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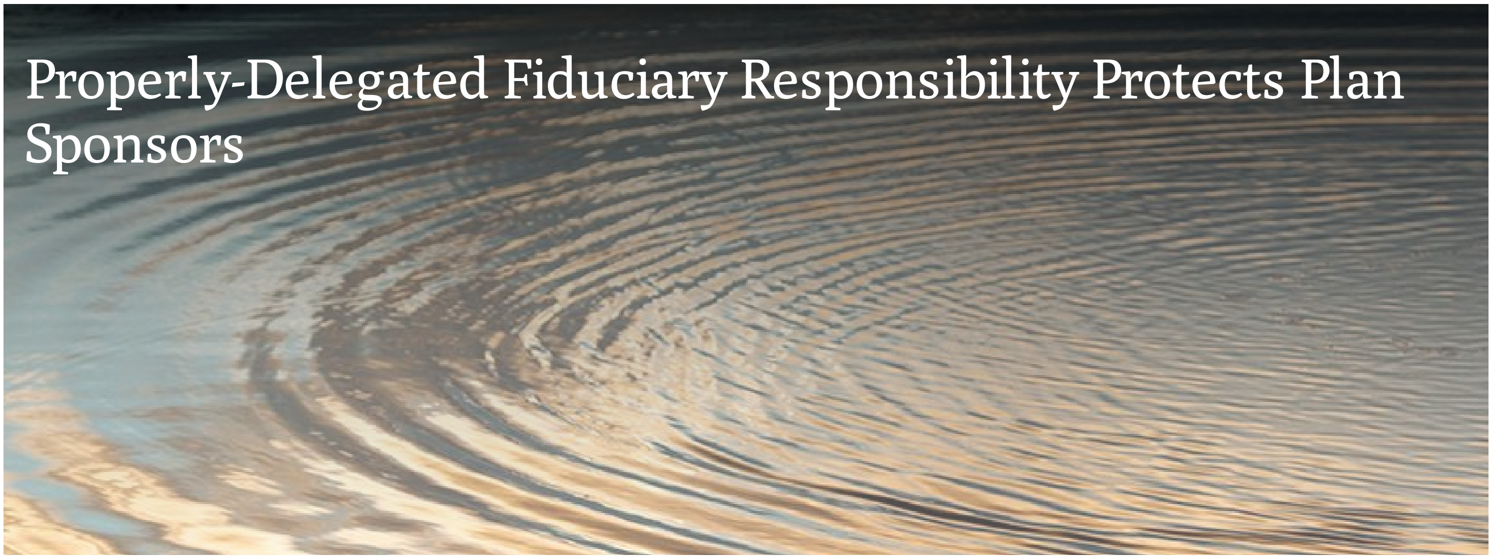

Properly-Delegated Fiduciary Responsibility Protects Plan Sponsors

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In *Coulter v. Morgan Stanley & Co.* (May 29, 2014), the Second Circuit Court of Appeals dismissed ERISA breach of fiduciary duty claims against Morgan Stanley, Morgan Stanley & Co. Inc., and members of their respective Boards of Directors (collectively referred to here as "Morgan Stanley"). The plaintiffs, a class of participants in the company's 401(k) plan and employee stock ownership plan (the "Plans"), claimed that Morgan Stanley violated its ERISA fiduciary duties by electing to make Plan contributions in company stock. In 2007 and 2008, Morgan Stanley elected, pursuant to its express authority under the Plans, to make its employer contributions to the Plans in the form of company stock instead of cash. In late 2007 and early 2008, Morgan Stanley's stock price dropped dramatically (along with the price of most other stocks).

The defendants were not named fiduciaries under the Plans. Therefore, the plaintiffs' claims could survive only if the defendants were *de facto* fiduciaries. A *de facto* fiduciary is someone who exercises discretionary authority or discretionary control regarding the management or administration of a plan, or the management or disposition of a plan's assets. The plaintiffs alleged that Morgan Stanley was a fiduciary because it provided its CEO "with the authority and means to fund Company Contributions with Company Stock," and the CEO had the authority to decide whether to fund those contributions with company stock versus cash. The court held that Morgan Stanley was not a *de facto* fiduciary because its actions, although they may have been discretionary, did not involve plan management or administration.

The court found Morgan Stanley's actions to be "settlor" in nature, which do not trigger ERISA liability. Examples of settlor functions include establishing, funding, amending, or terminating a plan. Further, the court cited authority that specifically included decisions relating to the timing and amount of plan contributions as being settlor in nature. Interestingly, the court found that Morgan Stanley's decision to fund contributions in company stock could not be a fiduciary act in any event because, at the time the company made the decision, the company stock was not yet a plan asset.

Because Morgan Stanley's decision to invest employer contributions in company stock was not a fiduciary function, it could not trigger fiduciary liability. The court found that "the challenged conduct, even if it negatively impacted the Plans, did not occur in the performance of a fiduciary function and therefore cannot trigger fiduciary liability under ERISA."

Coulter is yet another reminder of the importance of proper delegation of fiduciary authority. Proper delegation is a Board of Directors' best defense against ERISA liability. Once proper delegation is in place, it is critical that the fiduciaries receive training to make sure they properly carry out their ERISA fiduciary duties. Not only is this key in a litigation context but also in an audit situation, where the DOL will ask your plan fiduciaries when they last received fiduciary training. If you have not already delegated fiduciary functions to designated individuals or a committee and/or don't already provide periodic fiduciary training and education to your retirement plan fiduciaries, you should adopt these best practices. We offer a comprehensive fiduciary training program and would be happy to answer any questions you may have.

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