

Recent Case Law Regarding Retirement Plan Investments in Employer Stock: Incorporation of Securities Law Filings into SPDs

Background

It is not uncommon for retirement plans holding employer stock to incorporate in summary plan descriptions, by reference, stock filings made under securities law. This practice satisfies certain securities law disclosure requirements. Recent case law suggests that incorporation of securities law filings by reference into an SPD is a fiduciary act, and so may lead to ERISA §404 fiduciary liability if the filings include false or misleading information.

Recent Case Law

Misrepresentations in a securities filing could lead to liability under securities law. Only recently it was unclear whether mere incorporation of these filings into an SPD could also form the basis for an ERISA fiduciary breach claim. A threshold question for an ERISA fiduciary breach claim is whether the defendant was acting in a fiduciary capacity when making the challenged statement or omission.

The 2nd, 6th, and 9th Circuit Courts of Appeals have all recently held that incorporating SEC filings into plan documents is a fiduciary activity.¹ The 6th Circuit Court of Appeals stated that an SPD is a fiduciary communication, and when SEC filings incorporated therein were alleged to contain false and misleading information an ERISA §404 action survived a motion to dismiss.² The 9th Circuit Court of Appeals similarly reversed a district court's dismissal of an ERISA fiduciary breach claim.³ There, the court agreed with the 6th Circuit and held that the incorporation of SEC filings into the SPD was a fiduciary act and that the incorporated statements could be used to show the defendants breached their ERISA fiduciary duties if they knew or should have known employer stock prices were artificially inflated.

The 2nd Circuit Court of Appeals also adopted the 6th Circuit's reasoning.⁴ Nonetheless, in that case the 2nd Circuit upheld the district court's dismissal because the plaintiffs did not identify the portions of the SEC filings that the defendants knew were false or misleading.

And finally, last year in an amicus brief the Department of Labor agreed with the 6th Circuit, that communications in an SEC filing that are incorporated by reference into an SPD are treated as if they were contained in the SPD itself.⁵ The Department of Labor argued the Supreme Court should not take cert. on the incorporation by reference issue, primarily because neither a Circuit Court nor the Supreme Court has disagreed with the DOL's position.⁶

Next Steps

We recommend fiduciaries review whether stock disclosures required by securities law can be efficiently accomplished via a method other than incorporation by reference into the SPD. For example, some employers will reverse the current process, by incorporating the SPD into the securities disclosure. This can sometimes be accomplished by adding a securities law section 10(a) cover sheet to documents currently being delivered to plan participants. However, securities law counsel should be consulted.

Not intended as legal advice.

¹ The Supreme Court rejected *certiorari* on the incorporation issue in the 6th Circuit, and vacated and remanded the 2nd and 9th Circuit cases. See our www.songmondress.com article on The Presumption of Prudence for the “presumption of prudence” issue reviewed by the Supreme Court.

² *Dudenhoefer v. Fifth Third Bancorp*, 692 F.3d 410, 423 (6th Cir. 2012) cert. granted in part, 134 S. Ct. 822 (U.S. 2013) and vacated and remanded sub nom. *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (U.S. 2014).

³ *Harris v. Amgen, Inc.*, 738 F.3d 1026, 1044 (9th Cir. 2013) cert. granted, judgment vacated sub nom. *Amgen Inc. v. Harris*, 134 S. Ct. 2870 (U.S. 2014).

⁴ *Rinehart v. Akers*, 722 F.3d 137, 152 (2d Cir. 2013) cert. granted, judgment vacated, 134 S. Ct. 2900 (U.S. 2014).

⁵ *Br. for the U.S. as Amicus Curiae* at 20-21, *Dudenhoeffer v. Fifth Third Bancorp*, 134 S.Ct. 822.

⁶ The Supreme Court did not take *certiorari* on the incorporation by reference issue; it did take *certiorari* on the presumption of prudence issue.