October 16, 2008

ERISA Investment Fiduciaries and the Recent Investment Market Turmoil

The recent turmoil in the investment markets has been extraordinary and raises for retirement plan fiduciaries questions about how to respond. It is important for plan fiduciaries to avoid short term, panic induced actions. Instead, fiduciaries should take a prudent process driven approach to investments and as with all fiduciary actions, document their considerations and decisions. More specifically, fiduciaries should consider the following:

Ask for Updated Advice from Investment Professionals

Fiduciaries who use the services of a professional investment adviser should consider an immediate consultation with the adviser. Fiduciaries should ask their adviser to review the plan's current investments and to provide a report analyzing whether these investments continue to be prudent at this time. The adviser should identify any uniquely at-risk assets given the current market volatility, financial institution instability and government intervention. They should have their adviser determine whether there are any specific short term steps the fiduciaries should be taking with regard to existing investments and whether the plan's long term investment policies continue to be prudent. Fiduciaries should ensure that this analysis be provided in a written report. Plan fiduciaries who do not currently use the services of a professional investment adviser should consider doing so.

Temporarily Increase Investment Oversight

Many plan fiduciaries review plan investment performance and obtain a market update on a quarterly or semi-annual basis. Fiduciaries should consider increasing the frequency of these reviews to monthly in order to demonstrate that their review process is designed to be responsive to the immediacy of current market activity. They should also review their written investment policies and make certain they are complying with their terms. Fiduciaries should keep records of all investment monitoring activities to demonstrate they are paying attention and acting prudently.

Keep Participants Informed

For plans in which participants direct investments such as 401(k) and 403(b) plans, fiduciaries should keep participants informed of developments related to the plans or their investments. For example:

- Fiduciaries could consider providing a direct communication to participants designed to reassure them that the plan's fiduciaries are monitoring the plan's investments, are complying with the plan's investment policies and are consulting with professional investment advisers. However, it is important that fiduciaries not try to downplay the current investment climate or make representations about when the market will improve.

- Many financial institutions have issued statements related to recent market events designed to provide the public specific information on the impact of market developments on the institution's financial position. Others have released general information designed to reassure the public that their corporate management is following events closely. Plan fiduciaries should consider providing copies of this type of information issued by institutions in which the plan invests or from plan service providers such as trustees, custodians or insurance companies.

- This is a good time to remind participants where to obtain resources regarding plan investment options and investment education such as a plan website, investment fund website, written newsletters and community resources. Fiduciaries can reinforce general investment concepts such as investing for the long-term and the importance of diversification across asset classes and market sectors. It is also prudent to advise participants to seek their own investment advice.

- If fiduciaries become aware of plan investment options which have been significantly adversely affected by a market event, such as a bankruptcy or a downgrade to below investment-grade, they should immediately pass this information on to participants.

Summary

Given the current condition of investment markets, it is important that retirement plan investment fiduciaries be actively engaged in the fiduciary compliance process. They should follow a deliberate well-designed process in doing so and should keep written records evidencing their considerations and actions. Doing so will help fiduciaries minimize their fiduciary risk.

If you have question regarding fiduciary duty or other employee benefits matters, please contact your regular Butzel Long attorney, a member of the Butzel Long Employee Benefits Practice Group, or the authors of this e-mail news alert.

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