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Participant Self-Direction of Account Balances: Investment Advice or Investment Education?

Marcia S. Wagner and Robert N. Eccles *

With the exponential growth of pension plans established pursuant to section 401(k) of the Internal Revenue Code (the "Code")¹ more and more employees² are responsible for making the investment decisions on which the comfort and security of their retirement years will depend. In other words, where professional trustees and investment managers once, practically exclusively, invested pension plan assets, more and more plans are providing that participants themselves invest their pension plan assets.

Freed of the responsibility for investing pension plan assets or hiring professionals to do so, employers have nonetheless been concerned about the competence of their employees to direct the investment of those assets. To assist their employees in directing the investment of their pension plan assets, some employers have hired others to provide employees with either investment education or investment advice. Providing investment education means providing investment information to employees to assist them in making informed investment decisions — without

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¹ I.R.C. § 401(k) (1998) (providing for cash or deferred arrangements).

² Although this Article refers to persons with pension plan assets for which they direct the investment as employees or participants, the same principles apply to beneficiaries of pension plan assets who direct the investment of those assets. Thus, the word participant in this Article should be read to include both employees and beneficiaries where appropriate.

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providing employees with the kind of individualized investment information that constitutes investment advice. In this context, for investment information to be considered investment advice, the information must be understood to be “a primary basis for investment decisions with respect to plan assets” and must be individualized and based on the particular needs of the participant “regarding such matters as, among other things, investment policies or strategy, overall portfolio composition or diversification of plan investments.”³

The first section of this Article summarizes Department of Labor (DOL) Interpretive Bulletin 96-1,⁴ concerning investment education. The second section describes a prohibited transaction exemption received by Trust Company of the West (TCW) to permit it to offer investment advice to certain pension plan participants.⁵ The third section explains the advantages of the investment advisory approach.

I. DOL INTERPRETIVE BULLETIN 96-1

A. BACKGROUND

A person who is otherwise a fiduciary with regard to pension plan assets over which a participant has investment control is not responsible for any losses that result from the participant's exercise of such control.⁶ Thus, a plan sponsor, subject to regulations adopted by DOL,⁷ can set up an employee pension plan that has individual accounts for each employee and for which each participant, not the plan sponsor, is responsible for managing the investments (“individually directed pension plan”).

³ 29 C.F.R. § 2510.3-21(c) (1998).

⁴ Interpretive Bulletin Relating to Participant Investment Education [hereinafter Interpretive Bulletin], 29 C.F.R. § 2509.96-1 (1998).

⁵ Prohibited Transaction Exemption 97-60 [hereinafter PTE], 62 Fed. Reg. 59,744 (1997).

⁶ Employee Retirement Income Security Act of 1974, as amended (ERISA) § 404(c)(1)(B), 29 U.S.C. § 1104(c)(1)(B) (1998).

⁷ 29 C.F.R. § 2550.404c-1 (1998).

A plan sponsor may still have fiduciary responsibility for investment advice provided to a participant who directs the investment of his or her individual account assets if the sponsor provides the participant with investment advice for compensation.⁸ A service provider hired by a plan sponsor to advise participants would also be a fiduciary with respect to the individually directed pension plan. Moreover, a sponsor who hired a service provider to provide participants with investment advice would be required by the Employee Retirement Income Security Act of 1974 (ERISA) to be prudent in the choice of a fiduciary to provide investment advice⁹ and could even be subject to co-fiduciary liability with the investment adviser if the plan sponsor chose imprudently.¹⁰

B. DOL CLARIFIES WHEN PARTICIPANT INVESTMENT EDUCATION IS NOT INVESTMENT ADVICE

Because DOL shared the concern of many employers that employees might not be competent to direct the investment of their individually directed pension plan assets,¹¹ the Department issued Interpretive Bulletin 96-1 on June 11, 1996. The purpose of the Interpretive Bulletin is to encourage plan sponsors to provide participants with investment information without concern on the part of the sponsor about the fiduciary duties the sponsor might assume if the investment information provided were considered to be investment advice. The Interpretive Bulletin accomplishes this by clarifying when investment

⁸ ERISA § 3(21)(A)(ii), 29 U.S.C. §1002(21)(A)(ii) (1998).

⁹ Specifically, a plan sponsor must act "prudently and in the sole interest of plan participants and beneficiaries...." Interpretive Bulletin, 29 C.F.R. § 2509.96-1(e) (1998).

¹⁰ See *id.* Specifically, the Interpretive Bulletin provides:

[t]he designation of an investment advisor to serve as a fiduciary may give rise to co-fiduciary liability if the person making and continuing such designation in doing so fails to act prudently and solely in the interest of plan participants and beneficiaries; or knowingly participates in, conceals or fails to make reasonable efforts to correct a known breach by the investment advisor. *Id.*

¹¹ See Interpretive Bulletin, 29 C.F.R. § 2509.96-1(b) (1998).

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education is not “investment advice” for purposes of the definition of “fiduciary” in section 3(21)(A)(ii) of ERISA.¹² Specifically, the Interpretive Bulletin describes “a series of graduated safe harbors under ERISA for plan sponsors and service providers who provide participants and beneficiaries with four increasingly specific categories of investment information and materials — plan information, general financial and investment information, asset allocation models and interactive investment materials.”¹³

Neither of the first two safe harbors — for plan information and general financial and investment information — applies to information about specific investment alternatives available to participants under a plan. In contrast, the third and the fourth safe harbors permit the use in investment education materials of specific investment models incorporating actual investment alternatives available under the plans offered to participants. The use of the models in participant investment education materials is subject to the following restrictions.

The third safe harbor — for asset allocation models — permits a plan sponsor or service provider to make available to employees models “of asset allocation portfolios of hypothetical individuals with different time horizons and risk profiles, where:

(i) Such models are based on generally accepted investment theories that take into account the historic returns of different asset classes (e.g., equities, bonds, or cash) over defined periods of time;

(ii) all material facts and assumptions on which such models are based (e.g., retirement ages, life expectancies, income levels, financial resources, replacement income ratios, inflation rates, and rates of return) accompany the models;

¹² The Interpretive Bulletin does not address the question of when advice is provided for compensation. Interpretive Bulletin, 29 C.F.R. § 2509.96-1(b) (1998).

¹³ Interpretive Bulletin, 61 Fed. Reg. 29,586, 29,586 (1996).

(iii) to the extent that an asset allocation model identifies any specific investment alternative available under the plan, the model is accompanied by a statement indicating that other investment alternatives having similar risk and return characteristics may be available under the plan and identifying where information on those investment alternatives may be obtained; and

(iv) the asset allocation models are accompanied by a statement indicating that . . . participants or beneficiaries should consider their other assets, income, and investments . . . in addition to their interests in the plan.”¹⁴

The fourth safe harbor — for interactive investment materials — permits a plan sponsor or service provider to make available to participants materials, including worksheets, questionnaires and software, that enable the participant to estimate his or her own future retirement income needs and to “assess the impact of different asset allocations on retirement income” as long as there is “an objective correlation between the asset allocations generated by the materials and the information and data” provided by the plan sponsor or service provider and as long as restrictions similar to the ones applied to asset allocation models are met.¹⁵

C. ASSUMPTION OF RESPONSIBILITY UNDER INTERPRETIVE BULLETIN 96-1

The Interpretive Bulletin also makes clear that hiring a person to provide investment educational services to participants in individually directed pension plans is “an exercise of discretionary authority or control with respect to management of the plan”¹⁶ just as is the hiring of a person to provide investment advisory services.¹⁷ Thus, the

¹⁴ Interpretive Bulletin, 29 C.F.R. § 2509.96-1(d)(3) (1998).

¹⁵ *Id.* § 2509.96-1(d)(4).

¹⁶ *Id.* § 2509.96-1(e).

¹⁷ See *supra* notes 9-10 and accompanying text.

act of employing a service provider to provide investment educational services is subject to the prudent man standard of care in section 404(a) of ERISA.¹⁸ A plan sponsor must be prudent in selecting (and continuing to retain) a service provider, even though the sponsor neither has liability for the education provided nor for the consequences of investment decisions made by participants who have received the education.

II. PROHIBITED TRANSACTION EXEMPTION 97-60

A. BACKGROUND

Although the Interpretive Bulletin provided guidance for plan sponsors who wish to offer investment education to participants, it did not offer comparable guidance for sponsors who wish to offer participants more significant assistance in the form of investment advice. As noted above, the act of hiring someone to provide investment advice to an individually directed pension plan is a fiduciary act. In addition, a service provider hired to provide plan participants with investment advice is a fiduciary.¹⁹ Moreover, if the service provider also offers the investment alternatives about which participants are receiving investment advice, then the service provider may have committed a transaction prohibited by ERISA unless the service provider has received an exemption from the application of provisions of that Act.

The following is a description of one program under which investment advice may be offered to certain pension plan participants and the prohibited transaction exemption that permits the offer of the program under specified conditions. For reasons set forth in a later section of this Article,²⁰ the authors believe that the conditions for receipt of the prohibited transaction exemption would also protect participants from breaches of fiduciary responsibility by the sponsor and the service provider and, thus, lessen the

¹⁸ 29 U.S.C. § 1104(a) (1998).

¹⁹ See *supra* notes 8-10 and accompanying text.

²⁰ See *infra* note 46 and accompanying text.

liability for any sponsor who hired a service provider with a similar prohibited transaction exemption to provide investment advice to participants.

B. DESCRIPTION OF THE TCW PORTFOLIO SOLUTIONS PROGRAM

In Prohibited Transaction Exemption 97-60 (PTE),²¹ DOL granted exemptive relief²² under section 408(a) of ERISA²³ and section 4975(c)(2) of the Code²⁴ on behalf of The TCW Group, Inc., and its wholly owned subsidiaries TCW and TCW Funds Management, Inc., the investment adviser to the TCW Galileo Funds, Inc. ("Galileo Funds").²⁵ In the PTE, DOL considered "TCW Portfolio Solutions," a program under which TCW could render investment advice to participants in individually directed pension plans. The program would provide an individual plan participant responsible for the investment of his or her account balance with a convenient way to benefit from the knowledge and experience of professional investment advisers and thereby receive advice concerning which of the investment vehicles offered under the program would represent an appropriate allocation of the assets in that individual's account.

²¹ PTE, 62 Fed. Reg. 59,744 (1997).

²² The relief granted was from the application of section 406(b) of ERISA to certain proposed transactions involving TCW and fiduciaries of individually directed pension plans whose participants receive investment advice from TCW.

TCW also received relief for the proposed purchase and sale by individually directed pension plans of units in commingled trusts described below and of shares of the Galileo Funds. The grant of relief for the purchase and sale transactions is not discussed further in this Article.

²³ 29 U.S.C. § 1108(a) (1998).

²⁴ I.R.C. § 4975(c)(2) (1998).

²⁵ The Galileo Funds is a series mutual fund, an open-end investment company, that has separate series that operate as individual mutual funds. See generally PTE, 62 Fed. Reg. 59,744, 59,746 (1997).

The program could be offered to independent fiduciaries²⁶ of individually directed pension plans.²⁷ In accordance with its responsibilities under Title I of ERISA,²⁸ an independent fiduciary would have to review the program before offering it under the pension plan.

1. TCW Portfolio Solutions Trusts

Under TCW's proposed program, TCW would recommend to participants one of a number of trusts maintained under the program or a money market fund or similar vehicle²⁹ as an investment vehicle for the participant's account balance. Multiple trusts would be established, structured as separate commingled trusts.³⁰ Each trust would hold, in varying proportions, shares of some or all of the mutual funds offered by the Galileo Funds.

The mix of mutual funds in each commingled trust would be designed to accommodate the investment needs and risk tolerances of a different profile of a participant with the salient factors being the participant's financial objectives, time horizon, other savings and risk tolerance. The trusts could range from aggressively structured (generally comprised of mutual funds invested primarily in equities), to conservatively structured (generally comprised

²⁶ An independent fiduciary would be a fiduciary who has discretionary authority with regard to an individually directed pension plan and who is not affiliated with TCW. The term could include named fiduciaries of the plan such as the plan sponsor or plan administrator or any fiduciary responsible for selecting investment vehicles for the pension plan.

²⁷ TCW's program would only be offered to sophisticated plans, that is those with a minimum of \$5 million in plan assets.

²⁸ See ERISA, Pub. L. No. 93-406, Title 1, 88 Stat. 832 (1974) (codified as amended in 29 U.S.C.).

²⁹ The money market fund or similar option would be provided so that TCW's program could comply with the requirements of 29 C.F.R. § 2550.404c-1 (1998).

³⁰ Each commingled trust would be a group trust, satisfying all requirements of Revenue Ruling 81-100, 1981-1 C.B. 326, and thus, qualifying for tax exemption under section 501(a) of the Code. I.R.C. § 501(a) (1998).

of mutual funds invested primarily in fixed income instruments).

TCW would employ a financial expert to construct appropriate asset allocation models for the commingled trusts, using generally accepted principles of modern portfolio theory. The financial expert would be independent from and have no previous pre-existing relationship with TCW or its affiliates.³¹ The asset allocation models would not be static, but rather the financial expert, in its sole professional discretion, would adjust them, taking into consideration the investment goals and risk tolerances that the models represent and changes in the economy and market conditions. The financial expert would be solely responsible for deciding how the models might best be implemented by selecting the mutual funds each commingled trust held and the weightings thereof.

The commingled trusts might comprise all or part of the investment alternatives available to a participant in an individually directed pension plan.

2. Investment Advice Offered to Participants Under the Program

An integral part of the program would be the investment advice offered to participants. TCW would provide each plan participant with worksheets³² that would elicit from the participant his or her retirement funding needs, risk tolerance and life cycle stage. Upon completion of the worksheets, the participant's responses would be analyzed and the participant would receive a written recommendation from TCW of an appropriate commingled trust.³³ There would be no separate fee at the

³¹ In addition, no more than five percent of the financial expert's gross income in any taxable year could be derived from TCW or its affiliates.

³² The worksheets would be formulated by an independent expert.

³³ Because the worksheets would take into account risk tolerances, TCW might find itself in the position of recommending a more conservative commingled trust than would be the case if the worksheets had only a mathematical basis with no behavioral or psychological

trust level for the provision of this investment advice; however, the costs of the program (for example, the costs of developing and implementing the asset allocation models and the worksheets)³⁴ would be paid by TCW and TCW would be reimbursed for such expenses by the trusts.³⁵

Whether a participant elected to invest in the recommended commingled trust would be entirely within the participant's discretion. A participant might disregard the recommended trust and invest in another trust. Moreover, some participants might not elect to participate in the asset allocation program at all, in such cases a person independent of TCW, generally the participant, would elect in which trust to invest the pension plan assets.

3. Disclosure Under the Program

TCW would provide plan sponsors with full disclosure concerning the composition of the commingled trusts and concerning fees and expenses charged at the mutual fund and the trust level. TCW also would provide sponsors with a quantitative annual report by which each sponsor could determine if the program had attained its objectives.

component. Since equity-based mutual funds provide TCW with higher fees (and generally higher profits) than fixed-income mutual funds, TCW would not necessarily maximize its short-term return by incorporating the behavioral or psychological component into the worksheets.

³⁴ Other trust level expenses would include expenses payable to regulatory authorities, accounting, auditing and legal expenses, clerical and administrative expenses, expenses of printing and mailing reports, expenses for computer programmers, certain insurance and fidelity bond premiums and other expenses incurred by each commingled trust in the ordinary course of its business.

³⁵ Because TCW generally would pay for direct expenses and then seek reimbursement from the commingled trusts, the payment of expenses could be viewed as an extension of credit between a plan and a party-in-interest prohibited under sections 406(a)(1)(B), 406(a)(1)(D) and 406(b)(2) of ERISA. 29 U.S.C. §§ 1106(a)(1)(B), 1106(a)(1)(D) and 1106(b)(2) (1998). However, relief likely would be available under Prohibited Transaction Class Exemption 80-26, 45 Fed. Reg. 28,545 (1980) concerning interest free loans between a plan and a party-in-interest.

Finally, participants also would receive full disclosure concerning the composition, operating costs, and historical performance of the commingled trusts and a description of the Galileo Funds before directing their account balances.

C. EXEMPTIVE RELIEF GRANTED BY PTE 97-60

Section 406(b) of ERISA³⁶ prohibits a fiduciary from dealing with a pension plan in the fiduciary's own interest or for the fiduciary's own account; from acting on behalf of a party whose interests are adverse to a plan in any transaction involving the plan; or from receiving consideration for the fiduciary's own account from a party dealing with the plan in connection with a transaction involving plan assets.³⁷

DOL gives several examples of transactions prohibited by section 406(b) in a rule adopted under section 408(b)(2)

³⁶ 29 U.S.C. §1106(b) (1998).

³⁷ Section 406(a) of ERISA prohibits a fiduciary with respect to an employee benefit plan from causing the plan to engage in certain prohibited transactions, including the sale or exchange of property between a plan and a party-in-interest, the furnishing of services between the plan and a party-in-interest and the transfer to, or use by or for the benefit of, a party-in-interest of any assets of the plan. ERISA §§ 406(a)(1)(A), 406(a)(1)(C) and 406(a)(1)(D), 29 U.S.C. §§ 1106(a)(1)(A), 1106(a)(1)(C) and 1106(a)(1)(D) (1998).

Section 408(b)(2) of ERISA provides that the prohibitions provided in section 406 shall not apply to the provision of services "necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor." 29 U.S.C. § 1108(b)(2) (1998). DOL regulations state that section 408(b)(2) of ERISA "does not contain an exemption from acts described in section 406(b). . . ." 29 C.F.R. § 2550.408b-2(a)(3) (1998). Although section 408(b)(2), thus, does not resolve the question of whether TCW's program would involve transactions prohibited under section 406(b), section 408(b)(2) would apply to transactions that would otherwise be prohibited under section 406(a) of ERISA. Since an independent fiduciary of a sophisticated benefit plan would have to decide to enroll in the program and TCW would have every incentive to ensure that services were provided at the Trust level in a cost effective manner because it would not profit from providing such services, the authors believe that the provision of services under the program should not be a violation of section 406(a) of ERISA, because such transactions would likely be exempt under section 408(b)(2) of ERISA.

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of ERISA.³⁸ Under DOL's second example, an investment adviser ("C") by recommending the purchase of an insurance contract on which C would receive a commission from the insurance company, engages in an act prohibited by section 406(b), even if C fully discloses the reasons for the recommendation and the fact that it will receive a commission, and even though an independent fiduciary (a fiduciary of the plan independent of C) considers the recommendation and approves the transaction. Similarly, because TCW could be deemed to be a fiduciary of individually directed pension plans enrolled in its program by virtue of the investment advice it would provide to participants in such plans,³⁹ TCW could be deemed to engage in a prohibited transaction if it advised a participant to invest in one of the more aggressive equity-based commingled trusts because TCW generally would receive higher net fees (and, thus could receive higher net profits) from such trusts.

Because of the risk that an offer of investment advice to participants in its program might be viewed as involving an act of prohibited self-dealing, TCW sought and received an exemption from the provisions of section 406(b) with respect to the proffer of investment advice. In support of its request, TCW noted that its proposed exemption was similar to Prohibited Transaction Exemption 93-59 received by Prudential Mutual Fund Management, Inc.,⁴⁰ in which DOL permitted an investment adviser affiliated with the applicant to evaluate and recommend a mutual fund investment mix comprising mutual funds that were advised by the applicant. TCW also cited the similar exemption received by Shearson Lehman Brothers, Inc.⁴¹

³⁸ 29 C.F.R. § 2550.408b-2(f) (1998).

³⁹ Because the participants under the individually directed pension plans often would be financially unsophisticated, it is anticipated that any advice rendered by TCW would be relied upon by participants. Therefore, provision of the advice could render TCW a fiduciary of the plans according to the definition of fiduciary in section 3(21)(A) of ERISA. See *supra* note 5 and accompanying text.

⁴⁰ 58 Fed. Reg. 47,290 (1993).

⁴¹ Prohibited Transaction Exemption 92-77, 57 Fed. Reg. 45,833 (1992).

III. THE ADVANTAGES OF INVESTMENT ADVICE OVER INVESTMENT EDUCATION

There are several advantages to a plan sponsor in hiring a service provider who provides investment advice rather than investment education.

First, the provider can give participants the investment advice they desire and need. Consequently, plan participation and retention rates should increase.

Second, any prohibited transaction exemption received by a service provider offering investment advice would contain protective conditions that could protect the plan sponsor as well as participants.

As noted above, a plan sponsor is responsible for the selection and oversight of the service provider whether the service provider is an educator or an adviser.⁴² Because a prohibited transaction exemption relieves liability from the prohibitions of the self-dealing provisions of section 406 of ERISA but does not provide relief from the responsibility of prudence and care under section 404,⁴³ DOL must, in order to grant a prohibited transaction exemption, find that the transaction is in the interests of plan participants.⁴⁴ Therefore, DOL only grants exemptions that incorporate conditions and procedures that the Department believes will ensure, to the greatest extent possible, that the transactions it exempts are prudent.

⁴² See *supra* notes 9 and 16-18 and accompanying text. Also, as noted above hiring by a plan sponsor of a person as an investment adviser may result in co-fiduciary liability under section 405 of ERISA (29 U.S.C. § 1105) if the fiduciary hiring the adviser fails to carry out the designation in a manner consistent with the general fiduciary responsibility provisions of ERISA. See *supra* note 10 and accompanying text. As a practical matter, the liability of a plan sponsor in selecting TCW or any other fiduciary where conduct is circumscribed by an exemption is no greater than the liability a plan sponsor would incur in selecting an educator.

⁴³ ERISA § 408(a), 29 U.S.C. § 1108(a) (1998).

⁴⁴ *Id.* § 1108(a)(2).

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Similarly, DOL must also find that the terms of a transaction are protective of the rights of participants.⁴⁵ Accordingly, unless the Department is comfortable that the terms of a transaction are favorable to participants, it will not issue an exemption. It is not unusual for the Department to insist that the terms of a transaction be made more favorable to participants than the requester of the exemption had initially proposed.

The caution of DOL has had a predictable result. Exhaustive computer searches have failed to uncover any case in which a party complying with the conditions of an individual prohibited transaction exemption was held liable for a breach of its fiduciary responsibilities. Further, the authors have been unable to locate a single reported case in which a fiduciary breach was even alleged against such a person. Thus, as long as a service provider has a prohibited transaction exemption, complies with the conditions of that exemption, and fulfills its responsibilities to the individually directed pension plans, a plan sponsor could take comfort in the likelihood that its duties of prudence and care in hiring the service provider have been met.⁴⁶

Third, if a plan sponsor hired a service provider offering investment advice, the sponsor would not have to monitor whether the provider actually provided investment education or investment advice. In contrast, if a plan sponsor hired a service provider who claimed only to offer investment education, the sponsor would have to monitor

⁴⁵ *Id.* §1108(a)(3).

⁴⁶ A plan sponsor would have had to have made an initial determination that the investment advice furnished by the service provider would be likely to be helpful to its employees. Moreover, a fiduciary who hires a service provider that performs well could still be subject to equitable relief, such as removal, for not following proper procedures in hiring the provider. See *Brock v. Robbins*, 830 F.2d 640, 648 (7th Cir. 1987). However, the disclosures that a service provider would be required to make to receive a prohibited transaction exemption are intended to ensure that proper procedures are used in the selection process. For the information provided by TCW under its program, see section II.B.3 of this Article (Disclosure Under the Program), *supra*.

whether the investment education provided slipped over the line into investment advice. If the investment education were actually investment advice, then the plan sponsor might be found to have hired a fiduciary on behalf of the plan, which fiduciary would not have received a prohibited transaction exemption addressing any possible self-dealing issues involved in the arrangement.

Fourth, hiring a service provider who offers investment advice rather than investment education protects a plan sponsor from certain ambiguities in the interplay of state and federal law.

A service provider offering investment education may be subject to state law,⁴⁷ rather than to ERISA. This may permit an educator with a financial interest in which investment vehicle a participant selects to skew the investment education to lead to the selection of vehicles that result in higher fees and profits for the educator without liability for the educator under ERISA. Such a scenario would enhance the possibility of liability under ERISA for the plan sponsor for either improper selection or inadequate monitoring of the educator.

Finally, many of the different state laws to which a service provider offering investment education might be subject may well have different standards than ERISA. If an educator were held liable for a violation of state law, the holding might be evidence in a federal court that a plan sponsor had not satisfied ERISA's prudence requirement in selecting and monitoring the educator. On the other hand, if the educator were not held liable under state law for something that would be a violation of ERISA because

⁴⁷ See *Coyne v. Selman*, 98 F.3d 1457 (4th Cir. 1996); *Curtis v. Nevada Bonding*, 53 F.3d 1023, 1027 (9th Cir. 1995); *Dukes v. U.S. Healthcare, Inc.*, 57 F.3d 350, 355 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 564 (1995). In contrast, most state laws do not apply to a service provider acting as a fiduciary to a pension plan subject to ERISA. See ERISA § 514(a), 29 U.S.C. §1144(a) (1998), which generally preempts the application of all state laws to fiduciaries except for those laws that relate to banking, insurance, securities, and generally applicable criminal law.

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of less restrictive standards in the state law, the plan sponsor might still be liable for the imprudent selection or monitoring of the service provider since the less restrictive state laws might have deprived the plan of a cause of action against the educator.