

Be Mindful of Section 404(b) of ERISA When Investing ERISA Plan Assets in International Markets

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Section 404(b) of ERISA generally requires ERISA plan fiduciaries to maintain the “indicia of ownership” (i.e., the “evidence of ownership”) of ERISA plan assets within the jurisdiction of U.S. District Courts. Plan fiduciaries should be mindful of this requirement when investing plan assets in international markets, in order to avoid breaching this fiduciary duty.

There are limited exceptions to this requirement, which are found under DOL rules interpreting Section 404(b). These exceptions generally permit the indicia of ownership of plan assets to be held outside the U.S. if the plan assets are: (i) securities issued by non-U.S. companies or governments, securities principally traded in non-U.S. markets, or non-U.S. currency held outside the U.S. “solely as an incident to the purchase, sale or maintenance of” such securities (ii) under the management of a fiduciary that is a U.S. registered investment adviser, bank or insurer meeting certain requirements, including being organized under the laws of the U.S. (or a state) with its principal place of business in the U.S.

Plan fiduciaries may seek to confirm that international investments are maintained in accordance with Section 404(b) by, among other methods, delegating responsibility for maintaining the indicia of ownership of plan assets to the plan’s trustee and/or to one or more discretionary investment managers managing the plan’s international portfolio (in either case, subject to a written agreement addressing the requirements of Section 404(b), among other important provisions), and requesting written certification from the applicable service provider on a periodic basis that it and the portfolio continue to comply with Section 404(b) and any underlying exception and immediate notice in the event of an expected violation.

If the plan’s trustee is responsible for maintaining compliance with Section 404(b), plan fiduciaries should take care that the trustee has a robust diligence process for selecting and monitoring international sub-custodians, particularly in emerging and frontier markets, and confirm that the trustee will remain liable for any sub-custodians’ actions or omissions to the same extent as if the trustee made such actions/omissions. If a plan fiduciary retains an investment adviser that is not organized under the laws of the U.S. with its principal place of business in the U.S., the plan fiduciary should take care to confirm that its Section 404(b) obligations are satisfied through an arrangement with the plan’s trustee (or other qualified provider) because the investment adviser likely could not meet the requirements of the DOL exception addressed above due to its non-U.S. status. Additionally, when preparing investment guidelines

for an international portfolio, the plan fiduciaries should be mindful of whether the investment instruments permitted under the guidelines will conform to the narrow exceptions to Section 404(b) outlined in the DOL rules.

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