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The Employee Retirement Income Security Act (ERISA) permits plan participants to challenge the prudence of actions by plan fiduciaries as long as they do so within six years. Today, the Supreme Court granted certiorari in *Tibble v. Edison Int'l*, No. 13-550, to decide whether plan participants may challenge decisions initially made more than six years before filing suit, if those decisions could have been reconsidered during the six-year window.

The plaintiffs in *Tibble* are participants in a multi-billion-dollar 401(k) plan that is offered and administered by the defendants. The plaintiffs choose their investments from a menu of funds selected by the Investment Committees, which meet quarterly to review plan investments and to consider whether to remove, replace, or add funds. Plaintiffs' suit alleges in relevant part that the defendants breached their duty of prudence by offering higher-fee retail-class mutual funds as plan investments when lower-fee institutional-class funds were available. The district court granted summary judgment to the defendants in relevant part, holding that ERISA's six-year statute of limitations barred plaintiffs' claim because the defendants initially selected the mutual funds more than six years before the complaint was filed. The Ninth Circuit affirmed.

At the Supreme Court's invitation, the Solicitor General filed an amicus brief, which recommended on behalf of the United States that the Court grant review on the statute-of-limitations issue. The Solicitor General argued that the Ninth Circuit erred in failing to recognize that the defendants owed a *continuing* duty of prudence, which they breached by failing to research fund options and offer available lower-cost institutional-class investments during the six-year period prior to the filing of the complaint. The Solicitor General also stated that the courts of appeals disagree on this question. (Although the petition also presented a separate question regarding the level of deference due to fiduciary decisions, the Solicitor General recommended that the Court not address that other issue, and the Court followed the Solicitor General's recommendation.)

The Supreme Court's decision in this case will be important because it will necessarily address the nature of a separate duty to reconsider past decisions and decide whether a theory of "continuing violation" can be used to evade ERISA's limitations period. The Court's decision may therefore alter the nature of fiduciary duty and expose ERISA fiduciaries to increased risk for past actions.

Absent extensions, amicus briefs in support of the plaintiffs will be on November 24, 2014, and amicus briefs in support of the defendants will be due on December 24, 2014. Any question about this case should be directed to Nancy Ross (+1 312 701 8788) in our Chicago office or Brian D. Netter (+1 202 263 3339) in our Washington office.