

# CLIENT REPORT

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## NYHART / ABG CORNER: WE'RE ON THE MOVE!

Beginning June 1, 2009, The Nyhart Company / Alliance Benefit Group of Indiana will be in a new office location.

8415 Allison Pointe Boulevard  
Suite 300  
Indianapolis, IN 46250

317-845-3500  
317-845-3650 FAX  
800-428-7106  
www.nyhart.com

Along with the office move, we are also returning to The Nyhart Company name. We will, however, remain a member of Alliance Benefit Group.

Individual phone numbers and FAX numbers will be changing, but our 800/888 numbers will not be changing.

### SPECIAL POINTS OF INTEREST:

- Nyhart / ABG Corner:
  - *New Address, Phone, FAX*
- *Defined Benefit Corner*
- *Defined Contribution Corner*
- *Plan Fiduciary Corner*
- *COBRA Corner*

## DEFINED BENEFIT CORNER: ERISA §204(h) NOTICE

**Inadequate ERISA §204(h) Notice Results in Participant Receiving Pre-Amendment Benefit:** ERISA §204(h) requires an advance notice ("§204(h) Notice") be provided to participants if a defined benefit or money purchase plan is being amended to reduce future benefit accruals. A Fourth Circuit of Appeals (Maryland, North Carolina, South Carolina, Virginia, and West Virginia) case (Brady, Dennis v. the Dow Chemical Company Retirement Board) involved a claim by participants that they did not receive adequate notice of a plan change that would reduce future benefit accruals.

The Dow Board provided a §204(h) Notice informing participants of the amendment changes. However, the Notice did not directly address the elimination of an additional benefit for those participants who were "forced" to retire early and who

were just short of being eligible for unreduced benefits because of the combination of age and service. Even though several employees questioned whether the amendment eliminated the early retirement benefit, the Dow Board did not revise the Notice.

The Court held that it is not enough for a plan administrator to have made a good faith effort to provide an adequate §204(h) Notice at the outset of an amendment. The Dow Board knew participants were confused about this particular provision because of the questions from employees, but it did not take steps to revise the Notice. As a result, the additional early retirement benefit was not allowed to be eliminated.

The lesson learned in this case is to listen to questions from employees because they can help you identify areas of confusion

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ERISA §204(h)) (Continued on page 2)

that can be cleared up through a revised communication to participants.

**Underfunded Plans may be Restricted in Making Distributions:** The stock market drop and resulting decline in the value of assets in many defined benefit plans may lead to distribution restrictions for participants who want to receive a form of distribution providing benefits bigger than would be provided if the benefit were paid in a life annuity. The most obvious distribution option affected is a lump sum distribution, but options

such as a Social Security level income option and early retirement incentives are also affected.

If the plan is less than 80% funded, the participant can only receive 50% of one of these “enhanced” distribution options. Participants must be notified when these distribution restrictions apply.

**Pension Underfunding was not a Fiduciary Breach:** A Federal District Court case (Cress v. Wilson) in the Southern District of New York dealt with whether the failure to fund a defined benefit plan “properly” constitutes a breach of fiduciary duty.

The case involved the defined benefit plan covering the pilots of Northwest Airlines. The Court held that there is no fiduciary duty to fund plans in excess of the minimum funding obligations, which the plan had complied with.

This case is good news if other courts follow the same reasoning. Because some plans will have to restrict distributions to participants because of the funded status (see “Underfunded Plans may be Restricted in Making Distributions” above), we may begin to see suits claiming plan fiduciaries breached their duty by not adequately funding the plan.

## DEFINED CONTRIBUTION CORNER: AUTOMATIC ENROLLMENT AND PLAN LOANS

**IRS Finalized Regulations for Automatic Enrollment Plans:** The IRS published regulations for two types of 401(k) plan automatic enrollment added by the Pension Protection Act (“PPA”). The regulations are effective January 1, 2010, but they can be relied on prior to that date as a basis for good faith compliance. The regulations provide some welcome clarifications.

One type of arrangement included in

the guidance is the Qualified Automatic Contribution Arrangement (“QACA”). The guidance includes details on how the automatic increases in deferrals work, which was an area of confusion prior to the final regulations. It is now allowable to have the automatic increase coincide with mid-year salary increases rather than waiting until the beginning of a plan year for the increase to become effective.

The other type of arrangement added



by PPA is the Eligible Automatic Enrollment Arrangement (“EACA”). The regulations confirm that an EACA can only be implemented at the beginning of the plan year for a plan that al-

*DC Corner (Continued on page 3)*

## PLAN FIDUCIARY CORNER: FIDUCIARY RESPONSIBILITIES

**Madoff Losses:** The Department of Labor (“DOL”) issued a memorandum putting plan fiduciaries on notice that, if they determine their plan is at risk of loss from Madoff investments, they should act consistent with their ERISA fiduciary duties. Recommended action may include:

- Requesting disclosures from

investment managers and other investment intermediaries regarding potential exposure;

- Seeking advice regarding losses due to investments that may be at risk;
- Making disclosures to other

fiduciaries and plan participants; and

- Considering the potential assertion of claims against responsible fiduciaries or other investment intermediaries.

*Fiduciary Corner (Continued on page 3)*

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ready has a 401(k) feature.

The regulations give some leeway for the advance notice requirement for all types of automatic enrollment arrangements in the case when the person enters the plan on his date of hire.

Please contact your ABG consultant if you have questions about automatic

enrollment.

**Plan Loans – A Welcome Change:**

Plans with more than 25 loans per year were required to provide Truth in Lending disclosures under Regulation Z of the Truth-in-Lending Act published by the Federal Reserve.

Regulation Z has now been amended to exempt qualified plan loans from the Truth-in-Lending disclosure if:

- The loan is made to a participant,
- The loan is comprised of fully-vested funds from the participant's account, and
- The loan is made in compliance with the Internal Revenue Code requirements for a qualified plan loan.

*Fiduciary Corner (Continued from page 2)*

Fiduciaries need to be sure to make a timely filing if they have claims against the bankruptcy estate. The guidance is available at <http://www.dol.gov/ebsa/pdf/madoffguidance.pdf>.

**No Fiduciary Breach Where Fees and Revenue Sharing Not Fully Disclosed:**

The Seventh Circuit Court of Appeals (Illinois, Indiana, and Wisconsin) found no fiduciary breach in a case (Hecker v. Deere & Company) where fees and revenue sharing were not fully disclosed to participants. The case involved the participant-directed 401(k) plan sponsored by Deere & Company with investments in Fidelity mutual funds. Fidelity Research and Fidelity Trust both received compensation from revenue earned from mutual fund fees.

The plaintiffs claimed that the fees were excessive, not transparent, and not incurred solely for the benefit of the participants.

The Court quickly found that Fidelity Trust was not a plan fiduciary. It also found that the fees paid to Fidelity Research came from underlying mutual fund assets and did not constitute plan assets, based on a detail in ERISA that plan assets include the

mutual fund shares but not the assets that make up those shares.

With respect to the claim against Deere, the court took a very broad view of the protections provided by ERISA §404(c) for participant directed plans that satisfy certain requirements and receive §404(c) protection. The Summary Plan Description advised participants to review the fund Prospectuses for detailed information on fund-level fees and the Court



found this disclosure to be satisfactory. The plaintiff's asserted that all revenue sharing arrangements violate ERISA, but the Court disagreed.

The lesson learned in this case is the protection that can be provided by complying with ERISA §404(c) if your defined contribution plan lets participant direct their own investment.

**Fiduciaries Do Not Have Duty to**

**Maximize Value of Investments:** This case (Bunch v. W.R. Grace & Co.) was decided by the First Circuit Court of Appeals (Maine, Massachusetts, New Hampshire, and Rhode Island) and it involved the W.R. Grace & Co. 401(k) plan. As with the Deere case discussed above, participants directed their own investments. One investment option was Grace company stock.

Because of a conflict of interest, when the value of Grace stock declined because of Grace's involvement in asbestos litigation, the plan's benefits committee hired an independent advisor (State Street) to determine whether to sell the stock. State Street eventually sold the Grace stock and participants sued claiming the stock was traded in an efficient market. As a result, they claimed State Street should have relied more heavily on market prediction of the stock's value before deciding to sell the Grace stock.

The Court applied the prudent person standard and ruled that ERISA does not require a fiduciary to maximize the value of investments. Instead, ERISA calls for the fiduciary to use the care, skill, prudence, and diligence of a prudent person in the same situation (the "prudent person" standard).

## COBRA CORNER:

### FEE DISCLOSURE RULES

**COBRA Premium Subsidy:** One of the first pieces of the legislation passed in 2009 by Congress and signed by the President is an attempt to extend the reach of private health care for those who lose coverage because of an involuntary termination of employment. The American Recovery and Reinvestment Act of 2009 ("ARRA") became law on 2/17/09. It provides a governmental subsidy of 65% of the COBRA premium payable for *some* health plan participants who qualify for COBRA through the end of 2009. However, the subsidy is only payable for 9 months, and it will end sooner if COBRA coverage ends sooner.

ARRA uses a government subsidy to help individuals purchase COBRA coverage through private employer-sponsored health care rather than requiring some sort of governmental health care program to provide the benefits.

Please contact your ABG consultant if you have any questions or need assistance complying with this new law.



nyhart

8415 Allison Pointe Boulevard, Suite 300  
Indianapolis, IN 46250-4201

Phone: 800-428-7106

FAX: 317-845-3650

[www.nyhart.com](http://www.nyhart.com)