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**A Matter of Trust: Standards of Conduct
Under ERISA, the Exchange Act
and the Advisers Act: Part 2 of 2**

By David C. Kaleda

While most broker-dealers and investment advisers know whether they are supposed to be registered under the Securities Exchange Act of 1934 (Exchange Act) or the Investment Advisers Act of 1940 (Advisers Act), they are not likely to be aware of their fiduciary status under the Employee Retirement Income Security Act of 1974 (ERISA). Or, even if they do know that they are fiduciaries for purposes of ERISA, they are unaware that there are substantial differences between how the securities laws and ERISA govern transactions involving employee benefit plan assets and the assets of an entity that are deemed to be employee benefit plan assets for purposes of ERISA.

The purpose of this article is to help a broker or dealer registered under the Exchange Act (BD) and an investment adviser registered

under the Advisers Act (RIA) better determine at what point he or she is acting as a fiduciary for purposes of ERISA and the applicable standards of conduct under ERISA by comparing and contrasting the corresponding requirements under the Exchange Act and the Advisers Act. The importance of understanding the differences will grow in the near future

Mr. Kaleda is a Principal in the Fiduciary Responsibility practice group of the Groom Law Group, Chartered in Washington, DC.

as the Department of Labor (DOL) works to revise its regulations identifying fiduciaries that provide investment advice and the Securities Exchange Commission (SEC) looks to coordinate the standards of conduct under the Exchange Act and Advisers Act.

Part 1 of this article, which was published in the February 2013 issue of *The Investment Lawyer*, focused on determining when a BD or RIA was covered by the Exchange Act or Advisers Act, as applicable, versus whether the BD or RIA was a fiduciary for purposes of ERISA. Part 1 also reviewed the standards of conduct applicable to BDs and RIAs. This Part 2 addresses the standard of conduct applicable to ERISA fiduciaries, including BDs and RIAs who are fiduciaries pursuant to the functional definition found in section 3(21) of ERISA or designated as fiduciaries pursuant to sections 405(c)(1)(B) and 3(38) of ERISA (as described in Part 1 of this article), and how that standard compares to the standards of conduct under the Exchange Act and Advisers Act.

Summary of Exchange Act and Advisers Act Standard

As discussed in Part 1 of this article, the Exchange Act provides for a general prohibition against fraud. In addition, the Exchange Act, SEC regulations, and Financial Industry Regulatory Authority (FINRA) establish a code of conduct applicable to BDs that includes the following:

- Duty to deal fairly with clients;
- Duty to make a suitability determination (including reasonable basis, customer specific, and quantitative suitability);
- Duty of best execution; and
- Duty to disclose conflicts in certain situations.

The Exchange Act does not create a fiduciary relationship between the BD or an underlying duty of loyalty. Rather, a BD is bound by a standard that requires it to act honorably and fairly in dealings with his or her clients.

The Advisers Act, on the other hand, imposes a fiduciary duty on RIAs in dealing with clients and prospective clients. Section 206 of the Advisers Act, which on its face does not

appear to establish a fiduciary duty, prohibits its conduct by an RIA that is manipulative, fraudulent, or deceitful with respect to a client or a prospective client. However, the US Supreme Court and the SEC have interpreted Section 206 to establish a fiduciary relationship between the RIA and its clients and prospective clients. The following duties are derived from that fiduciary relationship:

- Duty to disclose material facts;
- Duty to not engage in transactions involving a conflict of interest unless such conflicts are disclosed;
- Duty to determine suitability (including a duty to inquire);
- Duty of best execution; and
- Duty of loyalty.

The SEC has also promulgated regulations under Section 206 of the Advisers Act that address how certain transactions that raise conflict of interest issues can be undertaken without violating the Advisers Act.

ERISA

ERISA, the regulations thereunder, and guidance issued by the DOL establish an extensive standard of conduct pursuant to which fiduciaries must operate. Such standard of conduct essentially can be broken down into three parts (i) the general fiduciary duty provisions, (ii) prohibitions against self-dealing, and (iii) prohibitions against dealings with parties in interest.

1. General Fiduciary Duty Provisions

Section 404(a) of ERISA sets forth ERISA's general fiduciary duty provisions. The fiduciary duty established under ERISA is recognized as the "highest known to the law."¹ ERISA provides that a person acting as a fiduciary with respect to a plan has the following duties:

- *Duty of Prudence*: ERISA's duty of prudence requires that a fiduciary 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.”²

- *Duty of Loyalty*: Plan fiduciaries must discharge their duties with respect to the plan solely in the interest of the participants and beneficiaries for the “exclusive purpose” of providing benefits to participants and their fiduciaries and defraying reasonable expenses of the plan.³
- *Duty to Diversify*: A fiduciary must discharge his or her duties “by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so.”⁴
- *Duty to Follow Plan Documents*: A fiduciary must discharge his or her duties “in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [ERISA].”⁵

ERISA further establishes that a fiduciary is personally liable for any losses incurred by a plan by reason of a breach of fiduciary duty.⁶ Furthermore, ERISA specifically provides that the use of exculpatory language as a means of avoiding liability under ERISA is void as against public policy.⁷

In defining how the aforementioned general fiduciary provisions are to be applied by a fiduciary responsible for investing plan assets (Investment Fiduciary), the DOL issued regulations further explaining how the general fiduciary duties apply in the context of making investment decisions with respect to plan assets.⁸ An Investment Fiduciary must give “appropriate consideration” to those facts and circumstances that, given the scope of such fiduciary’s investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role the investment or investment course of action plays in that portion of the plan’s investment portfolio with respect to which the fiduciary has investment duties.⁹ “Appropriate consideration” includes (i) making a determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio, to further the purposes of the plan, taking into consideration the risk of loss

and the opportunity for gain (or other return), and (ii) considering factors such as the composition of the portfolio with regard to diversification, the liquidity needs of the portfolio, and the projected return of the portfolio relative to the funding objectives of the plan.¹⁰

While the fiduciary standards under ERISA are high, ERISA does not require omniscience on the part of a fiduciary or that the fiduciary must always be right. Rather than focusing on the outcome of a decision by a fiduciary, the focus is on the process whereby the fiduciary gathers appropriate facts and information to make a reasoned determination within the standards described above.¹¹ This process is commonly referred to as “procedural prudence.” In evaluating a fiduciary’s conduct, a court will take into account the special purpose of an ERISA-governed plan, which is to provide employee benefits. Thus, while the fiduciary duty provisions of ERISA were founded on principles found in the common law of trusts, the requirements under ERISA are more “exacting” than those under common law.¹²

2. Self-Dealing Prohibited Transactions

In addition to the general fiduciary duties described above, which include a duty of loyalty requiring a fiduciary to exclusively act in the interest of plan participants and beneficiaries, ERISA strictly prohibits the fiduciary from engaging in a transaction that involves plan assets where a conflict of interest exists. ERISA prohibits the following self-dealing transactions:

- A fiduciary may not deal with assets of the plan in his own interest or his own account¹³;
- A fiduciary may not act in any transaction involving the plan on behalf of a party whose interests are adverse to the interests of the plan or the plan’s participants and beneficiaries¹⁴; and
- A fiduciary may not receive any consideration for his own personal account from any party dealing with the plan in connection with a transaction involving plan assets.¹⁵

The inclusion in ERISA of both a general fiduciary duty of loyalty and a specific prohibition against self-dealing transactions should lead a fiduciary to consider whether

prohibited self-dealing exists upon the occurrence of any of the above events, even if the fiduciary had the best intentions when entering the transaction. Generally, ERISA assumes the existence of an ulterior motive (that is, self-interest) under the above circumstances unless an exemption applies, notwithstanding the intent of the fiduciary.

While ERISA prohibits self-dealing and other transactions discussed below, ERISA provides for 20 statutory exemptions, and the DOL has issued several dozen class exemptions pursuant to its authority in Section 406(a) of ERISA that permit common transactions that may occur in the operation, management, or administration of a plan as long as certain requirements are met.¹⁶ However, very few of these actually exempt self-dealing transactions. Moreover, even if the exemption covers self-dealing,¹⁷ disclosure of a conflict by itself is never sufficient under those exemptions to remediate the conflict. Rather, in addition to extensive disclosure obligations, ERISA requires oversight by an independent fiduciary and other mechanisms designed to protect the interests of plan participants and beneficiaries.

3. Party in Interest Prohibited Transactions

In addition to the general fiduciary duty provisions and the self-dealing prohibited transactions, fiduciaries may not cause a plan to enter into one of several transactions with a party in interest. Section 406(a) prohibits plan fiduciaries from engaging in the following transactions:

- A fiduciary may not engage in a transaction that constitutes a direct or indirect sale or exchange of property between the plan and a party in interest.
- A fiduciary may not engage in a transaction that constitutes a direct or indirect lending of money or other extension of credit between the plan and a party in interest.
- A fiduciary may not engage in a transaction that constitutes a direct or indirect furnishing of goods, services, or facilities between the plan and a party in interest.
- A fiduciary may not engage in a transaction that constitutes a direct or indirect transfer

to, or for the use by or for the benefit of, a party in interest of plan assets.

- A fiduciary may not cause the plan to purchase employer securities or employer property.

A “party in interest” is defined broadly to include, among others, another fiduciary, a plan service provider, and their affiliates.¹⁸

As a result of Section 406(a), virtually any transaction involving plan assets with a party in interest is a prohibited transaction. Thus, as in the context of self-dealing, even in the case of a transaction that would otherwise be prudent, exclusively in the interest of the plan, and otherwise in line with the general fiduciary duty provisions, such transaction is presumed to be nefarious. For example, (i) payment of brokerage commissions and advisory fees from account assets, (ii) block trades involving account assets, (iii) cross-trading involving account assets, and (iv) execution of securities transactions by a BD (principal or agency) on behalf of a plan are all prohibited transactions. However, as noted above, there are myriad statutory and class exemptions that permit such transactions and other common transactions as long as they are done in accordance with the terms of the applicable exemption.

BDs and RIAs Conducting Transactions As ERISA Fiduciaries

While they are subject to rigorous standards of conduct under the Exchange Act and the Advisers Act, BDs and RIAs who are also ERISA fiduciaries should not assume that compliance with the securities laws will meet ERISA’s fiduciary standards or its prohibited transaction provisions. As discussed above, the fiduciary duty provisions have been interpreted to require a very high standard of conduct in light of the purpose of the plan. Furthermore, ERISA’s general fiduciary duty provisions are particularly demanding when they are combined with ERISA’s prohibited transaction provisions.

Under the Exchange Act, a BD is only required to recommend transactions involving securities that are “suitable” for the client and to seek “best execution” in making trades. These standards are grounded in concepts of

fair dealing, truthfulness, and acting honorably in the conduct of a commercial endeavor. On the other hand, a BD that is a fiduciary for ERISA purposes must act as a “prudent person” would under the circumstances then prevailing as if he or she had the necessary expertise to recommend or engage in such transactions. Furthermore, the fiduciary must act pursuant to a duty of loyalty that requires it to make decisions with an “eye single” toward protecting the interests of the plan.¹⁹

A fair reading of the Advisers Act and ERISA’s conduct provisions strongly indicates that the prudence standard puts a greater burden on the BD than making a suitability and best execution determination. A trade that is “suitable” and executed at the best price under the circumstances would not necessarily be prudent for ERISA purposes. A determination that a trade is reasonable under a given set of facts solicited by the BD does not necessarily equate to the “care, skill, prudence, and diligence under the circumstances then prevailing” that a prudent person with similar skills and experience would exercise. The ERISA standard appears to leave less room for error, and a violation would result in the BD’s personal liability to the plan.

In addition, even if in a given situation suitability and best execution qualified as ERISA prudence, the BD may not be acting exclusively in the interest of the plan’s participants and beneficiaries, a standard which does not apply under the Exchange Act. For example, a BD may be engaging in prohibited self-dealing under ERISA if it received a commission or mark up for recommending a security purchased by a plan even if the BD complied with the Exchange Act’s best execution requirements unless it complies with the provisions of DOL Prohibited Transaction Class Exemption 86-126.²⁰ Furthermore, while the relief available under this class exemption applies to the fees received, the exemption does not apply if the BD may enjoy a benefit from the transaction other than the receipt of a commission.

The Advisers Act, on the other hand, creates a fiduciary relationship between the RIA and its client. So, like ERISA, the Advisers Act creates a relationship of trust through which the RIA bears a greater burden than mere fair and honorable dealings in commercial transactions

as required under the Exchange Act. For example, the duty to disclose material information, the duty of suitability, and the duty of best execution appear to place a greater burden on the RIA. In fact, compliance with the Advisers Act and the underlying regulations may meet the prudence requirements under ERISA’s fiduciary requirements, as an RIA will likely undergo an analysis under the Advisers Act that is very similar to the analysis required of Investment Fiduciaries described above.

However, an RIA acting as an ERISA fiduciary should not always assume that compliance with the Advisers Act is tantamount to compliance with ERISA, particularly with respect to conflicts of interest. ERISA requires that the fiduciary duty provisions be applied with the understanding that fiduciary decisions are being made with respect to a plan, taking into account the special nature of such plan (for example, the funding of retirement benefits). Thus, investment recommendations or activities with respect to a plan account may be different than those applicable to a non-plan account even for the same customer. In addition, while one recommendation or decision will be appropriate for one plan client, such recommendation or decision may not be appropriate for every plan client.

Also, an RIA will never be in compliance with ERISA merely by disclosing conflicts of interest or potential conflicts of interest, even though such disclosure typically suffices under the Advisers Act. Conflicts of interest are, by definition, contrary to ERISA’s fiduciary duty of loyalty and self-dealing prohibited transaction provisions. Furthermore, an RIA would have difficulty arguing that a transaction in violation of these provisions was prudent. As such, the RIA must be able to identify potential conflicts and take steps to avoid them either by complying with an exemption or complying with other DOL guidance.

Based upon the foregoing, the following are several areas with which a BD or RIA should be concerned when acting as an ERISA fiduciary, even though it may be complying with the Exchange Act or the Advisers Act:

- *Disclosure of Conflicts of Interest:* One of the most obvious areas in which there is a significant divergence between the securities

laws and ERISA is in the area of conflicts of interest. Under ERISA, the disclosure of a material conflict, by itself, will never be sufficient under ERISA's duty of loyalty and self-dealing prohibited transaction provisions to avoid a violation of ERISA.

- *Use of Fiduciary Discretion or Authority to Increase Compensation:* A BD or RIA breaches its fiduciary duty of loyalty, as well as the self-dealing prohibited transaction provisions, if it uses its fiduciary discretion or authority to increase its own compensation. ERISA's exemptions with respect to such activity are limited in usefulness particularly with respect to RIAs. Thus, for example, an RIA or its affiliate typically cannot receive transaction-based compensation or revenue sharing payments from mutual funds in addition to its advisory fee. Notably, however, there is generous prohibited transaction relief associated with the receipt of commissions and similar forms of compensation by BDs if certain requirements are met. However, BDs are cautioned that such relief does not exempt other kinds of self-dealing. In addition, performance fees that may be permissible under the Advisers Act may not be permissible under ERISA.²¹
- *Affiliate Transactions:* The duty of loyalty and self-dealing prohibited transaction provisions make engaging in transactions between a BD or an RIA and its affiliates (or

in transactions in which the RIA or BD is on both sides) impossible unless the BD or RIA can point to a specific exemption that permits such transactions and the requirements of that exemption are met. In other words, transactions between the RIA and its affiliates (or itself) are presumed to be violative of ERISA in the absence of an exemption even if they are anticipated to be beneficial to the plan. Thus, transactions such as cross-trading, block trading, principal transactions, use of affiliated broker dealers, and others should be carefully evaluated for compliance with the general fiduciary and prohibited transaction provisions of ERISA.

- *"Party in Interest" Transactions:* Even if the BD or RIA is not engaging in transactions with its affiliates or otherwise engaging in self-dealing, the BD or RIA must not engage in transactions with any "party in interest" to the plan unless it can point to an exemption that permits such transactions and the requirements of that exemption are met. Again, notwithstanding compliance with ERISA's general fiduciary and self-dealing requirements, ERISA assumes a transaction with any other party related to the plan is improper unless an exemption applies.

The following chart illustrates the differences among the three statutory and regulatory regimes.

Standards of Conduct Under ERISA, Advisers Act, & Exchange Act		
ERISA Fiduciary	Registered Investment Adviser	Registered Broker Dealer
<p><i>General Fiduciary Duties:</i></p> <ul style="list-style-type: none"> • Duty of Prudence: act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use under similar circumstances; • Duty of Loyalty: discharge his or her duties with respect to the plan solely in the interest of the plan for the exclusive purpose of providing plan benefits; 	<p><i>Antifraud Provisions:</i> RIA may not-</p> <ul style="list-style-type: none"> • Act in a manner designed to manipulate, defraud, or deceive its clients or prospective clients; or • Engage in any course of conduct that will have the effect of manipulating, defrauding, or deceiving a client or prospective client. 	<p><i>Anti-fraud Provisions:</i> BD may not-</p> <ul style="list-style-type: none"> • Cause a client to enter into a securities transaction "by means of any manipulative, deceptive, or other fraudulent device or contrivance"; or • Use "any manipulative or deceptive device or contrivance" contrary to the rules established by the SEC or self-regulatory organization to protect the interest of clients.

ERISA Fiduciary	Registered Investment Adviser	Registered Broker Dealer
<ul style="list-style-type: none"> • Duty to Diversify: diversify plan investments so as to minimize the risk of large losses; and • Duty to Follow Plan Terms: follow the terms of the plan’s governing documents. <p><i>Self-dealing Prohibited Transactions:</i></p> <ul style="list-style-type: none"> • A fiduciary may not deal with assets of the plan in his own interest or his own account; • A fiduciary may not act in any transaction involving the plan on behalf of a party whose interests are adverse to the interests of the plan or the plan’s participants and beneficiaries; or • A fiduciary may not receive any consideration for his own personal account from any party dealing with the plan in connection with a transaction involving plan assets. <p><i>Party in Interest Prohibited Transactions:</i> A fiduciary should not cause the plan to enter into non-exempt transactions with parties in interest.</p> <p>Compliance with statutory or administrative exemption (if available) will not result in a self-dealing or party-in-interest prohibited transaction.</p>	<p><i>Fiduciary Duties:</i></p> <ul style="list-style-type: none"> • Duty to disclose material facts; • Duty of loyalty (including a duty to not engage in transactions involving a conflict of interest unless such conflicts are disclosed); • Duty to determine suitability (including a duty to inquire) – reasonable determination that advice is appropriate based upon client’s financial situation, investment experience, and investment objectives; • Duty of best execution - seek best price at which trades could be executed in light of facts and circumstances (dealer mark ups and mark downs, brokerage commissions, etc.). RIA must also consider compensation paid to the RIA. <p>SEC regulations specifically address agency cross transactions, principal trades, custody, and proxy voting.</p>	<p><i>Other Duties:</i></p> <ul style="list-style-type: none"> • Duty to deal fairly with clients; • Duty to make suitability determination: <ul style="list-style-type: none"> • “reasonable-basis” – after reasonable due diligence, reasonable basis to believe recommendation is suitable for at least some investors; • “customer-specific” – suitable for the specific client given such client’s investment profile; and • “quantitative” - reasonable basis to believe that a series of recommended transactions is not excessive or otherwise unsuitable given such client’s investment profile. • Duty of best execution – use reasonable diligence to achieve as favorable a price as possible under prevailing market conditions; and • Duty to disclose conflicts in certain situations. <p>BD not a fiduciary under Exchange Act, although may be under state law.</p>

A Word About IRAs

One other point to note is whether individual retirement accounts and individual retirement annuities (IRAs) fall within ERISA’s regulatory scheme. In most cases, IRAs are not “plans” offered by employers as determined under ERISA; thus BDs or RIAs that provide services to them are not subject to the general fiduciary duty provisions or prohibited transaction provisions *found in ERISA*. However, IRAs are “plans” for purposes of the prohibited transaction provisions in the Internal Revenue Code (Code), which includes a definition of fiduciary and prohibited transaction

provisions that, for the most part, mirror those found in ERISA.²² In fact, the DOL has jurisdiction over interpreting the Code’s provisions regarding fiduciary status and prohibited transactions.²³ Thus, much of the above discussion addressing self-dealing prohibited transactions and party in interest transactions²⁴ should concern BDs and RIAs who deal with IRAs.²⁵

Summary and Conclusion

The Exchange Act, Advisers Act, and ERISA each prescribe standards of conduct

that apply to BDs, RIAs, and ERISA fiduciaries. While there is some overlap between the Exchange Act and Advisers Act standards of conduct and the ERISA fiduciary provisions, BDs and RIAs who are also fiduciaries should not assume that compliance with the Exchange Act or Advisers Act, as applicable, will lead to compliance with ERISA. In particular, the “suitability” standard under the Exchange Act does not appear to be the equivalent of prudence as set forth in ERISA and interpreted by the DOL and the courts. Furthermore, ERISA’s fiduciary conduct provisions must be read in the context of its fiduciary duty of loyalty and its prohibitions against fiduciary self-dealing and transactions with parties in interest. Therefore, except in very limited circumstances outlined in statutory or administrative exemptions issued under ERISA, BDs and RIAs who are ERISA fiduciaries cannot engage in self-dealing. While such exemptions do exist, the mere disclosure of a conflict of interest will not meet the requirements of the exemptions or overcome a violation of ERISA’s duty of loyalty and self-dealing prohibitions.

Finally, BDs and RIAs acting as ERISA fiduciaries should remember that the courts have interpreted ERISA’s prudence requirements to impose a fiduciary standard of care that is one of the highest known under the law. The price of failing to comply with this requirement, as well as the others discussed above, can be high. ERISA provides that a fiduciary is personally liable in the event of a breach of the fiduciary duty provisions.²⁶ Furthermore, ERISA provides for a comprehensive remedial scheme, including the fiduciary making good on any losses to the plan caused by the breach and the restoration of any profits gained by the fiduciary in using plan assets to its own benefit. As such, BDs and RIAs would do well to understand whether they are fiduciaries and the implications of that status.

Notes

1. *Donovan v. Bierwith*, 680 F.2d 263, 272 n. 8 (2d Cir. 1985).
2. ERISA § 404(a)(1)(B).
3. ERISA § 404(a)(1)(A).

4. ERISA § 404(a)(1)(C).
5. ERISA § 404(a)(1)(D).
6. ERISA § 409(a).
7. ERISA § 410(a).
8. 29 CFR § 2550.404a-1(b).
9. *Id.*
10. *Id.*
11. *Donovan v. Mazzola*, 716 F.2d 1226 (9th Cir. 1983); *See also GIW Industries, Inc. v. Trevor*, 895 F.2d 729 (11th Cir. 1990).
12. *Mazzola* at 1231.
13. ERISA § 406(b)(1).
14. ERISA § 406(b)(2).
15. ERISA § 406(b)(3).
16. ERISA § 408(a) also allows the DOL to issue prohibited transaction exemptions on an individual basis, and such exemptions can only be relied upon by the applicant. The statutory and class exemptions are available to any party that complies with its terms.
17. ERISA § 408(b)(19) (statutory exemption for cross trading among actively managed customer accounts); Prohibited Transaction Class Exemption 86-125 (class exemption allowing fiduciary to use affiliated broker dealer to conduct trades).
18. Specifically, Section 3(14) of ERISA defines a “party in interest” as (i) plan fiduciary, plan legal counsel, or an employee of the plan, (ii) a service provider to the plan, (iii) an employer whose employees are covered by the plan, (iv) a direct or indirect owner of 50% or greater interest in the employer whose employees are covered by an employee benefit plan; (v) an entity of which a 50% or greater interest is owned by a plan fiduciary, plan service provider or employer whose employees are covered by the plan, and (vi) an employee, officer, director, or a 10% or more shareholder directly or indirectly, of a plan service provider, an employer whose employees are covered by the plan, or an entity with at least a 50% ownership interest in an employer whose employees are covered by the plan.
19. *Kuper v. Iovenko*, 66 F.3d 1447, 1458 (6th Cir.1995).
20. *See DOL Prohibited Class Exemption 86-125* (exempts certain transactions by registered broker-dealers who are ERISA fiduciaries).
21. The SEC’s regulations provide that an RIA will not violate Section 205 by including in an agreement an arrangement whereby compensation is determined on the basis of a share of the capital gains upon, or the capital appreciation of, the funds, or any portion of the funds, of a client if the client is a “qualified purchaser.” However, the DOL’s requirements for performance fees are stricter. For example, DOL guidance provides, among other things, (i) that the performance fee be based on a calculation of

net profits that reflected realized and unrealized gains and losses, (ii) that the gains and losses be determined on the basis of market quotations or on valuations made by independent parties or services selected or approved by a fiduciary independent of the fiduciary receiving the fee, and (iii) that the fee was approved by an independent plan fiduciary after full disclosure of the facts. *See* DOL Adv. Op. 1999-16A.

22. I.R.C. § 4975.

23. Reorganization Plan No. 4, 1978 (43 FR 47713, Oct. 17, 1978).

24. The Code uses the term “disqualified person” rather than “party in interest.” I.R.C. § 4975(e)(2).

25. *See* David C. Kaleda, “Do you Really Want to Do That? IRAs and the Prohibited Transaction Provisions,” *The Investment Lawyer*, Vol. 19, No. 5 (May 2012).

26. ERISA § 409.

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