

Employee Benefits Alert: Financial Markets Impact ERISA Retirement Plans and Plan Fiduciaries

9/23/2008

The events of the last few days and weeks related to the financial markets impact retirement plans governed by the Employee Retirement Income Security Act (ERISA) and their sponsors, as well as other plan fiduciaries. ERISA generally requires fiduciaries to act with care, skill, and prudence, and for the exclusive benefit of plan participants and beneficiaries. The U.S. Department of Labor (the "Department"), the agency with primary jurisdiction over the provisions of ERISA dealing with participant protections, has made clear its view that fiduciaries must monitor developments that impact retirement plans, and to take action where appropriate.

In 2004, the Department set out its views, and provided a useful compliance roadmap, in connection with an investigation of certain mutual-fund trading practices.¹ According to the Department, fiduciaries should consider the potential economic impact on the plan's investments, whether any steps might be taken to limit the potential for reoccurrence in the future, and any remedial action taken or contemplated to make investors whole. If necessary, the fiduciary should consider contacting the fund directly in an effort to obtain information.

At a minimum, plan fiduciaries should contact their investment providers and investment advisors and ask for a current update on the status of the mutual funds and other investment vehicles. Fund ratings should be reviewed, as should the plan's investment policy statement. In any case, even where no action is warranted, it is important to document the efforts of fiduciaries. For example, this might take the form of retirement committee minutes. In the event of a subsequent challenge, documentation can be used to demonstrate that fiduciaries satisfied their obligations under ERISA.

Communication with participants and beneficiaries is also important. The purpose is twofold: first, it sends the message that the fiduciaries are paying attention; and second, it further buttresses the written record establishing compliance with ERISA.

The ERISA fiduciary standards ensure that fiduciaries at all times—including times of great uncertainty—act in the best interests of participants and beneficiaries. Fortunately, we have clear and useful guidance from the Department, which instructs fiduciaries as to how best to proceed. It is now up to plan sponsors and fiduciaries to act accordingly.

Endnotes

¹ See Statement of Assistant Secretary Ann L. Combs, "Duties of Fiduciaries in Light of Recent Mutual Fund Investigations" (Feb. 17, 2004).