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Erisa Section 404(C) Plan Fees and Expenses: Is there an Affirmative Fiduciary Duty to Disclose?

Yolanda Sayles

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ERISA SECTION 404(C) PLAN FEES AND EXPENSES: IS THERE AN AFFIRMATIVE FIDUCIARY DUTY TO DISCLOSE?

Yolanda Sayles[†]

[T]he continued well-being and security of millions of employees and their dependents are directly affected by [employee benefit] plans¹ It is . . . the policy [of ERISA] to protect the interest of participants in employee benefit plans . . . by requiring the disclosure and reporting to participants . . . of financial . . . information . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries²

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[†] William Mitchell Law College of Law, J.D., May 1999. Ms. Sayles is currently pursuing an advanced law degree in the employee benefits practice area and will receive her L.L.M. in Employee Benefits from The John Marshall Law School, Chicago, IL in June 2000. For his support and encouragement, I am grateful to and would like to thank Mark A. Glavin, my love and the inspiration for this article.

1. Employee Retirement Income Security Act ("ERISA") of 1974 § 2(a), Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified at 29 U.S.C. Ch. 18), 29 U.S.C. § 1001(a) (1994).

2. ERISA § 2(b), 29 U.S.C. § 1001(b).

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I. INTRODUCTION

The Employee Retirement Income Security Act ("ERISA" or the "Act")³ is the foundation of the United States private retirement system. ERISA was enacted on September 2, 1974⁴ "to strengthen and improve the protections and interests of participants and beneficiaries"⁵ of employee benefit plans.⁶

One of several concerns the Act was designed to address is adequate communication to plan participants.⁷ The solution was to impose greater fiduciary responsibility and disclosure obligations on persons controlling employee benefit plans as well as personal liability for the breach of any responsibility, duty, or obligation owed to the plan or plan participants

3. ERISA, 29 U.S.C. Ch. 18.

4. Pub. L. No. 93-406, 88 Stat. 829 (1974).

5. S. Rep. No. 93-127 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4838.

6. ERISA defines an "employee benefit plan" as "an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." ERISA § 3(3), 29 U.S.C. § 1002(3). An "employee welfare benefit plan" is:

[A]ny plan, fund, or program [that is] established or maintained . . . for the purpose of providing . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services [for its participants or their beneficiaries].

ERISA § 3(1), 29 U.S.C. § 1002(1). An "employee pension benefit plan" is:

[A]ny plan, fund, or program [that is] established or maintained by an employer or by an employee organization, or by both, to the extent that . . . such plan, fund, or program (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

ERISA § 3(2), 29 U.S.C. § 1002(2).

7. *See* S. Rep. No. 93-127, *reprinted in* 1974 U.S.C.C.A.N. 4838, 4851. The Committee on Labor and Public Welfare (to whom the initial bill which resulted in ERISA was referred) also found that the problems in the private pension field at the time included malfeasance and maladministration, and a broad spectrum of questions including adequacy of funding of retirement plans, plant shut-downs and plan terminations, transferability of vested pension credits, and the establishment of certain minimum standards. *See id.* The Committee decided that a comprehensive legislative program was necessary "if the private pension promise is to become a reality rather than an illusion." *Id.*

and beneficiaries.⁸

ERISA limits the liability imposed on plan fiduciaries⁹ by providing that plans which establish individual participant accounts and allow a participant or beneficiary to exercise control¹⁰ over the assets in his account exempt a fiduciary from liability for any loss or by reason of any breach resulting from a participant's or beneficiary's exercise of control.¹¹ These plans are referred to as "participant-directed account plans" or "section 404(c) plans"¹² and are commonly found in 401(k) plans.¹³

A. *Significance of Participant-Directed 401(k) Plans*

Prior to the enactment of ERISA, defined benefit plans¹⁴ were the dominant form of retirement plan offered by employers.¹⁵ Since ERISA's enactment, defined benefit plans have grown only slightly while defined

8. See S. Rep. No. 93-127, reprinted in 1974 U.S.C.A.N. 4838, 4863. Prior to the enactment of ERISA, general information regarding plan operations was reported to plan participants and beneficiaries and to the public-at-large. See *id.* Individual participants, however, were not provided with information regarding benefits to which they were entitled, what circumstances would preclude a person from obtaining benefits, procedures to be followed to obtain benefits, or the person(s) to whom the management and investment of plan funds had been entrusted. See *id.*

9. See *infra* Part II. For purposes of this article, the terms "him," "her," or "it" are synonymous when referencing an ERISA fiduciary.

10. See *infra* Part III.B.

11. See ERISA § 404(c), 29 U.S.C. § 1104(c) (Supp. II 1996).

12. See Frederick C. Kneip, *Section 404(c): Basic Principles*, 397 PLI/TAX, May 1997, at 43, 46.

13. 401(k) plans are so named from the section of the Internal Revenue Code that provides for their existence and governs their operation. See 26 U.S.C. § 401(k) (1994). Basically, a 401(k) plan is an arrangement between an employee and his employer which is part of a profit-sharing plan under which the employee may elect to have the employer make pre-tax compensation payments as contributions to a trust under the plan on behalf of the employee, or to the employee directly in taxable compensation. See *id.* 401(k) plans are often also referred to as "cash or deferred arrangements." See *id.* These arrangements are subject to participation and discrimination standards that are beyond the scope and purpose of this article. A 401(k) plan is not required to be structured as an ERISA section 404(c) plan. A plan becomes a section 404(c) plan only by complying with the Department of Labor regulations. See John L. Utz & Peter O. Shinevar, *ERISA Section 404(c): Limits on Fiduciary Responsibility*, 1997 A.B.A. INST. ON ERISA BASICS, Pt. II.

14. A "defined benefit plan" is a pension plan other than an individual account plan. See ERISA § 3(35), 29 U.S.C. § 1002(35) (1994). Generally, a defined benefit plan provides a specific benefit expressed as a monthly amount payable upon retirement and is frequently based on an employee's years of service with his employer and a percentage of his compensation. See John R. Keville, Note, *Retire At Your Own Risk: ERISA's Return On Investment?*, 68 ST. JOHN'S L. REV. 527, 528-29 (1994).

15. See Keville, *supra* note 14, at 529.

contribution plans¹⁶ have increased substantially.¹⁷ Participant-directed 401(k) plans “have become as common in the American workplace as the personal computer and the telephone.”¹⁸

Since 1975, the number of participants in 401(k) plans has increased from twelve million to more than twenty-five million.¹⁹ In 1997, the number of 401(k) plans reached 250,000, up from seventeen thousand in 1984.²⁰ More than one-half of all workers who participate in private pension plans do so through 401(k) plans.²¹ Total 401(k) plan assets have now topped one trillion dollars.²²

Employers find participant-directed 401(k) plans appealing because these plans increase employee involvement in retirement plans, transfer investment responsibility to employees, and transfer part or all of the cost of funding the plan to employees.²³ The practical effect of the shift to participant-directed account plans is that employees are now assuming more (or most) of the responsibility for ensuring the adequacy of their retirement income²⁴ and paying part (or all) of the cost of assuming that responsibility.²⁵

The role of 401(k) plans in our society increases dramatically when one considers the increasing use of such plans in conjunction with the growing concern regarding Social Security.²⁶ A lower level of retirement

16. A “defined contribution plan” (or individual account plan) is a pension plan that provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant’s account plus any income, gains, or forfeitures of accounts of other participants allocated to the participant’s account, less any expenses or losses. See ERISA § 3(34), 29 U.S.C. § 1002(34) (1994).

17. See Keville, *supra* note 14, at 529. Keville argues that the shift from defined benefit plans to defined contribution plans has occurred as a result of changes in the employment landscape, increasing regulation, and differences in the maintenance costs of the plans. See *id.* at 529-30.

18. Mary Rudie Barneby, *What Every Plan Sponsor Should Know About Retirement Plan Fees and Expenses*, 415 PLI/TAX, May 1998, at 91, 93.

19. See Tracey Longo, *Focusing On 401(k) Fees*, FIN. PLAN., Jan. 1998, at 132, 132; see also Rudie Barneby, *supra* note 18, at 93 (“More than 30 million Americans are covered by 401(k) plans and that number seems to grow significantly every year.”).

20. See Longo, *supra* note 19, at 132.

21. See Comment, *DOL Hearing Gathers Arguments For And Against Requiring Additional 401(k) Plan Fee Disclosures*, PENS. PLAN. GUIDE (CCH) ¶26,648 (1998).

22. See Longo, *supra* note 19, at 132.

23. See Frederick Reish & Bruce L. Ashton, *ERISA Section 404(c): Shifting Fiduciary Liability In Participant-Directed Retirement Plans*, PENS. & BEN. WK. (RIA), Jan. 12, 1998, at 9-10.

24. See Kneip, *supra* note 12, at 66.

25. See Keville, *supra* note 14, at 527.

26. See, e.g., *Proposals to Preserve and Protect Social Security—Personal Security Accounts: A Means of Strengthening and Securing Social Security*, Before the Senate Comm. on Fin., 105th Cong. (1998) (statement of Carolyn L. Weaver, Ph.D., Director, Social

income from Social Security and further cuts in Medicare benefits through higher deductibles, additional coinsurance, and eligibility testing are expected.²⁷ The real or imagined fear regarding cuts in Social Security will require larger savings and pension benefits.²⁸ "The best way to make up the difference is with a qualified retirement plan."²⁹ The retirement plans of this and succeeding generations are participant-directed 401(k) plans.³⁰

Whether the reason for the one trillion dollars³¹ of savings in 401(k) plans is to counter-act the expected lower level of retirement income from Social Security³² or other reasons,³³ participants in 401(k) plans are saving at higher rates than the general population.³⁴ The cornerstone of 401(k) plans, however, is not their appeal to employers and employees, it is their manner of operation. The retirement benefits available to a participant in a participant-directed account plan upon retirement depends on (1) how much a participant contributes (plus any contributions made on a participant's behalf by his employer), (2) how well a participant's investments perform (gains and losses), and (3) how much a participant pays in plan fees and expenses.³⁵

B. Plan Fees and Expenses

A previous concern involving 401(k) plans was that participant retirement accounts were being eroded by employers and plan fiduciaries in prohibited transactions.³⁶ Some employers were using plan assets to pay

Security Pension Studies; The American Enterprise Institute, former member, 1994-96; Social Security Advisory Council and U.S. Social Security Advisory Board) available in 1998 WL 18088310; Kathy Bergen, *Personal Savings Stutter While the Economy Hums*, CHI. TRIB., June 5, 1998, at 1, available in 1998 WL 2863616.

27. See Medical Benefit Alternatives, *Social Security Cuts Will Require Larger Savings, Pension Benefits*, RETIREMENT PLAN TRENDS, May 1998, at 1.

28. See *id.*

29. *Id.*

30. See Keville, *supra* note 14, at 527.

31. See Longo, *supra* note 19, at 132.

32. See Medical Benefits Alternatives, *supra* note 27, at 1.

33. A survey, *Americans and Their 401(k)s*, found that employees appreciate the ease of saving through automatic payroll deduction at work and the general population preferred that method of saving for retirement. See Medical Benefits Alternatives, *Survey Finds Higher Savings Rates for Participants In Sec. 401(k) Plans*, RETIREMENT PLAN TRENDS, Oct. 1997, at 3.

34. See *id.*

35. See Keville, *supra* note 14, at 556 n.15.

36. See Terence P. Pare, *Everything You Ever Wanted to Know About 401(k)s But Were Afraid to Ask*, FORTUNE, Dec. 25, 1995, at 2. Generally, a "prohibited transaction" is the sale or exchange, or leasing, of any property between the plan and a party in interest; the lending of money or other extension of credit between the plan and a party in interest; the furnishing of goods, services, or facilities between the plan and a party in interest; the transfer to, or use by or for the benefit of, a

corporate obligations rather than depositing the monies for investment.³⁷ To deter such misuse of plan assets, the Department of Labor (hereinafter “Department” or “DOL”) has increased the requirement for depositing plan assets for investment.³⁸

A new culprit having the potential to effect a substantial negative impact on the accumulation of retirement accounts of 401(k) plan participants has emerged:³⁹ plan fees and expenses.⁴⁰ The types of fees and expenses that can impact participant-directed account plans include: plan design and compliance costs (e.g., attorney’s fees and Internal Revenue Service filing fees), investment fees and expenses (which are deducted from participants’ investment assets before the price of the investment fund is calculated), on-going administrative costs, employee education and communication fees, and compensation for plan consultants and advisors.⁴¹

These fees and expenses can significantly reduce investment returns⁴² and “take major bites out of employee savings.”⁴³ The methods

party in interest, of any assets of the plan; or the acquisition, on behalf of the plan, or any employer security or employer real property in violation of other provisions of ERISA. See ERISA § 406, 29 U.S.C. § 1106 (1994). A “party in interest” is any fiduciary, including an administrator, officer, trustee, or custodian, counsel, or employee of an employee benefit plan; a person providing services to a plan; an employer or employee organization whose employees or members are covered by a plan; an indirect or direct owner of 50% or more of employer stock. See ERISA § 3(14), 29 U.S.C. § 1002(14). ERISA also specifically prohibits a fiduciary from dealing with plan assets in his own interest or for his own account; involving the plan on behalf of a party (or representing a party) whose interests are adverse to the interests of the plan or participants; or receiving any consideration for his own personal account from any plan; dealing with the plan in connection with a transaction involving plan assets. See ERISA § 406, 29 U.S.C. § 1106.

37. See Pare, *supra* note 36, at 2.

38. See Regulation to Definition of “Plan Assets”—Participant Contributions, 61 FED. REG. 41220, 41220 (1996) (codified at 29 C.F.R. pt. 2510). The Department changed the time period for deposit of participant salary deferrals to a plan complying with section 401(k) of the Internal Revenue Code from 90 days from the date on which the amounts are received by the employer or would otherwise be payable to the employee to no later than the 15th business day of the month following the month in which the amounts are received by the employer or would otherwise be payable to the employee. See *id.* The Department treats the salary deferrals as plan assets in an attempt to address the problem of delays in transmitting participant contributions to plans. See *id.*

39. See Longo, *supra* note 19, at 134.

40. See U.S. DEP’T OF LABOR, PENSION AND WELFARE BENEFITS ADMINISTRATION, A LOOK AT 401(K) PLAN FEES, Pt. 1 (1998) (visited Sept. 16, 1999) <<http://www.dol.gov/dol/pwba/public/pubs/401kfe~1.htm>>.

41. See Barneby, *supra* note 18, at 98-102.

42. See Bill Barnhart, *401(k) Fees Can Gnaw On Investor Returns*, CHI. TRIB., July 12, 1998, Business section, Zone C: Investing In Mutual Funds, at 3, available in 1998 WL 2875523.

43. Penelope Wang, *Protect Yourself Against the Great Retirement Rip-Off: Excessive*

which create these effects include reducing the percentage of the yield and direct deductions from account balances.⁴⁴ The problem arises because of the increasing shift of responsibility for payment of the various fees and expenses from employers to employees.⁴⁵ The DOL offers the

401(k) Fees Skim an Estimated \$1.5 Billion a Year From Workers' Retirement Savings. Here is How to Protect Your Nest Egg, MONEY MAG., Apr. 1997, Your Retirement, at 96.

44. See Economic Systems, Inc., *Final Report: Pension and Welfare Benefits Administration Study of 401(k) Plan Fees and Expenses*, § 3.2 (Apr. 13, 1998) (submitted to the U.S. Department of Labor) (visited Sept. 16, 1999) <<http://www.dol.gov/dol/pwba/public/pubs/401kRept.pdf>> (available only on the internet). There are: (1) asset-based fees which are computed as an annual percentage charge on the total assets of the plan; (2) census-based fees which are imposed on a per capita participant basis; and (3) itemized fees which specify a fixed charge for a specific service. See *id.*

45. See *id.* § 3.6. The following table illustrates the growth in plans (percent increases) in which plan expenses are paid by the participants only:

	1991	1993	1995	1997
Audit fees	16%	17%	18%	24%
Internal staff compensation	4%	3%	4%	4%
Employee communication	5%	10%	10%	14%
Investment education:				
Seminar/workshops	—	—	—	9%
Other media	—	—	—	10%
Non-mutual fund investment management fees	44%	50%	56%	56%
Legal/design fees	9%	7%	10%	9%
Recordkeeping fees	22%	27%	29%	35%
Trustee fees	27%	32%	33%	40%
Other administrative fees	14%	17%	18%	24%

(Source: Hewitt Associates, 1997 - 656 plans reporting in 1991; 486 plans reporting in 1993; 429 plans reporting in 1995; and 441 plans in 1997.) See *id.*

The following table, however, illustrates that the employer pays fees and expenses in a great majority of the plans (except investment management fees) surveyed:

	Participant Pays	Employer Pays	Shared Expenses
Audit fees	24%	73%	3%
Internal staff compensation	4%	93%	3%
Employee communication	14%	75%	11%
Investment education:			
Seminar/workshops	9%	83%	8%
Other media	10%	82%	8%
Non-mutual fund investment management fees	56%	39%	5%
Legal/design fees	9%	85%	6%
Recordkeeping fees	35%	58%	7%
Trustee fees	40%	55%	5%
Other administrative fees	24%	61%	15%

following example of the substantial negative impact plan fees and expenses can have on retirement account balances:

Assume that you are an employee with 35 years until retirement and a current 401(k) account balance of \$25,000. If returns on investments in your account over the next 35 years average 7 percent and fees and expenses reduce your average returns by 0.5 percent, your account balance will grow to \$227,000 at retirement, even if there are no further contributions to your account. If fees and expenses are 1.5 percent, however, your account balance will grow to only \$163,000. The 1 percent difference in fees and expenses would reduce your account balance at retirement by 28 percent.⁴⁶

ERISA charges plan fiduciaries with the duty to act solely in the interests of plan participants and beneficiaries.⁴⁷ The question is whether a plan fiduciary who fails to fully and affirmatively disclose all plan fees and expenses—costs that can substantially erode retirement account balances—is acting solely in the interests of plan participants.

This article examines plan fee and expense disclosure under ERISA section 404(c). Whether an ERISA section 404(c) plan fiduciary has an affirmative duty to disclose plan fees and expenses depends on the application of general fiduciary principles derived from the common law of trusts. The basis for holding an ERISA section 404(c) plan fiduciary liable for failure to affirmatively disclose participant-directed account plan fees and expenses to participants and beneficiaries is examined.⁴⁸

(Source: Hewitt Associates, 1997 - 441 plans reporting.) *See id.*

Investment management fees typically range from 75% to 90% of the total fees and expenses charged to a plan. *See id.* The author of this article does not advocate that employee responsibility is undesirable, nor that employers should shift the responsibility (at least in part) to employees. ERISA provides that employers may shift reasonable expenses to plan participants. *See* 29 C.F.R. § 2550.404c-1 (1998). However, the author of this article notes that employers are allowed a deduction for plan expenses under the Internal Revenue Code. *See* 26 U.S.C. § 404 (1994). Moreover, qualified retirement plans traditionally have been utilized by employers as a means of attracting and retaining employees. *See* JAY CONISON, *EMPLOYEE BENEFIT PLANS IN A NUT SHELL* 33-34 (2d ed. West Group, 1998). Since many employers offer 401(k) plans, employer payment of plan fees and expenses may become a focal point in a potential employee's selection of an employer.

46. U.S. DEP'T OF LABOR, *supra* note 40, Pt. 1.

47. *See* ERISA § 404(a), 29 U.S.C. § 1104(a) (1994).

48. Standing to bring suit under ERISA alleging a breach of fiduciary duty for failure to affirmatively disclose fee and expense information is presumed for purposes of this discussion and is beyond the scope of this article.

This article discusses the theories of affirmative fiduciary disclosure derived from the common law of trusts and applies them to ERISA section 404(c) plan fee and expense information. Although there is currently no case law that addresses the plan fee and expense disclosure issue, this article proposes that the fiduciary duty of affirmative disclosure under theories derived from the common law of trusts applies.

First, the article sets forth a general overview of persons⁴⁹ holding fiduciary status⁵⁰ and provides the general requirements of ERISA section 404(c).⁵¹ The article then discusses the theories of affirmative disclosure under the common law of trusts.⁵² Finally, the author ties the common law theories and principles of trusts to the structure of ERISA section 404(c) and the language of the section 404(c) Department of Labor Regulations.⁵³

II. WHO IS AN ERISA PLAN FIDUCIARY?

A fiduciary is a person⁵⁴ acting in a position of trust with regard to an employee pension,⁵⁵ welfare benefit,⁵⁶ or benefit plan recognized under the Act as being subject to the fiduciary responsibilities and liabilities enumerated under ERISA.⁵⁷

A person attains fiduciary status by being designated a plan fiduciary by appointment or in the plan document,⁵⁸ exercising discretionary authority or control over plan management or plan assets,⁵⁹ rendering investment advice regarding plan assets for a fee,⁶⁰ or exercising discretionary authority in plan administration.⁶¹ Fiduciary status may be established intentionally or inadvertently.⁶²

49. See *infra* note 54.

50. See *infra* Part II.

51. See *infra* Part III.

52. See *infra* Part IV.

53. See *infra* Part V.

54. "Person" means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization. See ERISA § 3(9), 29 U.S.C. § 1002(9) (1994). ERISA section 404(c) specifically excludes participants in section 404(c) plans from fiduciary status. See ERISA § 404(c)(1)(A), 29 U.S.C. § 1104(c)(1)(A).

55. See *supra* note 6.

56. See *supra* note 6.

57. See Wesley Kobylak, Annotation, *Who Is "Fiduciary" Within Meaning of § 3(21) of Employee Retirement Income Security Act of 1974 (29 U.S.C.S. § 1002(21))*, 67 A.L.R. FED 186, 188 (1994).

58. See 29 C.F.R. § 2509.75-5, at FR-3 (1998).

59. See ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) (1994).

60. See *id.*

61. See *id.*

62. See Jay B. Rosen, *Show Me the Money! (Otherwise Known as ERISA, Brokers and Wrap Fee Accounts)*, 999 PLI/CORP, July 1997, at 263, 268.

Under ERISA, a person is a fiduciary only to the extent he performs one of the defined fiduciary responsibilities.⁶³ Consequently, courts have held that a person who performs limited fiduciary duties is not a fiduciary for all purposes.⁶⁴ A functional test is utilized to determine whether a person or entity has or exercises any of the functions described in section 3(21)(A) of ERISA.⁶⁵ In applying this test, courts examine the person's actions and duties, not title or position, to determine fiduciary status.⁶⁶

A person's position is examined to determine whether the person engages in activities that carry fiduciary status.⁶⁷ This analysis applies to members of the board of directors of an employer⁶⁸ as well as to attorneys, accountants, actuaries or consultants who render services to an employee benefit plan.⁶⁹ Certain positions, however, such as plan trustee or plan administrator,⁷⁰ automatically carry fiduciary status.⁷¹

63. *See id.* at 269.

64. *See, e.g.,* Gelardi v. Pertec Computer Corp., 761 F.2d 1323, 1325 (9th Cir. 1985) (concluding that employer that was a fiduciary because it appointed plan administrator is not itself a fiduciary with respect to plan administration).

65. *See* Robert N. Eccles, *Fiduciary Litigation Under ERISA*, 415 PLI/TAX, May 1998, at 9, 14; *see also* Michael J. Dell, *ERISA Litigation Issues*, 560 PLI/LIT., Mar. 1997, at 67, 76 (stating that the courts have developed a flexible test to determine who is a fiduciary).

66. *See, e.g.,* Acosta v. Pacific Enters., 950 F.2d 611, 618 (9th Cir. 1991) (stating that a person's "actions, not the official designation of his role, determine whether he enjoys fiduciary status").

67. *See* 29 C.F.R. § 2509.75-8 at D-3 (1998). For example, the designation "benefit supervisor" may mean a plan employee whose sole function is to calculate the amount of benefits to which each plan participant is entitled and report the amount to the plan administrator who would authorize the payment of benefits to a particular plan participant. *See id.* In this situation, the benefit supervisor does not perform any of the functions described in section 3(21)(A) and is therefore not a plan fiduciary. *See id.* The designation of "benefit supervisor" also may mean a plan employee who has the final authority to authorize or disallow benefit payments. *See id.* Under this scenario, the benefit supervisor would be a fiduciary within the meaning of section 3(21)(A). *See id.*

68. *See* 29 C.F.R. § 2509.75-8, at D-4 (1998). Section 2509.75-8 provides:

A "person" may be a corporation under the definition of person contained in section 3(9) of the Act. While such designation satisfies the requirement of enabling employees or other interested persons to ascertain the person or persons responsible for operating the plan, a plan instrument which designates a corporation as "named fiduciary" should provide for designation by the corporation of specified individuals or other persons to carry out specified fiduciary responsibilities under the plan

Id. § 2509.75-5, at FR-3.

69. *See id.* § 2509.75-5, at D-1.

70. The plan administrator may be the employer that sponsors the plan. *See* Jody L. Mikasen et al., *What Is A Fiduciary*, 60A AM. JUR. 2D *Pensions and Retirement*

Individuals found to be plan fiduciaries have included a plan's insurance broker and a purchaser of a company sponsoring a qualified plan.⁷² A corporate employer has also been held to be a plan fiduciary where it exercised the authority contemplated by section 3(21)(A) of the Act.⁷³

III. ERISA SECTION 404(C)

A. Background

An ERISA fiduciary has the duty to make prudent investment decisions.⁷⁴ One aspect of that duty is to preserve the assets of the plan.⁷⁵ ERISA section 409 generally holds a fiduciary personally liable for breach of a fiduciary duty.⁷⁶ However, section 404(c) of the Act releases a fiduciary from liability for loss resulting from a participant's exercise of control over the assets in the participant's account if the plan meets certain requirements.⁷⁷ Generally, the plan must provide for individual participant accounts⁷⁸ and permit participants to direct the investment of assets in their accounts.⁷⁹

Section 404(c) was enacted in 1974 as part of the original regulatory scheme that became ERISA.⁸⁰ The DOL has adopted regulations that set forth the requirements of section 404(c) in detail, including fiduciary conduct, fiduciary obligations, and disclosure of plan financial information with which a plan must comply in order to be deemed a section

Funds § 569 (1988).

71. See 29 C.F.R. § 2509.75-8, at D-3 (1998).

72. See Kobylak, *supra* note 57, at 191.

73. See *id.* at 192.

74. See ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B) (1994); see also 29 C.F.R. § 2550.404a-1 (1998) (describing the investment duties of a fiduciary).

75. See *Central States, S.E. & S.W. Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 572 (1985) ("One of the fundamental common-law duties of a trustee is to preserve and maintain trust assets . . .").

76. See ERISA § 409, 29 U.S.C. § 1109.

77. See ERISA § 404(c), 29 U.S.C. § 1104(c) (Supp. II 1996).

78. See *supra* note 16. Individual participant accounts are found in an individual account plan or defined contribution plan defined under ERISA section 3(34). See ERISA § 3(34), 29 U.S.C. § 1002(34) (1994). For a detailed discussion, see generally, Daniel E. Feld, Annotation, *What Is "Individual Account Plan" or "Defined Contribution Plan" Under 29 USCS § 1002(34) Which Defines Such Terms for Purposes of Labor Law Provisions of Employee Retirement Income Security Act of 1974*, 51 A.L.R. FED 552 (1981) (analyzing the federal court cases which have discussed what is an "individual account plan" or a "defined contribution plan" under ERISA).

79. See ERISA § 404(c)(1)(B), 29 U.S.C. § 1104(c)(1)(B) (Supp. II 1996); see also 29 C.F.R. § 2550.404c-1 (1998) (describing the kinds of plans that are section 404(c) plans).

80. See *supra* notes 3-6 and accompanying text.

404(c) plan.⁸¹ The final regulations offering guidance on how to limit fiduciary liability under section 404(c) were issued by the Department in October of 1992, almost ten years after section 404(c) plans became private retirement vehicles.⁸²

B. ERISA Section 404(c) and the Department of Labor Regulations

A fiduciary of an ERISA section 404(c) plan is relieved of liability for a participant's or beneficiary's investment decision only if the participant or beneficiary has exercised independent control over the investment of his account.⁸³ To be deemed to exercise independent control, a plan participant or beneficiary must have an opportunity to choose from a broad range of investments and must have sufficient information to make an informed investment decision.⁸⁴

1. A Broad Range of Investment Alternatives

Paragraph (b)(2) of the regulations provides that a participant or beneficiary is afforded an opportunity to exercise control over the assets in her account only if the plan provides participants the opportunity to choose from a broad range of investments.⁸⁵ A plan satisfies this requirement if it provides participants the opportunity to invest in at least three different investment alternatives.⁸⁶ Many 401(k) plans, however, offer more than the three minimum investment options.⁸⁷ "[T]he average number of investment options offered to employees has doubled during the past decade, from less than four (3.5) in 1990 to more than eight (8.2) in 1997."⁸⁸

Each of the three minimum investment options must have materially different risk and return characteristics and contain diversified assets that will enable participants to: (1) affect materially their investment returns and degree of investment risk; (2) construct an investment portfolio with aggregate risk and reward characteristics that are normally appropriate to their individual needs; and (3) reduce investment risk through diversification.⁸⁹ Practitioners in the private retirement plan arena have concluded

81. See 29 C.F.R. § 2550.404c-1 (1998).

82. See *id.*

83. See *id.*

84. See *id.* § 2550.404c-1 (b).

85. See *id.* § 2550.404c-1 (b) (2).

86. See *id.* § 2550.404c-1.

87. See Medical Benefit Alternatives, *401(k) Plans Are Offering More Investment Options to Participants*, RETIREMENT PLAN TRENDS, Mar. 1998, at 3.

88. *Id.*

89. See Kneip, *supra* note 12, at 49; see also Thomas R. Hoecker & Nancy K. Campbell, *Participant Directed Investment Plans—Problems and Solutions*, Q245 ALI-

that a participant-directed investment plan must offer at minimum, a stock fund, a bond fund, and a money market (or similar) fund to meet the "broad range of investment" requirement.⁹⁰

2. *Sufficient Information to Make Informed Investment Decisions*

Paragraph (b)(2) of the regulations also provides that a participant or beneficiary is afforded an opportunity to exercise control over the assets in his account only if he is provided or has the opportunity to obtain sufficient information to make informed decisions regarding investment alternatives available under the plan.⁹¹ The regulations mandate that plan fiduciaries provide certain plan information to all participants⁹² and select plan information either directly or upon request.⁹³

a. *Affirmative Statutory Disclosure*

A plan fiduciary must provide, in relevant part,⁹⁴ participants with:

ABA, June 6, 1996, at 211, 218.

90. See Hoecker & Campbell, *supra* note 89, at 218-19. The regulations allow plans to offer "look through investment vehicles" as a means of fulfilling the diversification requirement of section 404(c). See 29 C.F.R. § 2550.404c-1(b) (1998). A "look-through investment vehicle" is defined in the regulations to include a mutual fund, collective trust fund, pooled separate account, guaranteed investment contract ("GIC"), or bank investment contract ("BIC"). See *id.* § 2550.404c-1(e).

91. See 29 C.F.R. § 2550.404c-1(b)(2) (1998).

92. See *supra* Part III.B.2.a and accompanying notes.

93. See *supra* Part III.B.2.b and accompanying notes.

94. An ERISA section 404(c) plan fiduciary is also required to affirmatively disclose the following information to plan participants in order for the plan to meet the requirements of section 404(c):

- An explanation that the plan is intended to constitute an ERISA section 404(c) plan, and that the plan fiduciaries may be relieved of liability for any losses which are the direct and necessary result of investment instructions given by the participant or beneficiary. See 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(I)(i);
- Identification of any designated investment managers. See *id.* § 2550.404c-1(b)(2)(i)(B)(I)(iii);
- An explanation of how investment instructions are to be provided by participants, including any specified limitation on investment instructions. See *id.* § 2550.404c-1(b)(2)(i)(B)(I)(iv);
- Name, address and telephone number of the plan fiduciary(ies) responsible for providing to plan participants the mandatory disclosure items and the items required to be disclosed upon request, and a description of the information available upon request. See *id.* § 2550.404c-1(b)(2)(i)(B)(I)(vi);
- For plans that offer employer securities as an investment alternative, a description of the plan procedures established to provide for the confidentiality of information relating to participants' interests in employer securities, and the exercise of voting, tender and similar rights. See *id.* § 2550.404c-1(b)(2)(i)(B)(I)(vii);

(1) a description of each investment alternative available under the plan and a general description of the investment objectives and risk and return characteristics of each investment alternative, including the type and diversification of assets comprising the portfolio of each investment alternative;⁹⁵ (2) a description of any transaction fees and expenses imposed upon the participant's account balance in connection with the purchase or sale of interests in each investment alternative;⁹⁶ and (3) immediately following a participant's initial investment in an investment alternative subject to the Securities Act of 1933, a copy of the most recent prospectus provided to the plan.⁹⁷ This requirement is deemed satisfied if the prospectus is provided immediately prior to the participant's initial investment in an investment alternative.⁹⁸

b. *Disclosure Upon Request*⁹⁹

In addition to the items set forth above, upon the request of a participant, a plan fiduciary must provide:¹⁰⁰ (1) a description of the annual

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- Subsequent to an investment, any materials provided to the plan relating to the exercise of voting, tender or similar rights incidental to a participant's ownership interest in the investment and passed through to participants, and a description of or reference to plan provisions relating to the exercise of those rights. *See id.* § 2550.404c-1(b)(2)(i)(B)(I)(ix).

95. *See id.* § 2550.404c-1(b)(2)(i)(B)(I)(ii).

96. *See id.* § 2550.404c-1(b)(2)(i)(B)(I)(v).

97. *See id.* § 2550.404c-1(b)(2)(i)(B)(I)(viii).

98. *See id.*

99. The regulations provide that this information is to be provided to a plan participant "either directly or upon request." *Id.* § 2550.404c-1(b)(2)(i)(B)(2). Available commentary regarding the regulations generally fail to note that a plan fiduciary may consistently and affirmatively provide this information to all plan participants and beneficiaries. *See, e.g.,* Kneip, *supra* note 12, at 63 (stating only that "[u]pon the request of a participant, an identified plan fiduciary (or its designees) must provide" such information); Hoecker & Campbell, *supra* note 89, at 221 (stating only "[i]nformation which is required to be provided on request to participants includes"); Reish & Ashton, *supra* note 23, at 13 ("Participants must be provided certain information on request."). *But see* Utz & Shinevar, *supra* note 13, Pt. II ("The participant or beneficiary must be provided by an identified plan fiduciary (or that fiduciary's designee), either directly or upon request."). Fiduciary disclosure is likely limited to "upon request" only. But one company breaks the mold. *See, e.g.,* Fred Williams, *Company Frank About Plan Fees: Black & Decker Tells All to Workers*, PENS. & INVESTMENTS, Dec. 22, 1997, at 2 (discussing that Black & Decker's \$300 million plan is a model because it has incorporated affirmative fee disclosure into its investment education and participant communication materials by itemizing fees on quarterly participant statements and explaining fees and guiding participants through the entire cost issue in a colorful brochure).

100. An ERISA section 404(c) plan fiduciary must also provide plan participants, either directly or upon request, the following information in order for the plan to meet the requirements of section 404(c) and for the fiduciary to claim the relief afforded by that section:

operating expenses¹⁰¹ of each designated investment alternative which reduce the rate of return to participants, and the aggregate amount of the expenses expressed as a percentage of average net assets of the investment alternative,¹⁰² and (2) prospectuses, financial statements and reports, and any other available materials relating to the investment alternative to the extent such information is provided to the plan.¹⁰³

IV. IS AN ERISA PLAN FIDUCIARY'S FAILURE TO AFFIRMATIVELY DISCLOSE 401(K) PLAN FEES AND EXPENSES A BREACH OF FIDUCIARY DUTY UNDER ERISA?

Fiduciary duties and standards of conduct are set forth generally in section 404 of ERISA.¹⁰⁴ In its most basic terms, section 404 directs ERISA plan fiduciaries "to act solely in the interest of the participants and beneficiaries"¹⁰⁵ and "for the exclusive purpose of: (1) providing benefits to participants and their beneficiaries; and (2) defraying reasonable expenses of administering the plan."¹⁰⁶ Commonly referred to as the exclusive purpose or exclusive benefit rule,¹⁰⁷ this ERISA fiduciary standard is derived from the common law duty of loyalty¹⁰⁸ and is one of the "highest [standards] known to the law."¹⁰⁹ "The duty of loyalty owed by ERISA fiduciaries is broad . . . and includes a duty to disclose material informa-

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- Information concerning the value of shares or units held in the requesting participant's accounts. *See* 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(2)(v);
 - Information concerning the value of an interest or units in an investment alternative, including the past and current investment performance, net of expenses. *See id.* § 2550.404c-1(b)(2)(i)(B)(2)(iv);
 - A list of the assets which constitute plan assets and the value of each such asset. *See id.* § 2550.404c-1(b)(2)(i)(B)(2)(iii);
 - For guaranteed fixed rate investment contracts, the name of the issuer of the contract and its terms and rate of return. *See id.*

101. *See id.* § 2550.404c-1(b)(2)(i)(B)(2)(i). Examples of annual operating expenses include investment management fees, administrative fees, and transaction costs. *See id.*

102. *See id.*

103. *See id.* § 2550.404c-1(b)(2)(i)(B)(2)(ii).

104. *See* ERISA § 404, 29 U.S.C. § 1104 (1994).

105. ERISA § 404(a), 29 U.S.C. § 1104(a).

106. *Id.* Section 403(c)(1) of ERISA also requires that the assets of a plan be held for the exclusive purpose of providing benefits to participants and beneficiaries and defraying reasonable administrative expenses. *See* ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1).

107. *See* Daniel Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105, 1108 (1998).

108. *See* Central States, S.E. & S.W. Areas Pension Fund v. Central Transp., Inc., 472 U.S. 559, 570-71 (1985).

109. *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir.), *cert. denied*, 459 U.S. 1069 (1982).

tion.”¹¹⁰

Courts have traditionally imposed liability on a plan fiduciary under the auspices of the exclusive purpose rule to actions taken by a fiduciary to benefit his own personal interest (whether or not the fiduciary actually benefits)¹¹¹ and to actions taken in favor of the interests of a third party even if a fiduciary’s own personal interest is not directly implicated.¹¹²

Under ERISA federal common law,¹¹³ ERISA fiduciary disclosure obligations are a category of actual or alleged duties¹¹⁴ that have developed recently¹¹⁵ under section 404 of the Act.¹¹⁶

A. *Affirmative Duty to Disclose Truthful Information—The Common Law Duty of Undivided Loyalty*

Several courts have applied the exclusive purpose rule to fiduciary communications and found misleading fiduciary communications to provide the basis for a claim of breach of fiduciary duty under ERISA and the

110. *International Bhd. of Painters v. Duval*, 925 F. Supp. 815, 821 (D.D.C. 1996) (citations omitted).

111. *See, e.g., Wright v. Nimmons*, 641 F. Supp. 1391, 1402 (S.D. Tex. 1986) (recognizing breach of fiduciary duty where fiduciary “consistently treat[ed] the trust assets as if they were his own property”); *Donovan v. Daugherty*, 550 F. Supp. 390, 409-10 (S.D. Ala. 1982) (finding breach of fiduciary duty where fiduciaries illegally made themselves and plan attorney eligible for plan benefits); *Teamsters Local No. 145 v. Kuba*, 631 F. Supp. 1063, 1072 (D. Conn. 1986) (finding fiduciary breach of duty of loyalty where trustees supported plan amendment permitting them to keep trustee positions even if they lost their union offices).

112. *See, e.g., Pension Benefit Guar. Corp. v. Solmsen*, 671 F. Supp. 938, 945-46 (E.D.N.Y. 1987) (finding breach of fiduciary duty where fiduciary utilized employee contributions for corporate purposes); *Marshall v. Cuevas*, 1 Employee Benefit Cas. (BNA) 1580, 1580-81 (D.P.R. 1979) (finding breach of fiduciary duty where fiduciary allowed needless payment to widow by plan).

113. Courts are charged with developing ERISA federal common law from the common law of trusts taking into account “the special nature and purpose of employee benefit plans.” *Jordan v. Federal Express Corp.*, 116 F.3d 1005, 1013 (3d Cir. 1997); *see also Youngberg v. Bekins Co.*, 930 F. Supp. 1396, 1400 (E.D. Cal. 1996) (observing that federal courts have an obligation to develop federal common law rights and obligations under ERISA-regulated plans); *Donovan*, 550 F. Supp. at 403 (stating that the provisions of ERISA are to be interpreted both in the light of the common law of trusts and the special nature and purpose of employee benefit plans to protect the interests of plan participants and beneficiaries); *Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629, 635 (W.D. Wis. 1979) (“[T]he intent of Congress was to federalize the common law of trusts.”).

114. *See Ethan Lipsig et al., Fiduciary Disclosure Obligation, in ERISA FIDUCIARY LAW 1998 SUPPLEMENT 153, 153* (Susan P. Serota ed. 1995).

115. *See id.*

116. This is to be distinguished from ERISA fiduciary disclosure obligations under section 104 of the Act. Under section 104, a plan fiduciary must comply with filing and disclosure requirements in addition to any affirmative disclosure obligations that arise from the general fiduciary principles inherent within section 404(a). *See ERISA* § 104, 29 U.S.C. § 1024 (1994).

common law duty of undivided loyalty. For example, the exclusive purpose rule was found to be a basis for a claim of fiduciary breach in the following cases: *Peoria Union Stock Yards Co. Retirement Plan v. Penn Mutual Life Insurance Co.*,¹¹⁷ *Local Union 2134, UMW v. Powhatan Fuel, Inc.*,¹¹⁸ *Muenchow v. Parker Pen Co.*,¹¹⁹ and *Berlin v. Michigan Bell Telephone Co.*¹²⁰ The courts recognized the following as misleading: (1) representations to plan trustees that interest credits and expense charges assessed to a defined benefit plan were lower than the actual interest credits earned and expenses charged;¹²¹ (2) representations to employees that they were insured under a health plan sponsored by their employer when health insurance coverage did not exist;¹²² (3) communications to employees that a certain number of jobs would be available after plant modernization to employees who terminated their seniority rights and accepted severance benefits subject to ERISA when the number of jobs available was significantly less than that communicated;¹²³ and (4) representations to employees that the company would not provide a second offering of severance plan benefits when the company later made a second offering of severance pay benefits.¹²⁴

Further, the United States Supreme Court's landmark decision in *Varity Corp. v. Howe*¹²⁵ applied the exclusive benefit rule to *employer communications* regarding *nonfiduciary matters*.¹²⁶ The Court found that the duty not to make affirmative material misrepresentations arose in the context of employer communications that were intentionally linked to benefits subject to ERISA.¹²⁷ The Court confirmed that section 404 of the Act

117. 698 F.2d 320, 326-27 (7th Cir. 1983) (recognizing that it is a breach of fiduciary duty to misrepresent deposit fund summaries and to fail to disclose internal account summaries).

118. 828 F.2d 710, 713 (11th Cir. 1987) (observing that misrepresentations to employees as to the existence of insurance coverage is a breach of fiduciary duty).

119. 615 F. Supp. 1405, 1412 (W.D. Wis. 1985) (recognizing a breach of fiduciary duty where the employer misrepresented maximum employment levels to induce employees to accept severance benefits in exchange for termination of their seniority rights).

120. 858 F.2d 1154, 1163-64 (6th Cir. 1988) (finding that liability will lie only if material misrepresentations in violation of ERISA section 404 are proven).

121. See *Peoria Union Stock Yards*, 698 F.2d at 326.

122. See *Powhatan Fuel, Inc.*, 828 F.2d at 713.

123. See *Muenchow*, 615 F. Supp. at 1417.

124. See *Berlin*, 858 F.2d at 1163-64.

125. 516 U.S. 489 (1996).

126. See *id.* at 498-503.

127. See *id.* at 498. Varity Corporation, acting in its corporate (rather than fiduciary) capacity, decided to spin off several of its divisions that were losing money and create a new, separately incorporated subsidiary. See *id.* at 493. The spin-off, in part, was to relieve Varity of its benefit obligations with respect to employees who transferred to the newly created subsidiary. See *id.* The new subsidiary was to have its own benefit programs. See *id.* To induce employees to transfer, Varity held a meeting to reassure employees that their benefits would remain secure fol-

incorporates the common law duty of loyalty and that lying is inconsistent with the duty of loyalty owed by all fiduciaries.¹²⁸

Since *Varity Corp.*, the fiduciary duty to disclose truthful information has been considered in a variety of situations including employer representations regarding the security of plan investments,¹²⁹ health maintenance organization disclosures regarding physician compensation arrangements,¹³⁰ and a plan trustee's failure to disclose a familial relationship with a financial consultant hired to manage the pension plan's assets.¹³¹

1. Substantive Requirements for Claim of Breach of Fiduciary Duty to Disclose Truthful Information

a. Misrepresentations or Misleading Communications

The United States Court of Appeals for the Seventh Circuit, in *Peoria*,¹³² observed that "there is little doubt that . . . misrepresentations and omissions [are] breaches of . . . fiduciary obligations"¹³³ and "[l]ying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA."¹³⁴

Peoria arose out of Penn Mutual's promotion of a group deposit administration annuity¹³⁵ to the trustees of the company's defined benefit

lowering their transfer. *See id.* at 493-94. Based on these representations, about 1,500 employees transferred to the new subsidiary. *See id.* at 494. The new subsidiary went into receivership in its second year of operations and employees lost their benefit coverage. *See id.*

128. *See id.* at 506 (quoting *Peoria Union Stock Yards Co. Retirement Plan v. Penn Mut. Life Ins. Co.*, 698 F.2d 320, 326 (7th Cir. 1983)).

129. *See, e.g., In re Unisys Sav. Plan Litig.*, No. 91-3067, 1997 WL 732473, at *25 (E.D. Pa. Nov. 24, 1997) (finding that participant-plaintiffs had all the information they needed to make informed choices about their investments and that Unisys had no obligation to disclose to the participants that which the participants already knew).

130. *See Shea v. Esensten*, 107 F.3d 625, 629 (8th Cir.) (finding a duty to disclose), *cert. denied*, 118 S. Ct. 297 (1997).

131. *See International Bhd. of Painters v. Duval*, 925 F. Supp. 815, 822 (D.D.C. 1996) (determining that exploiting and concealing such a relationship is inconsistent with a fiduciary's duty of loyalty).

132. 698 F.2d 320 (7th Cir. 1983).

133. *Id.* at 326.

134. *Id.* at 326. However, the *Peoria* court remanded the case for determination whether Penn Mutual was an ERISA fiduciary. *See id.* at 328.

135. *See id.* at 322. A group deposit administration annuity is a type of contract in which an insurance company determines an employer's annual contribution to its retirement plan in order to fund the plan, and the contributions are deposited with the insurance company for investment. *See id.* The insurance company invests the employer contributions as a single account (rather than setting up a separate account for each employee) and the funds in the account are commin-

plan.¹³⁶ The misrepresentations made by Penn Mutual involved the amount of investment income that would be credited to the plan rather than retained by Penn Mutual.¹³⁷ Penn Mutual failed to disclose the actual interest credits earned and expenses charged to the plan because the contract was of a type "in which [the] contractholder does not see actual expenses."¹³⁸

b. Materiality

Adopting the supporting rationale of *Peoria* and the early misrepresentation cases,¹³⁹ the Sixth Circuit, in *Berlin*,¹⁴⁰ extended the fiduciary duty to disclose to include negligent misrepresentations made by plan fiduciaries to plan participants.¹⁴¹ "Put simply, when a plan administrator speaks, it must speak truthfully."¹⁴² However, the court imposed a materiality requirement before a finding of liability will be imposed on a fiduciary for misrepresentations or omissions in violation of ERISA section 404.¹⁴³ A misrepresentation or omission by an ERISA fiduciary is deemed material if there is a substantial likelihood that the communication would mislead a reasonable participant in making an adequately informed decision.¹⁴⁴

2. Application to Plan Fees and Expenses

a. Misrepresentations or Misleading Communications

A fiduciary of a participant-directed account plan must provide participants and beneficiaries with information regarding each investment

gled with the funds of other customers of the insurance company. *See id.*

136. *See id.*

137. *See id.* at 323. Penn Mutual made representations that employer contributions would earn a certain interest and that the group annuity contract would incur only modest expenses. *See id.* at 322. The plan trustees later discovered that interest credits and expense charges assessed to the plan were higher than those represented by Penn Mutual. *See id.* at 323.

138. *Id.*

139. *See, e.g.,* *Local Union 2134, United Mine Workers of America v. Powhatan Fuel, Inc.*, 828 F.2d 710, 713 (11th Cir. 1987) (finding a breach of fiduciary duty if an employer misrepresents the existence of coverage to employees); *Muenchow v. Parker Pen Co.*, 615 F. Supp. 1405, 1417 (W.D. Wis. 1985) (finding employer's misrepresentation regarding severance pay plan to union-member employees a breach of fiduciary duty).

140. 858 F.2d 1154 (6th Cir. 1988).

141. *See id.* at 1163-64.

142. *Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130, 135 (3d Cir. 1993).

143. *See Berlin*, 858 F.2d at 1164 n.7.

144. *See Fischer*, 994 F.2d at 135.

alternative offered under the plan¹⁴⁵ in order to limit its liability under ERISA section 404(c).¹⁴⁶ In complying with the section 404(c) disclosure requirements, a fiduciary is arguably engaging in a fiduciary communication or representation.¹⁴⁷

Similar to the group annuity contract at issue in *Peoria*, participant-directed account plan assets are frequently invested in funds in which fees and actual rates of return are not disclosed to plan participants.¹⁴⁸ For example, participant-directed account plans are subject to investment fees.¹⁴⁹ Investment fees are “[b]y far the largest component of 401(k) plan fees and expenses.”¹⁵⁰ Investment fees are assessed against participant accounts in the form of an indirect charge¹⁵¹—i.e., deducted from an investment’s actual rate of return. Fees assessed in this manner “are not specifically identified on [participant] statements of investments, [and] may not be immediately apparent.”¹⁵² Consequently, only net (after-cost) rates of return are reported to plan participants and beneficiaries.

Disclosure of net rates of return misrepresent actual fund performance. The representation omits fees and expenses assessed against participant accounts. Such disclosures and omissions occur, albeit negligently,¹⁵³ within the auspices of fiduciary compliance with ERISA section 404(c). The plan fiduciary speaks but fails to speak truthfully.¹⁵⁴

145. See *supra* Part III.B and accompanying notes.

146. See ERISA § 404(c), 29 U.S.C. § 1104(c) (Supp. II 1996); see also 29 C.F.R. § 2550.404c-1 (1998).

147. See Barneby, *supra* note 18, at 93-94.

148. See U.S. DEP’T OF LABOR, *supra* note 40, Pt. 2.

149. See *id.* Pt. 2, at 4.

150. *Id.*

151. See *id.*

152. *Id.* Pt. 2, at 5.

153. One of the concerns advanced in the debate over disclosure of 401(k) plan fees and expenses is that plan fiduciaries themselves are unaware of the fees and expenses actually assessed against participant accounts because of the numerous pricing models and lack of disclosure by players in the investment industry. See Economic Systems, Inc., *supra* note 44, §§ 5.2, 5.3.3. However, a plan fiduciary’s ignorance of fees and expenses charged to the plan (regardless of who pays the fees) is arguably a breach of fiduciary duty to act for the exclusive purpose of defraying the reasonable expenses of the plan and solely in the interests of plan participants and beneficiaries. See ERISA § 404(a), 29 U.S.C. § 1104(a) (1994). This is also likely to be a breach of the duty of prudence in selecting investments. See *id.*

154. See *Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130, 135 (3d Cir. 1993) (requiring that “when a plan [fiduciary] speaks, it must speak truthfully”).

b. *Materiality*

Materiality is determined by the effect the statement has upon its listeners.¹⁵⁵ Implicit in the determination of materiality is the idea that ERISA plan fiduciaries need not pass along to participants information of which participants are already aware.¹⁵⁶

In his book, *Bogle on Mutual Funds: New Perspectives for the Intelligent Investor*,¹⁵⁷ John Bogle sets forth the concept of the eternal triangle.¹⁵⁸ Mr. Bogle observes:

[R]isk, return, and cost are the three sides of the eternal triangle of investing. . . . [T]he cost penalty may sharply erode the risk premium to which an investor is entitled. . . . [I]nvesting in a fund . . . bears careful examination. Unless . . . the higher costs . . . are justified by higher expected returns or enhanced value of service, select your investments from among the lower-cost . . . funds.¹⁵⁹

Arguably, participants in participant-directed account plans make investment decisions based on investment information disclosed by the plan fiduciary pursuant to ERISA section 404(c).¹⁶⁰ Investment information disclosed by section 404(c) fiduciaries, while arguendo in compliance with section 404(c), provides plan participants with after-cost investment risk and yield information only, without the cost penalties—cost penalties plan participants are paying.¹⁶¹ The information disclosed neither explains nor otherwise informs plan participants about the various fees and expenses assessed against their accounts, nor does it provide plan participants with a means for determining the fees and expenses or the relative impact of such fees and expenses. Consequently, the effect is that plan participants believe that there are no fees and expenses or that they (plan participants) do not bear the burden of any fees and expenses.¹⁶² Thus, reason-

155. See *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1164 n.7 (6th Cir. 1988).

156. See *In re Unisys Sav. Plan Litig.*, No. 91-3067, 1997 WL 732473, at *27 (E.D. Pa. Nov. 24, 1997).

157. JOHN C. BOGLE, *BOGLE ON MUTUAL FUNDS: NEW PERSPECTIVES FOR THE INTELLIGENT INVESTOR* (1994).

158. See *id.* at 303.

159. *Id.* at 303-04.

160. But see *Unisys*, 1997 WL 732473, at *27. Plan participants admitted that they did not read the materials Unisys provided to inform themselves when making their investment decisions and they would not transfer their money to other investments regardless of what Unisys said. See *id.* at *28.

161. See U.S. DEP'T OF LABOR, *supra* note 40, Pt. 2.

162. Arguably, the Department of Labor agrees to a degree by releasing its

able participants are being misled in making retirement investment decisions.

Plan participants (1) should be able to engage in the “careful examination” advanced by John Bogle,¹⁶³ and select investments from among lower-cost funds unless the higher expected returns or enhanced value of service warrant otherwise,¹⁶⁴ or (2) should be enabled to affect materially their investment returns and degree of investment risk; construct an investment portfolio with aggregate risk and reward characteristics that are normally appropriate to their individual needs; and reduce investment risk through diversification.¹⁶⁵ Plan participants require information regarding all fees and expenses assessed against their accounts and the impact such fees and expenses have on their accounts. According to the available literature, there generally is not affirmative disclosure of necessary plan fee and expense information.¹⁶⁶

Section (b)(2) of the regulations requires a plan fiduciary to provide upon request: (1) a description of the annual operating expenses which reduce the rate of return, including investment fees, administrative fees, and transaction costs; (2) the aggregate amount of expenses expressed as a percentage of average net assets of investment alternatives; and (3) prospectus, financial statements and reports, and any other available materials relating to an investment alternative to the extent such information is provided to the plan.¹⁶⁷ However, it can be contended that a participant lacks the knowledge to request fee and expense information when fiduciary communications (by omission) mislead a participant about the fee and expense aspect of his account. Affirmative disclosure of *after-cost (net)* rates of return preclude participant acquisition of the knowledge necessary to make an adequately informed (or any) request for detailed fee and expense information. “[T]he same ignorance that precipitates the need for answers often limits the ability to ask precisely the right questions.”¹⁶⁸

educational brochure in order to notify plan participants about fees and expenses and encourage them to ask their plan fiduciaries about the fees assessed against their plans. *See id.*

163. *See* BOGLE, *supra* note 157, at 302-06.

164. *See id.* at 304.

165. *See* Kneip, *supra* note 12, at 49.

166. *See, e.g.,* Longo, *supra* note 19, at 132-33 (discussing reasons why fees are not being disclosed); Wang, *supra* note 43, at 96 (stating that most plans do not regularly disclose the costs even when the fees seriously erode investor returns). *But see* Williams, *Company Frank About Plan Fees: Black & Decker Tells All To Workers*, Pens. & Investments, Dec. 22, 1997, at 2, 42 (discussing that Black & Decker’s \$300 million plan is a model because it has incorporated affirmative fee disclosure into its investment education and participant communication materials by itemizing fees on quarterly participant statements and explaining fees and guiding participants through the entire cost issue in a colorful brochure).

167. *See* 29 C.F.R. § 2550.404c-1(b)(i)(2)(B)(2) (1998).

168. *Eddy v. Colonial Life Ins. Co.*, 919 F.2d 747, 751 (D.C. Cir. 1990).

Alternatively, the fee and expense information that must be disseminated upon request does not communicate the impact of fees necessary for individual participants to make adequately informed decisions appropriate to their individual needs.¹⁶⁹ In its study on plan fees and expenses, the Department found that eighty-five percent of participants that responded to a survey regarding optional features in their plans prefer greater investment returns over more services from their plans.¹⁷⁰ Because only net rates of return are being disclosed to participants¹⁷¹ (thereby omitting the fees assessed for the various features and services offered), participants are precluded from making adequately informed decisions regarding greater investment returns as opposed to optional features or services that can increase the fees attributed to a particular investment fund.

In sum, current section 404(c) plan fee and expense disclosure practices¹⁷² are likely a breach of the affirmative duty to disclose truthful information to plan participants and beneficiaries under the common law duty of undivided loyalty. Arguably, most current disclosure practices involve misrepresentations or misleading communications regarding plan fees and expenses that are material to participant investment decision-making.

B. *Affirmative Duty to Disclose When the Plan Fiduciary Knows that Silence Might be Harmful*

Several circuit courts have held that ERISA may impose an affirmative fiduciary duty to disclose under certain circumstances.¹⁷³ One cir-

169. See Kneip, *supra* note 12, at 49. Kneip notes that the investment options offered under a participant-directed plan must be such that participants can construct an investment portfolio appropriate to their individual needs. See *id.* John Bogle recommends selecting investments from among lower-cost funds unless higher-cost funds are justified by higher expected rates of return or enhanced value of service. See BOGLE, *supra* note 157, at 303-04. Plan participants are not equipped with the ability to adequately select the funds that meet their individual preferences for investment growth, specialty services, or economy with regard to the fees and expenses they are willing to pay. See Eddy, 919 F.2d at 751.

170. See Economic Systems, Inc., *supra* note 44, § 3.7.

171. See U.S. DEP'T OF LABOR, *supra* note 40, Pt. 2; see also *supra* text accompanying notes 148-152.

172. That is, net (after-cost) rates of return on statements of investment. See U.S. DEP'T OF LABOR, *supra* note 40, Pt. 2.

173. See, e.g., Eddy, 919 F.2d 747, 751-52 (holding that a fiduciary has a duty, upon inquiry, to convey to a lay beneficiary correct and complete material information); Bixler v. Central Pa. Teamsters Health & Welfare Fund, 12 F.3d 1292, 1301 (3d Cir. 1993) (holding that a fiduciary has an affirmative disclosure obligation if the fiduciary is on notice that the failure to disclose would harm the participant or beneficiary); Glaziers & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Sec., Inc., 93 F.3d 1171, 1182 (3d Cir. 1996) (concluding that a financial consultant's former firm, if found on remand to be an ERISA fiduciary,

cumstance is when a plan fiduciary knows that silence about plan or benefit information may be harmful to a participant or beneficiary.¹⁷⁴ In *Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund*,¹⁷⁵ a plan beneficiary requested information regarding a death benefit but failed to inquire about continued medical coverage.¹⁷⁶ The court observed that a fiduciary has an affirmative disclosure obligation if the fiduciary is on notice that the failure to disclose would harm a participant or beneficiary.¹⁷⁷

*Eddy v. Colonial Life Insurance Co.*¹⁷⁸ appears to be the first case¹⁷⁹ in which a court recognized that plan fiduciaries may have an affirmative duty to disclose pertinent plan or benefit information *even when the information was not specifically requested* by a plan participant.¹⁸⁰ Plan or benefit information that may need to be disclosed includes new or relevant information about beneficiary status and options or circumstances that threaten interests relevant to the beneficiary relationship.¹⁸¹ The court noted that a fiduciary has a duty not only to inform a beneficiary, but also to advise him.¹⁸² This duty evolved from the common law of trusts “long before the enactment of ERISA.”¹⁸³

had a duty to disclose that the consultant had terminated employment due to integrity issues because the consultant’s clients “needed to know [this information] for [their] protection”); *Jordan v. Federal Express Corp.*, 116 F.3d 1005, 1013 (3d Cir. 1997) (finding that a written disclosure to a participant regarding his disability retirement options could constitute a breach of fiduciary duty if it did not notify the participant of the irrevocability of joint and survivor annuity elections). *But see* *Pocchia v. NYNEX Corp.*, 81 F.3d 275, 278 (2d Cir.), *cert. denied*, 117 S. Ct. 302 (1996) (rejecting the notion that a fiduciary is required to make voluntary disclosures regarding changes to a benefit program absent participant inquiry). *Cf.* *Weiss v. CIGNA Healthcare, Inc.*, 972 F. Supp. 748, 754-55 (S.D.N.Y. 1997) (holding that, absent inquiry or the creation of confusion by the fiduciary, no affirmative obligation exists to disclose an HMO’s physician compensation structure).

174. *See Bixler*, 12 F.3d at 1300.

175. 12 F.3d 1292 (3d Cir. 1993).

176. *See id.* at 1301-02.

177. *See id.* at 1300. Here, the alleged fiduciary was on notice by the beneficiary’s request for information. *See id.* at 1301.

178. 919 F.2d 747 (D.C. Cir. 1990). *Eddy* involved representations made by Colonial Life, as plan fiduciary, to Eddy, a plan participant who had AIDS, regarding Eddy’s ability to continue health coverage upon termination of his employer-provided group health plan. *See id.* at 749. Eddy failed to ask about his “conversion rights”—the right to convert the policy from employment-based coverage to an individual policy. *See id.* Colonial Life did not mention to Eddy that he could convert his employer-provided insurance to an individual policy and remain insured although Colonial Life truthfully told Eddy that he was not eligible for continuation coverage (which is available only where an individual’s coverage terminated but the group policy continued). *See id.*

179. *See Lipsig et al.*, *supra* note 114, at 166.

180. *See Eddy*, 919 F.2d at 750.

181. *See id.*

182. *See id.* at 750-51.

183. *Id.* Comment d to section 173 of the *Restatement (Second) of Trusts* pro-

The common law duty to furnish information to a beneficiary when a beneficiary needs to know the information for its protection has also been established as a fundamental fiduciary duty by the Third Circuit Court of Appeals in *Glaziers & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Securities, Inc.*¹⁸⁴ In *Glaziers & Glassworkers*, various benefit funds of the Union Local No. 252 brought an action against the securities brokerage firm managing the funds' assets for failure to disclose information the firm knew regarding fraudulent activity of one of its employees.¹⁸⁵ Relying on its earlier decision in *Bixler*, the court found that ERISA's duty to inform encompasses not only a negative duty to avoid misinforming, but also an affirmative duty to inform when the trustee knows that silence might be harmful.¹⁸⁶ *Bixler* recognized the disparity of training and knowledge that exists between a lay beneficiary and a trained fiduciary.¹⁸⁷ A fiduciary has a duty to convey complete and accurate material information based upon its advanced knowledge.¹⁸⁸

The Third Circuit affirmed this perspective in *Jordan v. Federal Express Corp.*,¹⁸⁹ concluding that a "specific request for information [by a participant] is not necessarily a prerequisite for finding a fiduciary breach to inform."¹⁹⁰ Rather, a fiduciary's knowledge can invoke a fiduciary's affirmative obligation to disclose¹⁹¹ since "the duty to disclose material information is the core of a fiduciary's responsibility."¹⁹² The information at issue in *Jordan* involved disclosure of an irrevocability aspect of a re-

vides:

Ordinarily the trustee is not under a duty to the beneficiary to furnish information to him in the absence of a request for such information In dealing with the beneficiary on the trustee's own account, however, he is under a duty to communicate to the beneficiary all material facts in connection with the transaction which the trustee knows or should know Even if the trustee is not dealing with the beneficiary on the trustee's own account, he is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person

RESTATEMENT (SECOND) OF TRUSTS § 173, cmt. d (1959).

184. 93 F.3d 1171 (3d Cir. 1996).

185. *See id.* at 1175-76.

186. *See id.* at 1180.

187. *See Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993).

188. *See id.* at 1302-03.

189. 116 F.3d 1005 (3d Cir. 1997).

190. *Id.* at 1016.

191. *See Glaziers & Glassworkers*, 93 F.3d at 1181 (citing *Bixler*, 12 F.3d at 1300).

192. *Bixler*, 12 F.3d at 1300 (quoting *Eddy v. Colonial Life Ins. Co.*, 919 F.2d 747, 750 (D.C. Cir. 1990)).

tirement benefit election and joint annuitant designation.¹⁹³ The court determined that the fiduciary's failure to affirmatively notify the participant of an arguably material fact could be a fiduciary breach even if the disclosure does not violate ERISA's specific disclosure provisions or a term of the plan.¹⁹⁴ According to the court, the relevant inquiry for determining such a breach is whether the administrator failed to inform the participant of a material aspect of his benefits.¹⁹⁵

Similarly, in *Shea v. Esensten*,¹⁹⁶ the Eighth Circuit found that a health maintenance organization acting as an ERISA fiduciary has an affirmative duty to disclose a physician compensation arrangement that offers financial incentives that discourage referrals to specialists.¹⁹⁷ Citing *Bixler*, the court affirmed that an ERISA fiduciary has a duty to speak out if it knows that silence might be harmful¹⁹⁸ especially when the danger to the plan participant's well being was created by the fiduciary itself.¹⁹⁹ This duty turns on the fiduciary's knowledge of any material facts that could adversely affect a plan member's interests.²⁰⁰ The financial incentive at issue in *Shea* was held to be a material piece of information from the participant's point of view.²⁰¹

In sum, the elements of the common law of trust's affirmative duty to disclose when the fiduciary knows that silence might be harmful to participants or beneficiaries include: (1) fiduciary notice or knowledge;²⁰² (2) potential for or existence of harm;²⁰³ (3) the information is a material aspect of benefits under the plan;²⁰⁴ and (4) the information is material

193. See *Jordan*, 116 F.3d at 1007.

194. See *id.* at 1014.

195. See *id.* at 1015.

196. 107 F.3d 625 (8th Cir.), *cert. denied*, 118 S. Ct. 297 (1997).

197. See *id.* at 628-29.

198. See *id.* at 629 (citing *Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993) (holding that a fiduciary has an affirmative disclosure obligation if the fiduciary is on notice that the failure to disclose would harm the participant or beneficiary)).

199. See *Shea*, 107 F.3d at 629.

200. See *id.* at 628. The Eighth Circuit also reiterated that ERISA fiduciaries must discharge their duties with respect to a plan solely in the interest of the plan participants and beneficiaries. See *id.* at 628-29. ERISA fiduciaries must comply with the common law duty of loyalty which includes the obligation to deal fairly and honestly with all plan members. See *id.* (citing *Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996)); accord *Drolet v. Healthsource, Inc.*, 968 F. Supp. 757, 761 (D.N.H. 1997) (citing *Shea*, 107 F.3d at 628 and *Eddy v. Colonial Life Ins. Co.*, 919 F.2d 747, 750 (D.C. Cir. 1990)).

201. See *Shea*, 107 F.3d at 628.

202. See *Bixler*, 12 F.3d at 1300.

203. See *id.*; accord *Glaziers & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Sec., Inc.*, 93 F.3d 1171, 1180 (3d Cir. 1996).

204. See *Jordan v. Federal Express Corp.*, 116 F.3d 1005, 1015-16 (3d Cir. 1997).

from a participant's point of view.²⁰⁵ Other factors include whether the disclosure violates any other specific disclosure provision of ERISA,²⁰⁶ and whether the harm is caused by the plan fiduciary itself.²⁰⁷

1. *Application to 401(k) Plan Fees and Expenses*

a. *The Prudent Man Rule—A Fiduciary Duty of Knowledge*

In addition to the exclusive benefit rule,²⁰⁸ ERISA fiduciaries must comply with section 404(a)(1)(B) of ERISA, commonly referred to as the prudent man or prudent expert rule.²⁰⁹ The prudent man rule requires an ERISA fiduciary to discharge his duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."²¹⁰ The prudent man rule has been characterized in a manner which can be consistently applied in all cases.²¹¹ However, the rule has been mainly utilized in cases regarding plan investment decisions by plan fiduciaries.²¹²

The prudent man rule incorporates a fiduciary duty to make an independent inquiry into the merits of a particular investment decision.²¹³ The DOL regulations identify the following specific factors that a fiduciary should take into consideration when conducting the requisite independent investigation (the list does not purport to be exclusive): (1) portfolio diversification; (2) the liquidity needs of the plan; (3) the projected return of the investment portfolio relative to the funding objectives of the plan; and (4) the opportunity for gain and the risk of loss associated with the investment under consideration.²¹⁴ These factors require a fiduciary to determine whether the investment is reasonably designed to further the

205. See *Shea*, 107 F.3d at 628.

206. See *Jordan*, 116 F.3d at 1010-11.

207. See *Shea*, 107 F.3d at 628-29.

208. See *supra* Part IV.A.

209. See ERISA § 404(a), 29 U.S.C. § 1104(a) (1994); see also Joseph R. Simone, *Statutory Framework, "Language," And Fiduciary Responsibility Provisions of ERISA*, 340 PLI/TAX, July-Aug. 1993, at 499, 522.

210. ERISA § 404(a), 29 U.S.C. § 1104(a).

211. See *Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629, 635 (W.D. Wis. 1979).

212. See *Eccles*, *supra* note 65, at 37 (providing list of cases dealing with plan investment decisions decided through application of the prudent man rule).

213. See *Donovan v. Cunningham*, 716 F.2d 1455, 1467 (5th Cir. 1983) ("Under ERISA, as well as at common law, courts have focused the inquiry under the 'prudent man' rule on a review of the fiduciary's independent investigation of the merits of a particular investment decision, rather than on an evaluation of the merits alone.").

214. See 29 C.F.R. § 2550.404a-1(b)(2) (1998).

purposes of the plan.²¹⁵

Courts have developed other key principles in characterizing the duty of prudence. These principles include: (1) a fiduciary's lack of familiarity with investments is no excuse;²¹⁶ (2) subjective good faith is not a defense;²¹⁷ and (3) the standard is not one of a prudent layperson but one of a prudent fiduciary with experience dealing with similar situations.²¹⁸ Moreover, an ERISA fiduciary has an affirmative obligation to seek independent advice when it lacks the requisite education, experience and skill.²¹⁹ These principles apply to plan administration and plan management alike.²²⁰

i. Fiduciary Knowledge of Plan Fees and Expenses

Although participants in participant-directed account plans select the investment alternative(s) for their retirement monies,²²¹ plan fiduciaries initially select the investment options ultimately available to section 404(c) plan participants.²²² Section 404(c) plan fiduciaries must comply with the prudent man rule when selecting the various investment alternatives to be offered under a participant-directed account plan.²²³ Specifically, "[s]ection 404(c) does not insulate fiduciaries with respect to the selection and monitoring of investment alternatives"²²⁴

The duty of prudence requires an ERISA fiduciary to conduct an independent investigation of the merits of a particular investment.²²⁵ Ar-

215. See Lee H. Robinson, *Investment Management by Fiduciaries, in ERISA FIDUCIARY LAW* 117, 131 (Susan P. Serota ed., 1995 & Supp. 1998). Generally, the purpose of a retirement plan, regardless of the type, is to provide retirement income. See CONISON, *supra* note 45, at 36.

216. See *Marshall v. Glass/Metal Assoc. & Glaziers & Glassworkers Pension Plan*, 507 F. Supp. 378, 384 (D. Haw. 1980) (stating that if fiduciaries commit a pension plan's assets to investments which they do not understand, they will be judged according to the standards of others acting in a similar capacity in such matters).

217. See *Donovan*, 716 F.2d at 1467 (stating that "a pure heart and an empty head are not enough").

218. See *Whitfield v. Cohen*, 682 F. Supp. 188, 194 (S.D.N.Y. 1988).

219. See *Donovan v. Bierwirth*, 680 F.2d 263, 272-74 (2d Cir. 1982).

220. See *Dell*, *supra* note 65, at 97.

221. See *Reish & Ashton*, *supra* note 23, at 10.

222. See *id.*

223. See *Nell Hennessy & Frank Daniele, Participant-Directed Retirement Plans Under Section 404(c)*, in *ERISA FIDUCIARY LAW* 175, 176 (Susan P. Serota ed., 1995 & Supp. 1998).

224. Susan P. Serota, *Overview of ERISA Fiduciary Law*, in *ERISA FIDUCIARY LAW* 9, 12 (Susan P. Serota ed., 1995 & Supp. 1998).

225. See *Conner v. Mid S. Ins. Agency*, 943 F. Supp. 647, 658 (W.D. La. 1995) (holding that the plan fiduciaries failed to make a proper investigation of the merits of offering to plan participants the opportunity to invest in the stock of the closely-held company).

guably, a fiduciary has knowledge of the fees and expenses charged against participant accounts and the effect such fees and expenses have on account balances. Regardless, courts require that plan fiduciaries seek advice if they lack the requisite knowledge.²²⁶

Additionally, the exclusive purpose rule²²⁷ requires fiduciaries to act solely for the purpose of defraying the reasonable expenses of the plan.²²⁸ Arguably, a plan fiduciary apprizes itself of the fees and expenses to be charged to participant accounts in order to determine whether such fees and expenses are reasonable.

b. Harm to Plan Participants

Plan fees substantially threaten retirement account balances.²²⁹ The problem arises from the shift in responsibility (from employer to employees) for the payment of plan fees and expenses.²³⁰ Plan participants are now paying a substantial portion of plan costs in participant-directed account plans.²³¹ Section 404(c) fiduciaries decide the investment options available under a section 404(c) plan²³² and the extent to which plan participants pay plan costs.²³³ Like the danger to health maintenance organization plan participants in *Shea*,²³⁴ the danger to 401(k) plan participants' well being with respect to their retirement income is created by the plan

Additionally, before this article went to press, the DOL released a brochure entitled *U.S. DOL, A Look at 401(k) Plan Fees...for Employers*. See *PWBA Press Release: Labor Secretary Herman Announces New Disclosure Information on 401(k) Fees [07/15/99]* (visited Sept. 21, 1999) <<http://www.dol.gov/dol/opa/public/media/press/pwba/pwb99191.htm>>. The new brochure explicitly informs employers that in offering a participant-directed retirement plan an employer is required to consider the costs of the plan when fulfilling its duty to act prudently and solely in the interest of plan participants upon its selection of investment options and service providers, and its prospective monitoring of both. See *U.S. DOL, A Look at 401(k) Plan Fees...for Employers* (visited Sept. 21, 1999) <<http://www.dol.gov/dol/pwba/public/pubs/401kt799.htm>>. Furthermore, at the DOL's request, the American Bankers Association, the American Council of Life Insurance, and the Investment Company Institute joined together to create a *401(k) Plan Fee Disclosure Form* (available at <www.dol.gov/dol/pwba>; <www.aba.com>; <www.acli.com>; or <www.ici.org>) to assist employers in fulfilling their fiduciary duty to obtain fee information as part of their independent investigation of the merits of an investment. See *PWBA Press Release, supra*.

226. See *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982).

227. See *supra* Part IV.A.

228. See ERISA § 404(a)(1)(A)(ii), 29 U.S.C. § 1104(a)(1)(A)(ii) (1994).

229. See *supra* Part I.B. and accompanying notes.

230. See *id.*

231. See *Economic Systems, Inc.*, *supra* note 44, § 3.6.

232. See *id.* § 3.5.2.

233. See *id.* § 3.6. The trend has been to shift expenses from the employer to the employee. See *id.*

234. See *supra* notes 196-201 and accompanying text.

fiduciary itself.

The effect of plan fees and expenses are exacerbated, in part, by the lack of affirmative disclosure of fee and expense information by plan fiduciaries.²³⁵ Without affirmative disclosure, plan participants²³⁶ lack the awareness necessary to request fee and expense information²³⁶ that can negatively impact their retirement account balances or make decisions with the knowledge necessary to understand and accept the financial consequences²³⁷ of investing in investment options with higher fees and expenses.

c. Information is a Material Aspect of Benefits under the Plan

Like other types of retirement plans, section 404(c) plans are established for the purpose of providing retirement income to plan participants and beneficiaries.²³⁸ One of the key elements of a 401(k) plan is tax-deferred compounding on contributions and earnings.²³⁹ Plan fees and expenses assessed against participant accounts reduce account balances²⁴⁰ and investment earnings.²⁴¹ Fees and expenses vary between the investment alternatives offered and may be imposed on investment transactions.²⁴² Participants can manipulate the fees assessed against their accounts through the selection of investment alternatives (selecting lower-cost versus higher-cost funds) and the frequency of investment transactions.²⁴³ Consequently, fees and expenses are a material aspect of benefits in a participant-directed account plan because fees and expenses are factors,²⁴⁴ which directly effect the account balance available at retirement.

235. See Associated Press, *Feds Offer Free 401(k) Information*, TELEGRAPH HERALD, Aug. 9, 1998, Business, at d3. Other concerns include non-disclosure of fees and expenses to employers and plan sponsors, and excessively high fees being charged to 401(k) plans. See U.S. DEP'T OF LABOR, *U.S. Labor Secretary Holds PWBA Hearings On 401(k) Fees*, 1997 Andrews Pens. Fund Litig. Rep. 8132, Dec. 11, 1997.

236. See *supra* Part III.B.2.b and accompanying notes.

237. See Economic Systems, Inc., *supra* note 44, § 3.7. In its study, the Department of Labor addressed the question of whether plan participants would demand so many optional features in their plans if they knew how much those features cost. See *id.* The study found that 85% of the participants that responded to the survey preferred greater investment returns over more services from their plans. See *id.*

238. See CONISON, *supra* note 45, at 36.

239. See Richard S. Teitelbaum, *How Your 401(k) Can Make You Rich*, FORTUNE, 1995, Investor's Guide, at 8.

240. See Economic Systems, Inc., *supra* note 44, § 3.2.

241. See Barnhart, *supra* note 42, at 3.

242. See Economic Systems, Inc., *supra* note 44, § 3.5.3.

243. See *id.*

244. See *supra* note 35 and accompanying text.

d. *Information is Material from Participants' Point of View*

The Second Circuit Court of Appeals, in *Pocchia v. NYNEX Corp.*,²⁴⁵ opined that "Congress's main purpose in imposing a disclosure requirement on ERISA fiduciaries was to ensure that 'employees [would have] sufficient information and data to enable them to know whether the plan was financially sound and being administered as intended.'"²⁴⁶ The issue before the court was whether an ERISA fiduciary has a duty to disclose pre-adoption deliberations and discussions of proposed plan changes.²⁴⁷ Concluding that Congress' purpose was not frustrated by permitting plan fiduciaries to keep their pre-adoption deliberations and discussions secret,²⁴⁸ the court observed that such a bright-line rule protects the interests of beneficiaries who will receive information at the earliest point at which their rights can possibly be affected.²⁴⁹

In contrast to the plan amendment pre-adoption deliberation information at issue in *Pocchia*, plan fee and expense information is not received by plan participants at the earliest point at which their rights can possibly be affected. Arguably, the rights of participants in participant-directed account plans are affected by plan fees and expenses as each dollar is invested and as each investment transaction occurs. Whether by direct deduction or lower investment returns,²⁵⁰ the eroding effects of fees and expenses compound to deliver a potentially substantial blow to retirement income over time.²⁵¹ Thus, a reasonable participant aware of the substantially negative impact of fees and expenses would likely consider fees and expenses as a factor when selecting investment alternatives under the plan and conducting transactions in his retirement account. Permitting section 404(c) fiduciaries to refrain from affirmative disclosure of plan fees and expenses likely thwarts Congress' main purpose in imposing a disclosure requirement on ERISA fiduciaries: to protect participants in employee benefit plans.²⁵²

Further, failure to affirmatively disclose section 404(c) plan fees and expenses precludes participants from determining whether section 404(c) fiduciaries are administering the plan as intended. For example, a plan fiduciary may select an investment option for the plan that charges exorbitant fees and expenses (because the fiduciary personally likes the fund or a key executive of the employer personally likes the fund). Such an investment selection may be in violation of the exclusive purpose rule to de-

245. 81 F.3d 275 (2d Cir. 1996).

246. *Id.* at 279.

247. *See id.* at 278.

248. *See id.* at 279.

249. *See id.*

250. *See supra* notes 42-44 and accompanying text.

251. *See supra* Part I.B.

252. *See supra* note 2 and accompanying text.

fray the reasonable expenses of the plan²⁵³ and the prudent man rule to act with care and prudence on behalf of plan participants.²⁵⁴ Arguably, participants are unable to “police” plan fiduciaries to enforce fiduciary compliance with the requirements of ERISA section 404 without affirmative disclosure of fee and expense information.

In sum, both the exclusive purpose rule and the prudent man rule require fiduciary knowledge of fees and expenses. Plan fees and expenses deliver a harmful blow to the availability of retirement income of section 404(c) plan participants.²⁵⁵ Adequate knowledge of plan fees and expenses can potentially enable participants to minimize their impact. A reasonable participant would likely consider fees and expenses as a factor in his retirement investment decision-making.²⁵⁶ Arguably, an ERISA section 404(c) plan fiduciary knows that silence about plan fees and expenses might be harmful. Therefore, the common law of trusts’ affirmative duty to disclose when the fiduciary knows that silence might be harmful likely applies to plan fee and expense disclosure.

V. COMMON LAW FIDUCIARY PRINCIPLES APPLIED TO ERISA SECTION 404(C)

Courts that have addressed the issue are split on the application of the affirmative fiduciary disclosure obligations implicit within ERISA section 404(a) to specific statutory disclosure obligations enumerated elsewhere in the Act. Some courts adhere to the principle that specific statutes control over general statutes.²⁵⁷ Under this principle, courts generally have held that it is inappropriate to infer an unlimited disclosure obligation on the basis of general fiduciary provisions that say nothing about disclosure.²⁵⁸

253. See ERISA § 404(a)(1)(A)(ii), 29 U.S.C. § 1104(a)(1)(A)(ii) (1994).

254. See ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B).

255. See *supra* Part I.B and accompanying notes.

256. See *Economic Systems, Inc.*, *supra* note 44, § 3.7; see also *supra* text accompanying note 170; *supra* note 239.

257. See, e.g., *Board of Trustees of the CWA/ITU Negotiated Pension Plan v. Weinstein*, 107 F.3d 139, 147 (2d Cir. 1997) (finding it “inappropriate to infer an unlimited disclosure obligation on the basis of general provisions that say nothing about disclosure”); *Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 661 (4th Cir. 1996) (stating that general duties under ERISA section 404 can be no broader than the specific duty to disclose under section 104(b)(4)), *cert. denied*, 117 S. Ct. 738 (1997); *Anderson v. Resolution Trust Corp.*, 66 F.3d 956, 956 (8th Cir. 1995) (finding that the provisions of an IRS publication trumped ERISA regarding notice requirements); *Weiss v. CIGNA Healthcare, Inc.*, 972 F. Supp. 748, 754 (S.D.N.Y. 1997) (stating that the general language of a statute will not apply to a matter dealt with specifically in another part of the same statute).

258. See *Weinstein*, 107 F.3d at 147; see also *Faircloth*, 91 F.3d at 661; *Weiss*, 972 F. Supp. at 754.

However, the Ninth Circuit, in *Acosta v. Pacific Enterprises*,²⁵⁹ observed that a fiduciary's duties under section 404(a)(1)(A) (exclusive purpose rule) may in some circumstances extend to additional disclosures beyond those specified in a particular section of ERISA where the interests of the beneficiaries so require.²⁶⁰ In *Acosta*, the question before the court was whether a plan trustee has a fiduciary duty under ERISA section 404(a) to provide a list of names, addresses, and shareholdings owned by each plan participant to an individual participant.²⁶¹ Under general common law of trust principles incorporated within section 404(a), the court found that the requested disclosure must be sufficiently related to the provision of benefits or the defrayment of expenses in order to create a fiduciary duty to disclose that reaches beyond disclosure provisions enumerated elsewhere in the Act.²⁶² The court read the common law of trust disclosure duties into ERISA through section 404(a) but only to the extent that disclosures relate to the provision of benefits or the defrayment of expenses.²⁶³ Disclosure of information under common law principles must not contradict or supplant existing disclosure provisions.²⁶⁴

Relying on the *Varity* and *Bixler* decisions, the Third Circuit, in *Jordan*,²⁶⁵ opined that:

[s]atisfaction by an employer as plan administrator of its statutory disclosure obligations under ERISA does not foreclose the possibility that the plan administrator may nonetheless breach its fiduciary duty owed plan participants to communicate candidly, if the plan administrator simultaneously or subsequently makes material misrepresentations to those whom the duty of loyalty and prudence are owed.²⁶⁶

The court concluded that fiduciary duties operate both independently from and in conjunction with ERISA's specifically delineated requirements.²⁶⁷ Arguably, the *Acosta* and *Jordan* decisions create an inter-

259. 950 F.2d 611 (9th Cir. 1991).

260. *See id.* at 618.

261. *See id.* at 614-15. The participant requested the information in order to solicit votes in the parent company's corporate directors election. *See id.* at 615. *Acosta*, like the other plan participants, owned common stock in one of Pacific Enterprises' subsidiaries through the subsidiary's retirement savings plan. *See id.*

262. *See id.* at 618-19.

263. *See id.* at 618.

264. *See id.*

265. 116 F.3d 1005 (3d Cir. 1997).

266. *Id.* at 1012 (quoting *In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 57 F.3d 1255, 1264 (3d Cir. 1995)).

267. *See Jordan*, 116 F.3d at 1012 (stating that the U.S. Supreme Court also made this determination in *Varity Corp. v. Howe*, 516 U.S. 489, 489 (1996)).

play between general fiduciary disclosure principles derived from the common law of trusts and other statutory disclosure obligations under ERISA.

A. *Interests of Participants Require Disclosure*

Current disclosure of after-cost (net) rates of return²⁶⁸ are, arguendo, misleading communications or misrepresentations by ERISA section 404(c) plan fiduciaries. As illustrated above,²⁶⁹ plan fees and expenses charged against participant accounts can have a substantial negative impact on retirement account balances.²⁷⁰ The interest of participants in participant-directed account plans is the accumulation of retirement income.²⁷¹ With retirement income at stake, participant interests require disclosure of plan fee and expense information.

B. *Sufficiently Related to Provision of Benefits or Defrayment of Expenses*

ERISA is concerned mainly with protecting employees' benefit interests and expectations.²⁷² A benefit refers to a participant's or beneficiary's right to receive monies from the plan.²⁷³ Plan information is subject to disclosure if it relates to the provision of benefits or will aid participants and beneficiaries in monitoring the plan's management.²⁷⁴

Fees and expenses reduce the amount of benefits available at retirement.²⁷⁵ Because of this effect, plan fees and expenses directly relate to the provision of benefits in participant-directed account plans.²⁷⁶ Plan fee and expense information is also directly related to defrayment of expenses. Under the exclusive purpose rule, a fiduciary has the duty to act solely in the interest of defraying the reasonable expenses of the plan.²⁷⁷ For participants of section 404(c) plans, the defrayment of expenses issue is arguably related to participants' ability to monitor fiduciary management of a plan. Without full and affirmative disclosure of fee and expense information, plan participants are precluded from determining fiduciary mismanagement. They are not adequately informed about fees and ex-

268. See *supra* Part IV.A and accompanying notes.

269. See *supra* Part I.B.

270. See *id.*

271. See CONISON, *supra* note 45, at 36. To a participant, a plan is a "source of retirement financial security." *Id.*

272. See CONISON, *supra* note 45, at 72.

273. See *Acosta v. Pacific Enters.*, 950 F.2d 611, 619 (9th Cir. 1991); see also *Hughes Salaried Retirees Action Comm. v. Administrator of Hughes Non-Bargaining Retirement Plan*, 72 F.3d 686, 693 (9th Cir. 1995) (quoting *Acosta*, 950 F.2d at 619)).

274. See *Hughes*, 72 F.3d at 694.

275. See *supra* Part I.B.

276. See *id.*

277. See ERISA § 404(a)(1)(A)(ii), 29 U.S.C. § 1104(a)(1)(A)(ii) (1994).

penses or their effects in order to request the appropriate information or determine fiduciary abuse in the selection and management of plan assets and service providers. Arguably, the inability to determine fiduciary mismanagement may preclude claims alleging breach of fiduciary duty under the exclusive purpose rule and deny participants of remedies available under ERISA.²⁷⁸

C. *Disclosure Does Not Contradict or Supplant Existing Disclosure Provisions*

1. *Structure of ERISA Section 404*

ERISA fiduciary duties and standards of conduct are generally set forth in section 404 of the Act.²⁷⁹ Within the overall provision of section 404, section 404(c) carves out an *exemption* from certain fiduciary liability.²⁸⁰ Section 404(c) *does not create an exception* to the standards of conduct and duties imposed on ERISA fiduciaries.²⁸¹ Thus, fiduciary duties explicitly enumerated in sections 404(a)(1)(A) (the exclusive purpose rule) and 404(a)(1)(B) (the prudent man rule) of ERISA, and any implied duties of disclosure derived from the common law of trusts apply to fiduciaries of section 404(c) plans.

2. *Text of Department of Labor Section 404(c) Regulations*

Erosion of retirement account balances by plan fees and expenses in section 404(c) plans did not exist when ERISA was enacted.²⁸² Assessment of fees and expenses against participant accounts (and the extent such fees and expenses are assessed) is a recent practice.²⁸³ Arguably, the fee

278. See generally ERISA § 409, 29 U.S.C. § 1109. Remedies for a breach of fiduciary duty include monetary relief, equitable relief, and removal of the breaching fiduciary. See *id.* Monetary relief may include restitution, disgorgement of profits, and consequential damages. See CONISON, *supra* note 45, at 253. Equitable relief may include injunctions, rescission and constructive trusts. See *id.* Whether punitive damages are available is still an open question. See *id.*

279. See ERISA § 404, 29 U.S.C. § 1104.

280. See ERISA § 404(c), 29 U.S.C. § 1104(c) (Supp. II 1996).

281. See *id.*

282. In 1974, defined benefit plans were the dominant form of pension coverage. See Keville, *supra* note 14, at 529. Internal Revenue Code Section 401(k) (which created 401(k) plans) was enacted in 1978. See Pub. L. No. 95-600, Title I, § 135(a), 92 Stat. 2785. Section 404(c) was enacted as part of the original Congressional schema that became ERISA. See Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified at 29 U.S.C. ch. 18). However, the DOL regulations that set forth the disclosure requirements particular to section 404(c) plans were not adopted until October 1992, almost ten years after ERISA's enactment. See 29 C.F.R. § 2550.404c-1 (1998).

283. See, e.g., *supra* note 45 and accompanying tables.

and expense disclosure at issue here was not deliberately excluded from the congressional schema in order to protect section 404(c) plan fiduciaries from conflicting directives which would affect their disclosure judgments while attempting to limit liability.

The text of the DOL regulations provide a compelling argument for affirmative disclosure of all plan fees and expenses:

[A] participant or beneficiary will not be considered to have sufficient investment information unless . . . [the] participant or beneficiary is provided by an identified plan fiduciary (or a person or persons designated by the plan fiduciary to act on his behalf), *either directly or upon request . . .*²⁸⁴

This language mandates affirmative disclosure when the circumstances warrant disclosure. The declared congressional policy of ERISA requires disclosure and reporting of financial information to participants and beneficiaries in the protection of the their interests through the establishment of standards of conduct, responsibility, and obligation of plan fiduciaries.²⁸⁵ Additionally, Congress expressly intended that the common law of trusts determine the scope of ERISA plan fiduciary powers and duties²⁸⁶—duties that arise from the general fiduciary principles implicit within the fundamental duty of undivided loyalty.²⁸⁷ These duties include an affirmative duty to disclose truthful information²⁸⁸ and an affirmative duty to disclose when the plan fiduciary knows that silence might be harmful.²⁸⁹ Under ERISA federal common law, the United States Supreme Court has read the affirmative duty to disclose material plan or benefit information into section 404 of ERISA.²⁹⁰ Arguably, the text of the section 404(c) regulations binds a section 404(c) fiduciary to affirmatively disclose fee and expense information when either of the common law duties of affirmative disclosure are implicated.

In sum, the threat to interests of participants in participant-directed account plans requires affirmative fee and expense disclosure. Fee and expense information is sufficiently related to both the provision of benefits and the defrayment of expenses to warrant affirmative disclosure to plan participants and beneficiaries. Affirmative disclosure of fees and expenses does not contradict or supplant the existing disclosure provisions

284. 29 C.F.R. § 2550.404c-1(b)(2)(i)(B) (emphasis added).

285. See ERISA § 2(b), 29 U.S.C. § 1001(b) (1994).

286. See *Central States, S.E. & S.W. Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 570 (1985).

287. See *supra* Part IV.A and accompanying notes.

288. See *id.*

289. See *supra* Part IV.B and accompanying notes.

290. See *supra* notes 113-16 and accompanying text.

of ERISA section 404(c). In contrast, the structure of section 404 of the Act and the explicit language of the section 404(c) regulations mandate application of common law of trust principles to fee and expense disclosure. A section 404(c) plan fiduciary must act within the standards of conduct and general fiduciary principles imposed by the common law of trusts implicit within ERISA section 404 even while claiming limited relief from fiduciary liability under section 404(c).

VI. CONCLUSION

ERISA was designed in part to address adequate communication to plan participants.²⁹¹ ERISA imposes standards of conduct, responsibilities, and obligations on plan fiduciaries—those persons²⁹² controlling employee benefit plans.²⁹³ The Act holds fiduciaries personally liable for the breach of *any* responsibility, duty, or obligation owed to the plan or plan participants and beneficiaries.²⁹⁴ Section 404(c) of the Act, however, limits personal liability for section 404(c) plan fiduciaries if certain administrative and disclosure criteria are met.²⁹⁵

Participant-directed account plans are commonly found in Internal Revenue Code section 401(k) plans.²⁹⁶ The number of participants in 401(k) plans has increased dramatically since ERISA's enactment in 1974.²⁹⁷ Total 401(k) plan assets have topped one trillion dollars.²⁹⁸ The significance of these plans is undeniable as this country continues to face cuts in Social Security and Medicare benefits and as employers and employees strive to make up the difference.²⁹⁹

A one percent difference in fees and expenses has the potential to retard retirement account balances by twenty-eight percent,³⁰⁰ which has a substantial negative impact on the accumulation of private retirement benefits.³⁰¹ Implications of fiduciary disclosure obligations and duties are reasonable in light of the effect of fees and expenses.

Courts are charged with the responsibility for defining the scope of a fiduciary's disclosure duties since ERISA does not enumerate or elaborate on that duty in any detail³⁰² and because Congress invoked the common law of trusts to define the general scope of fiduciary responsibility rather

291. See *supra* notes 7-8.

292. See *supra* note 54.

293. See ERISA § 404, 29 U.S.C. § 1104 (1994).

294. See ERISA § 409, 29 U.S.C. § 1109.

295. See ERISA § 404(c), 29 U.S.C. § 1104(c) (Supp. II 1996).

296. See *supra* note 13 and accompanying text.

297. See *supra* notes 19-21.

298. See *supra* note 20 and accompanying text.

299. See *supra* notes 27-30 and accompanying text.

300. See U.S. DEP'T OF LABOR, *supra* note 40, Pt. 2.

301. See *supra* note 46 and accompanying text.

302. See *Pocchia v. Nynex Corp.*, 81 F.3d 275, 278 (2d Cir. 1996).

than explicitly enumerating all of the powers and duties of an ERISA fiduciary.³⁰³ As a result, courts are developing a jurisprudence in fiduciary disclosure obligations.³⁰⁴ This jurisprudence currently includes an affirmative fiduciary duty to disclose truthful information³⁰⁵ and an affirmative fiduciary duty to disclose information when the fiduciary knows that its silence might harm participants and beneficiaries.³⁰⁶ Common law fiduciary principles may compel disclosure that reaches beyond specific statutory disclosure obligations explicitly enumerated elsewhere in the Act.³⁰⁷

Current disclosure of fee and expense information³⁰⁸ is often misleading³⁰⁹ and harmful to participants³¹⁰ in participant-directed account plans. The delegation of responsibility to plan participants to procure retirement income,³¹¹ the potentially substantial negative impact of fees and expenses,³¹² the structure of ERISA section 404 and the role of section 404(c),³¹³ and the explicit language of the Department regulations³¹⁴ warrant application of the evolving jurisprudence of affirmative fiduciary disclosure obligations to plan fee and expense disclosure in ERISA section 404(c) plans.

Moreover, fundamental in the common law of trusts is the principle that courts will give beneficiaries of a trust the remedies necessary for the protection of their interests.³¹⁵ Similarly, Congress intended that courts apply the rule of liberal construction in the interpretation of the various provisions of ERISA in order to protect the interests of participants and their beneficiaries.³¹⁶ Courts must find that an affirmative fiduciary duty

303. See *Central States, S.E. & S.W. Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 570 (1985).

304. See *Jordan v. Federal Express Corp.*, 116 F.3d 1005, 1013 (3d Cir. 1997).

305. See *supra* Part IV.A and accompanying notes.

306. See *supra* Part IV.B and accompanying notes.

307. See *supra* Part V and accompanying notes.

308. See *supra* Part IV.A.

309. See *id.*

310. See *supra* Part IV.B.

311. See Keville, *supra* note 14, at 528-29.

312. See *supra* Part I.B.

313. See *supra* Part V.

314. See *id.*

315. See *Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1299 (3d Cir. 1993).

316. See, e.g., *Donovan v. Daugherty*, 550 F. Supp. 390, 403 (S.D. Ala. 1982) ("ERISA is a comprehensive remedial statute enacted for the purpose of protecting the interests of plan participants and beneficiaries, and preserving the integrity of plan assets."); *Sirkin v. Phillips Colleges, Inc.*, 779 F. Supp. 751, 754 (D.N.J. 1991) (recognizing that courts liberally construe ERISA in favor of protecting employee participants in benefit plans where courts are required to fill in the gaps of the ERISA scheme); *Gilliam v. Edwards*, 492 F. Supp. 1255, 1261 (D.N.J. 1980) ("ERISA is a comprehensive remedial statute primarily designed to protect individual rights [and] should be given a liberal construction to safeguard the inter-

to disclose fee and expense information to participants in section 404(c) plans *does exist* pursuant to the common law of trusts and principles implicit within section 404 of ERISA.³¹⁷ To find otherwise thwarts ERISA's policy to protect the interests of participants in employee benefit plans through disclosure of financial information.³¹⁸

ests of [plan] participants and beneficiaries and to preserve the integrity of [plan] assets.”).

317. Courts must find an affirmative duty to disclose fees and expenses if and when a claim for breach of a fiduciary duty is alleged against a plan fiduciary for: (1) the failure to disclose truthful information, or (2) the failure to affirmatively disclose fees and expense information when the fiduciary has knowledge that fees and expenses cause harm yet remain silent. “High-cost 401(k)s are a lawsuit waiting to happen.” Wang, *supra* note 44, at 96 (quoting “David Wray, president of the Profit-Sharing/401(k) Council of America, a trade group for employers with 401(k)s . . .”).

318. See ERISA § 2(b), 29 U.S.C. § 1001(b) (1994).