Supreme Court Confirms ERISA Fiduciaries' Duty to Monitor, Leaving Contours to Lower Courts

On May 18, 2015, the Supreme Court of the United States confirmed the existence of an independent duty on the part of ERISA plan fiduciaries to continuously "monitor" retirement plan investments and remove those that are imprudent. In *Tibble v. Edison International*, the Court held that ERISA's six-year statute of limitations for breaches of fiduciary duty does not extinguish claims alleging imprudent selection of investments if a continuing "duty to monitor" those investments is violated within the limitations period. The Court thus breathed life into stale claims about investment selection by recognizing a fiduciary's continuing obligation to "monitor" investments and investment options. But the opinion stopped short of defining the precise contours of the duty to monitor, leaving the development of the obligation to case-by-case evolution.

Tibble arose out of a class action suit brought by beneficiaries of Edison International's 401(k) retirement plan. The plaintiffs asserted that the plan manager breached its fiduciary duty by offering certain higher-fee retail-class mutual funds, although lower-fee institutional-class mutual funds were also available. The plan manager defended the case on statute of limitations grounds, contending that since it first offered the funds more than six years before the suit, the plaintiffs' claim was time-barred. The District Court granted summary judgment to the fiduciary on that basis and the Ninth Circuit affirmed. In an opinion written by Justice Breyer, the Supreme Court unanimously reversed, holding that the plaintiffs' claims were not necessarily untimely because an ERISA fiduciary has a continuing duty to monitor – and if necessary discontinue – imprudent investments.

By the time the case was argued in the Supreme Court, the crux of the dispute had reduced to the scope of an ERISA fiduciary's duty to monitor. In *Tibble*, all parties ultimately agreed that an ERISA fiduciary's duty of prudence involves some type of ongoing duty to monitor investments. Indeed, that had long been the view of the Department of Labor. But the contours of that duty remained undefined. The plan managers argued that a fiduciary's obligation is limited to watching for a material change in circumstances, which would then trigger a full-scale review. The plaintiffs, supported by the United States (representing the Department of Labor), contended that the duty to monitor is plenary.

The Supreme Court refused to be drawn into that debate. Although the Court held that the duty to monitor existed, and was drawn from the law of trusts, the Court declined to say more about the nature and scope of that obligation. Rather, it explicitly expressed "no view on the scope of respondents' fiduciary duty" and left it to the lower courts to flesh that out on a case-by-case basis.

Although the Supreme Court declined to wade into the precise requirements of the duty to monitor, ERISA plan fiduciaries should still take note of the decision. By expressly recognizing the duty to monitor, *Tibble* confirms that ERISA plan fiduciaries cannot operate on autopilot. Managing investments in ERISA plans in compliance with a fiduciary's prudence obligation will involve careful selection of investments in the first place, as well as regular monitoring to make sure that they remain prudent. As lower courts resolve the scope of the duty to monitor plan investments on a fact-specific case-by-case basis, they are likely to look at factors such as the frequency of the ongoing evaluation, the rigor of that consideration, and the aspects of the investment that are assessed as part of the periodic monitoring.

ERISA fiduciaries should make sure they have proper systems and protocols in place to conduct periodic reviews of plan investments and a record-keeping practice that corroborates the judgments about continuing prudence that they make. As a matter of best practices, an ERISA plan fiduciary should schedule regular

reviews of the plan's portfolio and document the review process. It may be helpful to establish as part of the plan's written investment policy a list of criteria to be addressed in the regularly scheduled portfolio reviews. In the $6.8 trillion defined contribution plan industry, fiduciaries' decisions are coming under greater scrutiny from a variety of sources and are increasingly attracting class action litigation. *Tibble's* recognition of a continuing duty to monitor illustrates the need for continuing diligence on the part of plan fiduciaries to mitigate that risk.

For further information, please contact your usual Ropes & Gray attorney or one of the Ropes & Gray attorneys listed below.

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