

I, FIDUCIARY: SOME REFLECTIONS ON THE DEFINITION OF FIDUCIARY UNDER ERISA

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INTRODUCTION

The discussion of all things fiduciary under ERISA during the *Drexel Law Review Symposium, ERISA at 40: What Were They Thinking*, held on October 25, 2013, brought me back to a summer job I had as a law student.

The summer was 1975, not quite a year after ERISA was enacted. The United Mine Workers of America Health and Retirement Funds hired me and thirty-nine other law students as part of its settlement of *Blankenship v. United Mine Workers Welfare & Retirement Fund of 1950*.¹ In *Blankenship*, a class of former mineworkers alleged, among other things, that the Retirement Funds' eligibility standards for a mineworker's pension were arbitrary and capricious, and that the trustees who set those standards had committed a structural violation of section 302(c)(2) of the Taft-Hartley Act.² The settlement agreement required the trustees to modify the pension eligibility requirements and also to hire law students during the summer to ensure that the resulting new benefit applications were resolved expeditiously.³

We spent our first week in Washington, D.C. at the Funds' offices in training sessions and were then sent to a field office in Appalachia for a month where we met with miners to help them prepare

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1. See RICHARD P. MULCAHY, *A SOCIAL CONTRACT FOR THE COAL FIELDS: THE RISE AND FALL OF THE UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND* (2001); *Blankenship v. United Mine Workers Welfare & Ret. Funds of 1950*, 1973 WL 1070, at *1 (D.D.C. Jan. 2, 1973).

2. *Blankenship*, 1973 WL 1970 at *1. In 1993, the Supreme Court held that section 302(c)(2) did not provide courts with authority to review pension plan provisions for "structural violations" in civil lawsuits. *Local 144 Nursing Home Pension Fund v. Demisay*, 508 U.S. 581 (1993).

3. MULCAHY, *supra* note 2, 6-7.

their cases for benefits under the new eligibility standards. The miners came in to the field offices, almost always with family and friends, and occasionally with attorneys. They often brought shoeboxes that contained documentary records of their lives—old pay stubs, correspondence with employers, Social Security employment records, correspondence with the union, correspondence with the retirement fund, and sometimes faded photographs, wartime letters from sweethearts, birth certificates of children. Many of the men we saw suffered from black lung or other respiratory diseases. We listened to their stories of hard work underground, of hard-fought strikes above ground, and of generally hardscrabble lives. We learned that being awarded a pension was, for some of them, not only the difference between deep poverty and comfort in their old age, but a kind of validation that their lives had had value. Listening to their stories was moving, and helping them prepare their cases was a privilege.

In the second half of the summer, we conducted pension eligibility hearings. The Funds moved us to different offices from the ones to which we were initially assigned so we would not have to rule on the bona fides of a pension claim that we helped the miners prepare a month earlier. This was the more difficult part of the summer because we sometimes had to reject applications from sympathetic but ineligible claimants. Although our decisions were reviewed in Washington, we knew that our determination was likely dispositive of whether a person qualified for a pension.

So what did that summer have to do with the meaning of the term “fiduciary” and with this ERISA history Symposium? To connect the former to the latter, I want to focus on a couple hours or so of the training we received in Washington. That training included a bit of history of pension law and the enactment of ERISA. We were told that the statute created a category of actor—the ERISA fiduciary. A person was an ERISA fiduciary if, among other things, he or she exercised any authority or control respecting disposition of plan assets or had any discretionary authority or discretionary responsibility in the administration of a plan, or provided investment advice for a fee.⁴ When we were in the field, we were told that we would be ERISA fiduciaries because we had discretionary administrative responsibilities and our decisions affected the disposition of plan assets.

4. See Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1102(a) (2012). The law students did not, of course, provide investment advice to the miners, for a fee or otherwise, although as we will see, the Department promulgated regulations in 1975 on this aspect of the meaning of fiduciary.

In the first half of the summer, our fiduciary duty was to help the miners understand the eligibility rules and put together their case. We needed to do that competently or, we were told, we were violating our statutory responsibilities. In the second half of the summer, our duty was to make decisions in accordance with the plan's eligibility provisions. If we gave a pension to someone who did not qualify, we violated that duty as much as if we failed to give a pension to someone who did qualify. We were told that we could be held financially responsible if we violated our responsibilities as fiduciaries.

As it turned out, the opinion that we were fiduciaries was probably not accurate. Following that summer, the Department of Labor issued an interpretive bulletin, IB 75-8, which addressed several fiduciary issues in a question and answer format.⁵ The bulletin provided that a person or entity that provided "ministerial" services, which included applying rules in determining eligibility for benefits, was not a fiduciary if the individual had "no power to make any decisions as to plan policy, interpretations, practices or procedures," and merely applied rules "within a framework of policies, interpretations, rules, practices and procedures made by other persons."⁶ We probably operated within such a framework that summer and, thus, were probably not fiduciaries. But at the beginning of the summer, the admonition that we were fiduciaries—while it may have been cautious—seemed a reasonable response to the statute. (To me, it still seems a reasonable response to the statute.) The Department of Labor's bulletin, though, reflected a policy decision that the term "fiduciary" should not reach as wide as the statutory language might be stretched.

The bulletin was not the only guidance on the definition of "fiduciary" that the Department published in the year immediately following ERISA's enactment. The Department had also released an earlier interpretative bulletin, IB 75-5, which provided that a plan's professional advisors—attorneys, actuaries, and accountants—would generally not be fiduciaries when rendering professional advice, unless the plan delegated to them effective decision-making authority.⁷ A 1976 advisory opinion seemed to squarely situate property appraisers into the category of professionals rendering

5. 29 C.F.R. § 2509.75-8, D-2 (2013).

6. *Id.*

7. 29 C.F.R. § 2509.75-5, D-1 (2013).

professional services due to their typical duties of valuing employer stock in closely held corporations.⁸

Finally, the Department issued perhaps the most controversial regulation that year, at least in retrospect, which provided that a person was not a fiduciary on account of giving investment advice unless the advice was rendered:

[O]n 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 such person will render individualized investment advice to the plan 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 assets.⁹

It is easy to understand why the Department wanted to quickly issue guidance on the meaning of fiduciary, and why that guidance placed limits on the conceivable statutory scope. ERISA was a sweeping new statute, and there was no doubt considerable concern in the plan sponsor and service provider communities about what the statute's fiduciary provisions meant and whom they affected—questions whose answers would impact the costs of maintaining a plan. The early regulations narrowed the definition of fiduciary and helped ease these concerns. But the guidance did not do this cleanly—as I will suggest below, the guidance did not end uncertainty about who is a fiduciary, but it did free the providers of some financial and administrative activities affecting employee benefit plans from the type of probing judicial review of their actions that the statute's fiduciary standards suggested Congress intended.

I. INTERPRETATIVE BULLETINS 75-5 AND 75-8

Return now to the summer of 1975 and the law students hired to advise miners and preside over benefit eligibility hearings. The Funds presumably hired us because they wanted reasonably bright people with sensitivity to evidentiary standards, some exposure to

8. Office of Pension and Welfare Benefit Programs (E.R.I.S.A.), Op. No. 76-65 (E.R.I.S.A. July 7, 1976) (determining that a person providing appraisal services was not rendering investment advice and thus was not a fiduciary). The opinion also applied to appraisers valuing employer real property and other non-publicly traded property.

9. 29 C.F.R. § 2510-3-21(c)(ii)(B) (2013).

administrative procedure, and the ability to read, understand, and apply the complex language in which the plan's eligibility rules were expressed. We were entrusted with fact-finding, and if we mistakenly denied or granted an application, we were either denying an old and often sick man (and his family) an earned benefit or we were wrongfully depleting fund assets by granting unearned benefits to an old and sick man. Depleting the Funds' assets would, of course, have an effect on the fund's solvency and ability to meet its benefit obligations to those who were eligible and would impose unfair costs on the companies that funded the plan.

While applying eligibility standards to a set of undisputed facts is arguably a ministerial function, fact-finding in cases in which facts *are* disputed seems to me now, and would have seemed to me then if I had thought about it, both a discretionary function and an action that directly affects disposition of plan assets. So we were (or at least should have been) fiduciaries, despite the Department of Labor's guidance. I can also say from my experience that summer that believing myself to be a fiduciary made me at least somewhat more careful and more attentive to detail than I would otherwise have been. The possibility of personal liability sometimes made me nervous that summer and may well have checked my sense of fair play when a miner was denied a pension because of the failure to produce documentary evidence or because of what sometimes seemed an arbitrary quirk in the eligibility language. Perhaps, then, our belief that we were fiduciaries was, overall, a good thing.

And as I just suggested, perhaps we were fiduciaries even under the interpretive bulletin. The bulletin itself says that a person who performs purely ministerial functions is not a fiduciary.¹⁰ It provides eleven examples of such functions, three of which are arguably relevant to a person making benefit eligibility determinations: (1) application of rules determining eligibility for benefits; (2) calculation of services and compensation credits; and (3) calculations for benefits.¹¹ But these examples do not necessarily cover a person engaged in fact-finding that is relevant to benefit determination. Return to the question of whether fact-finding is really a ministerial activity, even if another person reviews it. We do not generally think of fact-finding this way, particularly when it is a trial judge in federal or state court that is doing the finding. But even if fact-finding were a discretion-laden activity, the interpretive bulletin might still have evicted us from fiduciary status anyway because it provided that

10. 29 C.F.R. § 2509.75-8, D-2 (2013).

11. *Id.*

"[m]aking recommendations to others for decisions with respect to plan administration" was also a ministerial action, and our decisions were recommendations to the Funds' trustees, who with their lawyers would make a final decision to grant or deny benefits.¹² But again, we don't generally say that a trial judge's decisions are ministerial simply because they are reviewed by an appellate court. So perhaps the Department in 1975 did not definitively answer the question of whether we were fiduciaries. Since the Funds' attorneys and trustees reviewed our fact-finding, our determinations were merely recommendations, which were described by the bulletin as ministerial.¹³

What about the first half of the summer, when we were giving advice to miners on the plan's eligibility terms and how to build their evidentiary case showing entitlement under those terms? Were we fiduciaries then? Here, the interpretative bulletin again seems to answer no.¹⁴ It provided that "advising participants of their rights and options under the plan" was a ministerial activity if done under an appropriate administrative framework.¹⁵ Well, we were operating under such an administrative framework, but despite the supervision, some of us were doubtless more thorough and careful than others, and there were probably some miners whose ability to develop their case successfully depended on which summer law student was assigned to help them. And here I should note again that some of us were probably more serious, and more thorough, and more deliberate, in advising the miners *because* we thought we were fiduciaries.

The idea of conditioning non-fiduciary status on the existence of "a framework of policies, interpretations, rules, practices and procedures made by other persons" is itself odd.¹⁶ Does this mean that if a plan does not have such a framework, or if the framework fails to strip an individual of all discretion, that the individual is now a fiduciary? How does the midlevel human resources employee know if he or she is operating under a satisfactory administrative framework and thus is or is not a fiduciary? The law students working for the Funds that summer were almost certainly subject to a real framework of the sort contemplated by the interpretative bulletin,¹⁷

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. I recall that the Funds' lawyers had prepared a booklet for us, with interpretations of plan language. During the training we were instructed on evidentiary standards, preparing an

but my experience over the last thirty-five years suggests that for many plans there are, at most, the mere rudiments of such a framework. So does this mean that poorly trained and poorly supervised people are fiduciaries, but well-trained and well-supervised people are not? This is something of an odd outcome.

And what about third parties performing record-keeping and other administrative services? Many third parties, including record-keepers, apparently take the position that they are not fiduciaries when they perform such services because the services themselves are ministerial in nature.¹⁸ But under the interpretive bulletin, they are only relieved from fiduciary status if they are performing them under a framework of policies, interpretations, rules, practices, and procedures made by other persons.¹⁹ Generally, the record-keepers themselves make these policies and rules, and one can assume that few employers—especially small employers—are actively involved in helping to develop this framework.

The rationale of the interpretative bulletin seems to be that record-keeping is an administrative function, but it becomes ministerial if it is done pursuant to an administrative framework developed by others.²⁰ A third-party record-keeper who adopts such a framework may under the bulletin protect its employees who labor under that framework, but should the record-keeper be able to shed its own fiduciary status by developing such framework? The bulletin states that the policies must be adopted by “other persons” but the third-party record-keeper is itself creating the framework and it takes the position that it is not a fiduciary. If it is creating the framework and providing the supervision of its employees, shouldn’t it be a fiduciary?

Perhaps the above analysis—suggesting that record-keepers and other third-party administrators are in fact fiduciaries—is reading the bulletin too narrowly. Another “ministerial activity” under the bulletin is “making recommendations with respect to plan administrators.”²¹ So maybe the record-keepers are not only providing record-keeping services but also making recommendations to a plan fiduciary about adopting an administrative framework. But this is somewhat circular, because the interpretative bulletin only makes the “recommendations” ministerial if they are made under a

administrative record, and preparing an opinion that the Funds’ attorneys could review before making a benefit claim recommendation to the Trustees.

18. See 29 C.F.R. § 2509.75-8, D-2(A) (2013).

19. See *id.*

20. See *id.*

21. *Id.*

framework of policies and rules made by other persons.²² This suggests that maybe record-keepers and other third-party providers of administrative services, contrary to conventional wisdom, are fiduciaries after all. This interpretation of the guidance would no doubt be a surprise to the service provider industry.

As noted, the interpretative bulletin also provided that professionals—lawyers, actuaries, accountants, and consultants—are not fiduciaries when they render professional services to the plan or a plan fiduciary.²³ I am not aware of a single ERISA case that has found a fiduciary, actuary, or accountant a fiduciary because he went beyond his role as fiduciary, actuary, or accountant, so it appears that the circumstances under which a professional becomes a fiduciary when they are also rendering professional services are rare, if they exist at all. But in the real world, particularly the real world of small plans, it is often the case that the lawyer, accountant, or consultant's advice will always be followed. But this apparently is not enough to turn professionals into fiduciaries in the fictional world created by the interpretive bulletin.

The definitional aspects of fiduciary status under the interpretative bulletin—whether someone is rendering ministerial or merely professional services—are interesting, but perhaps the most pertinent question is whether the “exemption” for people providing “ministerial” services from fiduciary status actually matter in any concrete way? Here, the answer is that it matters in some situations, but probably not all situations, in part because of judge-made doctrine about the reach of ERISA's jurisdiction, judicial review of benefit decisions, the remedies for fiduciary breaches, and liability for non-fiduciaries. Oddly, the fiduciary status of a person evaluating a pension claim does not matter much, or at all, if the person rejects the claim (or advises an actual fiduciary that the claim be rejected). Courts have generally held that a participant does not have a fiduciary complaint if their claim in fact is for benefits under the plan.²⁴ Thus, a participant cannot generally bring a civil action against anyone, fiduciary or not, for denying a claim that should have been paid under the plan's terms. That is an action against the plan itself and the plan's obligation is simply to pay benefits.

22. *Id.*

23. See 29 C.F.R. § 2509.75-5, D-1 (2013).

24. See *Beddall v. State St. Bank & Trust Co.*, 137 F.3d 12, 18–20 (1st Cir. 1998); *Kyle Railways, Inc. v. Pac. Admin. Servs., Inc.*, 990 F.2d 513, 516 (9th Cir. 1993); *Strzelecki v. Schwarz Paper Co.*, 824 F. Supp. 821, 827–28 (N.D. Ill. 1993).

Ironically, it might be argued that plan participants with plausible but still disputable claims for benefits would be worse off if initial claim evaluators were considered fiduciaries. As noted, ERISA would not permit suits by disappointed participants against the fiduciary who denied, or recommended denying, their benefit claim. In theory, however, the *plan* could sue the fiduciary for the plan's losses if the fiduciary improperly approved a benefit claim. Thus, the incentives for a fiduciary would be at least subtly tilted toward denying rather than approving a claim, as only the latter creates the possibility of personal liability.

The interpretative bulletin, however, may dilute participant rights in situations other than the determination of benefit eligibility. If the law clerks during the summer had poorly advised a miner, and the miner's benefit application was rejected as a result, we could not have been sued unless we were fiduciaries. If a human resources professional gives faulty advice to a participant on which the participant relied—for example, overestimating the size of their benefits or telling them that they would not qualify for an early retirement subsidy—the person who gave the advice could not be sued unless he or she were a fiduciary, which she is probably not under the interpretative bulletin. If an appraiser overvalued employer securities, the appraiser could not be sued unless the appraiser was a fiduciary, which was also unlikely under the interpretative bulletin.²⁵

It should be said that in 1975, when the interpretative bulletins were issued, many believed that a participant could bring a civil action against a non-fiduciary who knowingly enabled another's fiduciary breach, even if the person was not himself a fiduciary. In *Mertens v. Hewitt Associates*, however, the Supreme Court suggested in strong dicta that ERISA does not provide jurisdiction for a claim against a non-fiduciary, even one who *knowingly* participated in a fiduciary breach.²⁶ I have found no post-*Mertens* court questioning that suggestion. Thus, professionals rendering professional services are effectively shielded against any ERISA liability. In 1975, when the interpretative bulletin was issued, few people anticipated the result in *Mertens*, which substantially increased the stakes of the definitional issue.

This does not mean that no one is responsible for the mistakes and lapses of non-fiduciaries performing "ministerial services" under an

25. The appraiser might, however, be liable under a state law malpractice action if the plan decides to bring suit, if the plan can prove actionable negligence, and if the state limitations period has not yet run.

26. See 508 U.S. 248, 260–62 (1993).

appropriate administrative framework, or of professionals rendering professional services to the plan. The interpretative bulletin specifically provides that a fiduciary can rely on information, data, statistics, or analysis furnished by non-fiduciaries only if the fiduciary “has exercised prudence in the selection and retention of such persons.”²⁷ The bulletin goes on to provide that the “fiduciary will be deemed to have acted prudently in such selection and retention if, in the exercise of ordinary care in such situation, he has no reason to doubt the competence, integrity or responsibility of such persons.”²⁸ This is not a particularly demanding standard for fiduciary behavior. The Department of Labor has also made clear that a fiduciary’s duty with respect to hiring a service provider, which would include a lawyer, actuary, accountant, or other consultant, is to prudently hire the provider and to periodically monitor its performance and cost.

The interpretive bulletins create what might be termed a liability gap in the regulatory framework governing fiduciaries. If the fiduciary transfers some of its administrative or managerial functions to a service provider or to its employees, the fiduciary’s responsibility is limited to the prudent selection of a service provider or the prudent hiring of employees, and the periodic monitoring of their performance. (And the governing standard, at least according to the bulletin, is a “no-reason-to-doubt-competence” standard.) But between initial selection and periodic monitoring, the fiduciary may rely on the service providers it has retained (and its employees) or the employees it has hired to perform the plan’s administrative functions. The service providers and their employees, however, are not themselves fiduciaries, so they are not responsible under ERISA for their mistakes, even those that result from gross negligence or actual bad faith.²⁹

Under this regulatory scheme, the fiduciary can transform its fiduciary responsibilities to administer and manage the plan into a responsibility to select service providers and to hire employees prudently (perhaps under a “no-reason-to-doubt-competence” standard) and to periodically monitor their performance prudently. But no one picks up liability for the actual administration and management of the plan that the fiduciary is thereby able to shed (unless the fiduciary actually knows or has reason to know that the service providers or employees have acted improperly).

27. 29 C.F.R. § 2509.75-8, FR-11 (2013).

28. *Id.*

29. The plan could, of course, sue the service provider for malpractice or contractual violations.

In an important sense, we can argue that this is a positive result. Most record-keepers are large, experienced agencies that are probably more likely to competently manage a plan than the employer and it is thus probably good that Department of Labor guidance encourages farm out of their administrative responsibilities. But would it be too much to ask of a service provider that it assumes fiduciary status to supervise its own employees when they take over this function from the plan's actual fiduciaries? When the employer hires the service provider, it relieves both itself and the service provider of the fiduciary duty to create the "framework," and provide the supervision, under which the non-fiduciaries' employees will perform their job responsibilities.

II. INVESTMENT ADVICE REGULATIONS

The statutory definition of fiduciary under ERISA includes a person who "renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of [a] plan, or has any authority or responsibility to do so."³⁰ In October of 1975, the Department of Labor promulgated regulations defining the term "investment advice for a fee." The regulations narrowed the statutory language so that a person would be a fiduciary in only two circumstances: first, when a person had discretionary authority or control to purchase or sell securities or other property for a plan;³¹ and second, when a person *renders* investment advice to a plan on a *regular* basis, *pursuant* to an agreement or understanding that the advice will be a *primary* basis for the plan's investment decisions, and that the advice is *individualized* to the particular needs of the plan.³² This latter test is sometimes described as the five-factor test, with a person found to be a fiduciary only if all five parts of the test are met.

The regulations are arguably an example of overreach in two ways. First, the statute uses a common term, "investment advice," whose meaning seems reasonably apparent: to recommend an investment.³³ The dictionary definition of the word "advice" in Webster's Third New International Dictionary is a "recommendation re-

30. ERISA § 3(21)(A)(ii), 29 U.S.C. § 1002(21)(A)(ii) (2012).

31. A person who has such authority would be an investment adviser even without the "investment advice for a fee" component of the statutory definition, since the person would be exercising discretionary control of a plan asset.

32. 29 C.F.R. § 2510.3-21(c)(1)(ii)(B) (2013).

33. 29 C.F.R. § 2510.3-21(c)(1)(i) (2013).

garding a decision or course of conduct,"³⁴ and in The New Oxford American dictionary is "guidance or recommendation concerning prudent future conduct, typically given by someone regarded as knowledgeable or authoritative."³⁵ Similarly, Black's Law Dictionary defines "advice" as a "view; an opinion" and as "an opinion expressed as to the wisdom of future conduct." Moreover, Black's notes that the term "advise" "imports that it is discretionary or optional with the person addressed whether he will act on such advice or not."³⁶

But the drafters of the regulations did not give the statute's language its ordinary or dictionary meaning. Instead, it substituted a technical and idiosyncratic definition that is far narrower than the ordinary meaning of advice. The Department does not explain or justify its approach in the preambles to either the proposed or final regulations.³⁷

I do not mean to argue that regulations should not have attempted to distinguish between the rendering of investment advice and overlapping activities, such as the marketing of securities or the providing of economic projections or investment education. But if this is what the drafters had in mind, the instrument they used—eviscerating the term "investment advice"—was far blunter than it needed to be.

Second, the regulations effectively made an investment adviser's fiduciary status voluntary. An investment adviser can avoid being a fiduciary simply by noting that it does not intend its advice to be a "primary basis" for the plan's investments. The fine print in the following advertisement is an attempt to opt out of fiduciary status.

34. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 32 (3d ed. 1993).

35. NEW OXFORD AMERICAN DICTIONARY 23 (2d ed. 2005).

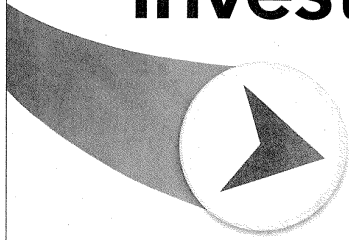
36. BLACK'S LAW DICTIONARY 63 (4th rev. ed. 1968).

37. The Preambles to the proposed and final 1975 regulations include virtually no explanation for the Department's introduction of these extra-statutory conditions on the meaning of investment advice. The few comments noted in the Preamble to the 1975 final regulations asked that the definition of investment advice be narrowed (the Department responded to these comments by adding to the final regulations additional limitations on the meaning of investment advice); asked that the meaning of "fee or other compensation" be clarified (the Department responded to these comments by indicating that it was still studying this issue); asked that the applicability of the regulations to investment companies subject to the Investment Company Act of 1940 be limited (the Department responded to these comments by adding to the final regulations some conditions and limitations related to the purchase and sale of securities by investment companies); and asked for clarification of certain issues involving broker-dealers and investment advice (the Department responded to these comments with a discussion of these issues in the Preamble to the final regulations). The Preamble to the final regulations is silent as to whether it received any comments suggesting that the regulations defined investment advice too narrowly, suggesting that it did not.

This conflicts with the structure of the definition of “fiduciary,” which the Department of Labor and courts have noted is a test of function rather than label.³⁸

38. Emp. Benefits Sec. Admin., U.S. Dep’t of Labor, *Meeting Your Fiduciary Duties 1* (2012), available at <http://www.dol.gov/ebsa/publications/fiduciaryresponsibility.html> (“[F]iduciary status is based on the *functions performed for the plan*, not just a person’s title.”).

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In 1975, however, these questions about the regulations may not have been important as a practical matter. The predominant plan vehicle was the defined benefit plan, which typically had sophisticated investment managers who could competently evaluate investment advice. The arguably pernicious effects of the regulations were probably limited, and the regulations tamped down the anxiety of the investment industry, which feared that ERISA would make them fiduciaries and substantially change legitimate business practices.

There have been significant changes in the retirement plan and investment universe since 1975 that have undermined whatever justification there might have been for the regulations' cramped scope. There has been a seismic shift in the retirement plan world from defined benefit plans—in which investment advice was generally rendered to sophisticated plan fiduciaries—to self-directed defined contribution plans, in which investment advice is issued to individual participants that often have only rudimentary financial literacy. Mutual funds, and sellers and brokers for mutual funds and other investment products, who played a relatively small role in retirement plans when ERISA was enacted, have become dominant players in the new order. The variety and complexity of investment products has also changed markedly over the last three decades, so that even sophisticated plan fiduciaries have difficulty evaluating new investment instruments such as credit swaps.

Thus, what may have been well-intentioned regulations that caused only limited harm when promulgated in 1975 are arguably causing considerable harm in today's new retirement world. In 2011, the Department of Labor proposed new regulations that would have eliminated the five-factor test and expanded the universe of people who become fiduciaries because they render investment advice for a fee. The investment advice industry lobbied hard against the proposed regulations, which they contended had flaws, and in 2012 the Department ultimately withdrew the proposed regulations. However, the Assistant Secretary of Labor has indicated that the Department will propose similar regulations in the future.

CONCLUDING THOUGHTS

In 1975, the year following ERISA's enactment, the Department of Labor issued two interpretative bulletins and a regulation on the definition of "fiduciary."³⁹ This collective guidance was designed to address employer and investment communities' concerns about

39. See *supra* Parts I, II.

who was a fiduciary and what fiduciary status entailed. This Reflection has suggested problems with the early guidance, which, at least in retrospect, might have benefited from a longer gestation period for a variety of reasons.

First, the Department of Labor did not have prior experience implementing or regulating a fiduciary legal regime and, indeed, had little experience with pension or welfare benefit plans beyond the collection of documents under the Pension and Welfare Disclosure Act. As we learned from the ERISA Symposium, the Department was also in the process of assembling a staff and creating an organizational structure.⁴⁰ Arguably, the Department should have developed more expertise in fiduciary regulation before putting regulatory pen to paper.

Second, in 1975, when the Department issued the guidance, there were apparently no participant-oriented advocacy organizations commenting on Department positions, and thus the Department did not benefit from comments from the perspective of consumers and workers and their families.⁴¹

Third, the statute itself was in its infancy, and the regulatory interpretation of the statute's definition of "fiduciary" might have awaited judicial consideration of some important, related issues, such as whether non-fiduciaries would have financial liability under the statute.

Fourth, although few, if any, observers in 1975 anticipated it, the design of employee benefit plans was about to undergo a revolution, particularly in the move from defined benefit retirement plans to self-directed 401(k) savings plans, and from fee-for-services health care plans to health maintenance organizations. The regulations did not anticipate these changes, and today are arguably an anachronistic holdover from a different era.

Unfortunately, the 1975 guidance, after almost forty years, may be too well entrenched to yield to a more mature understanding of the statute's demands on those who administer, manage, and advise employee benefit plans in a world that has since evolved.

40. See generally Panel Discussion, *Making Sausage: The Ninety-Third Congress and ERISA*, in Symposium: *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 291 (2014).

41. The Department of Labor has reported to the author that it cannot locate the comments made on the proposed regulations. The Preamble to the Final Regulations discusses comments, but none of the comments discussed were submitted by consumer or participant advocacy groups. The Pension Rights Center, the principal consumer-oriented group concerned with the rights of participants in pension plans, was not yet in existence and the author spoke with lawyers at AARP and the AFL-CIO and the lawyers doubt that either organization would have submitted comments on the regulation in 1975.