

## Supreme Court Emphasizes Requirements About Selecting and Monitoring Plan Investments

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Plan administrators, investment committees and any other plan fiduciary responsible for selecting the investment options of an employee benefit plan subject to ERISA should take note of the recent U.S. Supreme Court ruling in *Tibble v. Edison Intl.* In *Tibble*, the Supreme Court expressly held that ERISA fiduciaries have an ongoing duty to monitor plan investments and remove imprudent investments.

### *Background Facts*

In 2007, a class action lawsuit was filed against Edison International (“Edison”) by certain participants and beneficiaries in the Edison 401(k) Savings Plan (“Plan”) alleging various fiduciary breach claims associated with the selection, monitoring and removal of certain investment options in the Plan. The plaintiffs sought to recover damages suffered by the Plan when Edison added six retail mutual fund options to the Plan’s available investment options in 1999 and 2002. The plaintiffs alleged that the Plan’s fiduciaries acted imprudently by offering the retail mutual fund options instead of similar institutional-class mutual funds that charged lower administrative fees. The district court ruled that the plaintiffs’ claims related to the investment options that were added to the Plan’s investment options in 1999 were untimely because they had been added more than six years prior to the filing of the complaint. The Court of Appeals for the Ninth Circuit affirmed and held in part that the statute of limitations for a fiduciary breach claim alleging that the Plan’s investments were imprudent begins to run from the date when the investment is included in the Plan, not from the

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date fiduciaries of the Plan failed to remove the investment option.

### *The Supreme Court's Decision*

On appeal, the Supreme Court determined that under trust law a fiduciary is required to conduct a “regular review” of its investments, with the nature and timing of the review dependent on the circumstances. The Court explained that this duty exists separate and apart from a fiduciary's duty to exercise prudence in selecting investment options in the first place. As such, the Supreme Court unanimously held that the Court of Appeals erred in failing to consider the ongoing role of the fiduciary's duty of prudence under trust law when it rejected the plaintiffs' claim as untimely. Pursuant to the *Tibble* decision, a participant's claim alleging a breach of fiduciary duty for failing to monitor an investment is timely so long as the claim of imprudence occurred within six years of filing the lawsuit.

The Court also remanded the issue of the scope of the continued duty to monitor plan investments to the lower court to consider whether the Plan fiduciaries breached their duties, based on analogous trust law. Citing trust law, the Court noted that a fiduciary must “systematically consider all the investments of the trust at regular intervals” to ensure that such investments continue to remain appropriate.

### *Implications of the Tibble Decision*

As a result of the *Tibble* decision, the general consensus is that litigation based on an ERISA plan fiduciary's failure to monitor investments will increase. Although the duty to monitor investment decisions is not new, the *Tibble* decision points plan fiduciaries to trust law to determine how to monitor such investments. Thus, plan fiduciaries are advised to (1) establish a reasonable procedure in line with industry standards to monitor plan investment options and related fees, (2) diligently follow that procedure when monitoring plan investment options, and (3) maintain written support, such as meeting minutes, reflecting that the procedure was followed. Failure to document either the deliberation process or the decisions made may rouse the suspicions of a judge who may review the procedure. To succeed against a claim of failing to monitor, fiduciaries need to be able to show due diligence not only in the selection process but in the ongoing monitoring process.