June 2013 Employee Benefits Update

SELECT COMPLIANCE DEADLINES AND REMINDERS

Plan administrators generally have seven months after the end of a plan year to file Form 5500. For plan years ending December 31, 2012, the deadline for filing Form 5500 is July 31, 2013. Plan sponsors who extended their corporate federal income tax return deadline can receive an automatic extension until September 16, 2013 if certain criteria are satisfied. Otherwise, plan administrators can apply for a deadline extension until October 15, 2013 by filing Form 5558 on or before July 31, 2013 (the plan's regular filing deadline).

2012 Form 8955-SSA and Individual Statement Deadline

Form 8955-SSA (Annual Registration Statement Identifying Separated Participants With Deferred Vested Benefits) is also due on the date the 2012 Form 5500 is due. The Form 8955-SSA is eligible for the same extensions as the Form 5500, so for calendar year plans, plan administrators can also apply for an extension until October 15, 2013 by filing Form 5558 on or before July 31, 2013. Plan administrators must also provide the individual statements to those separated participants identified on the Form 8955-SSA prior to the deadline for filing the Form 8955-SSA.

Annual Benefit Statement for Defined Contribution Plans With Plan-Directed Investments

Administrators of defined contribution plans that do not allow participant investment direction must provide an annual benefit statement to participants and beneficiaries by the date the Form 5500 is filed. Thus, the annual benefit statement must be sent by July 31, 2013 unless a Form 5500 extension applies.

Reminder: FBAR Filing for Certain Foreign Investments

U.S. persons who have a financial interest in, or signature or other authority over, foreign financial accounts are generally required to report on the Treasury Department Form TD F 90 22.1 (the FBAR) by June 30 of each year. While foreign hedge funds and private equity funds are not required to be reported on the FBAR, many other accounts in foreign jurisdictions might. Plan sponsors should consult with tax and legal counsel to determine if any FBAR filing is required.

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Reminder: Summary of Description of Material Modifications for Calendar-Year Plans

Plan administrators of employee pension and welfare benefit plans must provide a summary description of any material modifications (SMM) to the plan and changes in the summary plan description (SPD) to each participant covered under the plan and to each beneficiary receiving benefits under the plan. Administrators must provide this summary no later than 210 days after the close of the plan year in which the modification or change was adopted, which is July 29, 2013 for calendar-year plans.

In addition, please note that group health plan sponsors that make a material modifications to plan terms or coverage that is not reflected in the most recently provided Summary of Benefits and Coverage (SBC) must provide notice of the modification 60 days in advance of the effective date of the change. No advance notice is required for changes to the SBC that are effective in conjunction with benefit renewal. Plan sponsors that timely comply with the SBC 60-day advance notice requirement do not have to also send an SMM summarizing the changes disclosed in the 60-day advance notice.

RETIREMENT PLAN DEVELOPMENTS

Department of Labor (DOL) Issues Advance Notice of Proposed Rulemaking on Illustration of Lifetime Benefits

The DOL's Employee Benefits Security Administration (EBSA) recently released an advance notice of proposed rulemaking focusing on the addition of a lifetime income illustration to the required content of the pension benefit statement provided to participants in defined contribution retirement plans (including 401(k) and 403(b) plans). Section 105 of ERISA requires administrators of defined contribution plans to provide periodic pension benefit statements. Benefit statements must be furnished at least annually, unless the plan is a participant-directed plan, in which case benefit statements must be furnished at least quarterly. Benefit statements must show the participant's total benefits accrued. EBSA's proposal would require plan sponsors to include additional information in the participants' benefit statements:

- The participant's current account balance and an estimated lifetime income stream of payments attributable to that balance based upon the expected mortality of the participant. If the participant has a spouse, the lifetime income stream would be based upon the joint lives of the participant and spouse;

- For participants who have not yet reached normal retirement age, a projection of the participant's account balance at normal retirement age based upon certain assumptions and estimated lifetime income; and
- An explanation of the assumptions behind the lifetime income stream illustrations.

The DOL has posted a "Lifetime Income Calculator" on its website that allows an individual to estimate his/her monthly income stream by inserting his/her projected retirement age, current account balance, current annual contribution amount and the number of years until expected retirement.

DOL Issues Proposed Amendment to Prohibited Transaction Class Exemption (PTE) 80-26

The DOL recently issued a proposed amendment to PTE 80-26, which permits interest-free loans from parties in interest to employee benefit plans. The proposed amendment appears to primarily impact individual retirement accounts (IRA). The changes do not seem to implicate employer-sponsored plans that use the exemption for the purpose of providing liquidity to the plan.

The DOL is proposing a temporary exemption that would grant relief to retirement accounts involved in a security agreement to guarantee payment to a financial organization if investment losses occur. Such an arrangement can arise, for example, when there is an agreement to transfer assets from an IRA to a general brokerage account if the brokerage account contains insufficient assets to cover investment losses. The DOL clarifies that these arrangements are prohibited but provides temporary relief to allow the agreements to be amended. Following the amendments, the security agreements cannot contain provisions that allow transferring assets between nonqualified investment accounts and IRAs or employee benefit plan accounts.

Seventh Circuit Reaffirms Position in "Stock Drop" Lawsuit

In a recent case, *White v. Marshall & Ilsley Corp.*, the U.S. Court of Appeals for the Seventh Circuit concluded that plan fiduciaries who continued to allow investment in employer stock did not violate their fiduciary duties. The plaintiff in White alleged that Marshall & Ilsley Corp. (M&I) expanded its business to include risky loans outside its expertise, which led to a 54% drop in stock price when analysts repeatedly downgraded M&I bonds and stock. The plaintiff filed a putative class action alleging plan fiduciaries violated their duty of prudence by continuing to offer the M&I stock in the plan despite the sharp decline in the value of the stock.

The Seventh Circuit concluded that a finding in favor of the plaintiffs would require fiduciaries to violate the plan's governing documents, which required that fiduciaries continue to offer M&I stock in the plan "no matter how dire" the circumstances. Further, the court stated that the plaintiff's theories would seem to require the plan fiduciary to either outsmart the stock market or use inside information to benefit employees, which would violate federal securities laws. The court affirmed the lower court's dismissal of the participant's claims and held that the plan fiduciaries had not violated ERISA by continuing to offer M&I stock as an investment option when the stock experienced a 54% decline in value.

HEALTH AND WELFARE PLAN DEVELOPMENTS

DOL Issues Model Exchange Notices

Background

The ACA added section 18B to the Fair Labor Standards Act (FLSA), which requires certain employers to provide a notice (an Exchange Notice) to each employee at the time of hire that includes:

- Information about the existence of the exchanges, a description of the services provided by the exchanges and the manner in which the employee may contact the exchange;
- Information about premium tax credit availability of the employer's coverage is not statutorily sufficient; and
- A caution that if an employee purchases coverage through the exchange, the employee may lose the employer contribution to the cost of coverage and that contribution may be excludable from taxes.

Temporary Guidance

The Exchange Notice requirement applies to all employers to which the FLSA applies. The FLSA applies to employers that employ one or more employees who are engaged in interstate commerce. For most employers, a $500,000 annual dollar volume of business test applies. The FLSA also applies to hospitals and institutions primarily engaged in the care of the sick, aged, mentally ill or disabled who reside on premise; schools and institutions of higher education; and federal, state and local government agencies.

Employers must provide the Exchange Notice to each new employee at the time of hire beginning October 1, 2013. The DOL will consider an Exchange Notice to be provided "at the time of hiring" if it is provided within 14 days of the

employee's start date. Employers must also provide the Exchange Notice to all current employees no later than October 1, 2013. Employers subject to the rule must provide an Exchange Notice to each employee, regardless of plan enrollment status or part-time or full-time employment status. The Exchange Notice must be provided to employees only - employers are not required to provide a separate notice to dependents who are not employees. The Exchange Notice must be provided automatically, free of charge and in a manner calculated to be understood by the average employee. Employers who meet the DOL electronic notice requirements may provide the Exchange Notice electronically, otherwise the Exchange Notice must be in writing. Please note that it is not sufficient for employers to merely post the Exchange Notice.

Employers are not required to use the model notices, and may modify the model notices, provided the notices contain all the required content. The model notices also include information employees will use to apply for coverage on the exchanges. The model notices highlight the exchange coverage and the tax credits and downplay the benefits of the employer coverage. Employers should carefully review the Exchange Notice to ensure that it contains an appropriate message.

This guidance will remain in effect until future regulations or guidance is issued. Any future guidance will allow for adequate time to comply with any additional or modified requirements.

DOL Issues Model COBRA Election Notice Updated for ACA

The DOL issued a revised model COBRA election notice explaining that alternative health coverage may be available through the health insurance exchanges that will be created as a component of the Affordable Care Act (ACA). The model notice advises participants they may buy coverage through the exchanges once they are set up. The model notice also informs participants that they may be eligible for the premium tax credit if they purchase coverage through an exchange.

The model notice is available on the DOL's website.

REINHART COMMENT: The model notice is worded prospectively such that it may be used immediately though the exchanges are not yet operational. However, the notice will likely be further updated once the exchanges are functioning.

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