BENEFIT PLANS AND DEALS:
APPLYING ERISA’S FIDUCIARY STANDARDS TO
BUSINESS COMBINATIONS

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I. Introduction

The acquisition or disposition of any sizable business triggers a wide array of benefit plan issues. Regardless of the structure of the transaction, redundant retirement plans typically are terminated or merged, assets and the related benefit liabilities might be transferred from the plans of the seller to a new or existing plan of the buyer, and the responsibility for providing various unfunded benefits such as retiree insurance coverage may be shifted from one party to the other. Frequently, the seller and the buyer also negotiate the treatment of the seller’s employees under the buyer’s benefit plans.

In most transactions, the benefit plan issues are addressed in the same manner as all of the other relevant items, such as purchase price adjustments. Representatives of the seller and the buyer discuss the plan related issues and reach an agreement. Although both are typically mindful of the interests and needs of the seller’s employees, in most instances the employees are not separately represented and have little or no voice in the process. Once the negotiations are concluded, the decisions are communicated to the employees as a fait accompli and the decisions are implemented by the employer or other plan fiduciaries.

As explained below, the fiduciary standards of the Employee Retirement Income Security Act of 1974 (“ERISA”) have little, if any, application during the negotiation phase of the typical transaction. On the other hand, once the negotiations are concluded and the decisions are being communicated to the participants and, in some limited instances, implemented, the fiduciary standards take on a major role. The application of ERISA’s fiduciary standards to the negotiation process is discussed in Section III. Section IV deals with implementation issues and Section V addresses a variety of communications issues. Before discussing the applicability of the fiduciary rules in these specific contexts, Section II provides a general overview of the fiduciary standards.

II. ERISA’s Fiduciary Rules

ERISA imposes certain obligations on the individuals or entities who are responsible for the administration and management of employee benefit plans. The plan fiduciaries are required to observe ERISA’s “Exclusive Benefit Rule” and its “Prudent Man Rule.” A plan fiduciary also must administer the plan in accordance with its terms. In addition, a plan fiduciary is subject to ERISA’s co-fiduciary liability and prohibited transaction rules.

A. The Exclusive Benefit Rule

ERISA section 404(a)(1)(A) requires that a fiduciary discharge his or her duties with respect to a plan for the exclusive benefit of plan participants and their beneficiaries and for the purpose of defraying the expenses of administering the plan. Similarly, section 403(c) of ERISA provides that “the assets of a plan shall never inure to the benefit of any employer and
shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan."

Although the “Exclusive Benefit Rule” of sections 403(c) and 404(a)(1)(B) is phrased in terms of “never,” “solely” and “exclusively,” the courts have recognized that a literal reading of the statute is nonsensical and have readily acknowledged that incidental benefits may flow to the fiduciary or the plan sponsor as long as the fiduciary’s primary motivation is to benefit the plan.6

B. **The Prudent Man Rule**

Under the “Prudent Man Rule” of ERISA section 404(a)(1)(B), a plan fiduciary must discharge his or her duties with the care, skill and diligence that would be exercised by a reasonably prudent person who is familiar with such matters. Although some commentators have suggested that section 404(a)(1)(B) imposes a “prudent expert” standard, the better view is that the Prudent Man Rule is a restatement of the prudent person standard developed as part of the common law of trusts.7

C. **The Diversification Requirement**

As a general rule, the investment diversification requirement of ERISA section 404(a)(1)(C) places an affirmative duty on a plan fiduciary to diversify plan investments unless, under the circumstances, it is clearly prudent not to diversify.8

Under ERISA section 404(a)(2), an “eligible individual account plan” may acquire and hold qualifying employer securities or qualifying employer real property without regard to the diversification requirements or the diversification element of the Prudent Man Rule. Profit sharing, stock bonus, thrift, or savings plans may qualify as “eligible individual account plans” as may certain money purchase pension plans.9

D. **Compliance with Plan Documents**

ERISA section 404(a)(1)(D) requires and allows a fiduciary to follow the provisions of the plan, but only if the provisions of the plan are consistent with ERISA.10 If the action called for by the plan provision is inconsistent with ERISA, the fiduciary is obligated to ignore the plan provision.

The requirements of section 404(a)(1)(D) are particularly important in the context of a plan that permits or allows investments in employer securities. For example, 401(k) plans frequently provide that an employer’s contributions will be made and continue to be invested in employer stock. A plan fiduciary may be required to disregard these provisions if allegiance to the plan language will violate the Prudent Man Rule or the Exclusive Benefit Rule.

E. **Co-Fiduciary Liability**

Under ERISA section 405(a), a fiduciary may be liable for the acts or omissions of a co-fiduciary if the fiduciary knows that the person committing the act or omission is a fiduciary with respect to the same plan, participates knowingly in the act or omission and knows that the act or omission is a breach of fiduciary duty.11 A fiduciary also may be held responsible for a breach committed by a co-fiduciary if the first fiduciary breached his or her own responsibilities under ERISA section 404(a), thereby enabling the second fiduciary to violate ERISA.12 Finally, a
fiduciary will be held responsible for a breach committed by a co-fiduciary if the fiduciary has knowledge of a breach committed by the co-fiduciary and fails to make reasonable efforts under the circumstances to remedy the breach.\textsuperscript{13}

F. **Co-Trustees**

If a plan provides for co-trustees, plan assets are to be jointly managed unless the trustees agree (in accordance with the trust instrument) to allocate specific responsibilities, obligations and duties among themselves. If trustee duties are allocated in this fashion, a trustee to whom a duty has not been allocated is not liable for losses due to acts and omissions of the trustee to whom the duty has been allocated.\textsuperscript{14}

If plan assets are held in more than one trust, the trustee of only one of the trusts is not liable under ERISA’s co-trustee rules for the acts and omissions of the trustee of any other trust.\textsuperscript{15}

G. **Allocation of Trustee Responsibilities – The Directed Trustee**

Section 403 of ERISA provides that the trustees of a plan must have the “exclusive authority and discretion to manage and control the assets of the plan.”\textsuperscript{16} As mentioned above, co-trustees may allocate so-called “trustee responsibilities” (which are responsibilities that relate to the management or control of plan assets) among themselves, but trustee responsibilities generally may not be allocated to others.\textsuperscript{17} This general rule is subject to three exceptions.

First, and perhaps most importantly, a plan may provide that the trustee is subject to the direction of a named fiduciary who is not a trustee.\textsuperscript{18} Second, a plan also may permit the appointment of an investment manager with authority to manage, acquire or dispose of plan assets. If an investment manager is properly appointed, the plan trustee no longer has the responsibility for managing the assets controlled by the investment manager and is not liable for the investment manager’s acts or omissions.\textsuperscript{19} Finally, a plan trustee may follow the directions of plan participants if the plan and the directions comply with the requirements of ERISA section 404(c).

H. **Allocating and Delegating Non-Trustee Responsibilities**

Named fiduciaries may allocate responsibilities other than “trustee responsibilities” (i.e., they may allocate responsibilities that do not involve the management and control of plan assets) among themselves if the plan expressly provides a procedure for shifting non-trustee fiduciary responsibilities.\textsuperscript{20} If named fiduciaries follow the plan’s allocation procedures, they are not liable for the acts or omissions of the fiduciary assuming the transferred responsibilities. Named fiduciaries are liable to the extent they violate their own fiduciary responsibilities under ERISA section 404(a)(1) with respect to the actual act of allocation and they also remain subject to the general co-fiduciary liability rules discussed above.\textsuperscript{21}

A named fiduciary also may delegate non-trustee fiduciary responsibilities to someone other than a named fiduciary if the plan so permits. Responsibilities typically delegated include the responsibility for day-to-day plan administration, the disbursement of plan benefits and claims review. If proper delegation procedures are followed, the named fiduciary will not be liable for the acts or omissions of the fiduciary to whom non-trustee responsibilities have been delegated.\textsuperscript{22}
Plan fiduciaries (including fiduciaries to whom duties have been delegated by named fiduciaries) also may hire agents to perform ministerial tasks. If the fiduciary exercises prudence in the selection and retention of such agents, the fiduciary may rely on information, data, statistics and analysis provided by the agent without risking exposure.23

Any delegation of a fiduciary responsibility should be made with the Exclusive Benefit Rule clearly in mind. Responsibilities should never be delegated to friends, relatives or business acquaintances if such a delegation would conflict with the requirement that the fiduciary discharge his or her duties solely in the interest of participants and beneficiaries and for the exclusive benefit of those individuals.

I. ERISA’s Prohibited Transaction Rules

ERISA supplements its general fiduciary responsibility requirements by specifically prohibiting certain transactions between a covered plan and related parties, referred to as “parties in interest.”24

Under section 406(a) of ERISA, a plan fiduciary is specifically prohibited from engaging in certain transactions with a party in interest. The list of banned transactions includes: the sale, exchange or lease of property; the lending of money or other extension of credit; the furnishing of goods, services or facilities; or the transfer or use of plan assets. A plan fiduciary also is prohibited from acquiring or holding any securities issued by the plan sponsor other than “qualifying employer securities.”25

The “self-dealing” prohibitions of section 406(b) also are quite significant. Section 406(b) prohibits a plan fiduciary from dealing with the assets of the plan in his own interest or for his own account. A plan fiduciary is also prohibited from receiving any consideration for his personal account from any party dealing with the plan in a transaction involving plan assets.26 Similarly, the self-dealing provisions prohibit a plan fiduciary from acting on behalf of a party whose interests are adverse to the interests of the plan or its participants.27

ERISA provides for certain exemptions from the prohibited transactions listed in section 406. ERISA section 408(a) provides for administrative exemptions (granted by the Secretary of Labor on a case-by-case basis) and statutory exemptions which permit certain classes of transactions.

If a transaction is a prohibited transaction under ERISA section 406 and an exemption is not available, the transaction must be “undone” or “corrected.” The fiduciary also will be liable to the plan for losses resulting from the prohibited transaction and will be required to disgorge any profits.28

Section 4975 of the Internal Revenue Code of 1986 (the “Code”) also imposes an excise tax on “disqualified persons” participating in the transaction in an amount equal to fifteen percent of the amount involved in the transaction for each year in the “taxable period.”29 If the prohibited transaction is not corrected in a timely manner after the receipt of notice to do so from the Internal Revenue Service, a tax of 100% of the amount involved also may be imposed on the disqualified person. The term “disqualified person” includes, but is not limited to, plan fiduciaries.30 A fiduciary acting only as such is not liable for any excise taxes imposed by Code section 4975.
III. The Negotiation Phase

A. General Introduction to The Settlor Function Doctrine

Employers and their officers and other representatives often wear multiple hats. The employer typically serves in a fiduciary capacity with respect to its plans, since it may be the formal “plan administrator” or it may have the authority to appoint plan fiduciaries or make a variety of other decisions with regard to the plan. Similarly, officers of the employer are often plan fiduciaries. In the typical negotiation regarding a business acquisition or disposition, however, the representatives of the seller and the buyer are not acting as plan fiduciaries. Instead, they are acting in their corporate roles.

The Supreme Court and most of the Circuits have long recognized that an employer or one of its officers or other representatives is subject to ERISA’s fiduciary standards only when it is wearing its fiduciary hat. The following passage from the Court’s decision in *Lockheed Corp. v. Spink* is illustrative:

Plan sponsors who alter the terms of a plan do not fall into the category of fiduciaries. . . . When employers undertake those actions, they do not act as fiduciaries,. . . but are analogous to the settlors of a trust . . . .

This rule is rooted in the text of ERISA’s definition of fiduciary. . . . As the Second Circuit has observed, “only when fulfilling certain defined functions, including the exercise of discretionary authority or control over plan management or administration,” does a person become a fiduciary under § 3(21)(A).31

The Court provided the litmus test for identifying settlor as opposed to fiduciary functions in *Varity Corp. v. Howe*.32 In *Varity*, which is discussed in further detail below, the employer made a number of representations concerning the prospects of a new subsidiary that was about to be formed. When the subsidiary failed, the benefits of the employees who transferred to the subsidiary were jeopardized and the employees brought suit, alleging, among other things, that the employer had violated its fiduciary duties under ERISA by intentionally misleading them. The employer claimed that when it made the representations it was acting in its settlor capacity rather than as a plan fiduciary.

In the following passage of its opinion, the Court concluded that the employer was acting as a fiduciary when it made the representations:

To decide whether Varity’s actions fall within the statutory definition of “fiduciary” acts, we must interpret the statutory terms which limit the scope of fiduciary activity to discretionary acts of plan “management” and “administration.” ERISA § 3(21)(A). These words are not self-defining, and the activity at issue here neither falls clearly within nor outside of the common understanding of these words. The dissent looks to the dictionary for interpretive assistance. . . . Though dictionaries sometimes help in such matters, we believe it more important here to look to the common law, which, over the years, has given to terms such as “fiduciary” and trust “administration” a legal meaning to which, we normally presume, Congress meant to refer. . . . The ordinary trust law understanding of fiduciary “administration” of a trust is that to act as an administrator is to perform the duties imposed, or exercise the powers conferred, by the trust documents. . . . The law of trusts also understands a trust document
to implicitly confer “such powers as are necessary or appropriate for the carrying out of the purposes” of the trust.33

B. Classifying Commonly Negotiated Issues

Any number of benefit related issues may arise in the negotiations regarding a business acquisition or disposition. Several of the more common issues are discussed below.

1. Plan Terminations

Transaction documents often call for the termination of the seller’s plans. Many of the seller’s plans may be redundant or inconsistent with the buyer’s benefit philosophy. In addition, the buyer may have reservations about the qualified status of the seller’s plans or concerns about fiduciary or other compliance issues.

The decision to terminate a plan is clearly a settlor function and the negotiators for the seller and the buyer are free to deal with this issue without regard to ERISA’s fiduciary standards.34

2. Plan Amendments

The seller and the buyer will frequently negotiate concerning the modification of the benefit plans of the buyer or the seller. For example, the seller may ask the buyer to consider amounts paid by an employee under the seller’s medical plans for purposes of the limits on out of pocket expenses or deductibles under the buyer’s health insurance program. The seller also may ask the buyer to consider service with the seller for purposes of eligibility, vesting or benefit accrual under the buyer’s retirement plans. On the other hand, the buyer may request that certain amendments be made to the seller’s plans prior to the consummation of the transaction.

In deciding whether to request a change in the other party’s plans or to accede to such a request, neither the seller nor the buyer is acting as a fiduciary; each is free to act in its corporate self interest. As noted above, when an employer amends one of its benefit plans, it is acting as the “settlor” of the plan, not a fiduciary, and ERISA’s fiduciary standards are inapplicable.35

Ames v. American National Can Co.36 provides a good example of the application of this concept in the transactional setting. In 1995, American National Can (“ANC”) entered into an agreement to sell its Food Metals Division to Silgan Containers. As part of its preparations for the sale of the Food Metals Division, ANC modified its pension and severance programs to provide supplemental benefits for displaced employees. ANC also modified its severance program to make it clear that an employee who took a job with Silgan, or rejected a reasonable job offer from Silgan, would not receive severance benefits.

ANC intended to sell the Food Metals Division to Silgan as a going concern. To achieve this objective, in designing the changes to its benefit programs, ANC purposefully attempted to discourage attrition in the Food Metals ranks. Certain Food Metals employees brought suit, challenging ANC’s actions on a number of grounds, including a claim that ANC violated its fiduciary duties to the plaintiffs by favoring its commercial or business interests over the plaintiffs’ interests in receiving the enhanced benefits. The Seventh Circuit disposed of this claim in the following passage of its opinion:
This argument fails to acknowledge one of the fundamental principles of
ERISA plan management, which the Supreme Court established in *Lockheed
Corp. v. Spink*, 517 U.S. 882, 135 L.Ed. 2d 153, 116 S. Ct.: 1783 (1996), and
reaffirmed as recently as January 1999 in *Hughes Aircraft Co. v. Jacobson*, 142
fiduciaries are allowed to wear more than one hat, and when employers make
design changes in plans, they are not wearing their fiduciary hats. *Lockheed,
517 U. S. at 890.* Similarly, when company representatives are negotiating the
sale of a division, they are not acting in their capacity as a plan fiduciary, and
thus they do not bear the legal obligations that go along with the fiduciary status.

The Second Circuit reached a similar result in the context of a corporate restructuring in
*Siskind v. The Sperry Retirement Program,* holding that an employer could intentionally
exclude the employees of divisions that it intended to dispose of from a special early retirement
program.

3. **Plan Spin-Offs**

If only a portion of a business is sold, the benefit liabilities and the corresponding assets
attributable to the employees engaged in the portion of the business transferred to the buyer are
frequently spun-off and transferred to a plan of the buyer. The seller’s decision to spin-off a
portion of its plan and the buyer’s decision to accept the transfer is a settlor function (or
business decision) and is not subject to fiduciary scrutiny. Moreover, the amount of assets to
be assigned to the spun-off plan and the decision to transfer employer securities to a new plan
for a spun-off subsidiary are business decisions, not fiduciary actions. Of course, the
fiduciaries of the transferring plan must assure compliance with the plan merger and asset
transfer provisions of section 208 of ERISA.

The District of Columbia Circuit’s decision in *Systems Council* addressed a spin-off
situation. *Systems Council* arose out of AT&T’s 1995 spin-off of Lucent. At the time, AT&T’s
pension program was over funded and an agreement between AT&T and Lucent provided for
the allocation of the surplus. Plaintiffs claimed that the agreement favored AT&T in violation of
AT&T’s fiduciary obligations to the Lucent employees. Citing the Eighth Circuit’s decision in
*Maniac v. Commerce Bank,* the court observed that “under ERISA, AT&T, as an employer
and a plan administrator, is subject to ERISA’s fiduciary standards only when it acts in a
fiduciary capacity.” The court then concluded that AT&T was not acting in its fiduciary
capacity when it amended its plans and allocated the assets in connection with the spin-off.

4. **Plan Mergers**

The retirement plans of the seller and the buyer also are frequently combined as part of
a business combination. As noted above, the decision to transfer assets and liabilities is a
settlor function. A plan merger should be treated in the same fashion.

5. **Transfer of Unfunded Liabilities**

The buyer will frequently agree to assume the seller’s responsibility to provide various
unfunded benefits. For example, in exchange for a purchase price adjustment, the buyer may
agree to assume the seller’s responsibility to provide post-retirement medical coverage to
former employee’s of the seller. Depending on the form of the transaction, the seller may or
may not be able to effectively shed this liability, but the seller’s decision to transfer the liability and the buyer’s decision to accept the transfer are settlor decisions, not fiduciary functions.

6. **Indirect Use of Plan Assets**

   The parties must be careful to avoid using assets indirectly to facilitate the transaction. Any purchase provisions that result in the use of plan assets (either directly or indirectly) for any purpose other than to pay plan benefits are likely to be questioned. This idea is illustrated by *Kayes v. Pacific Lumber Co.*\(^47\) and *In re Gulf Pension Litigation.*\(^48\)

   In *Kayes*, the seller (Pacific) obtained a bridge loan to help finance the purchaser’s takeover.\(^49\) As part of the loan, Pacific pledged as collateral the right to receive any reversion upon the termination of Pacific’s retirement plan.\(^50\) The court found that given the clear legislative intent of ERISA “[c]orporations should not be permitted to rely on their ERISA plan assets to finance takeovers or other risk ventures.”\(^51\) Accordingly, the court held that the pledge constituted a prohibited transaction under ERISA section 406(b).

   Similarly, in *In re Gulf Pension Litigation*, Chevron Corporation sold part of the assets it previously acquired in a merger with Gulf Oil Corporation to Cumberland Farms. As part of the transaction, Cumberland Farms was required to establish a pension plan for former Gulf employees who went to work for it. The terms of the asset purchase agreement provided for an individual asset transfer that was admittedly inadequate. The Agreements also provided that if a second transfer was needed to meet the requirements of section 414(l) of the Code, Cumberland Farms would reimburse Chevron on a dollar-for-dollar basis.\(^52\) In other words, the Agreement provided for the payment of funds from the Gulf Plan to the Cumberland Farms Plan with a dollar-for-dollar payment to Chevron, for any over-funding. The court found that in negotiating the agreement, Chevron “used its fiduciary status to obtain a quid pro quo for its own corporate benefit” and by doing so violated the prohibited transaction provisions of ERISA section 406(b).\(^53\)

IV. **Implementing the Decisions**

A. **General Rule**

   As a general rule, plan fiduciaries are free to implement the decisions made by the buyer and the seller in the negotiation process. For example, if the parties agree to terminate a particular plan, the fiduciaries may carry out the normal termination functions of distributing plan assets. Similarly, if a plan is amended, the fiduciaries not only may, but must, honor the amended provisions. Section 404(a)(1)(D) of ERISA specifically provides that plan fiduciaries must administer a plan “in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [ERISA].”

B. **Possible Pitfalls**

   In implementing the parties’ decisions, the plan fiduciaries must be mindful of all of the language of section 404(a)(1)(D). The fiduciaries may only implement plan amendments that are consistent with the provisions of ERISA. Although problems are rare, any number of plan amendments adopted in the context of a business transaction may run afoul of ERISA’s specific provisions. A few possible problem areas are worth noting.
1. **Avoiding Cutbacks**

Both the buyer and the seller may have an interest in preventing the seller’s employees from receiving plan distributions. Although the decision to amend the seller’s plan is a settlor function, plan fiduciaries have an obligation to disregard the amendment if the amendment violates the anti-cutback provisions of section 204(g) of ERISA. For example, if a participant is entitled to receive a distribution, the amendment of the plan as part of the negotiation process to delay distributions will violate the anti-cutback rule and, as a result, that amendment may not be implemented.

2. **Investment Decisions Following a Merger or Transfer**

In the context of a defined contribution program, the merger of the seller’s plan into the buyer’s plan, or the transfer of assets and liabilities from the seller’s plan to the buyer’s plan, typically means that the investment options available under the buyer’s plan will replace those previously available under the seller’s plan. On occasion, participants in the seller’s plan may claim that the substitution of the investment options violates ERISA’s fiduciary standards. In the typical situation, these claims are likely to fail, but there may be some cause for concern in unusual, egregious situations.

For example, plan fiduciaries should be cautious if a plan is amended to call for the liquidation of the current diversified investments and the reinvestment of all available funds in securities of the buyer.

3. **Compliance with the Merger Standards of Section 208**

Although the decision to merge a plan is a settlor function and not subject to fiduciary scrutiny, plan fiduciaries may not honor that decision in the absence of compliance with section 208 of ERISA, which provides as follows:

A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan . . . , unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated).

4. **Managing the Plan Combination Process**

A number of issues arise when the seller’s defined contribution plan is combined with the buyer’s plan, regardless of whether the combination is accomplished by way of a plan merger, spin-off or transfer of account balances.

(a) **Blackout Periods**

Depending on the circumstances, combining the plans of the seller and the buyer might give rise to a “blackout period” for the seller’s employees. During this “blackout period,” participants in the seller’s plan are precluded from taking any action (such as taking a loan from the plan or transferring amounts from one fund to another). A blackout period may be inevitable and deciding to combine programs in the face of a reasonable blackout period certainly should not give rise to a breach of the fiduciary standards. The plan fiduciaries nonetheless should
consider the impact of the blackout period on the plan participants and make every effort to minimize its length. Perhaps most importantly, the plan fiduciaries should make sure that the rules that will apply during the blackout period are carefully and accurately communicated to the plan participants well in advance of the commencement of the blackout period in order to enable the participants to take action before the period begins.

(b) **Mapping**

If the plans of both the seller and the buyer allow participants to direct the investment of their accounts between and among various investment funds, the conversion from the seller’s plan’s investment alternatives to the alternatives available under the buyer’s plan can be a challenge. One alternative is to collect new investment instructions from all of the participants. This approach, however, can be problematic. Many participants may fail to return the new investment instructions and the end result may be an unacceptable extension of the “blackout period.”

An alternative approach that is favored by many, if not most, employers and service providers is a technique called “mapping.” With “mapping,” each of the displaced investment options is compared to the new options. When the conversion takes place, amounts are then automatically transferred or “mapped” from the displaced option to the most comparable new option.

Although mapping may be the most administratively acceptable approach, it may deprive plan fiduciaries of any protection under section 404(c) following the completion of the conversion. Based on the regulations issued by the Department of Labor under ERISA section 404(c), many advisors believe that 404(c) relief is only available if the participant has exercised actual control over the investment of his or her account. With mapping, the participant never actually selects the new fund. Rather, the participant selected the displaced fund from which the participant’s account was transferred.

If the mapping concept is carefully explained to participants in ample time for them to make investment fund changes before the blackout period begins, it may be possible to argue that the mapping process results in a “silent direction” by the participant to transfer his account to the mapped successor funds. The “silent direction” argument is based on the Eleventh Circuit’s decision in *Herman v. NationsBank Trust Company*, which is discussed below. Whether this “silent direction” argument will be successful is unclear and, as noted above, the argument clearly is inconsistent with the position taken by the Department in the regulations.

5. **Identifying Partial Terminations**

In order to obtain tax qualification, qualified retirement plans must provide that a participant’s accounts will be fully vested in the context of a “partial termination.” Whether a partial termination has occurred must be determined on the basis of all of the relevant facts and circumstances. Plan fiduciaries are responsible for making this determination.

6. **Voting and Tender Decisions**

The voting of the employer securities held by an ESOP or any other individual account plan, such as a 401(k) plan, and decisions concerning the tender of securities, also can prove troublesome. ESOPs of publicly held companies necessarily provide that voting decisions regarding employer securities allocated to the accounts of plan participants will be passed
through to the participants.\textsuperscript{59} Frequently, tender decisions with regard to allocated shares also
are passed through in order to minimize the conflicts faced by plan fiduciaries.

In the early years of a leveraged ESOP, a large block of employer securities will be held
in a loan suspense account, which means the securities are “unallocated.” Voting and tender
decisions regarding these unallocated securities must be made by plan fiduciaries. Plan
documents often provide that the voting and tender decisions with regard to unallocated
securities will be made in the discretion of the trustee or another named fiduciary. Frequently,
though, the plan will include a “mirror” voting or tender provision that directs the trustee or other
fiduciary to vote or tender the unallocated securities in the same proportion as the participants
have chosen to vote or tender the allocated securities.

The Department of Labor initially took the position that plan fiduciaries may not
automatically follow the directions of participants with regard to the voting or tender of allocated
shares. In an April 30, 1984 letter regarding the Profit Sharing Retirement Income Plan for the
Employees of Carter Hawley Hale Stores, Inc., the Department advised the trustee of the plan
that it could accept the participants’ directions only if the trustee concluded that the participants
had exercised independent discretion, had received complete and accurate information and had
not been subject to coercion by the employer.\textsuperscript{60}

In 1995, the Department slightly changed its stance. In a letter to Ian D. Lanoff, the
Department rephrased its position with respect to a fiduciary’s acceptance of participant
directions with regard to allocated shares.\textsuperscript{61} According to the Lanoff letter, a fiduciary must
follow a participant’s directions with regard to allocated shares unless the fiduciary is able to
“articulate well-founded reasons why doing so would give rise to a violation of titles I or
IV . . . .”\textsuperscript{62}

The Department of Labor’s view with respect to the use of a “mirror” voting provision for
unallocated shares is expressed in an unsolicited 1989 letter to the trustee of an ESOP
sponsored by the Polaroid Corporation.\textsuperscript{63} In the Polaroid letter, the Department cautioned the
trustee against blind adherence to the mirror voting provision in the ESOP documents and
advised the trustee that it could follow the mirror voting provision only if the trustee concluded
that doing so was consistent with the obligations imposed on the trustee by ERISA’s general
fiduciary standards.

The position taken by the Department in the Polaroid letter has since been upheld by the
Eleventh Circuit in \textit{Herman v. NationsBank Trust Company}.\textsuperscript{64} The \textit{NationsBank} case, like the
Polaroid letter, arose out of competing tender offers for Polaroid’s stock. One of the tender
offers was made by Shamrock Acquisitions and the other was a self-tender by Polaroid. Both of
the tender offers were described by NationsBank\textsuperscript{65} in a letter to plan participants, who were
asked to instruct NationsBank regarding the tender of the shares allocated to them.

NationsBank also convened a meeting of its Trust Policy Committee to consider the
competing tender offers. After review, the Committee concluded that each of the available
alternatives (tendering to Shamrock, tendering to Polaroid, or refusing to tender to either) would
be a prudent course of action. Based on that conclusion, the Committee decided to follow the
plan’s provisions regarding the tendering of shares.

Under the plan, NationsBank was required to honor a participant’s directions to tender
allocated shares. NationsBank also was directed to treat any non-response as a “silent
direction” not to tender allocated shares. Further, as noted above, the plan included a mirror
tender provision that required NationsBank to tender the unallocated shares in proportion to the
tender decisions made by participants.

Consistent with the position taken in its letter, the Department brought suit, claiming that
NationsBank violated both the Prudent Man Rule and the Exclusive Benefit Rule by failing to
tender all of the unallocated shares and by failing to tender the allocated shares for which no
directions were received. In a separate count in its complaint, the Department also alleged that
an indemnification provision included in the Polaroid ESOP violated ERISA, since it provided
NationsBank with an incentive to honor the plan’s mirror voting provisions.

The district court granted the Department of Labor’s motion for summary judgment with
respect to the indemnification count. The court denied the motions for summary judgment filed
by both the Department of Labor and NationsBank with respect to the mirror tender of
unallocated shares and the effectiveness of the plan’s provision that characterized a
participant’s failure to respond as a silent direction to not tender allocated shares. At the
request of NationsBank, the district court certified its order for an interlocutory appeal, which
was granted by the Eleventh Circuit.

On appeal, NationsBank argued, initially, that its action in failing to tender unallocated
shares in accordance with the plan’s mirror tender provisions and its failure to tender allocated
shares in accordance with the plan’s silent direction provisions should be tested by the
standards of ERISA section 403(a)(1) rather than by ERISA’s Prudent Man and Exclusive
Benefit Rules. According to NationsBank, the plan participants were “named fiduciaries” with
respect to the tendering of shares. As a result, NationsBank was required, under
section 403(a)(1) of ERISA, to follow the directions of these named fiduciaries as long as the
directions were in accordance with the terms of the plan and were not contrary to ERISA. In the
alternative, NationsBank argued that its decision not to tender satisfied ERISA’s prudence and
exclusive benefit requirements.

The Department of Labor agreed that plan participants could be named fiduciaries with
respect to the decision to tender allocated shares. According to the Department, however, the
ESOP participants could not be named fiduciaries with respect to the decision to tender the
unallocated shares. On this basis, the Department contended that NationsBank’s failure to
tender all of the unallocated shares must be judged by ERISA’s Prudent Man Rule rather than
the more deferential standard of section 403(a)(1). As an alternative argument, the Department
contended that the ESOP participants could not be named fiduciaries with respect to the
decision to tender the unallocated shares because the NationsBank letter describing the tender
offers did not explain how a participant’s tender decision (or failure to make a decision) with
regard to shares allocated to him would affect the tendering of unallocated shares.

The Eleventh Circuit began its analysis by noting the great degree of deference that it
would give to the Department’s determinations. The court then accepted the Department’s
more narrow view – the plan participants could not be “named fiduciaries” with respect to the
decision to tender the unallocated shares because they had not been informed of the impact
that their tender decision would have on the tendering of unallocated shares.

The Eleventh Circuit then turned its attention to the impact or effectiveness of the plan’s
“silent direction” provision. The Department of Labor contended that NationsBank violated
ERISA by not tendering the allocated non-voted shares in reliance on the silent direction
provision. Although the court again noted the deference that should be given to the
Department, it nevertheless rejected the Department’s position. According to the Eleventh
Circuit, as long as participants are clearly advised that the failure to issue any directions will be treated as a silent direction not to tender the stock, the trustee may honor the silent direction. The Eleventh Circuit then remanded the case to the district court to determine whether the silent directions given by the plan participants could be treated as “proper directions.”

In NationsBank, the plan trustee attempted to pass through the tender decision. If the tender decision is not passed through to the participants, the plan fiduciaries must make the tender decision. In 1989, the Departments of Labor and Treasury issued a joint statement of their views regarding the standards to be followed by a plan fiduciary in this context. According to the Joint Statement, a plan fiduciary is not necessarily obligated to accept a tender offer that promises a premium over the current market price. Instead, the fiduciary must make a prudent decision after considering all of the relevant factors, including the intrinsic value of the company, the possibility of a better offer and the alternative investment opportunities available to the plan.

The Sixth Circuit considered whether the right to vote stock held by an ESOP was a “plan asset” in Grindstaff v. Green. The ESOP in the Grindstaff decision was created by North American Rayon Corporation (“NAR”), which was a wholly owned subsidiary of North American Corporation (“NAC”). The ESOP held approximately 85% of the NAC stock, with the remaining 15% being held by management.

Although NAC retained an independent trustee for its ESOP, an administrative committee had the power to direct the trustee with respect to the voting of the securities held by the ESOP. The committee consisted of three individuals. Two committee members, the president and vice president of NAC, were appointed by the NAC board of directors and also served on the board. The third committee member was recommended to the board of directors by the union that represented some of the employees who were covered by the plan.

The administrative committee routinely directed the trustee of the ESOP to vote the ESOP’s securities in favor of the company’s slate of directors, which as noted above included the two company appointed administrative committee members. In their complaint, the plaintiffs contended that the administrative committee members violated the general fiduciary responsibility provisions of ERISA section 404(a) and the prohibited transaction provisions of ERISA section 406(b) when they voted to elect themselves to the NAC board of directors. The plaintiffs characterized the ESOP’s voting rights with respect to the NAC stock as a “plan asset” and contended that exercising voting rights in order to “entrench” a plan fiduciary’s position in the management of the plan sponsor is a violation of ERISA fiduciary duties.

The plaintiffs also contended that the ESOP committee members, acting in their capacities as members of the board of directors of NAC, breached their fiduciary duties when they refused to vote in favor of an amendment calling for pass through voting.

The Sixth Circuit reviewed a number of cases dealing with the special nature of ESOPs, noting that ERISA specifically contemplates that individuals will serve in multiple roles with respect to ESOPs. The court also commented that the express language of ERISA section 408(c)(3) “makes clear that Congress intended that small companies ought to be able to have managers run their ESOPs and vice-versa.” The court then concluded as follows:

Viewed in this context, we cannot say that the mere voting of an ESOP’s stock by incumbent directors to perpetuate their own incumbency constitutes a breach of an ERISA fiduciary’s duty in the handling of a “plan asset.” Put another way, the
right to vote, or direct the voting of an ESOP’s shares, even when used to perpetuate one’s own incumbency, does not, by itself, constitute a plan asset.\textsuperscript{70}

The court then addressed the plaintiffs’ claim that the members of the administrative committee, when acting on the board of directors, violated their duties to the plan participants by refusing to vote in favor of pass through voting. Recognizing that the implementation of pass through voting would require an amendment to the plan, the court quickly disposed of this issue by holding that the fiduciary standards of ERISA do not apply in the context of a plan amendment.

V. Communicating the Decisions

Business combinations are typically accompanied by considerable publicity. At a minimum, participants must receive summaries of changes being made to their benefit programs and summaries of any plans that they may be entering. If plans are being terminated or frozen, the requisite notice called for by section 204(h) of ERISA also may be required, depending on the type of plan involved.

Employers or other fiduciaries often supplement these required communications with additional material explaining a variety of matters that may be of interest to plan participants. For example, supplementary materials might well attempt to compare the benefits provided by the seller with those to be offered by the buyer in the future. When they provide these plan communication materials, employers and plan fiduciaries must take care to avoid inaccurate statements. In some Circuits, they also arguably must consider whether the materials are adequate to provide the plan participants with the information they may need to make informed retirement decisions.

A. The Duty to Inform in General

As the Supreme Court found in \textit{Varity Corp. v. Howe}, “‘lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA.’”\textsuperscript{71} Based on the facts in \textit{Varity}, the Court did not need to consider whether an employer or other fiduciary had an affirmative duty to disclose information on a voluntary basis or in response to inquiries by plan participants. A number of circuits, however, have had little difficulty in doing so.

For example, in \textit{Bixler v. Central Pennsylvania Teamster’s Health & Welfare Fund}, the Third Circuit held that a plan fiduciary has an affirmative duty to speak “when the trustee knows that silence might be harmful.”\textsuperscript{72} The Third Circuit also recently held that a plan fiduciary has an obligation to inform a plan participant of its reading of a potentially ambiguous plan provision pursuant to which the participant may be charged with a break in service.\textsuperscript{73}

Similarly, the Sixth Circuit has held that plan fiduciaries have an obligation to disclose “complete and accurate information material to the beneficiary’s circumstance, even if that requires conveying information about which the beneficiary did not specifically inquire.”\textsuperscript{74} The Sixth Circuit went on to hold as follows:

As set out in the Restatement (Second) of Trusts, a trustee “is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person.” Restatement (Second) of Trusts, § 173, Comment d (1959). Moreover, we have
been admonished by the Supreme Court to interpret the trust-like fiduciary standards ERISA imposes “bearing in mind the special nature and purpose of employee benefit plans.” . . . Accordingly, we agree with the conclusion of our sister circuits that the “duty to inform is a constant thread in the relationship between beneficiary and trustee; it entails not only a negative duty not to misinform but also an affirmative duty to inform when the trustee knows that silence might be harmful.”

The court also held that the fiduciary’s duty was not satisfied by the dissemination of the statutorily required summary plan descriptions.

In the Ninth Circuit, a plan fiduciary “has an obligation to convey complete and accurate information material to the beneficiary’s circumstance, even when a beneficiary has not specifically asked for the information.” More recently, the Ninth Circuit found that plan fiduciaries had an obligation to provide plan participants with enough information regarding the tax consequences of various elections to alert them to potential tax problems.

The Eighth Circuit also has acknowledged that “ERISA fiduciaries are prohibited from materially misleading plan participants, and fiduciaries sometimes have a duty to disclose information.”

B. The Duty to Inform in the Transactional Context

The duty to inform can arise in any number of ways in connection with the sale of a business. Some of the more common problem areas are described below.

1. Benefit Comparisons

In the typical transaction, the seller’s benefit programs are replaced with the programs sponsored by the buyer. In order to educate the transferring employees about the new benefit programs, charts are often provided that compare the programs offered by the seller with those offered by the buyer. Care must be taken to assure that these charts are accurate.

On occasion, either the seller or the buyer also might draw broad generalizations concerning the benefit programs. For example, a memo to the employees of the seller might say that the buyer’s benefit programs are “comparable” to the seller’s programs. Not surprisingly, these broad generalizations can lead to litigation if the buyer’s programs do not turn out to provide very similar benefits to a particular employee.

The Seventh Circuit dealt with this type of claim in *Ames v. American National Can Co.* Following a review of the buyer’s benefit programs, a representative of the seller, ANC, wrote to ANC employees stating “the ANC and Silgan programs are not identical and individuals may be affected in different ways, but in the aggregate, the total value of the programs of the two companies is very comparable.” The *Ames* plaintiffs claimed that this representation was akin to the representations made in *Varity*, but their claim was rejected by the Seventh Circuit:

The information they had from ANC disclosed the fact that the two packages were not identical, and the statement that they were “comparable” cannot be seen as more than a general opinion ANC was offering. Some people might have liked the Silgan package better; others might have preferred ANC’s. We cannot find that the statement about “comparability” is misleading under the
circumstances, and we conclude that the district court correctly granted summary judgement to ANC on this count also.82

2. One Time Offers

In *Barnes v. Lacy*,83 the employer, Alagasco, announced the adoption of a voluntary early retirement program. As part of the communication materials, Alagasco characterized the program as a “one-time offer.” The plaintiffs did not qualify for the initial program and retired after it closed. Subsequent to their retirement, Alagasco announced a second program and plaintiffs brought suit claiming that they had been misled into thinking that no additional program would be adopted.

The evidence available at trial established that when it made its “one-time offer” representations, Alagasco had no intention of ever offering a similar program in the future. Both the trial court and the Eleventh Circuit found that Alagasco’s “one-time offer” representations were accurate when made and were not actionable.

3. Pension Plan Conversions

The seller’s employees typically will find themselves as participants in the buyer’s pension programs. In the context of a 401(k) or other defined contribution plan, the variations between the plans should be easily explainable. In the context of a defined benefit plan, however, the task becomes more difficult.

To guard against potential claims, all plan communication materials regarding the conversion from the seller’s defined benefit plan to the buyer’s should be carefully checked for accuracy. In this context, at least in some circuits, fiduciaries face the difficult task of identifying and providing the information that the participants will need in order to make an informed decision regarding retirement.

Consider the following questions that might confront a fiduciary depending on the approach followed in the conversion from the seller’s defined benefit plan to the buyer’s:

1. May the fiduciary simply distribute a summary satisfying the Department of Labor’s summary plan description regulations?

2. If the seller’s defined benefit plan is more generous, how will the conversion be accomplished? Will the buyer’s plan use the “wear away” approach? With the “wear away” approach, a participant’s initial benefit under the buyer’s plan is equal to the benefit under the seller’s defined benefit plan. The participant’s benefit is frozen as of the date of the conversion and will remain at that level until the buyer’s formula produces a greater benefit. If the “wear away” approach is used, must the fiduciary specifically advise participants that they may not accrue any new benefits until the benefit under the buyer’s plan “catches up to” the frozen defined benefit from the seller’s plan?

3. If the seller’s plan is a traditional defined benefit plan and the buyer has a cash balance plan, should the fiduciary advise the participants that the risk and reward of future interest rate adjustments is now borne by the participants rather than the plan?
4. Should the fiduciary point out every instance in which the buyer’s plan may be less favorable than the replaced plan of the seller? For example, if the seller’s defined benefit plan includes special forms of subsidized early retirement benefits (for example, a “30-and-out” benefit with no actuarial reduction for early commencement of benefits) must the fiduciary point out to the participants that they will no longer be accruing additional subsidized benefits?

5. Should the fiduciary provide plan participants with a comparison of the projected benefits under the seller’s discontinued plan and the projected benefits under the buyer’s plan? Must this comparison be done on a participant-by-participant basis or will a general comparison suffice?

The current case law does not provide definitive answers to these and other related questions. As a general matter, though, the careful fiduciary will strive to provide participants with all of the information they may need to make informed decisions. Perhaps more importantly, the careful fiduciary will make sure that in providing information to the participants it does not inadvertently mislead them with respect to these or any other issues.

4. Early Retirement Windows and the “Serious Consideration” Concept

Corporate acquisitions are frequently followed by a realignment of the work force. In order to accomplish the optimal staffing levels, companies will frequently offer “window plans” which allow employees to leave during a defined period of time and receive supplemental benefits.

In a typical situation, a window plan may be in development for several months before it is announced. In some industries and some companies, window plans have become so common, and the employee rumor mill so effective, that employees nearing retirement will frequently ask about the possibility of a window program or a “package.” Plan fiduciaries and other employer representatives need to be particularly careful about the responses they give to these inquiries.

Although the Second and Fourth Circuits have held that employers are not required to disclose changes in their programs before the changes are actually adopted, the majority of the Circuits have followed a different route. In the clear majority of the Circuits, once a window plan is under “serious consideration,” plan fiduciaries and other employer representatives may not mislead employees about the possible adoption of the program. The Ninth Circuit explained the rationale of the serious consideration concept as follows: “As the Fischer II court cogently stated, the goal of the serious consideration test is for ‘employees to learn of potential changes when the company’s deliberations have reached a level when an employee should reasonably factor the potential change into an employment decision.”

The “serious consideration” approach has been adopted by the First, Third, Sixth, Ninth, Tenth and Eleventh Circuits. The Second Circuit’s position is less than clear. As noted above, in Pocchia v. Nynex Corp., a Second Circuit panel held that there is no duty to disclose a window plan prior to its adoption, at least in the absence of a specific inquiry. In Mullins v. Pfizer, an earlier case that was cited with apparent approval in Pocchia, the panel seemingly adopted the serious consideration approach. Finally, in Ballone v. Eastman Kodak Co., the panel referred to the serious consideration approach but indicated it was not dispositive.
Since the serious consideration standard seems to apply in most Circuits, the next question becomes when “serious consideration” attaches. The most commonly cited formulation of “serious consideration” stems from the Third Circuit’s decision in Fischer v. Philadelphia Electric Co., which is generally referred to as Fischer II. The Fischer II court stated that “serious consideration requires (1) a specific proposal (2) discussed for purposes of implementation (3) by senior management with the authority to implement the change.” The Fischer II test has been adopted, in one form or another, by the First, Sixth, Ninth and Tenth Circuits. Both the Second Circuit and the Ninth Circuit seem to apply the “serious consideration” standard less literally than the others.

All of the Circuits require the employer to speak the truth when asked. More particularly, once “serious consideration” takes place, if any employee makes an inquiry, most Circuits require disclosure of the possible adoption of a window plan. A lingering question relates to an employer’s duty in the absence of an employee inquiry.

In its first decision in Bins, a Ninth Circuit panel held that an employer had an affirmative duty to announce the possible adoption of a window program once serious consideration attached even in the absence of an employee inquiry. This decision was replaced by an en banc decision that rejected the affirmative duty to disclose. At present, no Circuit seems to impose an affirmative duty to disclose a possible plan change in the absence of an employee inquiry.

To minimize exposure, some employers have considered instituting a “Chinese Wall” between management involved in the window program and those employees who regularly communicate with employees. The theory behind the Chinese Wall concept is that the Wall removes any possibility of an affirmative misrepresentation regarding the existence or consideration of a window plan until its formal announcement. Although the Chinese Wall may prevent an affirmative misrepresentation, the serious consideration cases also require, at a minimum, accurate responses when an employee makes an inquiry. As a result, the Chinese Wall should crumble as soon as serious consideration takes place.

Note: This paper is intended to provide general information concerning the application of ERISA’s fiduciary standards to business combinations. This paper should not be relied on as legal advice or as a legal opinion on any specific facts or circumstances. You are urged to consult legal counsel concerning your situation and any specific legal questions you may have.

1 The author thanks Reese L. Anderson and Michael J. Wise, attorneys at Snell & Wilmer L.L.P. for their assistance in preparing this paper.

2 The most notable exception is a transaction involving a company that sponsors an employee stock ownership plan or “ESOP.” If the seller has a plan that holds employer securities, the plan fiduciaries should exercise the same rights as any other shareholder. As a general rule, ESOP related concerns are beyond the scope of this paper, since they will be addressed in a separate portion of the program. ESOP voting and tender issues are addressed in Section IV.B.6.
ERISA is codified at 29 U.S.C. § 1001 et seq. (2000). All references in this paper are to the ERISA section numbers.

For a more detailed discussion of ERISA’s fiduciary responsibility requirements, see EMPLOYEE BENEFITS COMMITTEE, SECTION OF LABOR AND EMPLOYMENT LAW, AMERICAN BAR ASSOCIATION, EMPLOYEE BENEFITS LAW, (2d ed. BNA 2000) [hereinafter EMPLOYEE BENEFITS LAW].

The Exclusive Benefit Rule applies to all areas of plan administration and not merely the investment of plan assets. See 29 C.F.R. § 2550.404a-1 (2001).


EMPLOYEE BENEFITS LAW, supra note 4 at 666. Thus, a fiduciary will be held to the standard of any prudent fiduciary who is skilled in carrying out and familiar with the duties with which he or she is charged. Id.


ERISA § 407(d)(3) (A), (B).

The phrase “documents and instruments governing the plan” as used in ERISA section 404(a)(1)(D) encompasses more than the plan document itself. Investment management agreements or investment policies are also included. See Plan Fiduciaries’ Responsibilities for Voting Proxies, Pension and Welfare Benefits Administration Interpretive Bulletin No. 94-2, Pens. Plan Guide (CCH) ¶ 19,971 (July 29, 1994); see also Dardaganis v. Grace Capital, Inc., 664 F. Supp. 105, 108 (S.D.N.Y. 1987), aff’d, 889 F.2d 1237 (2d Cir. 1989) (holding investment manager responsible for violating provisions of investment management agreement).

ERISA § 405(a)(1).

ERISA § 405(a)(2).

ERISA § 405(a)(3). “Reasonable efforts” can consist of rescinding the transaction, notifying the plan sponsor of the breach, filing suit in a federal district court or contacting the Department of Labor regarding the breach. The reasonableness of a fiduciary’s efforts will be determined in light of the surrounding circumstances, including the nature of the breach and the fiduciary’s responsibilities. See EMPLOYEE BENEFITS LAW, supra note 4 at 700.

ERISA § 405(b)(1)(B).

ERISA § 405(b)(3)(A).

ERISA § 403(a).

ERISA § 405(c)(1).

ERISA §§ 403(a)(1), 405(b)(3)(B).
In order for the trustee to be relieved of any responsibility, the “investment manager” must satisfy the requirements of ERISA section 3(38) and the delegation must be authorized by the plan documents. See Whitfield v. Cohen, 682 F. Supp. 188, 196 (S.D.N.Y. 1988). See Whitfield v. Cohen, 682 F. Supp. 188, 196 (S.D.N.Y. 1988).

ERISA § 405(c)(1).

ERISA § 405(c)(2).

ERISA § 405(c)(1), (2).


ERISA § 406; see also ERISA § 3(14) (defining the term “party in interest”).

ERISA §§ 406(a), 407(a).

ERISA § 406(b)(1), (3).

ERISA § 406(b)(2).

ERISA § 409(a).


Id. at 502 (citations omitted).

See Lockheed, 517 U.S. at 891.


170 F.3d 751 (7th Cir. 1999).

Id.; see also Sutton v. Weirton Steel Div. of Nat’l Steel Corp., 724 F.2d 406 (4th Cir. 1983).

47 F.3d. 498 (2d Cir. 1995).


See Hunter v. Caliber Sys., 220 F.3d 702, 719-20 (6th Cir. 2000); Systems Council, 159 F.3d at 1380.

Hunter, 220 F.3d at 719-20; see also, Blaw Knox, 998 F.2d at 1190.

Systems Council, 159 F.3d 1376.

40 F.3d. 264, 267 (8th Cir. 1994).
44 Systems Council, 159 F.3d at 1379.

45 Id. at 1380.


47 Kayes v. Pacific Lumber Co., 51 F.3d 1449 (9th Cir. 1995).


49 Kayes, 51 F.3d at 1466.

50 Id. At the time of the termination of the Pacific Lumber Company Pension Plan, it was overfunded by approximately $62 million. Id. at 1453.

51 Id. at 1466.

52 In re Gulf, 764 F. Supp. at 1208. Chevron intentionally designed the actuarial assumptions so that there would not be a sufficient transfer to satisfy Code section 414(l). At trial, Chevron’s Assistant Comptroller acknowledged that at the time of the transfer, he (and Chevron) knew that the actuarial assumptions were inadequate and would probably require additional transfers from the Gulf Plan to the Cumberland Farms Plan when the later Code section 414(l) calculations were required to be made. Id. at 1209.

53 Id. at 1209-10.


55 See Eaves v. Penn, 587 F.2d 453, 457 (10th Cir. 1978).

56 126 F.3d 1354 (11th Cir. 1997).

57 See infra Part IV.B.6.

58 Treas. Reg. § 1.411(d)-2(b).

59 See I.R.C. § 409(e)(2) (2000) (requiring the pass through of voting rights if the plan sponsor has a registration-type class of securities); Id. at § 409(e)(3) (requiring the pass through of voting rights only in certain limited situations for employers that do not have a registration-type class of securities).


62 Id. at 2250-51.

At the time of the tender, the trustee of the ESOP was Citizens & Southern Trust Company, which later became NationsBank. Following the lead of the Eleventh Circuit, Citizens will be referred to herein as “NationsBank.”

Adopting a standard espoused by the Department of Labor in the Lanoff letter, the Eleventh Circuit found that a direction is proper if: “[the trustee] follows procedures to assure that the eligible individual account plan’s provisions are fairly implemented, that the participants have not been subjected to coercion or undue pressure in making their decisions, that necessary information is provided to the participants, [and] that clearly false information or misleading information is not distributed to the participants . . . .” NationsBank, 126 F.3d at 1371.


Id. at 424.

Id. at 425.

516 U.S. at 506 (citing Peoria Union Stock Yards Co. v. Penn Mut. Life Ins. Co., 698 F.2d 320, 326 (7th Cir. 1983)).

12 F.3d 1292, 1300 (3d Cir. 1993).

See Harte v. Bethlehem Steel Corp., 214 F.3d 446, 454 (3d Cir. 2000), cert. denied, _____ U.S. _____, 121 S. Ct. 626 (2000) (A plan fiduciary must “use clear language when describing severance terms in a plan, or explain them when they are unclear and likely to be misunderstood.”); cf. Switzer v. Wal-Mart Stores, 52 F.3d 1294, 1300 (5th Cir. 1995) (holding contrary to Harte but finding that denial of coverage was not arbitrary and capricious because employer’s communications to employee were clear and unambiguous).


Id.

Id. at 550.

See Barker v. American Mobile Power Corp. 64 F.3d 1397, 1403 (9th Cir. 1995).

Farr v. U.S. West Communications, 1998 U.S. App. LEXIS 38509 at *20 (9th Cir. July 15, 1999) (finding a fiduciary breach but concluding that no relief was available).

Anderson v. Resolution Trust Corp., 66 F.3d 956, 960 (8th Cir. 1995).

170 F.3d 751 (7th Cir. 1999). For a good explanation of the duty to inform, see Howard Shapiro & Robert Rachal, The Duty to Inform and Fiduciary Breaches: The “New Frontier” in ERISA Litigation, 14 Lab. Law. 503, 522 (1999).

Id. at 754.

Id. at 758.
Pocchia v. Nynex Corp., 81 F.3d 275 (2d Cir. 1996) ("a fiduciary is not required to voluntarily disclose changes in a benefit plan before they are adopted"); but see Ballone v. Eastman Kodak Co., 109 F.3d 117 (2d Cir. 1997); Mullins v. Pfizer, 23 F.3d 663 (2d Cir. 1994) (suggesting that the serious consideration concept may have some life in the Second Circuit).

Stanton v. Gulf Oil Corp., 792 F.2d 432 (4th Cir. 1986).

Bins v. Exxon Co., 220 F.3d 1042, 1052 (9th Cir. 2000).

Vartanian v. Monsanto Co., 131 F.3d 264 (1st Cir. 1997).


Bins, 220 F.3d 1042.

Hockett, v. Sun Co., 109 F.3d 1515 (10th Cir. 1997).

Barnes v. Lacy, 927 F.2d 539 (11th Cir. 1991).

Compare Mullins, 23 F.3d 663 (2d Cir. 1994) (which seemed to accept the serious consideration approach); with Pocchia, 81 F.3d 275 (holding that the employer did not have a duty to disclose proposed changes in the absence of an inquiry by the participant). In Pocchia, the Second Circuit panel cited Mullins with approval. As a result, there is some confusion concerning the Second Circuit's stand on this issue.

Pocchia, 81 F.3d at 278-79 ("NYNEX only came under a duty to disclose once it adopted the plan changes.").

Mullins, 23 F.3d at 668-69 ("We adopt the view that a 'plan administrator may not make affirmative material misrepresentations to plan participants about changes to an employee pension benefits plan.'") (citation omitted).

1997 U.S. App. LEXIS 15274 at *16 (2d Cir. Mar. 21, 1997) ("Whether consideration is being given to altering a pension plan at the time the misrepresentation is made is relevant to materiality, . . . but is not a prerequisite.").

96 F.3d 1533 (3d Cir. 1996).

Id. at 1542.

Vartanian v. Monsanto Co., 131 F.3d 264 (1st Cir. 1997).


Bins v. Exxon Co., 220 F.3d 1042, 1045 (9th Cir. 2000) (en banc) ("In the absence of an employee inquiry, however, the employer-fiduciary does not have an affirmative duty to volunteer information about any changes prior to their final adoption.").
102 Hockett v. Sun Co., 109 F.3d 1515 (10th Cir. 1997).


104 Bins, 220 F.3d at 1049-50.


106 Bins, 220 F.3d at 1053.