

ERISA 404(c) and Company Stock

Currently, an employer that offers a self-directed retirement plan (e.g. a 401(k)) that qualifies as an ERISA Section 404(c) plan is relieved of fiduciary liability as to a participant's asset allocation decisions (i.e. which investment to purchase, quantity to purchase, etc.). This fiduciary relief extends to a participant's voluntary decision to invest in company stock, even if the stock later becomes worthless.

However, under ERISA 404(c), employers always retain fiduciary responsibility for their selection of the plan's investment options.¹ Consequently, employers who offer their own stock as an investment option need to be particularly mindful of how they treat their own stock as an investment option. For example, using Enron as a test case, Enron employees have filed class action lawsuits alleging that fiduciaries breached their duties by (1) providing misleading information about Enron's future to encourage plan investments in Enron stock, (2) declining to postpone an excessively long "lockdown" period during which participants could not sell Enron stock as the company approached bankruptcy, (3) failing to remove Enron stock as an investment option even as the price continued to downward spiral, and (4) preventing participants from selling Enron stock received as "matching" contributions.¹ This phenomenon is not limited to Enron, as similar suits have been filed against Global Crossing, Lucent Technologies and Nortel Networks.

The results of this litigation remain to be seen but clearly anything an employer can do to potentially limit its fiduciary liability as it relates to company stock as an employee investment option would be wise. Accordingly, companies might consider adopting some or all of the following modifications:¹

- Avoid recommending plan investments in company stock.
- **Make independent investment education available to plan participants.**
- Negotiate a penalty or incentive provision in record-keeping agreements to facilitate transitions to a new record-keeper within a reasonable timeframe.
- Provide employees with at least 30 days' advance notice of any "lockdown."
- **Inform plan participants that concentrated investment in any single security may be imprudent.**
- Consider appointing an independent fiduciary on behalf of the plan to determine whether to continue to offer company stock (or whether to sell company stock already held by the plan), particularly if corporate insiders are aware of nonpublic information that might have a substantial impact on the value of the stock.
- Amend plans in a manner that restricts employee investments in employer securities or provides greater freedom to diversify stock contributed by the employer.

¹ Linda K. Shore, Esq. "Fallout from the Enron Debacle: How Should Employers Respond to the Threat of 401(k) Participant Class Actions?" ©2002 Buchanan Ingersoll