



MEMORANDUM

TO: Our Plan Sponsors
FROM: Ice Miller Donadio & Ryan (James D. Kemper)
DATE: May 30, 2003
RE: What Services Is It Reasonable to Expect from Your Investment Advisor or Consultant?

As a sponsor of an ERISA plan, you are held to a standard of care as a fiduciary known as a "knowledgeable person" standard. For example, in exercising your fiduciary duties in selecting the investment choices available to your participants (many times this means selecting the available mutual funds) under your 401(k) plan, you must use the same care and skill as an experienced investment professional. Many plan sponsors conclude that they need the advice of an independent experienced investment professional in making these selections.

Many times a broker or insurance salesman is consulted. However, at that point the plan sponsor may make a *critical mistake* and assume that because an experienced broker or salesperson was engaged, therefore the plan sponsor has fulfilled its ERISA responsibility. Thereafter, it is the broker or salesman (or their respective companies) that is liable under ERISA. This assumption in most cases is *not correct*.

The following is a guideline for selecting an experienced investment professional and, to the extent possible, shifting ERISA responsibility to that professional. After all, isn't that why you engaged the professional in the first place?

We suggest that the plan sponsor have a written contract with the investment advisor or consultant which sets forth the *expectations* of both parties. We think it is reasonable for you to ask that your investment advisor agree to the following expectations:

X *Acknowledge and accept ERISA fiduciary responsibility.* You should be able to rely on the recommendation and advice of your investment advisor. You make the final decision as to investment policy and choices, but you should expect your advisor to make recommendations and give advice as an "ERISA fiduciary." After all, that is what you are.

X *Provide the initial draft of the investment policy for the plan.* The policy is the guideline for your participants, your advisors, and, ultimately, the court if anything goes wrong. You should expect your advisor to proactively develop and



recommend an investment policy for your plan.

- X Monitor and recommend changes in the investment policy for the plan. The markets are very volatile and ever changing. Your advisor should be on top of market conditions and recommend changes to your investment policy to keep pace with today's market conditions.
- X Conduct investment product searches and screening and make recommendations. The range of investment products is mind boggling. There are over 60,000 mutual funds alone. Which are right for your plan and participants? You should expect your advisor to screen through the options, make "apples to apples" comparisons and, ultimately, make sound reasoned recommendations as to which are right for your plan and your participants.
- X Provide a rational decision process. You should expect your advisor to bring rationality to your decision making process in narrowing the range of available investment choices for your participants. The Department of Labor has repeatedly emphasized the importance of plan fiduciaries following a rational process in making investment decisions. Your selection of which mutual funds to make available to your participants is an investment decision. Your decision should be based on a sound decision making process. Your advisor should set out *in writing* the appropriate steps to follow in making your decision and provide sound data and *written* recommendations to guide your decisions.
- X Monitor the investment options or mutual funds. Merely providing reports and comparisons is not enough. Much of that is free for the asking on the Internet. You should expect your advisor in addition to understand the investment strategies underlying each option or mutual fund and monitor personal and institutional changes. If there are changes that are cause for concern, your advisor should keep you informed on a timely basis, not just when the next report is due.
- X Proactively search out new investment opportunities and products. Your advisor should keep you informed of new investment products that may be appropriate for your plan and participants.
- X Provide investment education. You are not an investment expert. Your advisor is. Nevertheless, you must make the final investment decisions. You should expect your advisor to help guide you through inscrutable jargon, provide background information, and provide in-depth reports on products and markets.



- X *Give independent advice rather than sell a product.* You are seeking independent, experienced advice, not necessarily a product. You should also expect your advisor to give you advice even if he or she thinks it will be unpopular with you. You need an advisor who is looking out for the best interest of your plan and its participants not just to sell a product.

We have found that a clearly written agreement between the plan sponsor and the investment advisor is the best way to protect the sponsor and to avoid misunderstandings down the road. The agreement does not have to be long nor should it be one sided. It should explicitly set out each party's expectations. That's the best way to build a sound foundation for a long lasting relationship.

We would be pleased to consult with you in crafting an Investment Advisor Agreement custom designed to fit your unique situation and expectations.

InvestAdvisorMemo.doc