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The Insider's Guide to Plan Design, Administration, Funding & Compliance

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Must Death Distributions under 10-Year Rule Be Taken Annually?

Thomas E. Clark, Jr., Kimberly Shaw Elliott, and Jon Schultze, partners, The Wagner Law Group

New Pub 590B Prompts Surprise

Just in the nick of time for filing 2020 federal income tax returns, the IRS issued a revised Publication 590-B (2020), Distributions from Individual Retirement Accounts (IRAs) (Pub 590-B). In it, the IRS suggests in an example that taxpayers who inherit IRAs and are not eligible designated beneficiaries must take a distribution for each of the 10 years following the IRA owner's death. This would eliminate the flexibility to determine the years in which the benefit is distributed, so long as the entire amount is distributed within the 10-year period. While Pub 590-B applies solely to IRAs, the same interpretation would also apply to tax qualified plans such as 401(k)s, as well as 403(b) plans and other plans subject to the required minimum distribution (RMD) rules of the Internal Revenue Code.

The SECURE Act Changed Stretch IRAs

The SECURE Act eliminated the "stretch IRA" for all beneficiaries who inherit an IRA, other than the IRA owner's surviving spouse and certain "eligible designated beneficiaries." The spouse and eligible designated beneficiaries are individuals who may "stretch" distributions over their remaining lifetimes. An eligible designated beneficiary includes one who is disabled, chronically ill, or is not more than 10 years younger than the decedent. An eligible designated beneficiary who is a minor (an undefined term) may stretch distributions over the period of minority, then switch to a 10-year period. Other individual beneficiaries must complete distributions from the IRA within 10 years following the death of the original IRA owner (extended from five years under prior law). Other beneficiaries who are not individuals, such as estates or trusts, remain subject to a five-year rule.

Under prior interpretations of the five-year rule, the beneficiary need not take distributions each year of the applicable period but could wait until the entire period ended and distribute the IRA all at once. We would expect that the newer 10-year rule to be construed in the same way as the five-year rule. The seeming difference in treatment found in Pub 590-B presents a conundrum.

Reinterpretation by IRS

The IRS's apparent interpretation of the SECURE Act would require annual distributions over the 10-year period and is contrary to what many commentators, including The Wagner Law Group, believe to be the plain meaning of the SECURE Act. It also runs counter to the legislative history of the provision.

If the new interpretation is intended and the IRS wants distributions to be taken annually, this would be an unusual attempt to narrow a statute through a publication, without the benefit of a regulation or other formal guidance such as an announcement, notice, FAQs (frequently asked questions) or a revenue procedure. Regulations, to be effective, require prior notice and the opportunity to present comments in writing and at a hearing. This is a time-consuming process but is generally expected if there is to be a change from the common understanding of the law. It is more likely, however, that the changes to Pub 590-B were made in error, during the haste of publication prior to the tax filing deadline, by an already over-burdened IRS staff.

So What Should a Taxpayer Do?

The SECURE Act changes became effective January 1, 2020, and therefore apply only to IRAs and other accounts whose owners died on or after the first of last year. Due to COVID-related relief, no RMDs were required for 2020 at all, so no corrections need be made for last year. The question is whether a distribution should be made in 2021 to those beneficiaries who are subject to the 10-year rule.

Cautious taxpayers could certainly plan to make 2021 distributions, including considering any additional cash resources that may be needed to pay any applicable income taxes. It is likely safe, however, to wait until year end for further guidance or a correction from the IRS. We believe that some response from the IRS will be forthcoming. In the end, this may prove to be a tempest in a teapot.

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401(k) Advisor

The Insider's Guide to Plan Design, Administration, Funding & Compliance

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May a Plan Recover a Fiduciary's Liability From Her Plan Account?

Peter Gulia, Esq.

Imagine a fiduciary breached his or her responsibility to a retirement plan and is liable to the plan, but lacks assets—other than the fiduciary's account as a participant under the plan the fiduciary wronged. May the plan get a recovery for its losses and other harms that resulted from the fiduciary's breach?

Section 206(d)(1) of the Employee Retirement Income Security Act of 1974 (ERISA) commands: "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." Before 1997, courts differed about whether a fiduciary's liability or other equitable relief owed to the plan allows a setoff against a participant/fiduciary's benefit.

In 1997, Congress amended ERISA to add § 206(d)(4)-(5). For a participant/fiduciary's breach of a fiduciary responsibility to the plan, a plan may set off against a participant's account the amount the participant is required or obligated to pay under a court's order or a settlement agreement. A plan, acting alone, cannot apply an offset; rather, it requires a court's order or a settlement agreement with the Secretary of Labor. However, one court held that a plan's administrator correctly delayed distributing benefits until the plan's right to the offset was determined.

This offset does not deprive the participant's spouse of a survivor annuity, which § 206(d)(5) specially limits, unless the court order or settlement agreement requires the spouse also to pay the plan for a fiduciary breach, or the spouse consents.

Conclusion. Sometimes, a retirement plan may get a practical remedy by setting off a fiduciary's liability to the plan against his or her account under the plan.

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Editor's Note: For a somewhat related issue, also see "The Feds Can Garnish a Retirement Plan Account to Enforce a Restitution Award" *on page 13.*

DOCUMENT UPDATE

Extending Executive Benefits beyond Qualified Retirement Plans

Bruce J. McNeil and Kelly A. Davis

A traditional qualified retirement plan, such as a 401(k) or 403(b), may be a good base plan to provide tax deferred benefits to employees, as well as executives, however have certain limitations that may minimize retirement benefits an executive or key employee may defer.

Employers seeking to provide additional retirement benefits to executives in addition to a traditional qualified retirement plan may consider a split-dollar life insurance arrangement to extend the benefits to its executives. A split-dollar life insurance arrangement is one where an employer purchases a life insurance policy on an executive and pays the premiums. The employer owns and controls the policy with access to its cash value.

A split-dollar life insurance arrangement may be a beneficial tool as an overall executive compensation strategy that offers flexibility and tax deferred growth of the life insurance policy's cash value. However, they have complex aspects, and the tax aspects should be carefully considered.

In *De Los Santos v. Commissioner*, 156 T.C. No. 9 (April 12, 2021), the United States Tax Court ruled that a compensatory split-dollar life insurance arrangement affording benefits to a taxpayer in his capacity as an employee of an S corporation may not be characterized as a distribution "by a corporation to a shareholder with respect to its stock," under Section 301 of the Code. The Tax Court reviewed the background of the case. In general, the husband and wife taxpayers owned an S corporation. The husband was the sole owner and an employee of the S corporation. The wife was also an employee. The S corporation adopted an employee welfare benefit plan that provided benefits to the taxpayers, and four other employees.

The court previously decided that participation in the plan constituted a compensatory "split-dollar" life insurance arrangement and the benefits were considered current taxable income.

The taxpayers did not report any income related to their participation in the plan. In a notice of deficiency, the IRS determined that the economic benefits of the life insurance were taxable to the taxpayers as ordinary compensation income. The husband as a shareholder of the S corporation argued that the economic benefits he realized were taxable to him as a distribution. The economic benefits were taxable as ordinary income because the split-dollar arrangement was a "compensatory arrangement" that afforded benefits to the husband in his capacity as an employee according to the court. The court did not follow the Sixth Circuit Court of Appeals decision that treated compensation regarding any spit-dollar arrangement under Section 301. Because the payment was not based on stock, Section 301 did not apply according to the court. Even if the taxpayers were correct in contending that split-dollar insurance benefits received by an employee-shareholder of a C corporation would necessarily be treated as a distribution under Section 301, Section 1372 and Section 707(c) dictate that the result is different for an employee-shareholder of an S corporation who owns 2 percent or more of its stock according to the Tax Court.

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LEGAL UPDATE

Important Benefit Plan Provisions of the American Rescue Plan Act of 2021

Marcia S. Wagner, Esq.

Although not the primary focus of the American Rescue Plan Act of 2021 ("ARPA") and, at least with respect to the multiemployer relief measure, having little direct relationship with the pandemic, there are some benefit plan provisions that will affect plan sponsors and contributing employers.

I. Dependent Care Assistance

Solely for the plan year beginning in 2021 and with regard to the Internal Revenue Code ("Code") §125 plans that offer dependent care flexible spending accounts for employees, the $5,000 annual limit for married employees filing jointly has increased to $10,500, and the $2,500 annual limit for married employees filing separately or single employees has increased to $5,250. An amendment to your Code §125 plan to implement this change in the annual limit would need to be executed no later than the last day of the 2021 plan year. This change coupled with the midyear election change relief discussed in IRS Guidance on Flexible Spending Account Relief Under CAA, may allow for midyear election changes to increase amounts deferred to dependent care flexible spending accounts in 2021. *See https://www.wagnerlawgroup.com/resources/health-welfare/irs-guidance-on-flexible-spending-account-relief-under-caa.*

II. 100 Percent COBRA Subsidy

A 100 percent subsidy for COBRA premiums is provided for a maximum six-month period beginning April 1 and ending September 30. This subsidy is similar in many respects to the COBRA subsidy enacted in 2009 under the Obama administration except that the subsidy is greater and the administrative complexity is increased by the need to coordinate this subsidy with the extended deadlines for taking actions with respect to COBRA elections and COBRA payments as discussed in Surprise DOL Guidance on Conclusion of One-Year ERISA Compliance Relief Period. *See https://www.wagnerlawgroup.com/resources/health-welfare/surprise-dol-guidance-on-conclusion-of-one-year-erisa-compliance-relief-period.*

The subsidy is not included in the gross income of the individual receiving the subsidy. Individuals eligible for the subsidy are any individuals who became or become eligible for COBRA continuation coverage as a result of termination of employment or a reduction in hours, except for voluntary terminations and terminations due to gross misconduct. There is no requirement that the termination of employment or reduction in hours have any connection with the pandemic, and the manner in which the law is drafted suggests that the relief could be available to former employees who became eligible to elect COBRA prior to the pandemic and either failed to make an election or made an election and subsequently discontinued coverage.

The period of assistance extends until the end of the coverage period (generally 18 months), the individual obtains coverage under another group health plan (with limited exceptions) or the individual becomes eligible for Medicare. The eligible individual must notify the group health plan if he or she becomes eligible for Medicare or becomes covered under another group health plan (with limited exceptions). The subsidized coverage is prospective, and cannot begin before April 1, 2021. It appears that a COBRA beneficiary whose qualifying event was earlier than April 1, 2021 may be able to just elect COBRA starting from that date, and skip the period prior to that date for which the beneficiary is eligible.

Further, not only will the individual be eligible for COBRA continuation coverage, he or she will have the opportunity to elect a less expensive option, so long as it is being offered to similarly situated individuals. Plan sponsors will notify eligible employees of this option, and employees will have a 90-day period within which to decide if they want the less expensive coverage. The plan administrator is required to notify assistance-eligible individuals within 60 days of April 1 of the extended election period and the availability of lower cost coverage, and within 30 days of enactment, the DOL, IRS and HHS are to provide a model notice. The Plan administrator is also required to provide notice of the expiration of coverage, and the three agencies are required to issue a model notice with respect to the expiration of coverage within 45 days of the date of enactment. The Act also includes provisions dealing with agency regulations and outreach. Plan sponsors paying subsidies will receive a refundable tax credit each quarter in the amount of the premiums they would have received if not for the COBRA subsidy.

III. Single Employer Defined Benefit Plans

The present seven-year period for amortizing defined benefit plan shortfalls would be extended to 15 years for plan years beginning in 2022, although a plan sponsor could implement the extended period in 2019, 2020 or 2021, resulting in a modified extended period. The favorable interest rate corridors that were scheduled to be phased out beginning in 2021 have been extended and expanded, and there is an interest rate floor of 5 percent on the 25-year average that is used to stabilize interest rates. These changes are beneficial to plan sponsors, because the higher the interest rate, the lower the plan's liability. The effect of these changes is to reduce contributions, which increases tax revenue to pay for the multiemployer pension plan reform discussed below. However, the Senate version of the bill eliminated one of the ways in which the multiemployer pension plan relief would have been paid for, the freezing of certain annual cost of living adjustments to tax-qualified plan benefits.

IV. Multiemployer Pension Plan Reform

Because the multiemployer pension plan relief provisions were part of budget reconciliation, which allowed the Act to pass the Senate by a simple majority, certain provisions were not included. These provisions could be included in subsequent pension plan legislation, such as the so-called SECURE Act 2.0, which generally has widespread bipartisan support, although further legislation would require 60 votes for Senate approval.

There are two distinct elements to the multiemployer pension plan relief. One component, temporary relief for plans that have been adversely affected by the pandemic, is similar to pension relief provided in response to the 2008 financial crisis. These changes include:

- a one-time freeze of zone status as defined under the Pension Protection Act of 2006;
- a five-year extension of funding improvement or rehabilitation periods;
- a longer period for amortization of losses resulting from the pandemic;
- an extension of the asset-smoothing period; and
- a widened corridor for determining the actuarial value of plan assets.

The last three of these relief provisions, however, are not available if the plan is also receiving special financial assistance as described below, and the provisions are also subject to a solvency test and restrictions on improving benefits.

The second component attempts to address a long-standing problem, the severely underfunded status of several multiemployer pension plans that face insolvency in the near term, which would result in the insolvency of the PBGC multiemployer insurance fund. Rather than relying upon multiemployer premiums to guarantee benefits under these plans, the Act establishes a new fund with the PBGC, which can receive funds from the Treasury until September 30, 2030. Payments provided to multiemployer plans from the new fund are not loans: the plans will have no repayment obligation.

To be eligible for this special financial assistance, a multiemployer plan must satisfy one of four conditions:

- the plan must be in critical and declining status for any plan year beginning in 2020 through 2022;
- a suspension of benefits must have been approved for the plan as of the date of enactment;
- in any plan year beginning in 2020 through 2022, the plan must be certified by the actuary to be in critical status, have a modified funding percentage of less than 40 percent, and have a ratio of active to inactive participants that is less than 2:3; or
- the plan must have become insolvent after December 31, 2014, and have remained insolvent, and not have been terminated, as of the date of enactment.

Within 120 days after enactment, the PBGC is required to issue regulations or guidance setting forth the requirements for special financial assistance applications. The PBGC was also given the authority for a period of two years (beginning on the date of enactment) to give priority consideration to plans that:

- are insolvent or likely to become insolvent within five years of enactment;
- the PBGC projects to have a present value of financial assistance that exceeds $1 billion in the absence of special financial assistance;
- have implemented benefit suspensions as of the date of enactment; and
- the PBGC determines to be appropriate based on other similar circumstances.

If the PBGC exercises its authority to issue guidance, it must do so in consultation with the Secretary of the Treasury.

An application for special financial assistance must be submitted by December 31, 2025, and any revised application must be submitted no later than December 31, 2026. An application is deemed approved by the PBGC unless the PBGC responds within 120 days. If an application is not approved, the plan can resubmit the application which will be deemed approved unless the PBGC notifies the plan of an issue with the application. The financial assistance will be effective not later than one year after the application is approved, but no financial assistance will be paid after September 30, 2030. The Act directs financial assistance to be paid in a lump sum as soon as practicable after approval by the PBGC, without regard to the PBGC cap on guaranteed benefits.

The amount of the special financial assistance benefit is the amount required for the plan to pay all benefits during the period beginning on the date of payment and ending on the last day of the plan year ending in 2051, with no reduction in accrued benefits (except for adjusted benefits and taking into account reinstatement of suspended benefits). The Act prescribes actuarial methods and assumptions for making that determination.

Plans may invest the special financial assistance only in investment-grade bonds or other investments permitted by the PBGC, a radical departure from traditional ERISA and qualified-plan guidance, which has not regulated plan investments.

Addressing moral hazard concerns, the PBGC is permitted to impose reasonable conditions on plans receiving special financial assistance relating to increases in future accrual rates and retroactive benefit improvements; allocation of plan assets; reductions in employer contribution rates; diversion of contributions and allocation of expenses to other benefit plans; and withdrawal liability. However, the PBGC may not impose conditions relating to a prospective reduction (or adjustment) of plan benefits; plan governance, including selection and removal of and terms of contracts with trustees, actuaries, investment managers and other service providers; and funding rules. Additionally, an eligible multiemployer plan may not apply for a new suspension of benefits.

PBGC premiums will continue to apply, and the plan will be in critical status through the 2051 plan year. Any special financial assistance received by the plan will not be considered in determining the amount of its required contributions under the Code. PBGC premium rates will be increased to $52 per participant beginning with the 2031 plan year and will be adjusted annually thereafter based on the Social Security national average wage index. The PBGC rate for 2021 is $31 per participant.

V. Code Section 162(m)

For tax years beginning after December 31, 2026, the definition of a covered employee for purposes of Code §162(m) is expanded to include the five most highly compensated employees. Unlike the rule applicable to other covered employees under Code §162(m), this group will be redetermined each year.

Clearly, ARPA has important employee benefit plan implications beyond providing pandemic relief for working families. For help navigating Code §125 plan temporary changes and amendments, implementing and communicating the 2021 COBRA subsidy for employees, taking advantage of the single employer pension plan interest rate changes, complying with the Code §162(m) change, or for more information on multiemployer plan relief, please contact The Wagner Law Group.

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Q & A

The (New) Fiduciary Rule: Do We Finally Know Who is a Fiduciary?

On December 18, 2020, the Department of Labor (DOL) issued Prohibited Transaction Exemption (PTE) 2020-02, effective February 16, 2021, and released additional guidance on April 13, 2021, revisiting and—from the industry's *perspective—hopefully settling the definition of a fiduciary in the context of advice to retirement plan. In this month's Q&A, we do a deeper dive with Adrienne Robertson, J.D., CPC, QPA, Senior Director, Client Compliance and Consulting at Transamerica, about the new definition and supplemental guidance.*

Q Can you start us off with a high-level summary of what the PTE addresses?

A Certainly. In general, parties who provide fiduciary investment advice to retirement plan participants, beneficiaries, and IRA owners may not receive payments resulting in conflicts of interest unless they comply with the conditions under a prohibited transaction exemption. PTE 2020-02 provides relief from potential prohibited transactions that might otherwise result when a firm or an investment professional provides fiduciary investment advice to a retirement plan for a fee. The exemption in the PTE covers prohibited transactions that might result from either advice on how to invest assets within a retirement plan covered by the Employee Retirement Income Security Act of 1974 (ERISA) or from advice related to outbound rollovers from those plans. The overall objective of the PTE is to promote investment advice in accordance with the "Impartial Conduct Standards," requiring fiduciaries to acknowledge their fiduciary status in writing, to document their services, disclose conflicts of interest, and certify their processes annually. In addition, what we think of as the 'traditional' five-part test for defining a fiduciary in the investment advice context has been reinstated.

Q You mentioned that the traditional five-part test for defining an investment advice fiduciary has been reinstated; what are the components of that test?

A Last summer, prior to the issuance of the new PTE, the DOL issued a technical amendment restoring the five-part test for an investment advice fiduciary that was originally established in 1975. To be a fiduciary in the context of a retirement plan or IRA, the investment professional must give advice on investing in, purchasing, or selling securities or other property that are plan or IRA assets. The investment professional must give this advice on a regular basis. The advice must be given pursuant to a mutual agreement or understanding with the retirement plan, plan fiduciary, or IRA owner. The advice must serve as the primary basis for investment decisions with respect to plan or IRA assets. Finally, the advice that is being provided by the investment professional must be individualized, meaning that it considers the retirement plan's or IRA owner's demographics, needs, objectives, and so forth. All five of these elements must be satisfied for the investment professional to be considered a fiduciary.

Q Can you address the relationship of rollovers into IRAs in the context of the fiduciary rule?

A Yes. In 2005, the DOL issued an Advisory Opinion (Advisory Opinion 2005-23A) that took the position that a financial consultant hired by a participant to provide investment management or advice services would not, in general, be considered a fiduciary under ERISA if he advised the participant to take a withdrawal from the plan and invest those assets in an investment not available under the plan, and received a fee related to those investment products. The DOL withdrew the Advisory Opinion last summer, which created some concern regarding prior reliance on it. The current guidance clarifies that the DOL will not pursue claims for a breach of fiduciary duty related the Advisory Opinion for the period between its issuance in 2005 and February 16, 2021, when the current guidance became effective.

The new guidance affirms that advice to roll money from a qualified plan to an IRA may be considered fiduciary advice, although it does clarify that all five parts of the fiduciary test must still be met. In this regard, the requirement of advice on a 'regular basis' may be met if there is an expectation of continued advice of the life of the IRA investment, or if the advisor is working with the individual in an existing or ongoing relationship that considers all accounts of the investor, without regard to whether they are ERISA accounts. In the context of an IRA rollover, the PTE contemplates that, when making a recommendation for a rollover, the advisor will consider and document alternatives to a rollover (*i.e.*, leaving the money in the qualified plan); the fees and expenses of the qualified plan and the IRA; whether the employer covers any of the cost of the qualified plan; differences in service levels and investment in each; and disclosure of conflicts of interest.

Q Compliance with the investment advice-related fiduciary rules has been something of a moving target for several years now; how does the current guidance reconcile the prior guidance and relief related to that guidance?

A Field Assistance Bulletin (FAB) 2018-02 established a temporary enforcement policy related to the previously issued definition of a fiduciary (which unwound the five-part test), including the Best Interest Contract (BIC) Exemption and the Principal Transactions Exemption. Specifically, it provided that, until after the DOL issued new regulations, exemptions, or other administrative guidance, the DOL would not pursue prohibited transactions claims against investment advice fiduciaries who were working in good faith to comply with the BIC Exemption and Principal Transactions Exemption, nor would it treat such fiduciaries as violating the applicable prohibited transaction rules. PTE 2020-02 extends the relief established under FAB 2018-02 through the end of 2021.

Q What are the requirements for compliance with the new PTE?

A There are four components for prohibited transaction relief under PTE 2020-02: Adherence to the "Impartial Conduct Standards," written disclosures, the adoption of certain policies and procedures, and an annual retrospective compliance review.

Adherence to the Impartial Conduct Standard has three prongs – a requirement to provide advice under a "best interest" standard, a "reasonable compensation" standard, and a requirement to make no misleading statements about investment transactions or other relevant matters. The best interest prong consists of two components, a prudence standard and a "loyalty" standard, under which the advice provider may not place their own interests ahead of the interests of the retirement investor. The reasonable compensation standard requires the investment advisor to charge no more than reasonable compensation and to comply with federal securities laws regarding "best execution."

With respect to written disclosures, the investment advisor must acknowledge his or her fiduciary status under ERISA and the Internal Revenue Code in writing when providing investment advice to the retirement investor. The investment advisor must also provide a written description of the services to be provided and any material conflicts of interest. Furthermore, with respect to rollovers, the investment advisor must document the reasons that a rollover recommendation is in the investor's best interest and provide that documentation to the investor. The DOL has provided model language that details the required content, including a statement that the fiduciary will meet a professional standard of care and give prudent advice; never put the advisor's interests above the investor's interests; avoid misleading statements; follow policies and procedures that are designed to give advice in the investor's best interests; charge no more than reasonable fees, and provide information about any conflicts of interest.

They must also establish, maintain, and document policies and procedures to ensure compliance with the Impartial Conduct Standards and that mitigate conflicts of interest. This includes implementation of effective oversight structures. The policies and procedures must be prudently designed to protect retirement investors from recommendations to make excessive trades, to buy investment products, annuities, or riders that are not in the investor's best interest, or to allocate excessive amounts to illiquid or risky investments. The investment advisor's compensation structure should be scrutinized to avoid any incentive structures that a reasonable person would view as creating incentives for the investment advisor to place his or her interests ahead of the interest of the advice recipient (the plan, the plan sponsor, the IRA owner). Any incentives that may be misaligned with the interests of the are to be eliminated or otherwise mitigated.

Finally, the investment advisor must conduct an annual retrospective review of compliance reasonably designed to assist investment advisors in detecting and preventing violations of, and achieving compliance with, the Impartial Conduct Standards and their policies and procedures. The PTE requires that both the methodology and results of the retrospective review be summarized in a written report provided to the financial institution's senior executive officers, who must then make certain certifications related to their review of the report. The report, certification, and supporting data must be retained for six years and must be provided to the DOL within 10 business days of a request.

Q How would violations be addressed or corrected under the PTE?

A The PTE does include provisions for correcting violations of the exemption requirements. Specifically, violations may be corrected within 90 days after the financial institution learns (or reasonably should have learned) of the violation; the investor must be made whole for any losses that may have resulted from the violation; the financial institution must notify the DOL within 30 days of correction; and the violation and correction information must be disclosed to the team preparing the firm's retrospective review and documented in the written review report.

Q What are the steps from here?

A The DOL has indicated that it intends to make further changes to framework for providing fiduciary advice, and we anticipate that any regulatory actions would be preceded by notice and opportunity for public comment. The DOL has also stated that it believes the core components of PTE 2020-02, including the Impartial Conduct Standards and the requirement for strong policies and procedures, are fundamental investor protections, the implementation of which should not be delayed while other protections and clarifications are under discussion.

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REGULATORY AND JUDICIAL UPDATE

Item	Statement	Status
Recordkeeper's use of personal data of 401(k) plan participants to market non-plan products did not subject it to fiduciary liability	***Harmon, et al. v. Shell Oil Company, et al.*, United States District Ct, S.D. Texas, No. 3:20-cv-00021, March 30, 2021**. The use by a 401(k) plan recordkeeper of confidential participant data to market non-plan financial products offered by affiliates of the recordkeeper to plan participants did not subject it to liability as an ERISA fiduciary, according to a federal trial court in Texas. Participant data, such as Social Security numbers, income, investment history, and account balances, are not plan assets under ERISA, the court explained. Shell Oil sponsors a 401(k) plan for its employees. Fidelity Investments Institutional Operations Company (FIIOC) performs recordkeeping functions for the plan. In its role as recordkeeper, FIIOC maintains information about participants, including their names, contact information, Social Security numbers, financial information, investment history, identity of their investments, account balances, investment contribution amounts, age, income, marital status, call-center notes, and information regarding "triggering events," such as when a plan participant is nearing retirement. It is alleged that FIIOC further uploads the participant data into a customer interaction software program that is shared with various Fidelity affiliates, who then use the data to solicit the purchase of non-plan retail financial products and services (*e.g.*, IRAs, credit cards, and managed accounts) via multiple platforms, such as phone calls, in-person meetings, and emails. Plan participants, individually and as a class, brought suit, charging that FIOCC breached its fiduciary duty by sharing participant data with its affiliates for the purpose of benefiting Fidelity and not for the exclusive purpose of providing benefits to plan participants and beneficiaries. The gravamen of the participants' complaint was the assertion that the participant data were plan assets over which FIOCC exercised control, subjecting it to fiduciary liability. In determining whether the participant data allegedly marketed by FIOCC were plan assets, the court looked to ERISA and the governing rules under ERISA Reg. 2510.3-101. The governing rules describe plan assets as including investments but, the court noted, do not "expressly or by any plain-language interpretation" include participant data as plan assets under ERISA. In addition, the court stressed that no other courts have treated participant data as plan assets. The court relied heavily on *Divane v. Northwestern University*, in which a federal trial court in Illinois explained that, in considering what constitutes a plan asset, courts consider ordinary notions of property rights under non-ERISA law (DC IL (2018) No. 16 C 815, aff'd, CA-7 (2020), 953 F.3d). The *Divane* court acknowledged that confidential participant information "has some value," but could not conclude that it is a plan asset under ordinary notions of property rights. The court in the instant case found no reason to depart from the pervasive judicial view that participant data are not plan assets. Accordingly, the use of the data did not subject the recordkeeper to fiduciary liability and the participants' fiduciary breach claim was dismissed.	**Plan participant data, such as Social Security numbers, income, investment history, and account balances, are not plan assets under ERISA.**

BENEFITS CORNER

William F. Brown, Esq.

DOL Issues Cybersecurity Guidance

In April, the Employee Benefits Security Administration issued three pieces of guidance for plan sponsors and fiduciaries, plan service providers, and plan participants regarding best practices for maintaining cybersecurity and protecting retirement plan assets.

The first piece of guidance, *Tips for Hiring a Service Provider with Strong Cybersecurity Practices*, contains six tips to help a plan sponsor and fiduciaries "to prudently select and monitor" plan service providers. These include: asking about the service provider's information security standards, practices and policies, and audit results, and comparing them to industry standards adopted by other financial institutions; asking whether the service provider has experienced past security breaches, what happened, and how the service provider responded; finding out if the service provider has any insurance policies to cover losses caused by cybersecurity and identity theft breaches, whether resulting from misconduct by the service provider's own employees or breaches caused by external threats, such as third-party hijacking plan participants' accounts; and confirming that the service provider agreement requires ongoing compliance with cybersecurity and information security standards and watching for contract provisions that limit the service provider's responsibility for IT security breaches. The last item has five subparts for review of service provider contracts. This list provides a checklist for plan sponsors reviewing the services provided by plan recordkeepers or other service providers engaged to assist with a retirement plan.

The second piece of EBSA guidance, entitled *Cybersecurity Program Best Practices,* discusses the responsibilities of plan fiduciaries, recordkeepers, and other service providers regarding management of cybersecurity risks. The longest of the three, it itemizes 12 best practices, including: having a formal, well-documented cybersecurity program; conducting prudent annual risk assessments; having a reliable annual third-party audit of security controls; having strong access control procedures; conducting periodic cybersecurity awareness training; encrypting sensitive data, stored and in transit; and appropriately responding to any cybersecurity incidents. The guidance discusses each of the 12 recommendations, with several subpoints for each.

Finally, *Online Security Tips* includes 9 security tips to help plan participants reduce the risk of fraud and loss to their retirement accounts. These include: register, set up, and routinely monitor online accounts, to prevent an interloper from assuming the participant's identity; use of strong and unique passwords and multifactor authentication; be wary of free Wi-Fi; beware of phishing attacks; use antivirus software and keep apps and software current; and know how to report identity theft and cybersecurity incidents. As with the other two, this guidance includes discussion of all 9 tips.

All three pieces of guidance are available on the EBSA website and are written in straight-forward prose rather than regulatory legalese. The piece regarding participant security is designed to be handed to participants without any need for additional explanation or embellishment. Several commentators praised the EBSA effort, although some expressed desire for a more formal, follow-up effort that allowed for outside comments. Doug Peterson, the chief information security officer for Empower Retirement, noted that cyberthreats to plan accounts are increasing and have become far more sophisticated. Others predicted DOL investigations into cyber breaches in the wake of this detailed guidance.

Editor's Note: You can find these tips online at:

https://www.dol.gov/sites/dolgov/files/ebsa/key-topics/retirement-benefits/cybersecurity/tips-for-hiring-a-service-provider-with-strong-security-practices.pdf

https://www.dol.gov/sites/dolgov/files/ebsa/key-topics/retirement-benefits/cybersecurity/best-practices.pdf

https://www.dol.gov/sites/dolgov/files/ebsa/key-topics/retirement-benefits/cybersecurity/online-security-tips.pdf

For a related article, see our Last Word in this issue.

The Feds Can Garnish a Retirement Plan Account to Enforce a Restitution Award

It is well-known that ERISA contains an expansive anti-alienation provision that protects retirement plan assets from the participant's creditors. Less well-known is the fact that the Mandatory Victims Restitution Act provides, with exceptions, that a restitution award may be enforced against all property or rights to property of the person subject to the award. The exceptions do not include private retirement accounts, and the courts have regularly held that ERISA does not preclude the assignment or alienation of pension benefits when the federal government takes action to collect on a judgment of restitution.

The scope of this rule was recently discussed in *United States v. Greebel*, 15-cr-637(KAM) (E.D.N.Y. Apr. 16, 2021).

Evan Greebel was convicted by a jury of conspiracy to commit wire fraud and conspiracy to commit securities fraud for his role in the activities of the infamous Martin Shkreli, which led to his own entry on Wikipedia. He was sentenced to 18 months in prison and ordered to pay restitution of $10,447,979. Among his assets were accounts totaling more than $900,000 in the retirement plans of two New York law firms where he had previously worked. To enforce the restitution order, the government sought writs of garnishment against those accounts.

Mr. Greebel objected to the writs, arguing that he did not have a current, unilateral right to withdraw funds from either plan account. He also argued that if the government is allowed to garnish the accounts, it is limited to 25 percent of the funds by the Consumer Credit Protection Act (CCPA). The district court rejected both arguments.

The court characterized his first argument against a "current right" to the accounts as "creative, if not tortured, constructions of both retirement plan documents." Those documents "clearly and unambiguously" entitle him to withdraw his entire account balance in a single lump sum once his employment with the plan sponsors ended.

Regarding the second argument, the court noted that the CCPA imposes a 25 percent limit on "the aggregate disposable earnings of an individual for any workweek" that are subject to garnishment [15 USC § 1673(a)(1)] and that "earnings" for this purpose includes "periodic payments pursuant to a pension or retirement program" [15 USC § 1672(a)]. The court concluded that the 25 percent limitation does not apply when the government garnishes the entire account before the participant begins to receive periodic payments. It noted that the Supreme Court has held that the limitation applies only to "periodic payments of compensation need to support the wage earner and his family on a week-to-week, month-to-month basis." *Kokoszka v. Belford*, 417 U.S. 642, 651 (1974). The district court concluded that the limitation "was not meant to apply to the garnishment of a debtor's interest in the entire balance of an asset that may be withdrawn in a lump sum."

Raising the RMD Age to 75 Is a Bad Idea

Among other changes, the SECURE Act raised the age that a participant must begin Required Minimum Distributions from a retirement account from 70½ to age 72, effective for distributions in 2020. The timing was excellent, given the resulting pandemic, and it got rid of one of the ridiculous ½-year rules that plague plan administration.

Doubling down on this change, the House is now considering new legislation, commonly called the SECURE Act 2.0, which includes a provision raising the RMD trigger age to 75. An article by Jeff Berman posted on the ThinkAdvisor website discussed the negative aspects of this idea, which Christine Benz, the director of personal finance at Morningstar, characterized as "a solution in search of a problem."

As Benz and others pointed out, the RMD regime is hated by affluent retirees and their financial advisors, who want those funds to stay in their tax-deferred retirement accounts. The age increase is not pertinent to most retirees, explained Jeffrey Levine, the chief planning officer for Buckingham Wealth Partners: "[T]his is only an issue for about 20% of people because most people already take out the required minimum amount or more annually . . . because they need the money to live on"—or they don't even have a retirement account to begin with." The proposed delay would give "a pretty significant break to the wealthiest and most fortunate of taxpayers" who already have more than enough money to live on without withdrawing money from their retirement plans. Levine suggested that a better idea would be to eliminate the RMD altogether for participants with smaller retirement accounts, such as under $100,000.

Others characterized this change as bad tax policy. Michael Finke, retirement professor at The American College of Financial Services explained that an RMD delay simply defers the removal of assets from publicly-subsidized accounts. He added: "RMDs exist so that the government can get part of their tax money back that they have subsidized. The whole purpose of 401(k) plans—of the whole defined contribution system—[and] the reason that we spend $150 billion every year to subsidize it, is to help people live better in retirement." If retirees "never spend the money—if they simply pass it on to the next generation—then why did we spend all that money to improve your retirement security?"

Mr. Finke added that RMDs are "accidentally a very efficient way to withdraw money from your IRAs." He explained that RMDs take "two pieces of information into account: your remaining expected longevity and the amount of money that you have in your IRA balance. That's actually a more efficient way to create a drawdown from your retirement savings than the 4% rule."

LAST WORD ON 401(k) PLANS

The Department of Labor's Latest Cybersecurity Guidance—What Does This Mean for Plan Fiduciaries?

Angel L. Garrett

Following the Department of Labor's (Department) announcement last year that they were examining cybersecurity best practices and the report by the Government Accountability Office's (GAO) in February recommending that the Department establish minimum expectations for addressing cybersecurity risks, the Department issued cybersecurity guidance for plan sponsors, plan fiduciaries, record-keepers, and plan participants on April 14, 2021. The Department's guidance came in three forms: (1) tips for plan sponsors and fiduciaries in hiring a service provider; (2) a list of 12 best practices for plan fiduciaries and recordkeepers in managing cybersecurity risks; and (3) security tips for plan participants and beneficiaries.

Interestingly, what the guidance does not do is to formally state whether cybersecurity for defined contribution plans is considered a fiduciary responsibility under ERISA – in fact, the GAO, based on its analysis of cybersecurity risks, recommended that the Department make such a statement. Despite this lack of formality, the Department's guidance does establish new standards for existing fiduciaries for handling plan participant data (*e.g.*, the participant's names, ages, retirement date, account balance, employment status, length of employment, and choice of investments), including, but not limited to, having a formal, well documented cybersecurity program, conducting annual risk assessment and periodic cybersecurity awareness training, and ensuring that any data that is stored in a cloud or managed by a third party vendor is subject to appropriate security reviews and independent security assessment. Along with these "best practices," the Department's guidance provides that for plan fiduciaries to ensure that they are meeting their responsibilities in prudently selecting and monitoring service provider, they should ask service providers about their information security standards and policies (including audits on their security standards), insurance policies covering losses resulting from security breaches, and past breaches. Plan fiduciaries are also advised to evaluate the services provider's track records. While this guidance is couched as best practices, the implications of such guidance is that plan fiduciaries are tasked with the burden of ensuring that the plan's recordkeepers and/or service providers meet and comply with the Department's standards.

Furthermore, the Department's guidance does not address one question that we have seen percolating in recent lawsuits—whether plan participant data constitutes a "plan asset." And while no court to date has ruled that participants' data is a plan asset, plan fiduciaries should be aware that the sharing of participant data with service providers and storing such information can lead to significant cybersecurity risks. Ultimately, with the proliferation of cyberbreaches and fraud, plan fiduciaries should consider the Department's best practices and discuss such practices with potential and existing service providers.

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