Pension Plan Fix-It Handbook

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FBAR Obligations Clarified

The IRS has recently issued several pieces of guidance related to the filing of the Report of Foreign Bank and Financial Accounts (FBAR) by pension plan sponsors. While the IRS has relieved some of the filing obligations, others remain. Plan sponsors with foreign financial accounts should be aware of their FBAR filing obligations and should be gearing up to make filings before June 30, 2011.

Under IRS rules, U.S. persons with a financial interest in, or signature or other authority over, financial accounts in a foreign country that have an aggregate value exceeding $10,000 at any time during the calendar year are required to file the FBAR by June 30 of the following year. Although this filing requirement is not new, the IRS recently made clear that the scope of the requirement is much broader than previously understood. ***Page 2***

Funding Relief Granted

Congress passed, and President Obama signed into law, a bill that gives pension plans a break from tough funding targets. The new law provides temporary funding relief to defined benefit pension plans that suffered significant losses due to the steep market slide in 2008. The measure allows plan sponsors more time to make up those investment losses.

Under the new funding relief law, pension plans will be allowed to elect relief for two plan years through an extended amortization period. Plans will be able to choose to amortize losses over periods of nine years or 15 years instead of the usual seven years. ***Page 4***

International Focus Revealed

The IRS Employee Plans (EP) Division is targeting the employee benefit plans of multinational companies and plans with international investments. One item on the EP priority list indicates that the IRS will "develop strategies and capabilities to address key international issues impacting the employee plans sector." Another item states that the employee plans team audit is expanding enforcement in "targeted risk areas, including international and abusive emerging issues."

But what is the IRS really talking about? Although the agency is still figuring out and it views the priority items as flexible concepts, the IRS has begun to raise some specific issues. These include Puerto Rican plans, foreign plan investments, and loans and distributions. ***Page 7***

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IRS Issues FBAR Filing Relief, But Certain Filing Obligations Remain

By Karen A. Simonsen, Todd A. Solomon and James G. Issac

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The IRS has recently issued several pieces of guidance related to the filing of the Report of Foreign Bank and Financial Accounts, IRS Form TD F 90-22.1 (FBAR), by pension plan sponsors. While the IRS has relieved some of the filing obligations, most notably the requirement for plans to file for foreign hedge fund investments for 2009 and prior years, certain filing obligations remain. Plan sponsors with foreign financial accounts should be aware of their FBAR filing obligations and should be gearing up to make filings before June 30, 2011 (and, in some cases, June 30, 2010). The following discussion is intended to provide plan sponsors and related individuals with a better understanding of the IRS's position on FBAR requirements and how this position may affect their filing obligations.

Who is generally required to file an FBAR?

Under IRS rules, U.S. persons with a financial interest in, or signature or other authority over, financial accounts in a foreign country that have an aggregate value exceeding $10,000 at any time during the calendar year are required to file the FBAR by June 30 of the following year (subject to limited exceptions). Although this filing requirement is not new, the IRS has recently made clear that its scope is much broader than previously understood.

Are there consequences for not filing an FBAR?

Yes. Criminal penalties for the willful violation of FBAR requirements can — if connected with the violation of another law or if part of a pattern of illegal activity — reach $500,000 and include imprisonment for 10 years.

Are plan sponsors and related individuals subject to the FBAR filing requirements?

In short, the answer may be "yes." The IRS has indicated that the FBAR filing requirements may extend to employee benefit pension plans and trusts, plan sponsors, plan trustees, investment managers and plan service

See *FBAR*, p. 3

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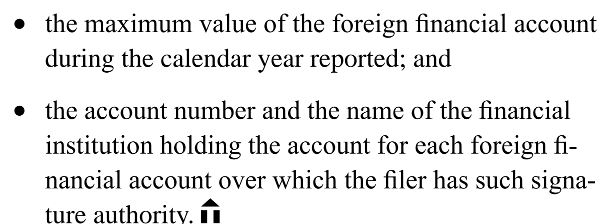
FBAR Reporting Obligations

A plan filer with signature authority over a foreign financial account faces burdensome FBAR reporting obligations. If covered, plan filers are required to list the following:



- the maximum value of the foreign financial account during the calendar year reported; and
- the account number and the name of the financial institution holding the account for each foreign financial account over which the filer has such signature authority.

FBAR (continued from p. 2)

providers — collectively, “plan filers.” This is because a pension plan, for example, will often invest in offshore investment vehicles. These foreign investments may fall within FBAR’s use of the term “foreign financial accounts.”

Most defined contribution plans do not hold foreign financial accounts (for example, most “international” mutual funds are U.S.-based funds that hold international securities and thus do not constitute foreign financial accounts). However, many defined benefit plans hold foreign mutual funds or offshore hedge funds and private equity funds, both of which would qualify as a foreign financial account.

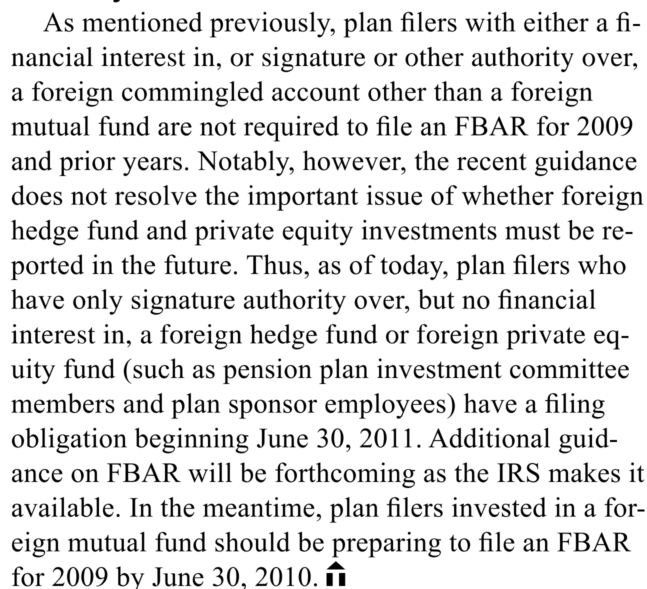
ERISA says each plan must have a “named fiduciary” responsible for the management and administration of the plan. Named fiduciaries have the power to dispose of a plan’s assets. Under FBAR’s instructions, such persons will generally have “signature or other authority” over the assets invested in the offshore investment vehicles mentioned above and would need to file an FBAR.

Depending on the identity of a plan’s named fiduciary, the plan sponsor’s directors, officers, investment committee members and a number of other employees may have the authority to engage in transactions on behalf of the plan. Arguably, this power could fall within the definition of “signature or other authority” over the plan’s foreign accounts, and thus require each of these individuals — whose normal job duties may be only tenuously related to a plan — to file an FBAR as well. If covered, plan filers face burdensome reporting obligations (see box, p. 2).

Does recent IRS guidance clarify plan filer FBAR obligations?

Although several issues remain unresolved, recent guidance has clarified some important points. For example:

- Plan filers with signature authority over, but no financial interest in, a foreign financial account have received a one-year extension of their filing deadline until June 30, 2011. Examples of this type of plan filer might include investment committee members and in-house investment officers who are authorized to move money for the plan’s trust.
- Plan filers invested in a foreign account, such as a foreign mutual fund, must still file an FBAR for 2009 by June 30, 2010. Examples of this type of plan filer might include the plan or the plan’s trustee(s).
- Plan filers with either a financial interest in, or signature or other authority over, a foreign commingled account other than a foreign mutual fund are not required to file an FBAR for 2009 and prior years.
- The recent FBAR guidance specifically does not exempt pension plans from filing requirements, which means the FBAR requirements for foreign accounts, including commingled accounts such as foreign hedge funds, are likely here to stay.



What key issues remain unresolved?

As mentioned previously, plan filers with either a financial interest in, or signature or other authority over, a foreign commingled account other than a foreign mutual fund are not required to file an FBAR for 2009 and prior years. Notably, however, the recent guidance does not resolve the important issue of whether foreign hedge fund and private equity investments must be reported in the future. Thus, as of today, plan filers who have only signature authority over, but no financial interest in, a foreign hedge fund or foreign private equity fund (such as pension plan investment committee members and plan sponsor employees) have a filing obligation beginning June 30, 2011. Additional guidance on FBAR will be forthcoming as the IRS makes it available. In the meantime, plan filers invested in a foreign mutual fund should be preparing to file an FBAR for 2009 by June 30, 2010.

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Washington Watch

Pension Funding Relief Becomes Law

Relief has finally arrived for pension plans struggling to meet funding targets. After more than a year of pressure from pension plan sponsors, Congress passed and President Obama signed into law a bill that provides plans with a break from tough funding targets. The retirement plan industry welcomed the news.

The law provides temporary funding relief to single employer and multiemployer defined benefit pension plans that suffered significant losses due to the steep market slide in 2008. It allows plan sponsors more time to make up those investment losses.

Under the bill, single employer plans will be allowed to elect relief for any two plan years during 2008-2011 through extended amortization periods. Plans will be able to choose to amortize losses over periods of nine years or 15 years instead of the usual seven years. Plans that choose the nine-year option will pay interest only in the first two years. Multiemployer plans that experienced investment losses will be able to take advantage of similar relief in the form of a 30-year amortization period.

Employers that choose the relief will be required to make additional contributions to their plans if they pay compensation to an employee in excess of $1 million, pay extraordinary dividends or engage in extraordinary stock buybacks during the first part of the relief period. Business groups are not pleased with these rules but are willing to accept them in return for funding relief.

Rep. Earl Pomeroy (D-N.D.), the primary advocate in the House for pension funding relief, said the legislation will help shore up pension plans and give employers across the nation "the flexibility to recover from the damage caused by Wall Street's meltdown. That will help workers and help these companies preserve jobs."

The president signed the legislation — the Preservation of Access to Care for Medical Beneficiaries and Pension Relief Act, H.R. 3962 — on June 25. In addition to funding relief for pension plans, the bill raises the Medicare payment rate for physicians.

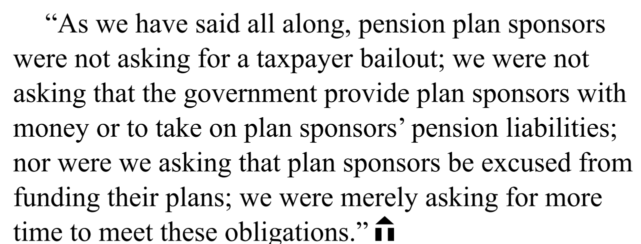
The Senate passed the final version of the bill by unanimous consent on June 18. The House approved it on June 24 by a vote of 417-1. Rep. George Miller (D-Calif.) was the lone holdout. He voted against the bill because it did not contain provisions to require 401(k) plans to provide more information about retirement plan fees to participants. President Obama signed it into law on June 25. Congressional leaders chose to attach pension funding relief to the Medicare-payment bill after another bill containing the relief — the American Jobs and Closing Tax Loopholes Act, H.R. 4213 — stalled in the Senate.

> Plans will be able to choose amortization periods of nine years or 15 years instead of the usual seven years.

Relief Welcomed

The American Benefits Council was among the industry groups that signaled its approval of the legislation. Council President James A. Klein said the bill will provide "a boost of economic stimulus." The group said in a statement that "the measure will help save jobs across the country by allowing companies more time to repay the huge losses brought about by a 'perfect storm' of economic factors, including the depressed financial markets, low interest rates and the 2006 pension funding rules."

The ERISA Industry Committee (ERIC) sounded a similar note. In a statement, ERIC President Mark Ugoretz commented, "ERIC applauds the House, as well as the Senate, for supporting pension funding relief and recognizing the urgency of this issue. While this bill is not perfect, it is an important step in providing urgent relief to plan sponsors — many of whom continue to be strapped for cash and must choose between funding their plans or delay hiring and capital investments or even further cut back on jobs.



"As we have said all along, pension plan sponsors were not asking for a taxpayer bailout; we were not asking that the government provide plan sponsors with money or to take on plan sponsors' pension liabilities; nor were we asking that plan sponsors be excused from funding their plans; we were merely asking for more time to meet these obligations."

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Congress Addresses Concerns About Swaps Legislation

Major players in the financial and retirement plan industries convinced lawmakers to scale back a provision in the financial reform bill that would have imposed a fiduciary duty on swap dealers, which typically include banks and investment banks. Lawmakers in the House and Senate reached a compromise on the reform legislation in late June in an effort to clear it for President Obama's signature. Many observers characterize the bill as the most comprehensive and significant financial services legislation since the Great Depression.

One of the stated goals of the bill — the Dodd-Frank Wall Street Reform and Consumer Protection Act — is to bring increased transparency and accountability to the derivatives market. Derivatives encompass a broad range of financial instruments, including swaps, that derive their value from underlying assets or interest rates, for example. Generally, large defined benefit pension plans enter into swap arrangements. Large defined contribution plans also use swaps to hedge risk in separately managed accounts offered as a plan investment option.

The Senate passed a version of the financial reform bill that would have imposed a fiduciary duty on a swap dealer that "provides advice regarding, or offers to enter into, or enters into a swap with a pension plan, endowment, or retirement plan." But after hearing objections from financial firms and retirement plans, lawmakers softened the language contained in the compromise legislation.

The ERISA Industry Committee (ERIC) was among the hundreds of organizations that raised concerns. ERIC raised two specific concerns with the bill: (1) the Senate provision requiring a swap dealer to have a fiduciary duty to a retirement plan would effectively require a swap dealer to represent both sides of a swap transaction, which is legally unworkable; and (2) the House bill's definition of a "major swap participant" (MSP) would subject plans to dealer-type regulation, which would inappropriately harm plans' ability to deliver benefits efficiently.

In response to industry concerns, the compromise legislation would exempt pension plans from the definition of MSP. Specifically, the bill states that the following will be exempt from the definition: "positions maintained by any employee benefit plan … for the primary purpose of hedging or mitigating any risk directly associated with the operation of the plan."

Rather than imposing a specific fiduciary duty, the bill adds provisions that would apply certain standards of business conduct to swap dealers that provide advice to an entity entering into a swap transaction. For instance, when acting as counterparties to a pension fund, endowment fund, or state or local government, dealers are to have a reasonable basis to believe that the fund or governmental entity has an independent representative advising them.

Lawmakers reached compromises on other sticking points, including whether to impose a fiduciary duty on broker-dealers. House and Senate negotiators agreed to call for a six-month study and to give the Securities and Exchange Commission the power to write rules on a standard of care for all professionals rendering investment advice to "retail customers," following a public comment period.

What Is a Swap?

Swap: A privately negotiated agreement between two parties to exchange cash flows at specified intervals (payment dates) during the agreed-upon life of the contract (maturity or tenor). Entering a swap typically does not require the payment of a fee.

Source: International Swaps and Derivatives Association Inc.

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Industry Update

Cash Balance Plans Post Gains

The number of active cash balance plans in the United States has increased more than threefold in recent years, according to Kravitz Inc., a California retirement plan administrator. There were 4,797 active cash balance plans in 2007 (the most recent year for which IRS data is available). That's up 359 percent from 2001, when there were 1,337 active cash balance plans, Kravitz said in its *National Cash Balance Research Report 2010*.

Cash Balance Plan Features

A cash balance plan is a defined benefit (DB) plan that defines benefits in terms that are more characteristic of a defined contribution (DC) plan. In other words, a cash balance plan defines the promised benefit in terms of a stated account balance.

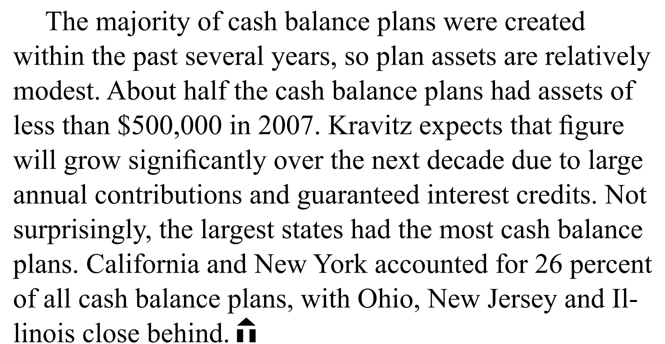
In a typical cash balance plan, a participant's account is credited each year with a pay credit — such as 5 percent of compensation from the participant's employer — and an interest credit. Increases and decreases in the value of the plan's investments don't directly affect the benefit amounts promised to participants.

In addition to generally permitting participants to take their benefits as lump sum benefits at retirement, cash balance plans often allow vested participants to receive their benefits in lump sums if they terminate employment before retirement age. Traditional DB pension plans typically don't offer this feature.

Continued Growth Expected

Business owners recovering from losses in their DC plans are turning to cash balance plans for security, according to Kravitz. Investments in cash balance plans are typically tied to a conservative benchmark and are shielded from market volatility.

Small and mid-sized firms have driven the recent growth in cash balance plans. Nearly 80 percent of active cash balance plans in 2007 were in place at firms with fewer than 100 employees. Conversely, the remaining 20 percent of U.S. cash balance plans were sponsored by firms with 100 or more employees. The majority of cash balance plans — 68 percent — had fewer than 36 participants, Kravitz said.



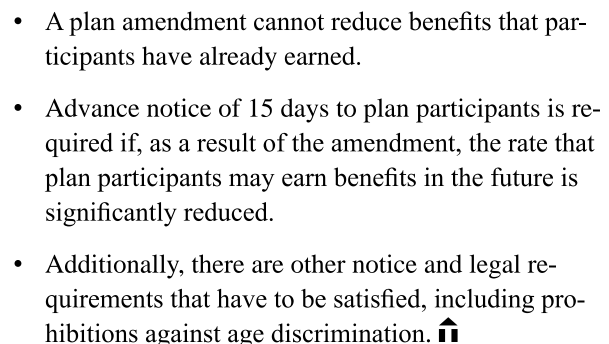
Cash balance plans are particularly popular with professional services firms — especially medical and dental businesses, Kravitz found. In 2007, medical and dental groups together accounted for 34 percent of all U.S. cash balance firms. Cash balance plans are becoming increasingly popular in other sectors as well, according to Kravitz, including law, financial services, technology and manufacturing firms.

The majority of cash balance plans were created within the past several years, so plan assets are relatively modest. About half the cash balance plans had assets of less than $500,000 in 2007. Kravitz expects that figure will grow significantly over the next decade due to large annual contributions and guaranteed interest credits. Not surprisingly, the largest states had the most cash balance plans. California and New York accounted for 26 percent of all cash balance plans, with Ohio, New Jersey and Illinois close behind.

Restrictions Apply When Converting to a Cash Balance Plan

Employers have substantial flexibility to terminate or amend their existing retirement plans. Therefore, they generally may change by plan amendment their traditional pension plans and the benefit formulas they use.

As noted below, federal law does place some restrictions on plan changes, including amendments that convert a traditional pension plan formula to a cash balance plan formula.



- A plan amendment cannot reduce benefits that participants have already earned.
- Advance notice of 15 days to plan participants is required if, as a result of the amendment, the rate that plan participants may earn benefits in the future is significantly reduced.
- Additionally, there are other notice and legal requirements that have to be satisfied, including prohibitions against age discrimination.

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IRS Seeks Increased International Employee Benefits Compliance

By David W. Powell

David W. Powell is a principal with the Groom Law Group in Washington, D.C. He has worked on tax and ERISA issues relating to all types of employee pension and welfare benefit plans for more than 26 years. He specializes in qualified plans of public companies, including 401(k), profit sharing, pension and cash balance plans, and international benefits tax issues.

Among the items listed by the IRS as key Employee Plans Division (EP) priorities for fiscal year 2010 (see box, p. 8), two target the employee benefit plans of multinational companies and plans with international investments. The very first item on the list indicates the IRS will "develop strategies and capabilities to address key international issues impacting the employee plans sector." Another item states that the employee plans team audit (EPTA - Large Case) is expanding enforcement in "targeted risk areas, including international and abusive emerging issues."

Forewarned is forearmed: The IRS is targeting the employee benefit plans of multinational companies and plans with international investments.

But what is the IRS really talking about?

Although the agency is still figuring that out and it views the priority items as flexible concepts, we understand that the IRS has begun to raise some specific issues.

Puerto Rican Plans

First are issues surrounding Puerto Rico plans and "dual status" plans. In addition to the U.S. tax treatment of distributions (see, for example, Revenue Procedure 2004-37) and deductions for contributions, the IRS has been working with the Hacienda in Puerto Rico (the Puerto Rican Treasury Department). The IRS is training Puerto Rican plan auditors and helping the Hacienda develop its own EPCRS-style correction program. This was also mentioned in the Winter 2010 *Employee Plans News* from the IRS.

In that regard, plan sponsors may also want to keep in mind that if they want to make changes involving plan transfers, the transition relief under Revenue Ruling 2008-40 for transfers to Code Section 1022(i)(1) transferee plans (qualified in Puerto Rico only) from U.S.-qualified plans ends on Dec. 31, 2010.

Foreign Plan Investments

Another priority area appears to be the valuation of foreign plan investments and disclosures. Apparently, particular concern has been raised that investments in nonperforming non-U.S. debt instruments are not being properly valued. Another concern has involved the valuation of alternative investments, such as foreign private equity and hedge funds. Of course, if valuations are incorrect, Form 5500 issues arise and perhaps plan funding issues as well.

The IRS has also expressed concern that GAAP/IAS (generally accepted accounting principles/international accounting standards) conversion of information may be resulting in some incorrect accounting and reporting by U.S.-qualified plans. With respect to mobile employees, the IRS is apparently concerned that multinational employers may not be properly sourcing the income of employees as well as the benefit arrangements of employees. This may affect U.S. expenses or transfer pricing when reflecting costs relating to expatriate employees.

Loans and Distributions

The IRS is also understood to be concerned that plans are not following the 401(k) loan and hardship distribution rules when employees leave the United States on an assignment. For example, the related foreign employing unit may not be imposing the U.S. plan rules for repayments and contribution restrictions.

Also, the IRS believes it has not made sufficient efforts in the past to enforce Code Section 402(b) (and presumably Section 72(w) as added by American Jobs Creation Act in 2004), which can result in the taxation of funded foreign plans to U.S. taxpayer

See *Compliance*, p. 8

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Rules and Regulations

Agency Roundup

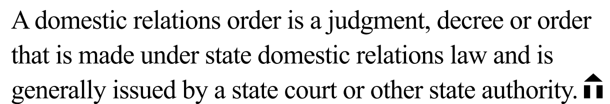
This occasional feature appears in the newsletters that accompany supplements to the *Pension Plan Fix-It Handbook*. It highlights the activities of the federal agencies that regulate the U.S. pension system that are of the most interest and relevance to plan sponsors and administrators.

DOL Issues Final Rule on QDROs

The U.S. Department of Labor (DOL) published a final rule clarifying certain requirements for qualified domestic relations orders (QDROs, see ¶734, ¶744 and ¶745 of the *Handbook*). The rule is designed to give retirement plan administrators additional guidance when deciding whether to turn over money from the plan to someone other than a plan participant to satisfy a domestic relations obligation, such as alimony or child support.

The final rule states that a domestic relations order otherwise meeting ERISA's QDRO requirements will not fail to be treated as a QDRO solely because of when it is issued or because it is issued after, or revises, another domestic relations order (DRO, see box). The rule includes examples of circumstances involving the timing of a DRO.

What Is a Domestic Relations Order?



A domestic relations order is a judgment, decree or order that is made under state domestic relations law and is generally issued by a state court or other state authority.

A QDRO is a DRO that creates or recognizes the existence of an alternate payee's right to receive, or assigns to an alternate payee the right to receive, all or a portion of the benefits payable with respect to a participant under a retirement plan. Under federal law, the administrator of a retirement plan that provides the benefits affected by an order is initially responsible for determining whether a domestic relations order is a QDRO.

The DOL regulation — Final Rules Relating to the Time and Order of Issuance of Domestic Relations Orders — was published in the June 10 *Federal Register*.

EBSA Expands Assets Acceptable To Settle Litigation

The EBSA expanded the category of assets that can be accepted as settlement of litigation between employee benefit plans and related parties. The expansion was made as an amendment to an existing class exemption — Prohibited Transaction Exemption (PTE) 2003-39.

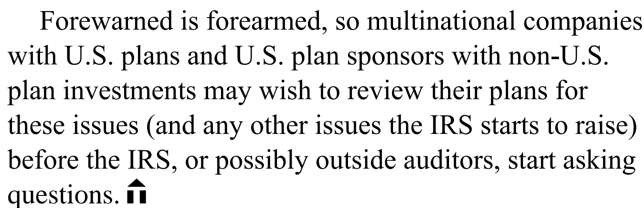
PTE 2003-39 provides an exemption under ERISA for a plan to receive consideration from a related party to partially or completely settle litigation. The final exemption allowed plans to release claims against related parties in exchange for cash, securities (including employer securities) and the promise of additional benefits. The exemption also allows related parties to pay amounts owed to plans over time.

See *Roundup*, p. 9

Compliance *(continued from p. 7)*

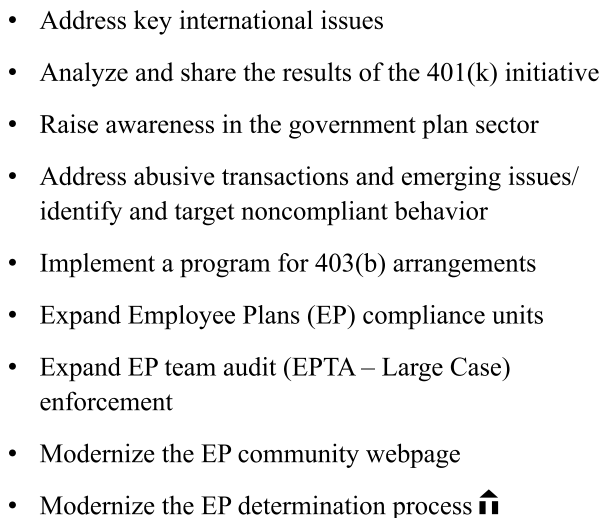
participants (subject to tax treaty), and the IRS wants to change that.

Also, at some point, enforcement of Section 457A — intended to curtail deferred compensation offshore and a provision very broad in scope — will follow in the footsteps of the enforcement of Section 409A.



Forewarned is forearmed, so multinational companies with U.S. plans and U.S. plan sponsors with non-U.S. plan investments may wish to review their plans for these issues (and any other issues the IRS starts to raise) before the IRS, or possibly outside auditors, start asking questions.

Key Employee Plans Division Priorities 2010



- Address key international issues
- Analyze and share the results of the 401(k) initiative
- Raise awareness in the government plan sector
- Address abusive transactions and emerging issues/identify and target noncompliant behavior
- Implement a program for 403(b) arrangements
- Expand Employee Plans (EP) compliance units
- Expand EP team audit (EPTA – Large Case) enforcement
- Modernize the EP community webpage
- Modernize the EP determination process

Roundup *(continued from p. 8)*

The EBSA's recent amendment expands the types of assets that can be accepted in settlement of litigation to include non-cash assets that can be valued using independent third parties or an objective methodology. The amendment also allows plans to acquire, hold or sell employer securities received to settle litigation. In addition, it clarifies the duties of the independent fiduciary charged with settling litigation on behalf of a plan.

PTE 2003-39 requires that the terms of the settlement be approved by a fiduciary not involved in the transaction that was the subject of the litigation. It also requires the settlement to be reasonable, in light of the plan's likelihood of full recovery, the risks and costs of litigation and the value of claims forgone. The amendment to PTE 2003-39 was published in the June 15 issue of the *Federal Register* and became effective on that date.

Amendment Would Expand Allowable Transactions for In-house Asset Managers

The EBSA has proposed an amendment to a prohibited transaction exemption — PTE 96-23 — that allows in-house managers of large employee benefit plans to engage in a wide range of transactions with related parties.

The EBSA's proposed amendment would ease administrative burdens and expand relief under the class exemption to include certain transactions not currently permitted. The proposed amendment also is designed to address practitioner uncertainty that exists regarding certain provisions contained in the class exemption. The proposed amendment includes provisions that would clarify the department's views and expectations regarding the class exemption's annual audit and written report requirements. The amendment was published in the June 14 issue of the *Federal Register*. Written comments and requests for a public hearing about the proposed amendment must be received on or before Aug. 13.

Premium Filing Relief Issued

The Pension Benefit Guaranty Corporation (PBGC) issued a technical update providing relief to defined benefit plans that calculated their variable-rate premiums (VRPs) using the alternative premium filing target (APFT) but did not indicate in their premium filings that they were electing to do so by checking Box 5. The PBGC said that plans failed to check Box 5 in approximately 5 percent of the cases in which the APFT was used to compute VRPs.

The relief — Technical Update 10-2 — is in response to a May 20 letter from the leaders of the Senate's Health, Education, Labor and Pensions Committee, and the Senate Finance Committee. The chairmen and ranking members of those committees raised concerns with the PBGC that many plans made their premium filings for 2009 thinking they had elected to use the APFT, rather than the standard method, but were told by the agency that they could not use the APFT because they failed to check Box 5.

The PBGC announced that relief would be available to any plan that intended to make the election to use the APFT but did not check Box 5 if:

- the plan filed on time;
- the plan used the APFT to determine the VRPs; and
- the "Alternative" box was checked in line 7d(1), where the actuary reports the method that was used to determine the VRPs.

To take advantage of the relief, plan administrators will be required to notify the PBGC in writing to say the plan intended to make the election. A plan in this situation will be deemed to have made a valid election, which will be locked in for five years. The PBGC issued Technical Update 10-2 on June 16.

Premium Filing Instruction Changes Planned

The PBGC intends to revise its 2011 and 2012 filing instructions to an information collection it conducts annually through comprehensive premium filings — premium-payment information filed electronically by plan administrators through My Plan Administration Account (My PPA). All plans covered by Title IV of ERISA pay a flat-rate per-participant premium. Underfunded single-employer plans also pay a variable-rate premium based on the value of the plan's unfunded vested benefits.

The PBGC intends to revise the 2011 filing instructions to, among other things, clarify that if a plan has been frozen more than once, a filer should report the most recent date that the plan became closed to new entrants. The agency also intends to revise the 2012 filing instructions to require plans using the alternative premium funding target to report the "effective interest rate," as defined in Section 430(h) of the tax Code. The PBGC's proposal was published in the May 20 *Federal Register*.

New Information Collection Proposed To Locate Participants of Terminated Plans

The PBGC plans to modify the information it collects from participants and beneficiaries who may be entitled to pension benefits under a defined benefit plan that has terminated. The collection consists of information participants and beneficiaries are asked to provide in connection with an application for benefits. The requested information is needed to enable the PBGC to determine benefit entitlements and to make appropriate payments. The

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information collection includes My Pension Benefit Account (My PBA), an application on the PBGC's website, http://www.pbgc.gov, through which plan participants and beneficiaries may conduct electronic transactions with the agency, including applying for pension benefits.

The PBGC intends to add three new forms to the information collection. Two of the new forms will be used to ascertain the continuing eligibility of participants who are receiving benefits based on disability. The other new form will be used to determine whether participants are eligible for additional pension service credits under the Uniformed Services Employment and Reemployment Rights Act, which establishes specific rights for re-employed service members in their employee pension benefit plans. The agency also intends to modify PBGC Form 704 (Request for Earnings Information) to eliminate the need for respondents to provide copies of IRS Form W-2 (Wage and Tax Statement) to confirm their earnings. The PBGC published its notice of intent in the June 2 *Federal Register*.

PBGC Clarifies Reporting Instructions For Multiemployer Plans

The PBGC has provided technical guidance clarifying how multiemployer plans can meet the requirement that they report inactive employees whose employers have withdrawn from the plans.

Multiemployer defined benefit plans are required to include on their annual Form 5500 report, as of the end of the plan year to which the report relates, the number of participants on whose behalf no contributions were made by an employer of the participant for the applicable year and for each of the two preceding plan years. Beginning with the 2009 plan year, plans must report this information on Line 14 of the Schedule R (Retirement Plan Information).

In Technical Update 10-1, the PBGC provided clarifying guidance on the instructions for Line 14 of Schedule R. The technical update clarifies the "last employer rule" under the Schedule R instructions. It also provides plans with reporting relief for the 2009 plan year through the use of "a reasonable approximation" of the number of participants required to be reported (for example, based on samplings) or an alternative method of compliance based on the number participants of withdrawn employers. The PBGC issued Technical Update 10-1 on June 8.

IRS Collecting Compliance Data From Sponsors of 401(k) Plans

The IRS has begun sending its 401(k) Compliance Check Questionnaire to 1,200 randomly selected employers that sponsor 401(k) plans. Employers that receive the questionnaires will have 90 days to complete them online.

In the United States, 401(k) plans have become the predominant retirement plan. There are nearly half a million 401(k) plans in the country, covering more than 50 million participants, according to the IRS. But the rapid expansion of 401(k) plans has been accompanied by widespread noncompliance. A previous IRS study indicated that 401(k) plans are by far the most noncompliant retirement plan type.

The IRS expects to use the information it gathers from the questionnaire to help focus its enforcement and outreach efforts. While the questionnaire does not qualify as an audit or investigation, the agency could use information collected from individual plans to audit those plans. The questionnaire covers the following categories:

- demographics (plan type, status, features, other plans maintained by the employer);
- 401(k) plan participation (number of employees, number of participants, age and service restrictions);
- employer and employee contributions (deferrals, matching contributions, non-elective contributions);
- top-heavy and nondiscrimination rules (actual deferral percentage and actual contribution percentage testing, top-heavy and non-discrimination rules);
- distribution and plan loans (distribution options, loan amounts, repayment terms);
- other plan operations (losses due to fraud or theft, employer stock, foreign investments);
- automatic contribution arrangements (types of arrangements, default deferral rates);
- designated Roth features (number of participants making designated Roth contributions, rollover options);
- IRS voluntary compliance programs (use of the Employee Plans Compliance Resolution System (EPCRS) or the 401(k) Fix-It Guide); and
- plan administration (plan operations, compliance procedures, plan amendments).

The questionnaire is quite extensive, with 69 multiple-part questions. Not all questions will be applicable to the plans that are asked to complete the questionnaire.

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The questionnaire can be used as a tool for plans to detect compliance problems, which can often be corrected through the EPCRS (see ¶1110, App. I of the *Handbook*). A copy of the 401(k) Compliance Check Questionnaire can be found at http://www.irs.gov/pub/irs-tege/epcu_401k_questionnaire.pdf.

IRS Issues Final Diversification Rules For DC Plans

The IRS has issued final regulations relating to the diversification of publicly traded employer securities held by certain defined contribution (DC) plans. The regulations apply for plan years beginning on or after Jan. 1, 2011.

Code Section 401(a)(35), which was added to the tax code by the Pension Protection Act of 2006, provides certain plan participants with the right to diversify publicly traded employer securities held by a DC plan. To remain qualified under Section 401(a), a DC plan (other than certain employee stock ownership plans) must provide applicable individuals with the right to divest employer securities in their accounts and reinvest those amounts in diversified investments.

Each participant who has completed at least three years of service, a beneficiary of such a participant or a beneficiary of a deceased participant must be allowed to divest employer securities allocated to the individual's account and to reinvest in other qualifying investment options. A DC plan must offer individuals at least three investment options, other than employer securities, to which the individuals may direct the proceeds from the divestment of employer securities. Each option must be diversified and have materially different risk and return characteristics. A plan generally may not impose restrictions or conditions on the investment of employer securities that are not also imposed on the investment of other assets of the plan.

Plan administrators are required to furnish a notice to individuals not later than 30 days before the first date on which an individual is eligible to exercise her right to divest employer securities. The notice must set forth the individual's diversification rights and describe the importance of diversifying retirement account investments. The IRS published the final regulations in the May 19 issue of the *Federal Register*.

New SEC Rules Would Apply To TDF Marketing Materials

Investors would have new information available to help them better understand target date funds (TDFs), under new rules proposed by the Securities and Exchange Commission (SEC). The proposed rules are designed to help clarify the meaning of a date in a TDF's name.

TDFs are structured to make investing for retirement more convenient by automatically changing an investor's investments to a more conservative mix as the investor nears retirement. This automatic asset allocation has been referred to as a fund's "glide path."

The name of a TDF often refers to its target date, which generally represents the year in which the investor intends to retire. But TDFs that share the same target date may have very different investment strategies or risks, as well as varying fees.

The rules proposed by the SEC would give investors more information about a fund's anticipated investment glide path and risk profile. For example, they would require a TDF's marketing materials to include a prominent table, chart or graph that depicts the how the fund's asset allocation changes over the life of the fund.

The rules would also require the materials to include a written statement explaining that the fund's investment mix changes over time and that the asset allocation eventually stops changing. The statement would explain when — how many years after the target date — the asset allocation becomes final and what the final investment mix would hold.

"These proposed rule changes would help clarify the meaning of the date in a target date fund and improve the information provided when these funds are advertised and marketed to investors," commented SEC Chairman Mary L. Shapiro.

Under the SEC's proposed rules, marketing materials for a TDF that includes a target date in its name would need to break down the fund's holdings in different types of investments — such as equity securities, fixed income securities or cash. The types of investments would need to appear with the fund's name the first time the name is used. The SEC's proposal would require TDF marketing materials to include a warning to potential TDF investors that they could lose money by investing in the fund.

The SEC voted unanimously on June 16 to propose the new rules, which would amend the Securities Act and the Investment Company Act. The SEC is seeking public comment for a period of 60 days following their publication in the *Federal Register*. In May, the SEC and the Department of Labor (DOL) issued an investor bulletin explaining aspects of TDFs investors should consider before investing in one. The DOL also intends to issue new TDF disclosure rules in the near future.

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