401(k) Investments

A New Look at Fiduciary Responsibility

"There are plenty of recommendations on how to get out of trouble cheaply and fast. Most of them come down to the same thing. Deny your responsibility."

— Nancy Peretsman (b. 1955) U.S. Investment Banker

Fiduciaries of retirement plans must act responsibly and think independently—regardless of what their peers are doing—to ensure that their motivations are proper so that they can serve only the best interests of plan participants, which is defined as securing income for participants in retirement.

By Matthew D. Hutcheson

Matthew D. Hutcheson is an independent pension fiduciary who is well-known and trusted in the world of finance, economics, and retirement plans. He is a Congressional expert and is recognized internationally as a dedicated advocate of investor and plan participant rights. He possesses extensive private sector experience in operations and administration of large retirement programs. In 2004, Mr. Hutcheson wrote what has now become the most widely distributed paper on retirement plan economics. The paper has been studied by the White House, the General Accountability Office (GAO), members of Congress, and regulators. In March 2007, Mr. Hutcheson testified before a full Congressional committee hearing on retirement plan economics.

What Triggers Fiduciary Responsibility?

Responsibility may be defined in one of two ways within the context of retirement plan management: (a) *explicitly*, by statute and regulation; or, (b) *implicitly*, with reference to four key indicia that clearly evidence the existence of a fiduciary relationship.

ERISA Section 3(21)(A) states:

> . . . a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or *discretionary responsibility* in the administration of such plan. [Emphasis added]

While adequate for many purposes, the simple notion of "discretion = duty" doesn't capture the full breadth of fiduciary responsibility, particularly in practice. For example, because the U.S. Courts treat the concept of who is a "fiduciary" very broadly, advisors and their clients are often misled to believe that the advisors are not fiduciaries. The advisors often spend much of their time skirting wherever they believe the fiduciary line is to avoid the obligations that are attendant to that label.

Countries such as the United Kingdom, Australia, Canada, and New Zealand that base their legal structure on British common law have fiduciary laws and concepts that are essentially identical to those in the United States. In 1996, the High Court of Australia (the Australian "Supreme Court") offered a fundamental explanation of fiduciary responsibility [Breen v. Williams, 186 CLR 71 (1996)]. In this case, the High Court provides a particularly clear and meaningful explanation of what triggers a fiduciary relationship, and this explanation is directly relevant to fiduciary duties as they apply to retirement plans in the United States. While the Australian court is not discussing the ERISA definition of fiduciary, its analysis is instructive nonetheless on what triggers the relationship between the fiduciary and the beneficiary and why the duties owed are so aggressively enforced by courts. The High Court outlines the four indicia of the fiduciary-beneficiary relationship:

- **Vulnerability**. "[A] dependency or *vulnerability* on the part of one party that causes that party to rely on another" [Breen v. Williams, 251]. That vulnerability can be the result of an inequality

of bargaining power, or perhaps knowledge or understanding [Breen v. Williams, 248].

- **Reliance**. That "dependency or vulnerability on the part of one party that *causes that party to rely on another*" [Breen v. Williams, 251]. The conscious recognition of vulnerability cannot be an indicator of fiduciary relationship by itself. This is a supporting indicator of the fiduciary relationship when coupled with a participant's conscious recognition of that vulnerability and a resultant reliance on the fiduciary. The avoidance of fiduciary responsibility once both vulnerability and reliance exist is contrary to the overarching intent of ERISA, and thus any behavior to avoid fiduciary responsibility is confusing to participants and plan sponsors. For example, if a participant knows that he or she is vulnerable but lacks someone to rely on, that creates a disruption to the balance of loyalty, care, and general protections a participant could otherwise expect. A service provider's avoidance of its fiduciary role by its very nature is a sleight exercise in discretion that controls outcomes to some scope or extent, but not for the benefit of participants. As plan sponsors consider those realities, it will become clear that the only reasonable solution is to retain those who readily embrace their fiduciary duty to ensure that the vulnerability/reliance balance remains undisturbed.
- **Expectation**. "The actual circumstances of a relationship are such that one party is *entitled to expect* that the other will act in his interests in and for the purposes of the relationship" [Bender, Mark, working paper, "Fiduciary Obligations in Australia: The Essential Ingredient," quoting Paul Finn, *Fiduciary Obligations* (1977); Social Science Research Network, page 7] [Italics added]. In other words, the situation is such that the reliance is reasonable. A fiduciary relationship should not be created when it is unreasonable to do so.
- **Discretion**. "[T]he scope for one party to *unilaterally exercise a discretion or power* which may affect the rights or interests of another [Breen v Williams, 250]. That is, the fiduciary is empowered to act without permission from the beneficiary.

Challenging Old Notions

Those four elements have equal relevance and applicability in the United States. The combination of those ideas, working together, directly challenges the notion that there can be some instances where these characteristics exist, but the responsible party is not treated as a fiduciary under ERISA. For example, according to a New York court, managers of hedge funds are not deemed to have fiduciary responsibility within the meaning of ERISA if less than 25 percent of the fund is held by employee benefit plans [Ennis v. Montemayor, 14 F. Supp. 2d 379 (S.D.N.Y. 1998)].

Can the vulnerability of hedge fund investors and the associated reliance they place upon the fund's managers be disputed? [*See* http://www.sec.gov/litigation/complaints/2008/comp-madoff121108.pdf.] And, can the resultant obligation of the fund manager be dependent on how much of the fund is held by an ERISA plan? If the percentage of assets held by plan investors is less than 25 percent, should those plan participants be owed any lesser duty by the fund managers?

Vulnerability may not be linear. It may increase disproportionately to the size of assets at stake. It extends even to those who had not previously viewed themselves as vulnerable because of an expectation that those relied upon would treat them in the same way they treat others ["Suicide Madoff investor was 'honorable man,'" http://www.msnbc.msn.com/id/28368421].

From those four elements, it is fair to conclude that hedge fund managers, who are fiduciaries as a matter of law ["Hedge fund advisers have this fiduciary obligation as a matter of law regardless of whether they are registered with the Commission." http://www.sec.gov/news/testimony/ts051606sfw.htm] must also be fiduciaries within the meaning of ERISA; thus making it difficult to view the Ennis decision as legitimate. This is particularly true in light of the widespread hedge fund collapses.

Higher Responsibility Requires Higher Understanding

To many, the fundamental notion of fiduciary duty and responsibility entails acting as your brother's keeper or doing unto others what you would want for yourself. Within that broader context, fiduciary duty is implied when one party is vulnerable and reliant on another and where the reliant party can reasonably expect the other to properly exercise discretion on his behalf. The concept of looking out for another's interests lies at the heart of fiduciary responsibility. It applies even when a specific fact pattern is not addressed by the language of a regulation or statute.

In an ideal world, if everyone in a capacity of trust relied upon that universal conception of fiduciary responsibility as a natural law, statutory and

regulatory edicts would be unnecessary, and individuals in fiduciary capacities would have a clear guide as to the proper fulfillment of their duties. They would no longer worry about *whether* their actions triggered fiduciary liability. They would never wonder whether they needed to "act like a fiduciary." Everyone would know that they have the best interests of participants at heart.

However, this utopian framework does not exist. Because the broad principle of fiduciary responsibility depends upon the exercise of sound and loyal judgment, no one can reasonably anticipate *all* the many situations that may arise. By attempting to articulate all applicable situations, you run the risk of leaving out something important, thereby creating the fly-speck argument, i.e. "if it's not prohibited it must be okay." That is why fiduciary responsibility is the "highest duty known to the law." It is not contemplated that we as a people accept it as a base or crude law comparable to "red light means stop." Rather, by its very nature, fiduciary responsibility always requires a morally sympathetic response by the fiduciary to both the unique challenges presented and the continuing process.

Failure to understand this strong level of obligation will eventually translate into certain behaviors by fiduciaries that are inconsistent with the essence of their responsibility. Correct understanding must precede loyalty, monitoring, investigation, evaluation, accountability, etc. Consider the following statement from Joshua Itzoe's "Fixing the 401(k)":

> You are a fiduciary. With that grear responsibility, you literally have the powet to improve or impair an individual's quality of life during retirement. That power is why Courts have called fiduciary duty "the highest known to the law." It really is that important. [Hutcheson, Forward to "Fixing the 401(k): What Fiduciaries Must Know (and Do) to Help Employees Retire Successfully," Joshua P. Itzoe.]

Those in the United States are not the only ones who have struggled with the concept of when and how fiduciary responsibility is triggered. Canada's Supreme Court, noted for its progressive activity in this area, seemed to express frustration, as well:

> [T]here are few legal concepts mote frequently invoked bur less conceprually certain than that of the "fiduciary relationship" that "the principle on which that (fiduciary) obligation is based is unclear" and that the rerm fiduciary has been described as *"one of the most ill-defined, if not altogether misleading terms in our law."* [Bender, Mark, working paper, "Fiduciary Obligations in Australia: The Essential Ingredient," quoting Paul Finn, *Fiduciary Obligations* (1977); Social Science Research Network ID 916711.] [Italics added]

If fiduciary responsibility is the "highest duty known to the law," why has there not been a clear explanation formulated of what that responsibility is or means, how it is triggered, and what it means to an individual after it has been triggered? In other words, where a "highest duty" exists, there should be an expectation of "highest understanding" to accompany it. The current definition of what triggers a fiduciary relationship under ERISA is inadequate because it leaves too much wiggle room for those who wish to avoid being tagged as a fiduciary to both argue it and eventually believe it. The current definition under ERISA seems to presume that all who exercise discretion or control over outcomes would agree that is what they are doing. Instead, those who exercise "secondary discretion" over a plan to varying degrees or extents have found ways to argue that secondary discretion is not discretion at all. Even if a more comprehensive definition of "fiduciary" were developed within the statute, it would remain worthless without commensurate understanding and action. That dilemma may never be resolved. However, that does not mean we should continue on as we always have, as too much is at stake right now in our retirement system and economy as a whole.

Understanding the Cause of Vulnerability

It is critically important for fiduciaries in the United States to understand that participants and beneficiaries are vulnerable. They must know the causes of that vulnerability. So what causes participants to be vulnerable? Consider the following for starters:

1. Widespread lack of understanding of financial and economic concepts.
2. Lack of transparency.
3. A difficult to understand regulatory scheme.
4. The failure of fiduciaries to understand and discharge their duties, and even worse, failure to even inquire whether there is more they should be doing.
5. The interests of financial service providers are often at odds with those who are contributing their capital for investment.

6. The inequality in bargaining power; that participants must simply accept what is given to them (and the associated consequences) without the real power to effectuate change.
7. Worries such as "Is our plan being handled by someone like Bernard Madoff?"
8. Beneficiaries left "in-the-dark" by the participant without knowing who they can rely upon.

Perhaps (many) other reasons also exist.

Expectation, Reliance, and Excellence

"Reliance" and "vulnerability" are inextricably connected. Fiduciaries must understand that connection and act accordingly. For our retirement plan system to thrive, a participant must be able to expect that their fiduciaries know what to do, and rely upon them to do it for the right reasons and with the right attitudes. Too many fiduciaries neglect the interest of those who they are bound to protect until they are awakened to a fear that their past neglect will result in litigious or regulatory enforcement. Our system must move past behaviors motivated by fear, and evolve to motivation by compassion and an eagerness to embrace fiduciary "virtue," which Adam Smith (1723–1790) [http://www.adamsmith.org/dr-adam-smith-%281723%111790%29/] explained was "moral excellence for all the right reasons." That is what we need right now—fiduciary excellence for the right reasons. Participants have the right to expect and rely upon a fiduciary whose behaviors are excellent.

Conclusion

Fiduciary discretion must be exercised to reduce vulnerability, justify reliance, and fulfill expectations. Although discretion is sufficient by itself to trigger fiduciary responsibility, discretion alone is not sufficiently understood to permit fiduciaries to truly grasp the relationship they have with their participants. This lack of understanding is due in large measure to the varying degrees, scopes, extents, and secondary existences of the responsibility.

Fiduciary responsibility will be more deeply understood and appreciated when the fiduciary internalizes that participants and beneficiaries are vulnerable to some extent or scope. In the qualified retirement plan context, there could be multiple vulnerable parties. For example, a plan sponsor could simultaneously be the vulnerable and relied upon party. In that scenario, a plan sponsor may be vulnerable to their fund manager(s), but relied upon by beneficiaries they have never met.

If participants and beneficiaries were not vulnerable, there would be no reason or need for a fiduciary. In many cases, those that are vulnerable are not conscious of that fact, which makes the fiduciary relationship all the more important. It is not a prerequisite that the vulnerable party be aware he or she is a subject to fiduciary protections. It is, however, the duty of the relied-upon party (the fiduciary) to know its duties and the extent of its responsibilities, and properly discharge those responsibilities.

At some point in time, retirement plan participants may become conscious of their vulnerability. It is that dependence or vulnerability of the participant that causes the expectation that he or she can confidently rely on the plan fiduciaries. Fiduciaries must therefore use their discretion—which is their power—to act loyally and with excellence so that expected reliance is not in vain. Even if a participant is not conscious of the fiduciary relationship, it is not enough to take comfort in what others are doing solely to comply with the explicit provisions of law. That is simply not good enough to ensure the welfare of the participants. Nor is it a good indicator of what is prudent, sound, intelligent, or worthy. Fiduciaries of retirement plans must act responsibly and think independently—regardless of what their peers are doing—to ensure that their motivations are proper so that they can serve only the best interests of plan participants, which is defined as securing income for participants in retirement. ■