Plan Governance

The old adage, "The devil is in the details," aptly applies to plan governance. Like so many other things in life, success in governing a plan depends on how well the details are handled. From clearly defining and streamlining who is exercising fiduciary authority to making sure that the plan documents, minutes and other paperwork accurately reflect the correct fiduciary structure and decisionmaking, these are the kinds of things that are often overlooked and attract unwanted litigation and personal liability for senior management and members of the board of directors. We describe below some key legal strategies and principles to make plan governance more effective.

Plan's Fiduciary Structure

In recent lawsuits involving Enron and Worldcom, fiduciary breach claims were cast against a wide net of fiduciaries including the sponsoring company, the CEO and CFO, the board of directors, the plan administrator, members of plan committees, service providers, and human resources personnel. Given that an ERISA fiduciary can be held personally liable for losses that result from a breach of fiduciary liability, or the breaches of other plan fiduciaries, we thought it would be helpful to review some plan governance strategies that can reduce the number of potential fiduciary defendants.

1. Consider a fiduciary structure whereby the President or CEO of the company appoints the fiduciaries of the plan, including the plan investment committee. Fiduciary appointments should not be a responsibility of the board of directors. Members of the board can play an important, albeit non-fiduciary, role in helping the company fulfill its mission as a plan sponsor. Board members should determine whether the company is fulfilling its mission of ensuring that the company's benefit programs are first rate and that the company is getting a good bang for its buck. The advantage of this structure is that it reduces the possibility that the members of the board of directors will be named fiduciary defendants in lawsuits involving the plan.

2. Consideration should be given to the composition of the plan's fiduciary committees, especially the investment committee. Make sure that the persons appointed to these positions have sufficient time in their schedules to devote to plan business and familiarity with the issues facing the plan. Where committee members are busy, the committee should delegate day-to-day responsibilities to staff.

3. We recommend against appointing the general counsel of a company to the plan's fiduciary committees in keeping the general counsel and staff counsel off these committees will help preserve the attorney-client privilege. Attorneys can attend committee meetings as representatives of the plan sponsor. The minutes should reflect that attorneys are representing the plan sponsor and not the plan.

Plan Documents and Meetings

We often see fiduciary provisions of plan documents that do not accurately describe the plan's fiduciary structure, that conflict with the plan's actual practices, or that assign the same function to several fiduciaries. Savvy plaintiffs' attorneys use these poorly drafted plan provisions to support the addition of more defendants to a suit than is warranted.

1. Make sure the plan accurately describes the decisionmakers with regard to plan investments and does not assign fiduciary functions to more than one fiduciary or committee.

2. Where fiduciary functions have been allocated or delegated to other fiduciaries, make sure that effective and up-to-date delegations have been made according to plan terms, are executed by the proper parties and are reflected in the plan minutes.

3. Plan counsel should include certain agenda items and discussion points for every meeting of the plan's fiduciary committee.

- Whether the plan is in compliance with the requirements of ERISA section 404(c)
- A report on each of the plan's investments covering how each investment is performing in relation to benchmarks and peer groups
- Whether any of the plan's investments have fallen outside the plan's investment guidelines and benchmarks
- Whether persons to whom fiduciary functions have been delegated and service providers hired by the committee are appropriately performing their duties and effectively serving the plan's needs
- Whether there are any problems with fiduciary liability insurance or the company's and plan's indemnification of plan fiduciaries

Procedures for Company Stock

Plans that permit investments in company stock face heightened litigation risks. Accordingly, consideration of the following procedures for the plan's company stock holdings is warranted:

1. Performance of company stock should be monitored just like every other plan investment even though the standard under ERISA for investment in company stock may be different than for ordinary plan investments.

2. Consider hiring an independent fiduciary to monitor the plan's company stock holdings under appropriate circumstances, such as where is a serious question as to the company's continued viability.

3. Make sure that the special ERISA section 404(c) rules that apply to company stock are satisfied. Review whether the stock continues to qualify as "employer securities," and whether the securities are publicly traded on a national exchange and with sufficient frequency

and volume to ensure that buy and sell orders are acted upon promptly and efficiently. ERISA section 404(c) also requires that (1) plan participants have voting and tender rights, (2) the plan to adopt procedures and designate a fiduciary to protect the confidentiality of company stock holdings, and (3) the plan fiduciary appoint an independent fiduciary if required in order to prevent undue employer influence.