Benefits Counselor June 2017

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Retirement Plan Developments

No Delay on Fiduciary Rule's June 9 Applicability Date; Additional Compliance Guidance Issued

On May 22, 2017, the Secretary of the Department of Labor ("DOL") confirmed that the fiduciary rule and its expanded definition of "fiduciary" will become applicable on June 9, 2017. The Best Interest Contract Exemption, the Class Exemption for Principal Transactions and related exemptions also become applicable on June 9. This guidance follows the DOL's previous announcement on April 4, 2017, in which the DOL delayed the rule's applicability date from April 10, 2017 to June 9, 2017.

The DOL has issued two additional pieces of guidance addressing compliance with the fiduciary rule: Field Assistance Bulletin ("FAB") No. 2017-02 and a set of frequently asked questions ("FAQs") entitled "Conflict of Interest FAQs (Transition Period)." Consistent with prior statements, FAB 2017-02 provides a temporary nonenforcement transition period, from June 9, 2017 to January 1, 2018, during which the DOL will not pursue claims against fiduciaries who are working diligently and in good faith to comply with the rule and related exemptions, and will not treat those fiduciaries as being in violation of the rule. The FAQs provide additional information to assist firms and advisors with compliance during the transition period. Both FAB 2017-02 and the FAQs indicate that the DOL continues to analyze and consider changes to the current rule, which may prompt the DOL to extend the transition period beyond January 1, 2018.

Excess Fees Cases Against Duke and Emory Universities Allowed to Proceed

District court judges in North Carolina and Georgia refused to dismiss claims against Duke and Emory Universities, respectively, in cases alleging that the schools' 403(b) retirement plans charged excessive fees and offered poor investment options. Since 2016, 14 universities have been sued on similar claims, including Columbia, Cornell, Princeton and Yale. The allegations include claims that plan fiduciaries breached their duties by selecting underperforming investment options and by failing to leverage their plans' size to negotiate lower recordkeeping fees. The lawsuits also allege that participants are offered too many investment choices, which causes confusion ("decision paralysis") and

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prevents plans from lowering fees through consolidation of assets. Though the Duke and Emory cases have been allowed to move forward, the recent rulings are not the final word on how these cases, or the other cases, will ultimately be decided.

Legislation Blocks Safe Harbor for State-Run Private Sector Retirement Programs

President Trump signed legislation overturning the previous administration's safe harbor rule allowing states to provide retirement plans to private sector employees. The now-repealed rule, which became effective in October 2016, allowed states to establish payroll deduction programs with automatic enrollment without becoming "employee pension benefit plans" subject to the Employee Retirement Income Security Act of 1974 ("ERISA"). Despite the repeal, some states have indicated they will proceed with their plans even in the absence of the safe harbor established under the prior rule.

PBGC Issues Q&A on Risk Mitigation and Early Warning Program

The Pension Benefit Guaranty Corporation ("PBGC") has posted a set of questions and answers ("Q&A") addressing some of the most common questions received in response to informational updates to its Risk Mitigation and Early Warning Program ("EWP"). Under EWP, the PBGC identifies corporate transactions and events that could pose a risk to the viability of single-employer defined benefit plans. Depending on the PBGC's assessment of the transaction in question, the PBGC may require the employer to enter into an agreement to implement financial protections for participants and protect the solvency of the federal pension insurance program. Among other things, the EWP Q&A addresses monitoring criteria, credit reporting and PBGC investigation procedures The Q&A can be found at: .

IRS Reminds Taxpayers to Submit Electronic Payment for Letter Rulings and Similar Requests

In IR-2017-102, the Internal Revenue Service ("IRS") reminded taxpayers that, beginning June 15, 2017, user fee payments for letter rulings, closing agreements and certain other rulings must be made electronically by using the federal government's Pay.gov system. Taxpayers may submit payments by check during the transition period of June 15, 2017 to August 15, 2017, but Pay.gov will be the only permissible payment method thereafter. Notably, IR-2017-102 provides that determination letters are not affected by this requirement because they are sent

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to other offices, as described in applicable Revenue Procedures.

Health and Welfare Plan Developments

New Health Care Bill Advances to Senate

On May 4, 2017, the U.S. House of Representatives passed the American Health Care Act ("AHCA") by a narrow 217-213 vote. The AHCA is intended to alter or repeal major provisions of the Affordable Care Act ("ACA"). The bill now moves to the U.S. Senate for further deliberation.

IRS Announces 2018 Limits on HSAs and High-Deductible Health Plans

On May 4, 2017, the IRS released Revenue Procedure 2017-37 setting dollar limits on health savings accounts ("HSAs") and high-deductible health plans ("HDHPs") for 2018. For 2018, the maximum HSA contribution (employee + employer) for an individual with self-only coverage will increase from $3,400 to $3,450, and for an individual with family coverage it will increase from $6,750 to $6,900. In addition, the HDHP out-of-pocket maximums for self-only and family coverage have increased for 2018 (note that the ACA imposes out-of-pocket maximums applicable to essential health benefits which are higher than the HDHP maximums, and differ in their application).

HHS Announces $2.5 Million HIPAA Settlement with Wireless Health Services Provider

On April 24, 2017, the Department of Health and Human Services' Office of Civil Rights ("OCR") announced its first settlement under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") involving a wireless health services provider. CardioNet, a provider of remote cardiac monitoring services, agreed to settle potential noncompliance claims under HIPAA's Privacy and Security Rules for $2.5 million and implement a corrective action plan to remedy deficiencies. In early 2012, CardioNet reported to OCR that an employee's laptop was stolen from a parked vehicle outside the employee's home. The laptop contained electronic protected health information ("PHI") of 1,391 individuals. During its review of the breach, OCR's investigation revealed that CardioNet had failed to conduct an adequate risk analysis and implement a corresponding risk management plan, failed to implement Security Rule policies and procedures, and failed to address the security of electronic PHI stored in mobile devices such as laptops.

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HHS Enters Into $2.4 Million HIPAA Settlement Following Health System's Disclosure of Patient Information to Media

On May 10, 2017, OCR announced a $2.4 million settlement with Memorial Hermann Health System ("MHHS") following MHHS' disclosure of PHI to multiple media outlets without authorization. In September 2015, a patient at an MHHS clinic presented an allegedly fraudulent identification card to an office employee. The staff alerted law enforcement of the incident, which is a permissible disclosure of PHI under HIPAA, and the patient was arrested. However, MHHS subsequently published a press release regarding the incident that included the patient's name in the title, which OCR indicated MHHS should reasonably have known was impermissible without the patient's authorization. MHHS senior officials further disclosed the patient's information without authorization during meetings with third parties. In addition to the monetary settlement, MHHS agreed to implement a corrective action plan requiring it to, among other things, update its policies and procedures on workforce training, employee sanctions and permissible uses and disclosures of PHI.

IRS Confirms that Certain Wellness Rewards Are Taxable

On May 12, 2017, the IRS released additional guidance addressing the potential tax consequences of cash benefits received under an employer-provided wellness program. In Chief Council Advice ("CCA") memorandum 201719025, the IRS confirmed that cash benefits received by employees under an employer's self-funded health plan are included in income and wages if the average amounts received by employees for participating in a health-related activity (*e.g.*, a wellness program) predictably exceed the after-tax contributions of the employees. The CCA is a response by the IRS to its discovery that some wellness programs have been promoted as a way to return pre-tax premium payments to employees as wellness rewards or premium reimbursements. The CCA rejects such arrangements and clarifies that any reward, incentive or other cash-equivalent benefit that is not medical care (including gift cards pursuant to prior guidance) must be included in an employee's gross income and wages. The CCA is in line with earlier guidance, including Revenue Ruling 2002-03, in which the IRS ruled that reimbursements paid to employees to compensate their pre-tax salary reductions for health insurance premiums must be treated as taxable income to the employee.

Tenth Circuit Upholds Disability Plan's Termination Decision

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In an unpublished decision, the Tenth Circuit Court of Appeals upheld a disability plan's denial of benefits following a participant's request for a second-level claim appeal. *Blair v. Alcatel-Lucent Long Term Disability Plan*, No. 16-7062 (May 9, 2017). The participant claimed that the disability plan administrator's decision to terminate her benefits should be subject to the heightened "de novo" standard of review instead of the "abuse of discretion" deferential standard because the plan administrator failed to communicate with her regarding her second appeal. Ordinarily, a court will leave undisturbed a plan administrator's decision to determine eligibility for benefits or interpret plan terms unless the administrator abused its discretion by acting in an "arbitrary or capricious" manner. When a plan administrator is found to have abused its discretion, such as failing to follow the plan's claims procedures, courts may apply the "de novo" standard of review and refuse to grant any deference to the plan's initial determination. However, in this case, the court found that neither the plan nor ERISA required the plan administrator to respond to the participant's request for a second-level internal appeal. Therefore, the court upheld the plan administrator's termination decision using the lower standard of judicial review.

Upcoming Compliance Deadlines and Reminders

2016 Form 5500 for Calendar-Year Plans. Plan administrators generally have seven months after the end of a plan year to file a Form 5500 (*e.g.,* for plan years ending December 31, 2016, the Form 5500 deadline is July 31, 2017). Plan administrators can apply for a deadline extension until October 15, 2017, by filing Form 5558 by July 31, 2017.

Upcoming Health Plan Compliance Deadlines and Reminders

1. **PCORI Fee Due July 31**. Plan sponsors of self-funded plans must report and pay the annual Patient-Centered Outcomes Research Institute ("PCORI") fee by July 31, 2017 by filing IRS Form 720. As a reminder, the PCORI fee is based on the average number of lives covered under the plan during the plan year that ended in the preceding calendar year (*e.*, for calendar year plans, the plan year that ended December 31, 2016). As an additional reminder, the PCORI fee sunsets with plan years ending before October 1, 2019.

Upcoming Retirement Plan Compliance Deadlines and Reminders

1. **Annual Funding Notice**. Calendar year defined benefit plans with more

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than 100 participants must provide the annual funding notice to required recipients within 120 days of the end of the plan year. Small plans (100 or fewer participants) generally have until the Form 5500 filing deadline to provide the annual funding notice.

2. **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 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.

These materials provide general information which does not constitute legal or tax advice and should not be relied upon as such. Particular facts or future developments in the law may affect the topic(s) addressed within these materials. Always consult with a lawyer about your particular circumstances before acting on any information presented in these materials because it may not be applicable to you or your situation. Providing these materials to you does not create an attorney/client relationship. You should not provide confidential information to us until Reinhart agrees to represent you.

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