Schulte Roth&Zabel

Employment & Employee Benefits Developments

2012 Year-End Reminders for Pension Plan Sponsors

Over the past year, the Departments of Labor ("DOL") and Treasury (the "Departments"), as well as the Internal Revenue Service ("IRS"), have issued a variety of statutory and regulatory provisions with which tax-qualified pension, profit-sharing, 401(k) and 403(b) plans must comply. In this issue we provide an overview of these provisions so that employers and other plan sponsors (collectively referred to throughout as "plan sponsors") can continue to assess the effects that these changes will have on financial and administrative planning to ensure their plans maintain compliance.

Ongoing Duties To Comply With Fee Disclosure

408(b)(2) Fee Disclosure

Plan sponsors of most defined benefit and defined contribution plans were required to receive disclosure statements from "covered service providers"— providers who are engaged by the plan to provide services to the plan of $1,000 or more, including plan fiduciaries or trustees, registered investment advisers, investment contract providers, investment managers and other professionals (including attorneys, actuaries, custodians and third-party administrators) who expect to receive $1,000 or more in indirect compensation over the course of providing services to the plan (for more information, please see our July 2012 *Alert*, *What Do Retirement Plan Sponsors Have To Do Now That the ERISA 408(b)(2) Fee Disclosure Deadline Has Come and Gone?*). These disclosure statements had to include enough information so that plan sponsors could assess the reasonableness of each contract or agreement in light of the level and quality of services, including the reasonableness of the fees paid to each covered service provider. Though there is no clear standard on what constitutes "reasonable," the DOL has made clear that plan fiduciaries must engage in some comparative analysis in order to ensure that a contract or arrangement is reasonable.

Assuming plan sponsors received compliant disclosure statements by the July 1, 2012 deadline, plan fiduciaries should be in the process of using the statements to assess the quality and value of the services they receive from each covered service provider and take any actions necessary, including negotiating fees down going forward or amending a contract to provide for clearer terms, to ensure that their plans are receiving the highest quality services for the best possible price.

If a covered service provider has failed to respond to a plan sponsor's initial disclosure request, the plan sponsor had a fiduciary duty to send a second letter to the covered service provider requesting the necessary information. If a plan sponsor has sent a second request for information, the plan sponsor must notify the DOL of the provider's failure to respond not later than 30 days after the provider refuses to provide the information or the expiration of a 90-day period following the date of the

plan sponsor's second request, whichever is earlier. Plan sponsors must also review arrangements with providers that fail to respond to a second request for information and determine whether to terminate the arrangement. If, however, a plan sponsor requests information related to services that will be performed after the expiration of the 90-day period and the provider does not disclose such information by the end of the 90-day period following the second request for information, the plan sponsor must terminate the arrangement with the delinquent provider as soon as possible.

Plan sponsors should also pay special attention to the disclosures they received because earlier this year the director of the DOL's Office of Regulations and Interpretations reported that the Department has begun to review disclosures to assess compliance with the new fee disclosure requirements.

"Plan administrators should be aware that Schedule C to Form 5500 now requires plan administrators to identify service providers to the plan that receive $5,000 or more in both indirect as well as direct compensation."

Revised Schedule C Reporting

Plan administrators should be aware that Schedule C to Form 5500 now requires plan administrators to identify service providers to the plan that receive $5,000 or more in both indirect as well as direct compensation. For purposes of Schedule C reporting, "indirect compensation" is compensation received from sources other than directly from the plan or plan sponsor in connection with the services rendered to the plan during the plan year or the provider's position with the plan. Plan administrators should ensure that they are ready to include this information by their next Form 5500 filing deadline.

404(a)(5) Participant Disclosures

Plan sponsors of individually directed account plans must ensure that quarterly statements comply with new information standards. As plan sponsors are aware, initial disclosure statements were required to be sent to participants earlier this year that included more information regarding fees that are and may be assessed against each participant's account. Each quarterly statement issued after the initial disclosure must include the following information:

- **General Plan Administrative Fees**
  Each quarterly statement must include the dollar amount of fees and expenses charged against the participant's account for general plan administrative services (i.e., legal and accounting services) during the preceding quarter, a description of services to which the charges relate and, if applicable, an explanation that in addition to these fees, some of the plan's general administrative expenses for the previous quarter were paid from the total annual operating expenses of one or more of the plan's designated investment alternatives.
- **Individual Expenses**
  Each quarterly statement must include the dollar amount of fees and expenses charged against the participant's account on an individual, and not plan-wide, basis (i.e., fees for loan or QDRO processing) during the preceding quarter and a description of the services to which the charges relate.
- **Fixed-Return Investments**
  If the plan offers a fixed-return investment as a designated investment alternative, the plan must update the investment's performance data on at least a quarterly basis.

Hurricane Sandy Relief

The IRS has provided relief for individuals who have been affected by Hurricane Sandy and who participate in plans, or have relatives who participate in plans, that permit loans or hardship distributions. Through Feb. 1, 2013, if an affected participant requires a loan or hardship distribution for a need arising from Hurricane Sandy, a plan administrator can rely on the participant's representation that a loan or distribution is necessary (unless the plan administrator has actual knowledge otherwise), grant the loan or distribution, and then make a good faith effort to comply with the plan's verification requirements within a reasonable time after the loan or distribution is made. The six-month ban on contributions that normally applies after a participant takes a hardship distribution will also not apply to a participant affected by Hurricane Sandy. In addition, a plan participant who was not affected by Hurricane Sandy but has a child, parent, grandparent or other dependent who was affected can take a loan or hardship distribution from his or her plan to assist the affected family member. Plan sponsors may wish to confirm that their plans permit participant loans and hardship distributions; if not, they may wish to consider amending their plans to provide for such relief.

Cycle B Determination Letter Filing Deadline

Plan sponsors of retirement plans scheduled to apply for a determination letter from the IRS under Cycle B (i.e., individually designed plans other than governmental or multiemployer plans, and all individually designed multiple employer plans, whose EINs end in 2 or 7) should ensure they have adopted all of the necessary amendments so that their plans maintain tax-qualified status. For example, pension plans must be amended to reflect the Pension Protection Act's funding based limits on benefit accruals and distributions by the end of 2013. Applications for Cycle B determination letters must be submitted to the IRS no later than Jan. 31, 2013.

Ongoing Plan Maintenance

Update Beneficiary Designation Plans

Outdated or incomplete beneficiary designation forms can lead to a host of plan-related issues, including potentially providing a benefit to an incorrect beneficiary which could lead to subsequent legal action. Plan sponsors should remind employees to review and update their beneficiary designation forms on file so as to avoid this and other similar outcomes.

Allocate All Forfeitures

Plan sponsors of defined contribution plans should ensure that any amounts in their plans' forfeiture accounts are allocated by the end of the plan year, as the IRS generally does not permit defined contribution plans to carry over unused and unallocated amounts from one plan year to a subsequent year. These amounts can be reallocated to active plan participants or applied as a credit toward future employer contributions or plan expenses. Plan sponsors should check their plan documents as their plans may specify where the forfeiture accounts must be allocated.

Schulte Roth & Zabel Contacts

For additional information on the topics raised in this newsletter, or if you would like assistance implementing any of the requirements and recommendations discussed, please contact your Schulte Roth & Zabel attorney or one of the following authors:

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