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Retirement Plan Developments

Implementation of DOL Fiduciary Rule Not Currently Delayed

President Trump issued a memorandum on February 3, 2017 directing the Department of Labor ("DOL") to conduct a new "economic and legal analysis" to determine whether the rule is likely to harm investors, disrupt the industry, or cause an increase in litigation and the price of advice. The directive to delay implementation of the rule for 180 days was not included in the final memorandum.

IRS Proposes Use of Forfeitures to Fund QNECs and QMACs

On January 18, 2017, the IRS issued proposed regulations expanding the use of forfeitures in a 401(k) plan. Under the proposed rules, contributions will qualify as a qualified nonelective contribution ("QNEC") or qualified matching contributions ("QMAC") if they are 100% vested and subject to distribution restrictions at the time such amounts are allocated to a participant's account. The IRS is allowing plan sponsors to rely on the proposed regulations immediately. As a result, plan sponsors may begin using amounts from a plan's forfeiture account to make QNEC and QMAC contributions, including safe harbor 401(k) contributions, provided the plan allows forfeitures to be used to reduce employer contributions.

The IRS previously took the position that such requirements must be met at the time the amounts are first contributed to the plan, effectively eliminating the use of forfeitures to reduce such contributions.

DOL Releases Second Set of FAQ Guidance on Fiduciary Rule

On January 13, 2017, the DOL issued a second set of Frequently Asked Questions ("FAQ") providing guidance on the DOL's new fiduciary rule. This set of FAQs addresses interpretive questions about the rule itself, including several important exceptions to fiduciary status. The FAQs address the following questions:

- What communications are considered recommendations?
- What communications are considered nonfiduciary investment education?

- What kinds of information are considered nonfiduciary general communications?
- How does the independent fiduciary or seller's exception apply?
- How does the platform exception apply?

IRS Announces Remedial Amendment Period for 403(b) Plans

The Internal Revenue Service ("IRS") released Revenue Procedure 2017-18 providing that the last day of the remedial amendment period for section 403(b) plans will be March 31, 2020. After that date, plan sponsors of preapproved 403(b) plans will be unable to file for opinion letters.

PBGC Releases 2017 Premium Flings Instructions

The Pension Benefit Guaranty Corporation ("PBGC") published the premium filing requirements for 2017 plan years. The premium filing requirements in 2017 are nearly identical to the premium filing requirements in 2016, but with the following changes:

- Premium Rates. The annual premium rates for 2017 increased as follows:

	2017 Rate	2016 Rate
Flat-Rate Premium for Single Employer Plan	$69	$64
Flat-Rate Premium for Multiemployer Plan	$28	$27
Variable-Rate Premium (per $1,000 of unfunded vested benefits)	$34	$30
Cap on Variable-Rate Premium	$517 x Number of Participants	$500 x Number of Participants

- Spinoffs, Mergers and Consolidations. The PBGC provided additional guidance in determining premiums in a year when a plan is involved in a spinoff, merger or consolidation.

- Spinoff. According to the new guidance, if the transferee plan is a new plan, all special rules applicable to new plans and continuation plans apply. Therefore:
  - Depending on when the transaction occurred and the plan's valuation date, the premium due date may be later than the normal due date.
  - The applicable participant count date for purposes of determining the flat-rate premium is the first day of the premium payment year.
  - The standard premium funding target is used to determine the variable-rate premium unless the plan makes a timely election to use the alternative premium funding target. This is true even if the transferor plan had an election to use the alternate premium funding target in effect or revoked such an election fewer than five years prior to the spinoff.
  - If the plan is a small plan, the lookback rule does not apply because there is no prior year to look back to. The lookback rule will automatically apply for the plan's second year of existence, unless the plan opts out of using that rule.
- Merger. In the case of a merger where a plan ceases to exist following the transaction, in addition to reporting information about the transaction, the fact that the premium filing is the last premium filing for the plan must also be reported.
- Consolidation. The plan that exists after a consolidation follows the premium filing rules for a new plan. Additionally, if a plan ceases to exist as the result of the consolidation, in addition to reporting information about the transaction, also report that the premium filing is the last premium filing for the plan.

PBGC Requests Comments Regarding "Two-Pool" Withdrawal Liability Calculation

The PBGC is requesting comments related to proposed "two-pool" alternate withdrawal liability arrangements. The PBGC has recently received a number of requests from plans to approve various two-pool alternate allocation methods. Such arrangements would create two separate withdrawal liability pools. One pool is considered the "new pool" and relates to the unfunded vested benefits relating to the future liabilities of the new employers. The second pool includes

the unfunded vested benefits relating to past and future liabilities of existing employers. Generally, under such arrangements, any future increases in the old pool are allocated solely to the remaining employers in the old pool. If an existing employer in the old pool wishes to transfer to the new pool, the employer would need to pay its frozen old-pool withdrawal prior to the transfer. The PBGC is requesting feedback on various issues and questions raised by these arrangements.

Comments are requested by February 21, 2017.

D.C. Circuit Upholds Fiduciary's Valuation of Company Stock

In *Coburn v. Evercore Trust Co.,* the D.C. Circuit rejected a claim brought by a former J.C. Penney employee and investor in the J.C. Penney ESOP that the ESOP manager breached its fiduciary duty by failing to take action as the value of the J.C. Penney stock fell. The participant was enrolled in the J.C. Penney Savings Profit-Sharing and Stock Ownership Plan and selected an investment option consisting largely of J.C. Penney Stock. In 2012 and 2013, the Evercore did not exercise its authority to restrict or limit plan participants from purchasing or holding J.C. Penney stock, nor did the Evercore eliminate the ESOP as an investment option. The D.C. Circuit Court affirmed the lower court's dismissal of the case, finding that, under *Dudenhoeffer*, to bring a claim that continued investment was imprudent, the plaintiff must also demonstrate that special circumstances affected the market.

Health And Welfare Plan Developments

President Trump Issues Executive Order Regarding ACA

President Donald Trump issued an executive order on January 20, 2017 declaring his intention to "seek the prompt repeal of the Patient Protection and Affordable Care Act ('ACA')" while minimizing the "economic and regulatory burdens of the Act." The executive order gives the following directives:

- agencies with authorities or responsibilities under the ACA must "waive, defer, grant exemptions from, or delay the implementation of" any ACA provision that would impose a fiscal or regulatory burden on states or private entities;
- those same agencies must provide greater flexibility and cooperation to states in implementing healthcare programs; and

- all agencies with responsibilities relating to healthcare or health insurance coverage must encourage the development of a free and open interstate market for health services and health insurance.

Until further direction is received, plan sponsors should continue to comply with the ACA. Plan sponsors should not make changes to their health plans to roll back ACA requirements. The executive order should instead be viewed as a mission statement for Congress and the Trump Administration for how they intend to alter the health care and health insurance landscape.

Seventh Circuit Avoids Ruling on ADA Safe Harbor in *EEOC v. Flambeau*

On January 25, 2017, the Seventh Circuit Court of Appeals issued its decision in *EEOC v. Flambeau, Inc.* As a reminder, Flambeau's wellness program required employees to complete a medical questionnaire and undergo biometric testing as conditions to receive employer-subsidized health insurance. The Equal Employment Opportunity Commission ("EEOC") objected under the Americans with Disabilities Act ("ADA"), deeming it an impermissible involuntary medical exam. In 2015, the Western District of Wisconsin ruled that a safe harbor under the ADA allowed an employer to design its health plan to require otherwise prohibited medical examinations as a condition of enrollment.

In the Seventh Circuit's review, it upheld the Western District's dismissal, finding that compensatory and punitive damages on the employee's behalf were unavailable based on the undisputed facts. The court did not comment on or review whether the wellness program fell within the ADA safe harbor. As a result, the relationship between the ADA's prohibition on involuntary medical examinations and its insurance safe-harbor provision remains an area of unsettled law.

DOL Highlights Growth in 2016 of MHPAEA Enforcement

On January 11, 2017, the DOL issued "FY 2016 MHPAEA Enforcement," a fact sheet regarding the enforcement of the Mental Health Parity and Addiction Equality Act ("MHPAEA"). According to the fact sheet, 191 of the DOL's 330 total health plan investigations closed in 2016 were related to MHPAEA enforcement. Additionally, 44 of those plans were cited for noncompliance. Commentators expect these numbers to rise due to the DOL's efforts to bring health plans in line with MHPAEA.

The most common violations include:

- Residential Treatment Exclusions;
- Chronic Disorders and Preauthorizations; and
- Written Treatment Plans.

Agencies Decline to Change Contraceptive Coverage Accommodation

The DOL, Health and Human Services ("HHS") and the Treasury (collectively, the "Departments") jointly released an FAQ to address the accommodation procedure for eligible organizations objecting to the provision of contraceptive coverage for religious reasons. Following a request for comment, which received 54,000 responses, the agencies determined no feasible approach has been identified to resolve competing concerns. As a result, the Departments have decided to maintain the accommodation requiring an insurer or plan sponsor to provide contraceptive coverage without payment from the employer.

HIPAA Enforcement Update

The Office for Civil Rights ("OCR") announced the first Health Insurance Portability and Accountability Act of 1996 ("HIPAA") settlement based on an untimely reporting of a breach of unsecured PHI. Presence Health, a major health care network in Illinois, discovered on October 22, 2013 that its paper-based operating room schedules, containing the PHI of 836 patients, were missing. However, Presence Health did not report the breach to OCR until January 31, 2014, well after the 60-day notification requirement had lapsed. Presence Health agreed to pay $475,000 for the breach.

Departments Issue 37th FAQ Addressing ACA Implementation

On January 12, 2017, the Departments jointly issued a new set of FAQs. In this 37th set of FAQs, the Departments addressed the ability to integrate a health reimbursement arrangement ("HRA") with a group medical plan sponsored by another employer.

- Integrated HRAs. The FAQs provide that HRAs will be in compliance with the annual dollar limit prohibition and the preventative services requirements of the ACA if they are integrated with other compliant coverage as part of a group health plan.
- Family HRAs. The FAQs confirm that an HRA covering the medical expenses of employees and their spouses may be integrated with a group medical plan

sponsored by another employer (such as the spouse's employer) if that group medical plan meets all of the applicable integration requirements. Additionally, a family HRA will qualify as an integrated HRA if the employee has self-only coverage under the employer's group medical plan and the employee's spouse and dependents have coverage under another employer's group medical plan.

General Developments

DOL Announces Adjustments to Employee Benefit Plan Penalties

The DOL issued an annual adjustment of civil penalties for benefit-related violations. The adjustments include:

- Form 5500. The maximum penalty for failing to file a Form 5500 increased from $2,063 to $2,097 per day.
- Health Plans. The maximum penalty for failing to provide a summary of benefits and coverage ("SBC") increased from $1,087 to $1,105 per failure. Additionally, penalties for GINA violations, including establishing eligibility rules based on genetic information or requesting genetic information for underwriting purposes, increased from $110 to $112 per day.
- 401(k) Plans. The penalty for failure to provide a preemption notice for plans with automatic contribution arrangements increased from $1,632 to $1,659 per day. Penalties for failure to provide a blackout notice increased from $131 to $133 per day.
- Multiple Employer Welfare Arrangements ("MEWA"). Penalties for failure to meet applicable filing requirements, including annual Form M-1 filings, increased from $1,502 to $1,527.

Upcoming Compliance Deadlines And Reminders

Retirement Plan Compliance Deadlines and Reminders

Quarterly Fee Disclosure and Benefit Statements for Participant Directed Defined Contribution Plans. Plan sponsors of plans permitting participants to direct the investment of their accounts must provide participants with a fourth quarter benefit statement, as well as a disclosure of fees and administrative expenses deducted from the accounts of participants during the fourth quarter of the plan

year, by February 14, 2017 (or within 45 days after the fourth quarter).

Health Plan Compliance Deadlines and Reminders

1. Medicare Part D Creditable Coverage Disclosure. Calendar year plans providing prescription drug coverage must provide the annual creditable coverage disclosure to the Centers for Medicare and Medicaid Services by March 1, 2017 (or 60 days after the beginning of the plan year for noncalendar year plans).

2. Form M-1. Multiple employer welfare plans providing health coverage must electronically file the annual Form M-1 by March 1, 2017. Employers may request a 60-day automatic extension in the filing.

3. Forms 1095 B and 1095 C. Forms 1095-B and 1095-C must be distributed to participants and filed with the IRS. Plan sponsors of self-funded health plans and Applicable Large Employers ("ALE") must provide Forms 1095 B and 1095 C to employees by March 2, 2017. Plan sponsors and ALEs should also file these forms with the IRS by February 28, 2017 (or March 31, 2017, if filing electronically).

4. Forms 1094 B and 1094 C. Plan sponsors and ALEs must file the first forms 1094-B and 1094-C with the IRS no later than February 28, 2017 (or March 31, 2017, if filing electronically). These forms serve as transmittal forms for the Forms 1095-B and 1095-C.