

FYI® Roundup

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Retirement Plans – 2016 Summer Recap

This *FYI Roundup* recaps recent defined benefit and defined contribution retirement plan developments since our January review. Highlights include DOL's final fiduciary rule, multiemployer plan guidance, changes to the IRS determination letter program, compliance challenges and proposed guidance for nonqualified deferred compensation plans.

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General Interest

Our roundup of general interest items highlights DOL's fiduciary rule, the continuing acceleration of agency audits and increased penalties.

DOL's Final Fiduciary/Conflict of Interest Rule

In the face of resistance from financial sector vendors, plan administrators and plan sponsors, the DOL successfully navigated OMB review and released a final regulation redefining ERISA fiduciary investment advice and setting forth conflict of interest rules. The final guidance includes some changes responsive to plan sponsor critiques of DOL's 2015 proposal. Under specified circumstances, DOL will not consider a plan's use of asset allocation models or interactive investment materials that identify specific plan investment options to be fiduciary investment advice. DOL also confirmed that the definition of fiduciary investment advice excludes many common plan sponsor-employee interactions.

The final rule is not applicable until 2017, and a new presidential administration or courts could modify the final rule before it goes into effect. In the meantime, however, in response to the final rule, it may make sense for plan sponsors to review their investment education material. Investment fiduciaries' attendance at fiduciary training with a focus on investment selection and monitoring duties could also be helpful as the rule's impact becomes clearer under various factual scenarios. Read more about the fiduciary rule in our [April 6, 2016 FYI Alert](#) and [April 22, 2016 For Your Information](#).



Compliance is Key in Face of Audits, Penalty Increases and Complex Court Hurdles

The DOL is now specifically investigating retirement plans to determine whether plan sponsors have timely begun paying vested benefits to retirement-eligible participants. Issues are not limited to retirement plans and have been found in ERISA severance plans as well. Our [March 15, 2016 For Your Information](#) has the details. And our [July 18, 2016 For Your Information](#) reports on DOL's release of new ERISA penalties updated to reflect cost-of-living increases — values to keep in mind when assessing the cost of noncompliance in general. Not to be outdone, IRS has been active with audits of nonqualified deferred compensation plans as we reported in our [February 29, 2016 For Your Information](#). Plan sponsors can avoid criticism by following robust operational policies and procedures.



Robust operational policies and procedures can also short-circuit troubles in trying to correct plan overpayments. Although it remains to be seen whether the ruling will be applied in the context of retirement plan overpayments, a recent decision from the Supreme Court may spell trouble for plans. The Court limited a health plan's ability to recoup the medical expenses it paid on behalf of a participant injured in a car accident before he obtained — and spent — a settlement award in his lawsuit against the drunk driver who hit him. The Court refused the plan's claim for recovery from the participant's general assets, ruling that a plan can seek equitable relief only against specifically identified settlement funds in the participant's possession or traceable items that he purchased with those funds. In light of this decision, plans should act promptly to preserve their reimbursement rights. Read more in our [February 15, 2016 For Your Information](#).

Another development to watch is the proposed overhaul of Form 5500 that is slated for 2019 plan years. Joint IRS, DOL and PBGC proposed changes would significantly increase reporting obligations for employee benefit plans. The changes report on existing compliance requirements, but gathering the information in the manner requested will add some time and effort to this annual chore. Our [August 4, 2016 For Your Information](#) reports on the proposal and suggests using the detailed updated form as a compliance tool to keep your plans in tip-top shape — and hopefully insulate them from negative audit results.

Determination Letter Woes

As expected, IRS has formally eliminated the staggered five-year remedial amendment cycle for individually designed plans, effective January 1, 2017. After that time, it will accept applications for a determination letter only for initial plan qualification, qualification upon plan termination, and in "other circumstances" — which it will consider and announce every year for situations such as significant law changes, new approaches to plan design, and inability to use pre-approved plan documents. IRS will publish an annual Required Amendments List, as well as an annual Operational Compliance List identifying qualification changes effective during a calendar year. Plan sponsors should consider compliance processes to ensure timely amendments and plan operations, given that, going forward, they can rely on an existing determination letter only to the extent a plan provision has not been amended or affected by a change in law. Our [July 8, 2016 For Your Information](#) covers the announcement.

Brexit: What It Is and Its Impact on Retirement Plans

The UK referendum vote in favor of leaving the European Union has had a negative effect on world markets both in terms of equity losses and interest rate declines. Despite some positive upside on the value of bond portfolios, the net effect will likely be a large decline in funded status for underhedged defined benefit plans. The market upheaval

that followed the vote has affected defined contribution plan participants as well. Rebalancing and staying the course will be key. Our [June 28, 2016 For Your Information](#) has the story.

DOL's Final Overtime Rule

In May, the DOL unveiled its widely anticipated overtime rule, expanding overtime eligibility to millions of workers by more than doubling the minimum salary threshold for the so-called "white-collar" exemptions. Employers should assess the financial, operational and organizational impact of the final rule on their workplaces, and that includes analyzing the impact on retirement plans. Will compensation increases affect benefit levels? Will the change disrupt nondiscrimination tests? Our [May 18, 2016 FYI Alert](#) explains the new overtime rule.

Proposed Changes for Nonqualified Deferred Compensation Plans

Even once the IRS issued multiple pieces of additional guidance after finalizing its Section 409A regulations in 2007, questions remained. On June 22, the IRS answered several of these questions in proposed regulations and replaced a provision of previously proposed regulations on the calculation of amounts includable in income under 409A. The IRS simultaneously released proposed regulations on deferred compensation plans of state and local governments and tax-exempt entities under Code Section 457. The Section 457 proposed regulations incorporate certain changes that have been made to Section 457 and the existing regulations since they were finalized in 2003 and align many provisions with 409A. Read our [August 2, 2016 For Your Information](#) for more information on these proposed changes.

Defined Contribution Plans

In addition to the impact of many of the changes described above, two recent developments for defined contribution plans included guidance on Roth taxation from the IRS and on stock-drop cases from the SEC and DOL.

Roth After-Tax Allocation Regulation

Final IRS regulations affirm its previous notice and proposed regulations on the allocation of taxable and non-taxable amounts among distributions from designated Roth accounts to multiple destinations. IRS had provided revised language for the "Special Tax Notice" to reflect this change in 2014. Details are in our [May 19, 2016 For Your Information](#).



SEC and DOL on Stock-Drop Case

The SEC endorses DOL guidelines governing the proper behavior for fiduciaries who manage company stock funds in defined contribution plans and who learn that employer stock is materially overvalued due to an undisclosed alleged fraud. Read more on this topic in our [April 5, 2016 For Your Information](#).

Defined Benefit Plans

In addition to lots of activity on the multiemployer front, defined benefit plans were treated to a reversal on IRS' proposed QSERP restrictions, PBGC finalized its annual financial reporting regulations and issued guidance on penalty rules, and FASB proposed some changes for accounting presentations.

Reversal on QSERP Portion of Proposed Nondiscrimination Regs

In Announcement 2016-16, the IRS withdrew its proposal to apply a higher nondiscrimination test passing threshold to retirement plan formulas that are not based on a “reasonable business classification.” Our [April 14, 2016 FYI Alert](#) announced the news.

Proposed Accounting Changes

The Financial Accounting Standards Board proposed two Accounting Standards Updates that would affect pension and postretirement benefit accounting. The first would change the presentation of the benefit cost, and would allow only the service cost component to be eligible for capitalization. The second change would both add new and remove some current footnote disclosures. Details are in our [January 29, 2016 For Your Information](#).

PBGC Changes to 4010 Annual Financial Reporting

PBGC’s final regulation on ERISA 4010 filings of financial information about plan sponsors and their pension plans revises the waiver for plans with less than \$15 million of unfunded liabilities, adds a smaller plan waiver, and cuts back reporting due to missed contributions and funding waivers. The revisions apply to information years beginning after December 31, 2015 (generally filings due on or after April 17, 2017). Read more on this development in our [March 25, 2016 For Your Information](#).

PBGC Penalties – Up and Down

PBGC has issued regulations increasing certain maximum ERISA penalties as mandated by Congress and the OMB. However, PBGC did not revise its 1995 policy on penalties for failure to provide timely information. Until further changes are announced, it appears the reduced penalties for most violations will continue to apply. Our [May 17, 2016 For Your Information](#) covered this general announcement. Meantime, PBGC had separately proposed cutting in half filing penalties for late payment of annual PBGC premiums and reducing them even further for plan sponsors who have a history of timely payment. More on this cheery news in our [April 28, 2016 For Your Information](#).

Multiemployer Guidance

The agencies continued to churn out guidance on the Multiemployer Pension Reform Act of 2014 (MPRA) relief for struggling multiemployer plans.

The Treasury Department issued final regulations and an updated revenue procedure to address the benefit suspensions available to multiemployer plans in critical and declining status. Details are in our [May 3, 2016 For Your Information](#). Treasury also provided proposed regulations on MPRA benefit suspensions to address the ordering rule to be used when a plan covers participants who had worked for employers that had withdrawn from the plan prior to December 16, 2014, when the law was enacted. The amount of suspension for such participants will be affected by whether their employer had paid withdrawal liability and agreed to set up a “make whole” plan. These rules were finalized essentially unchanged from the rule as proposed in February. Read our [May 4, 2016 For Your Information](#) for word on that final rule.

Alas: Following on the heels of the release of these final rules, we learned that Treasury had denied the Central States Pension Plan’s application to reduce benefits. Our [May 16, 2016 Legislate](#) reported on this activity as well as the reactions and calls for more work by Congress to find a solution in lieu of MPRA.

On the PBGC front, that agency proposed regulations on multiemployer plan mergers to set the stage for approvals of facilitated mergers under MPRA. Under facilitated mergers, PBGC would be able to offer training, technical

assistance, mediation, communication with stakeholders, support with requests to other government agencies and financial assistance. Our [June 7, 2016 For Your Information](#) will bring you up to speed on this development.

Special Interest Areas

Governmental Plans – Normal Retirement Age

IRS proposed regulations on normal retirement age specific to governmental plans would allow for an NRA based on years of service — both instead of, and in conjunction with, age. The proposed rules also set forth safe harbors on NRA that are available only to governmental plans. These provisions address many of the concerns governmental plan sponsors expressed in response to the 2007 NRA regulations. While all governmental plans should review their terms in light of the proposal, it is expected that most would be able to keep their current NRA definition intact under these rules. Details are in our [February 16, 2016 For Your Information](#).

On the accounting front, GASB Statement 82, an amendment of GASB Statements No. 67, No. 68, and No. 73, modifies the presentation of “covered payroll” and “pick-up” contributions. In addition, it clarifies the unacceptability of assumptions that deviate from the requirements of the earlier statements. Read all about it in our [May 4, 2016 For Your Information](#).

Puerto Rico Plans

Puerto Rico revised its annual return filing requirements for retirement plans. Instead of Form 480.7(OE), retirement plan sponsors will now be required to file Form 6042 — either as an attachment to their Puerto Rico income tax return, or as a standalone form if they do not file a Puerto Rico income tax return. Catch up on this development in our [May 19, 2016 For Your Information](#).

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