Agenda

Current Regulatory Issues:
- Restatements required for most qualified DC plans (401(a) and 401(k))
- DOMA – update

On The Horizon:
- 403(b) pre-approved plans
- 408(b)(2) disclosure guide proposal
- Annuity Illustrations in pension benefit statements
- Fiduciary oversight of self-directed brokerage windows
- Uniform fiduciary standard (SEC) and expanded definition of fiduciary (DOL)

Miscellaneous Of Interest:
- Non-binding IRS interpretations regarding loans
- Non-binding IRS interpretations regarding contributions after safe-harbor hardship withdrawal

Case Law:
- Fiduciary considerations
Current Regulatory Issues: Restatements (Qualified DC Plans)

Plan documents must be updated from time-to-time to conform to changes in the federal tax laws made by Congress, or to reflect regulations under the Internal Revenue Service or Department of Labor.

Pre-Approved Plans (Master & Prototype or Volume Submitter plans)
Plan sponsors should have already adopted interim good faith amendments for certain regulatory and legislative changes. In the current restatement period, the plan document will be re-written to incorporate the full text of the language that those interim amendments previously summarized.

- Recently created plans likely do not satisfy the restatement requirement. Plan sponsors should consult with their document provider, as they may likely still need to restate the plan document.

Failure by plan sponsors to complete the restatement during this window could result in plan disqualification leading to unintended tax consequences for both employers and participants.
Current Regulatory Issues: Restatements (Qualified DC Plans)

Interim and Good Faith Amendments
Interim and good faith amendments are required to keep a written plan document current between remedial amendment cycles. For plan sponsors who will restate their plan after December 31, 2014, an interim amendment may be required by the end of the year to comply with IRS guidance on same gender marriage.

- In June 2013, the Supreme Court in United States v. Windsor, invalidated Section 3 of the Defense of Marriage Act (DOMA) which limited marriage to opposite sex couples for purposes of federal law, including the Employee Retirement Income Security Act of 1974 (ERISA). As such, depending on the language of your plan document, an interim amendment may be required by December 31, 2014 to comply with the Windsor decision.

Discretionary Amendments
Plan sponsors may also adopt discretionary amendments. Discretionary amendments must be adopted by the end of the plan year in which the plan amendment is to be effective.
Current Regulatory Issues: DOMA

IRS provides guidance on retroactivity of DOMA decision for qualified retirement plans

The Internal Revenue Service (IRS) recently issued Notice 2014-19 and related answers to FAQs, which give plan sponsors additional guidance on how the Supreme Court's decision in U.S. v. Windsor applies retroactively to qualified retirement plans.

Whether a plan must be amended in light of Windsor and the subsequent IRS guidance depends upon the plan's current language relating to married participants.

- No amendment is required if the plan can be operated in compliance with Windsor and the subsequent IRS guidance without changing its language (the IRS gives the example where the term "spouse," "legally married spouse" or "spouse under federal law" is used in the plan without any distinction between a same-sex spouse and an opposite-sex spouse).

The deadline for the majority of plan sponsors to adopt plan amendments due to Windsor is the later of the normal amendment deadline or December 31, 2014 (for calendar year plans, the December 31, 2014 date will apply).
On The Horizon: Pre-Approved (403(b) Plans)

The IRS postponed the 403(b) document submission deadline for a year from April 30, 2014, to April 30, 2015.

In April 2013, the IRS released Revenue Procedure 2013-22 detailing the available options for obtaining approval on plan documents used for 403(b) plans. The new program is limited to opinion and advisory letters for prototype and volume submitter plans (“pre-approved plans”).

The IRS will not provide determination letter for individually designed 403(b) plans.

- Employers who currently sponsor these plans must restate them onto pre-approved plans if they wish to obtain reliance that the terms of the plan comply with section 403(b) of the Code.

Vendors began submitting prototype and volume submitter plan documents for IRS approval starting June 28, 2013. The submission window will close April 30, 2015.

Employers will not have to adopt pre-approved plans until at least one year after the IRS announces it has ruled on all of the vendor applications that it received during the window (so, no earlier than April 30, 2016).

The IRS expects that future guidance will be issued that requires every pre-approved 403(b) plan to be restated by the plan sponsor every six years to reflect subsequent changes in the law, regulations, revenue rulings, or other IRS guidance. This six-year remedial amendment cycle is modeled after the pre-approved plan program for qualified plans.
On the Horizon: Summary Guide for 408(b)(2) Plan Disclosures

Under the proposal, a guide would be required if a covered service provider’s 408(b)(2) disclosures are contained either in more than one document or in a document in excess of a (to be determined) specified number of pages.

No guide would be required if the disclosures are contained in a “single, concise” document.

Changes to the information provided in the guide would have to be furnished only annually.

• However, guides for plans entering into new service arrangements are required to contain current information. Therefore, CSPs would still need to update the guide on a real-time basis, even if the changes need be communicated for existing arrangements only annually.

The DOL requested commentary on the page length criterion, including on page format and font size and other constraints to prevent manipulation of that criterion.

• The comment deadline ended on June 10. The DOL did not provide a deadline for final action.
On the Horizon: Annuity Illustrations in Pension Benefit Statements:

In May 2013, the U.S. Department of Labor’s Employee Benefits Security Administration (EBSA) published an advance notice of proposed rulemaking focusing on lifetime income illustrations.

Under that proposal, a participant’s pension benefit statement (including his or her 401(k) statement) would show his or her current account balance and an estimated lifetime income stream of payments based on that balance.

In 2014, the DOL is expected to “explore whether, and how, an individual benefit statement should and could present a participant’s accrued benefits in a defined contribution plan (i.e., the individual’s account balance) as a lifetime income stream of payments, in addition to presenting the benefits as an account balance.” Whether the DOL will encourage or mandate the inclusion of this information, and whether these types of projections would increase fiduciary exposure, remains to be seen.

http://www.dol.gov/ebsa/newsroom/fsanprm.html
On the Horizon: Oversight of Self-Directed Brokerage Windows

The DOL is planning to issue a request for information (RFI) regarding fiduciary guidance for plan sponsors offering brokerage windows in defined contribution plans.

It is nearly, if not impossible for an ERISA fiduciary to effectively monitor the performance of the multitude of investment options in a brokerage window. The RFI project is expected to examine whether and/or to what extent guidance on fiduciary requirements and/or regulatory safeguards for self-directed brokerage windows would be appropriate.

The DOL’s Spring 2014 Semiannual Unified Agenda estimated the RFI would be released in May, but it was not.
On the Horizon: Uniform Fiduciary Standard for Brokers and Advisers

A long-anticipated rule imposing a uniform fiduciary standard for brokers and investment advisers was notably absent from the SEC’s regulatory agenda. Dodd-Frank did not require the SEC to adopt a rule - it only required a study and provided the SEC the authority to do so. Earlier this year, SEC Chairman Mary Jo White said instead of proposing a rule in 2014, she would make a “threshold decision” on whether to proceed with a rulemaking this year.

In contrast, the DOL continues to list a revised fiduciary definition on its regulatory agenda. However, according to the DOL’s Spring 2014 Semiannual Unified Agenda, this issue has been pushed back (again) to January 2015.
Miscellaneous of Interest: Recent Non-Binding IRS Representative Interpretations

Loan Defaults:
A deemed distribution generally occurs, and a Form 1099-R must be issued, whenever a borrower fails to make a loan installment payment by its due date (including any additional cure period provided by the plan).
- If the participant fails to make repayment, an operational failure will occur if the employer does not, at that time, default the loan, and issue the Form 1099-R. This can only be corrected through VCP.

Loan Repayments:
To be a permissible loan from a qualified plan, the loan must be “required to be repaid within five years.” Neither the Code nor the regulations specifies when the five-year period begins. The regulations state that a loan must be repaid within “five years from the date of the loan.” Many recordkeepers treat the start of the five-year repayment period as the date the first payment is withheld from the borrower’s pay.
- An IRS representative stated that the date of the loan is supposed to be specified in the terms of the plan agreement.
- The representative noted the start date cannot be after the loan is funded or after the loan proceeds are paid to the participant. At the very latest, that is when the loan starts.

http://www.americanbar.org/content/dam/aba/events/employee_benefits/2014_irs_qa.authcheckdam.pdf
Miscellaneous of Interest: Recent Non-Binding IRS Representative Interpretations

A 401(k) plan permits participants to receive hardship distributions in accordance with the “safe harbor” rules, including suspending elective contributions and employee contributions for 6 months after a participant receives a hardship distribution.

If the plan document provides that participant contribution elections will be reinstated automatically after the six (6) month suspension period, the plan must automatically reinstate contribution elections (unless the participant elects otherwise) or experience an operational failure under EPCRS (e.g., failure to follow plan provisions, missed deferrals)

- The plain text of the regulation requires a suspension of “elective contributions and employee contributions to the plan and all other plans maintained by the employer for at least 6 months after receipt of the hardship distribution.” If the plan document does not provide expressly for a grace period, the plan will experience an operational failure if it fails to reinstate participant elections as soon as administratively practicable after the end of the 6-month suspension.

- There is nothing in the regulations that says suspending for six months plus a grace period (e.g. 30 days or two pay periods) is not permitted.

- However, if the plan document provides for suspension for six months and there is other added time which is not directly related to administration, then it would be a failure to follow the terms of a plan.

http://www.americanbar.org/content/dam/aba/events/employee_benefits/2014_irs_qa.authcheckdam.pdf
Case Law Update: Tussey v. ABB

In May 2014, the Eighth Circuit Court of Appeals rejected requests to appeal from both ABB and from plaintiffs to rehear a complex split decision that had been issued on March 19, 2014. That decision:

- Upheld a federal district court judge's ruling that ABB had violated its fiduciary duties by (among other things) failing to control record-keeping costs. The district court ordered ABB to pay $13.4 million to the plaintiffs.

- Vacated a $21.8 million judgment against ABB for mapping Vanguard's Wellington Fund to the Fidelity Freedom Funds target-date series. The appeals court sent this matter back to the lower court "for further consideration."

- Reversed the district court judge's ruling that Fidelity breached its fiduciary duty by improperly managing float income (money earned from interest-bearing accounts used temporarily by 401(k) plans before plan assets are disbursed).

  - On this "float" claim, the panel majority held (over a dissent) that the float was not a plan asset, and "the Plan investment options held the property rights in the depository float and were entitled to the float income.” The reversal removed the $1.7 million penalty assessed by the district court judge.

http://media.ca8.uscourts.gov/opndir/14/03/122056P.pdf
Case Law Update: Tatum v. RJR Pension Investment Committee

On August 4, 2014, the Fourth Circuit Court of Appeals ruled that where fiduciaries act in a way that violates their duty of procedural prudence and the plan suffers a loss, the fiduciaries will be liable for causing the loss, unless they demonstrate that a fiduciary who satisfied that duty of prudence would have made the same decision.

Defendants argued that a prudent fiduciary “could have” made the same decision. The court explained that the “could have” versus “would have” standards represented the difference between a decision that was merely possible versus one that was probable.

The “would have” standard reminds us of the high bar necessary to satisfy the test of procedural prudence. Retirement plan fiduciaries should demonstrate strong adherence to plan documents and also carefully review and document their decisions to manage and control plan assets.

http://www.ca4.uscourts.gov/Opinions/Published/131360.P.pdf
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