HOLLAND&HART. BENEFITS LAW GROUP

News Alert

October 6, 2008

The Sky is Falling?
How Plan Fiduciaries Should Respond

The recent turmoil in the stock market and failures and rescues of financial institutions serve as an important reminder to ERISA plan fiduciaries about the need to take seriously the fulfillment of their duties under ERISA. Not only is the initial selection of investment options for plans subject to ERISA's fiduciary standards, but plan fiduciaries are also required to monitor the plan's investment selections on a regular basis to ensure such investment options continue to be suitable and prudent for participants. In addition, ERISA requires fiduciaries to prudently select and evaluate any plan service providers, such as financial institutions that may serve as recordkeepers for the plan.

The guidance from the U.S. Department of Labor is clear, and recent litigation has reinforced the points, that although fiduciaries are not required to be psychic, their decisions regarding plan investments must be made prudently and solely in the interest of plan participants and beneficiaries. In other words, ERISA plan fiduciaries must pay close attention to activities that materially affect the plan's investments or that expose the plan to investment risks. Similarly, plan fiduciaries must have an objective process for evaluating the qualifications of a service provider.

The cornerstone of ERISA fiduciary duties is engaging in prudent processes and procedures. In the midst of the current market turmoil, increased monitoring of investment options and heightened attention to prudent processes and procedures are essential. As always, fiduciaries must be vigilant about documenting their considerations in order to demonstrate prudence and should keep records of the information considered, the decision-making process and the conclusions reached with respect to the plan and its investments.

If the plan is a defined benefit plan or other plan for which the fiduciaries are responsible for making investment decisions in the plan, fiduciaries must work with their investment advisors to evaluate the investments and assess whether, at this time, the plan's investments continue to be prudent. If an investment manager makes the investment decisions for the plan, fiduciaries must monitor and evaluate the performance of the investment manager.

If the plan is a defined contribution plan such as a 401(k) plan, participants typically may select the investments from an investment menu. Although fiduciaries generally are protected from the effects of individual participant investment decisions and are not guarantors of performance, fiduciaries are required to monitor the plan's investment option menu and ensure that the menu itself is appropriate. Fiduciaries are not required to monitor participants' individual investment choices.

Fiduciaries should not wait until the next scheduled meeting to get an update on the plan's current financial status. Plan fiduciaries need to check in with plan advisors, evaluate the advisors' recommendations and determine whether immediate action is required in response to any of the current market conditions. If the plan has a statement of investment policy, fiduciaries should determine whether the changes in the market require any changes to the investments under the standards of the investment policy. Plan fiduciaries should meet more often and engage in more frequent review, evaluation and monitoring of the plan's investments during times of market turmoil.

Fiduciaries should also investigate whether the plan's service providers are financially at risk. One of the relevant factors for selection and evaluation of a service provider is information about the financial condition of the firm acting as the service provider. For example, it may not be prudent to transfer the plan's recordkeeping to a financial institution that is experiencing financial problems.

Moreover, although not required, plan fiduciaries may want to provide additional information to anxious participants. Fiduciaries may explain to participants that plan funds are held in a trust and can only be used to provide benefits to participants and their beneficiaries. The trust cannot be accessed by the financial institution that holds the fund or acts as recordkeeper. In addition, an investment provided by a financial institution may be insured or guaranteed up to certain amounts; contact the financial institution in order to determine any protection.

Fiduciaries may also want to remind participants of general investment information, such as information about diversification, and that retirement plan accounts are long-term investments and should be viewed from that perspective. However, fiduciaries generally should be careful not to give specific investment advice to participants, unless the plan has set up a permitted investment advice arrangement, or they risk being responsible for the investment results of the decision.

If you have any questions about ERISA's fiduciary obligations in the context of the financial crisis, or any other question pertaining to employee benefits, contact a member of the Benefits Law Group.

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