Bidwell Confirms That QDIA Safe Harbor Applies to Re-Enrollments

Marcia S. Wagner, Esq.

The Pension Protection Act of 2006 included a safe harbor for qualified default investment alternatives ("QDIAs") under which individual account plan fiduciaries will not be responsible for investment losses where a participant's account is defaulted into a QDIA because the participant failed to make a timely investment election. This has led to interest in using negative elections to reallocate participant accounts so that both new money and existing account balances are transferred to the QDIA unless the participant opts out.

Significance of the Bidwell Case. In a re-enrollment utilizing negative elections, participants are asked to provide new or updated investment instructions for their plan accounts, and those who do not do so by a specified date are defaulted into the plan's QDIA. In the recent case of *Bidwell v. University Medical Center*, the Sixth Circuit Court of Appeals affirmed the holding of a lower court that this procedure entitled a plan sponsor to relief under the QDIA safe harbor. While the court's willingness to apply the safe harbor in *Bidwell* is comforting, careful readers will note that the decision rests on the court's interpretation of both the applicable DOL regulations and the plan's language, and will therefore consider amending their plan documents to remove any impediments to a re-enrollment.

Reasons for Re-Enrollment. Until recently, reallocations of plan investments were typically performed when a plan eliminated an investment alternative or changed service providers. However, the tactic of making such adjustments pursuant to a re-enrollment is now considered to be valuable in and of itself by overcoming participant inertia and thus improving diversification of plan assets and optimize returns. Some would also argue that it is to the advantage of both participants and plan sponsors to use re-enrollments to engineer investments in target date funds established as a QDIA, since these investments arguably provide better investment performance than the current plan investments of many participants and also insulate plan sponsors from liability.

Failure to Respond Justifies Fund Transfer. The *Bidwell* plaintiffs were participants in a 403(b) plan who affirmatively directed their account balances into a stable value fund which served as the plan's default investment. In 2008, the plan sponsor sought to take advantage of the QDIA safe harbor by changing the default investment to a target date fund and transferring existing investments in the prior default fund to the new one. Because there were no records of which participants had affirmatively elected to invest in the stable value fund and which were stable value fund investors by default, the plan sponsor sent notice of the change to the participants who had the entirety of their plan funds invested in the stable value fund. The notice, which for unexplained reasons was not received by the plaintiffs, advised participants that existing investments in the stable value fund would be transferred to the new default fund unless the participants gave instruction by July 16, 2008. When their quarterly statements were received on October 15, 2008, the plaintiffs immediately switched their investments back to the stable value fund, but they had already incurred significant losses due to market fluctuation.

Regulatory Safe Harbor Applies to Re-Enrollments. The Sixth Circuit held that the QDIA safe harbor applied to the plan sponsor and that it did not matter that the plaintiffs previously elected their investment vehicle rather than having it chosen for them. In so doing, it cited the DOL's emphasis in the preamble to the QDIA regulations that "whenever a participant or beneficiary has the *opportunity to direct the investment* of assets in his or her account, but *does not direct the investment* of such assets, plan fiduciaries may avail themselves of the relief provided by this final [QDIA] regulation, so long as" the other safe harbor requirements are satisfied. The court further noted that the "opportunity to direct investment" included the situation in which a plan administrator requests participants who previously elected an investment to confirm whether they wish their funds to remain in that investment.

The failure of the plaintiffs in *Bidwell* to respond to the request for a new election was the critical condition enabling the plan sponsor to claim protection of the QDIA safe harbor. The court deferred to the DOL's interpretation that the safe harbor applies beyond automatic enrollment to "any other failure" of a participant to provide investment instruction. Although the court was somewhat troubled by the fact that the plaintiffs never actually received the notification they needed to respond, in the end this was irrelevant, because by using first class mail to send the notices, the plan took steps that were, in the court's view, "reasonably calculated to ensure actual receipt," which was all that the regulations required.

Plaintiffs' Arguments Based on Plan Documents. Plans considering re-enrollment should be aware, however, that more than compliance with

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the regulations may be required, since the *Bidwell* plaintiffs had one more argument that, although it failed, others may successfully repeat. This argument relied on a provision in the 403(b) plan to the effect that all participant elections would control until a new election was made. In effect, the plaintiffs asserted that the plan administrator did not have the authority under the plan document to transfer funds from the stable value fund to the target date funds. The court sidestepped this contention by holding that the cited plan provision had to be read in conjunction with a collection of other plan provisions that prescribed the plan administrator's general powers, such as the power necessary to enable proper administration of a fund, to direct participant investments where no election is made, to restrict investments as necessary, and to establish uniform rules for plan administration.

Another plan containing terms that provide for the finality of a participant's investment decision might not contain similar language that supports an override, or might not be interpreted as liberally as the Sixth Circuit's reading in *Bidwell*. Therefore, advisors and plan administrators interested in re-enrollment should review their plan documents to ensure that the documents do not contain contradictory provisions and, if necessary, amend the plan to grant the necessary authority for re-enrollment. ❖

Marcia S. Wagner, Esq. is the Managing Director of The Wagner Law Group. She can be reached at 617-357-5200 or Marcia@WagnerLawGroup.com.