Legal Regulatory Update

2011 NCCMP Annual Conference

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Proposed Merger

- Medco and Express Scripts, Inc. (ESI)
  - Possible effects of merger
    - Competition
    - Market impact

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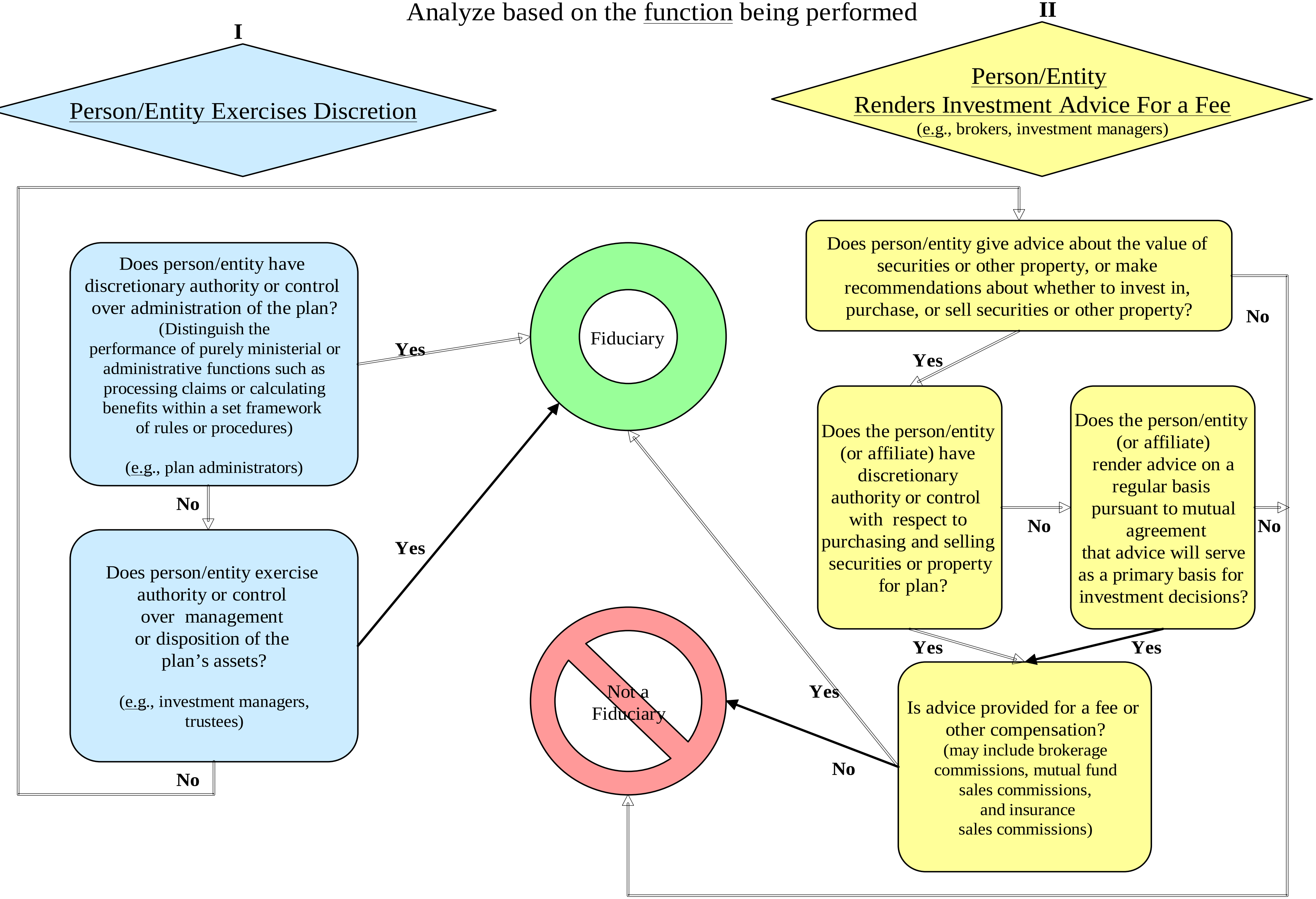
ERISA Fiduciary Definition

- October 22, 2010 - Proposed rule interpreting definition of "fiduciary"
- March 1 & 2, 2011 – DOL held hearings
- September 19, 2011 DOL announced rule will be reproposed in early 2012
- "The core argument (of the proposed regulations) is solid . . . We are not backing down . . .We thought the rule would be received with some trepidation, but not the firestorm we received." - Deputy Assistant Secretary of Labor Michael Davis.

Chart II: Fiduciary Analysis

Analyze based on the function being performed



Framework for Analyzing Investment Advice Fiduciary Status under DOL Proposed Regulations

Advice Category + Status of Advisor + Fee or other Compensation

Advice Category

Does the person or entity provide any of the following categories of advice to a plan, a plan fiduciary or a participant or beneficiary?

Advice, an appraisal or fairness opinion about the value of securities or other property (including real estate)

or

Make recommendations about whether to invest in, purchase, or sell securities or other property

or

Provide advice or make recommendations as to the management of securities or other property (including recommending investment managers)

Status of Advisor

Does person/entity have the following status or make any of the following representations, together or through an affiliate?

Represent or acknowledge fiduciary status

or

Exercise authority or control over the management or disposition of the plan's or participant's assets

or

Have discretionary authority or control over plan administration

or

Act as an "investment adviser" pursuant to Advisers Act

or

Have an agreement, arrangement or understanding with the plan, fiduciary or participant, that advice given:

• "may be considered" in connection with plan investments; and

•Will be individualized

Fee or other Compensation

Does the person, entity or an affiliate receive any fee or compensation for the advice from any source, including any fee or compensation incident to the transaction in which the investment advice has been rendered or will be rendered. Examples include: brokerage, mutual fund sales and insurance sales commissions, and fees and commissions based on multiple transactions involving different parties.

Person is providing investment advice for a fee unless a specific regulatory limitation applies

See next page for limitations

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Framework for Analyzing Investment Advice Fiduciary Status under DOL Proposed Regulations

A person is not providing investment advice for a fee merely by reason of an activity described in any of these limitations

Limitations – IAPD Plans Only

A person will not be considered to be providing investment advice for a fee to an individual account, participant directed (IAPD) plan if:

The person is providing "investment education" within the meaning of IB 96-1.

or

The advice involves marketing or making available a platform of investment alternatives for a plan fiduciary to select from, which is not individualized to the needs of the plan, and the person providing the platform has disclosed in writing to the plan fiduciary that it is not undertaking to provide impartial investment advice.

or

The advice involves providing general financial information and data to assist in investment selection or monitoring, and the person providing the platform has disclosed in writing to the plan fiduciary that it is not undertaking to provide impartial investment advice.

Seller's / Appraisers Limitation – All Plans

A person will not be considered to be providing investment advice for a fee to any type of plan if:

The person or entity has not acknowledged fiduciary status, and can demonstrate that the person receiving the advice knows or reasonably should know :

(1) that the adviser is acting as a seller, agent or appraiser for a seller with adverse interests to the plan; and

(2) the adviser is not undertaking to provide impartial investment advice.

and

Preparation of a general report or statement that merely reflects the value of an investment of a plan or a participant or beneficiary that is provided for purposes of compliance with the reporting and disclosure requirements of ERISA, the Code, and related regulations, forms and schedules is not "advice," or an "appraisal or fairness opinion" **unless** such a report involves assets for which there is not a generally recognized market and it serves as a basis on which a plan may make distributions to participants and beneficiaries.

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Impact of Proposed Changes to Fiduciary Definition

Some currently "non-fiduciary" activities may become "fiduciary advice" activities, including:

- Recommending advisers
- Rollover advice
- Sales presentations (unless "seller's exemption" disclaimers are provided)
- Investment consulting services
- Valuation services
- Plan sponsor employees supporting fiduciary activities (i.e., corporate treasury employee recommending new plan trustee or consultant)

New Disclosure Regulation

- Service Provider Disclosure
  - Amendment of Form 5500 Schedule C
    - 75 Fed. Reg. 64710 and 64731 (Nov. 16, 2007)
  - "Point of Sale" – Interim Final 408(b)(2) Regulation
    - 75 Fed. Reg. 41600 (July 16, 2010)
- Disclosure to Participants
  - 75 Fed. Reg. 64910 (Oct 20, 2010) (final regulation)
  - 75 Fed. Reg. 73987 (Nov 30, 2010) (target date funds) (proposed)
  - Regulatory Agenda – Pension Benefit Statements

Service Provider Disclosure – Interim Final Regulation

- ERISA prohibits a "party in interest" from providing plan services, unless statutory exemption under § 408(b)(2) applies.
  - New regulation defines "reasonable arrangement."
- Providers who do not comply may engage in a "prohibited transaction" under Code § 4975.
  - Provider may be liable for excise taxes, possibly required to return "excess compensation" to plan.
- Class exemption provides relief for plan fiduciary (not provider). Requires fiduciary to report provider non-compliance to DOL.

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Service Provider Disclosure – Interim Final Regulation

- In general, *covered service providers* to *covered plans* must disclose direct and indirect compensation they expect to receive for providing services.
- Covered Plans - ERISA-covered pension plans
  - excludes IRAs, SEPs, SIMPLE accounts, "top-hat" plans
  - separate regulation pending for welfare plans
- Covered Service Providers – a person who:
  (1) expects to receive more than $1000 in direct or indirect compensation, and
  (2) provides certain fiduciary or non-fiduciary services

Form 5500 Schedule C uses similar definition of compensation; but covered plans and providers are not the same.

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Service Provider Disclosure – Interim Final Regulation

- Required Disclosures
  - description of services provided to plan
  - statement of fiduciary status, if applicable
  - "direct" compensation
    - excludes payments by plan sponsor or employer
  - "indirect" compensation
    - including a description of services provided for indirect compensation and payer identity
    - includes "non-monetary" compensation
  - manner of receipt of compensation

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Service Provider Disclosure – Interim Final Regulation

- *When is disclosure required?*
  - Existing service arrangements
    - before April 1, 2012 effective date
  - All arrangements
    - "reasonably in advance" of entering into service arrangement
    - within 60 days of service provider knowledge of change
    - within 30 days to correct an error

Participant Disclosure Regulation-Background

- DOL interprets ERISA's fiduciary responsibility rules to require fiduciaries to provide participants in a participant-directed plan "sufficient information" to make informed investment decisions.
  - 75 Fed. Reg. 64910 (Oct 20, 2010) (final regulation)
- Disclosures required by 404(c) have been "optional"– new requirements are mandatory.
- Consequences of failure to comply – breach of fiduciary duty and loss of 404(c) protection.
  - Fiduciaries could be liable for losses resulting from participant investment decisions made without sufficient information.

Participant Disclosure Regulation – Comparison to 408(b)(2) Disclosure

	408(b)(2) <u>Regulation</u>	Participant <u>Disclosure</u>
Information Recipient	Plan-Level Fiduciary (e.g., Sponsor or Administrator).	Participants/beneficiaries who direct their plan account investments.
Duty to Disclose	Covered Service Providers	Plan Administrator.
Form and Presentation	Flexible rules, but sufficient to allow evaluation of fees.	Specific form and presentation requirements.
Electronic Media	Contract may allow electronic disclosure.	DOL regulation governs availability.

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Participant Disclosure Regulation – Overview

Three "Levels" of Required Information

- <u>Automatic Disclosures</u>
  - Provide on or before the date the participant may first give investment instructions.
  - Provide to all "eligibles" annually, whether not the individual participates.
- <u>Website Investment Disclosure</u>
- <u>"On request" Disclosures</u>

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Overview

- Overview of DOL structure & law
- Anatomy of a DOL EBSA Audit
- What do I do when I get a DOL document request?
- Issues that come up on audit
- What can I do before the plan is audited?

Issues that Have Come Up on Audit

- Meals for trustees and employees or their families
- Travel expenses for trustees and employees
- Alcohol expenses
- Graduation ceremony expenses:
  - Who is attending? Family members? Union Officers? Dignitaries?

Strategy Going Forward

An Industry Problem Requires An Industry Response

- Apprenticeship Enforcement Group Forming
  - Groom Dial-In
  - Tuesday, October 4, 2011 2:00 PM Eastern

- Local & National Apprenticeship Plans
- Local & National Employer Associations
- Local & International Employer Associations
- Benefit Focused Educational Organizations
- Fiduciary Insurers

Litigation – ERISA Remedies

Cigna Corp v. Amara, 536 U.S. _ (2011)

- SPD provisions are not the “plan” and not enforceable under ERISA section 502(a)(1)(B).
  - Core issue is disclosure to participants.
- (In dicta) Additional forms of relief may be available depending upon the level of harm– remedies might include:
  - reformation of contract (i.e., the plan)
  - estoppel (e.g., plan may not enforce certain terms)
  - monetary compensation from a trustee (surcharge)

Litigation – Foreign Currency Exchange

- Many cases filed against custodians/directed trustees
- No decisions – still in litigation
  - Some under seal
  - Review with counsel if issues affect your plans