

Monday, April 21, 2025

Re: Retiree Drug Subsidy Reopening

Attn:

Dear Mr

As a follow up to the notice I sent you of a potential underfunding of your organizations Retiree Drug Subsidy account.

**I wanted to present the most compelling reason for a plan sponsor to proceed with conducting the Retiree Drug Subsidy reopening.**

As a plan sponsor, your organization is considered a fiduciary in relation to the Retiree Drug Subsidy payments that are being received or not being received from the RDS Service center.

As a fiduciary, you are responsible for the benefits of the prescription drugs that are provided by the plan, as well as the cost. The prescription drugs are provided by the plan at a specific cost based on the negotiated pricing from the prescription benefit manager; in combination with the cost reducing Retiree Drug Subsidy that is provided by the Centers for Medicare and Medicaid Services.

The Retiree Drug Subsidy provides a significant offset to the cost of the prescription drug benefit and keeps the beneficiaries' co-payments lower.



**This is a direct and tangible cost offset that can be attributed to the Retiree Drug Subsidy and the actions of the plans fiduciary activity.**

*Being a fiduciary is a burden with significant liability for the actions that are taken. Every action must be carefully considered, however, in the case of the Retiree Drug Subsidy reopening, inaction will create the liability. To have a known potential increase of the Retiree Drug Subsidy and not take steps to recover those monies is where the liability to the plan sponsor will be incurred.*

So before you decide to not take action to recover any additional monies from the Retiree Drug Subsidy program, I would ask you to consider the following information published by the Corporate Governance Research Institute.

#### WHAT IS A FIDUCIARY ACTIVITY?

Just what exactly constitutes a fiduciary activity seems fairly straightforward.

Under state corporate law, fiduciary duty is defined as the following.

The “duty of care” requires that directors make decisions with due deliberation.

The “duty of loyalty” requires that directors act “in the interest of the corporation”.

The “duty of candor” requires that the board inform shareholders of all information that is important to their evaluation of the company.

Fiduciary duties are enforced by judicial intervention:

Injunction: court order that the boards refrain from a specific action.

Damages: requirement that the board pay for losses sustained.

Under the “business judgment rule,” the court will not second-guess a board’s decision if:

1. The board followed reasonable process. This is why conducting a Retiree Drug Subsidy Reopening is considered reasonable by the RDS Services Center.
2. The board took into account key relevant facts. The facts are clear and the potential for a significant recovery of subsidy dollars exists in your plan.
3. The board made the decision “in good faith.” “Good faith” requires that the board act without conflicts of interest and not turn a blind eye to issues for which it is responsible. Choosing to not recover the additional subsidy dollars could be considered a serious breach of “Good faith”.

**Under federal securities laws, directors have a legal obligation to disclose information to the public. Disclosure requirements are established by the Securities and Exchange Commission. In general, the company is required to disclose all “material information” – information that an investor would consider important in the evaluation of an investment decision. The choice of a Board of Directors to forgo potentially millions of dollars of subsidy will have a direct and material effect on investor returns and share value. This is the heart of the matter and why a reopening should be conducted.**

The board relies on external and internal auditors to ensure that material information is adequately disclosed. Securities laws are enforced through private lawsuits and SEC actions. Private lawsuits are led by investors who claim to have been harmed by a violation. In order to be found in violation of securities law, the court must find that a disclosure to the public contained a material misstatement or the omission of material information, and that the misstatement or omission was the cause of loss. A director cannot be held liable unless the misstatement or omission was intentional or the result of recklessness. In the case of the Retiree Drug Subsidy Re-opening, the act of not attempting to recover the known additional subsidy dollars would be well within the definition of an intentional act.

Director liability is reduced by three mechanisms:

1. Exculpatory provision: company charter excuses director from liability for unintentional negligent acts. However, not conducting a reopening when the Board has been informed is intentional.
2. Indemnification: agreement that company will pay for costs associated with lawsuits (if director acted “in good faith”).
3. Director and officers insurance (D&O): insurance contract that covers litigation expenses, settlement payments, and in some cases damages.

**Therefore, based upon these guidelines issued by the Corporate Governance Research Institute , a reconsideration of your position to not attempt to recover the potential additional funds from the Retiree Drug Subsidy program may not be the most prudent course of action in relation to the operation of the plan.**

I hope this information proves informative and I look forward to hearing from your organization on how you wish to proceed with the recovery of the additional subsidy funding. You can reach me directly at 516 361 9404.

Sincerely,

George Fox, LUTCF  
National Sales Manager  
RDS Services, LLC