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LEGAL UPDATE

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Fund Trustees Should Examine UBS Downturn

Will the Recent Woes of UBS Affect the Welfare Plan?

Welfare Fund ("Fund") trustees ("Trustees") are fiduciaries under ERISA and owe participants and their beneficiaries duties of prudence and loyalty. With respect to investment decisions, trustees must keep themselves informed through reasonable inquiry (prudence) and must carefully manage trust assets in light of the information learned (loyalty). If the Trustees do not take appropriate steps to act on investment information, they could be held liable for mismanagement of Fund assets.

Under ERISA, plan fiduciaries "are assigned a number of detailed duties and responsibilities, which include the proper management, administration and *investment* of plan assets . . . ." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251 (1993) (emphasis supplied). ERISA requires that a fiduciary shall act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B) (2000). This is known as the "prudent expert" standard. In enforcing this standard, a reviewing court will focus "not only on the merits of a transaction, but also on the thoroughness of investigation into the merits of that transaction." *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 (4th Cir. 2007) (quoting *Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996). Thus, trustees must exercise prudence in selecting *and retaining* investments. *DiFelice*, 497 F.3d at 418.

UBS and the Auction Rate Securities Market

News has surfaced to the effect that the auction rate securities market has become totally illiquid and largely worthless. There are allegations that UBS has both purchased some of these securities for its own inventory and has pushed them on UBS clients for direct investment.

This means that auction rate securities potentially invested in by the Fund and UBS investments that may hold auction rate securities have become suspect. The Trustees owe a duty of care to the participants and beneficiaries to investigate and make the appropriate decision in light of the information learned. Failure to investigate and heed the available information could result in the personal imposition of liability for mismanagement of fund assets. Case in point, the law firm that initiated the wave of hidden fee litigation, Keller Rohrbach, has already announced that it will begin its own investigation into the various breaches of fiduciary duty on the part of UBS for its conduct with respect to auction rate securities.

Liability Relating to Investment in UBS Funds

Whether or not there is any actual liability depends in large part upon the decisions made by the Trustees. If the Fund has sufficient liquidity and there is little or no loss of plan assets because of a decreased return on investments, then the risk is very low. (Someone could always claim that an investment would have produced higher returns and thus that a Trustee decision was improper, but without solid proof, such a claim is likely not viable.) On the other hand, if the fund will not have sufficient liquidity or there is a significant loss on a UBS investment, and if corrective action is not taken, the Trustees run a serious risk of being found liable should a participant or beneficiary sue, or should the Department of Labor audit the Fund.

In an effort to facilitate the Trustees' investigation, several articles are provided here for consideration, both in support of and describing the allegations against UBS. A summary of the main points from these articles is provided below:

UBS stock itself has been devalued as a result of three things:

- the Swiss bank has suffered losses in excess of $38 billion
- UBS has been indicted by the New York Attorney General for fraud relating to its pushing of auction rate securities
- The IRS and other authorities are investigating and prosecuting UBS for assisting U.S. citizens

in hiding money overseas

Auction Rate Securities (ARS)

- ARSs- Bonds, usually municipal or government bonds, that could ordinarily be sold at an auction
- 2006- no bidders at auctions, so banks, like UBS, started bidding and buying ARSs themselves
- End of 2007- no bidders at all; market froze
- UBS investment companies sold ARSs to many clients, $25 billion in all

UBS Actions

- Head of municipal bond section fired
- Agreed to buy back $3.5 billion in ARSs from clients

Securities regulator actions

- New York Attorney General filed securities fraud civil suit
- Massachusetts Attorney General filed suit on behalf of several municipalities that invested in ARSs, but the suit was settled
- Missouri Securities Department raided the Wachovia office in St. Louis looking for information about the ARS market

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For more information about the obligations of the trustees with respect to investment decisions, please contact your attorney at Brown & Ruprecht, PC:

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