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or control over the plan's management and the management or disposition of the plan's assets, renders investment advice for a fee or other compensation with respect to plan funds or property, and has discretionary authority or responsibility in the plan's administration. Individuals serving on investment committees, selecting service providers to a plan, and/or having influence, discretionary authority or control over a plan are typically considered to be functional fiduciaries.

Personal Liability

ERISA requires that all plan fiduciaries adhere to a very high standard of care, skill, prudence and due diligence in performing their responsibilities. According to ERISA §409, a fiduciary is personally liable to the plan for any losses resulting from a breach, and would also be required to restore to the plan any profits the fiduciary may have made through use of the assets of the plan, and may be subject to other equitable or remedial relief as the court deems appropriate, including the removal of the fiduciary. ERISA §502(l) goes on to state that the Department of Labor (DOL) can also assess a civil penalty in the amount of 20 percent of the amount recovered in a settlement with the DOL or awarded in a civil suit against the fiduciary who breached his or her duty or any person who knowingly participated in a breach.

Fiduciary responsibility carries personal liability and there is no "corporate veil," or corporate protection, for fiduciaries. There could also be criminal penalties, including imprisonment. A 2008 Supreme Court decision, *LaRue v. DeWolff, Boberg & Associates, Inc., et al.,* permits individual participants to sue plan sponsors for fiduciary breaches. With this decision, attorneys representing individual participants who believe fiduciary breaches have occurred see hefty "paydays" since U.S. 401(k) assets total over $3 trillion.

How to Mitigate Your Fiduciary Risk

Now that you are aware of your responsibilities to the plan, its participants and beneficiaries, including the related personal liability, you should take timely and appropriate steps to mitigate your risk, which may include:

- Act solely in the best interest of plan participants and their beneficiaries and with the exclusive purpose of providing benefits to them.
- Carry out your duties prudently.
- Understand and follow the terms of the plan document (unless it is inconsistent with ERISA).
- Select and monitor service providers actively.
- Develop an investment policy and ensure it is followed.
- Diversify plan investments.
- Monitor investment performance periodically.
- Compile and evaluate all fees and compensation, both direct and indirect, that are paid related to the plan. (See *Plan Expenses – Who, What, When, Why?* below.)
- Pay only reasonable plan expenses.
- Engage specialists when necessary.
- Document all decisions made regarding the plan.

Recent Regulatory Developments

In October 2010, the DOL proposed a rule to broaden the definition of a fiduciary. The consequences of the broader definition would be to encompass a larger group of individuals who would be defined as fiduciaries. The proposed change was the subject of much debate. In late September 2011, the DOL announced that it withdrew the proposed rule and would eventually re-propose the rule. This comes after requests from the public and Congress to allow an opportunity for more input on the rule.

It is expected that the revised portions of the rule will clarify the role of those providing investment advice and will be limited to individualized advice directed to specific parties. It is also anticipated that it will address the applicability of the rule to arm's length commercial transactions along with concerns about the impact of exemptions on the current fee practices of brokers and advisers. In addition, the revamped rule is expected to focus on the continued applicability of exemptions that allow brokers to receive commissions related to mutual funds, stocks and insurance products.

The DOL will continue to coordinate closely with the Securities and Exchange Commission,

MARK YOUR CALENDARS....

December 12-13, 2011

AICPA Employee Benefit Plans Accounting, Auditing and Regulatory Update

Washington, D.C.

This high-level conference, chaired by BDO's **Bob Lavenberg**, addresses critical issues relating to employee benefit plans, including auditing, accounting, tax and regulatory updates; audit implications of compliance issues; ASC 820 – *Fair Value Measurements & Disclosures*; SOC 1 (formerly SAS 70) – how service organization controls have changed; and a preview of the overhauled 2012 Employee Benefit Plan Audit Guide. Sessions are presented by regulators, administrators, standard setters and leading practitioners, including members of BDO's EBP Audit Practice. There will also be panel discussions, Q&A opportunities and case studies.

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Treasury Department, Internal Revenue Service (IRS) and the Commodities Futures Trading Commission to ensure that the revised rule is in sync with other ongoing rulemaking while upholding the separate federal protections that ERISA established for plans and plan participants. The new proposed rule is expected to be issued in early 2012.

▶PLAN EXPENSES – WHO, WHAT, WHEN, WHY?

Ever wonder what the true costs are to operate your 401(k) type plan? As a plan fiduciary you are required to know so that you allow only reasonable fees to be paid from plan assets. As a plan participant, you want to know so that you can make informed investment decisions when choosing your investment options in your account. The DOL wants to know, too!

The DOL website states that a 1 percent increase in plan expenses paid from plan assets can, over 35 years result in a 28 percent decrease in the ultimate account balance!

For years, many plan sponsors have struggled to truly understand the total expenses paid from their plan's assets. In addition to so-called direct expenses, where the plan clearly is paying for a product or service, most plans also incur what are commonly referred to as hidden or indirect fees (e.g., 12b-1 fees, sub-transfer agent fees, etc.). These fees are deducted directly from the investment earnings and generally have not been separately and clearly disclosed. When carefully reading service agreements and other documents related to plan investments, sponsors should be able to determine the extent of those fees. The challenge has been that the documentation tends to be voluminous and in very fine print making it difficult to fully comprehend. In addition, the various fees and expenses may not be disclosed in a single section but are likely spread throughout the often lengthy document.

In order to increase plan sponsor/fiduciary and participant awareness and understanding of all plan expenses and fees, the DOL has finalized related regulations. Although intended to be the last piece in this puzzle, the regulations regarding the Form 5500, *Annual Return/Report of Employee Benefit Plan*, added a revised Schedule C, *Service Provider Information*, to the filing requirements. Schedule C requires that anyone providing services to the plan disclose for reporting purposes not only the direct fees they receive from the plan but also any indirect fees received. For example, the plan may pay a quarterly fee to the plan's corporate trustee – a direct fee – and then the trustee may pay some of that fee to an investment manager who handles the plan's investments – an indirect fee. Both of these fees are generally required to be disclosed on Schedule C.

So how do plan sponsors/fiduciaries educate themselves about the fees and expenses being paid from their plans? That is where the DOL regulations under ERISA §408(b)(2) come into play. Originally scheduled to be effective in July 2011 and delayed until January 2012 and now further delayed to April 1, 2012, these rules require that anyone who provides services to the plan must provide, in writing, a document that clearly sets forth the services to be provided to the plan and fully discloses the costs associated with those services and any additional costs that may be incurred by the plan and in what circumstances. The costs may be disclosed using dollar amounts, percentages or through formulas. Although not required to be used, the DOL has provided a model disclosure of what the document should contain.

The service provider must also disclose whether or not they are acting as a fiduciary to the plan – a much higher commitment to the plan and its participants and beneficiaries. Refer to *Are you a Plan Fiduciary?* on p. 1 for further details on identifying plan fiduciaries. For any services provided after April 1, 2012, where a written agreement has not been provided, the service provider will be deemed to be a disqualified person and any transactions between the plan and a disqualified person would result in prohibited transactions.

The fees and expenses being paid from plan assets must also be disclosed to eligible employees, plan participants and their beneficiaries, as appropriate. This rule (ERISA

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§404(a)(5)), which has also been delayed, is now scheduled to go into effect as of May 31, 2012. In addition to the fee information that must be disclosed to all eligible employees, participants must receive information quarterly regarding the fees and expenses that were actually deducted from their accounts during the quarter. This information is required to be disclosed in dollar amounts.

It's important to note that in September 2011, the DOL issued Technical Release 2011-03, which sets forth an interim policy allowing plan administrators to furnish information required under the final participant disclosure rule through electronic media, if certain conditions and safeguards are met.

Plan sponsors/fiduciaries should contact their service providers immediately to ensure the readiness of the appropriate disclosures in order to be in compliance with the fast-approaching new requirements.

EMPLOYERS PARTICIPATING IN MULTIEMPLOYER PENSION PLANS: INFORMATION GATHERING AND COMMUNICATION KEY TO COMPLIANCE WITH EXPANDED DISCLOSURE REQUIREMENTS

Increased transparency is the trend in the world of financial reporting, and this trend is clearly reflected in the new Accounting Standards Update (ASU) for companies that participate in multiemployer defined benefit pension plans. The Financial Accounting Standards Board (FASB) recently completed redeliberations on the standard that becomes effective for public companies later this year. The FASB's September 2010 Exposure Draft on multiemployer defined benefit pension plans generated 330 comment letters. Among those who commented were participating employers, plan trustees and auditors, as well as high-profile industry association representatives. The FASB responded to the concerns of the commenters and eliminated the proposed requirement to disclose the employer's multiemployer pension plan withdrawal liability in the final standard. A summary of the disclosures required by the final standard follows:

Key Provisions in the Final ASU 2011-09 (issued Sept. 21, 2011)

The final ASU requires the following disclosures for individually material plans in which an employer participates:

- Identifying plan information (e.g., plan name and EIN) such that stakeholders may access additional information from an individual plan's public filing, including its financial statements.
- The funded status as most recently certified by the plan's actuary, and any resultant funding rehabilitation plans.
- Expiration dates of related collective bargaining agreements.
- Minimum funding arrangements, if any.
- Whether the employer's contributions represent more than 5 percent of the plan's contributions.
- Individual contributions made to material plans, and the aggregate of all other contributions to plans considered to be immaterial for each annual period for which an income statement is presented.
- Description of the nature and effect of any changes that would impact the comparability of information for each period an income statement is presented.

Scope and Effective Dates

The disclosures required by the final ASU are effective for public entities that participate in multiemployer defined benefit pension plans for annual periods in fiscal years ending after Dec. 15, 2011. Non-public entities have an additional year to prepare and must comply with the expanded disclosures for annual periods for fiscal years ending after Dec. 15, 2012. Early adoption is permitted.

We recommend that calendar year-end public companies begin the information gathering process for their multiemployer defined benefit pension plan disclosures now by initiating information requests to plan administrators and actuaries. The key to successful implementation of the new standard is timely and open communication with all parties involved.

REGULATORY UPDATE

PBGC Provides Defined Benefit Plan Sponsors Premium Payment-Related Relief

The Pension Benefit Guaranty Corporation (PBGC) announced it will waive penalties for late payment of 2011 premiums. Companies that pay their premium up to seven days past the due date will not have to pay a penalty to PBGC. In addition, the PBGC is offering relief in connection with alternative premium funding target elections. This relief is a result of the President's Executive Order mandating federal agencies to both improve regulations and the process used to review them, as well as feedback from pension professionals.

The PBGC's relief was effective as of its publication in the Federal Register on Sept. 15, 2011.

HELPFUL WEBSITES

http://www.dol.gov/ebsa/

http://www.efast.dol.gov

http://www.irs.gov/

http://ebpaqc.aicpa.org

http://asc.fasb.org

For previously issued *EBP Commentator* newsletters or special editions – **http://www.bdo.com/publications/assurance/ebp.aspx**

Read more on page 5

COMPLIANCE CORNER

NEW – FORM 8955-SSA, ANNUAL REGISTRATION STATEMENT IDENTIFYING SEPARATED PARTICIPANTS WITH DEFERRED VESTED BENEFITS, FINALLY ARRIVES

Earlier this year the IRS released the 2009 Form 8955-SSA, *Annual Registration Statement Identifying Separated Participants with Deferred Vested Benefits,* and related instructions, which replaces the Schedule SSA that was filed with Form 5500 prior to the 2009 filing.

In general, Form 8955-SSA must be filed by the last day of the seventh month following the last day of the plan year and can be extended for another 2 ½ months by filing a signed Form 5558, *Application for Extension of Time To File Certain Employee Plan Returns*. Therefore, for calendar year plans, the due date will be July 31 with the option to request an extension to Oct. 15.

Due to the delay in getting the new forms and instructions issued, the IRS has automatically extended the deadlines for the 2009 and 2010 Form 8955-SSA filings, which must be completed and filed the later of (1) Jan. 17, 2012 or (2) the due date that generally applies for filing the Form 8955-SSA for the 2010 plan year. Please note that the Jan. 17, 2012, due date cannot be further extended by filing Form 5558.

Here is a summary of information related to the new Form 8955-SSA:

- Form 8955-SSA cannot and should not be attached to your Form 5500 and filed with the DOL through the EFAST2 system.
- Just recently, the IRS released the 2010 Form 8955-SSA. The 2010 Form can be used to separately report participants for the 2010 plan year. However, in the IRS Frequently Asked Questions the IRS does state that the plan sponsor can continue to take advantage of the transition rules and submit a combined 2009 - 2010 Form 8955-SSA. The 2009 Form may be used for both 2009 and 2010 information. In combining both years, the 2010 employees are treated as reported in 2009.
- Form 8955-SSA may be submitted to the IRS on paper or filed electronically using third-party software (once available) via the IRS' Filing Information Returns Electronically ("FIRE") system.

In addition to reporting information related to participants with a deferred vested benefit in the plan, the form requires that changes in the plan administrator and plan sponsor name and/or EIN also be reported.

Finally, the new Form 8955-SSA includes a new question regarding participant statements: "Did the plan administrator provide an individual statement to each participant required to receive a statement?" The IRS has a long-standing requirement that each participant listed on the form be provided an individual statement describing the Form 8955-SSA information filed with respect to that person, including:

- Name and Social Security number of the participant. Note: While there is no guidance at the current time, many believe that a partial number (e.g., xxx-xx-1234) would be acceptable.
- Type of annuity (lump sum, term certain annuity, life annuity, etc.) and type of payment (lump sum, annually, monthly, etc.).
- For defined benefit plans, amount of the periodic payment.
- For defined contribution plans, the total value of the participant's account.
- The individual statement also must contain a notice, if applicable, of any benefits that are forfeitable if the participant dies before a certain date.

Some plans may fulfill this requirement with a quarterly or annual statement that the plan already sends. However, plan sponsors will want to review this requirement with their recordkeeper to make sure they are comfortable with the information that is being provided.

Penalties apply for plans that fail to file Form 8955-SSA, or send out the required statements. Penalties that are imposed on the person failing to file the required information include:

- $1 per participant not reported multiplied by the number of days the failure continues unless reasonable cause can be shown as to why the filing was not timely completed. The maximum penalty is $5,000.
- $1 per day for failure to file a notification of a change in the status of the plan (such as a change in the plan name, or a change in the name or address of the plan administrator).
- $50 per statement for "willful" failure to furnish the statement or "willful" furnishing of a false statement.

While there are still unanswered questions, it is clearly important for plan sponsors/fiduciaries to communicate with their service providers/actuaries/Form 5500 preparers to discuss the collection of information, preparation and filing of the Form 8955-SSA, as well as to make sure they have complied with the participant notification requirement.

BDO EBP PRACTICE

BDO is nationally recognized in the field of employee benefit plan consulting and auditing. We audit nearly 1,000 plans nationwide, ranging from 100 participants to close to 300,000 participants. Our engagements are staffed with accountants experienced with all types of audits including defined contribution (401(k), profit sharing, ESOP, and 403(b) plans), defined benefit (pension, cash balance) and health and welfare plans. We have extensive ERISA knowledge of audit and filing requirements, including full-scope, limited-scope, Form 11-K filings and Master trusts.

In addition, BDO has a National Employee Benefit Plan Audit Group that meets regularly to develop training and guidance and discuss updates in the industry and auditing practices. Our professionals are regular presenters at local, state and national seminars. BDO's professionals continue to be extensively involved as Chair of the American Institute of Certified Public Accountants (AICPA) National Conferences on Employee Benefit Plans. Many of our professionals serve in leadership roles in the accounting profession as senior advisors and are active members of several governing boards and CPA societies. For example, our professionals currently serve on various AICPA committees, such as the AICPA Employee Benefit Plan Audit Quality Center Executive Committee and the AICPA's Joint 403(b) Plan Audit Task Force (we are proud to have representation at the Chair level for these committees). BDO's EBP professionals have also served on the Employee Benefit Plan Expert Panel in the past.

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