Education and Advice Under ERISA for Employee-Directed 401(k) Plans

by John M. Kimpel

▶**Section 404(c) regulation sets forth the conditions that plan fiduciaries must meet to be relieved of liability for the consequences of employees' control over their accounts.** *After reviewing applicable laws and regulations, the author concludes that employers desiring to provide employees with education and/or advice services through a third party should be able to do so while still obtaining reliance on the protections of Section 404(c) and without taking on significant additional fiduciary responsibilities.*◀

One of the most remarkable developments in the retirement plan area over the last decade has been the phenomenal growth of 401(k) plans. Under this type of plan, employees are able to set aside a portion of their pretax salary in a retirement savings vehicle where earnings will accumulate on a tax-sheltered basis. Much of the decision-making authority is shifted from employers to employees under such an arrangement. The employee must decide whether to participate in the arrangement and how much to contribute to the plan. Furthermore, the risk and reward of investment performance thereupon flows to the employee rather than to the employer (as is the case with defined benefit plans). In other words, the amount available to an employee at retirement depends on the performance of the investment alternatives the employee has chosen. Growth of 401(k) plans has been dramatic. Virtually nonexistent before 1982,[1] when the Internal Revenue Service (IRS) issued final regulations for a statute first enacted in 1978, there were over 210,000 plans with $475 billion by 1993.[2] By 1999, approximately 273,000 U.S. corporations sponsored 401(k) plans, with $1.4 trillion in assets held by 36.7 million participants.[3]

Coupled with the growth of 401(k) plans is the trend toward employee-directed investments. To some extent, this trend results from the desire of employers to obtain the relief provided by compliance with §404(c) of ERISA. More importantly, however, employees have demanded control of their investments. It is their money after all, and it is they who gain from superior performance, but also suffer from poor performance. It is difficult from an employee relations standpoint to shift risk to employees without also shifting control to them as well. The Department of Labor (DOL) regulation issued under §404(c) in 1992[4] is perhaps best characterized as a reflection of this workplace reality in the regulatory arena.

The §404(c) regulation set forth the conditions that plan fiduciaries must meet to be relieved of liability for the consequences of employees' control over their accounts. Among these conditions are three primary requirements. First, the plan must offer a broad range of investment alternatives, including at least three diversified "core" options with each of

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those having different risk and return characteristics.[5] Second, employees must be allowed to transfer among these options with a frequency commensurate with the investments' market volatility, but at least as often as quarterly in the case of the core options.[6] Third, employees must have access to sufficient information about each investment option so that they can make informed investment decisions.[7]

Although the regulation provides broad relief to employers, its third requirement raised a new question: Does providing the necessary information constitute "investment advice" and thereby turn the information giver into an ERISA fiduciary? In other words, could he or she lose the protection of §404(c) by providing too much information?

If the employer errs on the side of excess in assuring that it supplied employees with sufficient information, the employer might be deemed to be providing investment advice under ERISA, thereby causing the employer to become a fiduciary with respect to, and therefore potentially liable for, that advice. In other words, by trying to rely on §404(c) to insulate itself from liability, the employer could, in an effort to satisfy the information condition set forth by the DOL for that relief, find itself in the role of an advice-giving fiduciary and once again liable for the employee's investment decisions.

On the other hand, if the employer errs on the side of brevity in supplying information to employees to assure that it does not "cross the line" and provide advice, the employer might risk failing to meet the requirements of §404(c). In such a case, the employer might find itself still responsible for the consequence of employees' investment decisions, the very thing compliance with §404(c) seeks to avoid.

In fairness to the DOL, concern over this dilemma may evidence an overabundance of caution on the part of employers. The §404(c) regulation itself states that the regulation does not require the employer to provide investment advice to be a §404(c) plan.[8] Accordingly, it is clear that providing the information necessary to satisfy §404(c) does not make the employer a fiduciary, and DOL officials have taken great pains to reiterate this point publicly. Nevertheless, many employers remain unconvinced.

For other employers, however, the issue is more than concern over possible liability for doing the minimum required by §404(c). Rather, the issue for these employers is concern over the possible liability for doing much more than the required minimum level of information disclosure. For these employers, §404(c) is the starting point, not the ending point. These employers want their employees to become knowledgeable, even sophisticated, investors who are therefore well equipped to ensure their own retirement income adequacy.

So the questions for these employers become: Can an employer provide robust education that goes way beyond the straightforward information requirements of §404(c) to employees and still obtain the benefits of §404(c)? Can an employer go further and engage an outside provider to give advice to its employees?

The answer is "yes" to each of these two questions, but the legal analysis is different for each alternative. To do this analysis, we need to look to the fiduciary provisions of ERISA. The most critical to this issue are the following.

SECTION 3(21): DEFINITION OF *FIDUCIARY*

ERISA Section 3(21) defines a *fiduciary* to include, among others, a person who gives "investment advice" for a "fee or other compensation." The determination of what constitutes relied upon by the employee benefits community since then.[9] Under that regulation, a person is deemed to give investment advice for purposes of the definition of a *fiduciary* only if such person:

1. Renders advice as to the value of securities or other property, or makes recommendations as to the advisability of investing in securities or other property, *and*
2. Renders such advice:
   i. On a *regular* basis
   ii. Pursuant to a *mutual* agreement that:
      a. Such advice will serve as a *primary* basis for investment decisions with respect to plan assets; *and*
      b. The person providing such advice will render *individualized* investment advice based on the particular needs of the plan.

Accordingly, four elements *in addition to* what would generally be considered rendering advice must *all* be present for that advice to constitute "investment advice" under ERISA in the context of an employee-directed plan. First, such advice must be given for a fee or other compensation. Second, such advice must be provided on a regular basis. Third, such advice must be given pursuant to a mutual agreement between the party providing the advice and the employee that such advice will serve as a primary basis for the employee's investment decisions. Fourth, such advice must be given pursuant to a mutual agreement that the provider of any such advice will individualize it based on the particular needs of the employee. Absent the presence of *all* four of these elements, advice is not, for ERISA purposes, *advice*.

The determination of who is a fiduciary is the necessary first step to addressing the issue for three reasons. First, only fiduciaries can be sued for money damages under ERISA[10] (although nonfiduciaries may be sued under §502(a)(3) for "appropriate equitable relief" such as rescission, at least in the case of a nonfiduciary party in interest found to participate in a prohibited transaction under §406(a)).[11] Second, and more specifically, only fiduciaries can have conflicts of interest sufficient under ERISA to create a cause of action for a breach of §406(b).[12] And third, only fiduciaries can be potentially liable for acts or omissions of other fiduciaries under §405(a).[13]

Why is the third issue important to an employer? Because the employer is always a fiduciary under ERISA, the employer needs to understand not only its exposure under ERISA for its own acts and omissions, but also its exposure for the acts and omissions of other fiduciaries.

SECTION 404(a): STANDARD OF CARE

Section 404(a) defines the standard of care for ERISA fiduciaries. Among other things, it requires fiduciaries to exercise their duties "solely" in the interest of plan participants and for the "exclusive purpose" of providing benefits to participants and "defraying reasonable expenses" of administering the plan, all with the care of a "prudent expert," i.e.:

> . . . with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.[14]

This "prudent expert" standard is important to the employer primarily in understanding how its own conduct will be judged. To the extent the employer may have co-fiduciary liability, however, it may also be important in enabling the employer to evaluate its co-fiduciary's conduct.

SECTION 406: PROHIBITED TRANSACTIONS

Section 406(a) of ERISA generally prohibits a fiduciary from causing a plan to engage in specified transactions with a "party in interest" to the plan, although a variety of statutory and administrative class exemptions diminish the scope of these specific "technical" prohibitions.[15] Section 406(b), however, more generally prohibits a fiduciary from engaging in acts of self-dealing or acting on behalf of the plan where a conflict of interest exists. These broad prohibitions preclude a fiduciary from:

1. Dealing with plan assets in his or her own benefit
2. Representing in a transaction involving the plan a party whose interests are adverse to the plan or
3. Receiving consideration for his or her own account from a third party with respect to a transaction involving plan assets.

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These are things a fiduciary just cannot do, regardless of how well-intentioned the fiduciary's actions are and how beneficial to the plan the fiduciary's actions might be. If a transaction is otherwise prohibited under §406(b), the only way a fiduciary may engage in it is to first obtain an administrative exemption from the DOL. The DOL does not issue these exemptions easily, so this can be a time-consuming experience.[16] It is almost always preferable, therefore, to try to structure the transaction in a way that will not violate §406(b). A fiduciary who engages in a prohibited transaction risks both monetary damages and equitable remedies against it, as well as the payment to the DOL of a penalty equal to 20% of that amount.[17]

SECTION 405: CO-FIDUCIARY LIABILITY

A fiduciary can be held liable under §405(a) of ERISA for a breach of fiduciary duties by a co-fiduciary. Section 405(a) reads as follows:

> In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:
>
> (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;
>
> (2) if, by his failure to comply with §404(a)(1) in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or
>
> (3) if he has knowledge of a breach by such other fiduciary, unless he takes reasonable efforts under the circumstances to remedy the breach.

Accordingly, a fiduciary may be liable for a plan loss caused by a second fiduciary even though the first fiduciary may not have been the direct cause of, or even most responsible for, the loss.

It is these co-fiduciary liability provisions that, when coupled with the general fiduciary standard of §404(a)(1), cause employers to be named as co-defendants in lawsuits generally aimed at other plan fiduciaries. Sometimes the employer's board of directors or officers are also sued individually as fiduciaries of the plan. Even more troubling, the courts are divided on the issue of whether a right of contribution against co-fiduciaries exists under ERISA. The Second and Seventh Circuits[18] have ruled such a right exists, but the Ninth Circuit[19] has ruled that such a right does not exist under ERISA. Accordingly, it is unclear whether the fiduciary who ultimately repays the plan's losses is able to recoup any contribution from its co-fiduciaries even though the co-fiduciaries also breached their duties.

With these fiduciary rules in mind, let's look at investment education and advice from the employer's perspective.

EDUCATION

The first alternative is for the employer to provide robust investment education that will not cross the line into investment advice. The good news here is that the DOL has provided a road map to employers to follow in taking this route. In 1996, the DOL issued an Interpretive Bulletin, I.B. 96-1, entitled "Interpretive Bulletin Relating to Participant Investment Education."[20] In its earlier release of the I.B. in exposure draft form, the DOL characterized it as an effort "to encourage employers and others to give pension plan participants valuable investment education."[21] At the same time the DOL released its exposure draft, the SEC made public a letter in which it expressed its view that employers that provide their employees with investment information of the type described in the exposure draft generally are not subject to registration or regulation under the Investment Advisers Act of 1940, because such employers are typically "not in the business" of providing investment advice to their employees.[22] The overall goal of the DOL and the SEC was to give plan sponsors comfort that they could provide investment education to plan participants without running afoul of ERISA fiduciary rules and the Advisers' Act.

What does the I.B. do? Specifically, it provides "safe harbors" for the following types of informational and educational materials.

Plan information. This safe harbor includes information about the plan and the consequences of participating in it, such as the benefits of increasing plan contributions. It also includes the basic information about the investment options available under the plan that is required by the §404(c) regulation, such as a description of the risk and return characteristics of each option.

General financial and investment information. This safe harbor goes well beyond the basic §404(c) information requirement and includes information about general financial and investment concepts, such as diversification and dollar-cost averaging. It also includes information such as the historic differences in rates of return between different asset classes based on standard market indexes, the effects of inflation, estimating future retirement needs, determining a participant's own time horizon for investments and assessing risk tolerance.

Asset allocation information. This safe harbor goes still further and includes information that provides employees with models of asset allocation portfolios of hypothetical individuals who have different time horizons and risk profiles. The model portfolios are based on generally accepted investment principles that take into account the historic returns of different asset classes (e.g., equities, bonds or cash).[23] These model portfolios may go beyond general asset classes and reference specific investment options available under the plan, provided that they are accompanied by a statement indicating that other options having similar risk and return characteristics may be available under the plan and, if so, identifying where information about them may be obtained. Perhaps most importantly, the models must be accompanied by all the material facts and assumptions on which the models are based. In other words, a "proprietary" black box approach won't do it; instead, what's inside the black box has to be disclosed to fall within the safe harbor.

Interactive investment materials. This safe harbor includes materials that are based on the same asset allocation models described above (and include all the requirements therefor) but are designed to provide employees with the means to estimate their own retirement income needs and to assess the impact of different asset allocations on retirement income. To fall within the safe harbor, there must be an objective correlation between the asset allocations generated by the interactive tool and the information and data supplied by the employee. Using such a tool, employees can input their own financial and personal information to project retirement savings based on different investment strategies, portfolios and economic assumptions. Employees can thereby see the interaction between various assumptions concerning contribution rates, time horizon and rates of return, and the consequences of varying any of these assumptions.

The I.B. therefore permits a broad range of informational and educational materials, from straightforward brochures describing a plan's investment options to sophisticated interactive tools that allow employees to model possible retirement income outcomes based on differ-

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ent investment mixes. An employer that utilizes one or more of the safe harbors is able to take full advantage of §404(c) and thereby shield itself from liability under ERISA for the consequences of employees' exercise of investment control over their accounts. This is not to say that the employer is completely home free under ERISA. If the employer engages an outside provider to provide investment educational services, the employer will be responsible for the prudent selection and monitoring of such service provider in accordance with §404(a) of ERISA.[24] But, utilization of the safe harbors under the I.B. does relieve the employer of any possible co-fiduciary liability under §405(a) because the service provider is not a fiduciary.[25]

Before leaving the issue of education, one final question must be addressed. Some employers have been wary to engage an education provider when that provider is affiliated with, or otherwise compensated by, one or more of the investment options available under the plan. The concern is based on the idea that the education provider could be engaging in a prohibited transaction if it is subsequently determined that the service provided goes beyond education and is treated as investment advice (notwithstanding the unlikelihood of such a transformation under the applicable ERISA rules). The potential prohibited transaction in question is the conflict of interest that might arise when the advice pertains to one or more investment options in which the advice giver has an interest. Such an interest could be direct, such as when the advice giver or its affiliate is the investment manager of the investment option; or it could be indirect, such as when the advice giver receives a distribution or other fee with respect to sales of the investment or owns an interest in the investment option or its manager, or when the investment option or its manager owns an interest in the advice giver.[26]

In any event, if an education provider (i) were deemed to be a fiduciary because it was providing advice rather than education and (ii) was determined to have entered into a prohibited transaction because of a financial connection to an investment option that is covered by the education provider's service, these facts should not, in and of themselves, create any liability on the part of the employer that engages such education provider, because the legal liability for entering into a prohibited transaction falls solely on the fiduciary who is a party that causes the plan to enter into that transaction (i.e., the advice provider).[27] Neither ERISA nor the Code contemplates sanctions on a fiduciary *merely* because *another* fiduciary has caused the plan to enter into a prohibited transaction.

If, on the other hand, the education provider who has transformed into an advice giver is subsequently determined to have given imprudent advice, the employer may, as discussed below, have potential co-fiduciary liability for that advice.

Accordingly, the worst-case scenario for an employer that engages an education provider is that the education provider's service is subsequently determined to be investment advice under ERISA, which it gives imprudently. An employer could have co-fiduciary liability for the consequences of that imprudent advice under §405(a)(3) if it is aware of that breach and doesn't make reasonable efforts under the circumstances to remedy it. The best protection an employer has against the possibility of such co-fiduciary liability is to do what the employer is already obligated to do under §404(a): prudently select and monitor the education provider.

INVESTMENT ADVICE

The second alternative is for the employer to go beyond I.B. 96-1 and to engage an outside party to provide investment advice. However, the §3(21) regulation sets the bar-defining advice high enough so that much of what is generally referred to in the marketplace as *advice* can walk under that bar without triggering the definition. In other words, it's not enough to ask whether or not the advice or advice-like service fits within the safe harbor of the I.B. Even if it does not, it still may not be *investment advice* as defined in the §3(21) regulation. If it falls outside the definition of *investment advice* under ERISA, the consequences of providing it to plan participants will have the same consequences to employers as providing a service that fits within one or more of the safe harbors under the I.B. Of course, if it's not *advice* within the ERISA definition, it's probably not prudent to characterize it as such.

But a different analysis is required if the advice falls within the definition of *investment advice* under the §3(21) regulation. The §404(c) regulation contemplates a similar, albeit not identical, situation. Example (8) of that regulation[28] states that, where the employer (or other fiduciary) designates three investment managers whom participants may appoint to manage assets in their accounts, the employer has no liability for the imprudent management of a participant's account by one of those managers, both because the employer has no affirmative duty to give investment advice to the participant[29] and because the employer is relieved of co-fiduciary liability by reason of §404(c)(2).[30] Accordingly, as the example states, the employer's fiduciary duty is limited in such a case to the prudent selection of the manager and monitoring the manager's performance to determine the suitability of continuing its engagement as investment manager.[31]

This example in the §404(c) regulation is important because it seems to relieve the employer of co-fiduciary liability in circumstances that otherwise would give rise to co-fiduciary liability. In the typical case, there are only two exceptions to the co-fiduciary liability provisions of §405(a). The first is §405(d), which relieves the plan trustee of liability for the acts and omissions of an investment manager properly appointed by the plan's named fiduciary in accordance with §402(c)(3). However, that provision provides no relief to the employer; it only provides relief to the trustee.

The other exception is §405(c), which relieves named fiduciaries of liability for the acts and omissions of another fiduciary to whom a particular fiduciary responsibility has been allocated. However, this provision specifically excludes "trustee responsibilities," which are defined at §405(c)(3) as the responsibility to manage or control the assets of a plan, the very thing that an investment manager does. In other words, appointment of an investment manager does not relieve the employer of co-fiduciary liability under §405(a) for the acts and omissions of an investment manager, but it may allow the employer to better meet its obligation under §404(a) to manage the plan assets as a "prudent expert" would.

Example (8) of the §404(c) regulation, however, suggests that the employer has no potential co-fiduciary liability for an investment manager's acts or omissions, where such investment manager has been selected by the plan participant from one of three managers designated by the employer. The example refers to an earlier provision of the regulation, §2550.404c-1(d)(2)(iii), which reads as follows:

> (iii) The individual investment decisions of an investment manager who is designated directly by a participant or beneficiary . . . are not direct and necessary results of the designation of the investment manager . . . However, this paragraph . . . shall not be construed to result in liability under §405 of ERISA with respect to a fiduciary (other than the investment manager) who would otherwise be relieved of liability by reason of §404(c)(2) of [ERISA] and paragraph (d) of this section.

In other words, the regulation suggests that §404(c) overrides the co-fiduciary liability provisions of §405. How can that be? Presumably because, at least in the circumstances described in the example, the degree to which the participant exercises control, in selecting the investment manager from the menu of three provided by the employer, sufficiently breaks the co-fiduciary relationship that otherwise would exist between the employer and the managers. Offering a menu of investment managers under the plan is therefore treated under §404(c)

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in the same way as offering a menu of investment options: The employer's exposure to fiduciary liability is limited to the prudent selection and monitoring of the investment managers on the menu. An employer that follows this route, therefore, is essentially in the same liability situation as an employer that provides educational tools to its employees.

It is not at all certain, however, if the same analysis applies in the case of an employer that offers the services of only *one* investment manager because the degree to which the employee exercises control is significantly reduced. Rather than choosing among several investment managers, the employee in this case is merely deciding whether or not to engage the investment manager at all. This situation certainly falls outside the facts cited in Example (8) under the §404(c) regulation. It therefore seems likely that an employer that provides its employees access to a single investment manager will continue to be exposed to co-fiduciary liability for the acts and omissions of that investment manager under ERISA §405(a). However, as discussed above in the case of an education provider transformed into an advice giver, the exposure to such co-fiduciary liability can be significantly diminished, if not altogether eliminated, if the employer acts prudently in the selection and monitoring of the single advice giver.

Furthermore, it is also not entirely clear whether Example (8) applies to an employer that offers employees access to three advice providers rather than to three investment managers. Under §3(38) of ERISA, an "investment manager" is a fiduciary "who has the power to manage, acquire or dispose of any asset of a plan. . . . " What is commonly referred to as *advice* falls well short of this discretionary power. However, as discussed above, *advice* in the ERISA sense contemplates a degree of reliance on the advice that is so great that it is functionally the same as discretionary control. It would, therefore, seem illogical to treat advice providers differently from investment managers for purposes of the protections offered employers by reason of Example (8).

Finally, the issues discussed above regarding the potential exposure of employers for the prohibited transactions entered into by an education provider who crosses the line into advice obviously apply as well to the situation where the employer engages a provider that characterizes itself as an advice giver and therefore a fiduciary. As discussed above, that exposure is minimal, since the consequences of engaging in a prohibited transaction fall squarely on the fiduciary who participates in that transaction.

CONCLUSION

An employer that desires to provide its employees with education and/or advice services through a third party should be able to do so while still obtaining reliance on the protections of §404(c) and without taking on significant additional fiduciary responsibilities. In the case of an employer that engages an education provider, that additional responsibility is limited to the prudent selection and monitoring of the education provider. In the case of an employer that engages an advice giver, that additional responsibility also includes co-fiduciary liability for the acts and omissions of the advice giver. But that exposure to co-fiduciary liability can be alleviated by the prudent selection and monitoring of the advice giver, the same responsibility that the employer would have in the case of the engagement of an education provider.

In other words, the plaintiff in a case against an employer engaging an education provider would have a very heavy burden. First, the plaintiff would have to prove that the service provided was in fact *advice* within the meaning of the §3(21) regulation. Then the plaintiff would have to prove that the advice was imprudent. Then the plaintiff would have to prove that the employer both knew that the service provided was in fact advice and that it was imprudent. Finally, the plaintiff would have to prove that the employer, knowing that the service was in fact advice and that it was imprudent, nevertheless did nothing about it. It's hard to imagine that case being made if the employer is diligent in its selection and monitoring of the education provider. And the issue of whether the provider had entered into a prohibited transaction would be largely irrelevant.

On the other hand, the plaintiff in a case against an employer engaging an advice provider would have an easier burden simply because the question of whether the service was advice, having been admitted by the employer, would not be an issue. As a consequence, the status of the advice giver, and the consequent co-fiduciary responsibility of the employer, would likewise be uncontestable. However, the plaintiff's burden would still be significant in that it would have to prove that the employer both knew that the advice was imprudent and, knowing that, nevertheless did nothing about it. It's again hard to imagine the case being made if the employer is diligent in its selection and monitoring of the advice giver. And again the issue of whether the provider had entered into a prohibited transaction is largely irrelevant. ◀

Endnotes

1. The history behind 401(k) plans is outside the scope of this article. Suffice it to say that salary reduction plans preceded the enactment of Section 401(k) by at least two decades. In fact, Section 401(k) can be viewed as the congressional veto of the Treasury's proposed regulation issued in 1972 that would have reversed the existing tax treatment and thereby included salary reduction contributions in employees' current income. Nevertheless, the actual number of salary reduction plans in existence before 1982 was quite small, in part because of the legal uncertainty that surrounded them before the final regulation was issued. For a full description of this history, see Raish, 338-3d T.M., *Cash or Deferral Arrangements*, p. A-2 et seq.

2. Access Research, cited in "401(k) Plans: How Plan Sponsors See the Marketplace" *ICI Research Report*, (Winter 1995) (Investment Company Institute).

3. Cerulli Associates' Market Update: 401(k) Industry, September 1999.

4. Labor Regulation §2510.404c-1 The regulation was first proposed in 1987 and was revised several times, in an effort to address concerns raised by the employee benefits community, before it was finalized five years later.

5. Labor Regulation §2510.404c-1(b)(1)(ii).

6. Labor Regulation §2510.404c-1(b)(2)(i)(A).

7. Labor Regulation §2510.404c-1(b)(2)(i)(B).

8. Labor Regulation §2510.404c-1(c)(4).

9. Labor Regulation §2510.3-21(c).

10. See *Mertens v. Hewitt Associates*, 113 S.Ct. 2063 (1993), in which the Supreme Court stated as dicta that §502(a)(3) of ERISA does not provide a private right of action for money damages against a nonfiduciary for participating in a fiduciary's breach.

11. *Harris Trust v. Salomon Smith Barney Inc.* No. 99-579, decided 6/12/00, in which a unanimous Supreme Court overruled the Seventh Circuit in holding that §502(a)(3) of ERISA does provide a private rule of action by a participant, beneficiary or fiduciary for appropriate equitable relief against a nonfiduciary party in interest who participates in a nonexempt prohibited transaction under §406(a). Harris, as trustee of the Ameritech Pension Plan, not only sought money damages from the investment manager (and therefore fiduciary) who caused the plan to purchase securities that ultimately proved to be worthless, but also sued Salomon, the counterparty to the transaction, for rescission, together with restitution of the purchase price with interest, and disgorgement of the profits made from use of the plan assets transferred to it. Salomon was not a fiduciary, but arguably was a party in interest to the plan because of brokerage services separately provided to it.

12. See discussion of ERISA §406(b) below.

13. See discussion of ERISA §405(a) below.

14. ERISA §404(a)(1)(B).

15. As indicated above at endnote 11, equitable relief may be obtained from a nonfiduciary party in interest who participates in a prohibited transaction.

16. Some, but not all, of the statutory and class exemptions provide relief from §406(b) in addition to §406(a). However, the breadth of the prohibitions under §406(b) make it more difficult for the DOL to provide relief from those prohibitions by way of class exemptions than is the case with the more specific—and therefore more limited—prohibitions under §406(a).

17. ERISA §§409(a), 502(a)(2) and 502(l); a 15% penalty tax may also be assessed under Internal Revenue Code §4975(a), but if it is, it is offset against the 20% penalty otherwise payable under §502(l).

18. *Chermung Canal Trust Co. v. Sovran Bank/Maryland*, 939 F.2d 12 (2d Cir., 1991), *cert. denied*, 112 S.Ct. 3014 (1992); *Free v. Briody*, 732 F.2d 1331 (7th Cir., 1984).

19. *Kim v. Fujikawa*, 871 F.2d 1427 (9th Cir., 1989).

20. Labor Regulation 2509.96-1.

21. Ibid.

22. Letter dated December 5, 1995 to Olena Berg from Jack W. Murphy, associate director (chief counsel) of the SEC's Division of Investment Management.

23. Among those who contributed to this body of knowledge are Nobel laureates Harry Markowitz and William Sharpe with their respective works regarding the efficient frontier and modern portfolio theory. The portfolios are also supported by historical performance data of different asset classes over time, including data originally generated by Roger Ibbotson and Rex Sinquefield (and updated annually by Ibbotson Associates).

24. Labor Regulation §2509.96-1(e).

25. By operation of I.B. 96-1.

26. In regard to the latter, see Proposed Exemption for Standard & Poor's (S&P), Standard & Poor's Investment Advisory Service, LLC (SPIAS) issued 3/22/00, wherein one of the proposed conditions was that neither could any of the service providers utilizing the S&P advice service own any interest in S&P, nor could S&P own any interest in the service providers.

27. Although, as discussed at endnote 11 above, equi-