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FYI® Roundup
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Retirement Plans — Summer Recap

This *FYI Roundup* recaps defined benefit and defined contribution retirement plan developments since our last *Roundup* in January. Highlights include agency efforts to improve defined contribution plan performance for individuals with better disclosure and through rollover, disability, and longevity features. We also saw a flurry of activity about foreign account tax withholding and reporting, as well as PBGC changes.

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General Interest

Our roundup of general interest items includes updates on implementing the Supreme Court Windsor decision, rollover enhancements, foreign plan tax filings, and some fiduciary issues.

Limited Retroactivity for Retirement Plans under IRS Windsor Guidance

The IRS released two pieces of guidance on how to apply the Supreme Court's decision on same-sex marriage to qualified retirement plans. In Notice 2014-19, IRS said there is no penalty for non-recognition of same-sex marriages prior to June 26, 2013 or for non-recognition of same-sex marriages in states that only recognized marriages in the state of domicile prior to September 16, 2013. The deadline for amending retirement plans with terms that conflict with the decision is generally December 31, 2014. Read more about the notice and amendment requirements in our April 9, 2014 *For Your Information.* In Notice 2014-37 (as reported in our May 16, 2014 *For Your Information),* IRS confirmed that to comply with the *Windsor* decision and ensure that spousal benefits are correctly applied, safe-harbor 401(k) plans may adopt amendments mid-year despite the general ban on mid-year amendments by those plans.

Agencies Pave Way for More Rollovers

When retirement plan participants terminate employment and take a distribution, they typically either keep the money or roll it over to an IRA. Rolling funds over to a new employer's plan is also an option, but one that many participants avoid as they find it frustrating and time consuming. Depending on the option selected, the end result may be savings in multiple locations or reduced savings due to cashouts. The IRS, in an attempt to prevent savings "leakage" and help individuals consolidate assets (which may reduce the fees associated with those assets), has provided a safe harbor method for plan administrators to determine whether a rollover contribution is valid. The safe harbor expands, and does not replace, the previously issued regulatory guidance and is intended to make it easier

for participants to roll over distributions to subsequent employers. Our April 7, 2014 *For Your Information* reviews this new guidance.

Our April 3, 2014 *For Your Information* covers PBGC's effort to encourage plan sponsors to offer lifetime annuity benefits using funds accumulated in defined contribution plans and rolled over to defined benefit plans. Proposed changes to PBGC's single-employer regulations on benefit guarantees would increase an individual's maximum guarantee by the amount of pension generated by rollover contributions to a plan.

Court Addresses Excessive Recordkeeping Fees in *Tussey v. ABB*

In a ruling that was a mixed bag for plan fiduciaries, the Eighth Circuit upheld the $13.4 million judgment against the ABB, Inc. fiduciaries based on excessive recordkeeping fees. However, it vacated the district court's award of an additional $21.8 million related to investment mapping and reversed its $1.7 million decision against Fidelity (the plan's trustee and recordkeeper) for the manner in which plan-related float income was allocated. The court remanded the mapping issue back to the district court and instructed it to review that claim using a deferential standard of review. The Supreme Court may ultimately weigh in on all or some of these issues. Our April 29, 2014 *For Your Information* provides the details and explores the ramifications.

Compliance—Always Compliance

There's no escaping the need to stay up-to-date with filing chores and data management. In our June 16, 2014 *For Your Information* we cover two IRS releases on relief from penalties for late filing of the Form 5500 and Form 8955-SSA. For retirement plans subject to ERISA, the new guidance requires the Form 8955-SSA to be submitted to the IRS in addition to compliance with the DOL-sponsored Delinquent Filer Voluntary Compliance program. For plans not eligible to use the DOL correction program, a pilot program is established providing similar relief. Audit activity has been generated based on information found in the Form 5500; therefore, accurate reporting is critical.

Audit activity is also focused on plans subject to 409A with the IRS selecting 50 plans for a limited scope audit initiative. The review will focus on initial deferral elections, including time and form of payment, subsequent elections to further defer receipt of deferred compensation and plan distributions. The audit and strategies for self-audit are discussed in the May 27, 2014 *For Your Information*.

If your plan allows cashing out former employees, fewer participants will need to be reported on the Form 8955-SSA. But you have to find them to extend distribution offers. Some plans used a letter forwarding service offered by the US Social Security Administration, but as we note in our April 21, 2014 *For Your Information,* that service is a thing of the past.

Foreign Account Tax Compliance Act for Non-US Funded Benefit Programs—and More!

Multinational employers that sponsor non-US retirement plans are subject to FATCA withholding and reporting deadlines. FATCA, which requires foreign financial institutions to report certain information to the IRS or face a 30% withholding tax on certain US source income, defines the term "foreign financial institution" broadly to include funded non-US employee benefit programs, including retirement plans. To avoid the hefty withholding tax on a plan's US-based investment income, a non-US retirement plan must register with the IRS and comply with certain reporting requirements about its US taxpayer participants — unless the plan (1) qualifies for a regulatory exception or exemption and/or (2) is covered by an intergovernmental agreement (IGA) between the US and its home country. Multinational employers can learn about FATCA compliance in our March 4, 2014 *FYI In-depth* and then

examine their non-US retirement plans, on a country-by-country basis, to determine whether an exception, exemption, and/or IGA applies.

Our April 17, 2014 *For Your Information* supplements the *In-depth* coverage with an update on additional guidance in Announcement 2014-17 and the release of the final Form W-8BEN-E, which non-US retirement plans that qualify for an exemption must provide to their US withholding agents to establish exempt status and avoid withholding. Following on from that, our July 9, 2014 *For Your Information* covered the release of W-8BEN-E instructions and common FATCA compliance issues for employee benefit plans.

In addition to FATCA, retirement plans have compliance obligations under two other regulatory schemes that address foreign assets held by retirement plans: the Report of Foreign Bank and Financial Accounts (FBAR), and regulations issued by Treasury's Office of Foreign Assets Control (OFAC). FATCA requirements apply to non-US plans sponsored by multinational employers, whereas FBAR and OFAC requirements address US retirement plan compliance. Brush up on all three distinct foreign compliance regimes with our June 12, 2014 *For Your Information* on "foreign asset-related compliance requirements for retirement plans".

Substantial Risk of Forfeiture Regulations for Compensation, FICA, and Pension Funding Rules

The IRS finalized regulatory changes under Code section 83 with few changes from what was proposed in 2012. The final regulations clarify the definition of a "substantial risk of forfeiture" in connection with compensatory transfers of property (e.g., restricted stock) by employers to their employees (and to other service providers, such as outside corporate directors and independent contractors). The change carries over to other tax rules such as (1) the acceleration of minimum funding contributions under Code section 430, (2) FICA taxes on deferred compensation under Code section 3121(v), and (3) change-in-control "golden parachutes" under Code section 280G. Read more in our March 10, 2014 *For Your Information.*

Puerto Rico Treasury Releases 2014 Key Benefit Plan Limits

Puerto Rico's Secretary of Treasury issued Circular Letter 14-01 announcing the Puerto Rico qualified retirement plan limits for 2014. See our February 18, 2014 *For Your Information* for a summary of the updated limits and key differences from the US IRC.

Defined Benefit Plans

Recent developments for defined benefit plans include thoughts on de-risking, funding changes and PBGC regulatory guidance.

Risk—and De-risk, or Fund

Improvements in defined benefit plan funding status are positioning plan sponsors and fiduciaries to take action aimed at reducing future volatility in plan costs by moving liabilities out of the plan and aligning investment allocations with plan liabilities. Financial, compliance, and accounting considerations all play into the decision of the course to pursue, the segment of the population to be involved, and the time for action. Our April 23, 2014 *For Your Information* presents our thoughts on the de-risking decision.

Our February 14, 2014 *For Your Information* on mortality improvements and volatile investment returns discusses proposed updated mortality tables under development by the Society of Actuaries RPEC (Retirement Plans Experience Committee) and the true effect of depressed interest costs. Earlier, in January, FASB had taken a stand

on pressure to change accounting measurements to use a long-term average discount rate similar to what was provided in MAP-21, which we discuss in our January 30, 2014 *For Your Information.*

FASB principles aside, minimum funding rules were in for more changes this spring with Congress sealing the deal on revised funding rules for "eligible charity plans" and for "cooperative and small employer charity" plans. The Cooperative and Small Employer Charity Pension Flexibility Act passed by the House and Senate in March was signed into law by President Barack Obama on April 7 and allows these plans access to PPA funding rules that had long been coveted, as discussed in our April 9, 2014 *For Your Information.*

Prolific PBGC

In our January 8, 2014 *For Your Information* we reported that PBGC has told at least one defined benefit plan sponsor that its separate Puerto Rican plan and trust for island operations is not eligible for PBGC insurance coverage. This change in status was informally affirmed for Puerto Rico (and Guam) plans by PBGC in a "Blue Book" response at the March 2014 Enrolled Actuaries Meeting (see question #1).

For their covered plans, as part of an effort to reduce administrative burdens associated with the payment of PBGC premiums, the agency adopted changes proposed last year, effective for the 2014 premium payment year. The final rule simplifies premium due dates by going back to a single annual filing, coordinates final payments for terminating plans with the closing-out process, reduces premiums for new and newly covered plans, and makes other technical and clarifying changes to its rules. Read all about it in our March 13, 2014 *For Your Information.*

Next, final PBGC regulations on the shutdown and other "unpredictable contingent event benefits" that are eligible for PBGC's guarantees when a single-employer plan undergoes a distress or involuntary termination impose tight limits. The regulations implement a PPA provision, effective for events that occur after July 26, 2005, that sets the date the event triggering the benefit occurs as the earliest date the phase-in period can begin for these types of benefits. Plan administrators have a responsibility to reflect this change when paying benefits beginning on a plan's proposed termination date. The final rules are covered in our May 12, 2014 *For Your Information.*

On May 28, 2014, PBGC finalized changes to multiemployer regulations aimed at eliminating unnecessary administrative costs that reduce multiemployer plan assets. Specifically, the final regulation (1) allows valuations every three years, instead of annually, for plans that are terminated by mass withdrawal but are not insolvent, where the actuarial value of the plan's nonforfeitable benefits is $25 million or less; (2) eliminates the requirement to provide annual updates to a terminated plan's notice of insolvency; and (3) shortens the notice period for multiemployer plan mergers that do not involve compliance determinations from 120 to 45 days. Reference our May 29, 2014 *For Your Information.*

And last, but importantly, to address ongoing uncertainty about whether and how PBGC enforces the ERISA protections triggered when a plan sponsor encounters a cessation of operations affecting more than 20% of plan participants, PBGC will hold off "ERISA section 4062(e)" enforcement efforts on open and new cases. However, PBGC still wants companies to report new events during the moratorium period. PBGC's moratorium is covered in our July 9, 2014 *FYI Alert.*

Defined Contribution Plans

Our roundup of defined contribution plan items covers new tools from the IRS as well as disclosure developments from the DOL and the Supreme Court's decision for plans with employer stock.

IRS Guidance on Tools for Addressing DC Plan Risk

The shift of risk to participants resulting from the use of defined contribution plans goes beyond the risk of investment losses. Two new regulations from IRS aim to pave the way for tools to address longevity risk and disability risk.

Effective July 2, 2014, deferred annuities that meet the criteria for a qualifying longevity annuity contract can be excluded from participant account balances when calculating required minimum distributions. This will allow retirees to purchase a deferred annuity to provide an income stream starting at an advanced age without concerns over cash flow to meet the minimum distribution requirements. The annuity premium cannot be more than the lesser of $125,000 or 25% of the account balance and annuity distributions must start no later than age 85. Special rules apply to death benefits and reporting requirements. Our July 10, 2014 *For Your Information* includes a pair of charts illustrating the variation in payment streams and death benefits possible with the new QLAC option.

In our June 11, 2014 *For Your Information* we cover final IRS regulations that open the door for defined contribution plan disability insurance that funds plan contributions when a participant is disabled. The regulations also clarify the income taxation results when using qualified retirement plans to fund other accident or health benefits. Aside from income exclusions for retiree health benefits funded via Code section 401(h) accounts and for premiums paid on behalf of retired public safety officers, premiums for such benefits are treated as taxable distributions when paid from a retirement plan.

Fiduciary Front

In a closely watched ERISA case, a unanimous Supreme Court struck down the “presumption of prudence” that several lower courts had held protects the fiduciaries of 401(k) plans that offer stock as a plan investment option. This ruling will make it easier for participants to plead their case, as they no longer have to demonstrate that the employer faced “dire” economic circumstances or was on the “brink of collapse.” On the other hand, however, the Court also imposed new pleading standards on participants suing fiduciaries for failing to act in the face of a drop in the publicly traded company stock price. These new standards may help fiduciaries dispose of many so-called stock drop lawsuits at the early stage of litigation. Read all about it in our June 25, 2014 *FYI Alert.*

From the Department of Labor we had two disclosure developments. On March 12, 2014, the DOL issued a proposed amendment to fee disclosure regulations published in 2012. The amendment, if adopted, would require retirement plan service providers to furnish a guide to ERISA plan fiduciaries identifying the location of fees that are required to be disclosed under ERISA 408(b)(2). The purpose of the guide is to facilitate the review of the fee information and assist fiduciaries in identifying and understanding potentially complex disclosures when provided in multiple or lengthy documents. The proposal is discussed in our March 17, 2014 *For Your Information.*

Next, we had the reopening of the comment period on DOL’s 2010 proposed target date fund disclosure rule. Over the past four years, the DOL has coordinated the development of this rule with a related SEC proposed rule on target date fund disclosures. DOL reopened the comment period in response to an SEC advisory committee recommendation that target date fund disclosures include a “glide path” illustration designed to allow investors to measure the risks involved in different target date fund investments. The SEC had already reopened its comment period to provide an opportunity for feedback on the recommendation. Our June 23, 2014 *For Your Information* covers the controversy.

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EPCRS News—Fixing Late Safe-Harbor Notices

One of the requirements to be considered a safe harbor 401(k) plan and avoid the annual nondiscrimination tests is to provide a timely notice to all eligible employees. Failure to provide the notice on a timely basis is a failure to follow the terms of the plan and an operational defect. Until now, there was no guidance from the IRS on how to correct this type of error. The February 24, 2014 edition of the Retirement News for Employers issued by the IRS provides some guidance. It recognizes that late or missed notices can have varying effects on the savings patterns of different employees. Therefore, the correction method must address the impact on each participant. Our March 19, 2014 *For Your Information* reviews the rule and the correction approaches.

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