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Polymer Advisory

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In This Issue...

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The United States - Central America Free Trade Agreement: An Overview of How It Will Impact the Plastics Industry

Introduction:

The Office of the U.S. Trade Representative (the "USTR") recently released the draft language of the United States-Central America Free Trade Agreement ("CAFTA"). CAFTA is a free trade agreement between the United States, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the Dominican Republic (collectively, the "Parties"). Currently, goods traded between the Parties total approximately $32.0 billion. The U.S. is Central America's largest trading partner with 52% of Central American exports going to the U.S. and 40% of its imports coming from the U.S. Plastics are among the major U.S. exports to Central America.

CAFTA will, among other things, eliminate tariffs on U.S. exports to the Central American Parties. Canada and Mexico have already signed free trade agreements with several Central American countries.

CAFTA will take effect upon the occurrence of: (i) the U.S. and at least one other Party exchanging written confirmation that the necessary domestic legal procedures have taken place; (ii) January 1, 2005; or (iii) such other date as the Parties may agree.

National Treatment of Goods:

Among other things, CAFTA reduces the barriers and restrictions imposed on U.S. goods entering the markets of the Central American Parties. Many U.S. exports of consumer and industrial goods to the Central American Parties will become duty-free upon the effectiveness of CAFTA, with more becoming duty-free within five years after CAFTA takes effect.

Due to the variety of products made with plastics, there is no single date on which the tariffs imposed on all plastics products will be eliminated. Many U.S. exports of plastics products to the participating Central American Parties will be duty-free within five years of the effective date of CAFTA. Plastics products entering the United States from the Central American Parties will be duty-free commencing on the effective date of CAFTA.

> ...CAFTA reduces the barriers and restrictions imposed on U.S. goods entering the markets of the Central American Parties.

Customs Administration:

CAFTA also seeks to make the process by which imported goods are released from customs quicker and more efficient. Parties are encouraged to use information technology to automate customs administration procedures. For example, CAFTA requires Parties to provide for electronic submission and processing of information and data before the arrival of shipments to allow for the release of goods upon arrival. CAFTA also requires Parties to adopt procedures that will expedite express shipments, including providing a separate, expedited customs procedure for express shipments; providing for processing of information before the express shipments arrive; allowing a single manifest covering all the goods contained in the express shipments to

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be submitted electronically, if possible; providing for the clearance of goods with minimal documentation; and (under normal circumstances) providing clearance for express shipments that have arrived within six hours after the necessary customs documents have been submitted.

Other Provisions:

CAFTA also contains provisions that will increase protection for U.S. investors, improve enforcement of intellectual property rights, increase the capacity of the Central American Parties to enforce their labor and environmental protection laws, and decrease corruption in international trade and investment.

For additional information on CAFTA and how it will impact the plastics industry, please contact T. Cormac McCarthy at 216.363.4682 or by electronic mail at tmccarthy@bfca.com.

Polymer Industry 401(K) Plan Issues—Learning a Lesson From Enron

For most employers in the polymer industry, a 401(k) plan is the primary, if not the only, retirement funding vehicle. In contrast to old-style defined benefit pension plans, the popularity of 401(k) plans is largely due to the fact that the employees bear the investment risk and, in most plans, control the selection of investment options. Obviously, employers find this reduced exposure to liability attractive. There is a danger though, that 401(k) sponsors (and every employer with a 401(k) plan is a sponsor) are lulled to sleep and, unknowingly, face potential fiduciary liability under Federal law (ERISA) as a result of their inattention, especially in light of recent market volatility.

A recent court decision involving the Enron 401(k) plan illustrates why polymer 401(k) sponsors should be concerned. First, the case alerts us to the fact that senior executives who have delegated 401(k) responsibilities to others inside or outside of the business still face potential liability as individuals for 401(k) investment problems. In other words, the Enron case casts a very wide net concerning who is considered a fiduciary under ERISA—just ask Ken Lay. In essence, the court said that the mere authority to supervise, appoint or remove fiduciaries or others involved in 401(k) investments results in the potential for personal liability for failure to train, properly supervise and monitor the investment activities. That leads us to the second important lesson from the Enron case – the absolute need to monitor what is going on. Even busy polymer industry executives should heed the Enron warning.

Fiduciary Process

The first step toward avoiding liability involves gaining an understanding that fiduciary responsibility really translates into implementing a fiduciary process. In fact, many court decisions point out that the process involved in making a fiduciary decision is far more important than the results of that decision. Fiduciaries are rarely found liable for errors in judgement where they acted reasonably and in good faith, provided evidence exists to document a sound fiduciary process. By being aware of what is and is not a fiduciary decision and by documenting the decision-making process, employers and executives can go a long way toward limiting future exposure. Ideally, regular meetings should be held and documented by minutes.

Fiduciary Insurance

Many executives would not consider working for a business without adequate D&O insurance coverage. Yet, a surprising number do not even ask whether the coverage extends to ERISA fiduciary liability. In most cases, a standard D&O policy excludes ERISA liability coverage unless an ERISA rider is attached. Given that the cost of the rider is minimal, insuring against ERISA liability certainly is a wise investment.

Investment Policy Statement

Every 401(k) sponsor is required by law to adopt and follow a written investment policy statement for the plan. Again, surprisingly, it is very common to learn that an employer has no clue what the statement is and what it is used for. Convincing a judge that your company follows a sound fiduciary process will be challenging if, at the outset, it is determined that the investment policy statement requirement was ignored. For a participant-directed 401(k) plan, the policy statement is very simple and straight forward (speaking generally of mutual fund selection parameters and monitoring) – so adopting one is an easy fix. The very process of developing an investment policy (usually done with the help of an investment professional) is very healthy and helpful from the standpoint of avoiding fiduciary liability. By adopting and following a few simple rules, you have already gone a long way toward reduced exposure.

Fund Selection

Selection of mutual funds to be made available under a plan is a fiduciary decision. The ERISA rules require that the mutual funds made available offer "a broad range of investment alternatives." In general, each fund selected must, itself, be diversified and, together, must offer "materially different risk and return characteristics." Usually, fund options are selected for the plan with the help of an investment professional who will make sure that the proper asset classes are represented. The fund selection process should include consideration of fund fees and expenses. Normally, plans end up offering around 10 – 20 funds (although the ERISA rules require only at least three). It should be noted that too many funds can be very confusing to the employees and, accordingly, it is usually best to avoid too broad an investment array. Once again, documenting the selection process is very helpful from a liability standpoint.

Fund Monitoring

The retention of a fund option over time is also a fiduciary decision. Periodically reviewing fund performance and making peer group and benchmark comparisons are necessary elements of the monitoring function. If these steps are followed and properly documented, a decision to keep or change a fund which, in hindsight, proves to be unwise should nevertheless not result in liability.

Sharing Information

The ERISA rules also require that plan participants be provided with prospectuses (or profile prospectuses) on each fund option. In addition, upon request, plan participants are entitled to see a description of fund operating expenses and other fees reducing returns, financial statements and virtually any other materials provided to the plan by the funds.

Participant Education

Most employees like the ability to control the investment of their retirement savings. However, statistics show that the employees are often their own worst enemies. Employees who try to time the markets in making investment changes generally tend to lose in the long run. This problem usually comes up in plans with daily valuations and the unlimited ability to change. Another problem is that individual investment selections often end up being far more conservative than the asset allocation that would be recommended by a professional investment manager. The end result is that participant directed 401(k) returns typically fall significantly short of the returns achieved by professionally managed retirement portfolios. When this shortfall is compounded over an employee's entire career, the effects can be staggering. The day soon may come where plan participants sue their polymer industry employer for knowingly allowing them to make uninformed, poor investment choices.

The real problem is a lack of education and investment savvy. Even if the employee actually pores through the prospectuses, without financial planning training and information on portfolio theory and asset allocation, many employees simply muddle through and make an uneducated guess. The issue of participant education is a difficult one. The employer or other fiduciary cannot "help" the participant too much, without incurring fiduciary liability for the selection. A vendor to the plan selling mutual funds is prohibited by ERISA from influencing a selection that might affect the vendor's fees (most vendors receive a share of the marketing fees paid under many funds). Congress is currently considering legislation to allow expanded participant education. In the interim, employers may wish to consider providing employees with generalized training in investments and financial planning. At least the employees would then have some clue as to how to proceed. Also, the plan sponsor may wish to offer asset allocation funds that internally build portfolios based on traditional retirement funding models.

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Selection Of Default Fund

Because not all participants respond when asked to direct the investment of their 401(k) accounts, it is necessary for the plan to establish a default selection for non-responders. The designation of a default selection is yet another fiduciary decision. Conventional wisdom has been to use a very safe alternative for the default, such as a money market fund. Plan sponsors may wish to re-think the logic behind this type of selection. With money market yields being extremely low, is it sound from fiduciary standpoint to select a default that, at least for now, is not going anywhere? Many sponsors are now making a conservative asset allocation fund the default so as to diversify and provide some meaningful opportunity for an up-side.

Conclusion

Polymer industry 401(k) sponsors and their executives should re-examine their approach to 401(k) investments in this post-Enron environment. By paying attention to fiduciary responsibility, documenting a fiduciary process and taking other, sometimes remarkably easy, steps, the potential for fiduciary liability can be minimized. With all of the other challenges facing the polymer industry today, employers do not need the headache of potential liability in connection with their 401(k) plans.

For additional information on this topic, please contact Kurt J. Smidansky at 216.363.4424 or by electronic mail at ksmidansky@bfca.com.

Trade Secrets and Confidential Business Information— Protect It or Lose It

"Trade secret" is more than just a label for information that a company thinks is important and merits protection from unauthorized disclosure and misappropriation. To merit protection as a trade secret, information must meet the definition developed by the courts or by a statute, usually the Uniform Trade Secrets Act. In Ohio, trade secrets are defined by statute as information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique or improvement, or any business information or plans, financial information or listing of names, addresses or telephone numbers that satisfies both of the following criteria:

- The information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can

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obtain economic value from its disclosure or use; and

- The information is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Over 80% of the states and the District of Columbia have adopted the Uniform Trade Secrets Act. In the remaining states, an employee is still generally prohibited from using or disclosing an employer's trade secrets based upon the nature of the employment relationship.

The types of information which may qualify as trade secrets are divided into two general categories: business related information and financial information. Information within these two categories that has been deemed protectable by Ohio courts includes: financial data, rate schedules, sales strategies, business plans, product development and product improvement plans, marketing strategy, customer lists, customer preferences, negotiated pricing arrangements, supplier information, technical drawings, and manufacturing processes that were unique to the company's products. Commercially obtained information may also qualify as trade secret information even though it was not originated by the holder. To qualify as a trade secret, the commercially acquired study or data must be manipulated or catalogued in a way which makes it not generally available.

In determining whether information constitutes a trade secret, courts review actual measures put into place to maintain the information's secrecy and the effectiveness of those measures. Efforts a company may take to maintain secrecy include: limiting access to the information by locking the file cabinets and offices where the information is stored; using buzzer or card key entry systems and screening visitors to the area; marking both hard and electronically stored copies "confidential"; password protecting electronically stored information; and instituting confidentiality and document retention and destruction policies. A company should also make the obligation to protect trade secrets part of the new employee orientation and the subject of periodic review in employee training sessions, and ensure that all employees return confidential information when the employment relationship ends.

Protection of trade secrets begins with a trade secret self audit. First, identify all of the company's trade secrets. That is, review all types of information you would not want a competitor to see. Typical areas of information include: pricing and cost information; business plans and strategies; customer identity, buying habits and history; vendor or supplier information; and technical data, such as product design, formulae, manufacturing process details, research and development. Next, analyze your current protection of each type of information. Look at where the information is kept, how many copies are made, and who has access to the information. Finally, analyze the extent to which your confidential information is known outside of the company. You can now assess what additional steps, if any, are needed to maintain the secrecy of your information and to protect your business.

For additional information on this topic, please contact Ann Knuth at 216.363.4168 or by electronic mail at aknuth@bfca.com.

INDUSTRY EVENTS

April 28, 2004

Ohio Polymer Summit, Columbus, Ohio co-sponsored by the Benesch Polymer Law Group. At the Summit, Frank Carsonie gave a presentation on *Strategic Alliances and Joint Ventures*, Megan Mehalko spoke on *How to Prepare Your Business for Sale and the Sale Process*, and Ginger Mlakar spoke on *Business Divorces, Buy-Sell Agreements and Estate Planning Considerations*. To discuss any of these topics, please contact Frank Carsonie at 614.223.9361 or by electronic mail at fcarsonie@bfca.com, Megan Mehalko at 216.363.4487 or by electronic mail at mmehalko@bfca.com, or Ginger Mlakar at 216.363.4520 or by electronic mail at gmlakar@bfca.com.

June 22-24, 2004

Plastics Encounter Midwest, Cleveland, Ohio. The Benesch Polymer Law Group will sponsor the Plastics Encounter Management Day Conference on Wednesday, June 23. Managing Partner and Polymer Law Group member, Jim Hill, will address cross-border mergers and acquisitions in the industry. For additional information on this conference, log on to www.plasticsencounter.com.

FOR MORE INFORMATION ABOUT OUR POLYMER LAW GROUP PLEASE CONTACT ONE OF THE FOLLOWING:

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