone who does.¹³

Increasing complexity of financial matters. The financial transactions and issues confronting today's named fiduciaries are varied and complex. For example, whenever the plan trades securities, the named fiduciaries are required to assure both that the plan obtains "best execution" and that its "soft dollar" arrangements with brokers, managers, consultants and others are in the plan's best interest.¹⁴ If the named fiduciaries wish to systematically control risk, they may need to evaluate sophisticated investment

techniques such as portfolio insurance or dedicated or immunized bond portfolios. If the named fiduciaries decide to utilize an incentive compensation arrangement with any (or all) of their plan's investment managers, they must be prepared to collect and evaluate a range of complex information about the manager's performance and the suitability of the compensation formula.¹⁵ If the named fiduciaries wish to allow the plan's investment manager to trade through an affiliated broker, they must analyze detailed information about the cost effectiveness and reasonableness of such brokerage.¹⁶ The list goes on and on.

Limitations on time devoted to plan-related affairs. Ironically, while the law requires increasing levels of expertise in all investment-related activities of ERISA-covered plans, the Labor Department and courts narrowly interpret the rules on compensating named fiduciaries for performing their responsibilities. ERISA prohibits payment of compensation from the plan to any fiduciary who is also a "full-time" officer or employee of the plan sponsor(s) (i.e., of the union and/or corporate employer). Various regulations, advisory opinions and court decisions have strictly construed this prohibition.¹⁷ The practical effect of these rulings is that most named fiduciaries are discouraged from spending extensive time on plan-related matters, and consequently, that proper operation of the plan and protection of the participants and beneficiaries (as well as the named fiduciaries themselves) often requires the attention and expertise of professionals whom the plan may legally pay.

Increasing Need for Independence. Developments in ERISA litigation and regulation have generated an increasing demand for independence in many situations, including the following:

Where the named fiduciaries of a corporate plan suffer a conflict of interest because they also serve as corporate officers or directors. ERISA theoretically allows individuals who are officers or employees of the plan sponsor to serve as plan fiduciaries as well, but in practice, serving two masters frequently creates severe conflicts of interest, contrary to the law. An impermissible conflict might arise where, for

instance, the named fiduciary/corporate official must decide in the midst of a hostile tender offer whether to tender company stock owned by the plan¹⁸ or where named fiduciaries maintain personal investments which may be hurt or helped, depending on how they manage the plan's portfolio.¹⁹ Or, if the sponsor terminates an overfunded plan, the named fiduciaries may seek to pay benefit obligations through an annuity which maximizes the amount of surplus to the sponsor rather than maximizing the amount and safety of benefits to participants.²⁰

To prevent a conflict of interest from generating this type of breach and liability, the named fiduciary/corporate officer should either (1) appoint an independent fiduciary to make the investment decision on behalf of the plan, or at least (2) hire independent advisers to assist the "conflicted" fiduciary in making the most careful and impartial decision possible.²¹ As the Labor Department has stated time and time again, an indispensable element for dispelling the conflict of the fiduciary/corporate officer is "that an independent fiduciary affirmatively approve and monitor the investment."²²

Where the prohibited transaction rules otherwise preclude a favorable investment opportunity. Labor Department class exemptions frequently permit plans to engage in favorable financial arrangements which are otherwise illegal under the prohibited transactions rules if a sophisticated fiduciary, independent of the parties who stand to benefit from the arrangement, investigates and authorizes it. For example, the Labor Department's prohibited transaction Class Exemption for "Qualified Professional Asset Managers" permits plans to transact many types of otherwise prohibited business with parties in interest, as long as a QPAM—basically, an eligible savings and loan, bank, insurance company or investment adviser—manages the transaction.²³ Many other prohibited transaction class exemptions regarding, for example, certain brokerage arrangements, various mortgage-related investments, and purchase of certain securities in a public offering, likewise require the involvement of an independent fiduciary.

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Increased Need for Protection from Liability. Many developments over recent years have increased the legal exposure of named fiduciaries and correspondingly increased their need for protection. In addition to the developments discussed above (the increased need for expertise and independence) are other developments which further contribute to the legal exposure of named fiduciaries. These include:

Broad interpretation of ERISA's enforcement provisions. Since ERISA's enactment in 1974, the courts generally have broadly interpreted ERISA's enforcement provisions so as to protect the interests of plan participants and beneficiaries. These interpretations have greatly exposed all ERISA fiduciaries, including named fiduciaries, to threat of litigation and liability for breaching their duties.

Consider, for example, the monetary liability imposed on breaching fiduciaries. Fiduciaries are personally liable under Sec. 409 of ERISA for losses to the plan resulting from their breaches.²⁴ Doubts as to who should compensate for such losses²⁵ or the causal link between the breach and loss²⁶ are resolved against the fiduciary. Where a fiduciary has used plan assets for his personal benefit or to benefit his corporation, the court may require him to disgorge whatever "unjust enrichment" he received, even if the plan did not suffer losses and, indeed, even if the plan gained from the transaction.²⁷ In certain circumstances, the courts may also hold fiduciaries liable for punitive dam-

ages.²⁸ Where a named fiduciary has made an imprudent investment but, at the date of final judgment, the investment has not yet created a measurable loss, the court may require him to post a bond or other security to protect the plan if a loss later materializes.²⁹ Under Sec. 502(g) of ERISA, a defendant fiduciary may also be liable for paying the plaintiff's attorney's fees and costs.³⁰

The difficulty of obtaining reasonable fiduciary liability coverage. Over recent years, while the courts have broadly construed ERISA's enforcement provisions, fiduciary liability insurance has grown more difficult to obtain. Premiums have soared, policy limits have fallen, deductibles have risen and exclusions grown broader. Policies now frequently exclude claims involving personal profit or advantage to the fiduciary (such as any type of self-dealing), violations of the securities laws (which might include failure to properly monitor a plan's brokers), claims under RICO (the Racketeer Influenced and Corrupt Organizations Act), terminations and reversions, disputes between trustees, and acts which—at the effective date of coverage—the insured reasonably should have foreseen. Policies may also include attorneys' fees as part of the policy limits. Thus in many situations named fiduciaries may be left largely unprotected.

The advising fiduciary

Given the demand for expertise and independence in supervising investment-related activities, and the serious legal exposure of named fiduciaries, many plans would benefit from professional assistance from another fiduciary which specializes in investment oversight and is legally accountable under ERISA for prudently performing that role. This overseer would be an ERISA fiduciary, legally responsible for prudently aiding in the oversight function, to the extent that it regularly advised the named fiduciaries about such oversight and the named fiduciaries frequently relied on that advice.³¹ This new fiduciary would not replace the plan's current investment manager, custodian, actuary, or other professionals but would help the named fiduciaries oversee all investment-related activities of the plan. Thus, the fiduciary would need a wide range of

expertise, spanning asset allocation, various investment vehicles (including securities, real estate, options and foreign investments), custody and master trust services, brokerage, enforcement and compliance, actuarial principles, insurance, internal procedures and manager selection. This is the role of "advising fiduciary."

Unique role

The concept of obtaining professional assistance in investment-related matters is not new. Plans have traditionally retained other fiduciaries, such as investment managers, master trustees, administrators and others for assistance in performing daily, hands-on functions. What is new, however, is the concept of obtaining assistance specifically on investment-related oversight and obtaining it from a fiduciary who is responsible for prudently fulfilling that role.

The role of advising fiduciary would be fundamentally different from that of other investment professionals. Pension consultants, for example, generally are not designed to act as fiduciaries and thus do not provide participants the degree of accountability—or named fiduciaries the degree of protection—that another fiduciary would provide. By contrast, the advising fiduciary is expressly designed to help shift liability away from the named fiduciaries, obtain liability insurance on reasonable terms and alleviate conflicts of interest confronting the named fiduciaries. Also because of its legal responsibility under ERISA, the advising fiduciary is designed to improve the plan's "bottom line."

Again unlike the advising fiduciary, investment managers typically manage only a portion of the portfolio and within guidelines imposed by the named fiduciaries from the "top down." Custodians and directed trustees (such as bank trustees) by definition are generally not charged with discretionary responsibility for making investment decisions or decisions regarding the selection, performance or termination of other professionals. By contrast, the advising fiduciary is responsible under ERISA for prudently overseeing all investment-related activities regarding the entire plan portfolio.

The specific duties of the advis-

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ing fiduciary would largely be a matter of contract, negotiated between the plan and the advising fiduciary on a case-by-case basis. Depending on the situation, the named fiduciaries might want assistance on a broad range of activities, only a few activities, or only a single issue or transaction in particular depth.

For example, the named fiduciaries could hire the advising fiduciary to perform an operational review of all investment-related activities of the plan. The goal of the review would be to identify ways in which plan assets were not productively or safely employed, plan expenses were unnecessarily high, or legal exposure (arising from investment-related activities) was unduly great.³² The review could evaluate the current condition and practices of the plan regarding, among other things, the process for allocating assets among investment managers and capital markets; negotiating contracts and fees with managers; brokerage; procedures for identifying and pursuing new investment opportunities; and the efficiency of trust and custody functions, including cash management, reporting, use of "float" and related matters.

If, in response to the operational review, the named fiduciaries decided that corrective action was appropriate, they could further retain the advising fiduciary to recommend the necessary changes and help implement them. The advising fiduciary would acknowledge its own legal responsibility for each of its recommendations which the plan implemented, thus providing participants and beneficiaries an extra measure of safety and helping protect the named fiduciaries against liability.

The plan could also retain the advising fiduciary on a transactional basis. For example, to minimize conflicts of interest where the plan is considering a purchase, sale or tender of employer securities, the named fiduciaries of a single-employer plan could retain an advising fiduciary for an independent assessment of the situation. Regardless of the decision reached, the advising fiduciary would be legally responsible for prudently evaluating the issue in the best interest of the plan's participants and beneficiaries.

The practical advantages to a plan, its participants and beneficiaries, and its named fiduciaries of hiring an advising fiduciary are essentially threefold:

1. improving the plan's financial operations and opportunities;
2. greater legal protection for participants and named fiduciaries; and
3. relieving the named fiduciaries from excessive time pressures while helping them fulfill their obligations.

Improved Financial Operations and Opportunities. By helping to oversee all of the plan's investment-related activities, the advising fiduciary would likely enhance the productivity and safety of plan assets, decrease expenses, or both. For example, tightening up custody services could well lead to fewer "fails" in securities clearance, more timely and complete collection of principal and interest payments on mortgage-related securities, and better cash management. Improved custodial reporting could help detect churning of the securities portfolio or help in monitoring brokerage commissions. Similarly, focusing on soft dollar arrangements could result in brokers providing more value to or for the benefit of the plan, rather than to the managers, the brokers themselves or others. More refined asset allocation—frequently considered the plan's single most important investment process—could improve overall return with equal or lower risk. Knowledge of new financial opportunities could similarly improve the plan's investment program.

Greater Protection. Assistance from an advising fiduciary could, for several distinct but related reasons, provide plan participants and named fiduciaries an added level of safety.

First, the participation of an advising fiduciary may lessen the risk of breaches both by generally improving the process for investment-related decisions and, more specifically, by alleviating unlawful conflicts of interest as discussed above.

Second, with the involvement of an advising fiduciary, insurance underwriters are more likely to offer the plan equal or better coverage for its named fiduciaries, at lower rates. This would be true not only because of the reduced chance for breaches but also because the advising fiduciary will probably be independently insured.

Third, and closely related to the second point, the fact that the advising fiduciary accepts legal responsibility for prudently overseeing the plan may help shield the named fiduciaries from liability. Theoretically, of course, the named fiduciaries remain ultimately responsible for overseeing all aspects of their plan; but practically speaking, the fact of retaining an advising fiduciary would go a long way in protecting them (and their insurer) from liability.³³

Relief from Time Pressures. The oversight responsibilities imposed on named fiduciaries require a great deal of time and attention, generally for little or no compensation. Nevertheless, most named fiduciaries presumably want to prudently exercise their responsibilities and to retain ultimate authority over the plan. Under these circumstances, the advising fiduciary may prove a great help. On the one hand, the advising fiduciary would by definition be both expert in overseeing the most time-consuming, complex and detailed investment-related matters and legally responsible for prudently doing so. On the other hand, the named fiduciaries would maintain authority to accept or reject any of the advising fiduciary's recommendations, to make the actual investment-related decisions, and, if appropriate, to terminate the advising fiduciary. An advising fiduciary could thus help named fiduciaries attend to their full-time occupations while improving the condition of the plan for which they are deemed ultimately responsible.

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ciaries and themselves by retaining an advising fiduciary to assist in overseeing the plan’s investment-related activities. □

FOOTNOTES

1. Sec. 402(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. Sec. 1102 (a).

2. ERISA Conference Report, p. 297; 29 C.F.R. Sec. 2509.75-5, FR-1, FR-2, FR-3.

3. *Birmingham v. So-Gen Swiss Internat’l Corp. Retirement Plan*, 718 F.2d 515, 522 (2d Cir. 1983).

4. ERISA Technical Release 86-1 (May 22, 1986).

5. See Brief of Secretary of Labor as *amicus curiae* in *In re Atlantic Financial Management, Inc. Securities Litigation*, 603 F. Supp. 135 (D. Mass. 1985). In dicta, the court approved of the Secretary’s conclusion that the named fiduciaries were liable in this situation. 603 F. Supp. at 138.

6. *Brock v. Self* 632 F. Supp. 1509, 1523-24 (W.D. La. 1986).

7. *Donovan v. Tricario*, 5 EBC 2057, 2064 (S.D. Fla. 1984), *aff’d sub nom.*, *Brock v. Tricario*, 768 F.2d 1351 (11th Cir. 1985); *Marshall v. Carroll*, 2 EBC 2491, 2498 (N.D. Cal. 1980), *aff’d mem.*, 4 EBC 1692 (9th Cir. 1982).

8. E.g., *Marshall v. Mazzola*, 2 EBC 2115 (N.D. Cal. 1981), *aff’d*, 716 F.2d 1226 (9th Cir. 1983); *Marshall v. Teamsters Local 282 Pension Trust*, 458 F. Supp. 986 (E.D.N.Y. 1978); *Donovan v. Walton*, 609 F. Supp. 1221 (S.D. Fla. 1985); *Davidson v. Cook*, 567 F. Supp. 225 (E.D. Va. 1983), *aff’d*, 734 F.2d 10 (4th Cir. 1984).

9. See *Mazzola*, 2 EBC at 2126-27, 2135-36; ERISA’s Conference Report at page 304, regarding diversification.

10. See *Fink v. NS&T*, 772 F. 2d 951 (D.C. Cir. 1985); Conference Report at 297 (regarding plan’s “funding policy”).

11. See, e.g., *Katsaros v. Cody*, 568 F.Supp. 360, 367 (E.D.N.Y. 1983), *aff’d in relevant part*, 744 F.2d 270 (2d Cir. 1984); *Tricario*, 5 EBC at 2064.

12. *Donovan v. Cunningham*, 716 F.2d 1455, at 1467 (5th Cir. 1983); *accord Katsaros*, 744 F.2d at 279; *Leigh v. Engle*, 727 F.2d 113, at 124 (7th Cir. 1984); *Marshall v. Glass/Metal Assn. & Glaziers*, 507 F.Supp. 378, 384 (D. Haw. 1980) (prudence standard “not a refuge for fiduciaries who are not equipped to evaluate a complex investment”).

13. See *Cunningham*, 716 F.2d at 1474; *Katsaros*, 568 F. Supp. at 367; *Walton*, 609 F. Supp. at 1240 n.23.

14. See ERISA Technical Release, 86-1, May 22, 1986.

15. DOL Advisory Opins. 86-20A and 86-21A, Aug. 29, 1986. As the Department stated: “... the plan fiduciary must act prudently with respect to the decision to enter into an incentive compensation arrangement with an investment manager, as well as to the negotiation of the specific formula under which compensation will be paid. The Department further emphasizes that it expects a plan fiduciary, prior to entering into an incentive compensation arrangement, to fully understand the compensation formula, and the risks associated with this manner of compensation, following disclosure by the investment manager of all relevant information pertaining to the proposed arrangement. In addition, such plan fiduciary must be capable of periodically monitoring the actions taken by the manager in the performance of its investment duties. Thus, in considering whether to enter into an arrangement of the kind described in your letter a fiduciary should take into account its ability to provide adequate oversight of the investment manager.” Opin. 86-20A, pp. 6-7 (emphasis added).

16. See Class Exemption 86-128 (Nov. 5, 1986), superseding Class Exemp. 79-1.

17. E.g., 29 CFR Sec. 2550.408c-2; Advis. Opins. 78-36, 79-92, 83-7A, 85-019A; *Donovan v. Daugherty*, 550 F. Supp. 390 (S.D. Ala. 1982).

18. E.g., *Donovan v. Bierwerth*, 680 F. 2d 263 (2d Cir. 1982), *cert. denied*, 459 U.S. 1069 (1982); *Danaher v. Chicago Pneumatic*, 635 F. Supp. 246 (N.D. Ill. 1986); *Martin Marietta Corp. v. Bendix Corp.*, Fed Sec. L. Rep. (CCH) para. 99,068 (S.D.N.Y. 1982); Dept. of Labor Advis. Opin. 80-83 (WSB No.), Aug. 14, 1980 (re: Frederickson Motor Express); see Palmieri, “Fiduciary Responsibilities Under ERISA in Corporate Takeovers,” 13 *Journal of Corporate Taxation* 127 (1986);

cf. *IAM Stock Ownership Investment Fund v. Eastern Air Lines, Inc.*, 7 EBC 1937, 1944-1945 n.11 (D.D.C. 1986) (suggesting need to remove union official from serving as ESOP fiduciary because of his conflicting loyalty to the union's interests).

19. *Leigh v. Engle*, 727 F.2d 113 (7th Cir. 1984); *Sandoval v. Simmons*, 632 F. Supp. 1174 (C.D. Ill. 1985); *Fisher v. MacKenzie*, No. C-84-868-JLQ (E.D. Wash. 1985) (available on Lexis, Genfed library, Dist. file).

20. The choice of which insurance company will provide annuities to participants upon termination, what the interest rate will be, whether to purchase a participating annuity and similar issues are all deemed fiduciary decisions, subject to ERISA. See letter from Dennis M. Kass, Administrator, Pension and Welfare Benefits Admin., to Congressman John Erlenborn, March 13, 1986, reprinted in 13 *BNA Pension Rptr.* pp. 472-73 (March 17, 1986); Letter from Dennis Kass to Congressman Edward Roybal, Nov. 18, 1986, reprinted in 13 *BNA Pens. Rptr.* 2080 (Dec. 15, 1986); *District 65, UAW v. Harper & Row Publishers, Inc.*, 576 F. Supp. 1468, 1477-80 (S.D.N.Y. 1983).



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21. See *Dimond v. Retirement Plan*, 4 EBC 1457, 1462 (W.D. Pa. 1983); *Sandoval v. Simmons*, 632 F. Supp. 1174, 1212-14 (C.D. Ill. 1985); *Fisher v. MacKenzie*, No. C-84-868-JLQ (E.D. Wash. 1985), slip opin. at 9-10 (avail. on Lexis, Genfed. library, Dist. file); Palmieri at 139-142; citing *Bierwirth, Leigh, and Bendix*; see also Pianko, "Plan Investments & Fiduciary Liability," 11 *Journal of Pension Planning & Compliance*, 241 (Fall 1985); Brief of Department of Labor as *amicus curiae* in *Leigh v. Engle*, 727 F.2d 113.

22. Department's Exemption Denial Letter to Albin C. Koch, Oct. 9, 1986, reprinted in 13 *BNA Pension Rptr.* 2055, at 2056 (Dec. 8, 1986); accord Technical Release 85-1, Jan. 22, 1985, on Retroactive Exemption Policy, reprinted in 12 *BNA Pension Rptr.* 166 (Jan. 28, 1985).

23. Class Exemp. No. 84-14.

24. *Donovan v. Bierwirth*, 754 F.2d 1049, 1052 (2d Cir. 1985).

25. *Mahoney v. Union Leader Retirement Profit Sharing Plan*, 635 F.2d 27 (1st Cir. 1980).

26. *Donovan v. Williams*, 4 EBC 1237 (N.D. Ohio 1983); *PBGC v. Greene*, 570 F. Supp. 1483, 1493, 1498-99 & n.32 (W.D. Pa. 1983).

27. *Leigh v. Engle*, 727 F. 2d at 139; see *Lowen v. Tower Asset Management, Inc.*, 8 EBC 1289, 1302 (S.D.N.Y. 1987).

28. *Kuntz v. Reese*, 760 F. 2d 726 (9th Cir. 1985); *Eaton v. D'Amato*, 581 F. Supp. 743, at 747-48 (D.D.C. 1980); see generally *Russell v. Mass. Mutual Life Ins. Co.*, 105 S. Ct. 3085 (1985).

29. *Mazzola*, 2 EBC at 2137.

30. E.g., *Eaves v. Penn.*, 587 F. 2d (10th Cir. 1978); *Iron Workers v. Bowen*, 624 F. 2d 1255, 1265 (5th Cir. 1980), on further appeal, 695 F. 2d 531 (11th Cir. 1983).

31. Although advisers are generally not deemed fiduciaries, they are considered fiduciaries if, because of their special expertise or the trustees' heavy reliance on them, they effectively exercise a significant degree of control over plan assets. See ERISA Conference Report, p. 323; 29 C.F.R. 2509.75-5, D-1; 29 C.F.R. Sec. 2510.3-21(c) (defining a person who renders "investment advice for a fee" as a fiduciary); *Brock v. Self*, 632 F. Supp. 1509, 1523-24 (W.D.La. 1986) (citing cases holding advisers and consultants to be fiduciaries); Department of Labor Adv. Opin. 84-03A (Jan. 4, 1984).

32. The advising fiduciary could coordinate with the plan's legal counsel in conducting this review.

33. See, e.g., *Bierwirth*, 680 F.2d at 272; *Walton*, 609 F. Supp. at 1240; *Saccio v. Eastern Air Lines*, No. 82 C 3950 (E.D.N.Y. 1984), slip opin. at 6 (available on Lexis, Genfed library, Dist. file.)