Swerdlin & Company
Actuaries and Employee Benefit Consultants

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Who is a Fiduciary?

A fiduciary is defined as a person or entity with the appointed discretion to administer and manage a plan or control a plan's assets. The plan document must identify at least one fiduciary either by name or through an appointment process described in the plan document. The Named Fiduciary can be identified by name or position. Generally, the plan's fiduciaries include the trustee, investment advisors, those designated to exercise discretion in the administration of the plan, plus those who select other fiduciaries.

So, who is not a fiduciary? The plan's accountants, attorneys, actuaries and consultants are not fiduciaries if they do not exercise discretion or control of the plan or its assets. Individuals who perform administrative functions for the plan, but who cannot make decisions about plan assets or policies, are not fiduciaries.

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Dorn's Corner

Hello everyone. It's time for me to make my declaration for 2013. I declare 2013 as The Year of Affluence.

One dictionary defines affluence as "an abundant flow or supply." Note that it does not refer to money. One can be affluent regardless of financial status. Flow is a key word in this definition. Money is like blood; it must flow. The flow of money is also a flow of energy from the giver to the receiver and vice versa. If the receiver does not accept the flow, then the flow stops. The energy is stopped in its tracks and like polluted standing water, the energy becomes stagnant. In order to keep affluence coming to us, we must keep the energy circulating.

When you change the way you look at things, the things you look at change. When you see the world as abundant and friendly, you see that you have genuine possibilities in your life. Be receptive to a world that provides, rather than restricts. You will see a world that wants you to be successful and affluent, rather than one that conspires against you. The more you serve others in helping them become affluent, the more affluent you become. Our current culture has a scarcity mindset.

In Deepak Chopra's book, Creating Affluence, he says it seems like "being happy" is what we aspire to. For example, "I wish I had more money – then I could buy a bigger house - that would make me more comfortable - and therefore, happy." In business, happy

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Who is a Fiduciary? *(continued from page 1)*

The following are examples of tasks that may be performed without being a fiduciary:

- determining plan eligibility;
- calculating and allocating plan contributions;
- preparing the government reporting;
- maintaining plan records;
- processing plan distributions; or
- making recommendations regarding the plan administration or design.

What are the responsibilities of a fiduciary? Fiduciaries are subject to standards of conduct because they act on behalf of the plan participants and their beneficiaries.

The following ERISA rules define the responsibilities of a fiduciary:

Prudent Person Rule

Fiduciaries must perform all duties with the skill, care, prudence and diligence that a prudent person acting in a like capacity and familiar with such matters would use. ERISA's prudence standard is not concerned with results, but it is a test of how the fiduciary acted "from the perspective of the time of the challenged decision."

Diversification Rule

Fiduciaries should diversify plan investments to minimize risk. If the plan participants are allowed to direct the investment of their accounts in the plan, then they should be provided with a broad range of plan investments so they can invest their account based on their own personal risk tolerance and goals.

Exclusive Benefit Rule

Fiduciaries must act solely in the interest of plan participants and their beneficiaries, with the exclusive purpose of providing benefits to them. They must not engage in acts that serve their own interests, or the interests of the plan sponsor.

Act in Accordance with the Plan Document

Fiduciaries must apply the terms and provisions of the plan document and trust agreement when performing their duties, except when these terms violate ERISA.

Prohibited Transactions

Certain transactions between a retirement plan and a party-in-interest are prohibited by ERISA. These include, but are not limited to:

- selling, exchanging or leasing of property;
- lending money or other extension of credit;
- furnishing goods, services or facilities; or
- using plan assets for the benefit of a party-in-interest.

A party-in-interest is any person or entity involved with the retirement plan, such as a service provider, fiduciary or plan participant.

If a prohibited transaction occurs, the fiduciaries involved are personally liable for any plan losses resulting from a breach in duty. They may be held personally liable and subject to penalties of up to 20% for any amount recovered as a result of the ERISA violation. The penalties for willful violations by a fiduciary can be as much as $50,000 ($100,000 for a corporation) and up to one year in prison.

Fiduciaries should be aware they may also be liable for the actions of another fiduciary if they conceal the breach; enable the breach; or know about the breach and fail to do anything to correct it.

Fiduciary liabilities can be controlled by:

- seeking the advice of independent professionals;
- adopting and following an investment policy;
- meeting on a regular basis;
- monitoring the plan service providers and others appointed as fiduciaries;
- reviewing all investment reports carefully;
- establishing ways to communicate clearly and concisely with participants;
- documenting every decision; and
- invoking available ERISA protection.

Feel free to contact your Swerdlin representative to learn more about the role of a plan fiduciary. ■

Dorn's Corner *(continued from page 1)*

employees make for happy clients, leading to more money for the organization to compensate the employees, to better serve the clients. The circle continues…

If you're thinking that it is hopeless at this stage of your life to change the thoughts that comprise your belief system, you are wrong. Don't defeat yourself with thoughts that come from feelings of scarcity and resistance to success and abundance. Make the choice to let go of your current beliefs and begin activating thoughts right now that allow you to feel good.

Be thankful and filled with appreciation, even if what you desire hasn't arrived yet. I believe the more you are grateful for, the more you will attract to be thankful for. Chopra says in his book that "truly wealthy people never worry about losing their money because they know that wherever money comes from, there is an inexhaustible supply of it."

Thanks for continuing to read my Corner. I wish you all a Happy and Healthy Holiday Season! ■

We can help you with the following:

1. Actuarial services, including:
   - Defined Benefit
   - Cash Balance
   - Supplemental Executive Retirement Programs (SERPs)
   - Actuarial Expert Witness
   - Medicare Part D Actuarial Attestation
   - Post-retirement medical calculations: ASC 715-60
   - Actuarial studies for Health and Welfare Plans
   - Compliance testing for self-funded plans.

2. ESOP administration, including:
   - Publicly traded
   - Privately held
   - Leveraged
   - Non-leveraged
   - KSOPs
   - Repurchase Liability Studies

3. Other Defined Contribution Plans, including:
   - 401(k)
   - TPA & Recordkeeping Services
   - Cross-tested and age-weighted
   - 403(b), 401(a), 457

4. Cafeteria (Section 125) Plan Administration, including:
   - FSAs
   - POPs
   - HRAs
   - QTPs

5. Other consulting services, including:
   - Comprehensive Employee Benefit Statements
   - Plan Design
   - Employee Communication
   - **Regulatory Compliance**
   - Special Studies

Each retirement plan must retain an outside broker or investment advisor. We are not investment advisors.
Give us a call at 770-396-6601 or 800-507-9373.
www.swerdlin.net

Service Spotlight: The Fiduciary Frenzy!

One definition of "frenzy" is out-of-control behavior: a state of uncontrolled activity, agitation, or emotion. Recent legislative changes in the retirement industry have produced such an effect surrounding the word fiduciary!

The word "fiduciary" is being used now more than ever when discussing retirement plans, especially participant-directed plans. Do you know who your plan fiduciaries are? You may think the answer is obvious, but do you know there are many different categories of fiduciaries spelled out in ERISA?

Some of the more common fiduciary roles are:

- Named Fiduciary,
- Plan Administrator,
- Trustee, and
- Investment Manager.

Each category of fiduciaries may be served by the same individual but, more often than not, multiple people serve as fiduciaries for your retirement plan.

The first fiduciary role, the **Named Fiduciary,** as defined in ERISA Section 3(21), is named in the plan document and takes full responsibility for the plan. The Named Fiduciary is also known as a 3(21) fiduciary, a discretionary trustee or full service trustee. The Named Fiduciary has the authority to hire, monitor or fire any service provider or other fiduciaries filling the roles of the other categories.

The Named Fiduciary can be an employee of the plan sponsor or an independent person or entity hired to serve in this capacity. It is common to see banks or trust companies as Named Fiduciaries of a retirement plan.

The **Plan Administrator** is also a type of fiduciary. Plan Administrators fall under Section 3(16) of ERISA and are sometimes referred to as 3(16) fiduciaries. A Plan Administrator should not be confused with a pension administrator or a Third Party Administrator (TPA). They **can** be one and the same, but not usually. Generally, the plan sponsor serves as the Plan Administrator, but the plan sponsor can hire a service provider such as a TPA to take on the role of Plan Administrator for some or all of the responsibilities.

The Plan Administrator is primarily responsible for:

- government filings such as Form 5500,
- distribution of required notices to plan participants,
- hiring and monitoring of plan service providers, and
- other responsibilities as defined in the plan document.

A third category of fiduciary is **Trustee**. Under Sections 403(a) and (b), ERISA describes a Trustee as a person or group who is exclusively responsible for the management and control of plan assets. The responsibilities of a Trustee are more specific as they are limited to the plan assets. If the Named Fiduciary does not assume the role of Trustee, then he is responsible for hiring and monitoring the person or group hired to perform this duty.

There are two types of Trustee: directed and discretionary. A directed trustee acts solely at the direction of a higher-level fiduciary such as the Named Fiduciary. A discretionary trustee is appointed to make all investment-related decisions on behalf of the plan and assumes full responsibility for the assets.

The Fiduciary Frenzy!

(continued)

A Named Fiduciary can also appoint an ERISA Section 3(38) **Investment Manager** (another category of fiduciary) to provide direction to a Trustee. ERISA defines this person as someone with full discretion over selecting and monitoring investment options in a qualified retirement plan. When a 3(38) Investment Manager is appointed, he takes on a higher fiduciary role than a Trustee.

Be careful not to confuse a 3(38) Investment Manager with an Investment Advisor. An Investment Advisor may or may not have full discretionary power over the plan assets and investment decisions. An advisor who is not acting as an Investment Manager has to be careful not to affect discretion by using his influence upon individuals to make certain decisions. If the advisor does use his influence to guide participants, he has taken on implied discretion, which translates to fiduciary responsibility.

Investment Advisors are generally considered limited scope fiduciaries under ERISA Section 3(21), and should use a fiduciary standard of care when providing services. Their duty should always be to serve the plan and plan participants. In fulfilling this role, they should always put the best interest of plan participants first and act with prudence.

Don't get caught up in The Fiduciary Frenzy! Know who your plan fiduciaries are and their roles and responsibilities. ■

Defined Benefit Plans: Still the Best Value

Defined benefit plans are still the best way to provide replacement income to participants for life. A defined benefit pension plan is one in which the benefits are first "defined" and the annual employer contributions needed to provide these benefits are determined. An actuary is crucial to the success of a defined benefit pension plan.

In order for a defined benefit pension plan to be successful, each of the following five plan functions should be taken into consideration:

- plan design,
- investment choices,
- administration and compliance,
- communication with employees, and
- control of expenses.

Employers should be aware of the characteristics of a defined benefit pension plan, such as:

- required contributions paid in a timely manner,
- the complexity of plan administration, and
- the need for effectively communicating the plan to employees.

Plan investment options must be carefully established and monitored. Since benefits are ultimately provided from employer contributions and their investment earnings, the employer's annual costs are reduced or increased by investment performance. Therefore, investments should not be overly aggressive; if a large loss occurs, contributions may dramatically increase.

Defined benefit plan administration and compliance requirements must be assigned and monitored. An actuary, and often a third party administrator, are needed for this function. Controls are needed to ensure that the data used to calculate participants' benefits is accurate. If these controls are not properly maintained, mistakes can easily occur and, if serious enough, could ultimately result in plan disqualification by the IRS.

Employers should be especially careful with all communication material provided for employees. Annual employee benefit statements should be reviewed for reasonableness before they are released; at the very least, the data used should be verified.

Employees are frequently unaware of how benefits accrue. The Summary Plan Description (SPD) will help them understand the plan's benefit formula and other plan provisions. If the employees understand the plan, they can appreciate and value this rich benefit.

Contact your Swerdlin representative to learn more about defined benefit plans. We have an Actuarial Team to help you. ■

2013 Limits at a Glance

IRS Dollar Limits	Code Section	2011	2012	2013
DB plan annual benefit limit	415(b)(1)(A)	$195,000	$200,000	$205,000
DC plan annual addition limit	415(c)(1)(A)	49,000	50,000	51,000
Max 401(k) deferral	402(g)(1)	16,500	17,000	17,500
Max 401(k) catch-up deferral	414(v)(2)(B)(i)	5,500	5,500	5,500
Max SIMPLE deferral	408(p)(2)(E)	11,500	11,500	12,000
Max 457 deferral	457(e)(15) & (c)(1)	16,500	17,000	17,500
Def of HCE (highly compensated employee)	414(q)(1)(B)	110,000	115,000	115,000
Annual Compensation Limit	401(a)(17) & 404(l)	245,000	250,000	255,000
Key Employee (officer compensation)	416(i)(1)(A)(i)	160,000	165,000	165,000
SS Taxable Wage Base		106,800	110,100	113,700

Above: A spooky bunch from Halloween raised money and had fun. Top left: Closest to Pin Award winner Ed Ilano. Bottom left: The Swerdlin Northeast office, Penret, turned out for the Cycle for Life to raise money for cystic fibrosis.

What's Happenin'

Anniversaries we celebrate this quarter: **Laura O'Connor**, 18 years; **Cynthia N. Clark** and **Lee Swerdlin**, 14 years; **Adrian Farnon** and **Ricky Cox**, 10 years; **Eric Myers** and **Marjorie Cade**, 6 years; **Janet Wadlington**, 5 years; **Catie Smith**, 3 years; and **David Brown**, **Kenneth Knapke** and **Nick Wilson**, 1 year.

Congratulations to **Tianna Barran**, who welcomed her second child, Cayla Cataleya Morgan, on September 14, 2012.

Our Swerdlin Northeast office, **Penret**, was a sponsor again this year for the bike ride for Cystic Fibrosis Foundation's Cycle for Life on October 6. The team raised $2,210 for the cause!

Lee Swerdlin attended the New England ESOP Chapter Conference in Killington, Vermont on October 10-11.

On October 18, **Connie Woodmansee**, **Ed Ilano**, **Joanne Swerdlin** and **Susan Petrirena** attended the New South ESOP Conference held at the Rosen Shingle Creek Resort in Orlando, Florida. Connie Woodmansee participated in a presentation on ESOP distributions. The day before the conference, the ESOP Chapter held a Golf Tournament and the proceeds went to the Employee Ownership Foundation. A reception was held that evening for the attendees and awards were given for winners of the golf tournament. Ed Ilano won "Closest To The Pin" and was also on the winning Foursome.

Lorene Pierre and **Rita Teague** attended the ASPPA Benefits Council of Atlanta conference on October 22. It was a two-day workshop covering defined contribution administrative issues.

Connie Woodmansee, **Dorn Swerdlin**, **Ed Ilano**, **Joanne Swerdlin**, **Lee Swerdlin** and **Susan Petrirena** attended the ESOP Association Annual Technical Conference and Trade Show in Las Vegas, November 7-9. Swerdlin hosted a booth at the Trade Show and Susan Petrirena presented with Lisa Durham of Krieg Devault on The Mechanics of ESOP Distributions. Swerdlin also hosted a reception on Thursday evening for clients and friends.

Patti Williams attended the Relius Administration National Daily Users Group conference in Orlando, Florida on November 12.

Dorn Swerdlin attended a Board of Trustees meeting of The Actuarial Foundation in Chicago, Illinois on December 5.

Swerdlin celebrated Halloween by dressing up, participating in a raffle, and having a bake sale. The first prize in the costume contest went to **Amy Letts** and **Nick Wilson**, who dressed as Drew Carey and Mimi. The raffle winner was **Donna Martin**. We were pleased to raise $400 for our charity fund at this event. Throughout the year teams within the company have hosted charity lunches and breakfasts. Our funds for 2012 will go to various charities.

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Fiduciary Responsibility and Defined Benefit Plans

A defined benefit pension plan is one in which the benefits are first "defined" and the annual employer contributions needed to provide these benefits are then determined. For a successful defined benefit pension plan, each of the following five plan functions must be well executed: design, investment, administration and compliance, communication with employees, and control of expenses. An actuary is crucial to the success of a defined benefit pension plan.

Employers are frequently unprepared for the demands that a defined benefit pension plan can place on an organization. Among these are the necessity of making required contributions in a timely manner despite financial hardship, the complexity of defined benefit pension plan administration, and the challenge in effectively communicating the plan to employees.

Plan investment options must be carefully established and monitored. Since benefits are ultimately provided from employer contributions and their investment earnings, the employer's annual costs are reduced or increased by investment performance. Therefore, investments should not be overly aggressive; if a large loss occurs, contributions may dramatically increase. Employers need not worry as much about fiduciary liability with investment performance as in a defined contribution retirement plan.

Defined benefit pension plan administration and compliance requirements must be assigned and monitored. A third party administrator and actuary will often be needed for this function. A description of all necessary services should be indicated by the defined benefit pension plan provider when the plan is established. Controls are needed to ensure that the data used to calculate participants' benefits are accurate. If these controls are not properly maintained, mistakes could easily occur and, if serious enough, ultimately result in plan disqualification by the IRS.

Employees are frequently unaware of how benefits are accrued in a defined benefit pension plan. Care should be taken to ensure they fully understand the plan's benefit formula. The defined benefit pension plan should be explained to employees. Poor understanding of the plan's benefits by employees can discourage employers from continuing the plan. Why provide this rich benefit if employees don't understand and appreciate it?

Employers should be especially careful with all communication material containing benefit calculations. Annual employee benefit statements should be reviewed for reasonableness before they are released; at the very least, the data used should be verified. You never want your employees to have unrealistic expectations with regard to their retirement benefits from the plan.

Employers should be cognizant of all fees when the plan is established and make provisions for their periodic review. Remember that failure to use quality actuarial services may cause problems that can result in higher costs to the employer. ■

OOPS!

In the 3rd Quarter 2012 *Swerdlin Quarterly*, we incorrectly identified the act which was upheld by the Supreme Court. The correct name is the Patient Protection and Affordable Care Act (PPACA). We appreciate one of our readers bringing this error to our attention.

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