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NEWSLETTER
A Courtesy To Our Clients and Friends
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MUTUAL FUND SCANDAL THROWS NEW SCRUTINY ON GOVERNANCE AND PERSONAL LIABILITY ISSUES FOR BENEFIT PLAN COMMITTEES

Many U.S. companies use a committee composed exclusively of in-house managers to administer the pension, 401(k) and other employee retirement, savings and welfare plans that the company sponsors. Often committee members are selected simply by the positions they hold within the company (corporate treasurer, VP of Human Resources, etc.) rather than the specific skills and experience they actually have in matters that the committee must address (selecting and monitoring a 401(k) plan's investment managers, re-setting a pension plan's asset allocation, reviewing actuarial valuations, resolving benefit claim disputes, etc.).

Yet the applicable federal statute (the Employee Retirement Income Security Act of 1974, as amended, known as "ERISA") imposes on committee members a high standard of care, that of a "prudent expert," and personal liability for any plan losses that result from a breach of this standard. Some risks of liability can be partially addressed by corporate indemnification and fiduciary liability insurance. But if they are to minimize the creation of liability in the first place, members of benefit plan committees require quite detailed advice on how properly to discharge their fiduciary duties.

In a few ways, this advice is similar to that required by boards of directors of public companies. For instance, the committee should receive and debate recommendations from qualified outside experts before taking action on matters on which committee members are not themselves expert, and should carefully document the foundation for the action taken.

But these individuals (often called "in-house ERISA fiduciaries") also require counseling that is unique to the function of a benefit plan committee. For instance:

- they must act as fiduciaries of the plan they are administering, **not** of the company and its shareholders, even when the best interests of the shareholders may conflict with the best interests of the plan (adequate funding, proper allocation of costs between the plan and the company, loan and investment of plan assets, etc.)
- unlike a board of directors, committee members actually can shift some of their fiduciary liability to certain other parties by written contract (with respect investment decisions, for

example, to institutional investment managers, **if** these managers are properly chosen and their performance is properly monitored by the committee)

- since they owe a fiduciary duty to **each** plan they administer, committee members must not disadvantage one plan's participants even where there might be a benefit to participants in the company's plans generally (e.g., by the bundling of costs of an outside provider who may, however, offer inferior investment options) or a benefit to the committee (e.g., by merging two plans for administrative ease)
- the committee must manage a unique array of outside vendors and advisors—investment managers, investment performance consultants, fund custodians, actuaries, ERISA counsel, plan accountants, etc.—in a complex regulatory setting.

The recent mutual fund scandal has triggered public statements from the U.S. Department of Labor (which enforces ERISA) cautioning in-house fiduciaries that they will be held responsible for the proper oversight of plan assets which are invested in mutual funds. Much like the Enron and WorldCom scandals triggered greater focus on the proper functioning of boards of directors, the mutual fund scandal has triggered greater concern for the proper functioning of benefit plan committees as a crucial element of good corporate governance.

A company obviously will have a concern for the personal liability of the employees it appoints to serve as plan fiduciaries. But companies have a direct interest in the quality of the committee's work as well. A company retains certain ERISA liability as the plan sponsor. In addition, improper administration of a plan can result in the disallowance of the federal tax deductions for company contributions to the plan. For all these reasons, companies should provide their retirement plan committees with the advice required to minimize the risk that committee action will be found defective.

Levett Rockwood P.C. regularly advises members of retirement plan committees on the special nature of their fiduciary duties. For more information, contact Rob Barberi at (203) 222-3114.

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