BENEFIT BYLINES

Fall 2013
Published by Associated Benefit Planners, Ltd.

Fee Disclosure Timing Relief

Background

In August 2012, many of ABP's clients experienced the first round of participant fee disclosure required by the Department of Labor. The result of DOL regulations, the disclosures were implemented to help keep plan participants informed of the various administrative and investment expenses incurred in their plan accounts. These regulations apply only to qualified retirement plans with participant-directed investments. As such, defined benefit plans and other defined contribution plans that employ a trustee-directed investment structure are exempt from providing these disclosures to participants.

Financial institutions and recordkeepers bore the responsibility to create these notices which focused heavily on investment expenses, with ABP often required to provide a supplemental notice for administrative expenses. With ABP's help to oversee and coordinate this process, our clients were able to timely distribute the disclosures by the August deadline and satisfy the new regulations. Regulations require subsequent annual notices to be provided within 12 months of the original distribution date.

Although the concept of informing participants is generally applauded, the experience of many plan sponsors and industry members has been that the extensive nature of these disclosures has somewhat hampered its effectiveness. Recognizing that these disclosures are here to stay, however, the retirement plan community requested changes from the DOL that would at least make the notice distribution process less burdensome on plan sponsors. As the August 2013 deadline for the recurring notice approached, the DOL listened to these comments and has provided partial relief. *(Continued on Page 6)*

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Are You a Candidate for a Cash Balance Plan?

The cash balance plan, a "hybrid" form of defined benefit plan (see below), is the fastest growing type of qualified retirement plan today. Between 2001 and 2011, the number of cash balance plans has grown at an average rate of 20% per year.

> Cash balance plans, also known as "hybrid" plans, are a form of defined benefit plan. In a cash balance plan, the "defined benefit" is represented by a hypothetical individual account balance that is credited with a contribution credit and an interest credit each year. Both of these credits are defined by the plan provisions. These characteristics make the funding more predictable and stable than traditional defined benefit plans and also tend to minimize investment risk, which is borne by the plan sponsor. Because the plan is a defined benefit plan, much larger contributions may be made to participants' accounts than would be the case in a defined contribution plan. And, because the benefit is expressed in terms of an individual account, participants understand and appreciate these plans more than the benefits from traditional defined benefit plans. Therefore cash balance plans are generally attractive to plan sponsors and participants alike.

Why are cash balance plans experiencing such a dramatic growth? There are several reasons to consider. First, and most important, is the passage of the Pension Protection Act of 2006, which contained several provisions favorable to cash balance plans. In addition, rising tax rates and the likelihood of future tax rate increases have motivated employers to maximize tax deductions and tax-deferred savings. Cash balance plans provide the opportunity to achieve these goals without
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most of the concerns associated with traditional defined benefit plans. By design, cash balance plans tend to minimize investment risk and uncertain costs that are more likely to be experienced by traditional plans. Compared to the maximum annual savings that may be achieved for an individual in a defined contribution plan ($56,500 in 2013 including a "catch-up" contribution of $5,500), a cash balance plan may provide an annual contribution credit of $150,000, $175,000 or even over $200,000, depending on the individual's age and compensation.

Who should consider a cash balance plan? Cash balance plans are sponsored by a variety of business sectors and seem to be particularly popular with professional service entities. Good prospects for these plans include:

- Business owners who want to contribute significantly more than the $51,000-$56,500 level available under a 401(k) plan
- Partnerships desiring to provide substantial equivalent contribution/savings opportunities among partners
- Companies that already sponsor a plan providing 3-4% of pay to their employees and want to increase retirement savings but are hesitant about committing to uncertain funding requirements of traditional defined benefit plans
- Closely held business looking to gradually transfer ownership to the "next generation"
- Older successful business owners who are now ready to maximize their retirement savings
- Highly profitable businesses of all types looking to increase tax deductions

If you think you may fit into any of these categories or if you are an adviser with clients that do, a cash balance plan may be worth considering. Cash balance plan designs are surprisingly attractive in various circumstances and work most successfully when implemented in conjunction with a defined contribution plan [e.g., 401(k)]. Please feel free to contact ABP for more information. ▪

DOMA Ruling Impacts Retirement Plans

On June 26, 2013, the United States Supreme Court ruled that Section 3 of the Defense of Marriage Act (DOMA) was unconstitutional. Although this ruling will have substantial impact on all employer provided benefits, the focus of this article is limited to its effect on qualified retirement plans.

The Defense of Marriage Act was enacted into law in 1996 and provided a legal definition of 'marriage' and 'spouse' for the application of over 1,000 Federal laws, including the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (IRC). 'Marriage' is defined in Section 3 of DOMA as the "legal union between one man and one woman as husband and wife" and ' spouse' is defined as a "person of the opposite sex who is a husband or a wife." In addition, Section 2 of DOMA allows individual states to disregard same-sex marriages that are legally entered into in other states. The effect of DOMA has been the denial of government protection and benefits to spouses of same-sex marriages, even if those marriages were performed in states that recognize same-sex marriage as legal.

What The Ruling Means

At first glance, the effect of the Supreme Court's ruling on the administration of qualified retirement plans would seem straight forward: the Federal government is no longer enforcing any authority in defining what constitutes a 'marriage' or a 'spouse' with the interpretation falling solely on each individual state. If a state recognizes same-sex marriage as legal, then the spouses of these marriages will be treated in the same manner as spouses of opposite-sex marriages. As of August 2013, the District of Columbia and thirteen states recognize same-sex marriage as legal: California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington.

In the operation of a retirement plan, spouses of plan participants are afforded specific rights including:

- Survivor Benefits. A participant's spouse has an automatic right to survivor death benefits provided under a qualified retirement plan. Spousal consent must be obtained in order for a plan participant to name someone other than his or her spouse as the primary beneficiary of the retirement account. *(Continued on Page 3)*

- QJSAs and QPSAs. Defined benefit and money purchase plans are required to provide for payments of participant benefits in the form of a qualified joint and survivor annuity (QJSA) which provides a lifetime stream of payments to a participant and continues a portion of these payments to the surviving spouse in the event of a participant's death. A participant may waive the distribution of his or her retirement benefit in the form of an annuity, and opt for a lump sum payment instead, only if the participant's spouse consents to the waiver. These types of plans must also provide for annuity payments in the form of a qualified pre-retirement survivor annuity (QPSA) to the surviving spouse of a participant who dies before commencing distributions from the plan.

- QDROs. A spouse may be awarded all or a portion of the retirement benefits of his or her estranged spouse in the case of divorce by the execution of a Qualified Domestic Relations Order (QDRO).

- Rollover. A spouse receiving a distribution from a retirement plan has the option of rolling that distribution into his or her own IRA or into another qualified retirement plan. The only rollover option available to a non-spouse beneficiary is a rollover to an Inherited IRA.

- Loans/Distributions. Some loans and certain distributions over a specified dollar amount may only be granted to a participant if the spouse approves the distribution.

- Hardship Distributions. Safe harbor hardship distribution rules allow participants to take distributions to pay for qualifying expenses incurred by a spouse.

- Minimum Required Distributions. The surviving spouse of a deceased participant who dies prior to receiving retirement benefits under the plan can defer payment of benefits until the year the participant would have reached age 70½. Non-spouse beneficiaries must begin receiving payments by the end of the year following the year a participant dies.

In addition to the considerations listed above, the status of a participant's spouse must be evaluated when determining company ownership as it applies to nondiscrimination, coverage and top heavy testing, controlled and affiliated service group status, and party in interest determination.

However, nothing is ever as clear as we would like it to be. Remember, only Section 3 of DOMA was deemed unconstitutional. Section 2, which is still law, allows states to ignore the validity of same-sex marriages that took place in another state. The challenge this creates is what to do if a same-sex couple is legally married in one state then moves to a state that does not recognize same-sex marriage. In operating retirement plans, do we apply the definition of spouse as provided in the state of the marriage or the state of residence? Until we are provided with official guidance, the facts and circumstances of each individual case will have to be reviewed to determine the course of action that is most compliant with current legislation.

What To Do Now

As noted above, official guidance is still required from the Internal Revenue Service (IRS) and Department of Labor (DOL) regarding the application of the ruling on Section 3 of DOMA. Included in this guidance will need to be the actual effective date of the law change. Will it be June 26, 2013, or will it be set retroactively to an earlier date? While we await further guidance, there are steps that a plan sponsor can take now in an effort to comply with the ruling:

- Request information from participants currently in same-sex marriages. Make sure beneficiary designation forms are current and if a participant has named someone other than a same-sex spouse as primary beneficiary, obtain spousal consent.

- If your current plan document contains DOMA language or a definition of 'spouse' or 'domestic partner', an amendment may be required to comply with post-DOMA provisions.

- Examine company policies and procedures that make reference to 'spouse' and 'domestic partner' to ensure their compliance with post-DOMA provisions.

- If you have operations in different states, some that recognize same-sex marriage and some that do not, you may need to adjust current policies accordingly.

As we go to press, the IRS has issued a ruling stating that same-sex spouses will be determined based upon the jurisdiction where the marriage took place rather than the state of residence. So, if a same-sex couple was married in a jurisdiction that recognizes same-sex marriage, then the same-sex spouse of a participant will be treated as a spouse for qualified plan purposes. This ruling is effective as of September 16, 2013. The IRS indicated that it would be providing guidance concerning required plan amendments and their timing as well as correction procedures that will apply to plan operations before guidance is issued. The IRS has not yet provided guidance on the application of this ruling for periods prior to September 16, 2013. ▪

Pros and Cons of Detailed IPS

Is your company retirement plan covered by an Investment Policy Statement (IPS)?

If one is in place, has it been kept up to date?

Is it being followed?

What Is An Investment Policy Statement?

An investment policy statement is a written document that describes the process for selecting, monitoring and replacing investments that are utilized by an investor, which, for purposes of this discussion, is the trust fund associated with an employer-sponsored retirement plan. Although the formal plan document and trust agreement identifies plan trustees as the parties responsible for plan investments, the IPS identifies other parties who may be involved in overseeing and administering the investment process. Some investment policy statements are quite detailed, whereas others can be a page or less, depending upon the philosophy of the client or the individual drafting the policy.

Is A Written IPS Required By ERISA?

Technically, a written IPS is not required by ERISA. However, most investment advisers, attorneys and other service providers strongly recommend that one be in place. Further, if there is an audit of the plan by the DOL, they will typically ask to see a copy of the plan's IPS.

How Detailed Should The IPS Be?

There is respectful disagreement among industry professionals regarding how detailed the language in an IPS should be. This topic was discussed earlier this year at a roundtable forum sponsored by the ASPPA Benefits Council of Greater Philadelphia. There was a lively debate among the ERISA attorneys, investment advisers and TPAs that were in attendance.

Some attendees argued that the IPS should include very specific language regarding the entire investment process. Their position is that substantial detail is necessary. It not only guides the parties in their investment decisions but also provides the framework for a documented defense in the event that a participant or the DOL should question the prudence demonstrated by plan trustees and others in carrying out their fiduciary duties. Other attendees suggested that the IPS be very brief in order to prevent tying the hands of the plan fiduciaries or provide information that itself could form the basis of a lawsuit. It was observed that it might be difficult to keep a detailed IPS up to date and equally difficult to consistently follow it operationally. More than one attendee went on to comment that having an out of date IPS or one that is not adhered to consistently places plan fiduciaries in a worse position than having no IPS at all.

What Should A Plan Sponsor Do?

ABP does not provide investment advice. However, we agree that having an out of date IPS or not following the provisions of the plan's IPS is highly problematic. So, our general advice is that every plan sponsor/trustee meet with a designated plan investment adviser at least one time per year to discuss plan investments and strategies. That meeting should include a review of the investment process and results and a discussion of whether or not changes to either the trust's investments or the IPS are required. ▪

Health Exchange Mandate Impacts Some Cafeteria Plans

Most employers who sponsor tax-qualified retirement plans recognize the complexities associated with complying with Federal laws and regulations and have for the most part adjusted to them. Today, a larger challenge for employers seems to be dealing with the various mandates and complexities associated with complying with health reform, mainly The Patient Protection and Affordable Care Act, aka "ObamaCare", and sometimes referred to by the acronyms PPACA or ACA.

While ACA applies primarily to medical insurance coverage, some of its requirements also extend to Section 125/Cafeteria plans. A Section 125/Cafeteria plan is an employer sponsored benefit program that wraps around employer-sponsored medical and other insurance type coverages so that employee contributions toward the cost of these benefits can be paid with tax-free dollars.

Health Exchange Mandate

Beginning January 1, 2014, individuals will have the opportunity to purchase health insurance through Health Exchanges. These exchanges, which the government calls "The Health Insurance Marketplace", are run by the Federal government or the states but the underlying insurance is provided by private insurers.

On or before October 1, 2013, employers are required to provide a written notice to employees alerting them to the fact that Health Exchanges will be available and that

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they can begin enrolling in them as early as October 1, 2013, with coverage effective beginning January 1, 2014. (Some of the other ACA requirements that were scheduled to take effect January 1, 2014 have been delayed for one year, but this was not one of them.) The Health Exchange itself is not an employer sponsored benefit. Further, employees who elect to participate in an individual Health Exchange are not eligible to have those premiums paid on a tax-free basis through their employer's Section 125 plan.

Why Fiscal Year Section 125 Plans Need To Be Amended

The availability of Health Exchanges has a ripple effect on fiscal year Section 125 plans, i.e., plans that have an accounting year other than the calendar year. This is due to the fact that participants who currently pay their share of premiums on a tax-free basis through a Section 125 plan are permitted to change their elections only as of the anniversary date of the Section 125 plan, unless they experience an event that qualifies as a "change in status".

The availability of Health Exchanges as of January 1, 2014 will have no impact on calendar year Section 125 plans because January 1, 2014 is a scheduled plan anniversary and open enrollment date. On the other hand, fiscal year Section 125 plans must be amended to provide a one-time exception to the change in status rules in 2014.

Amendment Timetable

Fortunately, those Section 125 plan sponsors who are required to amend their documents can do so as late as December 31, 2014 with a retroactive effective date of the first day of the plan year beginning in 2013. Although there is no indication that there will be changes in this area, it is possible that there may be additional guidance. Therefore, this is one time when it may be prudent to wait to amend.

ABP will contact our Section 125 plan clients who are required to amend their plan documents well in advance the above deadline. Section 125 plan sponsors who look to other service providers for plan document services should expect to be contacted by those providers soon if they have not yet heard from them.

Final Note

This is just one of many issues that employers continue to encounter when attempting to comply with Health Reform. Readers are encouraged to discuss the various ACA requirements with their brokers or other insurance professionals to assure that they continue to be in full compliance. ▪

Washington Update

Will Pending Federal Deadlines Stimulate Compromise in Washington?

If Compromise Is Achieved Will It Include Pension Changes?

Background

In past issues of *Benefit Bylines*, ABP has attempted to keep readers informed about various proposals coming out of Washington that could, if enacted, negatively impact private retirement plans and retirement savings opportunities for American workers. Many of these proposals have been developed as part of strategies attempting to reduce the Federal debt and annual budget deficits.

Some argue that the nation's debt and deficit problems can only be solved through comprehensive tax reform. However, deeply embedded philosophical differences have made it challenging for conservatives and progressives to agree on temporary fixes let alone long term solutions.

Could pending Federal deadlines be the catalyst to break the logjam?

Pending Deadlines

The Federal government operates on a fiscal year from October 1 through September 30. One would hope that the Federal budget for the fiscal year beginning October 1, 2013 (the 2014 budget) would be approved by Congress prior to October 1st. Unfortunately, that isn't going to happen. The budget proposal submitted to Congress by the Obama Administration this past April was just that, a proposal, not a detailed budget. It was promptly declared "dead on arrival" by all Republicans and even many Democrats. The Country has, in fact, operated without timely approved budgets throughout most of the last 4 budget cycles. (The 2013 budget has been adopted, but it took 2 separate appropriations bills enacted in September 2012 and March 2013 to get there.) So, the absence of an approved budget for 2014, in and of itself, won't be a direct driver for compromise.

Nonetheless, not having an approved 2014 budget means that temporary appropriations bills must be enacted to keep the Federal government going. Further, Congress will soon be asked to approve another increase in the Federal debt ceiling which currently stands at $16.7 trillion. Some pundits believe that these factors, combined with the long term impact of nondiscretionary cuts in spending for popular programs caused by the budget sequester, may result in a financial and political environment that finally results in compromise. *(Continued on Page 6)*

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Will Pensions Be Impacted?

If some type of deficit reduction/debt reduction/tax reform legislation is passed this year, it is difficult to predict whether or not retirement savings will be on the cutting block. Proposals negatively impacting private retirement savings continue to surface all the time. However, ASPPA, the Small Business Council of America, and other organizations have made a concerted effort to educate Washington officials and to lobby for legislation that encourages rather than discourages retirement savings. Only time will tell if this effort is successful.

Closing Comments

If the Administration and Congress are able to reach compromises, we can only hope that their actions will do more than just produce temporary fixes that kick the can down the road. Further, if permanent tax reform is part of the fix, let's hope that Federal spending and deficit reduction are not addressed through short sighted actions that adversely impact retirement savings. The Social Security Trust Fund has been running annual deficits since 2010 and is projected to run out of money to pay full promised benefits in 2033. Americans are not saving enough for retirement under the current environment that includes tax incentives. Reducing or eliminating those tax incentives will only make the problem worse. It just is not sound economic policy to address one crisis (the current deficit and debt) by actions that make another looming crisis (inadequate retirement savings) even worse. ▪

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Relief In Timing Of Notices

For 2013, the DOL will treat the timeliness standard as satisfied if notices are distributed within 18 months of the last distribution date. This provides a window for many plan sponsors to 'reset' their notice timing to a plan year basis. Fee disclosures can then be distributed with other annual plan notices, such as safe harbor notices or QDIA notices, if applicable. Because it would take more than 18 months to set certain plans on the proper schedule, plans with a year-end between May and August were still required to distribute notices by the end of August, 2013. These plans will be able to transition to a plan year basis for the following plan year.

We hope to see further actions taken by the DOL to help plan sponsors with this process, particularly in the area of facilitating electronic distribution of notices. The DOL has been slow to change previous electronic disclosure requirements, though, so there may not be relief in this area any time soon.

Required Actions

ABP has already contacted those clients who require disclosure notices at this time. ABP will help coordinate the process for all other clients on a plan year basis. If you are an ABP client, we will contact you to start the process 30-60 days prior to your plan year end.

Do not hesitate to contact Wesley Stohler or your ABP administrator should you have any questions regarding these disclosures. ▪

Associated Benefit Planners, Ltd.

Associated Benefit Planners, Ltd. (ABP) is an independent consultant and third party administrator (TPA) operating from offices located in Berwyn and King of Prussia, Pennsylvania. We specialize in the design and administration of employer-sponsored retirement/savings plans, including 401(k) arrangements. ABP also provides plan document and compliance support for Section 125 Plans and Employee Welfare Plans, operating on a fee-for-service basis.

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