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Case Underscores Importance of Plan Documents When Plans Hold Company Stock

A recent Northern District of Georgia case, *In re SunTrust Bank Inc.*, illustrates how, by having clear language in the plan documents, employers can protect fiduciaries from risks of fiduciary liability associated with having a company stock fund among their defined contribution plan investments.

Background. SunTrust stock made up nearly half of the assets in the company's 401(k) plan before the subprime mortgage crisis. After the bank's stock price collapsed, participants sued the fiduciaries responsible for plan investments, alleging that:

- They knew or should have known that the stock was an imprudent retirement investment;
- They should have taken action to eliminate company stock as an investment option; and
- By failing to do so, they breached their fiduciary duties and should be liable.

Based largely on a review of the language concerning company stock in the 401(k) plan document, investment policy statement and summary plan description ("SPD"), the United States District Court for The Northern District of Georgia dismissed the participants' claims.

Importance of Strong Language in Plan Documents. The *SunTrust* case and other recent cases have held that clear language in the plan documents requiring the plan to include a company stock fund is an essential key to protecting fiduciaries from potential liability. This type of language greatly reduces the likelihood that fiduciaries will be found to have breached their duties if the company's stock value declines while the stock fund remains part of the plan assets.

In the *SunTrust* case, language in various documents was cited as supporting the retention of the company stock fund even though it declined in value, including:

- Language in the plan document itself requiring the company stock fund to be offered;

- Language in the plan's investment policy explaining the purpose of the company stock fund investments and limiting the fiduciaries' ability to restrict or remove the fund; and
- Language in the SPD warning participants that the stock fund was a high-risk investment and explaining the importance of diversification.

In essence, the *SunTrust* holding suggests that by making a company stock fund a design feature that can only be changed by the board of directors or other company group acting in its settlor capacity, actions with respect to the company stock fund cease to be a fiduciary decision.

Next Steps. Employers who maintain plans with company stock funds should review their plan documents, strengthen language concerning the retention of company stock in the SPD, plan document and investment policy statement, and ensure that there are adequate warnings to participants about the risks associated with such investments.

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