

The ERISA and Securities Litigation Snapshot: Things You Can Do Now to Minimize CFO and Board Liability

March 7, 2012

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Agenda

- Introduction
- Presentation
- Questions and Answers — (anonymous)
- Slides — now available on front page of Securities Docket
 - www.securitiesdocket.com
- Wrap-up

Webcast Series

- **March 13: “Legal and Communications Strategies for US-Listed Chinese Companies in 2012”**
- **March 14: “Insights from the Chiefs of the SEC and CFTC Whistleblower Offices”**

Panel



James P. Baker, Partner
Baker & McKenzie LLP



Gerald M. Czarnecki, President & CEO
O2 Media



Susan Mangiero, PhD, CFA, FRM, Managing Director
FTI Consulting



Rhonda Prussack, Executive Vice President
Chartis Insurance

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Susan Mangiero, PhD, CFA, FRM



Critical thinking at the critical time™

Employee Benefit Plans and Enterprise Value

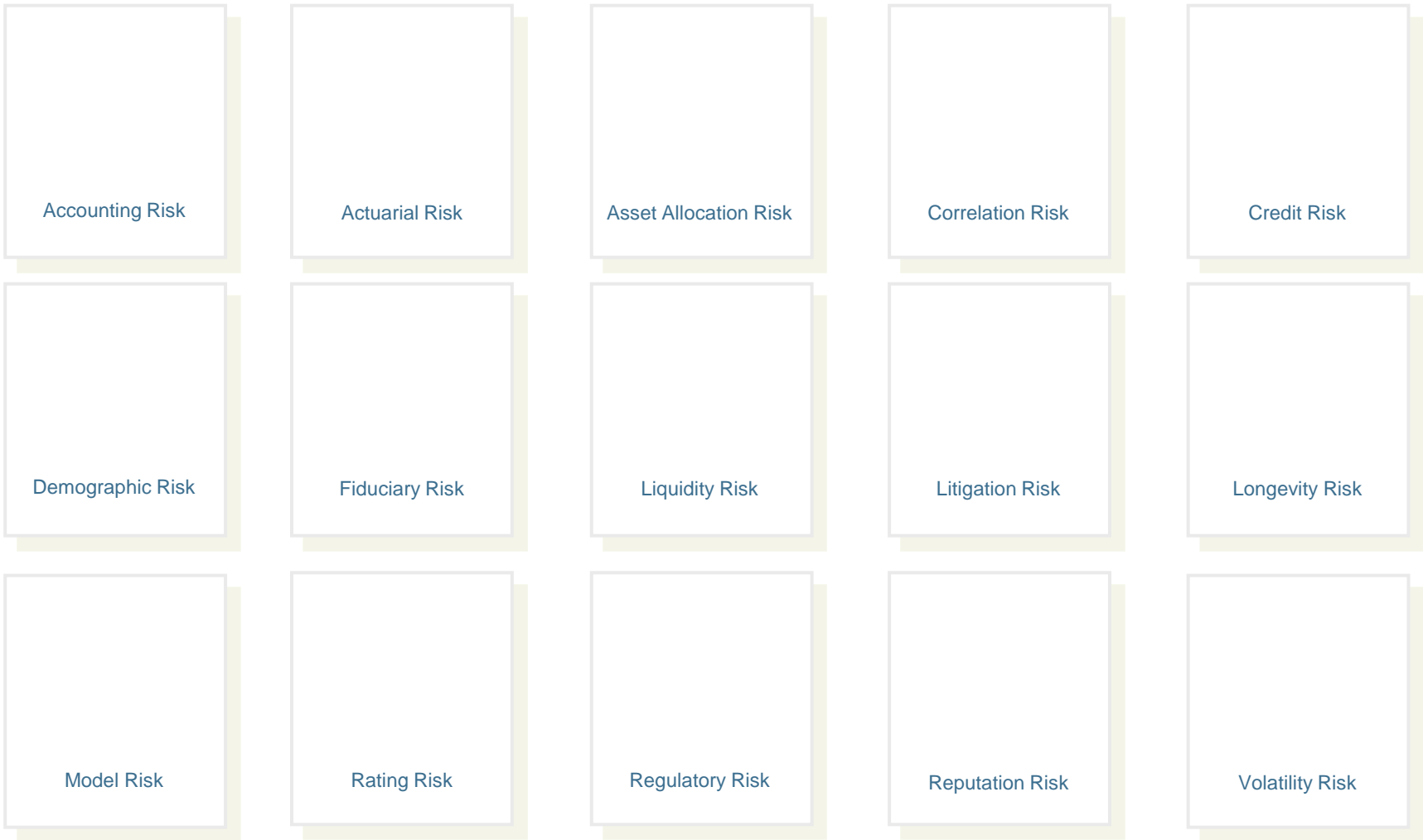
- “Companies’ pension plea” (*Wall Street Journal*, March 5, 2012)
- “Shortfalls increase for the pension world’s \$20 billion club; cash contributions on the rise” (Russell Investments, February 2012)
- “Towers Watson: Corporate plans' funding takes hit globally in 2011” (*Pensions & Investments*, February 13, 2012)
- “New Fee-Disclosure Regs Pose New Litigation Risks for Retirement Plan Providers” (Insurance News Net, March 2, 2012)
- Major Grocery Chain “Says Pension Costs Led to Loss in Quarter” (*New York Times*, March 2, 2012)
- “We project an average level of about \$90 billion per year over the ten years beginning with 2010, peaking at about \$140 billion in 2016.” (Society of Actuaries, 2011)
- “ERISA Class-Action Suits Shape U.S. Retirement Future” (*Institutional Investor*, February 16, 2011)

Poor Fiduciary Practices and Retirement Eco System: Big Impact on Many People



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Pension Risks Are Not Necessarily Created Equal*



* Partial List

Pension Litigation Categories*

- Adherence to Plan Documents
- Bankruptcy
- Breach of Fiduciary Duty
- Company Securities
- Conflicts of Interest
- Consultants and/or Advisors
- Controlling Interest
- Contributions
- Discrimination
- Duty to Disclose
- Duty to Diversify
- Duty to Monitor
- Excessive Risk Taking
- Exclusive Purpose
- Employee Stock Option Plans
- Fees
- Hedging
- Investment Prudence
- Investment Suitability
- Interference With Benefits
- Loyalty
- Material Misrepresentations
- M&A and Spinoff Liability
- Party in Interest
- Pay to Play
- Prohibited Transactions
- Two Hat Doctrine
- Top Hat Plan
- Withdrawal Liability

* Partial List

Pension Risk Management Within A Fiduciary Framework*



* Partial List

Bio/Profile



Susan Mangiero, PhD, CFA, FRM
Managing Director
Forensic & Litigation Consulting

3 Times Square
14th Floor
New York, NY 10036
Tel: 646 453 1241
Fax: 212 841 9350
Susan.Mangiero@fticonsulting.com

Education

Ph.D. in Finance, University of Connecticut
M.B.A. in Finance, New York University
M.A. in Finance, George Washington University

Practice

Forensic & Litigation Consulting

Certifications

CFA Charterholder
Certified Financial Risk Manager

Professional Affiliations

American Bar Association
American Society of Appraisers
Association for Financial Professionals
CFA Institute
High Water Women Foundation
New York Hedge Fund Roundtable

Dr. Susan Mangiero is a managing director in the FTI Consulting Forensic and Litigation Consulting practice and is based in New York. Her responsibilities include the further development of investment and financial management dispute related opportunities. Dr. Mangiero is a CFA charterholder and a certified Financial Risk Manager. She has provided testimony before the ERISA Advisory Council, the OECD and the International Organization of Pension Supervisors as well as offering expert testimony and behind-the-scenes forensic analysis, calculation of damages and rebuttal report commentary for various investment governance, performance, risk and valuation matters. She has over twenty years of experience in capital markets, global treasury, asset-liability management, portfolio management, economic and investment analysis, derivatives, financial risk control and valuation, including work on trading desks for several global banks, in the areas of fixed income, foreign exchange, interest rate and currency swaps, futures and options. Dr. Mangiero has provided insights about asset allocation, fiduciary duties, risk management, modeling, hedge effectiveness and valuation best practices for consulting clients and employers that include General Electric, PricewaterhouseCoopers, Mesirov Financial, Bankers Trust, Bank of America, Chilean pension regulator, World Bank, Pension Benefit Guaranty Corporation, RiskMetrics, U.S. Department of Labor, Northern Trust Company and the U.S. Securities and Exchange Commission. Dr. Mangiero is the author of Risk Management for Pensions, Endowments and Foundations (John Wiley & Sons, 2005), a primer on risk and valuation issues, with an emphasis on fiduciary responsibility and best practices. Her articles have appeared in *Expert Alert* (American Bar Association, Section of Litigation), *Hedge Fund Review*, *Investment Lawyer*, *Valuation Strategies*, *RISK*, *Financial Services Review*, *Journal of Indexes*, *Family Foundation Advisor*, *Bankers Magazine*, *Expert Evidence Report* and the *Journal of Compensation and Benefits*. Her article on CFO liability as relates to pension issues in bankruptcy, M&A and underfunding situations is due out shortly in the *Journal of Corporate Treasury Management*. Dr. Mangiero has written chapters for several books, including the Litigation Services Handbook and The Handbook of Interest Rate Risk Management. She is a frequently invited speaker and has keynoted or led workshops for organizations such as the Stable Value Investment Association, Harvard Law School, Florida Public Pension Trustees Association, New York State Department of Insurance, Association of Public Pension Auditors, AICPA - Employee Benefits Section, National Association of Corporate Directors and Financial Executives International.

CRITICAL THINKING AT THE CRITICAL TIME™

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James P. Baker
Baker & McKenzie LLP
San Francisco, CA

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Why ERISA Class Action Litigation?

- ERISA Plans are big economic targets
- There is over \$17 trillion invested in US retirement Plan assets
- \$4 trillion is invested in 401(k) and other “defined contribution” plans sponsored by private sector employers
- Over \$400 billion in defined contribution plans is invested in company stock
- 85% of Fortune 500 employers offer company stock as a retirement plan investment option
- For companies that do not limit company stock investment, the average employees has over 25% of his account invested in company stock

Securities Fraud Lawsuits and “Tagalong” ERISA Class Action Lawsuits

- Blame Congress?
- PSLRA changed the landscape for class action securities fraud lawsuits
- Need to find a “Lead Plaintiff”
- Impact on small plaintiffs firms

ERISA Class Actions are the Offspring of the PSLRA

- The New Lead Plaintiff PSLRA requirement left small Plaintiffs firms shut out of the big securities fraud cases
- “Me too” lawsuits were no longer viable
- The tagalong ERISA class action lawsuit was born
- ERISA procedural advantages
- Motion to dismiss advantages
- Who is an ERISA fiduciary?

Likenesses and Differences Between Securities Fraud and ERISA Class Action Lawsuits

- Both allege a “failure to disclose” material nonpublic information to investors about the company’s finances or operations causing economic harm
- Plaintiffs are different: securities fraud cases need a “lead plaintiff” who must be a large institutional investor
- ERISA plaintiffs are typically one or two retirement plan participants

Likenesses and Differences Between Securities Fraud and ERISA Class Action Lawsuits (cont'd)

- Defendants are different: while both of these lawsuits name the directors, officers and the company as defendants, the ERISA net for defendants is different. ERISA defendants usually include officers, directors, Board members who appoint retirement plan committee members, investment advisers, HR employees and consultants
- Example: *In re Enron Securities, Derivative and ERISA Litigation*

Liability Standards are Different

- Securities fraud plaintiff must show defendant made a knowing material misrepresentation of material fact, and loss causation
- ERISA plaintiff must show a breach of fiduciary duty and plan losses

Recent ERISA Class Action Settlements

Enron	\$442 Million in 2005
AOL Time Warner	\$100 Million in 2006
Merrill Lynch	\$75 Million in 2009
Tyco International	\$70.5 Million in 2009
Countrywide Financial	\$55 Million in 2009
Duke Energy	\$30 Million in 2012
General Electric	\$40 Million in 2010



James P. Baker
Baker & McKenzie
(O) 415-591-3232
James.Baker@BakerMcKenzie.com

How To Demonstrate To A Fiduciary Insurer That You Are A Good Risk

Rhonda Prussack

EVP and Product Manager, Chartis

Fiduciary Liability

March 7, 2012

Do Fiduciaries Meet To Review Investment Strategy?

- Is there a written investment strategy?
- Are meetings held periodically with external advisors to establish/amend strategies?
- Are updates received from investment managers at least quarterly ?
- Are investment committee meetings held at regular intervals?
- Is there a procedure in place to change investments or investment managers if performance lags?

Plan Fees

- Is there a procedure in place to assess the reasonableness of fees?
- When was the last time you reviewed fees/did RFP?
- Is there a procedure to replace service providers?
- Describe compliance with fee disclosure rules.

Any Organizational Changes?

- Layoffs
 - Plant closings
 - Early retirement windows
- Mergers & Acquisitions
- Spin-offs
- New board/management
- Changes in financial condition

Any Changes To Benefits?

➤ Defined benefit plans

- Change in benefit calculation formula?
- Conversion to cash balance?
- Freeze of accruals?
- Termination or partial termination?

➤ Defined contribution plans

- Change in investment lineup?
- Freeze or reduction in matching or profit sharing contribution?
- Blackout

Any Changes To Benefits?

➤ Welfare Plans (e.g. medical, dental, life insurance, etc.)

➤ Reduction or elimination of retiree benefits

- Current retirees
- Future retirees

➤ Increased costs to participants

➤ Modifications to comply with new laws

➤ Regardless of type of plan, how are changes communicated?

➤ Honesty is the best policy

Do Fiduciaries Fully Understand Their Duties And Obligations?

- Have they received fiduciary training?
- Have they read plan documents?

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Gerald M. Czarnecki

President and CEO, O2 Media



Questions?

Thank You

For Attending This Webcast