



notices due for 401(k) plans invested in employer stock

MSK Client Alert

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Under a provision of the Pension Protection Act of 2006 that will become effective January 1, 2007, sponsors of 401(k) plans that hold company stock will have to offer certain participants the right to diversify their account balances. Although plan sponsors that already provide diversification requirements have not had reason to pay much attention to this provision, there are also notice requirements applicable to the diversification rights which should be reviewed by all sponsors of plans holding employer stock. Although these notice requirements clearly apply to plans offering diversification rights for the first time, they may also apply to plans that have already offered diversification rights in the past. For calendar year plans the notice is due by December 31, 2006 and may be given electronically. Failure to give the notice can result in a penalty of \$100 per person per day.

Although it could be argued that plans that already provide diversification rights do not need to give the notice to the extent that prior notices already describe the diversification rights, neither Notice 2006-107 nor the Pension Protection Act includes an exception to the new statutory notice requirement under these circumstances. Therefore, plan sponsors with employer stock funds should seriously consider providing the notice prior to year-end even if they have already provide diversification rights. The IRS has issued a prescribed form of notice which can be edited to specifically describe the applicable plan terms. The form IRS notice also includes useful language concerning the benefits of diversification. Giving this notice would also be helpful to the plan sponsor's position if the plan sponsor ever had to defend a lawsuit concerning the holding of company stock in the plan. Especially for sponsors who satisfy the requirements for giving the notice electronically, the burden of the notice should be relatively slight compared to the possible penalty if there is a failure to provide the notice.

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