A Conversation with a Fiduciary (Part 2)

Matthew D. Hutcheson | 10-04-07

Phone ringing...

Fiduciary: Hello, how may I help you?

Attorney: Mr. Fiduciary?

Fiduciary: Yes?

Attorney: I am calling on behalf of my client, Bob. You spoke with him several months ago about a variety of fiduciary related topics?

Fiduciary: Of course. How is Bob?

Attorney: Very well. I must say, I was surprised by his sudden desire to focus on his fiduciary duties. It was almost like he "got religion" or something. The day after your conversation, Bob asked that I block out a couple of hours so he could tell me about his conversation with you.

Fiduciary: How did it go?

Attorney: It was interesting, although I'm not certain he explained everything to me the same way you did to him. I've been in the ERISA law business for over twenty-five years. Some of what he said was a bit surprising and even a little confusing. I wanted to understand what he was trying to explain. Would you mind taking some time with me to answer some questions?

Fiduciary: Certainly, I'd be glad to.

Attorney: Please bear with me; it's possible I've misunderstood Bob to some extent. He said you told him that a trustee-directed investment strategy was less risky - from a fiduciary liability standpoint - than a participant-directed strategy. He also said you thought 404(c) was a concept that ran counter to protecting participants. Rather, that it was strategy that had nothing to do with providing benefits and only existed to try to protect fiduciaries from liability. Is that what you said?

Fiduciary: Yes, that's what I told Bob; it seems he really took our conversation to heart.

Attorney: Most of my colleagues have long considered a traditional trustee-directed portfolio to be the best approach, but with the advent of participant-directed plans, we were worried about being accused of malpractice if we didn't at least try to help our clients obtain the regulatory protections 404(c) claims to offer.

Fiduciary: How have your clients fared with participant direction, generally?

Attorney: Oh, it's a mixed bag. Some fairly well, some pretty poorly. However, none of my participant-directed plans has done as well as my traditional pension clients' portfolios.

Fiduciary: Does that surprise you?

Attorney: Not really, but I don't think it matters, either.

Fiduciary: Really? Tell me why.

Attorney: Because the difference, for the most part, is due to participant choice. Participants simply don't know enough to make the right decisions no matter how much education they have received. If "education" alone worked, there wouldn't be

any obese people now would there!? We've all been told a thousand times what we should and shouldn't eat.

Fiduciary: ...or drink, smoke, or drive too fast; and we still don't always do what's best for us. But back to the point.participants simply guess about how to invest their accounts.

Attorney: Of course; that's a fact virtually everyone accepts.

Fiduciary: Do you agree that their guesswork investing approach is a primary cause of "sub-possible" returns in participant directed accounts?

Attorney: Yes, that's right.

Fiduciary: Do you see that in all of your plans?

Attorney: Yes, all the time; that's pretty much the norm.

Fiduciary: You don't think there are any fiduciary implications for allowing sub-possible returns to be the norm in participant directed 401(k) plans?

Attorney: No, I don't.

Fiduciary: So, to clarify, you believe that even though an 8% return was available to both plans, (since one of them actually earned that return), there are no fiduciary implications of any kind?

Attorney: Well, not in a participant-directed 404(c) plan, no.

Fiduciary: Okay, then, what if an employer had two plans, a traditional pension and a common 401(k). And what if both plans covered the exact same employees and were managed by the exact same fiduciaries. What then?

Attorney: I don't follow.

Fiduciary: What I'm saying is, what if one of your clients sponsored two plans; a Defined Benefit Plan, and a 401(k), both of which are subject to the protections and fiduciary standards of ERISA, that had substantially different investment results within the trust?

Attorney: Yes...go on.

Fiduciary: Would there be fiduciary implications then?

Attorney: I suppose there could be.

Fiduciary: Such as?

Attorney: Well, let me think...

Fiduciary: To begin, what is the common denominator all ERISA covered retirement plans have?

Attorney: They all have to file a 5500...

Fiduciary: Yes, there's that. But I'm getting at something more meaningful than matters of compliance and reporting.

Attorney: Okay then, how about both of them have to have a named fiduciary?

Fiduciary: Right, and...

Attorney: That fiduciary's sole purpose is to protect and secure retirement income.

Fiduciary: Bingo. So given that fundamental duty, let's say your client's pension plan portfolio earned 8%, and the 401(k), as a whole, earned 4% during the same year. What then?

Attorney: Hmm...well, that's a fairly common scenario, and I think that is where 404 (c) would kick in. It would be unfortunate that future benefits from the participant directed 401(k) plan would be diminished, but that wouldn't be the fiduciary's fault. The fiduciary would not be responsible for those lost benefits.

Fiduciary: I know it may seem like we're off on a tangent.

Attorney: Actually, this is why I called. It's all related to what Bob wants to accomplish in his Plan, so this is great; please go on.

Fiduciary: Ok, good. Now, please bear with me for a moment. What if all of the requirements for 404(c) protection are satisfied? Can a fiduciary simply ignore the 4% gap between the 8% return in the pension and the 4% return in the 401(k)? Is it as easy as that?

Attorney: Yes, I think it is.

Fiduciary: What about the Department of Labor's amicus curiae brief in Tittle v. Enron?

Attorney: I'm familiar with it and studied it a few years ago, but please remind me what you're referring to.

Fiduciary: Does the amicus brief speak to that gap between Plan returns?

Attorney: I don't think so; not specifically, does it?

Fiduciary: When constructing a portfolio, we are required - as a matter of fiduciary responsibility - to know and understand the risks associated with investing plan assets.

Attorney: Of course. That goes without saying.

Fiduciary: What types of risks are appropriate for a portfolio subject to ERISA's fiduciary standards of care?

Attorney: Well, I'm not an investment expert.

Fiduciary: But your clients don't know that. How do you advise them in that regard, generally?

Attorney: I don't advise my clients in that regard. I leave that up to their investment advisor.

Fiduciary: Of course, and you should for specific, practical application. Conceptually however, you certainly know and understand ERISA well enough to understand what is expected of a fiduciary with respect to identifying and managing risks to plan assets, right?

Attorney: Sure.

Fiduciary: For the sake of discussion, from a fiduciary prudence point of view, what are acceptable types of risk to plan assets?

Attorney: Let's see.there's general market risk. There's inflation risk, credit risk, and liquidity risk. I suppose there are others.

Fiduciary: Right. Those are the major ones. However, there is one particular risk that is easily predictable, consistent in its effect on portfolios, and almost universally ignored by fiduciaries, despite how it has eroded the future benefits of millions of American workers. According to Jeremy Siegel, Ph.D., this particular risk erodes the average investor's possible returns by 5% each and every year, or more.

Attorney: That sounds like a grave risk!

Fiduciary: That is exactly my point. The Department of Labor's amicus brief states: *"ERISA's fiduciary obligations do not permit fiduciaries to ignore grave risks to plan assets, stand idly by while participants' retirement security is destroyed, and then*

blithely assert that they had no responsibility for the resulting harm."

Attorney: Well, what is it? The grave risk, I mean?

Fiduciary: The grave "risk" to plan assets that participants are almost universally unaware, in many instances *is the participant themselves*!

Attorney: *What!?*

Fiduciary: There are many risks participants bear in self directed accounts, including not understanding their ERISA rights, not understanding risk/reward (portfolio dynamics), not understanding how fees impact long-term returns, not understanding time horizons, rate of return objectives, the specific objectives of the available individual investment choices, and how those choices can be utilized to construct a meaningful portfolio.

Attorney: I agree. Most participants are pretty unsophisticated.

Fiduciary: I'm not trying to pick on them by any means, but participants make decisions that subject their portfolios to various risks that may undermine their long term financial security. A low-cost, prudent portfolio is always within their reach, they just don't understand what to do. It is their right to have that low-cost prudent portfolio, yet millions of participants make decisions in ignorance. Thus, fiduciaries permit participants to take market risks, inflation risks, timing risks, asset allocation risks, and unnecessary risks borne of ignorance. Passing off "differences in portfolio returns" as caused by "participant choice" is not consistent with the Department of Labor's brief in the Enron case.

Attorney: Hmm...

Fiduciary: Are you still with me?

Attorney: Well, yes. But that's a different point of view than I have heard before.

Fiduciary: Do you disagree?

Attorney: I'm not sure; but I see your point. Both plans are subject to the same fiduciary standards of care and are managed by the same fiduciaries, yet one is subject to risks the other is not, unnecessary risks at that. That really poses an interesting conundrum under ERISA. Let me ruminate on it. If it is true, the implications are pretty far-reaching. That's not necessarily a bad thing. However, I don't think my clients would ever buy it.

Fiduciary: Which ones?

Attorney: Which ones? I don't follow...

Fiduciary: Which of your clients wouldn't buy it? Plan sponsors? Or financial service providers?

Attorney: *(Silence.)*

Fiduciary: Many attorneys tell me that they feel uneasy because they offer guidance to service providers that may conflict with the interests of plan sponsors. Although there is no technical conflict of interest, those in the financial services industry often are at cross-purposes with plan sponsors.

Attorney: Well, we offer advice to landlords as well as tenants. It's just the nature of our business.

Fiduciary: I understand. The more important point is that nobody is really looking out for the participants. They have the most to lose, yet don't really have an advocate. They trust their employer and a brand-name plan provider to do what is in the participant's best interests. But then the entire burden for investment decisions is placed squarely back on the participant's shoulders.

Attorney: Yes, I know what you are talking about. It's an unfortunate reality of our retirement system.

Fiduciary: You probably got more than you bargained for today.

Attorney: No, actually I've really enjoyed our call. Do you have a few more minutes?

Fiduciary: Of course.

Attorney: Since your conversation with Bob - and by the way, I think I understand where he is coming from now - there have been some changes in the industry. In particular, Congressman George Miller from California has issued legislation requiring full disclosure of all fees and charges assessed to participant 401(k) accounts. It is HR 3185, the 401(k) Fair Disclosure for Retirement Security Act of 2007.

Fiduciary: Yes, I am familiar with the Bill. What do you think of it?

Attorney: I don't like it, and think it is wrong for our industry. I think it will do harm to plan participants, prevent new plans from being adopted, and even encourage some plan sponsors to terminate their plans.

Fiduciary: Have you had a chance to read the actual draft Bill?

Attorney: No, but I've read the analysis from three industry advocacy groups, all who agree it's no good. Their review and analysis made me cringe. How can our legislators wield such a heavy regulatory hand? Don't they know the kind of damage that kind of regulation can do to a fragile retirement plan industry?

Fiduciary: So, do you feel that fee disclosure and transparency is not something that is important to our industry, plan sponsors, and especially plan participants?

Attorney: No one disputes the need for better disclosure. What I object to is an overly burdensome disclosure required by this Bill. It seems like it will ultimately cost plan participants a fortune to pay for it.

Fiduciary: If I understand your concern, you are saying that you want a different type of disclosure, or a different level of disclosure, or maybe in a particular disclosure format you feel the Bill doesn't lend itself to?

Attorney: Exactly, all of the above.

Fiduciary: Okay...

Attorney: Think about what would happen if that Bill became Law. Participants would stop contributing by the thousands because they would be drowning in paper and information they can't comprehend. It would be a disaster.

Fiduciary: What do other attorneys you know think about it?

Attorney: Some like it, others are concerned, just like me. What is your view?

Fiduciary: I feel it is exactly what is needed, and is long overdue.

Attorney: But how can you justify that position? It will wreck our entire 401(k) system. It's just too complex, cumbersome, and will prove to be extremely costly.

Fiduciary: But you are just repeating what those three industry groups stated in their reviews of the Bill, right?

Attorney: Well, yes, that's true.

Fiduciary: Do you really know what they are saying to be true? I mean absolutely true, or could it just be a smokescreen?

Attorney: I suppose it could be a smokescreen. After all, I realize most of the funding for those groups comes from the financial services industry.

Fiduciary: It's reasonable to expect the Bill be opposed by those who don't want full disclosure. If they wanted full disclosure, they'd be doing more than just complaining. They would have pressed the issue years ago. Now, that it's crunch time, they are

reacting, because they have been acted upon.

Attorney: That still doesn't make this particular Bill the right answer to the problem. It's still too complex and burdensome in my view.

Fiduciary: I disagree.

Attorney: Somehow, I figured as much.

Fiduciary: It's true the Bill will have greater impact on some plan providers than others. And some will barely be affected at all.

Attorney: But there's so much information to disclose. I simply can't see a participant getting any useful information from it. They'll be so overloaded with information, they'll simply ignore it. Some of them may even stop contributing to their plans.

Fiduciary: *(Chuckles.)*

Attorney: Are you laughing?

Fiduciary: Sorry; I've heard that argument and it makes me laugh.

Attorney: Why?

Fiduciary: Well, there's an important point you have failed to mention.

Attorney: Which is?

Fiduciary: What is the actual form the disclosure will be in? In other words, when all of the information in the Bill is ultimately disclosed to participants, what will it look like?

Attorney: Uh, I'm not sure.

Fiduciary: Didn't the industry, in its objections, describe in detail how the data would be disclosed to a participant?

Attorney: Well, no...I don't believe they did.

Fiduciary: So you really don't know what that format will be, do you?

Attorney: I suppose you are right; I don't know. I don't think anyone does.

Fiduciary: Thus, how can you say the Bill will overwhelm participants?

Attorney: Well...that's the assumption I am making from what I have read...

Fiduciary: Think of the Bill as the schematic for a common electronic device, such as a cell phone. Most folks won't be able to make heads or tails of that sort of diagram. However, when it is implemented, the consumer sees a simple interface and knows exactly what to do with it. The "user interface" for the Bill could be a simple table that has all of the required participant information and fills less than half a page.

Attorney: Sure, I suppose that's possible, but that's not the impression I get.

Fiduciary: Get from whom?

Attorney: Okay, okay. Yes, I see your point.

Fiduciary: I've read the disclosure Bill several times, and hope it becomes law. As you can imagine, I take my fiduciary assignments seriously; it will help me protect thousands of participants who are counting on me to be aware of fees being charged to their accounts. The 401(k) Fair Disclosure for Retirement Security Act of 2007 is sound legislation and I am confident the Bill will "right the ship" in the 401(k) industry.

Attorney: Well, you are not the first person to tell me that. However, I still don't like it. There are too many unresolved concerns in my mind.

Fiduciary: For instance? Share with me the first concern you have.

Attorney: My primary concern, as I have previously mentioned, is that participants will lose confidence in the system and stop contributing.

Fiduciary: If that were true, I might ask: Did you stop eating when nutritional information was added to the labels of food products? *(Laughter.)*

Attorney: Excellent point. But nutritional information on food products is so clear, so simple for anyone to understand.

Fiduciary: What makes you think fee disclosure won't be presented in a similar manner?

Attorney: Because industry associations and lobby groups say the disclosure is going to be some horrible thing, with multiple pages of disclosure items that will paralyze virtually every participant in the United States with fear.

Fiduciary: But let's think about why they want you to have that impression: That is their way of getting what they want. In other words, instead of giving detailed descriptions to folks like you and me of what they propose, they use fear, uncertainty, and doubt. If they really wanted to contribute something useful to the dialog, we would have heard it by now.

Attorney: Yes, I suppose you're right. It sounds a bit like political trickery to me.

Fiduciary: If we couldn't see through it, then political trickery would be apropos. However, many in my profession feel that the industry is reacting to something they have feared for thirty years. To use the "welfare of participants" as political cover is a bit hard to stomach.

Attorney: Well, despite my personal concerns, I admit that my clients' general reactions to the Bill have been universally positive-the Plan sponsors, that is. . .

Fiduciary: Did any of your Plan sponsor clients express concern that trust levels would go down if plan expense information were more transparent?

Attorney: *(Laughing.)* No, that idea is ludicrous. Everyone knows that open, honest, clear, and transparent information *builds* trust; it doesn't diminish it. It's almost embarrassing to claim otherwise.

Fiduciary: Have any of your Plan sponsor clients said that employees will discontinue contributions if they receive more information about the cost of their plan?

Attorney: No.

Fiduciary: Have you heard any concerns from participants?

Attorney: No, participants don't usually talk to me, of course, except in small plans. But my general sense is that they're enthusiastic about full disclosure.

Fiduciary: How do you reconcile that with your prior concern that it will cost them a fortune? If full disclosure is going to cost them a fortune, why would they want it?

Attorney: That's my point-they shouldn't! They just don't understand their costs well enough to know that this is just going to make things worse.

Fiduciary: It's kind of ironic to use the fact that they don't know their costs as an argument for not disclosing their full costs, but let's set that aside. Do you know how much will it cost to comply with the requirements of the Bill should it become law?

Attorney: Who knows? I shudder to think what new regulations will set in motion and what it may add to costs.

Fiduciary: Then you will be interested to hear that I spoke with a regional record keeper last week. They have performed a cost analysis on what it will take to capture data feeds from fund institutions, custodians, etc.-data which those institutions already

have in their possession. Since it is relevant to the revenues and profits of plan providers, we can be certain they count every penny and track its source.

Attorney: Of course. All of us do that. It's Accounting 101.

Fiduciary: The record keeper says it will take about $15,000 in programming costs to comply with the Bill.

Attorney: *(Thinking.)*

Fiduciary: If a record keeper has 1,000 clients, that's $15 per client. If their average plan has about 60 participants, compliance with the core part of the Bill will therefore require a one-time cost of about 25 cents per participant to deliver full and honorable disclosure to their clients.

Attorney: *(Silence.)*

Fiduciary: You still there?

Attorney: Yes, just thinking...

Fiduciary: Would you pay 25 cents to know exactly what is going on in your 401(k)?

Attorney: Of course! I'm paying 100 times that now for it to be hidden from me! As I think about it, I suppose if some firms and/or service providers choose to gross up their fees, ostensibly to cover the costs of such disclosure, such gross-ups would be included in the total costs reported. Is my thinking correct?

Fiduciary: Exactly. Those disclosed costs will be taken to market and compared to other providers. Unimpeded competition will result in substantial improvements in retirement income security. So, with clear disclosure, do you think the "it will cost too much" argument is still valid?

Attorney: No, clearly that's nonsense. I should have known better. If my 13 year-old can get a monthly "down to the second" list of every cell phone call and text message sent to her soccer teammates, surely Wall Street can figure out how to deliver an annual statement to plan participants.

Fiduciary: The Bill protects middle class workers. It empowers them-and fiduciaries responsible for their retirement income security-with all the information necessary to make prudent decisions regarding their 401(k) savings. That's what we all want and deserve.

Attorney: Yes, I appreciate that very much. But what if participants receive too much information and stop contributing to their plans?

Fiduciary: What that argument is really saying is that if participants receive too much information about their current 401(k), they'll stop contributing to it and demand a better one. They'll keep contributing; it will just be into a plan that is more honest and open and delivers better results. In other words, they will still eat, but they may read the nutritional label to decide what they want.

Attorney: That's a good point. I know I make better decisions when I have all the information to make an informed choice-whether it's for a cell phone plan, a new car, or anything else. Now I'm wondering why I ever bought the idea that 401(k) plans should be any different!

Fiduciary: Exactly. What's more, if fully-informed plan sponsors and/or participants want to continue with high cost investment and administration products, then that is their prerogative. At least they will do so with full knowledge. Full disclosure creates fair competition and allows the free market to function. However, a free market can only work if buyers and sellers are in possession of all relevant information. The Bill requires honest, transparent business practices in the retirement plan and employee benefit industries.

Attorney: Still, I wonder why the Bill is necessary. Why can't we just let the market's "invisible hand" work? Fiduciaries can make up their own minds what the plan will or will not pay.

Fiduciary: I think the metaphor of the "invisible hand" is sometimes used out of context. The point is that sound economic decisions that benefit individuals and society must be based on full and equal access to all relevant information.

Attorney: So you are saying the central problem we have in the current state of the retirement system - and no one disputes that there are problems - is that all of the relevant information is not being shared with buyers?

Fiduciary: Precisely. Relevant information is being withheld under the false notion that it is in the fiduciary's and the participants' best interest not to have access to it-presumably because they would be confused or overwhelmed.

Attorney: That raises some other questions that go back to the validity of 404(c), revenue sharing, and other "hot" topics. I'm curious, what do you think about revenue sharing?

Fiduciary: It all comes down to three fundamental issues: (1) Whether or not fiduciaries know about it; (2) Whether revenue sharing pays for services pertaining to securing retirement income that benefits *all* participants who pay for it (in many, if not most cases, they don't-but that's a more technical fiduciary discussion); and, (3) Whether revenue sharing is associated with, or is supporting any conflicts of interest. Many conflicts of interest arise from revenue sharing, and therefore fiduciaries need to know about them.

Attorney: Okay, that makes practical sense; in theory, revenue sharing could be benign, but in practice it distorts pricing and makes it hard for fiduciaries to do their job. I see how full disclosure could remedy the potential problems. But tell me what the balanced index fund component of the Bill is all about. It seems a little overreaching to require such a thing.

Fiduciary: Do you object to it because it is too much of a "blunt instrument" or because you feel government shouldn't be dictating what types of investments are held in employer sponsored retirement plans?

Attorney: Well, both, to be frank.

Fiduciary: An *informed* investor would most often choose the balanced index fund, and that concerns many people who make money from trying to beat the market.

Attorney: But if there are higher returns to be had, I'm willing to pay more to get more.

Fiduciary: That choice will still be there for you. In fact, the Bill gives you, your fund managers, and all those who claim that if you pay more you get more, the unique opportunity to prove it.

Attorney: Prove it?

Fiduciary: Yes. Paying more does not automatically mean you will get higher returns. You are simply paying someone for the privilege of chasing higher returns. Sometimes they may succeed, but very few will earn better than market returns over the long haul. Do you really want to pay funds from your account, possibly reducing your future retirement income, for the privilege of letting someone else chase better than market returns with a 90% chance of failure?

Attorney: 90% chance of failure?

Fiduciary: Yes. If 90% of professionally managed defined benefit plans are unable to outperform a simple market-based balanced index fund over a 15+ year period, then using it as an investment standard should be acceptable to all, no matter how blunt or plain vanilla it might appear to those who are paid to try to out-perform the market.

Attorney: So it is a standard, but participants won't be forced to choose it if they don't want to, right?

Fiduciary: Right. However, they probably should, at least as a foundational element of their portfolio. To use a simple sports analogy, if a general manager knew that a

rookie prospect would outperform 90% of the players on the New York Yankees over the next sixteen years, and that he could hire that player for the league minimum each year, he would jump at the chance, no matter how unsophisticated the prospect might appear in person or on paper. Although in any given year, the player may not be the league batting champion, the MVP, or even the team captain, he will end up in the Hall of Fame at the close of his career. That's the promise and historical result of a balanced index fund.

Attorney: Good analogy-even though I'm a Red Sox fan. How about the nationally accepted market index comparison? What's that all about?

Fiduciary: That is an extremely important element of the Bill. Such a measurement tool will show how fees and costs affect long term returns. For a portfolio to be meaningfully compared to a nationally recognized market-based index, both the portfolio and the index must be *personalized*. The index tracks hypothetical contributions into a passive balanced portfolio, *at the same times and in the same amounts that actual* contributions are being made in the real funds.

Attorney: Are you saying that it is not enough to say that the overall market as measured by any index rose X% during the year? A general index won't work?

Fiduciary: Right. It is simply not a valid comparison, since individual participants start with widely varying initial balances, and make contributions and withdrawals at various times and in different amounts throughout the period. Due to the dramatically different cash balances, inflows, and outflows for each participant, the "comparison to a nationally recognized market-based index" must be personalized to each participant.

Attorney: And a personalized measurement will also account for all types of costs and fees, some of which are individually unique; such as charges for taking out a loan?

Fiduciary: Exactly. The method for calculating a personalized index would comply with international standards for the determination of investment returns. It is founded upon the proven premise that there is a direct and exact inverse relationship between actual returns (i.e. the returns participants actually "keep"), and the costs to participants.

Attorney: In other words, the economic cost of any given defined contribution plan (or participant account) is the difference between an objective "market return" standard and the actual return of that plan or participant account over time?

Fiduciary: Precisely. It's a pretty simple concept, really. If someone can invest in the broad market with minimal transaction or overhead costs, they will realize average market returns over the long run. The degree to which they under-perform the broad market over the long run indicates their costs.

Attorney: I see, so if the personal index is computed to be 8.2% based on the actual cash flows of a specific participant over a period of time (say 5 years), and the actual return for that same participant (based upon the exact same cash flows and time frame) is 4.9%, one can accurately deduce that the actual, all-in costs for that participant are 3.3%.

Fiduciary: That's it. You've got it!

Attorney: Talk about leveling the playing field! If a participant's net investment performance is measured against an objective standard based on the participant's personal contributions, etc., then there is simply no longer anywhere for fees to hide. Every single fee and expense that lowers returns to the participant will be exposed by that one simple number-the difference between a market-based personalized index and the participant's actual returns.

Fiduciary: It will reward results, keep the industry honest and build trust in the system for generations to come.

Attorney: But won't it cost a fortune to deliver?

Fiduciary: No, not at all; probably less than 2 basis points per year. It's just math after all-probably easier than figuring out my daughter's cell phone bill.

Attorney: I suppose in the final analysis, what really matters is how much of the investment returns participants get to keep. Over time, I can see that method of measuring costs being the ultimate disclosure, because it reveals true economic impact at a personal level. It is not confusing, and it does not require special knowledge to evaluate and/or understand. It adjusts for all types of defined contribution plans, all variations of investment strategies, and empowers a fiduciary to discharge their "duty to know." It enables the employer to evaluate the quality and cost of a plan with certainty. Plans or participant accounts that consistently under perform this index will know without question what their costs are. Those who out-perform the market will be rewarded for their success. It might be the single most important part of the Bill.

Fiduciary: We've covered a lot of territory today. I'm curious, how do you feel about the Fair Disclosure Bill now?

Attorney: How do I *feel*, or what do I *think*?

Fiduciary: I'd be interested in both...

Attorney: Well, I *feel* a little embarrassed about accepting the industry associations' arguments at face value, without considering their source. I can only imagine how many billions in lost fees are at stake for the financial services industry, once full disclosure empowers plan sponsors to make better-informed buying decisions. I can understand why the lobbyists and paid spokesmen are fighting the legislation. But it makes me a little angry to think that all this is going on without putting the interests of the participants first.

Fiduciary: I understand. It is hard to avoid anger when you consider that these aren't just concepts at stake, but the lives of real people. Without the sort of protections offered by the Fair Disclosure Bill, many of them will retire in poverty, burden their families, and strain society's capacity to care for them. As a fiduciary, I look into their faces every day and know them by name. They deserve better than the industry currently offers.

Attorney: Agreed. From an intellectual standpoint, I understand and appreciate what the Bill can accomplish, and believe it's a huge step in the right direction. My thinking has been turned 180 degrees; I see the wisdom and necessity of fair disclosure.

Fiduciary: I agree with you; I believe that we will look back on this legislation in 10 or 20 years as a huge turning point toward protecting the retirement of America's middle class.

Attorney: You could well be right about that. I've thoroughly enjoyed our conversation today. Thank you very much for your time; I'll tell Bob you said 'hello.'

Matthew D. Hutcheson is an independent pension fiduciary well known for his work in developing practical methodologies that help fiduciaries uphold duties of care and loyalty to the participants in their retirement plans. He helps dozens of plan sponsors every year develop simple and practical fiduciary solutions. He has testified before Congress on matters relating to fiduciary prudence and retirement plan economics. He may be reached by e-mail at matt@erisa-fiduciary.com.

Questions and comments about this article should be directed to site manager Jerry Kerns.