

## **ERISA Fiduciary Issues for Plan Sponsors**

We in Groom's ERISA fiduciary practice group are assisting our clients in managing cutting edge and high liability issues facing plan sponsors. Below is a brief overview of some of the key items we've been working on. If you have questions or would like more information about these issues, please contact Steve Saxon, Andr e St. Martin, Jon Breyfogle, Roberta Ufford or any of our other fiduciary practice group attorneys.

### **Plan Governance**

A proliferation of company stock litigation (including the Enron and WorldCom cases) has changed the way courts and the Department of Labor think about plan governance. Practices widely accepted just a few years ago are seen as risky today. Current key considerations in plan governance are:

- The role of a company's board of directors (or a committee of the board) in pension plan governance.
- The presence of a company's in-house counsel on a plan's fiduciary committee.
- The importance of making plan documents consistent with each other (plan, trust, committee charters, delegations) and reflective of actual plan administrative practices.
- Identify the best people to serve on plan committees and implement solid practices documenting their actions (e.g., regular meetings, minutes).
- Establish the proper standards for monitoring the acquisition and holding of company stock in the company's defined contribution plan.
- Possible use of an independent fiduciary to monitor company stock.

### **Design Changes – Company Stock**

Company stock litigation is also forcing plan sponsors to consider design changes to plans:

- In response to litigation, and as part of a general recognition of the value of diversity in participants' defined contribution plan portfolios, many plan sponsors are changing their plan rules to allow for earlier or immediate diversification of matching contributions made in company stock.
- The House and Senate conference committee is currently debating whether to *require* that plans allow participants to divest company stock in a much shorter timeframe than allowed under current law. Under the new law, companies would no longer be able to require participants to elect to defer any amounts into a plan's company stock fund.
- Plan language regarding investment in company stock should be strengthened.

## **Investment Policy Statements**

Plan sponsors should adopt an investment policy statement for their defined benefit and defined contribution plans to assure they meet the fiduciary duties in overseeing and monitoring plan investments. Key considerations are:

- As the case law develops and the legal standards governing company stock and other aspects of plan fiduciary governance are refined, it is important for plan fiduciaries to keep the plan's investment policy statement current.
- While a plan fiduciary will often have a detailed investment policy statement for the company's defined benefit plan, it is also important to have a good current investment policy statement for the company's defined contribution plan.
- If plan's investment policy statement contains a standard for placing managers on a "watch list" plan's fiduciaries need to follow the process laid out in the document.
- If alternative investments are part of a plan's investment strategy, the investment policy statement should reflect that (more on this below).

## **Alternative Investments**

Alternative investments have been the best performing asset class in many defined benefit plan portfolios in recent years. More and more, plans are beginning to invest in complicated alternative vehicles. Whether you are a seasoned pro or just starting out, here are a few things to bear in mind:

- If plan fiduciaries have decided to invest plan assets in alternative investments, the plan's investment policy statement should clearly reflect this decision.
- Private equity and other alternative investments are very complex and constantly changing – even very experienced private equity investors may not be familiar with the latest features, such as credit facility arrangements, and the potential prohibited transaction issues that such arrangements may pose for plans.
- Although it's Fiduciary 101, it bears repeating that the plan fiduciary should consider the role of the investment in the plan's investment portfolio, including such factors as risk and return characteristics, the diversification requirements of the portfolio, the plan's liquidity needs funding requirements and even tax considerations (such as UBIT).
- The plan fiduciary must consider and understand the material terms of the investment, including required representations, indemnity provisions, fees, and withdrawal rights.