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CLIENT MEMORANDUM

Fiduciary Duty to Monitor Plan Investments Expands ERISA Statute of Limitations

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On May 18, 2015, the United States Supreme Court unanimously held in the case of *Tibble v. Edison International* that employee benefit plan fiduciaries who are subject to the fiduciary standards of the Employee Retirement Income Security Act ("ERISA") have a well-established continuing duty to monitor investments and to remove imprudent ones after the initial plan investments have been selected. In this case, ERISA's six-year statute of limitations did not prevent the case from proceeding based solely on the original date for selecting several of the plan's investment options without considering the ongoing fiduciary obligation to monitor plan investments.

The *Tibble* case was filed in 2007, on behalf of participants and beneficiaries of the Edison International 401(k) Savings Plan, a defined contribution plan with $3.8 billion in assets. The plaintiffs alleged that the plan's fiduciaries had breached their ERISA fiduciary duties in selecting six retail class mutual funds as plan investment options, when substantially identical lower priced institutional class alternatives were available. Three of the six funds were initially selected in 1999, more than six years before the lawsuit was filed, and thus, based on the original date of selection, were outside of the general six-year statute of limitations for breach of fiduciary duty claims under ERISA (the other three funds were selected in 2002, within the statute of limitations period).

The Court of Appeals for the Ninth Circuit, in affirming the District Court, concluded that the claims relating to the 1999 funds were time-barred and that the plaintiffs did not show a significant "change in circumstances" that would trigger an obligation on the part of the fiduciaries to reconsider (and possibly change) the investments. The U.S. Supreme Court rejected the Ninth Circuit's reasoning that only a significant change in circumstances could prompt a new breach of a fiduciary duty. The Court emphasized that ERISA's fiduciary standards are derived from the common law of trusts, and held that under ERISA, as under trust law, there is an ongoing duty, separate and apart from a fiduciary's duty to exercise prudence when initially selecting plan investments, to monitor and remove imprudent plan investments. Thus, when determining when the six-year period begins to run, it is not enough to look at when the initial investment decision was made, as the work of a fiduciary does not end there. According to the Court, "so long as the alleged breach of the continuing duty occurred within six years of the suit, the claim is timely."

The *Tibble* decision serves as a reminder to plan fiduciaries to conduct more frequent reviews of plan investment options, as a fiduciary is required to conduct a regular review of such matters, with the nature and timing of the review contingent on the particular circumstances. The Court remanded the case back to the Ninth Circuit to determine what the duty to monitor actually entails, declining to comment in the *Tibble* case on the specific scope of the plan fiduciary's responsibilities under ERISA.

If you have any questions about this memorandum or would like additional information, please contact Peter E. Haller (212 728 8271, phaller@willkie.com), Peter J. Allman (212 728 8101, pallman@willkie.com), Isabel D. Araujo (212 728 8517, iaraujo@willkie.com) or the Willkie attorney with whom you regularly work.

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