Morgan Stanley

ERISA Litigation Update

January 29, 2025

The Morgan Stanley ERISA Litigation Update seeks to provide an overview of recent, relevant cases which may impact your responsibilities as a plan sponsor and/or plan fiduciary.

I. Supreme Court to Consider Key Procedural Issue

The Supreme Court recently agreed to hear an appeal in Cunningham v. Cornell University to resolve a split among the courts of appeals over what plaintiffs must plead when challenging the relationship between benefit plans and their service providers under ERISA. In* Cunningham v. Cornell University*, the district court held that plaintiffs must allege both that a prohibited transaction occurred, and that there was no exemption available for such transaction. However, other circuit courts have held that plaintiffs need only allege that a prohibited transaction occurred, resulting in a split among circuit courts. The industry remains hopeful that the Supreme Court's ruling on the question of how much a plaintiff must allege/prove in order to move a suit about a breach of fiduciary duty to trial will resolve the inconsistent rulings among circuit courts.

Cunningham v. Cornell University was brought by employees of Cornell University, who alleged that the fiduciaries of Cornell's retirement plan violated their duties under ERISA and engaged in a prohibited transaction with respect to the selection and monitoring of certain investments and the plan's recordkeeper.

The district court in *Cunningham* dismissed the prohibited transaction claims by reasoning that, although the plaintiffs alleged a prohibited transaction occurred, they failed to allege that the defendants lacked an exemption that would allow that transaction. Specifically, ERISA section 408(b)(2) provides relief from certain prohibited transactions where a plan fiduciary procures necessary services to the plan and the plan pays no more than reasonable compensation. The district court held that plaintiffs must allege both that a prohibited transaction occurred *and* that there was no exemption available because the two statutory provisions are intended to work together. The practical effect of the holding is that the plaintiffs would have needed to plead with some degree of specificity that the fees were unreasonable, rather than just stating that the transaction occurred.

The Second Circuit affirmed that decision on appeal and joined the Third, Seventh, and Tenth Circuits in requiring plaintiffs raising a prohibited transaction claim to allege something more than the mere existence of a transaction between a plan and a service provider. In contrast, the Eighth and Ninth Circuits have held that plaintiffs only need to allege that a transaction took place and need not allege that the transaction was for more than reasonable compensation.

The Supreme Court heard oral arguments in *Cunningham v. Cornell University* on January 22nd and considered the question of what a plaintiff must allege in order to survive a motion to dismiss for claims involving a prohibited transaction under ERISA section 406(a)(1)(C). That provision of ERISA provides that, except as set forth in the exemptions outlined in Section 408 of ERISA, it is a prohibited transaction for a plan fiduciary to cause the plan to furnish goods, services, or facilities between the plan and a "party in interest," as defined under Section 3(14) of ERISA, which includes, but is not limited to, service providers. While the Supreme Court has not ruled on this issue yet, Justice Brett Kavanaugh remarked that it "seems nuts" that the mere fact of hiring an outside retirement plan service provider could qualify as a prohibited transaction under ERISA during oral arguments.

The cost to defend fee litigation can be substantial and grow materially if the lawsuit moves into the discovery phase, which involves depositions and other labor-intensive work. Consequently, the procedural rules in litigation are very important and can have a substantial impact on overall costs. By deciding to take up *Cunningham*, the Supreme Court has signaled a readiness to resolve this circuit split, and there is some optimism that the Supreme Court will use the case as an opportunity to make fee litigation more difficult for plaintiffs' bar attorneys. The case will likely be decided in 2025, and the decision could potentially have a significant impact on future ERISA litigation.

Best Practices for Plan Sponsors and Plan Fiduciaries to Consider:

- Establish, maintain, and periodically review formal, documented procedures regarding the plan fiduciary's prudent selection and monitoring of plan investments and service providers, including, but not limited to, any metrics or benchmarks used by plan fiduciaries to determine the reasonableness of any such service provider's fees.

II. Fee Litigation: Update

Employers, retirement plan committees, and other plan fiduciaries continue to face an onslaught of lawsuits by plaintiffs alleging the fiduciary has breached its duties under ERISA by allowing the applicable 401(k) plan to pay excessive investment and/or administrative fees. Recent cases underscore the important role a prudent process plays in defending against such lawsuits.

401(k) plan fee litigation has been rampant over the past two decades with nearly 700 lawsuits filed against plan sponsors, fiduciaries, and service providers. Most defendants have chosen to settle rather than risk taking the cases to trial. However, for those defendants that have elected to fight, there is a clear trend of district courts across the country rejecting excessive recordkeeping fee and imprudent investment claims after trial.

Most recently, in the case of *In re: Prime Healthcare ERISA litigation*, the Central District of California found in favor of *Prime Healthcare* after a bench trial. *The case* involved claims that the fiduciaries of the Prime Healthcare Services, Inc. 401(k) Plan, a multiple employer plan with sixty-eight different participating employers, caused the plan to pay excessive recordkeeping fees and that the plan retained underperforming investments. The court wholly rejected the plaintiffs' theories regarding the defendants' alleged imprudence, finding that the defendants used a "prudent process" to monitor the plan's investments and recordkeeping fees. The court noted that the defendants followed an established process for selecting, monitoring, and removing investment options, guided by the plan's investment policy statement, which was based on a comprehensive system developed by the plan's consultant. The court expressly rejected the plaintiffs' argument that the defendants' "reflexively deferred" to the investment consultant and, instead, found that the meeting minutes showed that the defendants had been actively engaged in the process. The court also noted that fiduciaries received regular fiduciary training that aligned with industry standards and included specific fiduciary-duty updates based on external developments in the industry.

The decision in the case against *Prime Healthcare* represents another significant defense victory in excessive fee and imprudent investment litigation. In recent years, defendants have fared well in defending against these types of claims at trial – including in cases such as *Nunez v. B. Braun Medical, Inc.*; *Mattson v. Milliman, Inc.*; *Vellali v. Yale University*; *Lauderdale v. NFP Retirement, Inc.*; and *Mills v. Molina Healthcare, Inc.* – and *Prime Healthcare* is another example in this growing trend.

Best Practices for Plan Sponsors and Plan Fiduciaries to Consider:

- In light of the importance court rulings place on maintaining rigorous processes related to a fiduciary's selection and monitoring of investment options available to participants as well as appointments of plan providers (also known as "procedural prudence," which focuses on the process utilized by a fiduciary rather than the ultimate performance or outcome of such decisions), consider establishing, maintaining and periodically reviewing formal, clearly documented processes utilized by plan fiduciaries when making investment-related and/or service provider decisions for the plan.
- Consider, in such processes, documenting a plan fiduciary's reasonable actions in its investment decisions and selection of service providers, as applicable, under the circumstances facing the fiduciary at such time, to demonstrate both procedural prudence and the fiduciary's basis for such decisions.
- Fiduciaries should keep records of not only the decisions made but also the rationale, including any research conducted, RFP discussions or outcomes, and/or expert recommendations (including, if applicable, in meeting minutes).

III. Investigation into the DOL's Use of Common Interest Agreements with Plaintiff Firms

***The DOL is under fire for its use of "secret agreements" with plaintiff's law firms, permitting the agency to "litigate in the shadows." While common interest agreements are frequently used in litigation between parties in active litigation, the DOL was not a party to the lawsuit nor was it conducting a parallel investigation on the matter. As a result, the magistrate judge in* Harrison v. Envision Management Holding Inc. Board of Directors et al. founds that the DOL lacked a "common interest" with the plaintiffs because the DOL was not pursuing parallel action based on the materials and emphasized that such a deal "could set a dangerous precedent."**

A federal magistrate judge in the U.S. District of Colorado unearthed, and criticized, a "common interest agreement" between the Department of Labor ("DOL") and a plaintiff's law firm that brought claims against an employee stock ownership plan (otherwise known as an "ESOP") in *Harrison v. Envision Management Holding Inc. Board of Directors et. al.*, such agreements were used to feed information obtained in a DOL investigation to the plaintiff law firm. The magistrate judge raised the concern that use of such secret agreements "would allow a government agency to weaponize private litigation against some target before confirming the target should be a target" and could allow the government to "litigate in the shadows, without giving the opposing party an opportunity to adequately probe and defend itself."

Common interest agreements are usually maintained by two parties in active litigation, but the DOL was not a party to the lawsuit, nor had it filed a lawsuit against the parties at issue. Absent a valid common interest, the materials DOL shared with the plaintiffs must be disclosed to the defendants. In *Harrison v. Envision Management Holding Inc. Board of Directors et. al.*, the magistrate judge invalidated the common interest agreement, finding that the DOL lacked a "common interest" with the plaintiffs because the DOL was not pursuing parallel action based on the materials and emphasized that such a deal "could set a dangerous precedent."

Representative Virginia Foxx, Chair of the House Committee on Education and the Workforce, criticized DOL's actions and asked the DOL Inspector General to open an investigation regarding (i) the number of time EBSA has shared information "gleaned from EBSA investigations with outside law firms" before taking action of its own, or with any law firm that would not otherwise have access to that information through the discovery process, and (ii) which law firms receive assistance from the DOL, how such firms are chosen, and the monetary value of that information, among other items. In response to the public outcry related to the agency's use of these common interest agreements, a DOL spokesperson stated that this is a standard legal practice and the DOL "is aware of Congresswoman Foxx's request to the Office of the Inspector General. Common interest agreements are a well-established legal tool that recognize existing legal privileges. They are used by government and private litigants alike." On January 14th, Representative Tim Walberg (R-MI), the successor to Representative Foxx as the new chairman of the House Education and Workforce Committee, submitted a letter to the DOL's Inspector General requesting they renew the Committee's prior request to investigate claims that the DOL was improperly sharing confidential information with plaintiffs' attorneys for use in ERISA-related litigation.

The DOL's defense of its use of these agreements signifies that these arrangements may be commonly utilized by the DOL, indicates to plan sponsors that when faced with a DOL audit, anything they provide to the DOL may make its way directly to plaintiff's lawyers, and highlights the need for defendants to request the disclosure of agreements between the plaintiffs and the DOL (and any information shared in connection therewith) during discovery. It appears the DOL only has a small number of common interest agreements in place at this point. However, this new information highlights how aggressive DOL has become in attempting to address actual or perceived ERISA violations.

Best Practices for Plan Sponsors and Plan Fiduciaries to Consider:

- When faced with a DOL audit, plan sponsors and fiduciaries should be cognizant of the fact that anything they provide to the DOL in connection with such audit may be disclosed to plaintiff law firms.
- Plan sponsors and fiduciaries, when facing ERISA-related litigation, should consider requesting the disclosure of any agreements or arrangements between the plaintiff's lawyers and the DOL, as well as any information shared in connection therewith, during the discovery stage.

IV. Forfeiture Lawsuits Claim Traction

Although IRS regulations permit the use of plan forfeitures to offset employer contributions, plan forfeiture litigation is nonetheless gaining steam. Mounting complaints generally allege that when there is a decision to use plan forfeitures to offset employer contributions instead of to reduce plan administrative expenses, the respective plan fiduciary has breached its fiduciary duties of loyalty and prudence under ERISA by failing to use plan assets for the benefit of participants. To date, courts considering lawsuits related to a plan sponsor's use of forfeitures have not ruled consistently, complicating the issue for plan sponsors and fiduciaries. However, a court's decision in **Naylor v. BAE Systems** ***in favor of the defendants highlight that some courts are ready to dispose with these claims.***

Plaintiffs' attorneys are rapidly filing lawsuits that target fiduciaries' use of 401(k) plan forfeitures. A plan forfeiture occurs when a participant's plan balance is forfeited due to events set forth in the plan document. Most commonly, plan forfeitures occur when participants separate from employment before becoming fully vested in employer contributions. Longstanding IRS guidance indicates that forfeitures are permissible and may be used to either pay plan administrative expenses or be used to satisfy the employer's matching contribution obligations under the plan; provided the plan document permits such uses of forfeitures. In recent lawsuits, plaintiffs have alleged that fiduciaries violated ERISA by exercising discretion to use forfeitures to offset the employer's matching contributions, which plaintiffs claim benefits the employer and not plan participants. To date, the early court decisions have been mixed, but the recent decision in *Naylor v. BAE Systems*, as described below, indicates that at least some courts are ready to dispose with the claims.

Courts recently dismissed forfeiture claims brought against Thermo Fisher Scientific Inc. and BAE Systems. In *Dimou v. Thermo Fisher Scientific Inc. et al.*, the court determined that defendants had acted as fiduciaries, but it concluded that ERISA "does not require a fiduciary to maximize pecuniary benefits," and as such, a fiduciary does not breach its duties by not using forfeitures to pay administrative expenses, "especially when the plan document permits such use and does not create an entitlement to such benefits." The court in *Naylor v. BAE Systems* found in favor of the defendants because the court determined the plan document effectively required forfeitures to be used to offset employer contributions, so the fiduciaries did not exercise discretion.

Best Practices for Plan Sponsors and Plan Fiduciaries to Consider:

- Identify, and review any forfeiture provisions set forth in plan documents with ERISA counsel and discuss whether any modifications are necessary regarding the exercise of discretion related to the use of forfeitures to reduce or eliminate the type of discretion over the assets that could form the basis for an ERISA fiduciary breach claim.
- Plan sponsors should review their plan forfeiture language to determine if the plan authorizes the use of forfeitures for employer contributions and to ensure that any ordering rules set forth in the

plan document are followed (e.g., some plans require plan expenses be paid prior to offsetting employer contributions).

If the clear intent of the plan document is for plan sponsors to use plan forfeitures primarily to offset employer contributions, plan sponsors should consider whether any modifications are needed to the plan document to remove discretion and optionality related to forfeiture use. Consider incorporating ordering rules into the plan document that clearly prioritize and/or define the circumstances in which plan sponsors may use forfeitures to offset employer contributions in lieu of using such forfeitures to pay plan administrative expenses, so that the plan sponsor does not have any discretion or optionality as to how such forfeitures are used (including, if desired, so that offsetting employer contributions is the first or only permitted use).

V. Pension Risk Transfers Under Fire

Since March 2024, at least nine class action complaints have been filed against plan sponsors for engaging in pension risk transfers ("PRTs") that selected Athene as the insurer taking over plan liabilities. All complaints allege that the relevant plan sponsor breached its fiduciary duties of loyalty and prudence under ERISA when choosing Athene for the PRT and such complaints also assert that the PRT constituted a nonexempt prohibited transaction under ERISA as Athene allegedly received more than reasonable compensation for its services, given Athene's "substantial risk" as insurer. Additionally, a new lawsuit* – Dempsey et al. v. Verizon Communications Inc. et al. – *involves the selection of Prudential and RGA Reinsurance Company as the selected annuity providers in connection with a PRT, indicating that more, and similar, class action complaints may be forthcoming and are not limited to plan sponsors that selected Athene as the PRT insurer, at least until one (or several) of the suits are dismissed.

It is common for plan sponsors to "de-risk" their defined benefit plans by purchasing annuities to satisfy the benefits for some or all of the plan participants. The annuity is purchased in what is commonly referred to as a PRT that results in the transfer of the benefit obligation from the plan sponsor to one or more insurance companies, which become responsible for paying out the monthly pension benefits.

Starting in March 2024, plaintiffs filed lawsuits against a number of large plan sponsors (*e.g.*, AT&T, Lockheed, Alcoa, GE, Bristol-Myers Squibb) that engaged in PRT transactions. The plaintiffs in these cases are former participants of the companies' respective pension plans whose assets were transferred to an insurer. The plaintiffs alleged, among other things, that the defendants violated ERISA by failing to select the "safest available" annuity provider. Many of the defendants had engaged an independent fiduciary to assist with the PRT transaction, and those independent fiduciaries were also sued. Most of the defendants have filed motions to dismiss, and the cases remain pending.

On December 12, a new class action complaint was filed against a plan sponsor for engaging in a PRT and its selection of Athene as the insurer taking over the plan's liabilities. The complaint in *Maneman et al v. Weyerhaeuser et al.* similarly alleges that the plan sponsor breached its fiduciary duties of loyalty and prudence under ERISA when choosing Athene as the insurer, and also alleges that the PRT constituted a nonexempt prohibited transaction under ERISA. Additionally, three former employees of Verizon filed a new lawsuit – *Dempsey et al. v. Verizon Communications Inc. et al.* – in the U.S. District Court for the Southern District of New York alleging that Verizon and SSGA violated their fiduciary duties with respect to two PRTs of $5.9 billion to Prudential and RGA Reinsurance Company.

Dempsey et al. v. Verizon Communications Inc. et al. highlights the expanding scope of this new wave of litigation, which previously targeted plans that selected Athene as the insurance company with respect to PRTs, and that these lawsuits are a material threat to the entire PRT business. It is still too early to tell whether the PRT lawsuits include viable claims, and there are very real questions about whether the plaintiffs have even suffered a harm. Regardless, the lawsuits are more evidence that virtually all fiduciary decisions carry risk, and it is important to take prophylactic steps in anticipation of potential litigation.

Best Practices for Plan Sponsors and Plan Fiduciaries to Consider:

- Plan sponsors should separately review, consider and document settlor versus fiduciary functions and decisions when de-risking a plan and/or executing a PRT, including when selecting an insurer.

If/when selecting an insurer, plan sponsors must perform due diligence into the insurance market and the particular insurer options, and must select the "safest available annuity" provider per DOL Interpretive Bulletin 95-1, including after weighing six crucial factors identified by the DOL. Plan sponsors may wish to engage an independent fiduciary to carry out the insurer due diligence, analysis and selection.

- In all events, the process carried out by the plan sponsor when acting as plan fiduciary, including if/when selecting an insurer, is key for defending ERISA fiduciary breach claims and so should be conducted in consultation with ERISA counsel and should be well-documented.

VI. Sales and Education Practices Attract Scrutiny

Managed accounts and participant-level advice programs have been the subject of several recent lawsuits. Sales and education practices are under scrutiny in **Kelly et al. v. Teachers Insurance and Annuity Association of America et. al.*****, which alleges that the defendants used an advice tool to steer plan participants to the defendant's proprietary investment products. The litigation is in the very early stages.***

TIAA and Morningstar are the subjects of a lawsuit (*Kelly et al. v. Teachers Insurance and Annuity Association of America et al.*) claiming they engaged in an "unlawful scheme to enhance corporate profits" by allegedly using an advice tool to steer participants to proprietary investment products, including the TIAA Traditional Annuity and TIAA Real Estate Account. The plaintiffs further alleged that TIAA created financial incentives for consultants to recommend the advice programs, despite the programs not being the best interest of participants.

Best Practices for Plan Sponsors and Plan Fiduciaries to Consider:

- Fiduciaries should consider reviewing managed account structures to clearly understand how these programs work as well as the guardrails available to ensure the programs provide prudent investment recommendations.
- Consider reviewing any communications to plan participants or beneficiaries related to the availability of managed account services (whether in plan or out of plan) to ensure such communications are educational in nature and do not constitute fiduciary investment advice.

VII. Cash Sweeps

Plaintiffs have brought more than 30 putative class action lawsuits challenged cash sweep arrangements, alleging that the defendants violated their duties under either Regulation Best Interest or the Investment Advisers Act of 1940 (the "40' Act") when implementing such cash sweep programs. Although none of the cases brought to date involve plans subject to ERISA, many 401(k) and other retirement plans have cash sweep programs, and such lawsuits serve as a good reminder to plan fiduciaries that they should periodically review cash sweep vehicles and arrangements.

Many brokerage accounts (advisory and non-advisory) have a feature that allows free credit (*i.e.*, available cash) to be "swept" to one or more designated investment vehicles (*e.g.*, money market fund, FDIC insured deposit). Plaintiffs argue that the defendants violated their duties – either under Regulation Best Interest or the 40' Act – to act in the client's best interest when implementing the sweep programs. Neither Regulation Best Interest nor the 40' Act provide for a private right of action, but the plaintiffs allege that violations of those federal laws are sufficient to serve as the foundation for claims for relief under state law. No court has yet ruled on this novel theory.

Best Practices for Plan Sponsors and Plan Fiduciaries to Consider:

- Consider establishing, maintaining, and periodically reviewing formal, documented procedures that require plan fiduciaries to periodically review and monitor cash sweep programs and sweep vehicles as the plan fiduciary would with respect to any other plan investment strategy or vehicle.
- Review the plan fiduciary's processes to ensure transparency in such fiduciary's decisions (and such processes) related to plan investments through additional disclosures and education to plan participants related to cash sweep program, and consider documenting why a plan fiduciary determined that such programs were appropriate and prudent.

VIII. ESG Investing

The United States District Court for the Northern District of Texas found the defendants breached their fiduciary duty of loyalty – but not the fiduciary duty of prudence – in* Spence v. Am. Airlines, Inc. *The decision is the first to apply ERISA's fiduciary rule to investment and proxy voting decisions taking into consideration environmental, social, and governance ("ESG") factors. The decision is arguably unhelpful for plan fiduciaries and asset managers as it muddies the waters when it comes to the fiduciary standards, and it may result in an increase in ERISA litigation on ESG and proxy voting issues.

On June 2, 2023, an employee of American Airlines ("AA") and a participant in AA's defined contribution plan filed a complaint alleging that AA and the American Airlines Employee Benefits Committee (together with AA, the "Defendants") breached their fiduciary duties of prudence and loyalty, as well as the duty to monitor, by using BlackRock, which the plaintiffs allege pursued "non-financial and nonpecuniary ESG policy goals through proxy voting and shareholder activism." After denying the Defendants' repeated motions to dismiss and motion for summary judgment, the Court held a four-day bench trial to consider whether the Defendants breached such duties by placing "corporate interests" ahead of the interests of plan participants and beneficiaries. On January 10, 2025, the United States District Court for the Northern District of Texas issued an opinion in *Spence v. Am. Airlines, Inc.*, holding that the Defendants violated ERISA's duty of loyalty by "allowing their various ties to BlackRock to influence management" of AA's defined contribution plan.

At the outset, the Judge defines ESG investing as "a strategy that considers or pursues a non-pecuniary interest as an end itself rather than as a means to some financial end." Notably, the Judge takes a restrictive view on subjective determinations of whether ESG factors present pecuniary considerations, noting that "[s]imply describing an ESG consideration as a material financial consideration is not enough" and that a "sound basis" is required to make that determination. The Judge further cautions that "[d]eferring to what an entity labels a financial interest would create an entirely different standard—a subjective one—that will infinitely vary based on who is asked."

With respect to the claims, the Court first analyzed whether the Defendants had violated ERISA's fiduciary duty of prudence. Although the prudence standard is often articulated as requiring a fiduciary to act as a prudent person or expert would, the Court framed ERISA's standard as requiring a fiduciary to comply with current industry standards. He then lamented that, "the 'incestuous' nature of the retirement plan industry makes a finding of imprudence essentially impossible in certain situations." Concluding that the Defendants had met, and in some cases exceeded, industry standards with respect to its monitoring obligations, the decision notes that the plaintiff had "identified not one fiduciary with a more rigorous monitoring process than Defendants" and that this "alone is dispositive."

The Court described the duty of loyalty as requiring fiduciaries to act with an "eye single" towards the financial performance of a plan which is breached if fiduciaries allow "cross-pollination" of plan sponsor interests into plan decision making. The Court further suggests that "a loyal fiduciary" would monitor and question an investment manager who engages in "non-pecuniary investment activities," concluding that the Defendants breached their duty of loyalty by allowing AA's ties to BlackRock and corporate policies to influence the management of the plan. Importantly, the Court determined that there was a conflict of interest because BlackRock holds approximately 5% of AA's stock and $400M of its corporate debt, and this conflict resulted in the Defendants taking actions on behalf of the plan to further corporate goals (e.g., staying in BlackRock's good graces). The decision also claims that the Defendants failed to separate AA's corporate commitment to certain ESG principles from the fiduciary decision-making process for the plan.

There is a high likelihood that the decision may be appealed, and because the holdings are so dependent on the specific facts at issue, it is not clear whether the decision will have broader legal implications. In that regard, the Court's ruling that the Defendants did not breach their duty of prudence merely by maintaining BlackRock funds is generally helpful for plan sponsors and fiduciaries. Similarly, the Court's ruling on the duty of loyalty does not rest solely on the inclusion of BlackRock funds but instead relies on a relatively unique combination of various circumstances, which may not be present for the typical plan sponsor and/or fiduciary.

Although the litigation neither challenges, nor relates to, the application of the Biden Administration's final rule on Financial Factors in Selecting Plan Investments, a separate lawsuit (*Utah, et. al. v. Su*) challenging the validity of that final rule was recently remanded by the Fifth Circuit Court of Appeals to be considered in light of the Supreme Court's *Loper Bright* decision. Beyond that challenge, ESG and proxy voting have been the subject of decades of regulation and guidance, and all four of the most recent administrations have issued guidance on this topic. It is highly likely the incoming Trump Administration will do the same, and this case may serve as a springboard.

Best Practices for Plan Sponsors and Plan Fiduciaries to Consider:

- In light of the importance court rulings place on maintaining rigorous processes related to a fiduciary's selection and monitoring of investment options available to participants and its appointment of plan providers (also known as "procedural prudence," which focuses on the process utilized by a fiduciary rather than the ultimate performance or outcome of such investment related decisions), consider establishing, maintaining and periodically reviewing formal, clearly documented processes utilized by plan fiduciaries when making investment related decisions for the plan.
- Consider reviewing the plan document, investment policy statement (if any) and other investment parameters to determine whether such governing plan documents permit the consideration of any ESG factors in plan fiduciary investment-related decisions.
- Consider employing additional protective measures to evidence why a plan fiduciary determined whether a particular plan investment was appropriate and prudent at the time of such decision, particularly where there could be questions as to whether one or more of the factors considered by a plan fiduciary when making plan investment decision relates to the financial performance of the investment.
- Review the proxy voting policies of any investment managers hired by a plan fiduciary to ensure that the voting decisions are made in the best interest of the plan.
- Plan fiduciaries should carefully review the documentation they receive from money managers about how proxy votes are determined and determine whether third-party service agreements accurately reflect participant interests.
- Plan sponsors and fiduciaries should be mindful of the separate roles these individuals serve in, to ensure separation between a plan sponsor's corporate interests and those interests of the underlying plan participants and beneficiaries.

IX. Actuarial Equivalence Litigation

Plan participants have filed several lawsuits arguing their pension benefits were improperly calculated using allegedly unreasonable actuarial assumptions. Plaintiffs argue that ERISA requires pension plans to calculate joint and survivor benefits using reasonable actuarial assumptions and that the assumptions used by the plans were unreasonable because, in part, the assumptions were outdated. These lawsuits are slowly being resolved through the court system.

A court recently granted preliminary approval of a settlement in a prominent lawsuit filed against Citgo Petroleum Corporation in *Urlaub et al. v. Citgo Petroleum Corporation et al*. In February 2022, the district court denied Citgo's motion to dismiss, rejecting the defendant's argument that ERISA does not impose a reasonableness standard on the actuarial assumptions that plans use to calculate joint and survivor benefits. This decision was noteworthy because, less than a month later, the United States District Court for the District of Massachusetts dismissed a similar lawsuit that had been filed against Partners Healthcare Systems, Inc., having reached the opposite conclusion (*i.e.*, that ERISA does *not* impose a reasonableness standard on the assumptions). The court subsequently denied most aspects of Citgo's motion for summary judgment and certified a class. The parties have now reached an agreement to settle the case by increasing plan benefits by $10 million, which would be spread among 1,743 members of the class. The agreement also calls for $4.75 million in attorney fees and expenses.

Best Practices for Plan Sponsors and Plan Fiduciaries to Consider:

- Consider reviewing all aspects of the relevant defined benefit plan, including the actuarial assumptions being used, to ensure such assumptions are reasonable and up to date.

Disclosures
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ESG investments in a portfolio may experience performance that is lower or higher than a portfolio not employing such practices. Portfolios with ESG restrictions and strategies as well as ESG investments may not be able to take advantage of the same opportunities or market trends as portfolios where ESG criteria is not applied. There are inconsistent ESG definitions and criteria within the industry, as well as multiple ESG ratings providers that provide ESG ratings of the same subject companies and/or securities that vary among the providers. Certain issuers of investments may have differing and inconsistent views concerning ESG criteria where the ESG claims made in offering documents or other literature may overstate ESG impact. As a result, it is difficult to compare ESG investment products or to evaluate an ESG investment product in comparison to one that does not focus on ESG. There is no assurance that an ESG investing strategy or techniques employed will be successful. Past performance is not a guarantee or a dependable measure of future results.

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