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HEADLINE: Enron recordkeeper not named in suit; DOL sees no liability for directed trustee

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BODY:

Houston-The Labor Department may be softening its position on the fiduciary liability of defined contribution plan providers.

Noticeably absent as a defendant in the Labor Department's June suit against Houston-based Enron Corp. and more than 20 Enron executives was its recordkeeper and trustee, Northern Trust Co. of Chicago.

"We looked at a number of potential defendants, including Northern Trust, and the evidence was not there to support an allegation of breach of fiduciary duty," said Ann Combs, assistant secretary in the Employee Benefits Security Administration in Washington.

Northern Trust was a directed trustee and recordkeeper, and as such took direction from the named fiduciaries, Ms. Combs said.

Directed trustees "have an obligation to follow directions and are entitled to assume that they (the plan's named fiduciaries) have a fiduciary responsibility and are fulfilling that responsibility," she said. "There have to be so many red flags that a reasonable person would or should know that the directions are imprudent and should not be blindly followed."

But Ms. Combs doesn't think her department is waffling. "We did not change our position," she said.

In an amicus brief that the Labor Department filed last August, the agency said Northern Trust was a fiduciary with respect to the blackout period-a period in which participants cannot conduct transactions-and would be liable, even if acting as a directed trustee, if Northern Trust knew or should have known that it would have been imprudent to proceed with the blackout period. Since the brief was filed, a Labor Department investigation showed there was no evidence that Northern Trust had actual knowledge, Ms. Combs said.

The Labor Department's brief was filed in connection with a class-action suit brought by participants in Enron's 401(k), cash balance and employee stock option plans. They sued Enron; Arthur Andersen L.L.P., the plan's consultant, auditor and accountant; Northern Trust Co., the plan's trustee; and Northern Trust Retirement Consulting L.L.C., the 401(k) plan's recordkeeper. That suit, filed in April 2002, is still pending in U.S. District Court in Houston.

Northern Trust is not completely off the hook. Attorneys familiar with the Enron situation say the class-action and Labor Department suits are likely to be consolidated.

Attorneys representing Enron plan participants in their class-action suit bristled at the position that there are not sufficient facts to sue Northern Trust.

"We respectfully disagree with Ms. Combs," said Eli Gottesdiener of the Gottesdiener Law Firm in Washington, who represents the participants. "The facts available to us make clear that Northern Trust had

no business proceeding with the lockdown and knew, or should have known, it would have disastrous consequences."

Close to half of Enron 401(k) plan-$1.3 billion-was in Enron stock. Plaintiffs in the class-action suit argue that Enron's stock was volatile during the blackout period imposed when Enron switched recordkeepers, from Northern Trust to Lincolnshire, 111.-based Hewitt Associates Inc. and that the defendants should have delayed the blackout.

According to the Labor Department's brief, Northern Trust could have stopped the blackout because it knew-or should have known-the 401(k) plan would lose money if the blackout proceeded. The brief also said a number of red flags should have alerted Northern Trust to the danger.

"The allegations are additionally bolstered by a number of publicly known facts that immediately predated the lockdown.. .as matters of public knowledge that should have been known to Northern Trust," the brief stated. Among those "facts": Enron had just reported a loss of $618 million and written down $1.2 billion of its net worth; plus, the Securities and Exchange Commission was opening an investigation of its accounting practices.

"Even if Northern Trust were a directed trustee in connection with the lockdown, it could not escape its fiduciary responsibilities by following directions that it knew or should have known were contrary to ERISA or the terms of the plan," the amicus brief said.

The Labor Department's Enron brief caused riptides across the defined contribution industry. In an unprecedented move last October, the SPARK Institute, a group representing defined contribution service providers, and the American Bankers Assn., both in Washington, filed an amicus brief challenging what the industry perceives as back-door regulation by the Labor Department.

At the time, Ms. Combs said recordkeepers and others that work for plan trustees should be held responsible for their actions.

But in an interview with Pensions & Investments, Ms. Combs said whether the provider calls itself a recordkeeper or a directed trustee does not determine its fiduciary responsibility. "If you have control or management of plan assets, then you are a fiduciary," she said.

But the attorney representing SPARK counters: "Recordkeepers are not fiduciaries."

Indeed, said SPARK attorney Stephen M. Saxon, principal of Groom Law Group in Washington, "It's possible to take a bundle of services beyond recordkeeping and trustee and put together a mutual fund lineup and not be a fiduciary."

Arleen Jacobius is a reporter for Pensions & Investments, a sister publication of Business Insurance.