Third Quarter 2018

Aon Quarterly Update

Retirement Legal Consulting & Compliance

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Notes From Your Editor

Welcome to the third quarter 2018 publication of the *Quarterly Update*. It's hard to believe that time has passed so quickly this year and summer is almost over! Plan sponsors are already working on year-end matters and changes to their benefits programs effective in 2019.

In this issue we start with an article about the Department of Labor's (DOL's) guidance on economically targeted investments and proxy voting guidelines for employee benefit plans. The DOL previously issued guidance on these topics over the last few years; the current guidance clarifies the extent to which environmental, social, and governance factors may be considered when fiduciaries are choosing plan investment options and while voting proxies relating to a plan's equity holdings.

Plan sponsors often struggle to find creative strategies for assisting their employees in saving for retirement. We include a description of a student loan program that has received a lot of recent attention following the issuance of an IRS private letter ruling. The program permits a plan sponsor that helps its employees who are paying off student loan debt also save for retirement. We always enjoy helping plan sponsors develop creative strategies to best meet their employees' needs.

On the regulatory front, the DOL has been inquiring about rollover solicitation practices from third-party administrators. While there is currently no clear guidance on this topic (following a return to the pre-fiduciary investment advice law), plan sponsors may wish to consider how terminated participants are contacted by vendors regarding rolling their assets out of qualified plans to individual retirement accounts.

If you have any questions or need any assistance with the topics covered, please contact the author of the article or Tom Meagher, our practice leader.

Regards,

Jennifer R Berrian

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Economically Targeted Investments: Fiduciary Duties Paramount

by Julie Becker

The U.S. Department of Labor (DOL) published Field Assistance Bulletin (FAB) 2018-01 on April 23, 2018, clarifying its previous guidance for private-sector employee benefit plans related to economically targeted investments which consider environmental, social and governance factors (ESG). The bulletin also addresses proxy voting of employer stock held by qualified plans. FAB 2018-01 specifically revisits the DOL's guidance in Interpretive Bulletins (IBs) 2016-01 (relating to proxy voting) and 2015-01 (relating to economically targeted investments (ETIs)).

The central theme of FAB 2018-01 requires plan fiduciaries to consider economic factors—potential risk and return—of investments ahead of any potential collateral social impact. Although it is permissible for plan fiduciaries to consider social policy goals, the DOL has stated that "fiduciaries may not sacrifice investment returns or assume greater investment risks as a means of promoting collateral social policy goals." Instead, plan fiduciaries must comply with their fiduciary duties as outlined in the Employee Retirement Income Security Act of 1974 (ERISA).

As an overview, ERISA requires a plan fiduciary to discharge its duties "solely" in the interest of the participants and beneficiaries for the "exclusive" purpose of providing benefits and for paying reasonable administrative expenses. In addition, ERISA requires a plan fiduciary to act with the care, skill, prudence, and diligence a hypothetical prudent person would use, and must diversify plan assets, unless under the circumstances it is not prudent to do so. Plan fiduciaries need not be experts on all aspects of an employee benefit plan and should retain experts as needed, though doing so will not relieve plan fiduciaries of their responsibilities.

IB 2015-01 recognized that plan fiduciaries are not permitted to sacrifice investment return or take on additional investment risk as a means of using plan investments to promote collateral social policy goals. The 2015 guidance stated that plan fiduciaries could consider the economic impact of an ESG factor on an investment option and could use an ESG factor as a "tie-breaker" between two investment options with similar characteristics, including expected rate of return and level of risk. In addition, the 2015 guidance stated that plan fiduciaries could consider ESG factors if they could affect material business risk or opportunities that bear directly on the economic considerations that prudent investors need to consider.

FAB 2018-01 appears to warn plan fiduciaries to not too readily treat ESG factors as economically relevant to the investment choices at hand when making decisions. The DOL warns that plan fiduciaries must not assume that ESG factors having a potential general positive impact on market trends or industry growth equate to an investment choice being a prudent investment. Economic factors of a proposed investment are paramount above all else. In addition, the 2018 guidance provides that plan fiduciaries are permitted to address ESG factors in their investment policy statements and/or integrate ESG-related evaluation tools, but are not required to do so. In fact, the guidance specifically states that any statements about ESG in investment policy statements should be disregarded if they are contrary to ERISA.

FAB 2018-01 also contains guidance applicable to defined contribution plans (such as 401(k) plans). A defined contribution plan that intends to comply with the requirements of ERISA Section 404(c) may offer an ESG-themed investment option, but that option must be prudently selected by the plan fiduciaries. The DOL also cautioned plan fiduciaries about selecting an ESG-themed qualified default investment alternative (QDIA).

> "[F]iduciaries may not sacrifice investment returns or assume greater investment risks as a means of promoting collateral social policy goals."

FAB 2018-01 clarifies the guidance in IB 2016-01, which suggested that plan fiduciaries could consider ESG factors and engage in shareholder activism without violating ERISA fiduciary obligations if the plan fiduciaries conclude there is a reasonable expectation that such activities (by the plan alone or together with other shareholders) are likely to enhance the economic value of the plan's investment after taking into account the costs involved. FAB 2018-01 advises that the 2016 guidance should be read with the DOL's observation that plan fiduciaries, including investment managers, should not incur significant plan expenses to fund shareholder activism. Specifically, the DOL noted that proxy voting and shareholder engagement does not normally involve significant plan expenses and that 2016 guidance should not be read as signaling that it is appropriate to incur significant expenses, sacrifice investment returns, or reduce the security of plan benefits in order to promote collateral social goals.

The key takeaway of FAB 2018-01 is that prudent plan fiduciaries must always consider the economic interests of their plans. Any consideration of ETI activity must be consistent with ERISA's fiduciary duties and be well documented. Plan fiduciaries should ensure they have properly documented policies, procedures, and analyses to demonstrate adherence to such duties. Aon's Retirement & Investment consultants are available to provide guidance on navigating in this area.

New Program to Reduce Student Loan Debt While Saving for Retirement

by Dan Schwallie

For many employees, paying off student loans takes precedence over saving for retirement. However, the earlier someone starts saving for retirement, the more likely goals for retirement saving will be met. One plan sponsor recently implemented a defined contribution plan design change to help employees who are paying off student loans also save for retirement. It's a novel approach that could provide a helpful plan design alternative for both plan sponsors and employees.

This plan design, like many 401(k) or 403(b) plans, provides a matching contribution for participants who make at least the specified amount of elective deferrals (either pre-tax or Roth) to the plan. However, the plan was amended to add a new feature for plan participants who are repaying student loans. If a plan participant repays student loans in a payroll period in an amount that would have received a matching contribution had it been contributed to the plan, the participant receives a nonmatching employer contribution to the plan equal to the amount that otherwise would have been provided as a matching contribution. The participant may also make elective deferrals to the plan, but those deferrals will not be matched for any payroll period in which the participant receives the nonmatching employer contribution based on student loan repayment. Effectively, these participants get the benefit of the plan match while paying down their student loans.

While programs to help employees both reduce student loans and prepare for retirement are of great interest to both employers and employees, there are a number of tax issues to be considered before proceeding. Prior to implementing a plan design change like the one described above, plan sponsors should evaluate the impact that the change may have on plan compliance. Aon's Retirement Legal Consulting & Compliance consultants have been consulting with many clients on student loan repayment/retirement plan contribution strategies and can assist plan sponsors with considering whether a program like the one described here would work to help their employees both reduce student loan debt and save for retirement.

Should Plan Fiduciary Monitor Rollover Marketing Practices?

by Hitz Burton

Defined contribution (DC) plan sponsors and fiduciaries have long sought ways to encourage employees to enroll in their DC plans and save for retirement. Over the past decade, sponsors and fiduciaries have targeted their efforts extensively on designing utilization features like auto-enrollment and auto-escalation, designating investment alternatives that simplify long-term retirement investment decisions, and negotiating lower fees for designated investment alternatives.

While these targeted efforts have been successful in significantly increasing plan participation, making participant investment decisions easier, and materially lowering the cost of investment for participants, these same plan sponsors and fiduciaries may not have undertaken any significant efforts toward participants who have terminated employment. Specifically, plan sponsors and fiduciaries may not be as focused on the information presented to, and the decisions made by, terminated vested participants regarding whether to take distributions of their vested DC plan balances, roll over their balances into individual retirement accounts (IRAs), or simply leave their balances invested in the DC plans. (This hesitancy may be due to any number of reasons, including the uncertainty surrounding whether any "advice" may be viewed as fiduciary in nature and thus may subject the plan sponsor to unintended fiduciary responsibilities.) A variety of studies have concluded that many plan participants may be better served by keeping their vested account balances in a qualified plan instead of an IRA because of a number of factors, including typically lower investment costs.

While there is a natural tendency for employers to focus on plan features that affect current employees, plan sponsors and designated fiduciaries should be mindful that the fiduciary principles under the Employee Retirement Income Security Act of 1974 (ERISA) applicable to current plan participants apply equally to terminated employees with vested account balances in the plan. Additionally, plan sponsors and fiduciaries should be mindful that the central purpose of a tax-qualified retirement plan is to promote the ability of participants to accumulate assets for retirement.

In April, it was widely reported that the U.S. Department of Labor (DOL) was investigating the rollover practices of one financial institution that is also a large, third-party recordkeeper to 401(k) and other DC plans. Specifically, the DOL is investigating whether the institution has been pushing participants in low-cost plans to roll over their balances to higher-cost IRAs. Given the recent setbacks to the DOL's fiduciary rule, the DOL may seek to provide formal guidance on how and to what extent ERISA fiduciary principles of loyalty and prudence apply when the sponsor permits its terminated vested participants to be contacted, often repeatedly, with marketing material designed to promote the idea of participant rollovers to IRA investment products. This concern arises due to the often material increase in investment costs and the resulting responsibility for the participant to make prudent investment decisions from among the vast number of possible investments available in the retail marketplace.

While we wait for potential additional developments from the DOL, prudent sponsors and fiduciaries would be mindful to start considering whether and how the plan's third-party recordkeeper is marketing IRA rollover opportunities to terminated participants. Aon's Retirement Legal Consulting & Compliance consultants can help plan sponsors with evaluating these issues and in assessing possible fiduciary exposure for the plan sponsor.

Recent Employee Benefit Issues in Business Transactions

by David Alpert and Ronald Gerard

There has been an increase in business mergers, acquisitions, dispositions, and similar transactions in recent years, which has led to a myriad of employee benefits-related issues. Aon's Retirement Legal Consulting & Compliance consultants routinely assist clients with the employee benefits issues that arise in connection with such transactions, whether the client is acquiring, spinning off, or selling a business. While there are many types of issues that may exist depending on the facts of the particular transaction, buyers and sellers, including their advisors, should pay particular attention to several areas of concern regarding defined benefit (DB) and defined contribution (DC) plans that we have seen in recent transactions.

- **DB Plan Asset Transfer Assumptions.** If both the buyer and seller agree that, as part of the transaction, assets are to be transferred from a DB plan maintained by the seller to a DB plan maintained by the buyer, the transaction agreement should clearly identify the underlying assumptions upon which that transfer is based. Such assumptions include, but are not limited to: the relevant actuarial factors for calculating the amount of DB plan assets to be transferred; the dates by which initial and true-up transfer amounts are to be calculated; and the method of calculating interest (or earnings) on any true-up amount. Disputes over the interpretation of a transaction agreement's asset transfer provisions are often difficult to resolve after the agreement is signed, so careful planning and drafting are necessary.
- **Protection Against Earnings Loss Pending DB Plan Asset Transfer True-Up.** The transaction agreement should specify how the portion of assets in the seller's DB plan that will be allocated and transferred to the buyer's plan will be invested pending the transfer. A buyer will often seek some guaranty against asset shrinkage in the event of underperformance.
- **Specificity of Seller's Obligations under Transition Services Agreement.** The transaction agreement should specify any post-closing transition services to be provided by the seller (or the services could be specified in a separate, detailed transition services agreement). This very often may require negotiating with the seller and its payroll vendor the terms and conditions with respect to handling future participant contributions during a specified transition period. Another common situation involves the buyer agreeing to assume the seller's employee benefit plan obligations. In order to minimize disruption in payments, the buyer and the seller should resolve how ongoing benefit payments will be paid to former employees of the seller who are currently in payment status. Negotiations may also be needed with the trustee of the seller's plan to continue to make benefit payments for a specified transition period.
- **Post-Closing "Lock-Up" Period during which Material Changes Are Prohibited.** The transaction agreement should set forth any limitations that may be imposed upon the buyer's ability to make post-closing changes (typically for a specific period of time) to its employee benefit plans and programs for the employees being acquired by the buyer.

- **Warranty As to Plan Qualification.** The transaction agreement should address the qualified status of each retirement plan that is sponsored by either the buyer or the seller. Since the Internal Revenue Service (IRS) has eliminated its determination letter program for ongoing, individually designed plans, the buyer and seller should consider how best to identify and address any potential plan qualification issues. The buyer should conduct a pre-closing due diligence review of any of the seller's plans that it will be assuming or from which any of the buyer's plans will be receiving a transfer of assets and liabilities. If the buyer is assuming sponsorship of any of the seller's plans, the buyer should consider conducting a post closing compliance review of the acquired plan to identify and correct any plan document or operational issues—particularly if there is an intent to merge the acquired plan into any existing plan sponsored by the buyer. The buyer should conduct a similar review of prior operations under the seller's plan if the buyer's plan receives any transfer of assets and liabilities from the seller's plan. The transaction agreement may include an escrow arrangement to cover the cost of any needed corrections.
- **Treatment of Employer Stock in DC Plans.** If assets and liabilities under the seller's DC plan will be transferred to the buyer's plan and the seller's plan holds investments in the seller's stock, the buyer and seller should consider how those investments in the seller's stock will be handled at closing (and post-closing, if needed). Various fiduciary issues should be considered in view of the increasing litigation involving the sale (and failure to sell) employer stock following completion of a transaction.
- **Treatment of DC Plan Loans.** If the seller's plan is a DC plan that offers plan loans, the buyer and seller (and their respective recordkeepers) should address whether acquired employees who are participants in the seller's plan will be permitted to transfer or directly roll over their outstanding plan loans from the seller's plan to the buyer's plan. Otherwise, acquired employees may face the acceleration of their outstanding plan loans, requiring immediate repayment of outstanding balances and the possibility of loan default and negative tax consequences.
- **Termination of Employment for Distribution Purposes.** Before an employee can take a distribution from a retirement plan, the employee must have a "distributable event." Most plans include "termination of employment" as a distributable event permitting distributions to participants. The seller should consider whether the transaction results in a termination of employment for purposes of eligibility for distributions under any of the seller's plans.
- **Plan Termination Preparation.** If the seller intends to terminate any of its plans as of, or prior to, the closing date, the buyer and seller should ensure that appropriate resolutions and plan amendments are adopted before the closing of the transaction. In addition, the buyer and seller should establish their respective obligations regarding the pursuit of a favorable IRS determination letter with respect to such plan termination (e.g., addressing issues regarding submission timing, payment of costs, provision of needed documents, responsibility for filing the submission, authority to respond to any IRS questions that may arise during the determination letter review process, etc.).
- **Safe Harbor 401(k) Plan Status.** The buyer and seller should consider what effect the transaction will have on the safe harbor status of any of their respective 401(k) plans for the plan year in which the transaction occurs. It may (under certain circumstances) be possible to cease safe harbor status mid-year, or merge two safe harbor plans mid-year. Merging a safe harbor plan with a non-safe harbor plan, or otherwise ceasing safe-harbor contributions mid-year, may pose compliance issues that require some careful pre-planning in order to achieve a favorable resolution.
- **Fiduciary Responsibilities.** Responsible fiduciaries of the seller's and buyer's plans should identify any relevant fiduciary issues and be prepared to act where appropriate to satisfy their responsibilities.
- **Reportable Events.** The buyer and seller should determine whether the transaction involves any reportable event that requires notice to the Pension Benefit Guaranty Corporation if a DB plan is involved.

Aon's Retirement Legal Consulting & Compliance consultants have significant experience regarding a wide range of employee benefits-related matters that may arise in connection with business transactions, and can assist with identifying and addressing any potential issues in advance of their becoming problematic (preferably prior to the closing, if practicable).

Quarterly Roundup of Other New Developments

by Jan Raines and Bridget Steinhart

Best Practices Addressed in Philips North America Case

To avoid protracted litigation and put "money toward plan participants' retirement savings rather than spending it on a costly legal battle," Philips North America LLC recently reached a proposed settlement of a class action lawsuit. The lawsuit alleged that Philips' 401(k) plan fiduciaries breached their fiduciary duties by acting imprudently with respect to 401(k) plan investment options and allowing the payment of unreasonable and excessive administrative and investment fees. Although they disagreed with the claims, the Philips' plan fiduciaries agreed to a $17M settlement and to certain non-monetary terms which require Philips to undertake a request for proposal for recordkeeping services, hire an independent advisor to review the 401(k) plan's investment structure, and review whether to retain the money market fund or to add a stable value or comparable fund. The proposed settlement agreement is pending court approval. *Ramsey v. Philips North America LLC, No. 3:18-cv-01099 (S.D. Ill. May 10, 2018) (settlement motion filed May 11, 2018).*

Deepening Court Split on Whether Unpaid Contributions Are Plan Assets

In recent litigation, the 9th Circuit Court of Appeals affirmed the dismissal of a lawsuit brought by several multiemployer funds against the owners and executives of a company that failed to make contributions to the funds as required under the terms of collective bargaining agreements (CBAs). The lawsuit alleged that, pursuant to the CBAs, the unpaid contributions were "plan assets" under the Employee Retirement Income Security Act of 1974 (ERISA) over which the owners and executives exercised control and, therefore, the owners and executives were liable in their individual capacities for breach of ERISA fiduciary duties. In rejecting the "plan assets" theory, the 9th Circuit cited its own precedent and similar rulings within the 6th and 10th Circuits, which held that employers are not ERISA fiduciaries as to unpaid contributions to ERISA benefit plans. The Department of Labor, in Field Assistance Bulletin (FAB) 2008-01, takes the position that employer contributions become plan assets only when the contribution has been made. However, both FAB 2008-01 and other circuit courts note that if an employer fails to make a required contribution to a plan in accordance with the plan documents, the plan has a claim against the employer for the contribution, and that claim is an asset of the plan. With the split in the circuit courts deepening on whether unpaid contributions are plan assets, the likelihood of future Supreme Court review increases. We will continue to monitor developments in this area. *Glazing Health & Welfare Fund v. Lamek, 63 EBC 2003 (9th Cir. 2018).*

Recent Legislation: Changes 401(k) Hardship Withdrawal Rules

Two items of recent federal legislation affect the rules regarding hardship withdrawals from defined contribution plans. First, changes to federal tax law regarding casualty losses were made by the Tax Cuts and Jobs Act (TCJA) late in 2017. In order to qualify as a casualty loss after the change, the loss now must result from a federally declared disaster. For defined contribution plans offering hardship withdrawals, this law change may have an impact as many defined contribution plans utilize the safe harbor hardship withdrawal categories listed in the Internal Revenue Code (Code). One of the safe harbor categories is casualty losses that are deductible under the Code. The change to the tax law regarding casualty losses serves to prohibit hardship withdrawals by participants who suffer casualty losses due to incidents that are not declared to be disasters by the federal government.

In addition, the Bipartisan Budget Act of 2018 (Budget Act) eased hardship withdrawal rules as follows:

- Eliminated the requirement that a participant must first take all available loans from the plan before taking a hardship withdrawal;
- Expanded the sources of funds that can be distributed as a hardship withdrawal to include qualified non-elective contributions, qualified matching contributions, 401(k) safe harbor plan contributions, and earnings on those money sources (including post-1988 earnings on elective deferrals); and
- Eliminated the required six-month suspension period for making new elective deferrals following a hardship withdrawal (although plan sponsors may choose to retain this provision).

These rules are effective for plan years after December 31, 2018.

Plan sponsors should carefully review the hardship withdrawal language in their plan documents to determine the impact of the TCJA and Budget Act changes on their plan documents and administration of hardship withdrawals. In addition, plan sponsors should coordinate any changes with their recordkeepers, update plan documents and administrative procedures, and communicate changes to plan participants. Aon's Retirement Legal Consulting & Compliance consultants can assist with reviewing plan documents and preparing any required amendments needed to address the implications of this recent legislation. *Tax Cuts and Jobs Act, H.R. 1, 115th Cong. (2017); Bipartisan Budget Act of 2018, H.R. 1892, 115th Cong. (2018); Treasury Reg. §1.401(k)-1(d)(3)(iii)(B)(6).*

Misappropriation of Plan Assets by Third-Party Administrator

In late 2017, the Federal Bureau of Investigation raided the offices of Vantage Benefits Administrators Inc. (Vantage), a third-party administrator, recordkeeper and professional fiduciary, due to allegations that funds were missing from retirement plan accounts managed by Vantage. A myriad of lawsuits against Vantage soon followed, alleging fraud and misappropriated plan assets as well as breach of ERISA fiduciary duties. A default judgment was recently issued in one of the lawsuits. Vantage and its CEO, Jeff Richie, were ordered to return nearly $10.2 million to a client's 401(k) plan and to pay almost $300,000 in attorneys' fees for breaching their fiduciary duties. From 2013 through 2017, Richie and his wife were alleged to have made hundreds of transfers from plan assets directly to one of Vantage's business accounts and to have supplied false information to the trustee to avoid detection. Additional suits are pending against Vantage and the Richies regarding other plans for which they were fiduciaries, and other suits may be brought against the trustee and the plan's auditor, who allegedly knew of the illegal transfers but failed to report them. While this is an extreme situation, it underscores the importance of plan fiduciaries monitoring their service providers and taking steps to ensure that the proper checks and balances are in place to ensure the safeguarding of plan assets. *Caldwell & Partners v. Vantage Benefits Administrators, No. 3:17-CV-03459-N, 2018 BL 82574 (N.D. Tex. 2018).*

No Presumption of Lifetime Vesting for Retiree Benefits

For many years, courts applied what has been referred to as the "Yard-Man Inference" to presume that collective-bargaining agreements (CBAs) vest retiree benefits for life. But three years ago, in *M&G Polymers USA LLC v. Tackett*, the U.S. Supreme Court held otherwise. The Court held that in disputes about whether retiree benefits are vested for life, courts are to apply ordinary principles of contract law without "placing a thumb on the scale in favor of vested retiree benefits . . . ." In a more recent case, the 6th Circuit Court of Appeals, in *CNH Indus. N.V. v. Reese*, used the Yard-Man Inference to presume lifetime vesting and ruled that the CBA at issue was ambiguous as a matter of law. On February 20, 2018, the U.S. Supreme Court reversed the 6th Circuit Court of Appeals opinion in Reese. The Supreme Court held that CBAs are to be interpreted according to ordinary principles of contract law, including the rule that a contract is not ambiguous unless it is subject to more than one reasonable interpretation. The Court remanded the case back to the trial court, noting the lower court's errors in basing its findings on assumptions or inferences as to the contracting parties' intentions. This case underscores the importance that the language used in plan documents and CBAs be carefully considered and agreed upon while at the bargaining table to ensure that the parties' intent is clearly reflected in the documents. *M.G. Polymers USA, LLC v. Tackett, 135 S. Ct. 926 (2015); CNH Indus. N.V. v. Reese, 138 S. Ct. 761 (2018).*

Recent Publications

Governmental Plans Are Different: A Regulatory Overview

By Daniel Schwallie

Benefits Quarterly (Third Quarter 2018)

Many rules that otherwise apply to qualified retirement plans either do not apply to governmental plans qualified under Internal Revenue Code (Code) Section 401(a) or apply differently. This article provides a high-level introduction to governmental tax-qualified retirement plans and highlights many of the differences in applying rules of the Code. Differences in application of many of the rules are conveniently summarized in two tables. This article also briefly discusses the applicability of the Age Discrimination in Employment Act (ADEA) to governmental plans.

Click here to read the article.

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