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January 2008 Employee Benefits Update

POSTED:

Jan 23, 2008

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SELECT COMPLIANCE DEADLINES

- DOL Form M-1 Filing Deadline is March 3, 2008. The deadline for filing the 2007 M-1 with the Department of Labor (DOL) is March 3, 2008, with an extension to May 2, 2008 available. Form M-1 filers generally include multiple employer welfare arrangements (MEWAs) that provide health benefits and certain entities that claim they are not MEWAs because of the exception for plans maintained under a collective bargaining agreement. The 2007 Form M-1 is substantially identical to the 2006 Form M-1. As in past years, the form's accompanying instructions include self-compliance checklists that are useful for all group health plans, not just Form M-1 filers. The checklists include numerous examples and practical tips to help group health plans comply with HIPAA's portability requirements, the Mental Health Parity Act, the Newborns' and Mothers' Health Protection Act and the Women's Health and Cancer Rights Act.

- **Review Retirement Plan Rollover Notices**. Administrators of tax-qualified retirement plans, 403(b) plans and governmental 457(b) plans must provide an explanation of certain tax and rollover rules to recipients of eligible rollover distributions (a "402(f) rollover notice"). The IRS issued a sample notice in 2002, but has not updated the notice for subsequent legal changes, such as certain changes made by the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) (e.g., requiring automatic rollovers of certain cash-outs effective March 28, 2005) and the Pension Protection Act of 2006 (PPA) (e.g., permitting rollovers to Roth IRAs effective January 1, 2008). Plan sponsors should periodically review their plans' 402(f) rollover notices to confirm the notices accurately describe current law and plan provisions.

- **Analyze Taxation of Group Term Life Benefits.** The taxation of employer-provided group term life insurance can be complex. In general, up to $50,000 of the value of group term life insurance provided by an employer is not taxable to the employee for federal income or FICA tax purposes under a nondiscriminatory plan. (Different tax rules apply to discriminatory plans.) The value of employer-provided group term life insurance in excess of $50,000 is generally included in the employee's income for federal income tax purposes and is subject to FICA tax withholding. The IRS's new cafeteria plan rules simplify how to calculate the value of this coverage effective August 6, 2007

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when premiums are run through a cafeteria plan. Under the new rules, the value of the coverage is determined under a uniform table, regardless of the actual premiums paid under the cafeteria plan. Employers providing group term life benefits, especially employers that utilize a cafeteria plan for providing these benefits, should analyze whether they are complying with the IRS's taxation and withholding rules.

RETIREMENT PLAN DEVELOPMENTS

Modified IRS Guidance on Income Exclusion for Pension Payments for Retired Public Safety Officers' Health Coverage

The IRS issued Notice 2007-99 modifying in part Notice 2007-7 in anticipation of a technical correction to the PPA. Internal Revenue Code (Code) section 402(l) was added by the PPA and provides an income exclusion for certain distributions from governmental pension plans which are used to pay for qualified health insurance premiums of eligible retired public safety officers. The IRS's previous guidance in Notice 2007-7 states that the income exclusion only applies when the health plan receiving the payments is an accident or health insurance plan, not a self-insured health plan. Based on the PPA technical corrections bill pending in Congress, Notice 2007-99 revises the IRS's guidance in Notice 2007-7 to expand the income exclusion to payments made to self-insured health plans.

Comment: The Senate passed the Pension Protection Technical Correction Act of 2007 by unanimous consent on December 19, 2007. As described in Reinhart's September 2007 Employee Benefits Update, the bill would make technical corrections to the PPA. The House is expected to consider the bill after it returns in January 2008.

Proposed IRS Reliance Regulations on Cash Balance and Other Hybrid Defined Benefit Plans

The IRS issued proposed regulations providing guidance on how the requirements of Code sections 411(a)(13) and 411(b)(5) apply to certain hybrid defined benefit plans, such as cash balance plans. The regulations are proposed to be effective for plan years beginning on or after January 1, 2009, and may be relied upon in the meantime. Comments on the proposed regulations must be received by March 27, 2008. Key provisions of the proposed regulations include:

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- An explanation of a safe harbor for age discrimination, including requiring a comparison of the accumulated benefit of each possible plan participant to the accumulated benefit of each other similarly situated, younger individual who is or could be a plan participant;
- Guidance on the conversion protections under Code section 411(b)(5), including a general prohibition on "wear-away" or other interaction between the pre-conversion and post-conversion benefit amounts
- An analysis on the application of the Code's anticutback rules to particular amendments to hybrid defined benefit plans
- Guidance on the PPA's requirement that the interest crediting rate cannot exceed a market rate of return

The IRS also stated that, pending final guidance, plan sponsors should be cautious in adopting interest crediting rates other than those specifically allowed in the proposed regulations. If such a rate was adopted and it did not satisfy the rules contained in final guidance, the IRS warns that the rate would have to be reduced. The proposed regulations do not include any specific rules for pension equity plans (PEPs). The IRS states it is continuing to evaluate comments received on PEPs.

Proposed IRS Reliance Regulations on Measurement of Assets and Liabilities for Defined Benefit Plan Funding Purposes

The IRS issued proposed regulations under Code section 430 providing guidance on the determination of plan assets and benefit liabilities for purposes of the new funding rules applicable to single-employer defined benefit plans. By way of background, a pension plan must generally satisfy the minimum funding requirements of Code section 412 to maintain its tax-qualified status. The PPA makes extensive changes to the minimum funding requirements, generally effective for plan years beginning on or after January 1, 2008. Code section 430, which was added by the PPA, specifies the minimum funding requirements that apply to single-employer defined benefit plans (including multiple employer plans) pursuant to Code section 412. The proposed regulations are the latest guidance from the IRS regarding how to apply the new minimum funding rules. The IRS is expected to issue additional proposed regulations on other portions of

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Code section 430 in the future. The regulations are proposed to be effective for plan years beginning on or after 3 January 1, 2009, and may be relied upon in the meantime. Comments on the proposed regulations must be received by March 31, 2008. Among other provisions, the proposed regulations include the following:

- An explanation of the rules for determining the funding target and target normal cost of a plan that is not in at-risk status, including an analysis of the plan terms taken into account in the determination
- Guidance on the interest rates used to determine present value and make other calculations under Code section 430
- An analysis of the rules and assumptions for determining the funding target and making other computations for plans in at-risk status
- A description of a plan's valuation date and an explanation of the valuation of plan assets, including an analysis of how to treat contributions made after the valuation date for a plan year

IRS Extension of Transitional Guidance and Relief and Proposed Reliance Regulations on Diversification Requirements for Publicly Traded Employer Securities

Extension of Transitional Guidance and Relief. The PPA added Code section 401(a)(35) providing diversification rights with respect to publicly traded employer securities held by a defined contribution plan, generally effective for plan years beginning on or after January 1, 2007. In late 2006, the IRS issued Notice 2006-107 providing transitional guidance and relief on the PPA's diversification requirement. Reinhart's December 2006 Employee Benefits Update describes the transitional guidance and relief provided by Notice 2006-107. In Notice 2008-7, the IRS provides that it plans on issuing proposed regulations under Code section 401(a)(35) and the IRS extends the transitional guidance provided in Notice 2006-107 until regulations under Code section 401(a)(35) go into effect. Notice 2008-7 also provides that the transitional relief applicable to certain "grandfathered" investments provided in Notice 2006-107 for periods before January 1, 2008 continues to apply after 2007 until the regulations go into effect.

Proposed Reliance Regulations. As forecast in Notice 2008-7, the IRS also issued

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proposed regulations regarding the diversification requirements of Code section 401(a)(35). The regulations are proposed to be effective for plan years beginning on or after January 1, 2009. The proposed regulations incorporate much of the guidance provided in Notice 2006-107, and provide some additional clarifications on complying with the PPA's diversification requirements. For example, the proposed regulations provide the following additional guidance:

- The proposed regulations would clarify the types of pooled investment vehicles that are exempt from the diversification requirements
- The proposed regulations would permit a plan to restrict the PPA's otherwise applicable diversification rights for a period of up to 90 days after (1) an initial public offering of employer stock, or (2) the plan becomes an applicable defined contribution plan (for instance, when a stand-alone ESOP first incorporates a 401(k) feature)
- The proposed regulations would permit a plan to impose reasonable restrictions on the timing and number of investment elections a participant can make to invest in employer securities, as long as the restrictions are designed to limit short-term trading in employer securities 4

Comment: Until the IRS's regulations under Code section 401(a)(35) are effective, the guidance provided in Notice 2006-107 will continue to apply. In addition, plans are permitted to rely on the proposed regulations for plan years before the regulations go into effect.

Proposed DOL Regulations on Penalties for Failing to Provide Documents, Including Notice of Automatic Contribution Arrangements

The DOL issued proposed regulations on the applicable civil penalties when a plan administrator fails to comply with certain disclosure requirements created by the PPA. The PPA establishes numerous new disclosure provisions applicable to retirement plan administrators. For example, the PPA requires administrators of automatic contribution arrangements to provide notice of the arrangement to plan participants. The PPA authorizes the DOL to assess a civil penalty of not more than $1,000 per day for violations of the new disclosure requirements. To highlight, the DOL's proposed regulations explain how the maximum penalty amounts are computed, identify the circumstances under which a penalty may be

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assessed, describe procedural rules for service and filing and provide for an administrative hearing process to contest a DOL assessment. The regulations are proposed to be effective 60 days after the publication of final regulations. Comments on the proposed regulations are due by February 19, 2008.

Final PBGC Premium Regulations

The Pension Benefit Guaranty Corporation (PBGC) issued final regulations on premium rates and payments to implement and clarify provisions of the Deficit Reduction Act of 2005 (DRA) and the PPA. The final regulations are effective January 16, 2008 and substantially adopt the proposed regulations, which are discussed in Reinhart's March 2007 Employee Benefits Update. The final regulations (1) reflect the DRA's change to the flat premium rate and clarify its inapplicability to pre-2006 plan years, (2) explain when a plan maintained by a small employer is eligible for a cap on the variable-rate premium and provide guidance on how to calculate the cap, and (3) implement the "termination premium" created by the DRA and the PPA that is payable in connection with certain distress and involuntary plan terminations.

PBGC Transitional Guidance on Reporting Requirements Affected by PPA Funding Changes

The PBGC issued Technical Update 07-2 providing transitional guidance on some of its reporting requirements. As background, the PPA modifies how the variable rate premium (VRP) is determined under ERISA section 4006. The modifications affect the valuation of vested benefits and assets and the determination of unfunded vested benefits (UVBs). These changes apply to plan years beginning after 2007. The PBGC uses some of the same terminology, including VRPs and UVBs, in determining whether a reporting requirement applies. The PBGC intends to amend its reporting regulations to reflect the PPA's funding–related changes. In the meantime, Technical Update 07-2 provides transitional guidance on the application of the funding changes to the PBGC's reporting requirements.

PBGC Guidance on Calculating Lump Sum Distributions for Plans Terminating Before 2008 but Making Final Distributions After 2007

The PBGC issued Technical Update 07-3 providing guidance on how to calculate

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lump sum distributions for a single-employer defined benefit plan that terminates in a standard termination with a termination date prior to the effective date of the PPA's changes to Code section 417(e)(3) and a final distribution date on or after the effective date of the PPA's changes. For plan years beginning after December 31, 2007, the PPA amends Code section 417(e)(3) to change the applicable interest rate and mortality table for calculating lump sum distributions. The PPA's interest rate and mortality table under Code section 417(e)(3) are described in Reinhart's November and December Employee Benefits Updates. 5 Technical Update 07-3 provides that the minimum lump sum value of a participant's accrued benefit is calculated under the applicable interest rate and mortality table in effect under the plan's terms on the plan's termination date. However, the time for determining specific assumptions is based on the actual distribution date. For example, assume a calendar year plan has a termination date of July 1, 2007 and makes its final distribution in February 2008. The plan has a one-month lookback and a one-month stability period. Because the plan terminated before the PPA's changes to Code section 417(e)(3) went into effect, the pre-PPA interest rate and mortality table apply. For the final distribution in February 2008, the applicable interest rate would be the 30-year Treasury rate in effect in January 2008 and the applicable mortality table would be the table in effect on July 1, 2007. PBGC Proposed Regulations on PPA Disclosure Requirements for Terminating Plans The PBGC issued proposed regulations regarding the requirement to provide information to affected parties in a distress or PBGC-initiated plan termination. The PPA amended ERISA's plan termination rules to require the administrator or sponsor of a plan terminating in a distress or PBGC-initiated termination to provide certain information to affected parties upon request. The PPA also requires the PBGC to disclose the administrative record upon request to affected parties in a PBGC-initiated termination. To highlight some key points, the proposed regulations specify the requirements which an affected party's request for information must satisfy and generally allow 15 business days for providing the requested information. In addition, for distress terminations, the PBGC proposes to require disclosure of the Form 600 as well as any additional information submitted to the PBGC in connection with the termination. The regulations are proposed to be applicable to terminations initiated on or after August 17, 2006, but only to requests for information made on or after the effective date of the final regulations. Comments on the proposed regulations must be submitted by February 4, 2008.

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Retirees Not Entitled to Additional Benefits Promised in Oral Misrepresentations

The Seventh Circuit Court of Appeals ruled that two retirees are not entitled to additional pension and "change-in-control" benefits allegedly promised to them by their former employer because the oral misrepresentations were innocent and could not trump the unambiguous written plan documents. Kannapien v. Quaker Oats Co., 2007 WL 3355718 (7th Cir. 2007). From a litigation-avoidance perspective, this case underscores the importance of providing accurate written and oral employee benefit communications. As demonstrated by this case, it is also crucial to maintain current and unambiguous plan documents.

The plaintiffs began working for Golden Grain Company (Golden Grain) in 1977 and 1980, respectively. Quaker Oats (Quaker) acquired Golden Grain in 1986, and the plaintiffs began participating in Quaker's pension plan (the Plan). The Plan provides that its benefits are calculated based on an employee's "credited service," and that credited service does not include any time before the employee became a Plan participant. The Plan also provides additional monthly change-in-control benefits to employees involuntarily terminated within two years of a corporate merger.

In 2001, Quaker merged with a subsidiary of PepsiCo, and soon after Quaker implemented an early retirement incentive program. Under the program, early retirees would receive their standard Plan benefits as well as change-in-control benefits. A Quaker representative told the plaintiffs that the benefits would be calculated based on their total years of service. The plaintiffs accepted the early retirement package. In 2004, the plaintiffs received Plan statements and learned that their Plan benefits were being calculated based on their credited service rather than their total years of service. The plaintiffs sued alleging that Quaker should be estopped from denying them benefits and that Quaker breached its ERISA fiduciary duties. The Seventh Circuit upheld the district court and dismissed the plaintiffs' claims. The court noted that the plaintiffs did not meet the elements for estoppel 6 because the Quaker representative's misrepresentations were innocent mistakes and not knowing misrepresentations. Also, the court noted that these innocent oral misrepresentations could not trump the plan's unambiguous written terms. Finally, the court concluded that the Quaker representative who made the misrepresentations was not an ERISA fiduciary because he did not have any discretion over the Plan's administration.

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HEALTH AND WELFARE PLAN DEVELOPMENTS

Updated IRS Forms for Health Savings Accounts

The IRS updated Forms 5305-B (Health Savings Trust Account) and 5305-C (Health Savings Custodial Account) that trustees and custodians of health savings accounts (HSAs) may use to allow individuals to establish HSAs. The IRS originally issued these HSA forms in 2004. The updated forms reflect the HSA changes that have been made in the last few years, such as providing for the acceptance of qualified HSA distributions from health reimbursement accounts (HRAs) or flexible spending accounts (FSAs). HSA trustees and custodians are not required to use the IRS's forms to establish HSAs. However, the IRS's forms may be useful in preparing or updating HSA documents.

The IRS also released the 2007 version of Form 8889 and its corresponding instructions. HSA account holders must file Form 8889 with their Form 1040 to (1) report any HSA contributions, (2) figure an HSA deduction, (3) report any HSA distributions and (4) figure any amounts includible in income and any additional taxed owed due to being an ineligible individual for HSA purposes. The IRS revised the 2007 version of Form 8889 and its related instructions to reflect changes made by the Tax Relief and Health Care Act of 2006 (TRHCA) to the rules governing HSAs, such as allowing qualified HSA distributions.

IRS Guidance on Code Section 213(d) "Medical Care"

The IRS issued Revenue Ruling 2007-72 explaining that the Code section 213(d) definition of "medical care" includes amounts paid for certain diagnostic procedures and devices even if the individual incurring the expense does not have symptoms of an illness. Code section 213(d) provides that "medical care" includes amounts paid for the diagnosis, cure, mitigation, treatment or prevention of disease, or for the purpose of affecting any bodily structure or function. Tax-free reimbursements under HSAs, FSAs and HRAs are limited by law to reimbursements of Code section 213(d) medical care expenses.

The IRS's guidance addresses three types of expenses in the context of an individual who has no symptoms of illness: (1) an annual physical exam (including doctor's services and lab tests); (2) a full-body electronic scan, obtained without a doctor's recommendation, that examines the internal organs to identify disease

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or other abnormalities and does not serve a non-medical function; and (3) a pregnancy test kit. The ruling notes that each of these expenses is diagnostic and falls under the Code section 213(d) definition of "medical care." For ease of administration and other reasons, many FSAs and HRAs are designed to reimburse participants for "medical care" that is much more narrowly defined than the Code section 213(d) definition. Nonetheless, sponsors of FSAs and HRAs should consider how this guidance affects reimbursements and, if necessary, should notify participants of expanded coverage.

IRS Guidance Regarding Deduction of Health Insurance Premiums for 2% S Corporation Shareholders

The IRS issued Notice 2008-1 providing guidance on when a 2% shareholder in an S corporation is entitled to a tax deduction for health insurance premiums that are paid or reimbursed by the S corporation and included in the shareholder's gross income. Code section 106 provides an exclusion from an employee's gross income for employer-provided health plan coverage. For this purpose, 2% shareholders 7 of an S corporation are treated as partners, and not as employees. Thus, health insurance premiums that an S corporation pays or furnishes on behalf of a 2% shareholder are generally includible in the shareholder's gross income for federal income tax purposes. However, a 2% shareholder of an S corporation is entitled to a deduction for premiums paid for medical care if certain requirements are satisfied, such as a requirement that the plan providing the medical care be established by the S corporation. Notice 2008-1 provides guidance on when a plan providing medical care is established by an S corporation and explains the necessary reporting requirements applicable to the deduction. Notice 2008-1 also explains how a 2% S corporation shareholder may file an amended tax return to claim a deduction for a prior tax year.

DOL Guidance on Supplemental Health Insurance Coverage Exception to HIPAA

The DOL issued Field Assistance Bulletin (FAB) 2007-04 in conjunction with the IRS and the Department of Health and Human Services (HHS) to provide guidance on when supplemental health insurance coverage is deemed to be excepted from HIPAA's health reform provisions, such as HIPAA's portability and nondiscrimination requirements. HIPAA's health reform provisions generally

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apply to group health plans, but not to certain excepted benefits, including supplemental excepted benefits. Supplemental excepted benefits are benefits provided under a separate policy, certificate or contract of insurance and are either Medicare or TRICARE supplemental health insurance or similar supplemental coverage provided under a group health plan.

According to the DOL, there is a concern regarding whether all of the coverage being marketed as similar supplemental coverage actually qualifies as such coverage. FAB 2007-04 establishes an enforcement safe harbor under which supplemental health insurance will be deemed excepted from HIPAA. The DOL warns that similar supplemental coverage that does not satisfy the safe harbor may be subject to DOL enforcement action. To fall within the safe harbor, a policy, certificate or contract of insurance must be (1) independent of primary coverage; (2) supplemental for gaps in primary coverage; (3) supplemental in value of coverage; and (4) similar to Medicare supplemental coverage in that the coverage may not provide different eligibility rules, benefits or premiums based on a health factor of the participant and/or dependent. FAB 2007-04 provides rules for satisfying each prong of the safe harbor. Employers using the HIPAA exception for similar supplemental coverage should carefully review the coverage to determine if it falls within the safe harbor.

Final EEOC Retiree Health Rule

The Equal Employment Opportunity Commission (EEOC) issued its long-awaited final rule allowing employers that provide retiree health benefits to continue the practice of coordinating those benefits with Medicare (or comparable state health benefits) without violating the Age Discrimination in Employment Act (ADEA). The final rule became effective December 26, 2007. The EEOC proposed the rule in response to the Third Circuit's controversial holding in Erie County Retiree Association v. County of Erie, 220 F.3d 193 (3rd Cir. 2000). In this case, the court held that employer-sponsored retiree health benefits are subject to the ADEA and that reducing benefits due to Medicare eligibility violates the ADEA unless the equal benefits/equal cost rules are satisfied. According to the EEOC, under the Erie County decision, most retiree health plans would violate the ADEA. If forced to comply with the Erie County holding, many labor organizations, employers and state and local governments indicated to the EEOC that they would reduce or eliminate their retiree health programs. According to the EEOC, it issued the rule to ensure that the ADEA does not impede employers' (and other plan sponsors') ability to provide retiree health benefits. 8

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As reported in Reinhart's July 2007 Employee Benefits Update, the AARP sued the EEOC to prevent it from issuing the final retiree health rule. The Third Circuit rejected the AARP's challenge and allowed for the publication of this final rule. However, some uncertainty about the validity of the final rule remains because the AARP recently filed a request for review with the U.S. Supreme Court.

OTHER DEVELOPMENTS

Limited IRS 409A Correction Program

The IRS issued Notice 2007-100 (the Notice) providing taxpayers with a limited correction program for unintentional operational noncompliance with the requirements of Code section 409A. The Notice also requests comments on a more comprehensive correction program. Comments must be submitted by March 3, 2008. As background, Code section 409A provides that, unless a nonqualified deferred compensation plan satisfies certain requirements, all amounts deferred under the plan for all tax years are currently includible in income to the extent not subject to a substantial risk of forfeiture and not previously taxed, along with interest and a 20% penalty. Thus, the financial consequences of Code section 409A noncompliance can be very severe.

The IRS's limited 409A correction program provides that, if the program's stringent requirements are met: (1) certain unintentional operational failures corrected during the same tax year will not result in violations of Code section 409A; and (2) certain unintentional operational failures that occur in tax years before 2010 and involve only limited amounts may be corrected within two years, and only the amount involved in the failure will be subject to adverse tax treatment under Code section 409A. The following paragraphs highlight some main aspects of the correction program.

Basic Requirements. To be eligible for the IRS's 409A correction program, the error must be an unintentional failure to comply with Code section 409A in operation. The correction program does not provide relief for plan terms that fail to meet the requirements of Code section 409A or for any intentional failures to comply with Code section 409A. Other eligibility requirements apply to this correction program, such as the reporting requirements described below.

Types of Noncompliance Eligible for Correction. The Notice describes the specific types of unintentional operational failures that may be corrected under the 409A correction program and details the related requirements for each type

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of failure.

Reporting Requirements. The 409A correction program has stringent reporting requirements. For example, the employer must provide a statement with its federal tax return identifying each employee involved and the amount involved, describing the error and correction and certifying that the requirements of the IRS's correction program have been satisfied. The employer must also generally provide each involved employee with a copy of the statement. For errors not corrected within the same tax year, the employee must attach a copy of the statement to his or her federal tax return.

DOL Proposed Regulations on New Disclosure Requirements for Plan Service Providers and Corresponding Proposed Class Exemption

The DOL issued proposed regulations under ERISA section 408(b)(2) requiring certain service providers that contract with health or retirement plan fiduciaries to provide the fiduciaries with comprehensive written disclosures regarding compensation and any potential conflicts of interest. The regulations are proposed to be effective 90 days after publication of the final rules. Comments on the proposed regulations must be received by February 11, 2008. By way of background, ERISA section 408(b)(2) provides relief from ERISA's prohibited transaction rules for service contracts or arrangements between a plan 9 and a party in interest (e.g., a service provider) if the contract or arrangement is reasonable, the services are necessary for the establishment or operation of the plan and no more than reasonable compensation is paid for the services. The proposed regulations would amend the existing regulations under ERISA section 408(b)(2) to clarify the meaning of a reasonable contract or arrangement. According to the DOL, the cost of complying with the new regulations will generally fall on the service providers that will need to create and provide additional disclosures. The following paragraphs highlight some key provisions of the proposed regulations:

Service Providers Subject to New Disclosures. The proposed regulations identify three categories of service providers subject to the new disclosure requirements: (1) service providers acting as fiduciaries under ERISA or the Investment Advisers Act of 1940; (2) service providers performing banking, consulting, insurance, investment advisory, investment management, recordkeeping, securities or other investment brokerage or third party

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administration services, regardless of the type of compensation or fees received; and (3) service providers receiving indirect compensation in connection with accounting, actuarial, appraisal, auditing, legal or valuation services.

Disclosure of Compensation and Services. The proposed regulations provide that the contract must require the service provider to identify in writing all services to be performed and all compensation or fees that will be received either directly from the plan or indirectly from parties other than the plan or plan sponsor.

Conflicts of Interest. The proposed regulations also require service providers to disclose information about relationships or interests that may raise conflicts of interest. The regulations require a number of specific disclosures regarding conflicts of interest, including a disclosure of any compensation the service provider may receive that it can affect without prior approval by an independent fiduciary. Ongoing Disclosure Obligations. The proposed regulations require service providers to disclose within 30 days any material changes to the required disclosures and disclose all information requested by the plan fiduciary or administrator to comply with ERISA's reporting requirements.

The DOL also proposed a class exemption that would provide relief to plan fiduciaries under certain circumstances from the prohibited transaction rules when a service provider fails to comply with the disclosure requirements. Among other requirements, the relief only applies if the plan fiduciary did not know, or have reason to know, that the service provider failed or would fail to comply with its disclosure obligations.

IRS Waiver of ISO and ESPP Reporting Obligation for 2007 Stock Transfers

The IRS issued Notice 2008-8 waiving the obligation to file a return with the IRS for transfers of stock pursuant to the exercise of an incentive stock option (ISO) and certain stock transfers under employee stock purchase plans (ESPPs), effective for post-2006 stock transfers. Code section 6039 requires companies to furnish a written statement to each employee who exercised an ISO or who sold or otherwise transferred shares acquired under an ESPP. This statement is due by January 31 of the year following the year for which the statement is required. The Tax Relief and Health Care Act of 2006 (TRHCA) amended Code section 6039 to require companies to file an information return with the IRS in addition to

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providing employees with a written statement, effective for stock transfers occurring after December 31, 2006. In Notice 2008-8, the IRS states that it intends to issue regulations under Code section 6039 in the future. Because the regulations have not yet been issued, the IRS waives the obligation to make an information return for 2007 stock transfers governed by Code section 6039, and provides that companies should continue to provide employees with a written statement. 10

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