ADDITIONAL THOUGHTS ON THE LATEST TUSSEY V. ABB DECISION: FIDUCIARY LESSONS APLENTY

JULY 20, 2015 DAVID WITZ LEAVE A COMMENT

As we covered in our last post, the district court's latest decision in Tussey v. ABB found ABB breached their fiduciary duties but imposed no monetary damages on a procedural technicality. The moral victory for the plaintiffs, however, can still prove to be instructive for other fiduciaries responsible for the selection and monitoring of plan investments. Based on this case, past case law, as well as Department of Labor publications including the most recently issued Field Assistance Bulletin 2015-02, there are six basic obligations a fiduciary must consider when selecting and monitoring investments including:

1. Engage in an objective, thorough and analytical search,
2. Avoid self-dealing, conflicts of interest, or other improper influence,
3. Consider the risk associated with the investment versus alternatives,
4. Consider ALL costs in relationship to services provided,
5. Ensure the investment is diversified to minimize the risk of large losses, and
6. Consult with experts when that expertise is lacking.

Not adhering to this six step process, ultimately resulted in a finding of a breach. According to the court, "ABB's inconsistent explanations for removing the Wellington Fund and mapping its assets to Fidelity Freedom Funds, the fact that ABB took a substantial part of the PRISM Plan's assets and put them in an investment that was so new that ABB needed to make an exception to the IPS, and Fidelity's explicit offer to give ABB a better deal if the Wellington assets were mapped into the Fidelity Freedom Funds" were all reasons cited for the court's conclusion that ABB was conflicted when it chose to replace Wellington with Fidelity Freedom Funds. Had ABB adhered to the six step process, the outcome would likely have been different because documentation showing compliance with ERISA's fiduciary duties would have been in place to exonerate ABB.

So what is the lesson here for other ERISA fiduciaries? If you are faced with the opportunity to reduce costs by using proprietary investments, consider documenting your reasons to adopt proprietary funds by answering the following questions:

1. Are we using proprietary funds?
2. Are we replacing an existing fund with a proprietary fund?
3. Have we selected proprietary funds based on the standards and criteria established in the IPS?
4. If an exception is necessary to use a proprietary fund, should we change the IPS standards and criteria permanently?
5. Are we using a proprietary fund because it is in the best interests of participants or because it reduces the cost to the Plan Sponsor?
6. How are we accounting for any additional revenue sharing from the use of the proprietary funds?

It is worth noting that case law has not prohibited the use of proprietary funds, the collection of revenue sharing, or the payment of plan expenses from plan assets. However, fiduciaries must understand that the use of proprietary funds creates an opportunity for additional liability issues to arise that must carefully and deliberately be addressed.