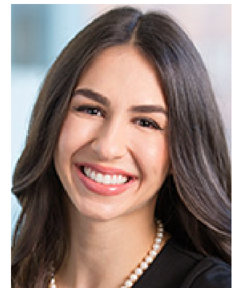
TRUCKER ✦ HUSS

BENEFITS REPORT

The Final Fiduciary Rule: Top Five Takeaways for Plan Sponsors



ADRINE ADJEMIAN, ROBERT R. GOWER, AND BENJAMIN F. SPATER

On April 8, 2016, the Department of Labor ("DOL") published the final fiduciary advice regulatory package (the "Package"). The Package includes regulations introducing a dramatically revised definition of who is considered a "fiduciary" by rendering investment advice for a fee (the "Final Rule"), a Best Interest Contract Exemption from the prohibited transaction for receipt of variable rate compensation when providing investment advice (the "BIC Exemption"), and other related exemptions.

Under the Employment Retirement Income Security Act of 1974, as amended ("ERISA"), a person is a fiduciary with respect to a plan to the extent that he or she renders investment advice for a fee. Fiduciaries are subject to heightened standards of care, must act impartially, and with the exclusive purpose of providing benefits to participants. The DOL first interpreted who can be considered a fiduciary rendering investment advice

IN THIS ISSUE...

SPECIALIZED TALENT & EXPERTISE TO SOLVE THE MOST COMPLEX OR STRAIGHTFORWARD CLIENT CHALLENGES.

With more than 25 attorneys practicing solely in employee benefits law, Trucker Huss is the largest employee benefits specialty law firm on the West Coast. Our in-depth knowledge and breadth of experience on all issues confronting benefit plans, plan sponsors and plan fiduciaries translates into real-world, practical solutions for our clients.

A DIVERSE CLIENT BASE. We represent some of the country's largest companies and union sponsored and Taft-Hartley trust funds. We also represent mid-sized and smaller employers, benefits consultants and other service providers, including law firms, accountants and insurance brokers.

PERSONAL ATTENTION AND SERVICE, AND A COLLABORATIVE APPROACH. Since its founding in 1980, Trucker Huss has built its reputation on providing accurate, responsive and personal service. The Firm has grown in part through referrals from our many satisfied clients, including other law firms with which we often partner on a strategic basis to solve client challenges.

NATIONALLY-RECOGNIZED. Our attorneys serve as officer and governing board members to the country's premier employee benefits industry associations, and routinely write for their publications and speak at their conferences.

TRUCKER ✦ HUSS

A PROFESSIONAL CORPORATION

ERISA AND EMPLOYEE BENEFITS ATTORNEYS

www.truckerhuss.com

One Embarcadero Center, 12th Floor
San Francisco, California 94111-3617
Tel: (415) 788-3111
Fax: (415) 421-2017
Email: info@truckerhuss.com

Trucker ✦ Huss is pleased to announce...

T. Katuri Kaye was appointed Special Counsel to the Firm effective May 1, 2016.

Congratulations to Katuri!

for a fee in regulations issued more than 40 years ago. According to the DOL, changes in the retirement landscape over the last 40 years have increased the need to expand its interpretation in order to better protect the interests of retirement investors. The retirement world once dominated by defined benefit plans has increasingly been replaced by 401(k)-type defined contribution plans and IRAs where participants make investment decisions and have greater control over their financial future. Combining this changed landscape with increasingly complex and diverse financial products and features (which are often associated with many layers of fees), a new regulatory package and expanded definition of who is an investment advice fiduciary was inevitable.

Although the Package is primarily geared toward advisers, a working knowledge of the Final Rule and BIC Exemption will help plan sponsors understand potential changes in their relationships with advisers, and avoid inadvertently exposing themselves to co-fiduciary liability or engaging in prohibited transactions.

This article provides a brief overview of the Final Rule, and provides five important takeaways for plan sponsors.

Overview of the Final Rule

Section 3(21)(A)(ii) of ERISA provides that a person is a plan fiduciary to the extent he or she renders *investment advice* for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so. In issuing the Final Rule, the DOL sought to redefine what is meant by "investment advice for a fee or other compensation."

Under the Final Rule, in order to be treated as a fiduciary providing investment advice, a person, either directly or indirectly, must (1) represent or acknowledge that such person is acting as a fiduciary with respect to rendering investment advice, (2) render investment advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is based on the particular investment needs of the advice recipient, or (3) direct investment advice to a specific advice recipient or recipients regarding the advisability of a particular investment or management decision with respect to securities or other investment property of the plan or IRA.

What Is Investment Advice?

The Final Rule provides that a communication constitutes investment advice if a person provides directly to a plan, plan fiduciary, plan participant or beneficiary, IRA or IRA owner one of the following two types of advice:

- A "recommendation" as to the advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property, or a recommendation as to how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred or distributed from the plan or IRA; or

- A "recommendation" as to the management of securities or other investment property, including, among other things, recommendations on investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, types of investment account arrangements (brokerage versus advisory), or recommendations with respect to rollovers, transfers or distributions from a plan or IRA, including whether, in what amount, in what form, and to what destination such a rollover, transfer or distribution should be made.

Only a "Recommendation" Can Be Investment Advice

In order for a communication to constitute fiduciary investment advice, it must be a "recommendation." This means that based on its content, context, and presentation, the communication objectively would be reasonably viewed as a suggestion that such person engage in or refrain from taking a particular course of action. Determining whether a recommendation has been made requires an objective rather than a subjective inquiry. To prevent unintended consequences, the Final Rule provides that certain types of communications, such as general communications, comments at large speaking engagements, marketing of oneself, and providing investment education, may not rise to the level of being a "recommendation" and therefore, under many circumstances will not constitute investment advice.

Investment Advice Must Involve Compensation

Importantly, in order to be considered fiduciary investment advice, the advice must be "for a fee or other compensation, direct or indirect," which includes any fee or compensation received by the advice provider (or an affiliate) from any source in connection with or as a result of the recommended purchase or sale of a security or the provision of investment advice services. This includes a wide range of compensation, including, but not limited to commissions, finder's fees, revenue sharing payments, shareholder servicing fees, marketing or distribution fees, underwriting compensation, recruitment compensation paid in connection with transfers of accounts to a registered representative's new broker-dealer firm, gifts and gratuities, and expense reimbursements.

Top 5 Things Plan Sponsors Should Know

1. There Are No Changes With Respect to the Existing Responsibilities of Plan Fiduciaries

The Final Rule expanded the breadth of the statutory definition of fiduciary investment advice. It did not in any way lessen the pre-Final Rule responsibilities, duties, obligations or liabilities of plan fiduciaries. Fiduciary plan sponsors already have a duty of loyalty to participants and beneficiaries, including when selecting and monitoring plan service providers. As the DOL explains in the preamble to the Final Rule, the Final Rule does not change such well-established fiduciary obligations.

2. There Is a Seller's Exception Worth Paying Attention To

The Final Rule provides for several exceptions to communications that otherwise would be considered fiduciary investment advice, including a Seller's Exception. The Seller's Exception provides that a person will not be considered to be rendering fiduciary investment advice when such person is providing advice to an independent plan fiduciary involving the investment of securities or other property if the transaction is an arm's length transaction and the person providing the advice reasonably believes that they are dealing with an independent fiduciary who is a "sophisticated investor," including a bank or similar institution, an insurance carrier qualified under the laws of more than one state, a registered investment adviser, a federally registered broker-dealer, and any plan fiduciary independent of the seller with at least \$50 million in total assets under management. The purpose of this exception is to avoid imposing fiduciary obligations on sales pitches where neither side assumes that the counterparty to the plan is acting as an impartial or trusted adviser. Because sophisticated investors are involved on both sides of such transactions, there is presumably a level playing field, and neither party expects that recommendations will necessarily be based on the buyer's best interests, or that the buyer will rely on them as such.

The Final Rule requires satisfaction of a number of additional conditions in order to rely on the Seller's Exception. Perhaps most importantly, the seller must know or reasonably believe that the independent fiduciary is capable of evaluating investment risks and may rely on a written representation from the plan or fiduciary regarding such capabilities. This requirement may be difficult for a seller to prove in a transaction with a plan sponsor managing at least $50 million in total assets, as plan sponsors often bring in investment representatives and advisers under the assumption that the representatives and advisers have knowledge the plan sponsor (often acting through its investment committee) does not have. In other words, plan sponsors and investment committees often rely on representatives and advisers in making investment decisions, and thus may not be capable of independently evaluating investment risks. Importantly, a seller may rely on a written representation from a plan fiduciary that the plan fiduciary is capable of completing such an independent evaluation. Therefore, plan fiduciaries should avoid making such representations, whether through existing written agreements with the adviser or otherwise, in order to prevent shifting this fiduciary duty from the seller to themselves.

Furthermore, the DOL declined to apply the Seller's Exception to plan sponsors with less than $50 million in total assets, noting that although small plan sponsors are typically experts in the day-to-day business of running a company, they are not experts in managing financial investments and applying the Seller's Exception to such small plan sponsors would run the risk of creating a loophole that would result in no improvement in consumer protections.

Because of these conditions, the practical effect of the Seller's Exception is not likely to be great in any transaction with plan sponsors.

3. Investment Education Is Not Investment Advice

The Final Rule sets forth non-exhaustive examples of communications which generally are not "recommendations" and therefore do not constitute fiduciary communications. Perhaps the most significant of these examples is the provision of information and materials that constitute investment education ("Investment Education") or retirement education. The Final Rule describes four broad categories of non-fiduciary educational information and materials, including plan information, general financial, investment, and retirement information, asset allocation models, and interactive investment materials.

Merely providing information to plan and IRA investors about the characteristics of investment products available such as features, terms, and fees and expenses, to the IRA owner or plan investor, without reference to the appropriateness of the investment alternative, falls within the "plan information" category of Investment Education. Additionally, information and materials that do not address specific investment products, specific investment alternatives (offered under the plan or IRA or offered outside the plan or IRA) or distribution options and which inform the plan fiduciary, plan participant or beneficiary, or IRA owner about certain information, such as general financial and investment concepts, effects of fees and expenses on rates of return, and retirement-related risks, fall within the "general financial, investment, and retirement information" category of Investment Education.

The Final Rule also allows educational asset allocation models and interactive investment materials provided to participants and beneficiaries in plans to reference specific investment alternatives if they are presented as hypothetical examples to help participants and beneficiaries understand the educational information and not as investment recommendations. However, the Final Rule differentiates between education provided in the plan and IRA markets. For example, although asset allocation models may identify the plan's designated investment alternatives in participant directed plans, they may not do so under an IRA because in the IRA context, there is no independent plan fiduciary to review and prudently select investment options.

4. Recommendations Regarding Rollovers Are Investment Advice

The Final Rule provides that recommendations with respect to rollovers, transfers, or distributions from a plan or IRA, including whether, in what amount, in what form, and to what destination such a rollover, transfer, or distribution should be made constitute fiduciary investment advice.

Although it remains to be seen, it would appear some advisers may be less willing to assist participants with the decision of whether or not to roll over their plan assets to an IRA in order to avoid being held to the standard of a fiduciary in advising on such a decision. In particular, such a standard may be difficult to satisfy when recommending a rollover in light of the cost benefits plan participants may enjoy, including, for example, access to institutional share classes of mutual funds. A potential impact of this aspect of the Final Rule may be that more departing employees will stay with a plan after leaving the employer, as advisers are less likely to approach participants about considering a rollover. This may result in plan sponsors maintaining relationships with former employees via plan participation for much longer and in greater numbers than they had in the past.

5. The Final Rule Does Not Intend to Make HR Employees Fiduciaries

Employees of a plan sponsor, especially those working in employee benefits and human resources departments, do not want to be inadvertently considered to be rendering fiduciary investment advice in carrying out their job responsibilities. The DOL took note of this concern, and the Final Rule excludes two major forms of communications by employees of plan sponsors from being classified as investment advice.

First, an exclusion applies to employees of a plan sponsor who provide advice to either the plan fiduciary or another employee (other than in the advice recipient's capacity as a plan participant), as long as the employee does not receive compensation in connection with the advice outside of the employee's normal compensation. For example, this would cover a human resources employee relaying investment recommendations or financial information to the plan fiduciary, or an employee charged with preparing financial reports that are ultimately provided to the plan fiduciary (for example, to an investment committee of the plan sponsor).

Second, an exclusion covers employees who are charged with communicating information about the plan to participants, so long as such employee's job is not actually to provide investment recommendations to plan participants (this means the employee must not have job responsibilities that include the provision of investment advice, and must not be licensed to provide investment advice). This exclusion is particularly important because it protects employees who may have accidentally made statements that would otherwise constitute investment advice, and will help avoid a chilling effect on employees providing information about the plan to participants.

In conclusion, the five takeaways from the Final Rule for plan sponsors are that 1) there are no changes with respect to the existing responsibilities of plan fiduciaries, 2) there is a Seller's Exception for arm's length transactions which involve "sophisticated investors," 3) Investment Education is not investment advice, 4) recommendations regarding rollovers are investment advice, and 5) certain communications by employees of plan sponsors will not be investment advice.

Stay tuned for additional analysis, as necessary, of key portions of the Package in advance of its general applicability date of April 10, 2017, and download our recent webinar. If you have any questions, please contact one of the authors or the Trucker Huss attorney with whom you normally work.

APRIL 2016

Be Prepared for Phase Two of the HIPAA Audit Program

ELIZABETH LOH

Introduction

On March 21, 2016, the U.S. Department of Health and Human Services, Office for Civil Rights ("OCR") launched Phase Two of its Health Insurance Portability and Accountability Act ("HIPAA") Audit Program. In this phase of the HIPAA Audit Program, the OCR intends to audit a wide variety of covered entities (including health plans of all sizes) and business associates to determine whether these entities are meeting their HIPAA Privacy, Security, and Breach Notification obligations. In light of the launch of Phase Two of the Audit Program, covered entities and their business associates should take action to prepare for possible audit.

General Background

The Health Information Technology for Economic and Clinical Health Act (the "HITECH Act") requires the OCR to proactively conduct periodic audits of HIPAA covered entities (*i.e.*, health plans, health care providers, and health care clearing houses), and business associates to assess compliance with the HIPAA Privacy, Security, and Breach Notification rules. A covered entity is selected at random for audit, thus selection is not necessarily related to a particular incident or HIPAA complaint. OCR plans on using its Audit Program to identify best practices and discover potential HIPAA risks and vulnerabilities.

In Phase One of the HIPAA Audit Program, OCR implemented a "pilot audit program" where it audited 115 covered entities (47 of which were health plans). After analyzing the results of this "pilot audit program," OCR submitted a report to Congress on HIPAA compliance. This report is illuminating because it spells out the areas where covered entities "fell short" in their HIPAA compliance efforts. These areas included:

- Providing individuals with the Notice of Privacy Practices;
- Addressing the rights of individuals to access their protected health information;
- Obtaining HIPAA authorizations;
- Conducting HIPAA Security Risk Assessments; and
- Implementing the appropriate procedures for securing electronic protected health information ("ePHI") that is stored and/or transported on portable electronic devices.

OCR is using the information it gathered during the pilot audit program to implement Phase Two of the HIPAA Audit Program.

Phase Two of the HIPAA Audit Program Has Begun

OCR has announced that Phase Two of the HIPAA audit program is currently underway.

Who Is Subject to Audit?

According to the OCR announcement, "every covered entity and business associate is eligible for audit." OCR intends to create an audit pool that represents a wide range of health care providers, health plans, health care clearing houses and business associates. OCR has further clarified that it is looking to audit health plans of all sizes and functions.

How Will a Covered Entity Know if It Has Been Selected for Audit?

OCR has begun its audit selection process by sending out targeted emails to covered entities. These OCR emails ask the covered entity to verify that the contact information

OCR has on record (*e.g.*, primary contact information, email address) is accurate.

Once OCR has obtained the covered entity's contact information, it will send the covered entity a pre-screening questionnaire. This pre-screening questionnaire is designed to gather information regarding the covered entity's type, size, and operations. For example, health plans must answer questions regarding the "average number of claims processed monthly," and the "number of members covered by the health plan." As part of this pre-screening process, OCR also will ask the covered entity to provide a list of its business associates. To assist covered entities with this process, OCR has created a template that a covered entity may use when developing its list of business associates. http://www.hhs.gov/hipaa/for-professionals/compliance-enforcement/audit/batemplate/index.html

Once the pre-screening process is complete, OCR intends to build a diverse audit pool based on the information it has gathered from the pre-screening questionnaires. OCR will randomly select covered entities (and business associates) from this audit pool.

Note: OCR has stated that it will use publically available information for covered entities that do not respond to OCR's contact information or pre-audit questionnaire, thus a non-responsive covered entity may still be selected for audit or subject to a compliance review.

How Will the HIPAA Audit Program Work?

OCR plans on conducting both desk audits and on-site audits. OCR will first conduct desk audits of covered entities, followed by a round of desk audits of business associates. The third round of audits will consist of on-site audits.

OCR explains the desk audit process as follows:

1. In the coming months, OCR will notify a covered entity via email if it has been selected for a desk audit. The OCR notification letter will introduce the audit team, explain the audit process, and include a document request.
2. The covered entity has ten business days to supply the information requested by OCR. The covered entity will submit the requested documents on-line via OCR's "secure on-line portal."
3. Upon receiving the covered entity's documents, the OCR auditor will review the information submitted and provide the covered entity with its draft findings. The covered entity will have ten business days to review the draft findings and provide written comments to the OCR auditor.
4. The OCR auditor will complete a final audit report for the covered entity within 30 business days after the covered entity's response. OCR will share a copy of the final audit report with the covered entity.

After conducting the desk audits, OCR will conduct on-site audits. OCR anticipates that the on-site audits will be more comprehensive than the desk audits. Each on-site audit will be conducted over a period of three to five days. It's important to note that a covered entity that is subject to a desk audit may also be subject to a subsequent on-site audit by OCR.

What Happens After the Audit?

These audits are primarily a compliance improvement activity. OCR will use the audit results to determine what types of technical assistance it should develop to assist covered entities (and business associates) with their HIPAA compliance efforts. However, if an audit report shows that a covered entity (or business associate) has serious HIPAA compliance issues, OCR may initiate a compliance review and investigate further.

How Can I Prepare for an Audit?

Given OCR's launch of Phase Two of the HIPAA Audit Program, employers/plan sponsors should proactively take steps to prepare for potential audit. Examples of steps to take include:

- Take inventory of your group health plans to determine which plans are subject to HIPAA compliance (*e.g.*, Health Flexible Spending Accounts, self-funded medical, dental, vision plans, etc.).
- Evaluate whether you have entered into HIPAA

compliant business associate agreements with your group health plan vendors.

- Prepare a list of your business associates (with each business associate's contact information) so that you are prepared to respond to potential OCR requests.
- Review your Notice of Privacy Practices to verify that it is HIPAA compliant, and timely distribute this Notice to group health plan participants as required under the HIPAA rules.
- Verify that you have the appropriate HIPAA policies and procedures in place (including documentation).
- Regularly conduct HIPAA training for your workforce.
- Conduct HIPAA security risk assessments and document these assessments.
- Develop procedures for protecting ePHI that is stored or transported by portable electronic media (*e.g.*, laptops, USB storage devices, etc.).
- Look for emails from OCR requesting confirmation of your contact information. OCR recommends checking your junk or spam email folders in case OCR emails are incorrectly classified as spam.
- Review the Audit Protocol published by OCR. The Audit Protocol includes compliance questions that auditors may ask. This Audit Protocol was recently updated for Phase Two of the Audit Program and the HIPAA Omnibus Rules. A link to the updated Audit Protocol is included here http://www.hhs.gov/hipaa/for-professionals/compliance-enforcement/audit/protocol-current/

If you have any questions regarding this article, please contact the author.

APRIL 2016

Case Update: Ninth Circuit Revisits *Tibble v. Edison International*

ANGEL L. GARRETT

As we previously reported, on May 18, 2015, the Supreme Court issued a unanimous decision in favor of the plan participants in *Tibble v. Edison International*, 135 S. Ct. 1823 (2015). In October 2014, the Supreme Court granted the plaintiffs' petition for writ of certiorari to solely address whether ERISA's six-year statute of limitation bars the plaintiffs' claim that plan fiduciaries breached their duty of prudence by offering retail class mutual funds, even though identical lower-cost institutional class mutual funds were available, more than six years before the lawsuit was filed. In its unanimous decision, the Supreme Court vacated the Ninth Circuit's decision and remanded the case back to the Ninth Circuit to determine what the fiduciary duty to monitor plan investments requires within the context of trust law. The Supreme Court explained that under trust law there is a "continuing duty to monitor" separate from the duty to exercise prudence in selecting an investment option and that this duty exists even absent a change in circumstances. The Supreme Court further stated, "so long as the alleged breach of the continuing duty occurred within six years of suit, the claim is timely." For more information and discussion regarding this case, including the Ninth Circuit's decision in March 2013, see our March 2013 and July 2015 articles.

On April 13, 2016, on remand from the Supreme Court, the Ninth Circuit held that the plaintiffs forfeited their ongoing-duty-to-monitor argument by failing to raise it either before the district court or in their initial appeal. The Ninth Circuit rejected the plaintiffs' arguments that the district court's summary judgment order precluded them from presenting a duty to monitor argument. The Ninth Circuit explained that the plaintiffs only asserted that the Court "ought to read ERISA as excusing an otherwise time-barred lawsuit where the effects of a past breach continue into the future." Accordingly, the Ninth Circuit refused to allow the plaintiffs to have "a second bite at the apple on remand."

The Ninth Circuit's second decision in *Tibble* provides no plan guidance on the scope of the ERISA fiduciary duty to monitor plan investments but there are several steps that should be taken. Plan fiduciaries should review the plan's investment policy, and procedures for evaluating investments. Plan fiduciaries should also regularly review the investment options in their plans to determine whether to include or remove certain funds. This review should include determining which, if any, mutual funds, have revenue sharing, the amount of the revenue sharing, and the costs associated with these funds. Furthermore, plan fiduciaries should document the reasons for all decisions related to investments. If you have any questions on the *Tibble* decision or on fiduciary issues under ERISA, please contact us.

APRIL 2016

Ninth Circuit Decision Creates Uncertainty Regarding the Burden of Proof in Benefit Claim Cases

JOSEPH C. FAUCHER

Citing the 1977 animated TV special *It's Your First Kiss, Charlie Brown*, the Ninth Circuit Court of Appeals recently issued a decision that might have a significant impact on who has the burden of proof in ERISA benefit claims. In *Estate of Barton v. ADT Security Services Pension Plan*, No. 13-56379 (9th Cir. April 21, 2016), the Court held on the facts of the case, that when the information regarding eligibility for benefits is in the exclusive control of the defendants, defendants have the burden of proving that participants and beneficiaries are not entitled to benefits. The Court reached this conclusion (1) despite longstanding authority holding that plan participants — not administrators — bear the burden of proof in benefit claim cases, and (2) over a strongly worded dissent criticizing the majority opinion for running afoul of the U.S. Supreme Court's instruction that courts should not make "ad hoc" exceptions to the normal burden of proof in benefit claim cases.

It is too soon to tell what impact *Estate of Barton* will have. Plaintiffs' attorneys are sure to argue that their cases fit within *Barton's* rationale, and attempt to shift the burden of proof from where it has traditionally rested (on the shoulders of benefit claimants to show that they are entitled to benefits) and onto plan administrators, to prove that plaintiffs are not entitled to plan benefits. Defense attorneys will certainly argue that if *Barton* remains good law, its holding should be limited to a narrow range of cases with unusual facts. One thing is certain: as long as *Barton* remains the law, there is likely to be an additional layer of litigation in benefit claim cases pending in courts within the Ninth Circuit about who, exactly, bears the burden of proof. To understand how we arrived at this uncertain juncture, it helps to understand *Barton's* facts.

Bruce Barton worked for the American District Telegraph Company (ADT), and/or for some of its affiliated companies, from 1967 to 1986, when he resigned in his early 40s. (The dissenting opinion — discussed below — was more specific than the majority opinion in describing the evidence about the companies Barton worked for and when.) When he reached age 65 in 2010, he applied for a benefit under ADT's pension plan. Tyco acquired ADT in 1997 and had access to ADT's pension records. During the period of time that he was employed by ADT, he was apparently also employed by a moving company for a short period of time in 1968, and served in the Marine Reserves from 1965–1971.

One of the main issues in the case was whether Barton had enough years of "Continuous Service" to be entitled to a vested benefit under the plan. A pension benefit administrator (presumably, a third party vendor for the plan) concluded that the documents Barton submitted failed to establish that Barton had a vested benefit under the plan, and advised Barton he could file a claim with the Employee Benefits Committee. Barton subsequently submitted a formal benefits claim and presented evidence indicating that he was employed by American District Telegraph Co. at various times from 1968 to 1986, including Social Security documentation reflecting FICA withholding from 1968–1980.

The plan committee reviewed that documentation and other documents that tended to substantiate Barton's employment, but concluded that there were "… no Plan records indicating your eligibility for participation in the Plan, or your eligibility for benefits under the Plan. In addition, it was unclear from the information you provided whether you had a continuous term of employment or earned the required service to earn at least 10 Years of Continuous Service so as to be vested in a Plan benefit." The committee also stated that the records Barton presented did not cover each year of claimed employment and that some documents lacked identifying information. The Committee concluded that Barton's documentation "did not override or contradict the Plan records" and denied Barton's claim. The Committee invited Barton to present additional information. Barton responded, and requested certain Plan-related documents, including a Summary Plan Description and an example of a pension benefit statement. The committee responded, but apparently did not provide a full Summary Plan Description or any exemplars of a pension benefit statement as Barton had requested.

Barton appealed and provided additional FICA documents, reflecting his employment as an hourly employee from 1967–1977 and as a salaried employee from 1978–1986. The committee denied Barton's appeal, noting that his documentation "was insufficient to override the Plan records. The Committee also noted that the FICA records Barton presented reflected employment by companies other than ADT, which according to the Committee "*could indicate* that [he] did not have a continuous term of employment. (The Ninth Circuit interpreted this to mean that because Barton could not document that he worked 1000 hours or more for each of the years he was employed by ADT and its affiliates, or that his employers participated in the Plans, he could not prove he was entitled to a pension.)

Barton sued the Plan and the Committee, and the District Court ruled in favor of the defendants, concluding that (1) the Committee's decision was subject to an "abuse of discretion" standard of review, and (2) the Committee did not abuse its discretion in denying pension benefits to Barton.

The Ninth Circuit held that the District Court "… faithfully applied our precedent in reviewing the Committee's denial of benefits for abuse of discretion" but went on to create a new burden of proof applicable in cases where "the defending entity solely controls the information that determines entitlement, leaving the claimant with no meaningful way to meet his burden of proof." Concluding that this was just such a case, the Court held that the District Court "… incorrectly placed the burden of proof on Barton for matters within defendants' control." The Court stated that placing the burden of proof on Barton was inappropriate because "… defendants are in a far better position to ascertain whether an entity was a participating employer" but had claimed in the district court that they had "no records indicating whether the entities [identified as Barton's employers in the Social Security records] were Participating Subsidiaries in the Plan at any time."

The majority's most significant concern appears to have been the Committee's inability to explain why they could not identify which of the ADT-affiliated companies participated in the plans, or how Barton could have obtained that information. The defendants, meanwhile, contended that they had no evidence of Barton's service in their records to demonstrate that he worked for a participating employer. The Court questioned how Barton could have proven whether the Board of Directors ever authorized Barton's employers to participate in the plan. Consequently, the Court concluded that if Barton has made a "prima facie case" that he is entitled to pension benefits, "… it is properly defendants' burden to clarify what entities are covered under the Plans in the first instance. Employers, plans, and plan administrators must know the terms and conditions of the benefits they offer and be able to identify covered employers and participating employees." (The Court did not specifically state what it takes for a benefit claimant to present a "prima facie case" that he is entitled to a benefit, leaving that determination up to the district court, but instructed that "objective documentation of prior employment" such as Social Security records, W-2 forms, income tax returns and pay stubs would be appropriate evidence to consider.)

The Court was also concerned about requiring Barton to prove that he had worked the requisite 1,000 hours per year for each of the years in question, since "… nothing indicates that Barton was warned at the start of his career that he needed to retain a log of his hours to obtain pension benefits a generation or two later." The Court reasoned that it has "… previously shifted the burden of proving the number of hours an employee works where the calculation of damages is uncertain due to defendants' failure to keep statutorily required records." The Court concluded that to hold otherwise "would essentially reward Lucy for pulling the football away from Charlie Brown …"

The majority opinion leaves room for future litigants to argue that the ruling does not apply in all benefit claim contexts. Specifically, the Court held that it makes sense to require benefit claimants to bear the burden of proving entitlement to benefits "… where the claimant has better — or at least equal — access to the evidence needed to prove entitlement." The Court cited the example of a disability plan benefits claim, in which "… the burden lies most sensibly with the claimant, who can provide test results, physician reports, and other evidence about her condition." But the Court also held that "… in other contexts, the defending entity solely controls the information that determines entitlement, leaving the claimant with no meaningful way to meet his burden of proof. This is one of those cases." The decision, unfortunately, draws no bright lines between cases where claimants should bear the burden of proof, and cases where the burden should rest with administrators.

Circuit Judge Ikuta launched a particularly sharp dissent with "Today the majority goes off the rails." The dissent noted that when the plan document at issue confers discretion upon a plan administrator to determine entitlement to benefits, the administrator's decision is reviewed to determine whether the administrator abused that discretion. Even if the plan does not confer discretion, and the court reviews the administrator's decision "*de novo*," the burden of proving eligibility for, and entitlement to, benefits rests with the claimant.

The dissent also pointed to a fact about which the majority opinion was silent — the plan administrator had a system to maintain and update records regarding employees' pension eligibility, and those records contained no evidence that Barton was a participant in the plan or that certain of the ADT-affiliated companies for whom he worked participated in the plan.

The dissent accused the majority of "invent[ing] a burden-of-proof standard (along with a burden-shifting approach) that is in direct conflict with our abuse of discretion standard" and contrary to the Supreme Court's directive that courts should not make "ad hoc" exceptions to the abuse of discretion standard. The dissent was also concerned about the majority opinion's requirement that plan administrators must "reveal which companies did in fact participate in their plans," since "the plan administrator here elected to fulfill its fiduciary duty by maintaining and updating a record of past and present employees who are entitled to pensions, rather than by listing covered companies."

The dissent saved its harshest criticisms for the conclusion:

> In short, the majority's ad hoc rule designed to help Barton in this case is a disaster. The majority's requirement that the district court allocate a burden of proof when it is supposed to be

> reviewing a plan administrator's decision for abuse of discretion makes no sense and is contrary to our case law. And the rule itself, which verges on the incomprehensible, will defy district courts' efforts to apply it. Given that this rule was apparently developed to help a single claimant, one can only hope that this strange rule will be confined to the limited facts of this case.

The dissent's concern is a valid one. While there are strong arguments that Barton's holding should at least be limited to its facts — and perhaps only to this one case — there is nothing that prevents plaintiffs' attorneys from arguing that its burden-shifting approach should be applied in a broader range of cases. Only time will tell how far the decision might extend.

In the meantime, and unless the decision is modified on a rehearing, *Barton* is the law in the Ninth Circuit. The employers that are perhaps the most likely to have to navigate the decision are large companies with a long history of mergers and acquisitions that sponsor defined benefit plans. The corporate structure and history of those companies, and the plans they sponsor, can be complex. *Barton* shows how important it is that the employees responsible for administering the plan be prepared to explain its history — including its recordkeeping processes — and describe the classes of employees who are and who are not entitled to a benefit.

More generally, administrators should take care during the administrative claim process to explain exactly why benefits are being denied. Administrators should ask themselves whether a reasonable person could understand the reasons that underlie the decision. If the benefit decision requires the administrator to conduct historical research (as ADT may need to do to get to the bottom of whether Barton's employers participated in the plan), the administrative record should reflect the steps that the administrator went through to answer the question, and explain its conclusions.

We will continue to monitor *Barton*, and the cases that arise in its wake.

APRIL 2016

Trucker ✦ Huss is proud to be a sponsor of the 2016 Western Benefits Conference in Seattle, to be held July 19 – 22, at the Sheraton Seattle. This is certain to be a premier educational and networking opportunity for retirement and health & welfare benefits professionals, and our attorneys our are actively involved as committee members and presenters. Early registration ends June 17. Trucker ✦ Huss will be hosting a reception at the Conference on July 20, and details will be provided in future newsletters and through email announcements. We look forward to seeing you in the Emerald City!

FIRM NEWS

On March 16, **Marc Fosse** gave a webinar entitled: *Hot Topics in Executive Compensation* for the Knowledge Group. On March 22, Marc was also a participant on a panel at the WP&BC SF Chapter meeting on "What's in Your Toolbox to Help You De-risk . . .?"

On April 12, 2016, **Tiffany N. Santos** moderated an ABA JCEB webinar panel presentation entitled: *Navigating the Pitfalls of PBM Contract Negotiation,* and on April 14, 2016, Tiffany gave a presentation on the "Do's, Don'ts and Open Issues for Wellness Programs: Rules from Four Agencies and the Courts" at The Year in Employee Benefits 2016 conference in San Francisco sponsored by ALI-CLE.

On April 20, **Benjamin Spater**, **Nicholas White** and **Robert Gower** presented a webinar entitled: *The Department of Labor's Final Fiduciary Rule is Here — A First Look for Plan Sponsors.* They addressed the significance of the rule and the practical steps Plan sponsors should be taking with service providers to comply with it. If you missed the webinar, would like to hear it again, and/or would like to view the Powerpoint Presentation, you may do so here: http://www.truckerhuss.com/events/

On May 12, **Robert Gower** was a speaker at an ABD Office Hours Webinar entitled: *The New DOL Fiduciary Rule and Your 401(k) Plan: Cutting to the Chase — What You Need to Know.* He provided guidance on the purpose of the rule, how it effects ERISA plan sponsors, which practices are its primary target, and related topics.

On May 17, **Marc Fosse** will give a presentation to the East Bay Tax Club on *Section 409A Compliance and Corrections*.

On May 18–19, **Clarissa Kang** will be appear at the ABA JCEB's ERISA Litigation National Institute in Chicago, speaking on two panels: *Health Care Claims and Related Litigation under the ACA* and *Health Care Provider Litigation*.

On May 19, **Nick White** will be speaking at the WP&BC San Francisco Chapter Spring Conference regarding: *The DOL's New Fiduciary Conflict of Interest Rule*.

On May 19, **Kevin Nolt** will be giving an Employee Benefits Legal Update at the Hood & Strong Annual Payroll and Benefits Seminar in San Francisco.

On May 24, **Ben Spater** will speak at a Fiduciary Training Dinner presented by Sequoia Consulting Group, addressing the DOL's new fiduciary regulations, how to protect yourself from 401(k) lawsuits, and fulfilling your fiduciary duties.

On June 8, **Mary Powell** and **Marc Fosse** will present a webinar on compliance with 457(f) entitled: *Compensation Planning for Tax-Exempt Entities: Navigating IRC Section 457(f)*.

On June 8, **Ben Spater** will be a speaker at the 2016 San Francisco Fiduciary Summit, an educational workshop for finance, human resource & benefit executives, business owners, and fiduciaries, to discuss retirement plan best practices and strategies. For details and registration visit: http://xgrowthsolutions.com/events/2016-san-francisco-fiduciary-summit/

The Trucker ✦ Huss *Benefits Report* is published monthly to provide our clients and friends with information on recent legal developments and other current issues in employee benefits. Back issues of *Benefits Report* are posted on the Trucker ✦ Huss web site (www.truckerhuss.com).

Editor: Shannon Oliver, soliver@truckerhuss.com

TRUCKER ✦ HUSS

Adrine Adjemian
aadjemian@truckerhuss.com
415-277-8012

Jahiz Noel Agard
jagard@truckerhuss.com
415-277 -8022

Callan G. Carter
ccarter@truckerhuss.com
415-277-8037

Joseph C. Faucher
jfaucher@truckerhuss.com
213-537-1017

J. Marc Fosse
mfosse@truckerhuss.com
415-277-8045

Angel Garrett
agarrett@truckerhuss.com
415-277-8066

Robert R. Gower
rgower@truckerhuss.com
415-277-8002

Mikaela Habib
mhabib@truckerhuss.com
415-277-8009

R. Bradford Huss
bhuss@truckerhuss.com
415-277-8007

Clarissa A. Kang
ckang@truckerhuss.com
415-277-8014

T. Katuri Kaye
kkaye@truckerhuss.com
415-788-3111

Freeman L. Levinrad
flevinrad@truckerhuss.com
415-277-8068

Michelle Schuller Lewis
mlewis@truckerhuss.com
415-277-8038

Elizabeth L. Loh
eloh@truckerhuss.com
415-277-8056

Gisue Mehdi
gmehdi@truckerhuss.com
415-277-8073

Kevin E. Nolt
knolt@truckerhuss.com
415-277-8017

Barbara P. Pletcher
bpletcher@truckerhuss.com
415-277-8040

Mary Powell
mpowell@truckerhuss.com
415-277-8006

Tiffany N. Santos
tsantos@truckerhuss.com
415-277-8039

Eric Schillinger
eschillinger@truckerhuss.com
415-277-8071

Robert F. Schwartz
rschwartz@truckerhuss.com
415-277-8008

Benjamin F. Spater
bspater@truckerhuss.com
415-277-8011

Charles A. Storke
cstorke@truckerhuss.com
415-277-8018

Sean T. Strauss
sstrauss@truckerhuss.com
415-277-8028

Jennifer Truong
jtruong@truckerhuss.com
415-277-8072

Nicholas J. White
nwhite@truckerhuss.com
415-277-8016

PARALEGALS

Shannon Oliver
soliver@truckerhuss.com
415-277-8067

Susan Quintanar
squintanar@truckerhuss.com
415-277-8069

TRUCKER ✦ HUSS
A PROFESSIONAL CORPORATION
ERISA AND EMPLOYEE BENEFITS ATTORNEYS
www.truckerhuss.com

One Embarcadero Center, 12th Floor
San Francisco, California 94111-3617
Tel: (415) 788-3111
Fax: (415) 421-2017
Email: info@truckerhuss.com