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General Plan Developments

DOL Proposes 60 Day Delay of Fiduciary Rule

The Department of Labor ("DOL") proposed a 60 day extension of the applicability date of the fiduciary rule and related prohibited transaction exemptions ("PTEs") from April 10 to June 9, 2017. The final fiduciary rule on conflicts of interest in investment advice expands the definition of a "fiduciary" under the Employee Retirement Income Security Act ("ERISA") when providing investment advice to a retirement or other employee benefit plan or its participants, as well as individual retirement accounts ("IRAs") and health savings accounts ("HSAs"). The rule became effective June 7, 2016, and would have first applied to affected individuals on April 10, 2017.

In February 2017, the Trump administration directed the DOL to review the fiduciary rule to determine whether it could adversely affect investors' access to retirement information and financial advice. In response, the DOL issued a proposed regulation extending the applicability date of the final rule and related PTEs and seeking comment on both the extension and possible rule changes. In particular, the DOL seeks comment on the following:

- *Proposed 60 Day Delay*. The DOL is seeking comment as to whether the benefits of the proposed delay justify its costs, as well as the extent to which the delay should apply to the final rule's provisions and PTE conditions, or whether a different delay period would better benefit investors and the retirement investment industry.
- *Trump Administration Concerns*. The DOL also seeks comment on market responses to the final rule and PTEs, as well as specific responses to the Trump administration's concerns about adverse effects on investors' access to retirement information and investment advice.

The DOL will accept comments on the proposed 60 day delay until March 17, 2017, and will accept comments on the issues raised by the Trump administration until April 16, 2017.

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Retirement Plan Developments

IRS Issues 2016 2017 Operational Compliance List for Qualified Retirement Plans

The Internal Revenue Service ("IRS") published the annual 2016 2017 Operational Compliance ("OC") List for qualified retirement plans on its website. In Revenue Procedure 2016 37, the IRS set forth new remedial amendment cycle and determination letter submission rules to replace the staggered five year remedial amendment cycles for individually designed retirement plans. The new rules, effective January 1, 2017, require the IRS to publish two annual compliance tools, the annual Required Amendments ("RA") List and the OC List, to assist individually designed plan sponsors and advisors with compliance under the new determination letter program. The IRS issued the first annual RA List in December 2016, and has now issued the first annual OC List on its website. The OC List will only be published on the IRS website.

The OC List identifies matters that may involve either mandatory or discretionary plan amendments and may also include other significant guidance that affects daily plan operation. The OC List does not include annual, monthly or other periodic changes that routinely occur, such as cost of living increases, spot segment rates and applicable mortality tables. Therefore, plan sponsors and administrators should not rely on the OC List as a comprehensive list of every item of IRS guidance or new legislation that could affect a particular retirement plan.

IRS Releases Substantiation Guidelines for Safe Harbor Hardship Distributions from 401(k) Plans

On February 23, 2017, the IRS issued a memorandum to its employee plan examiners setting forth substantiation guidelines for safe harbor hardship distributions for 401(k) and other similar types of defined contribution plans. The memorandum describes alternative ways that a plan administrator can demonstrate a hardship distribution is based on "an immediate and heavy financial need."

The IRS had released prior, informal guidance maintaining that plan administrators must retain financial information and documentation to substantiate a hardship distribution. The new memorandum provides that plan administrators may instead retain a summary of information, rather than

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retaining source documents. To rely on the summary, the participant obtaining a hardship distribution must be provided with a notice containing information specified in the IRS memorandum, including the tax consequences of a hardship distribution and the participant's obligation to preserve source documents relating to the hardship.

All summaries must also include general information, such as the participant's name, total cost of the event causing the hardship, amount requested, and a certification from the participant that the information is true and accurate. Also, each summary must include basic information specific to the type of hardship distribution.

IRS Releases Guidance on 403(b) Plan Self Correction During Remedial Amendment Period

The IRS has released guidance outlining how 403(b) plan sponsors can correct defective plan provisions during the remedial amendment period ("RAP"), which ends on March 31, 2020. During this RAP, plan sponsors may correct the plan documents by either (1) adopting a 403(b) preapproved plan that has a 2017 opinion or advisory letter, or (2) amending their individually designed plan.

The correction must generally be retroactive to the later of January 1, 2010 or the plan's effective date. The IRS provides three examples of the types of plan provisions eligible for self correction during the RAP, including (1) absence of a required provision, (2) erroneous required provision(s), and (3) erroneous discretionary or optional provision(s). The IRS also provides two examples suggesting that operational compliance errors are not eligible for self correction.

Plan Administrator Can Choose Required Minimum Distribution Payment Date

In Information Letter 2016 0072, the IRS confirmed that a plan administrator may require plan participants to receive required minimum distributions ("RMDs") on a date specified in the retirement plan document or a date the administrator chooses, rather than a date chosen by the participant. Generally, participants must begin taking distributions from the plan by April 1 of the calendar year following the later of the year in which the participant (1) reaches age 70 1/2, or (2) terminates employment. The IRS letter points out that the tax rules do not specify a date during the calendar year on which the payment must be made, nor do they specify which party will determine the date on which the payment will be made. Therefore, if the retirement plan document does not specify such terms,

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the procedures for payment of a requested RMD are within the discretion of the plan administrator.

Health and Welfare Plan Developments

GOP Proposes Initial Bill to Repeal and Replace Affordable Care Act

On March 6, 2017, Republicans revealed the American Health Care Act ("AHCA"), which is the first phase of the Republicans' plan to repeal and replace the Affordable Care Act ("ACA"). The AHCA would replace the ACA's subsidies with a more limited program of subsidies for purchasers of health care on the individual market, and eliminates the requirement that individuals have insurance coverage (or be subject to a penalty tax). The AHCA would instead require that individuals maintain "continuous" insurance coverage, or face a higher premium as a penalty. The bill also eliminates or delays several taxes or fees imposed under the ACA, such as the "Cadillac" tax on high cost health plans (currently delayed in 2015; AHCA would delay until 2025). However, the AHCA does not impact ACA requirements, such as prohibition on annual or lifetime limits for essential health benefits, a ban on denying coverage to individuals with pre existing conditions, and allowing young adults to remain eligible for coverage under their parents' insurance until age 26. Republicans have advised that future legislation will address these and other topics to replace the ACA.

HHS Proposes Regulations to Stabilize Individual and Small Group Health Insurance Markets

The Department of Health and Human Services ("HHS") has issued proposed regulations intended to stabilize the individual and small group health insurance markets. If finalized, these regulations would make changes to the guaranteed availability rules, Exchange annual enrollment and special enrollment periods, and other standards.

- *Guaranteed Availability*. Currently, HHS allows individuals whose previous coverage was terminated for nonpayment of premiums to apply for coverage under a different product of the same insurer, and the insurer must issue the coverage. Under the proposed rule, insurers could refuse to enroll the individual and apply new premium payments to the outstanding debt from the nonpayment of premiums for up to the prior 12 months of coverage.
- *Annual Enrollment*. The proposed regulations shorten the annual Exchange open enrollment period for the 2018 plan year by six weeks—November 1, 2017 to

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December 15, 2017, rather than November 1, 2017 to January 31, 2018.

- *Special Enrollment*. The proposed regulations significantly increase the scope of pre enrollment verification of eligibility for all categories of special enrollment periods beginning in June 2017. Under the proposed rules, verification would require individuals to submit supporting documentation in federal Exchanges, as well as state based Exchanges that use the federal platform. Also, the proposed regulations would add tighter restrictions on enrolling dependents during a special enrollment period and would require some individuals to demonstrate prior coverage.

IRS Clarifies Effect of Retroactive Medicare Coverage on HSA Contribution Limit

The IRS has released Information Letter 2016 0082, which affirms that HSA holders cannot make contributions for months of retroactive Medicare coverage. Medicare coverage generally begins the month in which an individual turns 65, but the actual commencement of coverage depends on when the individual applies for Medicare or Social Security benefits that trigger coverage. The IRS explains in the information letter that months of retroactive Medicare coverage must also reduce any HSA contributions made during that time.

If an HSA account holder over contributes due to retroactive Medicare coverage, the individual can avoid the 6% penalty tax by withdrawing the excess contributions by the federal tax return filing deadline for the contribution year. Also, timely withdrawals of excess contributions will not be subject to the 20% additional tax for nonmedical distributions. However, the distributions must be included in income for federal tax purposes unless they were timely withdrawn *and* previously treated as taxable income.

IRS Determines Treatment of Fixed Indemnity Health Plan Payments

In Chief Counsel Advice ("CCA") 201703013, the IRS concluded that payments under fixed indemnity health plans and analogous wellness programs are taxable unless the premiums for coverage are paid on an after tax basis. A "fixed indemnity health plan" is a plan that pays a specified amount upon the occurrence of certain health related events, regardless of the actual amount of medical expenses incurred.

IRS Extends Period for Furnishing Initial QSEHRA Notice

In IRS Notice 2017 20, the IRS extended the period for employers to furnish an

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initial notice to eligible employees regarding the availability of a qualified small employer health reimbursement arrangement ("QSEHRA"). QSEHRAs are a new type of stand alone HRA permitted under the 21st Century Cures Act, and are generally not considered group health plans under the Internal Revenue Code, ERISA or the Public Health Service Act. QSEHRAs can only be offered by employers that do not offer group health plans, and are not applicable large employers ("ALEs") under the Affordable Care Act. Like a general HRA, funding for a QSEHRA must be through direct employer contributions and nondiscrimination rules restrict an employer's ability to set eligibility criteria. Employers offering QSEHRAs must furnish an annual written notice to eligible employees at least 90 days before the start of the plan year, by the employee's initial eligibility date, or within 90 days after the QSEHRA legislation's enactment, whichever is latest.

Employers offering QSEHRAs beginning in 2017 need not furnish the initial notice until further guidance is issued regarding the notice's content. Subsequent guidance will include a deadline for providing the initial notice, and employers that provide notice before the guidance is issued may rely on a reasonable good faith interpretation of the QSEHRA statute to determine their notices' content.

HIPAA Enforcement Update

HHS's Office for Civil Rights ("OCR") recently announced significant monetary settlements and civil penalties for violations of the Health Insurance Portability and Accountability Act ("HIPAA"). On February 16, 2017, OCR announced a $5.5 million settlement with a HIPAA covered entity that reported a breach of over 115,000 individuals' protected health information ("PHI"). Breach reports indicated that up to 14 employees of the HIPAA covered entity had impermissibly accessed patient information, including some instances that led to federal charges against the employees for selling PHI. According to OCR, the HIPAA covered entity failed to implement procedures to review, modify and terminate users' access to PHI, and failed to regularly review information systems activity by workforce members, despite having identified these risks over a five year period. In addition to the settlement payment, the HIPAA covered entity agreed to a corrective action plan ("CAP"), which includes revisions to policies and procedures, adoption of an internal monitoring plan and engagement of a third party assessor. Both the internal plan and third party assessor must be approved by OCR. The settlement is one of the largest reported civil settlements under HIPAA to date.

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OCR also announced a $3.2 million civil monetary penalty against a HIPAA covered entity based on repeated noncompliance with the HIPAA security rule, which led to impermissible disclosures of PHI. The penalty resulted from investigations prompted by the HIPAA covered entity's breach notifications following the loss of an unencrypted, nonpassword protected device at an airport and the theft of an unencrypted laptop computer from the HIPAA covered entity's business premises. Both devices contained the electronic PHI of thousands of individuals, and OCR's investigations revealed that the HIPAA covered entity failed to implement adequate risk management or proper procedures to encrypt the electronic PHI. To date, OCR has imposed just three civil monetary penalties under the HIPAA privacy and security rules.

Upcoming Compliance Deadlines and Reminders

Upcoming Health Plan Compliance Deadlines and Reminders

1. **Forms 1094 C and 1095 C**. If filing electronically, plan sponsors and ALEs must file the first Forms 1094 C and 1095 C with the IRS no later than March 31, 2017.

Upcoming Retirement Plan Compliance Deadlines and Reminders

1. **Form 1099 R.** The deadline to electronically file Form 1099 R to report the prior year's distributions is March 31, 2017.
2. **Required Minimum Distributions.** Initial RMD payments for eligible participants must begin by April 1, 2017.
3. **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 (*e.*, within 120 days of the end of the plan year). Plans with 100 or fewer participants generally have until the Form 5500 filing deadline to provide the annual funding notice.

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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