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## RECENT EBP DEVELOPMENTS

### The Role of Plan Management

Accounting Standards Codification (ASC) 820 (FAS 157) established management's responsibility for fair value measurements and disclosures in accordance with the standard, including the determination of fair value and classification of investments within the fair value hierarchy (i.e., Levels 1, 2 or 3). This includes cases where management may engage third parties (e.g., investment managers, custodians, trustees, pricing services, valuation specialists, etc.) to assist with such valuations. Although management may use the assistance of such service providers, they may not abdicate their responsibilities for fair valuation measurement and disclosure.

It is not uncommon for management to lack the requisite understanding of the investments contained in their plan's portfolio. Certain investment products designed for employee benefit plans and their participants lack the transparency often available for other types of investments. While this does not relieve management of their responsibilities under the standards, it certainly compounds the burden associated with fulfilling these responsibilities. For this reason, the additional scrutiny currently associated with investment valuation may also highlight potential regulatory exposure that may exist for plan fiduciaries as well. This presents an opportunity for plan management and those with fiduciary responsibilities to consider consultations with their advisors to ensure appropriate due diligence processes and documentation are in place when selecting investment options, hiring service providers and fulfilling their ongoing oversight responsibilities in this regard.

It is commonplace for entities to utilize daily price feeds from well known pricing services (e.g., Bloomberg and IDC) for purposes of valuing Level 1 and certain less complex Level 2 securities. In response to customer and auditor requests, as well as their understanding of management's responsibilities in connection with ASC 820, many of these pricing services continue to develop new products and services that expand the level of detail supporting the prices they provide. Management is encouraged to reach out to all of their service providers to request information regarding pricing

methodologies, inputs and assumptions necessary to understand the valuation of their plan's investments in a manner that allows them to fulfill their financial reporting and fiduciary responsibilities.

### Expanded Fair Value Disclosures

ASU 2010-06, mentioned above, is effective for plan year reporting periods beginning after December 15, 2009. The related amendments to ASC 820 offer some much needed clarification related to disaggregation of investments introduced in ASC 820-10-65-4 (FSP FAS 157-4) and also expands other fair value disclosures as follows:

- Disaggregation of debt and equity securities by "class" (previously referred to as 'major category') based upon nature and risk, generally considering such factors as: activity/business sector, vintage, geographic concentration, credit quality or economic characteristics;
- Disclosure of valuation techniques and inputs used in developing fair value measurements;
- Disclosures should allow the reader to reconcile fair value measurement disclosures based upon class to line items on the face of the financial statements; and
- Disclosure of significant transfers between Level 1 and Level 2 categorizations, and the related policy for determining when transfers between categories are recognized (e.g., actual date of event triggering transfer, beginning of reporting period, end of reporting period); such significant transfers in and out should be presented on a gross basis.

Additional provisions within ASU 2010-06 related to expansion of roll forward details reconciling fair value of Level 3 investments will be effective for fiscal years beginning after December 15, 2010.

### Reporting Participant Loans in Defined Contribution Plan Financial Statements

In September 28, 2010, the FASB issued ASU 2010-25, *Plan Accounting – Defined Contribution Pension Plans (Topic 962): Reporting Loans to Participants by Defined*

## COMPLIANCE CORNER

### Are your welfare plans current with their regulatory filings?

In general, health and welfare plans that are fully insured, paid out of the employer's general assets or a combination of both must file an annual Form 5500 if the plan had more than 100 participants at the beginning of the plan year. Now is a great time to check and make sure that all of those plans are being correctly filed. If not, there are DOL penalties of up to \$1,100 a day and IRS penalties of up to a total of \$15,000 associated with an unfiled Form 5500. The DOL and IRS encourage voluntary disclosure of unfiled Form 5500s, and have reduced the late filing penalties if the plan sponsor voluntarily files the delinquent returns before the DOL sends notice of the delinquency. Under the DOL's Delinquent Filer Voluntary Compliance Program (DFVCP), the plan sponsor pays a set fee depending on the type and size of plan as well as the number of years being filed. The fee can be as low as \$750 with a maximum fee of \$4,000 per plan no matter how many years back you need to submit. In exchange for filing under the DFVCP and paying the fixed fee, both the DOL and IRS agree to not assess any additional penalties related to the delinquent filings.

*If you have questions about how to determine whether or not you have missed past filings or would like assistance in getting your filings up to date, contact Joan Vines at 214-259-1414 or Penny Wagnon at 302-838-1605.*

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*Contribution Pension Plans*, to amend ASC Topic 962, Plan Accounting – Defined Contribution Pension Plans. This ASU affirmed and codified the FASB's original proposal to classify participant loans as notes receivable carried at amortized cost, rather than as investments subject to fair value measurement, in defined contribution plan financial statements. The amendments require that participant loans be segregated from plan investments and measured at their unpaid principal balance plus accrued but unpaid interest. As such, participant loans no longer require fair value measurement and are excluded from the disclosure requirements specified in ASC 825-10-50-10 through 16.

The amendments apply to all defined contribution plans that allow participant loans and should be applied retrospectively to all prior periods presented. The amendments are effective for fiscal years ending after December 15, 2010. Early adoption is permitted. It is also important to note, however, that based upon current Department of Labor (DOL) reporting requirements, participant loans will continue to be reported as investments on the supplemental schedule of assets (held at end of year) along with the plan's assets held for investment purposes. In addition, the FASB exempted these notes receivable from the credit quality disclosures in ASU 2010-20.

### ▶ 403(b) PLANS – HOW MANY ARE THERE?

As anticipated, the first required financial statement audits of large, ERISA-covered 403(b) retirement plans were fraught with challenges.

But, before the audit process even began, plan sponsors were faced with determining just how many plans they had and which, if any, were subject to the audit requirement. Unlike the environment for 401(k) type plans where plan assets generally are held by one trustee or custodian, 403(b) plans often purported to create a new plan each time a new vendor was added to the investment mix. As a result, plan sponsors needed to determine (often with legal counsel input) how many “plans” they sponsor, where the assets were held and how many were subject to audit.

Additionally, many plans that were believed to have been exempt from the ERISA requirements under the DOL Regulations [29 C.F.R. § 2510.3-2(f)] discovered that they were not exempt. This may have resulted from the plan sponsor exercising impermissible discretion and/or control over the plan and/or due to employer contributions into the plan or matching contributions made to a related plan.

It is expected that plan sponsors of 403(b) plans will continue to face challenges as they continue to evaluate their plans. BDO will continue to work with the AICPA 403(b) Audit Task Force and the DOL to keep our clients and staff informed of new developments.

*For additional information regarding 403(b) plans in general, please refer to previous issues of the EBP Commentator.*

### ▶ DOL AND INTERNAL REVENUE SERVICE (IRS) ANNUAL FILINGS

There are no changes of note in the 2010 Form 5500, but there are some items that plan sponsors may want to keep in mind as the filing season approaches.

#### Common Filing Problems

One of the most common problems experienced last year with filings was receiving a “Processed Stopped” status from the DOL. Such status indicated that the filing was considered received by the DOL but they could not complete processing it. The most frequent cause for this status involved some type of issue with the signing credentials including credentials (a) entered but not set-up with signing authority, (b) not entered into IFile or the third-party software correctly, (c) not entered on the correct signature line, and/or (d) not entered at all.

To avoid these issues, clients should make sure that when registering for signing credentials, you check the signer box, keep track of your EFAST2 User ID and four-digit PIN and check to make sure that DOL correspondence is not being filtered out as spam in your email inbox. If the plan administrator and plan sponsor is the same person, the signature need only be

## MARK YOUR CALENDARS...

**May 2-4, 2011**  
**AICPA National Conference on Employee Benefit Plans**  
**Las Vegas, Nevada**

This three-day event, chaired by **Bob Lavenberg**, will provide you with in-depth, comprehensive updates on the wide range of issues affecting employee benefit plans today, including recent changes in accounting, auditing, tax, and enforcement regulations. Sessions are presented by regulators, standard setters and leading practitioners, including members of BDO's EBP Audit Practice.

applied once on the plan administrator line. If the plan administrator and plan sponsor are different people, both must sign the form.

Adding attachments to the filings was sometimes a challenge. Some third-party software had trouble loading and transmitting attachments during peak processing times. In addition, attachments cannot be processed by the DOL if encrypted or password protected. To ensure your filing and attachments are properly filed in a timely manner, try to file at least a week before the deadline and make sure that encryption and password protections have been removed from all attachments.

#### IRS Notice CP 216H

The IRS sent Notice IRS CP 216H, “*Application for Extension of Time to File an Employee Plan Return Denied – Not Timely*,” to some plan sponsors in error. The IRS believes they now have the problem fixed. However, if this notice was received in error, the IRS suggests you send the denial letter and proof that the original Form 5558 was postmarked in a timely manner to the IRS's Ogden, Utah office.

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### Form 8955-SSA

This new, yet to be released, form will replace the Schedule SSA previously filed with the Form 5500. Plan administrators are not required to file the Form 8955-SSA for the 2009 plan year and subsequent years until the IRS issues guidance establishing a special due date. The special due date is expected to occur in 2011.

### ▶ REQUIRED FEE DISCLOSURES TO PLAN SPONSORS – 408(b)(2) INTERIM FINAL REGULATIONS

The DOL issued interim final regulations on ERISA section 408(b)(2) during 2010 relating to the required fee disclosures to retirement plan sponsors. These regulations are another step towards making plan service contracts and fee arrangements more transparent to those charged with governance of benefit plans so that they can appropriately discharge their duties as plan fiduciaries.

By way of background, in recent years there have been many changes to the types of services provided to plans, and also in the ways service providers are compensated. Although this may have resulted in some efficiencies and potential fee reductions, it has also become increasingly more complicated for retirement plan sponsors and fiduciaries to understand exactly what services they are paying for and the cost of these services.

Under Section 408(b)(2), certain plan service providers will be required to provide disclosures of their fee structure and any potential conflicts of interest before entering into a covered service agreement and before the performance of these services, if they want to be granted statutory exemption from ERISA's prohibited transaction provisions.

These new DOL regulations give much needed guidance so that plan sponsors and fiduciaries will be able to obtain accurate and complete information on service provider compensation and revenue sharing agreements.

These changes are challenging for plan sponsors and fiduciaries. Under ERISA section

404(a)(1), plan sponsors are required to act prudently and with the singular purpose of acting in the best interest of the plan participants and beneficiaries in order to provide them plan benefits and defray, as much as possible, the costs that these participants must absorb.

Plans covered under these regulations include ERISA-covered pension/profit sharing plans and 403(b) plans, but welfare plans are excluded. The disclosures are required regardless of the size of the plan and include any direct or indirect expenses that are expected to exceed \$1,000.

These interim final regulations were open to the public for comment into February 2011. As a result, on February 11, 2011, the DOL announced that they have delayed the implementation of the regulations from the original effective date of July 16, 2011 to January 1, 2012 to allow for time to review the recommendations received through the public comments.

### ▶ DEFINED BENEFIT PLAN AMENDMENT DEADLINE EXTENDED BY THE IRS

Notice 2010-77, issued in November 2010, further extended the deadline of adopting certain defined benefit plan amendments to the last day of the first plan year that begins on or after January 1, 2011. The additional time will allow plan sponsors to incorporate necessary changes from the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA) and Pension Relief Act of 2010.

The notice can be found at <http://www.irs.gov/pub/irs-drop/n-10-77.pdf>.

### ▶ EBSA ENFORCEMENT ACTIONS TO PROTECT EMPLOYEE CONTRIBUTIONS

The DOL's Employee Benefits Security Administration (EBSA) recently announced a series of enforcement actions, including both civil and criminal cases, that are designed to protect employee contributions made to retirement and health plans. The EBSA continues its commitment to safeguard

## 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>

employee contributions to employee benefit programs by investigating situations where an employer may either improperly delay forwarding contributions to the employee benefit plan or use the contributions for other personal or business purposes. The agency's first national criminal enforcement project, the Contributory Plan Criminal Project (CPCP), is designed to target persons committing fraud against participants and beneficiaries of contributory retirement and health plans. According to the CPCP Fact Sheet released by the EBSA, employers are not the only culprits – service providers may also gain access to retirement accounts and use employee contributions for their personal profit. In the criminal cases, the EBSA works with U.S. attorneys, as well as state and local law enforcement, to enforce laws safeguarding plan assets. Those convicted of embezzlement or misappropriation of employee funds can face severe criminal penalties, including imprisonment, and are typically barred from providing services or acting in any fiduciary capacity for a period of 13 years. To date, there have been 191 investigations initiated under the criminal project, of which 97 were referred to prosecutors, and 20 indictments have been obtained.

The DOL also published a list of "10 Warning Signs That Your 401(k) Contributions Are Being Misused," which educates employees

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by providing them a list of warning signs that a potential problem may exist in their retirement account.

A list of enforcement actions, the Contributory Plans Criminal Project Fact Sheet and the "10 Warning Signs" are available at the DOL's website at <http://www.dol.gov/ebsa>.

### ►DO YOU HAVE A "MR. FORFEITURE" IN YOUR PLAN?

"Mr. Forfeiture" will not have an enrollment form for the plan or receive a salary from the plan sponsor. Typically, his social security number is 999-99-9999. He is not an actual participant, but his account in your plan may represent the non-vested portion of terminated participants' account balances for matching or non-elective employer contributions.

In defined contribution plans, forfeitures occur when participants fail to complete a period of service before becoming fully vested in the employer's contributions. When a participant terminates before completing the service requirement, as defined in the plan document, his or her non-vested account may be forfeited. Some plan administrators place these forfeited amounts into a suspense or forfeiture account, sometimes commonly

titled as "Mr. Forfeiture," and allow these forfeitures to accumulate over several years. However, this practice is not allowed under the Internal Revenue Code (IRC).

The plan document should contain language that details how and when a plan can use the forfeitures. Forfeitures may generally be used to pay a plan's administrative expenses, to reduce employer contributions or be allocated among participants on at least an annual basis. Plan sponsors and third-party administrators need to monitor plan forfeitures periodically to ensure that forfeitures generated in a plan year are used in accordance with the plan document. If the plan document allows for forfeitures to reduce employer contributions, this may assist in the plan sponsor's cash management.

All funds in a defined contribution plan must be allocated to participants or it jeopardizes its qualified plan status. If your plan has been accumulating a balance in a forfeiture account, then there may be an operational error that will need to be corrected. Plan sponsors can correct this error using the Employee Plans Compliance Resolution Systems (EPCRS) with the IRS. Depending on the length of time between the error and the correction, the Plan would use either the Self Correction Program or the Voluntary Correction Program.

## FRIENDLY REMINDERS...

- Register for electronic signing credentials which will enable the appropriate individual to electronically sign the Form 5500 and submit it through EFAST2. Form 5500 signers can log on today and get credentials at <http://www.efast.dol.gov/portal/app/welcome?execution=e1s1>
- Communicate now with service providers regarding any information needed for the additional disclosures related to ASU 2010-6
- Request from the service providers the auditor's year-end reporting package
- Request and evaluate SAS 70 reports from all plan service providers
- Form 11-K filing deadline is 180 days after the plan's year end, generally for calendar year-end plans that would be June 29, 2011
- Form 5500 filing deadline is seven months after the plan's year end, generally July 31, 2011, for calendar year-end plans (an extension of 2 1/2 months may be requested)

### 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 best 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.

### ABOUT BDO

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