StatonWalsh

Financial Clarity Through Transparency

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Table of Contents

Employer Plan Fiduciary Standards and Responsibilities

One of the most important functions associated with all qualified retirement plans is the fiduciary role. The definition of fiduciary is a wide ranging one. Section 3 (21) (a) of ERISA[1] defines a fiduciary with respect to a plan to the extent he or she:

"Exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management of its assets, renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan or, has any discretionary authority or discretionary responsibility in the administration of such plan."

Department of Labor (DOL) Regulation 2510.3-21 exempts a securities broker or dealer if that person transacts the purchase or sale of securities on behalf of the plan, in the ordinary course of business as a broker or dealer, if the plan fiduciary is not the broker or dealer and the broker or dealer is operating under instructions from the plan. An insurance agent is similarly exempted if he or she provides the disclosure required in DOL Class Exemption 84-24.[2]

Duties of a Plan Fiduciary

- The fiduciary must follow the prudent man rule, but is held to a higher standard than the normal prudent man rule. ERISA states that the fiduciary is required to discharge his duties "with the care, skill, prudence and diligence under circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."[3]
- A fiduciary has the duty to diversify plan investments so as to minimize the risk of large losses, unless, under the circumstances, it is clearly not prudent to do so.[4] Investment of plan assets in a single bank or other pooled fund, mutual funds, annuity contracts, or life insurance contracts will satisfy the diversification rule if the fund itself is properly diversified.[5]

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[1] ERISA refers to the Employee Retirement Income Security Act of 1974.

[2] See DOL Reg. 2510.3-21 and DOL Class Exemption 84-24 for more details.

[3] See ERISA Sec. 404(a)(1)

[4] See ERISA Sec. 404(a)(1)(C)

[5] See H Rep. No. 1280, 93rd Cong., 2nd Sess. 305 (1974).

- The fiduciary is required to invest plan assets exclusively for the benefit of plan participants and beneficiaries.
- Fiduciaries must act in accordance with the plan documents unless that would violate the law.
- The fiduciary must arrange to purchase the bond required under ERISA. The amount of the bond must be at least 10% of the value of the plan assets.
- Unless given a funding policy by the sponsoring employer or plan trustee, the fiduciary must develop a funding policy for the plan and measure results against such policy on an annual basis.
  - If there are multiple fiduciaries, each fiduciary is responsible for the acts of the other fiduciary(s) unless the fiduciary authority has been delegated in writing to another specific fiduciary(s).
  - If plan assets do not have a readily determinable value, the fiduciary must determine their market value annually. It may be advisable to have an independent appraisal done, depending on the fiduciary's ability to determine the assets' market value.
  - A fiduciary may not engage (directly or indirectly) in the following activities between the fiduciary and the plan:
    - Sale, exchange or lease of property.
    - Lending money or extending credit.
    - Furnishing goods, services or facilities.
    - The transfer of assets to or for the use of the fiduciary.
    - Dealing with the plan assets for his or her own account.
    - Receiving any payment from a party dealing with a transaction involving plan assets.

CPA Audit Requirements

Plans with 100 or more participants at the beginning of the year must obtain an audit by a CPA for that plan year. There is one exception. If the plan in the prior year had less than 100 participants at the beginning of that year, and the current plan year has 120 or fewer participants at the beginning of the year, the CPA audit will not be required.

In addition, for plan years beginning on or after April 12, 2001, a CPA audit must be obtained regardless of the number of participants in the plan. If the plan meets either of the two following exceptions a CPA audit will not be required:

- At least 95% of the plan assets as of the end of the prior plan year are "Qualifying Assets." Qualifying Assets are assets held by banks, insurance companies, broker dealers, mutual funds, or for an individually directed account plan, the participant may direct the investment of these assets and receive statements at least annually.

  In addition, the Summary Annual Report given to each must identify the financial institution holding those assets. If there is a bond for non-qualifying assets exceeding 5% of the plan assets, the surety company must be identified. Lastly, the participant must be notified that he or she may examine the bond or the financial reports issued by the qualifying institutions.

- The plan may obtain a bond equal to 100% of the value of the non-qualifying assets as of the end of the prior plan year

It should be stressed that the plan must obtain both bonds if there are non-qualifying assets and the plan does not want to have a full CPA audit.

Failure to satisfy the CPA audit requirement or one of the exceptions for smaller plans means that the annual return is an incomplete filing resulting in penalties for non-filing.

Important Notice

This report is intended to serve as a basis for further discussion with your other professional advisors. Although great effort has been taken to provide accurate numbers and explanations, the information in this report should not be relied upon for preparing tax returns or making investment decisions.

Assumed rates of return are not in any way to be taken as guaranteed projections of actual returns from any recommended investment opportunity. The actual application of some of these concepts may be the practice of law and is the proper responsibility of your attorney.

Disclosure Notice