U.S. ERISA FIDUCIARY DUTIES GENERALLY – PLAN ASSETS

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FIDUCIARY DUTIES GENERALLY – PLAN ASSETS

- ERISA applies to a wide array of employee benefit plans including pension trusts, multi-employer pension plans and individual account plans. Fiduciaries who invest the assets of these ERISA plans are subject to fiduciary duties.

- Where the fiduciary of an ERISA plan makes an equity investment in another Fund, that Fund's assets are also considered plan assets unless an exception applies.[1]

[1] See deck U.S. ERISA Significant Participation Rules as to what constitutes a plan asset.

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- ERISA Section 3(21) provides that an ERISA fiduciary includes any individual who:
  - exercises any authority or control respecting management or disposition of plan assets,
  - renders investment advice for a fee or other compensation with respect to any moneys or other properties of plan, or has any authority or responsibility to do so, or
  - has any discretionary authority or discretionary responsibility in the administration of such plan.
- Such individual would include the fund manager of a private equity fund who is responsible for investing the assets of a fund holding plan assets.
- The U.S. Department of Labor is expected to repropose new fiduciary regulations in 2015 which will likely expand the definition of fiduciary to include a wider range of financial advisers to ERISA plans.

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- ERISA imposes the following obligations on fiduciaries:
  - Duty of Loyalty to act solely in the interest of plan participants
  - Duty of Care to act with the care, skill and diligence of a prudent person
  - Duty to Diversify Plan Assets unless, under the circumstances, doing so is imprudent
  - Duty to Follow Plan Documents
  - Duty with Respect to Co-Fiduciaries to not knowingly participate in or conceal another's breach

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- ERISA also prohibits fiduciaries, including a manager of a fund, from engaging in numerous transactions with a “party in interest” unless an exemption applies.

- Absent an exemption, these prohibited transaction rules could prevent a Fund from conducting normal business a fund.[1]

FIDUCIARY DUTIES GENERALLY – PLAN ASSETS

- If a fund manager is on ERISA fiduciary, then there are numerous responsibilities that apply to the fund manager including:
  - Providing information about transactions, assets and expenses to Benefit Plan Investors following each year for such plan fiduciaries to use in their own annual reports.
  - Disclosing to the plan fiduciaries each year information regarding the nature of the services being rendered by the fund manager, the direct and indirect compensation received by the fund manager, and an affirmative acknowledgement that the fund manager is a fiduciary with respect to the plan.