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General Plan Developments

EBSA Issues Temporary Enforcement Policy Regarding Fiduciary Rule

On March 10, 2017, the Department of Labor's ("DOL") Employee Benefits Security Administration ("EBSA") issued a temporary enforcement policy regarding the 60-day extension of the applicability date of the fiduciary rule and related prohibited transaction exemptions ("PTEs") from April 10 to June 9, 2017. In response to concerns from the financial services industry, EBSA issued Field Assistance Bulletin 2017-01 containing the following temporary enforcement policy:

- In the event the DOL issues a final rule after April 10 implementing a delay in the applicability date of the fiduciary duty rule and related PTEs, the DOL will not initiate an enforcement action because an adviser or financial institution did not satisfy conditions of the fiduciary rule or the PTEs during the "gap" period in which the rule becomes applicable before a delay is implemented, including a failure to provide retirement investors with disclosures or other documents intended to comply with provisions of the fiduciary rule or the related PTEs.
- In the event the DOL decides not to issue a delay in the fiduciary duty rule and related PTEs, the DOL will not initiate an enforcement action because an adviser or financial institution, as of the April 10 applicability date, failed to satisfy conditions of the fiduciary rule or the PTEs; provided that the adviser or financial institution satisfies the applicable conditions of the fiduciary rule or PTEs, including sending out required disclosures or other documents to retirement investors, within a "reasonable period" after the publication of a decision not to delay the April 10 applicability date.

EBSA did not define what may constitute a "reasonable period" of time.

IRS Announces Non-Applicability of Prohibited Transaction Excise Taxes to Conform with DOL Temporary Enforcement

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Policy on Fiduciary Rule

Following the issuance of the temporary enforcement policy (Field Assistance Bulletin 2017-01) described above, stakeholders raised concerns about the potential application of excise taxes under the Internal Revenue Code ("Code") section 4975 and related reporting obligations in cases covered by the temporary enforcement policy.

In response to the concerns, on March 28, the Internal Revenue Service ("IRS") published Announcement 2017-4 providing that the IRS will not apply Code section 4975 and related reporting obligations with respect to any transaction or agreement to which the DOL's temporary enforcement policy, or other subsequent related enforcement guidance, would apply.

Retirement Plan Developments

Sixth Circuit Holds Exhaustion of Administrative Remedies Not Required for Statutory Violation Claims Involving Plan's Illegal Actions

On March 14, 2017, in Hitchcock v. Cumberland University 403(b) DC Plan, the Sixth Circuit joined the majority of circuit courts of appeal in holding that a plan participant need not exhaust a plan's administrative remedies before bringing an action challenging the legality of a plan's actions.

Plaintiffs were former employees of Cumberland University (the “University”) and were participants in a defined contribution pension plan (the “Plan”) sponsored by the University for its employees. In 2009, the University adopted a 5% matching contribution, whereby the University would match an employee’s contributions to the Plan up to 5% of the employee’s salary. On October 9, 2014, the University amended the Plan to replace the 5% match with a discretionary match, whereby the University would determine the amount of the employer's matching contribution on a yearly basis. The University made the amendment retroactive effective January 1, 2013, and announced that the employer matching contribution for the 2013-2014 year and the 2014-2015 year would be 0%.

On November 12, 2015, the participants filed a class action complaint against the University alleging the following: (1) wrongful denial of benefits; (2) violation of ERISA’s anti-cutback provisions; (3) failure to provide notice to participants and beneficiaries; and (4) breach of fiduciary duty.

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The Middle District of Tennessee dismissed the first, second and fourth claims for failure to exhaust administrative remedies and dismissed the third claim for failure to state a claim upon which relief could be granted. The participants then appealed to the Sixth Circuit.

The Sixth Circuit reversed and remanded, ruling that the district court erred by ordering the participants to pursue a “futile” administrative process before bringing their suit in court. The Sixth Circuit stated that the exhaustion requirement includes an exception for circumstances when resorting to the administrative remedies would be futile or inadequate. The court noted that a challenge to the “legality” of a plan's amendment, rather than a challenge to the interpretation of an amendment, is futile because if plaintiffs were to resort to the administrative process, the plan administrator would merely recalculate their benefits and reach the same result. In this case, the court stated that the participants were challenging the legality of the amendment retroactively reducing the employer match from 5% to a discretionary amount, rather than challenging the calculation of their benefits.

Health and Welfare Plan Developments

House Republicans Withdraw Health Care Bill

On March 24, 2017, Republicans in the House of Representatives, short of support from their own party, withdrew the proposed health care bill, titled the American Health Care Act ("AHCA"). The AHCA would have repealed parts of the Affordable Care Act ("ACA"), including the individual and employer mandates and various taxes, and would have modified the federal Medicaid program. However, after withdrawing the bill, House Speaker Paul Ryan said that the ACA is "the law of the land” and will remain so “for the foreseeable future.”

HHS Encourages States to Apply for ACA State Innovation Waivers

On March 13, 2017, the Department of Health and Human Services ("HHS") sent a letter to state governors encouraging states to apply for State Innovation Waivers under ACA section 1332, as a way to "help foster healthcare innovation" and improve market stability. To receive approval, the state must demonstrate that a proposed waiver:

- will provide access to quality health care that is at least as comprehensive and affordable as would be provided without the waiver;

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- will provide coverage to at least a comparable number of residents of the state as would be provided coverage without a waiver; and
- will not increase the federal deficit.

In particular, HHS encourages states to pursue approval of waiver proposals that include high-risk pool/state-operated reinsurance programs because implementing such programs may be an opportunity for states to lower premiums for consumers, improve market stability, and increase consumer choice. HHS notes Alaska as an example of a state that has applied for a section 1332 waiver, part of which would implement a high-risk pool/state-operated reinsurance program for 2018 and future years. The letter also emphasizes that if a state's waiver proposal is approved, pass-through funding may be available to help offset a portion of the costs for the high-risk pool/state-operated reinsurance program.

In the coming weeks, HHS plans to provide a checklist with further information to help states apply for a waiver.

A Program of Administrative Services Is Not a Welfare Plan Subject to ERISA or MEWA

In DOL's Advisory Opinion 2017-01A, the DOL concluded that an association's program of administrative services for its members' employee benefit plans is not an "employee welfare benefit plan" within the meaning of ERISA section 3(1) or a "multiple employer welfare arrangement" ("MEWA") within the meaning of ERISA section 3(40).

The Health Transformation Alliance ("HTA") is an association of large employers that sponsor self-insured benefit plans through administrative-services-only agreements with various insurance companies. HTA intends to develop and give its members access to cost, quality and access standards for medical networks based on improved analysis of its members' individual and collective healthcare spending and utilization. HTA also acts as a negotiating agent on behalf of its members in order to leverage their combined purchasing power to get favorable terms and conditions from health care and pharmacy benefit providers on packages of benefits and services.

In the Advisory Opinion, the DOL stated that the program of administrative services created by HTA is not an employee welfare benefit plan because it has employers rather than employee participants and does not provide covered

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benefits to employees or their dependents. The DOL also stated that the program is not a MEWA under ERISA section 3(40) because no component of the program "offers or provides" any welfare benefit described in ERISA section 3(1) to the employees of its member-employers. In addition, no component of the program (1) underwrites or guarantees welfare benefits, (2) provides welfare benefits through group insurance contracts covering more than one employer, (3) pools welfare benefit risk among participating employers, or (4) provides similar insurance or risk spreading functions.

Upcoming Compliance Deadlines and Reminders

Upcoming Health Plan Compliance Deadlines and Reminders

1. New Summary of Benefits and Coverage ("SBC") Template. Plans that maintain an open enrollment period must use the new SBC template on the first day of the first open enrollment period that begins on or after April 1, 2017. Plans that do not use an open enrollment period must use the new template on the first day of the first plan year that begins on or after April 1, 2017.

Upcoming Retirement Plan Compliance Deadlines and Reminders

1. 2016 IRA Contributions. The IRS issued a reminder (IR-2017-60) that IRA contributions must be made by April 18, 2017.

2. Annual Funding Notice. Calendar year defined benefit plans with over 100 participants must provide the annual funding notice to required recipients by April 30, 2017 (i.e., within 120 days of the end of the plan year). Small plans (plans with 100 or fewer participants) generally have until the Form 5500 filing deadline to provide the annual funding notice.

3. Change in Due Date for FBAR Filing for Certain Foreign Investments. In prior years, persons who have a financial interest in, or signature or other authority over, foreign financial accounts were generally required to report on the Treasury Department Form TD F 90 22.1 (the "FBAR") by June 30 of each year. As a result of a recent law change, beginning in the 2017 calendar year, the annual due date for filing FBAR reports was moved from June 30 to April 15. However, the U.S. Department of the Treasury recently granted an automatic extension for filing the FBAR to October 15 (specific requests for this extension are not required).While investments in most

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foreign hedge funds and private equity funds are not required to be reported on the FBAR, other accounts in foreign jurisdictions might be. Plan sponsors should consult with tax and legal counsel to determine if any FBAR filing is required to be filed by the October 15, 2017 deadline.

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