Bloomberg BNA

Tax Management Memorandum™

The Teflon Fiduciary: The Fifth Circuit Muddies the ERISA Waters

By Carol Buckmann, Esq.[1]

It has always been difficult to determine the dividing line between general investment recommendations and the more targeted investment advice that results in fiduciary status under the Employee Retirement Income Security Act of 1974 (''ERISA'').

The ERISA rules date back to 1975, and they contain a functional definition of investment adviser that does not require that the adviser acknowledge fiduciary status. Investment advisers become fiduciaries based on what they do. Given that functional definition, it is somewhat surprising that we do not have clearer rules defining when investment advice is subject to the fiduciary responsibility provisions of ERISA. The differences in liability exposure and plan protections are striking. A fiduciary must give advice based on the best interests of plan participants, must function as a prudent expert, cannot personally benefit from the use of plan assets and may be personally liable for losses resulting from fiduciary breaches.[2] None of these restrictions apply to non-fiduciary advisers.

A recent decision by the United States Court of Appeals for the Fifth Circuit, *Tiblier v. Dlabal*,[3] has further muddied the waters in this area by holding that an adviser with no discretionary authority over plan management or assets cannot be an ERISA fiduciary unless the adviser's fee is paid by the plan.

The Fifth Circuit upheld the district court's granting of summary judgment in favor of Dlabal because Dlabal was compensated with a share of the unaffiliated broker's commission on the investment being challenged. This result appears to be based on a misreading or rejection of some long-standing ERISA regulations. It also provides a loophole for those who give investment advice on which plan fiduciaries rely to escape fiduciary responsibility by crafting creative compensation arrangements and becoming what I call ''Teflon Fiduciaries'' — those who will not be held accountable for bad advice.

This article will examine whether this is the appropriate policy, suggest how the Fifth Circuit could have handled this issue differently and, finally, will recommend some best practices for plan fiduciaries to avoid finding themselves in the same situation as Tiblier.

CURRENT LAW AND REGULATIONS

ERISA §3(21)(A) provides that a person who does not have administrative discretion or responsibility in plan administration is nevertheless a fiduciary if ''(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'' or ''(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.'' The Department of Labor's final regulations on investment advice at 29 CFR §2510.3-21(c) further established a five-part test to determine when investment advice is given in a fiduciary capacity. A person who makes recommendations as to the advisability of purchasing securities, as Dlabal appears to have done, is a fiduciary if the person has discretionary authority or control with respect to purchasing or selling securities or other property for the plan, or:

> (B) Renders any advice described [in this section] on a regular basis to the plan pursuant to a mutual agreement, arrangement or understanding, written or otherwise, between such person and the plan or a fiduciary with respect to the plan, that such services will serve as a primary basis for investment decisions with respect to plan assets, and that

---

[1] Carol Buckmann is counsel in the N.Y. office of Osler, Hoskin & Harcourt LLP where she practices exclusively in the areas of employee benefits and executive compensation.

[2] See ERISA §404 and §409, 29 USC §1104 and §1109.

[3] 743 F.3d 1004 (5th Cir. 2014).

> such person will render individualized investment advice based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments.

Thus, under the regulation, an adviser with no discretionary authority or control over plan assets will be considered a fiduciary under the following five-part test: (i) the adviser renders advice as to the value or securities or other property, or makes recommendations as to the advisability of investing in, purchasing or selling securities or other property (ii) on a regular basis (iii) pursuant to a mutual agreement, arrangement or understanding with the plan or a plan fiduciary, (iv) the advice will serve as a primary basis for investment decisions with respect to plan assets, and (v) the advice will be individualized based on the particular needs of the plan. In the preamble to the final regulations,[4] the Department of Labor responded to a question as to which compensation was covered by stating that until further guidance, compensation under the regulation should be deemed to include ''all fees or other compensation incident to the transaction in which investment advice to the plan has been rendered or will be rendered. This may include, for example, brokerage commissions, mutual fund sales commissions, and insurance sales commissions.''

Neither the ERISA conference report nor any of this authority makes a distinction based on who pays the compensation, and in particular, insurance sales commissions may be paid by the insurance companies to their agents.

THE TIBLIER DECISION

An examination of the facts and applicable law indicates that this court could have issued a reasoned decision reaching the opposite result.

Facts Presented to the District Court

The district court issued a one-page summary judgment decision in favor of Dlabal which does not analyze the issues or determine whether Dlabal was a fiduciary.[5] However, the facts can be reconstructed from the pleadings of the parties, the Department of Labor's *amicus* brief, and the appellate court's recitation.

Tiblier and Dlabal were both doctors who previously practiced together. Tiblier's medical practice had a 401(k) plan and a cash balance pension plan. Tiblier and his wife (both referred to here for convenience as ''Tiblier'') managed the plans and were trustees. The cash balance plan had a policy of conservative investment.

Dlabal received adviser and broker licenses, but as an adviser rep, he was only qualified to act in connection with a firm, so he became affiliated with the now-defunct CACH Capital Management. Dlabal recommended that the plans invest in bonds of a risky start-up company, and in lieu of the 1.5% annual recurring fee that he would otherwise have received from the plans under the existing agreement with Tiblier, decided to accept a portion of the broker's commission on the bond trades (which came from the start-up company). The start-up encountered financial difficulties and stopped making interest payments on the bonds, and Tiblier sued Dlabal and CACH for fiduciary breaches. Dlabal was the remaining deep pocket.

Beyond those basic facts, Tiblier and Dlabal did not agree on much of anything in their statements of the facts and the controlling law. However, it appears evident based on the agreed facts that if Dlabal were a fiduciary, the recommendation of a sizable investment (30% of the cash balance plan's assets) in a risky start-up company would be inappropriate for a plan with a conservative investment strategy such as the cash balance plan and for a 401(k) plan, where participants are charged with investment losses.

Tiblier's Side of the Story

In his response to Dlabal's motion for the district court to grant summary judgment, Tiblier claimed that Dlabal was a fiduciary who was acting under a written investment agreement Tiblier signed with CACH and, in addition to giving investment advice, had control over the account. The plans had made other investments on Dlabal's recommendation, and Dlabal met with Tiblier at least twice a month to discuss proposed investments and overall investment strategy. Thus, Tiblier maintained that Dlabal knew that his recommendations would be a primary basis for plan investments and that the additional requirements of the current regulation that advice be given regularly, and that it take into account the plan's particular needs, were satisfied. He argued orally and in his pleading that the compensation payable under the agreement and the commission received by Dlabal satisfied the requirement that the advice be given for ''compensation.'' While acknowledging that he had received disclosure of the risks of the investment and Dlabal's conflict of interest (being paid by the start-up company as a result of his recommendation), Tiblier maintained that disclosure does not cure ERISA violations and that there were multiple violations of

---

[4] 40 Fed. Reg. 50840 (1975).

[5] No. 12-CA-073-SS (W.D. Tex. Dec. 6, 2012).

ISSN 0148-8295

ERISA's fiduciary duties, including loyalty and prudence, and of the prohibition against self-dealing.

Dlabal's Argument

In his amended motion for summary judgment, Dlabal claimed that he had fully disclosed the risks and his conflict of interest to Tiblier, which the district court believed cured any problems. He claimed that he was not an ERISA fiduciary because Tiblier made the investment decision and had consulted another broker about the investment and because he was not paid by the plans.

The Department of Labor Weighs In

In its *amicus* brief,[6] the Department of Labor argued that the district court confused liability standards under the securities laws, where the issue is whether adequate disclosure was made, with ERISA's strict liability standards. Disclosure can never cure an ERISA fiduciary breach or self-dealing transaction. It cited the statute, but did not discuss the regulations or the preamble to the 1975 regulations expansively defining ''compensation'' for this purpose as including indirect compensation and commissions. The Department of Labor in this and another recent amicus brief (filed in *Santomenno v. John Hancock Life Insurance Company*)[7] has also indicated its belief that because determinations of fiduciary status and whether there was self-dealing require a careful examination of the facts, summary judgment on these issues is not appropriate.

The Department of Labor's brief also indicates that the record shows that Dlabal's recommendation was made at a time when the issuer had no assets and was under investigation by the Securities and Exchange Commission (''SEC'') as a possible Ponzi scheme. In addition, the investment was illiquid. These facts also support the conclusion that recommending the bonds was inconsistent with ERISA's fiduciary responsibilities.

THE FIFTH CIRCUIT DECISION

The Fifth Circuit concluded that Dlabal had no discretionary authority over plan investments. While it appears that the service agreement granted CACH some decision-making authority, as opposed to Dlabal personally, an additional issue that could have merited further investigation is whether the fiduciaries relied so much on Dlabal's advice that he had ''de facto'' investment discretion over plan assets. The court's investigation of this issue appears to have been less than thorough, but on the basis of the facts that Tiblier made the actual decision to invest, did not always follow Dlabal's recommendations, and consulted another adviser in some capacity regarding the bond investment, it appears to have reasonably concluded that he did not.

The court also stated that in order for an investment adviser to be a fiduciary, the adviser must ''be rendering advice pursuant to an agreement, be paid for the advice, and have influence approaching control over the plan's investment decisions.''[8] Thus, the court misconstrued the regulatory requirement that the advice be pursuant to an understanding or agreement that this advice would be ''a primary basis'' for the plan's decisions. The court read this as requiring that Dlabal's advice be ''*the* primary basis'' for plan decisions [emphasis added], approaching control, and seemed to assume that receiving advice from one adviser was a precondition to satisfying this requirement. Since the filings indicated that Tiblier had also consulted another adviser about the bond investments, the court assumed that this requirement could not be met.

However, the Department of Labor made clear in the preamble to its regulation that a person would be a fiduciary if ''it was expected that the advice will serve as ONE OF THE PRIMARY BASES for investment of plan assets'' [emphasis added].[9] Therefore, it is clear that in the Labor Department's view, the mere fact that Tiblier may have solicited input from another adviser about investments did not mean that Dlabal could not be a fiduciary with respect to investments he recommended. The Department of Labor clearly believes that there can be more than one primary basis for investments.

With respect to the compensation question, which was sufficient to defeat Tiblier's claims, as discussed, there also appears to have been a failure to carefully review existing authority, since neither ERISA §3(21)(A) nor the regulations makes the issue of who pays the adviser's compensation relevant and both refer to and include ''indirect compensation.'' Compensation is intended to include brokerage commissions, as explained in the preamble to the regulations. In its later rules regarding service provider compensation to be reported on Schedule C to Form 5500 and disclosure of service provider compensation to hiring fidu-

[6] Brief for the Secretary of Labor as Amicus Curiae Supporting Appellants, *Tiblier v. Dlabal*, 743 F.3d 1004 (5th Cir. 2014) (No. 13-50344).

[7] Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellants and Requesting Reversal at 12, *Santomenno v. John Hancock Life Insurance Co.*, 677 F.3d 178 (3d Cir. 2012) (No. 13-3467).

[8] *Tiblier*, 743 F.3d at 1008.

[9] 40 Fed. Reg. 50840 (1975).

ISSN 0148-8295

ciaries under DOL Reg. §2550.408b-2, the Department of Labor has clearly elected to include both direct and indirect compensation. For purposes of the ERISA §408(b)(2) disclosures by service providers to hiring fiduciaries, indirect compensation includes "compensation received from any source other than the covered plan, the plan sponsor, the covered service provider or an affiliate."[10] Thus, Tiblier's compensation would be required to be reported and disclosed under these rules.

Also missing from the Fifth Circuit decision is any discussion of why the Department of Labor's interpretation of the law was not given deference. For example, when a federal district court issued a decision (since overturned on appeal) in which it determined that it would not follow the PBGC's interpretation that an investment fund could be a "trade or business" for purposes of the controlled group liability rules, it set forth its analysis of why there was no reasonable basis for the PBGC position.[11] We would have expected a similar sort of exercise here.

PRIOR AUTHORITY IN THE FIFTH CIRCUIT

The Fifth Circuit also stated that it was constrained by its prior decision in *Am. Fed. of Unions Local 105 Health Assurance & Welfare Fund v. Equitable Life Insurance Company*,[12] in which advice was given to convert an insured welfare arrangement to a self-funded one and purchase excess insurance coverage. The court there held that the adviser was not a fiduciary for several reasons, including that payment did not come from the plan. However, the facts in that case are distinguishable in that it is not even clear that the advice given related to the value of or recommendations to purchase securities or other property as required by the statutory section, and it appears to have been advice given at the outset of plan restructuring rather than on a regular basis. There are other cases distinguishing the sale of a financial product or funding at the outset of a plan and finding that it was not advice given on a regular basis as required by the Department of Labor regulation;[13] and the *Tiblier* court could have followed that reasoning to find the *Equitable Life* case inapt. The court might also have distinguished Dlabal's situation based on the alteration of the compensation arrangement after it was entered into, which did not occur in the earlier decision. This raises both issues of constructive receipt and whether the commission might be an offset against, rather than a substitution for, the fee provided for in the investment agreement. In *Tiblier*, compensation was not originally intended to come from an unrelated third party.

Of course, the court might also have admitted that its prior decision did not take into account existing authority and declined to follow it.

EFFECT OF DISCLOSURE

As to the issue of whether disclosing the risks was sufficient to absolve Dlabal, the Department of Labor's *amicus* brief correctly states that the district court made an error of law in assuming that disclosure could cure fiduciary breaches, because disclosure has never been the standard under ERISA, which is firmly rooted in the law of trusts. If Dlabal was a fiduciary, he owed the highest fiduciary duty of loyalty to his client to help make sure the investments he was consulted about were prudent and appropriate and was prohibited from personally profiting from the investments he recommended, regardless of whether the compensation came from a third party or disclosure was made.

WAS SUMMARY JUDGMENT APPROPRIATE?

If the court had analyzed the five elements of the existing regulations to determine whether they were satisfied, as we might argue it should have done, it might well have remanded the case for further examination of facts regarding whether Dlabal's commission constituted compensation for purposes of the Department of Labor regulation. It would also have charged the district court to review the change Dlabal made to his manner of compensation, and whether he should have been deemed to have been in receipt of the fee which he waived in favor of sharing in the broker's commission. If the compensation requirement as interpreted by the Department of Labor was satisfied, the district court could have been instructed to examine the understanding pursuant to which advice was provided, whether advice was provided on a regular basis and whether Dlabal's advice was sufficiently based on the plans' individual circumstances. It would not simply have affirmed summary judgment.

The other requirements of the Department of Labor regulation are arguably shown to have been satisfied in the pleadings filed with the district court. For ex-

[10] DOL Reg. §2550.408b-2(c)(1)(iv)(C)(2).

[11] *Sun Capital Partners III, L.P. v. New Eng. Teamsters*, 903 F. Supp. 2d 107 (D. Mass. 2012), *rev'd*, 724 F.3d 129 (1st Cir. 2013).

[12] 841 F.2d 658 (5th Cir. 1988).

[13] See, e.g., *Consolidated Beef Industries, Inc. v. New York Life Ins. Co.*, 949 F.2d 960 (8th Cir. 1991), and most recently the Second Circuit opinion in *Coulter v. Morgan Stanley & Co., Inc.*, 58 EBC 1497, 2014 BL 148224 (2d Cir. 2014), finding that a decision to fund a plan with employer stock was not subject to the fiduciary responsibility rules.

ISSN 0148-8295

ample, in footnote 2 to Dlabal's amended motion for summary judgment, Dlabal admits that he recommended the bond investment ''as an appropriate investment for the Tiblier plans at the time. . .in light of the plan's funding requirements and time horizon.'' Tiblier in his answer to the summary judgment motion says that Dlabal recommended the investment ''as part of an overall strategy to allocate risks across a spectrum'' and that it was tailored to the cash balance plan's ''assets, liabilities and time horizon.'' Therefore, it appears that the individualized advice requirement could have been satisfied. Tiblier met with Dlabal twice a month to discuss investments, so the requirement that advice have been provided on a regular basis also appears to have been satisfied.

Other Case Law

The *Tiblier* court could also have elected to follow other cases which reached the opposite result. The Ninth Circuit in *Thomas, Head & Griesen Employees Trust v. Buster*,[14] and the District Court for the Northern District of Illinois in *Reich v. McManus*,[15] also examined the types of compensation that may be received by an investment adviser and taken into account in determining whether the adviser is a fiduciary. Both courts reached the result that compensation is to be interpreted broadly and includes commissions.

In *Thomas, Head & Greisen*, Buster, operating through a partnership, Northern Financial, located and investigated deed of trust notes for investment by a plan trust. Buster earned a commission from sale of the notes. Buster was accused of having made misrepresentations regarding the notes and to have promised a 20% return on the trust's investment. When the trust lost $142,000 on some of the notes, it sued Buster for fiduciary breach. The district court had concluded that Buster was a fiduciary, and satisfied all five parts of the regulatory test. Buster appealed, maintaining that he was just selling a product to the trust and did not give individualized advice.

The Ninth Circuit found that a nine-year relationship, coupled with evidence of regular meetings between Buster and the trustees to discuss investment strategy, was sufficient to enable the district court to conclude that the advice was individualized. The court rejected Buster's claim that he could not have given individualized advice because he had not been given the investment portfolio or trust documents. Buster typically received a 10% commission on the sale of notes, but the notes in the case were bought by him and then resold directly to the trust as principal. Accordingly, he was compensated by his profit; that is, the spread between his cost and what the plan paid. The court upheld the district court's determination that the commission earned on the sales and the profit earned by the spread represent ''fee(s) or other compensation'' for the rendering of investment advice.

In *Reich v. McManus*, certain real estate partnerships were sold to plans by their former administrators. The district court addressed the same question before the Ninth Circuit and in *Tiblier* — whether the source of compensation for the sales was relevant in determining fiduciary status of advisers. The defendants did not receive any fees or other compensation from the plans for their services, but were instead paid commissions on the sales made to their clients. On reconsideration of a ruling declining summary judgment, the court determined that the views of the Department of Labor that ''other compensation'' included commissions were entitled to deference, and the form in which defendants were compensated did not preclude the determination that they were fiduciaries. In a footnote to its decision, the court explained that it would not follow the *Equitable Life* decision that the *Tiblier* court said was controlling because ''we now read that case as looking to the payment structure employed by the broker as simply one of many factors to consider when determining whether he or she qualifies as a fiduciary under ERISA.''[16]

Other courts have simply not focused on the compensation issue as determinative. For an example of a decision finding that an adviser was a fiduciary even though the advice may have been given before a formal fee arrangement was in place, see *Severstal Wheeling, Inc. v. WPN Corp.*[17]

Policy Considerations

The Fifth Circuit did not discuss the policy implications of its decision, or give a reason for its holding that payment must come from the plan. It clearly viewed Tiblier as an unsympathetic plaintiff who had been told about the risks of these bonds, but there may have been other innocent employees in the plan who are also penalized by this decision.[18]

An argument in favor of the holding is that it is important that advisers, given the comprehensive fiduciary responsibilities under ERISA and potential per-

[14] 24 F.2d at 1119 (9th Cir. 1994).

[15] 883 F. Supp. 1144 (N.D. Ill. 1995).

[16] 883 F. Supp. 1144, n.4 (N.D. Ill. 1995).

[17] 58 EBC 1365 (S.D.N.Y. 2014).

[18] A plan covering only a doctor and the doctor's spouse would not be subject to ERISA. The court in *Tiblier* noted that Tiblier and his spouse made at least 95% of the contributions to the plans. This implies that others besides the owner and his spouse were participants in the plans. *See Tiblier* at 1005.

ISSN 0148-8295

sonal liability, know when they are providing advice in a fiduciary capacity, and they might not know the advice is for the benefit of a plan if the plan is not paying them. This seems less than persuasive, given that advice must also be based on the plan's individual needs — which the fiduciary must know about — before fiduciary status attaches under the existing regulations.

On the other hand, this decision may be better analyzed as undercutting the protections ERISA intended to provide to plan participants by looking to form over substance. Consider two investment advisers who are each providing advice to plan investment committees or other fiduciaries regarding the investment of plan assets. Each appears regularly to meet with the committees as to appropriate plan investments and is aware that the plan's investment fiduciaries will be relying on her advice. Is it rational to say that one of them may be personally liable for losses proximately caused by a fiduciary breach and is prohibited from self-dealing but the other is not, simply based on who pays them or the form their compensation takes? In fact, advisers now have a blueprint how to avoid liability by restructuring their compensation arrangements to avoid payment from plans because the Fifth Circuit blessed the substitution rather than viewing it as an attempt to avoid liability under ERISA. And is the court saying that if the plan sponsor pays the adviser's fee, an adviser without discretion cannot be a fiduciary? That cannot have been intended by the drafters of ERISA but could be the logical extension of the court's reasoning.

Regulatory Projects

The *Tiblier* decision also seems to be inconsistent with current regulatory agency projects to examine whether fiduciary standards should apply more broadly to those who give investment advice.

The Department of Labor's Fiduciary Proposal

In 2010, the Department of Labor proposed regulations updating the rules for determining persons who are fiduciaries. The proposed regulations would have eliminated the ''regular basis'' and ''primary basis'' requirements of the current five-part test. If they had been finalized, these regulations would also have definitively resolved the question of whether an investment adviser who was not paid directly by the plan could be a fiduciary. These regulations provided that an adviser's compensation could be direct or indirect, paid to an affiliate of the person, or ''from any source'' and even include ''compensation incident to the transaction in which the advice has been rendered or will be rendered.''[19] This is consistent with the definitions applied for purposes of Schedule C to Form 5500 and under the service provider disclosure rules set forth in DOL Reg. §2550.408b-2. The proposed regulations were very controversial, and have been withdrawn in anticipation of a re-worked version reflecting some of the critical comments received. At this time, we do not know what requirements will be in the re-proposal, or when it will be issued, but we have no reason to believe that the Department of Labor will limit its existing definition of compensation to make it narrower than that used for reporting and disclosing service provider compensation as the *Tiblier* court did.

PARALLEL SEC INITIATIVE

The *Tiblier* holding was issued at the same time the SEC is re-evaluating the rules governing investment advisers, and also seems inconsistent with the SEC's consideration of measures to hold those who give investment advice more accountable. The Dodd-Frank Act of 2010 permits, but does not require, the SEC to establish one fiduciary standard for all professionals who give investment advice, and the SEC is considering whether to issue new rulemaking in this area. Even if no new action is taken, the SEC's rules already provide that in determining whether an adviser receives compensation for advice, as required to be an investment adviser under §202(a)(11) of the Investment Advisers' Act,[20] ''the person receiving the advice or another person may pay the compensation.''[21] While the liability standards under ERISA and the securities laws are different, commenters on the Department of Labor's fiduciary proposal pointed to benefits from having consistent definitions under the two laws.

Fiduciary Best Practices

Hiring fiduciaries should take away several lessons from the *Tiblier* decision and what Tiblier did wrong.

1. We have no indication in the filings that Dlabal, who used to be part of a medical practice, had any experience dealing with ERISA plans. It appears that Dlabal was hired because he already knew Tiblier. There is no indication that Tiblier checked Dlabal's or CACH's disciplinary history either (though no violations have been brought to light) or inquired whether they had been the subject of client lawsuits. This pre-hire check should be standard practice when hiring any adviser.

---

[19] *See* 75 Fed. Reg. 65264 (2010), proposing changes to DOL Reg. §2510.3-21(c).

[20] 15 USC §80b-2(a)(ii).

[21] SEC Staff, Regulation of Investment Advisers by the U.S. Securities and Exchange Commission, Mar. 2013.

ISSN 0148-8295

2. There is no indication that Tiblier conducted a request for proposals (RFP) or investigated whether better advice could be obtained elsewhere. In particular, Tiblier could have sought an adviser who was certified for fiduciary excellence after completing a specific program focused on ERISA plans. CEFEX and DALBAR are two of the organizations that sponsor such programs.
3. Tiblier should have required an acknowledgment in writing from Dlabal and CACH that they would function as a fiduciary as part of the service agreement. Plan sponsors and committees are protected from advisers who disclaim responsibility for their advice if they hire investment advisers who acknowledge in writing that they are fiduciaries with respect to plans.
4. If business owners or plan committees reserve decision-making authority for investments, they are fiduciaries and have their own obligations to make sure that the investments are prudent, appropriate and consistent with the plan's investment policy. This means that they need to understand the investment risks themselves. While an investment adviser may be very helpful in assisting in this analysis, plan fiduciaries cannot blindly follow the recommendations that are made. There were many red flags in the disclosures that Tiblier received that should have been enough to discourage the investment Dlabal recommended.
5. If they lack the time or expertise to fulfill their responsibilities, business owners or plan committees should consider hiring an investment manager, as defined in ERISA §3(38), and delegating investment decisions to the professional manager as a named fiduciary under ERISA §402. One of the requirements of ERISA §3(38) is a written acknowledgment of fiduciary status. If an investment manager is retained, the hiring fiduciaries will still be responsible for prudently hiring and monitoring the investment manager, but will not be responsible for individual investment decisions.

Following these practices would protect plan fiduciaries and insure that those who represent plans are not relying on a ''Teflon Fiduciary.''

ISSN 0148-8295

ISSN 0148-8295