DOL and PBGC Address Fiduciary and Reporting Obligations in Wake of Madoff Scandal

by John M. Scannapieco and B. David Joffe

In response to a growing number of requests from fiduciaries, investment managers, and other investment service providers, the United States Department of Labor ("DOL") recently issued a brief statement addressing how fiduciaries should respond to plan losses caused by the staggering ponzi scheme orchestrated by Bernard Madoff. The Pension Benefit Guaranty Corporation ("PBGC") also recently issued a statement to plan sponsors informing them of their obligation to notify the PBGC if they are unable to pay benefits when due as a result of the Madoff scandal.

The DOL Statement

The DOL begins its statement reminding fiduciaries of their obligations to act prudently and loyally to plan participants and beneficiaries as required under the Employee Retirement Income Security Act of 1974 ("ERISA"). Against that backdrop, the DOL indicates that where plan fiduciaries determine plan assets were invested with a Madoff entity and material losses are likely, fiduciaries should take appropriate steps to assess and to protect the interests of the plan and its participants and beneficiaries. The DOL stated that appropriate steps may include:

- Requesting disclosures from investment managers, fund managers, and other investment intermediaries regarding the plan's potential exposure to Madoff-related losses.
- Seeking advice regarding the likelihood of losses due to investments that may be at risk.
- Making appropriate disclosures to other plan fiduciaries and plan participants and beneficiaries.
- Considering whether the plan has claims that are reasonably likely to lead to recovery of Madoff-related losses that should be asserted against responsible fiduciaries or other intermediaries who placed plan assets with Madoff entities, as well as claims against the Madoff bankruptcy estate.

The DOL cautioned fiduciaries to ensure that any claims against responsible fiduciaries or other intermediaries or the bankruptcy estate are filed in accordance with applicable filing deadlines such as those applicable to bankruptcy claims, for coverage by the Securities Investor Protection Corporation, and applicable statutory limitations periods.

The DOL also provided information regarding the court-appointed trustee for the liquidation of Bernard L. Madoff Investment Securities LLC, including information concerning its website (http://www.madofftrustee.com/), the liquidation notice, claim forms and deadlines for filing claims with the trustee. Additional information can be found at http://www.sipc.org/.

The PBGC Statement

The PBGC's notice, on the other hand, is directed to plan administrators and sponsors of single-employer and multiemployer defined benefit plans insured by the PBGC that may have experienced significant losses resulting from a relationship with a Madoff entity, either directly or indirectly through an advisor. The PBGC cautioned sponsors and administrators that, even though losses may have been caused by the alleged fraud of a third party, this fact does not relieve them of complying with their obligations under ERISA.

With respect to single-employer defined benefit plans, the PBGC indicated that, if the losses are large enough that the plan is unable to pay benefits when due, the plan administrator or sponsor must notify the PBGC within 30 days of knowing or having reason to know of the occurrence of this event that is reportable under Section 4043 of ERISA. In such an event, the plan administrator or sponsor should notify the PBGC by filing a PBGC Form 10 (Post-Event Notice of Reportable Events).

Unlike single-employer plans, multiemployer plans that are covered by Title IV of ERISA are not obligated to notify the PBGC of a reportable event under Section 4043 of ERISA. However, this does not excuse multiemployer plans from responsibility. Trustees of multiemployer plans have legal responsibilities, which may include reducing benefits, assessing withdrawal liability, or notifying the PBGC when the trustees believe that the plan cannot pay benefits when due or all or substantially all of the participating employers cease contributing to the plan.

Practical Considerations

Although the statements issued by the DOL and the PBGC deal specifically with the Madoff scandal, they also reinforce generally the ERISA fiduciary duties of prudence and acting for the exclusive benefit of participants and beneficiaries as well as reporting obligations of plan sponsors and administrators. Since it is very possible that similar situations will arise with investment firms in the future, plan fiduciaries should regularly review statements and disclosures from their investment managers and investment advisors. Plan fiduciaries should consider reviewing with their investment managers and investment advisors disclosures available through the Financial Industry Regulatory Authority, the Form ADV filed with the Securities and Exchange Commission, and other available disclosures. Plan fiduciaries should also review documentation regarding the custody of plan assets. The Madoff scandal also has highlighted as a consideration the diversification of investment managers so that a plan does not have disproportionate exposure to one investment manager.

If you have any questions about the DOL's statement and its impact on your fiduciary or reporting obligations, please contact John M. Scannapieco (615.252.2352 or jscannapieco@ba-boult.com) or David Joffe (615.252.2368 or djoffe@ba-boult.com) or one of the other Employee Benefits & Executive Compensation attorneys at Bradley Arant Boult Cummings LLP.

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