UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PATRICK CHENDES, JILLIAN SMITH and DION TUMMINELLO	:	Case No.:
	:	Hon.
Plaintiff(s),	:	
	:	CLASS ACTION (ERISA) COMPLAINT
v.	:	
	:	
XEROX HR SOLUTIONS, LLC,	:	
	:	
Defendants.	:	

CLASS ACTION COMPLAINT

PRELIMINARY STATEMENT

1. Plaintiffs Patrick Chendes, Jillian Smith and Dion Tumminello ("Plaintiffs") bring this action on behalf of three Ford Motor Company ("Ford" or the "Company") retirement plans and all other similarly situated qualified retirement plans (the "Plans"). The three Ford plans (collectively, the "Ford Plans") are: (i) the Ford Retirement Plan (the "FRP"), (ii) the Ford Motor Company Savings and Stock Investment Plan for Salaried Employees (the "Salaried Plan"), and (iii) the Ford Motor Company Tax-Efficient Savings Plan for Hourly Employees (the "TESPHE Plan").

2. Plaintiffs bring this action under Sections 502(a)(2) and 502(a)(3) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"),

29 U.S.C. §§ 1132(a)(2) and 1132(a)(3), against Xerox HR Solutions, LLC ("Xerox HR" or "Defendant").

3. The Ford Plans participate in the Ford Defined Contribution Plans Master Trust ("Master Trust"). Ford established the Master Trust to permit the commingling of trust assets of the Ford Plans for investment and administrative purposes. FRP is funded with employer contributions only. The Salaried Plan allows regular full-time salaried and some part-time Ford employees to participate and contribute a portion of their salary on a pre-tax, Roth and/or after-tax basis in order to save for retirement. Ford makes matching contributions and/or profit-sharing contributions to supplement the employees' contributions to the Salaried Plan. The TESPHE Plan allows eligible Ford hourly employees to contribute on a pre-tax, Roth and/or after-tax basis. TESPHE Plan participants may also elect to contribute distributions from the Company's Profit Sharing Plan to the TESPHE Plan on a pre-tax or Roth basis. Ford also makes supplemental and retirement contributions to the TESPHE Plan.

4. Participant accounts in the Ford Plans are thus comprised of various combinations of any employee contributions, any employer contributions and any investment income earned from the individual investment options selected within the participant account.

5. The Master Trust provides for several individual investment options, and the Ford Plans give individual plan participants the ability to choose among various investment options. Investment options include currently: BlackRock

U.S. Debt Index Fund, BlackRock EAFE MSCI Index NL Fund, Wells Fargo Short Term Funds, BlackRock LifePath Index Ret NL Fund, BlackRock LifePath Index 2020 NL Fund, BlackRock LifePath Index 2025 NL Fund, BlackRock LifePath Index 2030 NL Fund, BlackRock LifePath Index 2035 NL Fund, BlackRock LifePath Index 2040 NL Fund, BlackRock LifePath Index 2045 NL Fund, BlackRock LifePath Index 2050 NL Fund, BlackRock LifePath Index 2055 NL Fund, State Street Global Equity Index NL Fund, State Street U.S. Inflation Pro Bono Index, Vanguard US Equity Index Fund, T. Rowe Price Int'l Small Cap Equity Trust, Voya Clarion Global R.E. Sec Trust and Blackrock MSCI ACWI Ex-US IMI Index. Participants in the Salaried Plan and the TESPHE Plan also have the opportunity to invest in voting shares of the Company. In the absence of participant investment directions, contributions are invested in one of the LifePath funds as the qualified default investment alternative ("QDIA").

6. At December 31, 2015, the net assets in the Master Trust totaled $13.94 billion. At year-end 2015, FRP's interest in the Master Trust represented approximately 2 percent of the assets in the Master Trust, the Salaried Plan's interest represented approximately 67 percent of the assets and TEPHE Plan represented approximately 31 percent of the assets.

7. Xerox HR provides platform and recordkeeping services to the Master Trust for the administration of the Ford Plans. The Ford Plans are "individual account plans," tax-qualified retirement plans maintained by employers for the benefit of their employees. An individual account plan is defined in Section

3(34) of ERISA, 29 U.S.C. § 1002(34), as "a pension plan which provides for an individual account for each participant and for benefits based solely on the amount contributed to the participant's account, and any income, expenses, gains and losses ... which may be allocated to such participant's account." Participants in the Ford Plans are responsible for directing the investment of their accounts among the available investment options.

8. As recognized by the Employee Benefit Security Administration ("EBSA") of the U.S. Department of Labor ("DOL"), "[g]iven the rise in participation in 401(k) type plans and IRAs, the retirement security of millions of America's workers increasingly depends on their investment decisions. ***Thus, there is increased recognition of the importance of investment advice in helping participants avoid costly investment errors***."[1] (Emphasis added.)

9. In recognition of that need, Financial Engines Inc. through its subsidiary, Financial Engines Advisors, LLC, a federally registered investment advisor ("FE" or "Financial Engines"), developed a computer-based investment advice program which, based on personal and personal financial information and retirement expectations and goals provided by plan participants, will control the allocation of participants' accounts among the various investment options available through the plan.

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[1] EBSA Fact Sheet, "*Proposed Regulation to Increase Workers' Access to High Quality Investment Advice,"* Feb. 26, 2010, available at http://www.dol.gov/ebsa/newsroom/fsinvestmentadvice.html (last reviewed March 24, 2016 (emphasis added). *See* Exhibit A attached.

10. Nearly all individual account plans are administered on recordkeeping platforms provided by companies like Xerox HR. Therefore, the most efficient way to make FE's services available to plan participants is to make the services available on platforms like the Xerox HR plan recordkeeping platform on a plan-wide basis.

11. Accordingly, among the optional services that Xerox HR makes available to its qualified plan customers is the opportunity for plan participants to obtain professional investment advice regarding the investment of their Plan accounts. Xerox HR has contracted with Financial Engines to provide professional investment advice services to individual participants in the retirement plans serviced on the Xerox HR recordkeeping platform through an agreement (the "Master FE Agreement") that dictates and controls certain of the terms and conditions on which FE will provide services to the retirement plans administered on the Xerox HR platform.

12. Ford elected to include such investment advice service among the optional services made available by Xerox HR to Plaintiff and the other participants in the Ford Plans. A separate agreement was signed between the Ford Plans and/or Master Trust and FE. The agreement between the Ford Plans and FE contains an acknowledgement that FE is an ERISA fiduciary with respect to the investment advice program and specifies the fee that FE will charge to Plaintiffs and other plan participants for its services, stated as a percentage of the value of a participant's account on a scaled basis.

13. FE and Xerox HR were not content, however, with merely providing participants with access to FE's services. Xerox HR wanted a piece of FE's action, and saw an opportunity to take a percentage of the account of every participant choosing to use FE's services, in addition to the fees Xerox HR was collecting for recordkeeping. Accordingly, in order to be included as the investment advice service provider on Xerox HR's platform, FE agreed to pay -- and is paying -- Xerox HR a significant percentage of the fees it collects from Ford's 401(k) plan investors, like plaintiffs Patrick Chendes, Jillian Smith and Dion Tumminello. For its part, FE was interested in securing an arrangement with Xerox HR to be the exclusive provider of investment advice to participants in retirement plans administered on Xerox HR's platform, and was willing to charge excessive fees to Plaintiffs and other participants in order to meet Xerox HR's demand for a kickback. These fees are not being paid for any substantial services being provided by Xerox HR to FE or to participants of the Plans (the fees being paid ostensibly for "data connectivity services" as described in the Annual Return of the Master Trust filed with the EBSA on Form 5500 ("Annual Return")), but are instead being paid as part of a so-called "pay-to-play" arrangement; better described in the pejorative as a kickback. This "pay to play" arrangement wrongfully inflates the price of FE's professional investment advice services that are critical to the successful management of workers' retirement savings and violates the fiduciary responsibility and prohibited transaction rules of Sections 404, 405 and 406 of ERISA, 29 U.S.C. §§ 1104, 1105 and 1106.

14. Participants in the Ford Plans who use FE pay excessive fees -- excessive because of the fee-sharing arrangement with Xerox HR. Participants in the Ford Plans who opted to use Financial Engines paid FE $5,794,426 in 2015, out of which FE paid $1,840,048 to Xerox HR. Similar indirect fee-sharing payments have been made each year since 2012 to Xerox HR by FE.

JURISDICTION

15. Plaintiffs bring this action pursuant to ERISA §§ 502(a)(2) and 502(a)(3), 29 U.S.C. §§ 1132(a)(2), and (3). This Court has subject matter jurisdiction over Plaintiffs' claims pursuant to ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1), and 28 U.S.C. § 1331 because this action arises under the laws of the United States. Also, in the alternative, jurisdiction is proper pursuant to 28 U.S.C. §§ 1332, 1367.

16. Pursuant to 29 U.S.C. § 1132(e)(2) venue is proper in this District because the plans are administered in this district and the breaches occurred in this District. *Id.*

THE PARTIES AND THE PLANS

17. At all relevant times (the "Relevant Period"), Plaintiffs Patrick Chendes, Jillian Smith and Dion Tumminello have been participants in the Ford Plans, consisting of ERISA plans as defined in ERISA § 3(7), 29 U.S.C. § 1002(7). Plaintiffs engaged FE to provide investment advice.

18. Plaintiff Patrick Chendes is a resident of the State of Michigan. Mr. Chendes participated in the FRP and the Salaried Plan during the Relevant Period, during which his account was invested through FE's Professional Management Program.

19. Plaintiff Dion Tumminello is a resident of the State of Michigan. Mr. Tumminello participated in the TESPHE Plan during the Relevant Period, during which his account was invested through FE's Professional Management Program.

20. Plaintiff Jillian Smith is a resident of the State of Missouri. Ms. Smith participated in the TESPHE Plan during the Relevant Period, during which her account was invested through FE's Professional Management Program.

21. At all relevant times, the Ford Plans were employee pension benefit plans within the meaning of ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A) and an individual account plan within the meaning of ERISA § 3(34), 29 U.S.C. § 1002(34).

22. Ford Motor Company is a Delaware corporation with its headquarters in Dearborn, Michigan.

23. Defendant Xerox HR Solutions, LLC is a Pennsylvania limited liability company with its headquarters in New York, New York. Xerox HR provides recordkeeping and information management services for employee benefit plans for which it received direct compensation from the Ford Plans, and received indirect compensation from Financial Engines in connection with the

services FE provides to selected participants in the Ford Plans. Xerox HR is a subsidiary of Xerox Corporation ("Xerox"). Xerox acquired ACS HR Solutions, LLC in 2010 and renamed it Xerox HR Solutions, LLC in early 2012.

24. The Ford Plans allow participants to elect investment advisory services provided by FE. At all relevant times, FE was the exclusive provider of individualized investment advice services to participants in the Plans.

GENERAL ALLEGATIONS

A. Xerox's Fee Sharing Arrangement with Financial Engines

25. Commencing in 2011, the Director of Employee Benefits at Ford began sending letters to Salaried Plan participants to consider opting into Professional Management offered by FE "to manage your account, build a personalized retirement plan, pick investments for you, and help keep you on track."

26. According to the September 2011 letter, Ford negotiated the Professional Management fee with FE as a percentage of the value of a participant's account invested through FE: 45 basis points (forty-five hundredths of one percent) for the first $100,000 invested; 35 basis points for the next $150,000 invested; and 20 basis points for amounts in excess of $250,000 invested. Forty-five basis points is the maximum FE fee for any individual participant's account. For accounts with balances in excess of $100,000, the FE fee is, therefore, less than 45 basis points.

27. This Professional Management fee structure has remained the same since 2011.

28. FE's Form ADV filed with the Securities and Exchange Commission in connection with FE's status as a registered investment adviser states: "FEA may reimburse or compensate certain plan providers for maintaining secure communications links between the plan provider's information systems and FEA's systems for the purpose of facilitating the provision of FEA's services to FEA's clients who are plan participants."

29. FE's Form 10-K for fiscal year 2015 states with regard to the arrangement with Xerox HR:

> In these relationships, we are the primary advisor and a plan fiduciary. Data is shared between the plan providers and us via data connections. In addition, our sales teams directly engage plan sponsors, although, in some cases, we have formed and are executing a joint sales and collaborative marketing strategy with the plan provider. *We have separate contracts with both the plan sponsor and plan provider, and pay fees to the plan provider for facilitating the exchange of plan and plan participant data as well as implementing our transaction instructions for member accounts.* Plan providers with whom we have direct advisory relationships are Aon Hewitt, Charles Schwab, Fidelity, Mercer, T. Rowe Price, and *Xerox HR*.
>
> (Emphasis added.)

30. On information and belief, FE is paying Xerox HR over 30% of the fees it receives from the Ford Plans. For example, according to the Master Trust's 2015 Form 5500 Filing Schedule C, the Ford Plans paid FE $5.79 Million, and FE paid $1.84 Million of this amount back to Xerox HR, purportedly for "Data

Connectivity Services." On a relative value basis, Xerox HR's fee for whatever service, if any, it actually provides with respect to participants' use of FE's service is plainly unreasonable.

31. The Annual Returns for the Ford Plans, for plan years from 2010 through 2015, report that Xerox HR was a service provider to the Ford Plans and received direct compensation from the Ford Plans as follows:

Ford Plans' Direct Fees Paid to Xerox HR	
2010	$733,542[2]
2011	$526,565[3]
2012	$1,693,768
2013	$625,217
2014	$590,180
2015	$448,965

32. The Annual Returns for 2012 through 2015 further report that FE was a service provider to the Ford Plans and that as a service provider received direct compensation from the Ford Plans and paid indirect compensation to Xerox HR as follows:[4]

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2 Fees paid to ACS HR Solutions, LLC; predecessor of Xerox HR.

3 Fees paid to ACS HR Solutions, LLC; predecessor of Xerox HR.

4 The Form 5500s for the Master Trust for the Ford Plans indicate that Xerox HR reported receiving total indirect compensation excluding "eligible indirect compensation." "Eligible Indirect Compensation" is defined in the Instructions for Form 5500 as "[i]ndirect compensation that is fees or expense reimbursement payments charged to investment funds and reflected in the value of the investment

Ford Plans' Compensation Paid Directly to FE and Indirectly to Xerox HR by FE		
	FE Direct	*Xerox HR Indirect*
2012	$1,815,638	$692,393
2013	$3,391,191	$1,155,617
2014	$4,408,443	$1,172,153
2015	$5,794,426	$1,850,997

33. There is no rational justification for an asset-based fee for whatever services Xerox HR provided in connection with FE's investment advice program. For example, the level of Xerox HR's services to a participant who chooses to use FE's investment advice service does not increase when that participant's account has grown through additional contributions or investment gains, yet Xerox HR's fee will increase in proportion to the increase in the value of the account.

34. Likewise, Xerox HR provides no greater service to one Plan participant whose account value invested through FE is $50,000 than to another Plan participant whose account value invested through FE is $75,000, yet Xerox HR's fee for the latter participant's account is 50% greater than the fee for the former's account.

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or return on investment of the participating plan or its participants[,] finders' fees[,] 'soft dollar' revenue, float revenue, and/or brokerage commissions or other transaction- based fees for transactions or services involving the plan that were not paid directly by the plan or plan sponsor." The fee sharing payments received by Xerox HR that are the subject of this litigation are not considered "eligible indirect compensation" for purposes of the Master Trust's Form 5500 reporting.

35. In fact, since the interface of FE's advice program with Xerox HR's recordkeeping system does nothing more than implement investment instructions on behalf of participants in the same manner that participants directly provide investment instructions in the Ford Plans, rights that all participants have simply by virtue of their participation in the Ford Plans, Xerox HR is doing nothing more than providing an electronic mechanism for implementing instructions the participants could implement on their own.

36. FE describes its advisory services in its latest Form 10-K as follows:

> Unlike traditional advisory services, we do not rely on the subjective evaluation of each plan participant's portfolio by a human investment advisor. Instead, our services rely on Advice Engines that accept inputs on available investment choices along with a variety of personal information including investment objective, risk tolerance, investment horizon, age, savings, outside personal assets, investor preferences and tax considerations. This approach results in a consistent, systematic and objective investment methodology in which the advice generation is distinct from the method of delivery, which may be online, via printed materials or through phone conversations with our registered Investment Advisor Representatives or the call center representatives of certain plan providers with whom we have relationships.

37. The cost of maintaining "secure communications links" between Xerox HR and FE does not increase appreciably when the number of participants in the Ford Plans using FE's services increases from 2000 to 3000, but Xerox HR's fee for providing the data connectivity service could increase by 50%. An asset-based fee to Xerox HR for a fixed level of service is unreasonable.

38. Whether or not an asset-based fee for a fixed service is ever reasonable, the amount of compensation Xerox HR received was plainly unreasonable in relation to the services being provided.

B. <u>Xerox's Status as Fiduciary</u>

39. "Hiring a service provider in and of itself is a fiduciary function."[5] Xerox HR hired FE and controlled the negotiation of the terms and conditions under which FE would provide its services to the participants of the Ford Plans--specifically, the terms requiring payment to Xerox HR of a portion of the fees paid by retirement plan investors for participating in the investment advice program. If a Plan sponsor whose retirement plan was administered on the Xerox HR platform wanted to provide an investment advice program to its participants, there was no choice but to accept FE as the provider, together with the unlawful fee-sharing arrangement with Xerox HR complained of herein.

40. More specifically, "[t]he power to appoint fiduciaries is itself a fiduciary function." *Kling v. Fidelity Management Trust Co.*, 323 F. Supp. 2d 132, 143 (D. Mass. 2004). FE is unquestionably a fiduciary, because it "renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan", 29 U.S.C. § 1002(21)(A)(ii), and has acknowledged in writing that it is a fiduciary.

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[5] EBSA Publication *Meeting Your Fiduciary Responsibilities*, available at http://www.dol.gov/ebsa/publications/fiduciaryresponsibility.html (last visited Mar. 24, 2016). *See* Exhibit B attached.

41. Because Xerox HR selected FE as the sole provider of investment advice to the Ford Plans and any other plan administered on Xerox HR's platform, and because the selection of a plan service provider fiduciary is itself a fiduciary function, Xerox HR is a fiduciary to the Plans.

42. Furthermore, since the terms of FE's services to Plaintiffs are governed in part by the terms of the Master FE Agreement, Xerox HR maintains an ongoing level of discretionary control over the agreement between FE and the Ford Plans and the other Plans, which it exercises through the continual enforcement, and acceptance of the benefits of, the illegal arrangement embedded in the Master FE Agreement.

43. Fiduciaries for retirement plans owe the plan and its participants and beneficiaries duties described as among the "highest known to the law." *Chao* v *Hall Holding Co*., 285 F.3d 415, 426 (6th Cir. 2002).

44. When choosing service providers for a retirement plan, an ERISA plan fiduciary is required to act with the care, skill, prudence and diligence that would be exercised by someone who is experienced and knowledgeable about the services to be provided; a prudent expert. Most fundamentally, ERISA fiduciaries are required to act solely in the best interests of plan participants. ERISA § 404(a)(1), 29 U.S.C. 1104(a)(1). That is especially true when choosing a service provider who will be a fiduciary to the retirement plan, because making that selection requires a determination that the service provider will perform its services

competently and solely in the best interests of the plan participants it will be advising.

45. Contrary to that obligation, Xerox HR selected a fiduciary that it knew would violate that obligation by implementing the illegal kickback scheme. Further, in Xerox HR's selection of FE as a fiduciary, it knew or should have known that it was not acting in the best interests of the participants and beneficiaries by negotiating a fee that required a kickback to Xerox HR; that it was not acting to defray reasonable expenses of administering the plan or acting with the care, skill, prudence and diligence required by a prudent fiduciary.

XEROX'S FIDUCIARY BREACHES

46. Specifically, with respect to that most fundamental duty of loyalty, ERISA prohibits a plan fiduciary from: (i) dealing with the assets of the plan for its own benefit or for its own account; (ii) representing a party or acting in a transaction on behalf of a party whose interests are adverse to the interests of the plan or its participants; and (iii) receiving for its own account any consideration from a party dealing with such plan in a transaction involving plan assets. ERISA § 406(b), 29 U.S.C. § 1106(b).

47. Xerox HR, by the terms of the Master FE Agreement, requires FE to charge an excessive fee to Plan participants, taken directly from participants' Plan accounts, which FE then passes on to Xerox HR, effectively dealing with the plan assets for its own benefit or its own account.

48. Xerox HR, in negotiating the terms on which FE would provide fiduciary investment advice services, represented its own interests rather than the interests of Plaintiffs and all other plan participants and beneficiaries, and extracted a fee that was far in excess of the value of any services provided in exchange for that fee and far in excess of any reasonable expenses required for administering the plan.

49. Xerox HR, as a fiduciary to Plaintiffs and the Ford Plans, is receiving fees deducted from Plaintiffs' accounts derived from FE's management of Plaintiffs' and other participants accounts, which are clearly transactions involving plan assets.

50. In turn, because Xerox HR's agreement with FE mandated the payment of a fee to Xerox HR based on the use by participants in the Ford Plans of the investment advice program, Xerox HR caused the Ford Plans to engage in transactions resulting in the transfer of plan assets to or for the benefit of Xerox HR, a party-in-interest, in violation of 29 U.S.C. 1106(a)(1)(D). This occurred through the imposition of excessive fees in connection with Xerox HR's unlawful fee sharing arrangement with FE.

51. As a result of this fee sharing arrangement with FE, Xerox HR received for its own account consideration from a party (FE) dealing with the Ford Plans in transactions involving plan assets, in violation of ERISA § 406(b)(3), 29 U.S.C. § 1106(b)(3).

52. None of the statements or disclosures provided to participants by either Xerox HR or FE disclosed the nature or the amount of the fee being paid to Xerox HR.

C. **FE's Fiduciary Breaches**

53. FE is a fiduciary to Plaintiffs and all other participants whose plan accounts are managed by FE. FE owes to Plaintiffs and the other participants a duty of undivided loyalty. Yet every time FE charges a fee for its services, it knows that a significant percentage of that fee will go directly to Xerox HR, for which it knew or should have known that Xerox HR was performing little or no services. FE is taking plan assets from participants' accounts in the guise of its investment management fee and transferring those assets to Xerox HR, a party in interest, in violation of 29 U.S.C. § 1106(a)(1)(D) and 29 U.S.C. § 1104(A)(i)(ii) and (B).

54. FE's *quid pro quo* for agreeing with Xerox HR to charge an excessive fee for investment advice services so that Xerox HR could receive additional and illegal compensation from the participants in its customer plans was that FE became the exclusive investment advice provider on the Xerox HR platform. The fruits of this conspiracy could not be achieved unless FE, after it became a fiduciary, continued to implement and enforce the illegal arrangement by charging excessive fees, in clear violation of FE's duty of undivided loyalty to Plaintiffs.

D. Xerox's Liability for FE's Fiduciary Breaches

55. Xerox is liable for FE's fiduciary breaches. ERISA § 405, 29 U.S.C. § 1105

56. Even if, *arguendo*, Xerox HR were not considered a fiduciary with respect to the selection of FE and the imposition of the fee-sharing arrangement on the Plans, the U.S. Supreme Court has made it clear that ERISA § 502(a)(3) authorizes a civil action against a non-fiduciary who participates in a transaction prohibited by ERISA § 406:[6]

> As petitioners and *amicus curiae* the United States observe, it has long been settled that when a trustee in breach of his fiduciary duty to the beneficiaries transfers trust property to a third person, the third person takes the property subject to the trust, unless he has purchased the property for value and without notice of the fiduciary's breach of duty. The trustee or beneficiaries may then maintain an action for restitution of the property (if not already disposed of) or disgorgement of proceeds (if already disposed of), and disgorgement of the third person's profits derived therefrom.[7]

[6] *Harris Trust and Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238 (2000).

[7] *Id.*, at 245.

CLASS ACTION ALLEGATIONS

57. 29 U.S.C. §1132(a)(2) authorizes any participant or beneficiary of a plan to bring an action individually on behalf of a plan to enforce a breaching fiduciary's liability to a plan under 29 U.S.C. § 1109(a).

58. In acting in this representative capacity, and to enhance the due process protections of unnamed participants and beneficiaries of the plan, as an alternative to direct individual actions on behalf of the plan under 29 U.S.C. §§1132(a)(2) and (3), Plaintiffs seek to certify this matter as a class action on behalf of all participants and beneficiaries in the Ford Plans and the Plans. Plaintiffs seeks to certify, and to be appointed as representatives of, the following class (the "Class"):

> All Participants and beneficiaries in the Ford Plans and in all other participant-directed individual account Plans for which Xerox HR provides recordkeeping services and for which Financial Engines provides investment advice to Plan participants (the "Plans"), one or more of whose participants have elected to utilize Financial Engines' Professional Management services, at any time before the filing of this action, and after the date on which Financial Engines first provided investment advice to Plan participants, through the date of judgment ("Class Period").

59. This action meets the requirements of Rule 23 and is certifiable as a class action for the following reasons:

a. The proposed Class includes thousands of members and is so large that joinder of all its members is impracticable.

b. There are questions of law and fact common to the Class because the Defendant owed fiduciary duties to the Ford Plans and to all Plans and took the actions and omissions alleged herein as to all of the Plans and not as to any individual Plan. Thus, common questions of law and fact include the following, without limitation: whether Xerox HR is a fiduciary with respect to the Plans and is liable for the remedies provided by 29 U.S.C. §1109(a) and 29 U.S.C. § 1132(a); whether as a fiduciary of the Plans, Xerox HR breached its fiduciary duties to the Plans; whether Xerox HR has co-fiduciary liability for any breaches by FE pursuant to 29 U.S.C. § 1105; if Xerox HR is not a fiduciary with respect to the selection and continued relationship with FE, whether Xerox HR is liable as a non-fiduciary with respect to FE's fiduciary breach; how the losses to the Plans resulting from the alleged breaches of fiduciary duty are to be calculated; and what damages and equitable remedies and other relief apply.

c. Plaintiffs' claims are typical of the claims of the Class because each Plaintiff was a Ford Plan participant during the time period at issue in this action, utilized FE's services, and all similarly situated participants in the Plans were harmed by Defendant's misconduct.

d. Plaintiffs are adequate representatives of the Class because they were participants in the Ford Plans during the Class period utilizing the services of FE, have no interest that is in conflict with the Class, are committed to the vigorous representation of the Class, and have engaged experienced and competent attorneys to represent the Class.

e. Prosecution of separate actions by individual Plans for these breaches of fiduciary duties would create the risk of: (1) inconsistent or varying adjudications that would establish incompatible standards of conduct for Defendant in respect to the discharge of their fiduciary duties to the Plans and personal liability to the Ford Plans under 29 U.S.C. §1109(a) and 29 U.S.C. § 1132(a), and (2) adjudications by individual participants and beneficiaries regarding these breaches of fiduciary duties and remedies for the Ford Plans would, as a practical matter, be dispositive of the interests of the Plans not parties to the adjudication or would substantially impair or impede those Ford Plans' ability to protect their interests. Therefore, this action should be certified as a class action under Rule 23(b)(1)(A) or (B).

60. A class action is the superior method for the fair and efficient adjudication of this controversy because joinder of all participants and beneficiaries is impracticable; the losses suffered by individual Plans and/or individual Plan participants may be small, rendering impracticable the enforcement of their rights through individual actions; and the common questions of law and fact predominate over individual questions. Given the nature of the allegations, no Class member has an interest in individually controlling the prosecution of this matter, and Plaintiffs are aware of no difficulties likely to be encountered in the

management of this matter as a class action. Alternatively, then, this action may be certified as a class under Rule 23(b)(3) if it is not certified under Rule 23(b)(1)(A) or (B).

61. Plaintiffs' counsel will fairly and adequately represent the interests of the Class and is best able to represent the interests of the Class under Rule 23(g).

COUNT I

ERISA § 404, 29 U.S.C. §1104 – Breach of Duty of Loyalty and Prudence – Unreasonable Administrative Fees

62. Plaintiffs repeat and reallege each of the allegations in the foregoing paragraphs as if fully set forth herein.

63. ERISA § 404, 29 U.S.C. § 1104 requires that Xerox HR and FE perform their fiduciary duties with respect to the plan solely in the interest of the participants and beneficiaries. *Id.* §1104(1)(A)(i). This duty is often characterized as the duty of loyalty.

64. ERISA § 404, 29 U.S.C. § 1104 requires that Xerox HR and FE perform their fiduciary duties "for the exclusive purpose of providing benefits to participants and beneficiaries and defraying reasonable expenses of administering the plan". *Id.* §1104(1)(A)(ii).

65. ERISA § 404, 29 U.S.C. § 1104 requires that Xerox HR and FE perform their fiduciary duties "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". *Id* § 404(1)(B).

66. Xerox HR breached its fiduciary duties by, inter alia,:

a. entering into a scheme to inflate fees and improperly share revenue as set forth herein;

b. failing to monitor and control its expenses;

c. causing itself to be paid excessive fees in breach of its fiduciary duties; *Tibble v. Edison Int'l*, 135 S.Ct. 1823 (2015).

d. failing to engage in a prudent process for selecting an investment adviser to the Plans, thus breaching its fiduciary duties;

e. failing to fully and adequately disclose to the participants its fee sharing scheme;

f. failing to advise the plan and the participants of the breaches of fiduciary duty by its co-fiduciary, FE; and

g. engaging in such other acts as shall become known during the course of discovery.

67. FE breached its fiduciary duties by, *inter alia*,

a. entering into a scheme to inflate fees and improperly share those fees as set forth herein;

b. failing to monitor and control its expenses;

c. causing itself to be paid excessive fees in breach of its fiduciary duties for the purpose of making illegal kickbacks to Defendant Xerox HR; *Tibble v. Edison Int'l,* 135 S.Ct. 1823 (2015).

d. failing to fully and adequately disclose to the participants its fee sharing scheme;

e. failing to advise the plan and the participants of the breaches of fiduciary duty by its co-fiduciary Xerox HR; and

f. engaging in such other acts as shall become known during the course of discovery.

68. Xerox HR and FE knew or should have known that their conduct breached their fiduciary duties. Yet, Xerox HR and FE both failed to advise the Plan and the participants and to disclose the other's misconduct or to remedy the breaches. Thus, Defendant Xerox HR is responsible for its own breaches and/or the breaches of FE. ERISA § 405, 29 U.S.C. § 1105.

69. Due to these breaches of fiduciary duty, the plans have suffered losses; and the value of plan assets in the participants' individual accounts have been impaired. *LaRue v DeWolff, Boberg & Associates, Inc.*, 552 U.S. 243, 128 S.Ct. 1020, 1026 (2008).

70. Plaintiffs bring this action to recover for these breaches pursuant to ERISA §§ 502 (a) (2), (3) and 409 and seek all damages and equitable or remedial

relief as appropriate, including costs and attorneys' fees pursuant to ERISA § 502(g).

COUNT II

Breach of Duty of Loyalty -- Investment Advice Program Dealing with Plan Assets for its Own Account; Receiving Consideration from a Party Dealing With Such Plan

71. Plaintiffs repeat and reallege each of the allegations in the foregoing paragraphs as if fully set forth herein.

72. ERISA § 406(b)(1), 29 U.S.C. §1106(b)(1), prohibits a fiduciary from dealing with the assets of a plan in its own interest or for its own account or otherwise engaging in a prohibited transaction.

73. ERISA § 406(b)(3), 29 U.S.C. §1106(b)(3), prohibits a fiduciary from receiving any consideration for its own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

74. Xerox HR acted as a fiduciary to Plaintiffs, the Ford Plans, and the Plans by, *inter alia*: (a) hiring FE and controlling the negotiation of the terms and conditions under which FE would provide its services to Plan participants, thereby effectively selecting FE as the investment advice provider and fiduciary for the Plans; and (b) retaining discretionary control over the terms of FE's services after FE became the investment advice provider to the Ford Plans and other Plans on the Xerox HR platform, through implementation and enforcement of the Master FE Agreement.

75. Xerox HR, as a plan fiduciary with respect to the selection of FE and with respect to its discretionary control over the terms of FE's agreement with the Ford Plans and the Plans through the Master FE Agreement, received consideration for its own account from FE in connection with FE's management of participant accounts (which constitute transactions involving plan assets), in violation of 29 U.S.C. §1106(b)(3).

76. Xerox HR breached its duty of loyalty under ERISA owed to Plaintiffs, the Ford Plans, and the Plans. These breaches include, *inter alia*: (a) receiving fee sharing payments from FE for Xerox HR's own benefit, at the expense of participants, the Ford Plans, and the Plans; and (b) charging unreasonable and excessive fees for the services provided to FE in connection with FE's investment advice program.

77. FE is a fiduciary as set forth herein and also breached its fiduciary duty by self-dealing as a conflicted party to this transaction pursuant to ERISA § 406(b), 29 U.S.C. § 1106(b)

78. Xerox HR was aware of and participated in not only its own breaches of fiduciary duty and self-dealing, but also the breaches of fiduciary duty and self-dealing of its co-fiduciary, FE. Xerox HR is responsible for not only its own breaches of fiduciary duty and self-dealing, but also for the breaches and self-dealing of its co-fiduciary FE. ERISA § 405; 29 U.S.C. § 1105.

79. Due to these breaches of fiduciary duty and self-dealing, the plans have suffered losses; and the value of plan assets in the participants' individual

accounts have been impaired. *LaRue v DeWolff, Boberg & Associates, Inc.*, 552 U.S. 243, 128 S.Ct. 1020, 1026 (2008).

80. Plaintiffs bring this action to recover for these breaches of fiduciary duty and self-dealing pursuant to ERISA §§ 502 (a) (2), (3) and 409 and seek all damages and equitable or remedial relief as appropriate, including costs and attorneys' fees pursuant to ERISA § 502(g).

COUNT III

Non-Fiduciary Liability for Fiduciary Breach -- Receipt of Improper Payment from Investment Advisor

81. Plaintiffs repeat and reallege each of the allegations in the foregoing paragraphs as if fully set forth herein.

82. FE, as a fiduciary to the Plaintiffs, the Ford Plans and the Plans,

a. Breached its duty of prudence by charging unreasonable, excessive fees to participants' accounts in relation to the minimal services provided by Xerox HR; and

b. Breached its duty of loyalty by charging unreasonable, excessive fees to participants' accounts for the purpose of transferring plan assets to or for the benefit of Xerox HR as a party-in-interest to the Ford Plans, in violation of the prohibitions of ERISA Sections 406(a) and 406(b) and in breach of ERISA Section 404 which requires fiduciaries to defray only the reasonable expenses of administering the plan, to perform their fiduciary duties prudently and solely in the interest of the participants and beneficiaries.

83. The authority provided in ERISA Section 502(a)(3) to a plan participant, beneficiary, or fiduciary to bring a civil action for appropriate equitable relief extends to a suit against a non-fiduciary "party in interest" to a prohibited transaction barred by ERISA Section 406.[8]

84. Defendant Xerox HR knew or should have known that FE violated ERISA Sections 404, 406(a) and 406(b) by causing the Plaintiffs, the Ford Plans and the Plans to pay excessive and improper compensation to Xerox HR. These transactions were not exempt under section 408(b)(2) or any other provision of ERISA, and Xerox HR knew or should have known so. As a knowing recipient of the improper payment, Xerox HR is liable to Plaintiffs, the Ford Plans and the Plans for disgorgement of the proceeds of the illegal arrangement.

85. Xerox HR is liable under 29 U.S.C. §§1109(a) and 1132(a) to make good to the Ford Plans and the Plans any losses to them resulting from the breaches of fiduciary duty alleged in this Count and is subject to other equitable or remedial relief as appropriate.

[8] *Harris Trust and Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238 (2000).

COUNT IV

Prohibited Transaction -- Excessive and Unreasonable Compensation for Services Related to Financial Engines in Violation of ERISA §408(b)(2)

86. Plaintiffs repeat and reallege the allegations contained above as if fully stated herein.

87. Section 406(a)(1)(C) of ERISA, 29 U.S.C. § 1106(a)(1)(C), generally prohibits the direct or indirect furnishing of services between a plan and a party-in-interest.

88. Section 3(14) of ERISA, 29 U.S. Code § 1002(14) defines a party-in-interest as, among other things, as a person providing services to a plan.

89. As a result of providing recordkeeping services to the Ford Plans and the Plans, Xerox HR is a party-in-interest to the Ford Plan and the Plans.

90. Section 408(b)(2) of ERISA, 29 U.S.C. § 1108(b)(2) exempts from the prohibitions of ERISA § 406(a)(1)(C) "contracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, ***if no more than reasonable compensation is paid therefor***" (emphasis added).

91. The indirect compensation Xerox HR received from FE in connection with FE's services to the Ford Plans and the Plans and their participants constitutes excessive and unreasonable compensation for which no exemption is available.

92. Accordingly, Xerox HR is liable to Plaintiffs, the Ford Plans, and the Plans for their actual damages as proven at trial, and any other available remedy pursuant to ERISA §§ 502(a)(2) and (3) and 409, plus interest and attorney's fees.

PRAYER FOR RELIEF

Wherefore, Plaintiffs pray for judgment as follows:

A. Certify this action as a class action as stated here and appoint Plaintiffs' counsel as Class Counsel pursuant to Federal Rule of Civil Procedure 23;

B. Declare that Defendant Xerox HR breached its fiduciary duties to the Class;

C. Declare that Defendant Xerox HR, as either a co-fiduciary, or non-fiduciary is responsible for any breaches of fiduciary duty and self-dealing by FE;

D. Enjoin Defendant from further violations of its fiduciary responsibilities, obligations, and duties and from further engaging in transactions prohibited by ERISA;

E. Order that Defendant make good to the Ford Plans and the Plans the losses resulting from its serial breaches of fiduciary duty;

F. Order that Defendant disgorge any profits that it made through its breaches of fiduciary duty and prohibited transactions and impose a constructive trust and/or equitable lien on any funds received by Defendant therefrom;

G. Order any other available equitable relief, or remedies, including but not limited to, the imposition of a surcharge, the restoration of the Plans to the position they would have been but for the breaches of fiduciary duty and self-dealing; and any other kind of relief and/or damages available pursuant to ERISA §§ 409 and 502(a)(2) and (3).

H. Order any relief or remedy necessary to recover for the fiduciary breaches that have impaired the value of plan assets in the participants' individual accounts;

I. Award Plaintiffs' attorney's fees and costs incurred herein pursuant to ERISA § 502(g), 29 U.S.C. § 1132(g), and/or for the benefit obtained for the Ford Plans;

J. Order Defendant to pay prejudgment interest; (in addition to any interest due and owing for the breaches of fiduciary duty);

K. Award such other and further relief as the Court deems equitable and just.

Dated: November 9, 2016

Respectfully submitted,

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INDEX OF EXHIBITS

Exhibit A

Fact Sheet

U.S. Department of Labor
Employee Benefits Security Administration
February 26, 2010

Proposed Regulation to Increase Workers' Access to High Quality Investment Advice

The Pension Protection Act of 2006 (PPA) amended the Employee Retirement Income Security Act of 1974 (ERISA) to create a new statutory exemption from the prohibited transaction rules to expand the availability of investment advice to participants in 401(k)-type plans and individual retirement accounts (IRAs), subject to safeguards and conditions. The Department of Labor (DOL) is publishing in the Federal Register a proposed rule to implement these PPA provisions and make investment advice more accessible for millions of Americans in 401(k) type plans and individual retirement arrangements (IRAs).

Background

- EBSA is responsible for administering and enforcing the fiduciary, reporting, and disclosure provisions of Title I of the ERISA. The agency oversees approximately 708,000 private pension plans, including 483,000 participant-directed individual account plans such as 401(k)-type plans, and millions of private health and welfare plans that are subject to ERISA.
- As of 2007, more than one-half of private-sector employees participated in defined contribution plans that allow for participant direction, with these plans covering 60 million active participants and holding about $3 trillion in assets.
- In general, investment advice given by an investment adviser to plan participants on investments that pay additional fees to the adviser or its affiliates can violate the prohibited transaction rules of ERISA and the Internal Revenue Code. This has limited the types of investment advice arrangements available to participants in 401(k) plans and IRAs.
- Given the rise in participation in 401(k) type plans and IRAs, the retirement security of millions of America's workers increasingly depends on their investment decisions. Thus, there is increased recognition of the importance of investment advice in helping participants avoid costly investment errors.
- The Department published a Request for Information in December 2006, published a proposed regulation in August 2008, and held a public hearing on October 21, 2008. A final rule and related class exemption published in January 2009 were withdrawn in November 2009 in response to concerns raised in public comment letters questioning the adequacy of the final class exemption's conditions to mitigate the potential for investment adviser self-dealing.

Overview of Proposed Investment Advice Regulation

- After review, the Department decided to propose a revised rule limited to the implementation of the PPA statutory exemption relating to investment advice.
- The proposed regulation allows investment advice to be given under the statutory exemption in two ways. One is through the use of a computer model certified as unbiased. The other

way is through an adviser compensated on a "level-fee" basis (i.e., fees do not vary based on investments selected by the participant).

- Several other requirements also must be satisfied, including disclosure of fees the adviser is to receive. The regulation contains some key safeguards and conditions, including:
  - Requiring that a plan fiduciary (independent of the investment adviser or its affiliates) select the computer model or fee leveling investment advice arrangement.
  - Imposing recordkeeping requirements for investment advisers relying on the exemption for computer model or fee leveling advice arrangements.
  - Requiring that computer models must be certified in advance as unbiased and meeting the exemption's requirements by an independent expert.
  - Establishing qualifications and a selection process for the investment expert who must perform the above certification.
  - Clarifying that the fee-leveling requirements do not permit investment advisers (including its employees) to receive compensation from affiliates on the basis of their recommendations.
  - Establishing an annual audit of investment advice arrangements, including the requirement that the auditor be independent from the investment advice provider.
  - Requiring disclosures by advisers to plan participants.

Public Notice and Comment on the Proposal

The Department will publish the proposed regulation in the Federal Register on March 2, 2010. The Notice of Proposed Rulemaking (NPRM) invites public comments from interested persons on the proposed regulation's conditions applicable to investment advice arrangements. Public comments can be submitted electronically by email to e-ORI@dol.gov or by using the Federal eRulemaking portal at www.regulations.gov. All comments will be available to the public, without charge, online at www.regulations.gov and www.dol.gov/ebsa, and at the EBSA Public Disclosure Room.

Benefits of Proposed Investment Advice Regulation

- The Department estimated that over 83,000 defined contribution pension plans with approximately 2 million participants and approximately 13 million IRA beneficiaries will be affected by the proposed rule.
- EBSA believes the proposed regulation will benefit plan participants by facilitating the availability of quality, expert investment advice to more retirement plan participants.
- The increased high quality investment advice will allow plan participants to make better investment decisions and have a higher income after retirement. The improved investment results will reflect reductions in investment errors such as poor trading strategies and inadequate diversification.
- EBSA expects that benefits from the proposed regulation will be approximately $8 billion annually due to improved investment results of participants. As annual costs are estimated at about $2 billion per year, the proposed rule is expected to result in net benefits of approximately $6 billion annually.

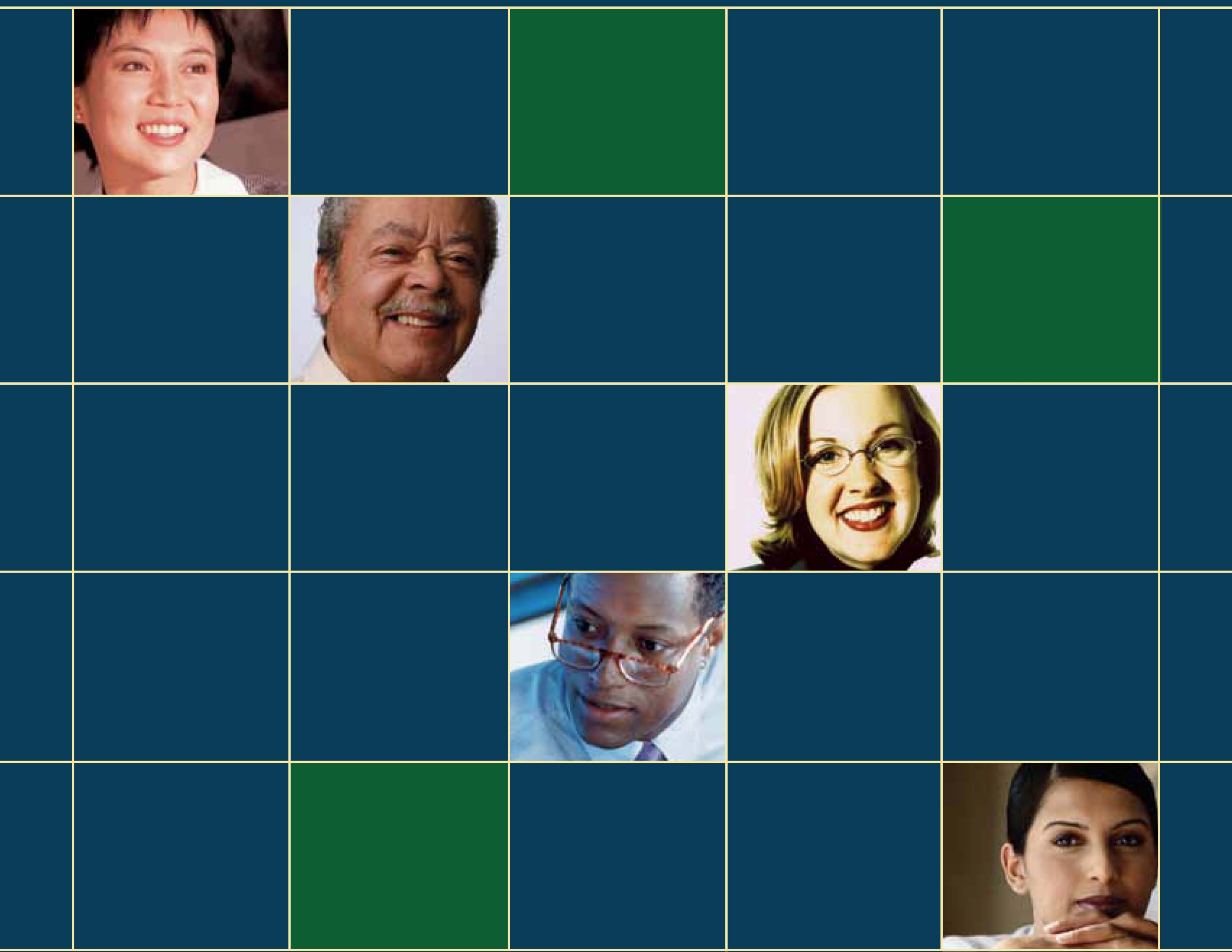
Investment Advisory Firms Covered by the Regulation

- The Department estimated that the regulation will affect 16,000 investment advisory firms (including broker-dealers). The main components of the cost of the regulation are: 1) the preparation and sending of 15 million disclosure statements to plan participants by plans annually, 2) the preparation of policies and procedures to assure compliance with the conditions of the exemption, 3) the preparation and maintenance of records, 4) the certification of the computer model investment advice arrangement, and 5) the audit of the investment advice arrangement.
- The costs in the first year for the statutory exemption include $240 million for the preparation and distribution of disclosures, $289 million to audit the investment advice arrangement, and $538 million to certify the computer investment advice arrangement.
- The costs in all subsequent years for the statutory exemption also include $125 million for the preparation and distribution of disclosures, $289 million to audit the investment advice arrangement, and $269 million to certify the computer investment advice arrangement.

This fact sheet has been developed by the U.S. Department of Labor, Employee Benefits Security Administration, Washington, DC 20210. It will be made available in alternate formats upon request: Voice phone: 202-693-8664; TTY: 1-202-501-3911. In addition, the information in this fact sheet constitutes a small entity compliance guide for purposes of the Small Business Regulatory Enforcement Fairness Act of 1996.

Exhibit B

Meeting Your Fiduciary Responsibilities



To view this and other EBSA publications, visit the agency's Web site at:
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Or call toll free: **1- 866-444-3272**

For assistance from a benefits advisor, visit EBSA's Web site at **www.dol.gov/ebsa** and click on "Request Assistance."
Or call toll-free: **1-866-444-3272.**

This material will be made available in alternative format to persons with disabilities upon request:
Voice phone: (202) 693-8664
TTY: (202) 501-3911

This booklet constitutes a small entity compliance guide
for purposes of the Small Business Regulatory Enforcement Fairness Act of 1996.

Meeting Your Fiduciary Responsibilities

February 2012

U.S. Department of Labor
Employee Benefits Security Administration

Meeting Your Fiduciary Responsibilities

Offering a retirement plan can be one of the most challenging, yet rewarding, decisions an employer can make. The employees participating in the plan, their beneficiaries, and the employer benefit when a retirement plan is in place. Administering a plan and managing its assets, however, require certain actions and involve specific responsibilities.

To meet their responsibilities as plan sponsors, employers need to understand some basic rules, specifically the Employee Retirement Income Security Act (ERISA). ERISA sets standards of conduct for those who manage an employee benefit plan and its assets (called fiduciaries). *Meeting Your Fiduciary Responsibilities* provides an overview of the basic fiduciary responsibilities applicable to retirement plans under the law.

This booklet addresses the scope of ERISA's protections for private-sector retirement plans (public-sector plans and plans sponsored by churches are not covered by ERISA). It provides a simplified explanation of the law and regulations. It is not a legal interpretation of ERISA, nor is it intended to be a substitute for the advice of a retirement plan professional. Also, the booklet does not cover those provisions of the Federal tax law related to retirement plans.

What are the essential elements of a plan?

Each plan has certain key elements. These include:

- A written plan that describes the benefit structure and guides day-to-day operations;
- A trust fund to hold the plan's assets[1];
- A recordkeeping system to track the flow of monies going to and from the retirement plan; and
- Documents to provide plan information to employees participating in the plan and to the government.

Employers often hire outside professionals (sometimes called third-party service providers) or, if applicable, use an internal administrative committee or human resources department to manage some or all of a plan's day-to-day operations. Indeed, there may be one or a number of officials with discretion over the plan. These are the plan's fiduciaries.

Who is a fiduciary?

Many of the actions involved in operating a plan make the person or entity performing them a fiduciary. Using discretion in administering and managing a plan or controlling the plan's assets makes that person a fiduciary to the extent of that discretion or control. Thus, fiduciary status is based on the *functions performed for the plan,* not just a person's title.

A plan must have at least one fiduciary (a person or entity) named in the written plan, or through a process described in the plan, as having control over the plan's operation.

[1] If a plan is set up through an insurance contract, the contract does not need to be held in trust.

The named fiduciary can be identified by office or by name. For some plans, it may be an administrative committee or a company's board of directors.

A plan's fiduciaries will ordinarily include the trustee, investment advisers, all individuals exercising discretion in the administration of the plan, all members of a plan's administrative committee (if it has such a committee), and those who select committee officials. Attorneys, accountants, and actuaries generally are not fiduciaries when acting solely in their professional capacities. The key to determining whether an individual or an entity is a fiduciary is whether they are exercising discretion or control over the plan.

A number of decisions are not fiduciary actions but rather are business decisions made by the employer. For example, the decisions to establish a plan, to determine the benefit package, to include certain features in a plan, to amend a plan, and to terminate a plan are business decisions not governed by ERISA. When making these decisions, an employer is acting on behalf of its business, not the plan, and, therefore, is not a fiduciary. However, when an employer (or someone hired by the employer) takes steps to implement these decisions, that person is acting on behalf of the plan and, in carrying out these actions, may be a fiduciary.

What is the significance of being a fiduciary?

Fiduciaries have important responsibilities and are subject to standards of conduct because they act on behalf of participants in a retirement plan and their beneficiaries. These responsibilities include:

- Acting solely in the interest of plan participants and their beneficiaries and with the exclusive purpose of providing benefits to them;
- Carrying out their duties prudently;
- Following the plan documents (unless inconsistent with ERISA);
- Diversifying plan investments; and
- Paying only reasonable plan expenses.

The duty to act prudently is one of a fiduciary's central responsibilities under ERISA. It requires expertise in a variety of areas, such as investments. Lacking that expertise, a fiduciary will want to hire someone with that professional knowledge to carry out the investment and other functions. Prudence focuses on the *process* for making fiduciary decisions. Therefore, it is wise to document decisions and the basis for those decisions. For instance, in hiring any plan service provider, a fiduciary may want to survey a number of potential providers, asking for the same information and providing the same requirements. By doing so, a fiduciary can document the process and make a meaningful comparison and selection.

Following the terms of the plan document is also an important responsibility. The document serves as the foundation for plan operations. Employers will want to be familiar with their plan document, especially when it is drawn up by a third-party service provider, and periodically review the document to make sure it remains current. For example, if a plan official named in the document changes, the plan document must be updated to reflect that change.

Diversification – another key fiduciary duty – helps to minimize the risk of large investment losses to the plan. Fiduciaries should consider each plan investment as part of the plan's entire portfolio. Once again, fiduciaries will want to document their evaluation and investment decisions.

Limiting Liability

With these fiduciary responsibilities, there is also potential liability. Fiduciaries who do not follow the basic standards of conduct may be personally liable to restore any losses to the plan, or to restore any profits made through improper use of the plan's assets resulting from their actions.

However, fiduciaries can limit their liability in certain situations. One way fiduciaries can demonstrate that they have carried out their responsibilities properly is by documenting the processes used to carry out their fiduciary responsibilities.

There are other ways to reduce possible liability. Some plans, such as most 401(k) and profit sharing plans, can be set up to give the participants control over the investments in their accounts and limit a fiduciary's liability for the investment decisions made by the participants. For participants to have control, they must be given the opportunity to choose from a broad range of investment alternatives. Under Labor Department regulations, there must be at least three different investment options so that employees can diversify investments within an investment category, such as through a mutual fund, and diversify among the investment alternatives offered. In addition, participants must be given sufficient information to make informed decisions about the options offered under the plan. Participants also must be allowed to give investment instructions at least once a quarter, and perhaps more often if the investment option is volatile.

Plans that automatically enroll employees can be set up to limit a fiduciary's liability for any plan losses that are a result of automatically investing participant contributions in certain default investments. There are four types of investment alternatives for default investments as described in Labor Department regulations and an initial notice and annual notice must be provided to participants. Also, participants must have the opportunity to direct their investments to a broad range of other options, and be provided materials on these options to help them do so. (See **Resources** for further information.)

However, while a fiduciary may have relief from liability for the specific investment allocations made by participants or automatic investments, the fiduciary retains the responsibility for selecting and monitoring the investment alternatives that are made available under the plan.

A fiduciary can also hire a service provider or providers to handle fiduciary functions, setting up the agreement so that the person or entity then assumes liability for those functions selected. If an employer appoints an investment manager that is a bank, insurance company, or registered investment adviser, the employer is responsible for the selection of the manager, but is not liable for the individual investment decisions of that manager. However, an employer is required to monitor the manager periodically to assure that it is handling the plan's investments prudently and in accordance with the appointment.

Other Plan Fiduciaries

A fiduciary should be aware of others who serve as fiduciaries to the same plan, because all fiduciaries have potential liability for the actions of their co-fiduciaries. For example, if a fiduciary knowingly participates in another fiduciary's breach of responsibility, conceals the breach, or does not act to correct it, that fiduciary is liable as well.

Bonding

As an additional protection for plans, those who handle plan funds or other plan property generally must be covered by a fidelity bond. A fidelity bond is a type of insurance that protects the plan against loss resulting from fraudulent or dishonest acts of those covered by the bond.

How do these responsibilities affect the operation of the plan?

Even if employers hire third-party service providers or use internal administrative committees to manage the plan, there are still certain functions that can make an employer a fiduciary.

Employee Contributions

If a plan provides for salary reductions from employees' paychecks for contribution to the plan (such as in a 401(k) plan), then the employer must deposit the contributions in a timely manner. The law requires that participant contributions be deposited in the plan as soon as it is reasonably possible to segregate them from the company's assets, but no later than the 15th business day of the month following the payday. If employers can reasonably make the deposits sooner, they need to do so.

For plans with fewer than 100 participants, salary reduction contributions deposited with the plan no later than the 7th business day following withholding by the employer will be considered contributed in compliance with the law.

For all contributions, employee and employer (if any), the plan must designate a fiduciary, typically the trustee, to make sure that contributions due to the plan are collected. If the plan and other documents are silent or ambiguous, the trustee generally has this responsibility.

Hiring a Service Provider

Hiring a service provider in and of itself is a fiduciary function. When considering prospective service providers, provide each of them with complete and identical information about the plan and what services you are looking for so that you can make a meaningful comparison.

For a service contract or arrangement to be reasonable, service providers must provide certain information to you about the services they will provide to your plan and all of the compensation they will receive. This information will assist you in understanding the services, assessing the reasonableness of the compensation (direct and indirect), and determining any conflicts of interest that may impact the service provider's performance.

Some additional items a fiduciary needs to consider when selecting a service provider include:

- Information about the firm itself: financial condition and experience with retirement plans of similar size and complexity;
- Information about the quality of the firm's services: the identity, experience, and qualifications of professionals who will be handling the plan's account; any recent litigation or enforcement action that has been taken against the firm; and the firm's experience or performance record;
- A description of business practices: how plan assets will be invested if the firm will manage plan investments or how participant investment directions will be handled; and whether the firm has fiduciary liability insurance.

An employer should document its selection (and monitoring) process, and, when using an internal administrative committee, educate committee members on their roles and responsibilities.

Fees

Fees are just one of several factors fiduciaries need to consider in deciding on service providers and plan investments. When the fees for services are paid out of plan assets, fiduciaries will want to understand the fees and expenses charged and the services provided. While the law does not specify a permissible level of fees, it does require that fees charged to a plan be "reasonable." After careful evaluation during the initial selection, the plan's fees and expenses should be monitored to determine whether they continue to be reasonable.

In comparing estimates from prospective service providers, ask which services are covered for the estimated fees and which are not. Some providers offer a number of services for one fee, sometimes referred to as a "bundled" services arrangement. Others charge separately for individual services. Compare all services to be provided with the total cost for each provider. Consider whether the estimate includes services you did not specify or want. Remember, all services have costs.

Some service providers may receive additional fees from investment vehicles, such as mutual funds, that may be offered under an employer's plan. For example, mutual funds often charge fees to pay brokers and other salespersons for promoting the fund and providing other services. There also may be sales and other related charges for investments offered by a service provider. The information provided by service providers noted above should include a description of all compensation related to the services to be provided that the service providers expect to receive directly from the plan as well as the compensation they expect to receive from other sources.

Who pays the fees? Plan expenses may be paid by the employer, the plan, or both. In addition, for expenses paid by the plan, they may be allocated to participants' accounts in a variety of ways. (See **Resources** for further information.) In any case, the plan document should specify how fees are paid.

Monitoring a Service Provider

An employer should establish and follow a formal review process at reasonable intervals to decide if it wants to continue using the current service providers or look for replacements. When monitoring service providers, actions to ensure they are performing the agreed-upon services include:

- Evaluating any notices received from the service provider about possible changes to their compensation and the other information they provided when hired (or when the contract or arrangement was renewed);
- Reviewing the service providers' performance;
- Reading any reports they provide;
- Checking actual fees charged;
- Asking about policies and practices (such as trading, investment turnover, and proxy voting); and
- Following up on participant complaints.

Providing Information in Participant-Directed Plans

When plans allow participants to direct their investments, fiduciaries need to take steps to regularly make participants aware of their rights and responsibilities under the plan related to directing their investments. This includes providing plan and investment-related information, including information about fees and expenses, that participants need to make informed decisions about the management of their individual accounts. Participants must receive the information before they can first direct their investment in the plan and annually thereafter. The investment-related information needs to be presented in a format, such as a chart, that allows for a comparison among the plan's investment options. A model chart is available on www.dol.gov/ebsa. If you use information provided by a service provider that you rely on reasonably and in good faith, you will be protected from liability for the completeness and accuracy of the information.

Investment Advice and Education

More and more employers are offering participants help so they can make informed investment decisions. Employers may decide to hire an investment adviser offering specific investment advice to participants. These advisers are fiduciaries and have a responsibility to the plan participants. On the other hand, an employer may hire a service provider to provide general financial and investment education, interactive investment materials, and information based on asset allocation models. As long as the material is general in nature, providers of investment education are not fiduciaries. However, the decision to select an investment adviser or a provider offering investment education is a fiduciary action and must be carried out in the same manner as hiring any plan service provider.

Are there some transactions that are prohibited? Is there a way to make them permissible if the actions will benefit the plan?

Certain transactions are prohibited under the law to prevent dealings with parties who may be in a position to exercise improper influence over the plan. In addition, fiduciaries are prohibited from engaging in self-dealing and must avoid conflicts of interest that could harm the plan.

Prohibited Transactions

Who is prohibited from doing business with the plan? Prohibited parties (called parties in interest) include the employer, the union, plan fiduciaries, service providers, and statutorily defined owners, officers, and relatives of parties in interest.

Some of the prohibited transactions are:

- A sale, exchange, or lease between the plan and party in interest;
- Lending money or other extension of credit between the plan and party in interest; and
- Furnishing goods, services, or facilities between the plan and party in interest.

Other prohibitions relate solely to fiduciaries who use the plan's assets in their own interest or who act on both sides of a transaction involving a plan. Fiduciaries cannot receive money or any other consideration for their personal account from any party doing business with the plan related to that business.

Exemptions

There are a number of exceptions (exemptions) in the law that provide protections for the plan in conducting necessary transactions that would otherwise be prohibited. The Labor Department may grant additional exemptions.

Exemptions are provided in the law for many dealings with banks, insurance companies, and other financial institutions that are essential to the ongoing operations of the plan. One exemption in the law allows the plan to hire a service provider as long as the services are necessary to operate the plan and the contract or arrangement under which the services are provided and the compensation paid for those services is reasonable.

One exemption allows the provision of investment advice to participants who direct the investments in their accounts. This applies to the buying, selling, or holding of an investment related to the advice as well as to the receipt of related fees and other compensation by a fiduciary adviser.

Another important exemption in the law – and a popular feature of most plans – permits plans to offer loans to participants. The loans, which are considered investments of the plan, must be available to all participants on a reasonably equivalent basis, must be made according to the provisions in the plan, and must charge a reasonable rate of interest and be adequately secured.

The exemptions issued by the Department can involve transactions available to a class of plans or to one specific plan. Both class and individual exemptions are available at www.dol.gov/ebsa (click on "Compliance Assistance"). For more information on applying for an exemption, see the procedures on the exemption Web pages at www.dol.gov.ebsa.

Additional Considerations for Plans Investing in Employer Stock

Plans that invest in employer stock need to consider specific rules relating to this investment. Traditional defined benefit pension plans have limits on the amount of stock and debt obligations that a plan can hold and the amount of the plan's assets that can be invested in employer securities. For 401(k) plans, profit sharing plans, and employee stock ownership plans, there is no limit on how much in employer securities the plans can hold if the plan documents so provide.

If an employer decides to make employer stock an investment option under the plan, proper monitoring will include ensuring that those responsible for making investment decisions, whether an investment manager or participants, have critical information about the company's financial condition so that they can make informed decisions about the stock. Participants in individual account plans must be provided an opportunity to divest their investment in publicly traded employer securities and reinvest those amounts in other diversified investment options under the plan. For employee contributions invested in employer securities, participants have the right to divest immediately. Where employer contributions are invested in employer securities, participants can divest if they have 3 years of service. This does not apply to stand-alone employee stock ownership plans where there are no employee or employer matching contributions.

A plan can buy or sell employer securities from a party in interest, such as an employer, an employee, or other related entity as described above (which would otherwise be prohibited) if it is for fair market value and no sales commission is charged. If the plan is a defined benefit plan (a traditional pension plan), the plan generally is not permitted to hold more than 10 percent of its assets in employer stock.

How do employees get information about the plan? How are employers required to report plan activities?

ERISA requires plan administrators to furnish plan information to participants and beneficiaries and to submit reports to government agencies.

Informing Participants and Beneficiaries

The following documents must be furnished to participants and beneficiaries.

The summary plan description (SPD) — the basic descriptive document — is a plain language explanation of the plan and must be comprehensive enough to apprise participants of their rights and responsibilities under the plan. It also informs participants about the plan features and what to expect of the plan. Among other things, the SPD must include information about:

- When and how employees become eligible to participate;
- The source of contributions and contribution levels;
- The vesting period, i.e., the length of time an employee must belong to a plan to receive benefits from it;
- How to file a claim for those benefits; and
- A participant's basic rights and responsibilities under ERISA.

This document is given to employees after they join the plan and to beneficiaries after they first receive benefits. SPDs must also be redistributed periodically and provided on request.

The summary of material modification (SMM) apprises participants and beneficiaries of changes to the plan or to the information required to be in the SPD. The SMM or an updated SPD for a retirement plan must be furnished automatically to participants within 210 days after the end of the plan year in which the change was adopted.

An individual benefit statement (IBS) provides participants with information about their account balances and vested benefits. Plans that provide for participant-directed accounts must furnish statements on a quarterly basis. Individual account plans that do not provide for participant direction must furnish statements annually. Traditional defined benefit pension plans must furnish statements every three years.

As noted above, for plans that allow participants to direct the investments in their accounts, plan and investment information, including information about fees and expenses, must be provided to participants before they can first direct investments and periodically thereafter– primarily on an annual basis with information on the fees and expenses actually paid provided at least quarterly. The initial plan related information may be distributed as part of the SPD provided when a participant joins the plan as long as it is provided before the participant can first direct investments. The information provided quarterly may be included with the IBS.

If a plan automatically enrolls employees, the automatic enrollment notice details the plan's automatic enrollment process and participant's rights. The notice must specify the deferral percentage, the participant's right to change that percentage or not make automatic contributions, and the plan's default investment. (See **Resources** for information on a sample notice.) The participant generally must receive an initial notice at least 30 days before he or she is eligible to participate in the plan. Employers that provide for immediate eligibility can provide this initial notice on an employee's first day of employment if they allow participants to withdraw contributions within 90 days of their first contribution. An annual notice also must be provided to participants at least 30 days prior to the beginning of each subsequent plan year.

A summary annual report (SAR) outlines in narrative form the financial information in the plan's Annual Report, the Form 5500 (see below), and is furnished annually to participants. Traditional defined benefit pension plans that are required to provide an annual plan funding notice are not required to furnish an SAR.

The blackout period notice requires at least 30 days' (but not more than 60 days') advance notice before a 401(k) or profit sharing plan is closed to participant transactions. During blackout periods, participants (and beneficiaries) cannot direct investments, take loans, or request distributions. Typically, blackout periods occur when plans change recordkeepers or investment options, or when plans add participants due to a corporate merger or acquisition.

Reporting to the Government

Plan administrators generally are required to file a Form 5500 Annual Return/Report with the Federal Government. The Form 5500 reports information about the plan and its operation to the U.S. Department of Labor, the Internal Revenue Service (IRS), and the Pension Benefit Guaranty Corporation (PBGC). These disclosures are made available to participants and the public. Depending on the number and type of participants covered, the filing requirements vary. The form is filed and processed electronically under the ERISA Filing Acceptance System II (EFAST2). For more information on the forms, their instructions, and the filing requirements, see www.efast.dol.gov and request the publication *Reporting and Disclosure Guide for Employee Benefit Plans*. See the **Resources** section to obtain a copy.

There are penalties for failing to file required reports and for failing to provide required information to participants.

Can a fiduciary terminate its fiduciary duties?

Yes, but there is one final fiduciary responsibility. Fiduciaries who no longer want to serve in that role cannot simply walk away from their responsibilities, even if the plan has other fiduciaries. They need to follow plan procedures and make sure that another fiduciary is carrying out the responsibilities left behind. It is critical that a plan has fiduciaries in place so that it can continue operations and participants have a way to interact with the plan.

What help is available for employers who make mistakes in operating a plan?

The Department of Labor's Voluntary Fiduciary Correction Program (VFCP) encourages employers to comply with ERISA by voluntarily self-correcting certain violations. The program covers 19 transactions, including failure to timely remit participant contributions and some prohibited transactions with parties in interest. The program includes a description of how to apply, as well as acceptable methods for correcting violations. In addition, the Department gives applicants immediate relief from payment of excise taxes under a class exemption.

In addition, the Department's Delinquent Filer Voluntary Compliance Program (DFVCP) assists late or non-filers of the Form 5500 in coming up to date with corrected filings.

For an overview of both programs, consult www.dol.gov/ebsa.

Meeting Your Fiduciary Responsibilities

Tips for Employers with Retirement Plans

Understanding fiduciary responsibilities is important for the security of a retirement plan and compliance with the law. The following tips may be a helpful starting point:

- Have you identified your plan fiduciaries, and are they clear about the extent of their fiduciary responsibilities?
- If participants make their own investment decisions, have you provided the plan and investment related information participants need to make informed decisions about the management of their individual accounts? Have you provided sufficient information for them to exercise control in making investment decisions?
- Are you aware of the schedule to deposit participants' contributions in the plan, and have you made sure it complies with the law?
- If you are hiring third-party service providers, have you looked at a number of providers, given each potential provider the same information, and considered whether the fees are reasonable for the services provided?
- Have you documented the hiring process?
- Are you prepared to monitor your plan's service providers?
- Have you identified parties in interest to the plan and taken steps to monitor transactions with them?
- Are you aware of the major exemptions under ERISA that permit transactions with parties in interest, especially those key for plan operations (such as hiring service providers and making plan loans to participants)?
- Have you reviewed your plan document in light of current plan operations and made necessary updates? After amending the plan, have you provided participants with an updated SPD or SMM?
- Do those individuals handling plan funds or other plan property have a fidelity bond?

U.S. Department of Labor
Employee Benefits Security Administration

RESOURCES

The U.S. Department of Labor's Employee Benefits Security Administration (EBSA) offers more information on its Web site and through its publications. The following are available on EBSA's Web site at www.dol.gov/ebsa or by calling **1-866-444-3272.**

For employers:

Reporting and Disclosure Guide for Employee Benefit Plans
401(k) Plans for Small Businesses
Understanding Retirement Plan Fees and Expenses
SEP Retirement Plans for Small Businesses
SIMPLE IRA Plans for Small Businesses
Automatic Enrollment 401(k) Plans for Small Businesses
Automatic Enrollment Sample Notice (Web only)
Adding Automatic Enrollment to Your 401(k) Plan
Profit Sharing Plans for Small Businesses
Retirement Plan Correction Programs
(Also see DFVCP and VFCP fact sheets, frequently asked questions and calculators at www.dol.gov/ebsa)

For employees:

Savings Fitness: A Guide to Your Money and Your Financial Future
Taking the Mystery Out of Retirement Planning
What You Should Know about Your Retirement Plan
Top 10 Ways to Prepare for Retirement
Women and Retirement Savings

U.S. Department of Labor
Employee Benefits Security Administration