

March 2014

In an age of global financial risk, the role of an ERISA fiduciary has become more complex. Annuity purchases for Defined Benefit (“DB”) plan terminations and pension risk transfers are subject to ERISA standards of “procedural prudence”

Department of Labor Interpretive Bulletin 95-1 (“IB 95-1”) (“safest annuity standard”) is often cited as a standard to be followed by fiduciaries. However, IB 95-1 is neither law, nor regulation. Plan fiduciaries must adhere to ERISA’s duties of care and loyalty to act solely in the interest of participants. ERISA “requires, at a minimum, that plan fiduciaries conduct an objective, thorough and analytical search for the purpose of identifying and selecting providers from which to purchase annuities.” (29 C.F.R. §2509.95-1(c)). Fiduciaries must take steps to ensure that this duty of loyalty is not

compromised. Retaining an Independent Fiduciary can potentially mitigate conflicts.

Shouldn't then, a comparable, intensive evaluation be applied to the proposed expert selecting the annuity provider?

In August 2000 a 5th Circuit Court in *Bussian v. RJR Nabisco, Inc.*, (“*Bussian*”) held that when retaining an outside expert, fiduciaries must focus on the *process* used by that expert to fulfill ERISA’s *procedural prudence standard* when selecting the annuity provider. Some firms assist in meeting IB 95-1. An Independent ERISA Fiduciary having sole responsibility to do so is a substantially different level of responsibility.



Compare The Fundamentals . . .

ERISA A federal law that establishes certain minimum standards for private pension plans.

DOL Interpretive Bulletin 95-1. Issued in response to concerns about insurance solvency, published without public comment. **It is neither a regulation, nor a law.**

. . . And Compare Their Standards

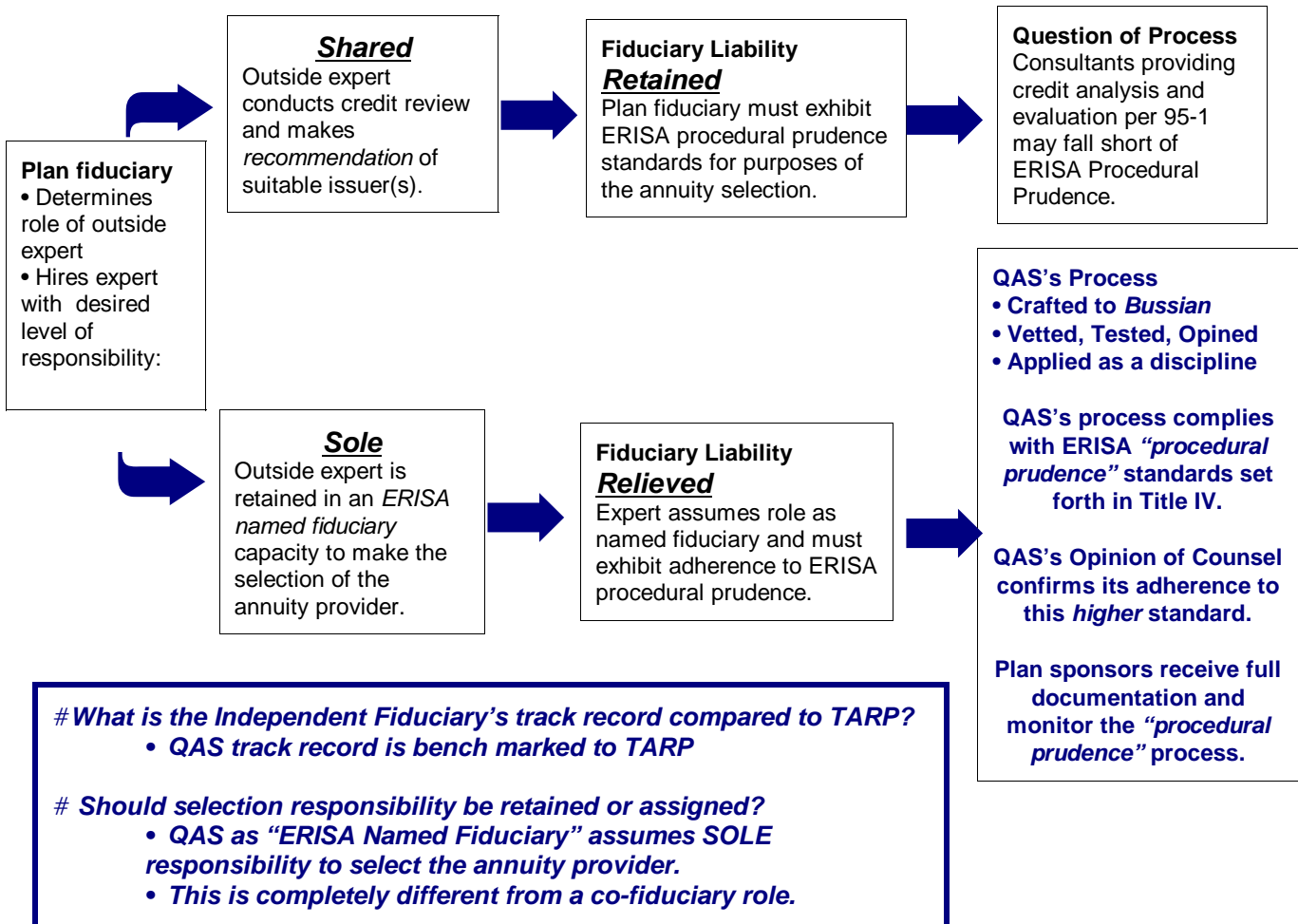
ERISA Duty of Care Focuses on how a fiduciary acts in the selection of an investment. *ERISA’s prudent man standard [ERISA’s test of prudence] is one of conduct, and not a test of the result of performance of the investment. In the most relevant ruling the court focused on how the fiduciary acted in the selection of the annuity, and not whether the insurer remained solvent or failed. (Bussian v. RJR Nabisco, Inc., 223 F 3rd 286, 5th Cir.).*

DOL Interpretive Bulletin 95-1 Focuses on the quality of the selected annuity by outlining six factors for consideration.

ERISA’s Duty of Loyalty The obligation of a fiduciary to act solely in the interest of participants and beneficiaries. *ERISA’s duty to loyalty is “the highest known to the law.” (Donovan v. Bierwirth, 680 F.2d 263, 272 n.8 (2d Cir.).*

Now, Compare How the Process is Applied . . .

The fiduciary *process* begins with a proper examination of possible outside experts and their ability to fulfill the requirements of ERISA as outlined in *Bussian*, and not the minimum standards of IB 95-1.



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