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ERISA: Life After the Stock Market Shock

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As the current financial crisis continues to unfold, questions abound about why the wheels fell off our economy and what, if anything, ERISA plan fiduciaries should do in response. What follows is the author's best guess as to what happened and what new problems ERISA fiduciaries face after the stock market shock.

What Caused the Crisis in the Financial Markets?

While no one knows for sure what caused credit markets to seize up and stock prices to crash, many commentators point to a confluence of unfortunate events. Beginning in the 1990s, the federal government became intent on making the United States a nation of homeowners. Financial institutions were encouraged by the federal government to lend more money. The mortgage crisis thus began innocently enough. To attract more home buyers, mortgage lenders innovated. Teaser

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rates and no-document ("Liar") loans were introduced. Between 2002 and 2004 home ownership became readily available to borrowers who previously would not have qualified for credit—the so-called subprime borrowers. As more people bought homes real estate values rapidly increased. Home prices reached unsustainable levels when the borrowers' incomes could no longer sustain their borrowing. Some experts believe that the mortgage and credit crises were caused by the inability of many homeowners to pay their mortgages when their low introductory rate (subprime) mortgages reverted to regular rates.

Because interest rates did not significantly increase during this time period, housing prices continued to go up. In response to concerns about inflation, the Federal Reserve began raising interest rates in 2004. Housing price increases first slowed and then started to falter in 2006. Between 2000 and 2006, US home prices rose on average by almost 50 percent. As the real estate market cooled off, borrowers who had expected to refinance their mortgages when their adjustable rate loans went to higher rates (and higher monthly payments) found they were unable to do so. Many of these borrowers who could not afford their new higher mortgage payments defaulted, causing real estate values to decline.

Coupled with innovation in the mortgage lending business came innovation in the financial markets. Pools of mortgage loans, including subprime mortgage loans, were packaged into portfolios of structured products based on cash flows. In other words, packaged subprime loans were made into tradable securities. To enhance the marketability of these prepackaged loans, credit default swaps were issued. A credit default swap (CDS) is a contract in which the buyer of the CDS makes a series of payments to the seller and, in exchange, receives a payoff if a credit instrument (typically a bond or loan) goes into default or on the occurrence of a specified credit event (for example, bankruptcy or restructuring). While some CDSs ended up in hedge funds, many CDSs were acquired by mutual funds, money market funds, financial institutions, and pension funds. As the real estate market defaults escalated during 2007 and 2008, many CDS contracts were called into play and later failed to perform.

What New ERISA Problems Have Emerged as a Result of the Credit Crisis?

New Pension Mandates

The government is apparently not always our friend. Almost three years ago the Pension Protection Act of 2006 (PPA) was passed. Congress wanted to beef up protections for pension participants and wanted to shore up the finances of the PBGC. To accomplish these goals it added a series of new funding mandates for defined benefit plan sponsors. Congress thought it would be a good idea to require

all defined benefit plans to achieve 100 percent funding within seven years.[1] The PPA also mandates all defined benefit plans to now fund the present value of the plans' accrued benefits and amortize any unfunded liabilities over a seven-year period, using legislated actuarial assumptions.[2] A new mandatory annual notice must also be issued to plan participants, labor organizations, and the PBGC generally describing the plan's current funding level. For calendar year defined benefit plans, the first annual funding notice was to be issued by April 30, 2009.[3] The PPA also states that smoothing techniques cannot exceed 24 months. If a pension plan's funding level falls below 60 percent, no lump-sum distributions will be allowed.[4] While plan sponsors have protested the wisdom of implementing new funding requirements during a severe market downturn, those protests have fallen on deaf ears. Many employers face 2009 PPA funding obligations that are multiple times their 2008 contribution amount. Going into 2009, the PBGC was already carrying an $11 billion deficit. It recently announced that it posted a $33.5 billion deficit for the first half of fiscal year 2009, the largest in the agency's 35-year history.

New COBRA Rules

The American Recovery and Reinvestment Act of 2009's amendments to COBRA are aimed at making COBRA coverage affordable for those who have lost their jobs due to our current recession. This new law, however, added a new level of complexity to an already complicated law regulating group health plans. In a nutshell, the 2009 COBRA amendments allow employees who lose their jobs through no fault of their own between September 1, 2008, and December 31, 2009, to have the federal government pay for 65 percent of their COBRA premiums (the employer receives a payroll tax credit equal to 65 percent of the COBRA premium). New laws mean new rules, new COBRA notices and, of course, new unanswered questions.

Hedge Fund Valuations?

On August 8, 2008, the US Department of Labor's Boston office sent a letter to an ERISA-regulated pension plan stating that the plan was in violation of ERISA because it had not performed its own independent valuation of its hedge fund holdings. According to the Department of Labor:

> It is incumbent on the Plan Administrator to establish a process to evaluate the fair market value of any hard to value assets held by the Plan. Such a process would include a complete understanding of the underlying investments and the fund's investment strategy. In addition, the Plan Administrator must have a thorough knowledge of the general partner's valuation methodology to ensure

> that it comports with the fund's written valuation provisions and reflects fair market value. A process which merely uses the general partner's established value for all funds without additional analysis may not ensure that the alternative investments are valued at fair market value.

The Department of Labor's bottom line appears to be that the buck stops with the ERISA plan fiduciary. It is his or her duty to properly value hard-to-value assets. The Department of Labor has made it clear that relying on a hedge fund's own valuation is not enough.

Rebirth of Stock Drop Lawsuits

The subprime mortgage crisis has also generated a lot of new ERISA lawsuits. The most obvious examples are the many lawsuits filed by 401(k) Plan Participants at Countrywide, AIG, Lehman Bros., Bear Stearns, and others alleging that plan fiduciaries knew or should have known it was imprudent to allow employees to ever invest in company stock. These new class action stock drop cases are the offspring of the debacle at Enron.

Securities Lending Lawsuits

Securities lending programs used to live in ERISA's sleepy backwaters. Not any more. Securities lending arrangements are commonly used by retirement funds as a means to produce additional income on stock portfolios. Here is how they work. A 401(k) trustee is often authorized to temporarily lend stock out to short sellers and other borrowers in exchange for cash as collateral. The cash collateral is then supposedly invested in "safe" investments, such as Treasury bills or money market instruments. Under typical securities lending agreements, the return on the invested cash collateral is split among the retirement fund (for the benefit of its participants), the trustee, and the borrower of the securities. While the gains are usually small in percentage terms (because under applicable Department of Labor exemptive relief allowing participation in such transactions the collateral is required to be invested in low-risk investments for short time periods), they can add up to big dollars over time when a large portfolio of securities is involved.

BP recently sued Northern Trust alleging Northern Trust breached its fiduciary duties when it lost 401(k) plan money by lending out securities (held in certain investment funds) and then failed to tell BP about the losses. It turns out that BP is not alone because securities lending programs have incurred huge losses stemming from the recent credit crisis. When supposedly reliable investments drop in market value due to the "flight to quality" and liquidity and liquidity

needs, securities lending programs have seen losses for the first time. The losses are realized when the cash collateral is invested in assets that drop in value, thus creating a deficiency between the book value of the cash collateral and the market value of the collateral investments. It is estimated that billions of dollars of losses have been sustained recently by ERISA-regulated plans in securities lending programs.

What Should ERISA Plan Fiduciaries Do in Response?

The requirement that ERISA fiduciaries act prudently applies to every fiduciary decision, including selecting plan investments, service providers, investment advisers, plan administrators, and the decision to continue offering plan investments. The stock market's dramatic decline during 2008 requires ERISA fiduciaries to investigate whether the Plan's investments continue to satisfy the Plan's investment policy and whether they have sufficient information to make that decision. Among the questions ERISA fiduciaries should consider are:

- Has the marketplace changed fundamentally?
- Are certain investment vehicles no longer appropriate for a retirement plan?
- Does the Plan have sufficient quantitative and qualitative information about historical performance, benchmark investment, peer groups, and volatility to justify the continued offering of all investments?
- Given the past performance of an investment, is the investment option likely to perform reasonably well in the future?
- Is there sufficient information to determine if a particular investment continues to meet the Plan's needs?
- How does the data compare to the Plan's investment policy?

ERISA fiduciaries also have a duty to document the investigation they undertake to determine if a Plan investment remains prudent. Taking the steps necessary to conduct an investigation is important, but equally important is being able to prove it. Fiduciaries are obliged to seek expert assistance when they do not have the knowledge, experience, or access to the information they need to fulfill their duty to investigate. ERISA fiduciaries must prudently select and monitor their experts and may not rely blindly on expert advice.

The legal standard for prudence under ERISA is "procedural prudence." What matters is whether a fiduciary can show he or she undertook reasonable processes and procedures in the fulfillment of his or her duties.[5] Whether a fiduciary reasonably relied on third-party experts is considered by the courts in any prudency analysis.[6] The courts often also state ERISA's "prudent person" standard as fact-based and flexible.[7] ERISA fiduciaries are more than just a "reasonable" person. Instead they are to be judged by the actions of a "prudent person" acting in a "like capacity" and engaged "in the conduct of an enterprise of a like character and with like aims."[8] Fiduciaries are not required to be prudent "experts" in all matters relevant to the conduct of an employee benefit plan.[9] Moreover, the actions of a fiduciary must be evaluated, not with the benefit of hindsight, but from the perspective at the time of decision.[10]

What Is a Plan Fiduciary's Potential Liability When Delegated Investment Decisions Don't Work as Expected?

The answer often depends on what steps the fiduciary has taken to transfer investment responsibility to another. Let us consider some key points.

How does someone become a fiduciary to a retirement plan? The layman's understanding is that fiduciaries are, of course, people who stand in a position of trust to protect the interests of someone else's beneficiaries. ERISA fiduciaries are usually responsible for controlling or managing a retirement plan's assets or operations. The federal law regulating retirement plans, the Employee Retirement Income Security Act of 1974 (ERISA) states fiduciary status can be acquired in three ways:

1. Being named as a fiduciary in the instrument establishing the employee benefit plan;

2. Being named as a fiduciary pursuant to a procedure specified in the plan documents, for example, being appointed an investment manager for a retirement plan brings with it ERISA-regulated fiduciary duties; and

3. Being a "functional" fiduciary.[11]

"Fiduciary" is not defined by ERISA in terms of formal trusteeship, but in functional terms of control and authority over the plan.[12] An ERISA "functional" fiduciary includes anyone who exercises discretionary authority over the plan's management, anyone who exercises authority or control over the plan's assets, or anyone having discretionary authority or responsibility in the plan's administration.[13]

Whether or not a person is a plan fiduciary becomes important when bad things happen. When economic disasters befall companies and retirement plan accounts nosedive, ERISA fiduciaries can be held personally liable to make good retirement plan losses resulting from their actions or from their inactions.[14]

ERISA establishes a number of rules governing fiduciary responsibility for plan investments.[15] A trustee of a retirement plan is generally responsible for the investment of plan assets.[16] Trustees may be relieved of this responsibility, in whole or in part, if:

- An investment manager has been appointed (ERISA § 403(a)(2)); or
- The trustee is a "directed" trustee (ERISA § 403(a)(1)) Section 404(c) of ERISA—the "participant directed investment" also aims at relieving any other plan fiduciary for any investment losses.

Even when the trustee exemptions apply, the employer that sponsors the plan often assumes responsibility for:

- Selecting the investment manager (this is common in defined benefit plans);
- Directing the trustee to take certain investment actions (this often occurs with ESOPs); and
- Selecting and retaining the investment options made available in participant-directed plans (the typical 401(k) plan model).

Fiduciaries need to ask additional questions regarding their involvement in plan investments.

Has the Fiduciary Delegated Responsibility for Plan Investments?

The members of the board of directors of a plan sponsor are sometimes ERISA plan fiduciaries because, in some cases, they are ultimately responsible for the selection and retention of other plan fiduciaries. However, the board may delegate the responsibilities relating to plan investments to other named fiduciaries, such as a retirement plan investment committee or a finance committee. To be effective, the delegation should be in writing, prudent, made in a manner that satisfies the requirements of state corporate law, and consistent with the terms of the various plan and trust documents. If proper delegation is made, the board's fiduciary role would be reduced to a residual duty to monitor the performance of its delegates.

Good plan language can go a long way in insulating a corporate board from imprudent investment claims. For example, in *Hull v. Policy Management Systems Corporation*,[17] the plan documents stated that the company was the named fiduciary and a committee was empowered with plan investment responsibilities. In deciding whether the company's board was an investment fiduciary, the federal court carefully evaluated the plan's language about who did what. The plan stated that other than the power of appointment and removal, the company's board had no other plan responsibilities.[18] As a consequence of this plan language, the court decided to dismiss the action against the company's board and its CEO, explaining that the "no other responsibilities" plan language mandated this result when coupled with plaintiff's failure to assert that defendants functioned as ERISA fiduciaries.[19]

Good plan language, however, is not always enough. Language expressly limiting the board's authority concerning the plan may backfire if language in other plan instruments contradicts it. Trust agreements, for example, must be consistent with other plan documents in order to effectively allocate fiduciary duties. When plan and trust documents clash in identifying who has a plan's investment policy responsibility, a court may be forced to conclude that everybody is an investment fiduciary. For example, the *In re McKesson HBOC ERISA Litigation* saga began in 1999 with the merger of McKesson Corporation and HBO & Company (HBOC). Within months of the merger, McKesson publicly announced that the company had engaged in improper and illegal accounting practices, had materially misrepresented the financial condition of the company, and that financial results would be restated downward. When the price of McKesson's stock subsequently collapsed with the public disclosure of HBOC's improprieties, the corresponding loss in value to the shares of McKesson HBOC stock held in the company's retirement plans was estimated to exceed $800 million. Lawsuits then rained down on McKesson, some alleging breach of fiduciary under ERISA.

The ERISA lawsuits named the McKesson board of directors, and others, as fiduciaries of the McKesson plan personally liable to make good the plan's losses. The McKesson board asserted that plaintiffs' case should be dismissed because the plan's language contained a "get out of jail free" provision for board members. The district court, however, refused to dismiss the ERISA fiduciary breach claims against McKesson's board members even though the plan document only identified the plan's administrative committee with investment responsibilities. This argument that relied on express plan language was ultimately rejected because the master trust document identified McKesson's board as responsible for determining the investment policy to be implemented by the Plan's administrative committee.[20]

Expressly delegating investment responsibilities in the plan document may be a good alternative. In *In re Williams Companies ERISA Litigation*, the plaintiffs teed up the familiar allegations that defendants' failure to disclose accurate information about Williams' stock and defendants' alleged failure to prudently monitor and to prudently divest the plan's investment in Williams' stock resulted in large plan losses.

The Williams companies, however, did things a little differently. The board appointed members of a benefits committee, which in turn appointed members of an investment committee.[21] The court dismissed the company and the board of directors from the lawsuit but denied a motion to dismiss by the benefits committees. The plan document contained "get out of jail free" language for the company and the board. The plan language employed by Williams attempts to assure that responsibilities of various persons are distinct and separate so as to prevent cofiduciary liability. Specifically, the plan provided:

> To prevent any two parties to the Plan from being deemed co-fiduciaries with respect to a particular function, both the Plan and Trust Agreement are intended, and should be construed, to allocate to each party to the plan only those specific powers, duties, responsibilities, and obligations as are specifically granted to it under the Plan or Trust... The Plan is intended to allocate to each named fiduciary the individual responsibility for the prudent execution of the functions assigned to it, and none of such responsibilities or any other responsibility shall be shared by two or more of such named fiduciaries unless such is provided for by a specific provision of the Plan.[22]

Looking to the plan provisions, the court summarily dismissed claims against the company, saying it was acting as settlor, and against the board of directors because the board's power was limited to the power to appoint and remove benefits committee members.[23]

Are the Persons Making the Investment Decisions Adequately Protected?

Fiduciary insurance policies and directors' and officers' insurance policies should be reviewed to ensure that the employer and its officers and directors who serve as fiduciaries under ERISA are adequately protected. Employers also often separately indemnify persons serving in fiduciary roles.

Are Plan Participants Given the Right to Make Investment Decisions?

ERISA Section 404(c) provides that if a participant in an individual account plan is given the opportunity to direct the investment of the

assets in his or her account into at least three diverse investment alternatives, the employer (and any other plan fiduciary) will *not* be liable for any losses caused by the participant's investment selections.

404(c)'s Recent Extension to Default 401(k) Plan Investments

Prior to the August 17, 2006, enactment of the PPA, the protections of Section 404(c) were not available for a 404(k) plan's default investment options. A little known quirk in the 401(k) world is that a fairly significant number of plan participants sign up to make regular payroll contributions to the 401(k) plan but never designate any investment choices. As the participant's money piles up, the plan's investment fiduciaries are left in a quandary. Plan investment fiduciaries fear that if they select default investment options with potential for investment losses (such as a diversified portfolio heavily weighted toward equity securities), they will be exposed to fiduciary liability if those equity-based funds posted losses. Prior to the PPA, most investment fiduciaries refused to default participants into any investment option or chose investment vehicles with little risk of investment losses, such as money market funds. This self-protective behavior led to plan participation rates of only about 70 percent or, for employees who were defaulted, investment returns on defaulted funds that didn't approach the inflation rate.

Congress attempted to correct this problem by including in the PPA an expansion of Section 404(c)'s protections. New ERISA Section 404(c)(5) provides the same protection to plan sponsors for default investment options as is provided by Section 404(c) for investments selected by plan participants. To garner new Section 404(c)(5) protection, the plan fiduciaries' default investment selections must be made in accordance with regulations prescribed by the Department of Labor. On September 27, 2006, the Department issued proposed regulations on this PPA provision to provide guidance on Congress's dictate that default investments covered by Section 404(c) include a mix of asset classes consistent with capital preservation and long-term capital appreciation. The proposed default alternatives are balanced funds, retirement date funds, and professionally managed accounts. The proposed regulation expressly contemplates that a covered-default option (referred to as a "qualified default investment alternative" in the proposed regulation), other than under the balanced fund approach, will change asset allocations and risk levels over time with the objective of becoming more conservative with the participant's increasing age. True to form, as in the original regulations under Section 404(c), the preamble to the new Section 404(c)(5) proposed regulations states that plan fiduciaries are not relieved of responsibility for the selection of a plan's default option even if they meet the

prescribed requirements for qualified default investment alternatives identified in the proposed regulations.[24]

Although Section 404(c) of ERISA can provide protection to employers, employers should not assume that its requirements are easily satisfied. Many of the formalistic requirements are easy to overlook. For example, employees must receive written notice of: (i) the fact that the plan is intended to constitute an ERISA Section 404(c) plan; (ii) the names of the investment managers; (iii) historic information regarding fund performance; and (iv) a description of transaction fees and expenses that are charged against accounts. Upon the request of a participant, detailed disclosure requirements also apply. For example, information must be provided upon request regarding (a) the annual operating expenses of an investment alternative (expressed as a percentage of net assets); and (b) listing of the assets comprising the portfolio of certain investments (excluding mutual funds). Finally, plans with company stock funds must have a written procedure (which is disclosed to participants) to protect the confidentiality of the voting and tender of company stock.

Do Plan Fiduciaries Appropriately Select, Monitor, and Retain Plan Investments and Investment Managers?

The selection of investment options for a 404(c) plan as well as the selection of investment managers for a defined benefit plan are fiduciary actions. Bad investment selections may expose employers or their employees or directors to potential damage claims for bad results. The same fiduciaries retain a duty to monitor the performance of the investment options or managers they have chosen. The duty to monitor entails more than a summary review of an annual report. Courts have held that plan fiduciaries must thoroughly investigate, monitor, and understand how plan investments work. At a minimum, the persons responsible for monitoring plan investments should have sufficient knowledge or should utilize the services of independent experts to assess the appropriateness of an ERISA plan investment. Investment guidelines should be established for each type of plan investment, and investment returns should be compared to the plan's pre-established goals. Obviously, investment rules should be followed if any restrictions contained in the investment guidelines should be adhered to.

Many employers offer a wide selection of investment alternatives under 401(k) plans based on the assumption that offering more choices will somehow insulate them from liability. While offering additional investment choices may assist with Section 404(c), compliance with additional investment funds may complicate the employer's duties with respect to the ERISA monitoring function. The plan's investment fiduciary must regularly review and monitor each investment option the plan offers.

In all of these matters, procedural prudence is the key. Meaningful periodic (*e.g.*, quarterly) meetings should be held, reports should be read and analyzed, and all actions taken should be documented.

Do Plan Fiduciaries Render Investment Advice?

There is a fine line between investment education and investment advice. Employers that sponsor participant-directed plans often want to provide investment-related information to assist participants in making wise investment choices with their retirement assets. However, a person that renders "investment advice" for a fee is considered a plan fiduciary and is potentially liable for that advice.[25] For employers that want to provide information without crossing the fiduciary line, the Department of Labor has published helpful guidance.[26] The PPA also added new provisions to ERISA aimed at making customized investment advice more readily available to 401(k) plan participants. As added to ERISA, new Section 408(b)(14) provides an exemption from ERISA's prohibited transaction rules for the provision of investment advice, the acquisition of securities pursuant to the investment advice, and the receipt of fees in connection with the provision of participant-level investment advice to a participant-directed plan.

The day after President Obama was inaugurated, on January 21, 2009, the Department of Labor published final investment advice regulations that included rules implementing Section 408(b)(14) and a class exemption covering certain transactions outside the scope of the statute and regulations. Shortly thereafter, in response to a memorandum issued by Rahm Emmanuel, Obama's Chief of Staff, the Department of Labor opened a new comment period inviting public comments on any substantive issues raised by the regulation, and delayed the regulation's effective date until May 22, 2009. On May 22, 2009, the Department further delayed the final regulations until November 18, 2009.

Conclusion

Healthy stock market returns seem like a distant memory. The recent market downturn and the stock market's continuing volatility should cause all fiduciaries to reconsider their approach to making investments. Basic questions need to be answered:

- Are the plan's long-term investments performing as well as peer group investments?
- Should the plan's investment policy be revised to respond to fundamental changes in the market?
- Are the plan's investment fiduciaries acting prudently?

While the law does not require Peter Lynch–type investment returns for an ERISA plan, what is required is that plan fiduciaries jump through the right hoops and ask the right questions. The stock market's meltdown is a reminder to all of us who manage 401(k) plan accounts that we do not live atop Mount Perfection. Plan fiduciaries can, however, avoid a trip to the "Pit of Despair" by conducting periodic reviews of their Plan's investments and by documenting that review.

Notes

1. IRC § 430.

2. *Id.*

3. US Department of Labor FAB 2009-01.

4. IRC § 436(d).

5. Donovan v. Mazzola, 716 F.2d 1226, 1232 (9th Cir. 1983).

6. Donovan v. Bierwirth, 680 F.2d 263, 271–273 (2d Cir. 1982) (use of outside experts constitutes part of prudence required by fiduciaries).

7. *In re Unisys Savings Plan Litig.*, 74 F.3d 420, 434–435 (3d Cir. 1996) ("The prudence requirement is flexible, such that the adequacy of a fiduciary's independent investigation and ultimate investment selection is evaluated in light of the 'character and aims' of the particular type of plan he serves."), citing Donovan v. Cunningham, 716 F.2d 1455, 1467 (5th Cir. 1983).

8. ERISA § 404, 29 U.S.C. § 1104.

9. *Cunningham*, 716 F.2d 1467 n.26.

10. *See* Roth v. Sawyer-Cleator Lumber Co., 16 F.3d 915, 917–918 (8th Cir. 1994) ("the prudent person standard . . . is a test of how the fiduciary acted viewed from the perspective of the time of the challenged decision rather than from the vantage point of hindsight.") (Citations omitted).

11. 29 U.S.C. § 1102(a)(2); Glazier & Glassworkers v. Newbridge Securities, 93 F.3d 1171, 1179 (3d Cir. 1996).

12. Mertens v. Hewitt Associates, 508 U.S. 248, 262 (1993).

13. Credit Managers Association v. Kenesaw Life & Accident Insurance Company, 809 F.2d 617, 625–626 (9th Cir. 1987).

14. 29 U.S.C. § 1109.

15. *See generally* ERISA §§ 403 and 404.

16. ERISA § 403(a).

17. 2001 U.S. Dist. LEXIS 22343 (D.S.C. Feb. 9, 2001).

18. *Id.* at *17–18.

19. *Id.* at *7–13.

20. *In re McKesson HBOC, Inc. ERISA Litig.*, 2002 WL, 31431588 at *9–10 (N.D. Ca. Sept. 30, 2002).

21. *In re Williams Companies ERISA Litigation*, 271 F. Supp. 2d 1328 (N.D. Okla. 2003).

22. *Id*. at 1334.

23. *Id*. at 1338–1339.

24. For a fuller discussion of ERISA Section 404(c), please see "ERISA Section 404(c) meets 'The Real World,'" *Benefits Law Journal*, Vol. 21, No. 1, Spring 2008, pp. 106–126.

25. ERISA § (3)(21).

26. Interpretive Bulletin 96-1 R concerning "participant investment education," 29 C.F.R. § 2509.96-1.

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