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EBP COMMENTATOR

THE NEWSLETTER OF THE BDO EMPLOYEE BENEFIT PLAN AUDIT PRACTICE



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Material discussed is meant to provide general information and should not be acted upon without first obtaining professional advice appropriately tailored to your individual circumstances.

To ensure compliance with Treasury Department regulations, we wish to inform you that any tax advice that may be contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding tax-related penalties under the Internal Revenue Code or applicable state or local tax or (ii) promoting, marketing or recommending to another party any tax-related matters addressed herein.

RECENT EBP DEVELOPMENTS

EMPLOYEE BENEFIT PLANS ("EBP") THIS YEAR ARE FACED WITH THE IMPLEMENTATION OF RECENT REGULATORY AND ACCOUNTING CHANGES THAT MAY IMPACT THE PLAN'S AUDIT AND/OR FORM 5500 FILING WITH THE DEPARTMENT OF LABOR ("DOL").

Recent changes include the new filing requirements for 403(b) plans covered under the Employee Retirement Income Security Act ("ERISA"); changes to the Form 5500, including the electronic filing required through the DOL's new EFAST2 system; fair value measurements and disclosures; and the continued focus on the timeliness of the remittance of participant contributions and loan repayments into plans.

► AICPA NATIONAL EBP MAY 2010 CONFERENCE UPDATE

In May 2010, regulators, standard setters, practitioners, third party service providers

and plan sponsors gathered in Las Vegas, Nevada for the American Institute of Certified Public Accountants ("AICPA") National EBP Conference. Top government officials from the DOL and the Internal Revenue Service ("IRS"), along with leading practitioners, provided comprehensive updates on a wide range of issues currently affecting EBPs, including recent changes in accounting, auditing, tax and enforcement regulations. Some highlights of this year's conference are included in this issue.

► 403(b) PLANS

Due to DOL regulations issued on November 16, 2007, retirement plans sponsored by

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charitable organizations and private schools under Internal Revenue Code section 403(b) and covered by ERISA are now subject to the same reporting and audit requirements that currently exist for section 401(k) plans. ERISA-covered 403(b) plans with 100 or more participants generally will be required to file audited financial statements beginning with their 2009 Form 5500 filing. Generally, 403(b) plans with fewer than 100 participants may be eligible to use abbreviated reporting forms without audited financial statements.

The initial audit of 403(b) plans will likely require significant effort to ensure completeness and accuracy of plan and participant level information going back numerous years. IRS Revenue Ruling 90-24 previously allowed 403(b) participants to initiate a transfer of their 403(b) assets and accounts from a vendor offered by their employer to outside of the plan vendors without any approval of the plan sponsor. Plan assets may be held in a custodial account or in an annuity contract that is issued in the participant's name as opposed to the plan's name. Given the expected challenges of identifying all the assets under the plan, the DOL issued Field Assistance Bulletins ("FAB") Nos. 2009-02 and 2010-01, which allow a plan administrator of a 403(b) plan to exclude certain contracts and accounts from plan assets under certain specified conditions. However, accounting principles generally accepted in the United States of America require the inclusion of such contracts and accounts as plan assets in the plan's financial statements. As such, there may be implications as to the type of auditor's report issued.

▶ THE DOL ADDRESSES AN INSURANCE CONTRACT CONFLICT

TIAA-CREF, a major provider of investment and recordkeeping services to 401(k) and 403(b) plans, requested an advisory opinion from the DOL with respect to their Traditional Annuity Contracts ("TACs"). Advisory Opinion 2010-01A was issued in March 2010 and can be found at <http://www.dol.gov/ebsa/regs/aos/ao2010-01a.html>. An advisory opinion is a response to a request from an individual or an organization asking that the DOL apply the

HELPFUL RESOURCES REGARDING 403(b) PLANS:

- DOL Employee Benefits Security Administration ("EBSA") 403(b) Web site: www.dol.gov/ebsa/403b.html
- AICPA EBPAQC 403(b) Plan Resource Center: [http://www.aicpa.org/InterestAreas/EmployeeBenefitPlanAuditQuality/Resources/AccountingandAuditingResourceCenters/Pages/403\(b\)%20Plans.aspx](http://www.aicpa.org/InterestAreas/EmployeeBenefitPlanAuditQuality/Resources/AccountingandAuditingResourceCenters/Pages/403(b)%20Plans.aspx)
- IRS 403(b) Resources: <http://www.irs.gov/retirement/article/0,,id=172430,00.html> and www.irs.gov/publications/p571/index.html

law to a specific set of circumstances or facts, or draw attention to established rulings or interpretations.

Prior to obtaining the advisory opinion, TIAA-CREF had operated with their understanding that the TACs were fully allocated contracts, and should therefore not be considered to be plan assets. Due to questions raised by various parties, TIAA-CREF requested the advisory opinion. Upon consideration, the DOL determined that these contracts are unallocated and therefore are plan assets. As a result, the TACs should be reflected in the plans' records.

Important matters of which to take note:

1. Qualified retirement plans invested in TACs with TIAA-CREF may need to consider whether a restatement of the plan's financial statements is necessary where the Plan Sponsor did not previously include these contracts as plan assets.
2. Although this advisory opinion was specifically requested by TIAA-CREF, the TACs may be similar to products offered by other insurance companies, and therefore this advisory opinion should be considered in relation to the applicability to any insurance contracts that have been treated as allocated contracts by other insurance companies.

If a retirement plan has investments with an insurance company, it is important to understand the types of insurance contracts and consider the following:

1. Make inquiries of the insurance company to determine the nature of the insurance

contracts held - either in the name of the plan or individual plan participants (as in 403(b) plans, for example) – and obtain copies of each type of contract.

2. Ensure that all contracts that meet the criteria discussed in the advisory opinion are included in the plan's records.
3. A trigger term such as "transfer payout annuities" or other similar terms may indicate that distributions do not agree to the amount and/or form the participant requested.
4. Loans to participants made directly between the insurance company and an employee requires that collateral on that loan be maintained in an insurance contract held by the plan.
5. Discuss with your auditors. They can assist you in formulating the appropriate questions, deciphering the responses from the insurance company, as well as assisting you in addressing these issues as they relate to your benefit plan.

Please contact your local BDO contact, Bob Lavenberg rlavenberg@bdo.com or Monique Elliott melliott@bdo.com with any questions.

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▶ ELECTRONIC FILING OF THE FORM 5500 (ANNUAL RETURN/REPORT)

EBPs required to file a Form 5500 must submit the 2009 and future forms and schedules electronically through EFAST2, the all electronic ERISA Filing Acceptance System. Prior year delinquent or amended Form 5500 filings also now must be filed electronically, except 2008 plan year filings, which may still be filed through the original EFAST on paper until October 15, 2010. EFAST2 will provide real time, online access to financial information about private sector employee benefit plans, including a copy of the audited financial statements that are attached to the Form 5500.

In May 2010, the DOL announced a new e-signature option for the electronic filing of the Form 5500 and 5500-SF. Under the new option, service providers that manage the filing process for plans can obtain their own signing credentials and submit the electronic Form 5500 and 5500-SF for the plan. The plan administrator (generally the plan sponsor) must manually sign the completed filing and the service provider must attach a PDF version of the manually signed Form 5500 or 5500-SF as an attachment to the electronic filing and confirm that the provider has specific written authorization from the plan administrator to submit the plan's electronic filing. The image of the manual signature of the plan administrator will be available in the annual return/report that is posted on the Internet for public disclosure. Since the service provider is submitting the electronic filing, all inquiries from governmental agencies (e.g., DOL, IRS or the Pension Benefit Guaranty Corporation) will be made to the service provider. The service provider must communicate all such inquiries to the plan administrator.

The 2009 and 2010 Forms 5500, 5500-SF, and the related instructions may be found at www.dol.gov/ebsa under "Forms and Filing."

▶ IRS FORM 8955-SSA

Schedule SSA was eliminated from the Form 5500 beginning with the 2009 plan year due to the fact that it contained sensitive information for separated participants with

deferred vested benefits that would otherwise have been available on the Internet with the electronic filing through EFAST2. Schedule SSA has been replaced with the Form 8955-SSA, which will be filed directly with the IRS. The new form will require information similar to that previously disclosed on the old Schedule SSA. Form 8955-SSA will not be required to be filed until further guidance is issued from the IRS and that guidance is expected to establish a special due date, expected to occur in 2011, for the 2009 Form 8955-SSA. This special due date will not impact the due date of the 2009 Form 5500 that is to be filed through EFAST2.

▶ FAIR VALUE MEASUREMENTS

Since the original issuance date in September 2006, the Financial Accounting Standards Board ("FASB") has amended Statement No. 157, which was codified in FASB Accounting Standards Codification ("ASC") 820, *Fair Value Measurements and Disclosures*, which provides enhanced guidance for using fair value to measure assets and liabilities. In April 2009, FASB issued FSP FAS 157-4, *Determining Fair Value When the Volume and Level of Activity for the Asset or Liability Have Significantly Decreased and Identifying Transactions That Are Not Orderly*, which has been codified in FASB ASC 820-10-50-2. ASC 820-10-50-2 provides additional guidance for estimating fair value when the volume and level of activity for the asset or liability have significantly decreased and guidance on identifying circumstances that indicate a transaction is not orderly. Also, FASB ASC 820-10-50-2 states that for equity and debt securities, major categories should be defined by major security type based on the nature and risks of the security. The activity, business sector, vintage, geographic concentration, credit quality or economic characteristic should be considered when determining if it is necessary to further disaggregate securities into further detail. ASC 820-10-50-2 is effective for the first reporting period **ending after** June 15, 2009.

In September 2009, FASB issued Accounting Standards Update ("ASU") 2009-12, *Investments in Certain Entities That Calculate Net Asset Value Per Share (or Its Equivalent)*, which provides amendments to FASB ASC 820 for the fair value measurement of

MARK YOUR CALENDARS....

December 13-14, 2010
AICPA Employee Benefit Plans Accounting, Auditing and Regulatory Update
Greater Washington, DC

This high-level conference, chaired by **Bob Lavenberg**, provides critical updates, new guidelines, and regulatory information from the regulators, standard setters and leading practitioners, including members of BDO's EBP Audit Practice.

investments in certain entities that calculate net asset value ("NAV") per share (or its equivalent). The ASU permits NAV to be used as a practical expedient in measuring the fair value of alternative investments (e.g., certain common collective trusts and private equity funds). It also requires additional disclosures regarding the nature and risk of the alternative investments. A Technical Practice Aid (TIS Section 2220.18-.27) was issued to provide clarification for determining the fair value of investments in certain entities that calculate NAV. The ASU is effective for the first reporting period **ending after** December 15, 2009.

In January 2010, FASB issued ASU 2010-06, *Fair Value Measurements and Disclosures (Topic 820): Improving Disclosures about Fair Value Measurements*, which requires new disclosures about transfers into and out of Level 1 and 2 of the fair value hierarchy and separate disclosures about purchases, sales, issuances, and settlements relating to Level 3 measurements. This ASU also clarifies existing disclosures regarding the level of disaggregation for each class of assets and liabilities. A class is often a subset of assets or liabilities within a line item in the statement of financial position. Management's judgment is required in determining the appropriate classes of assets and liabilities. The ASU also provides disclosures about inputs used

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to measure fair value for both recurring and nonrecurring fair value measurements and valuation techniques (i.e., the income, market or cost approaches) for fair value measurements that fall in either Level 2 or Level 3. ASU 2010-6 is effective for the first reporting period *beginning after* December 15, 2009, except for the separate disclosures about purchases, sales, issuances, and settlements in the roll forward of activity in Level 3 fair value measurements. Those disclosures are effective for fiscal years *beginning after* December 15, 2010. In the period of initial adoption, plans will not be required to provide the amended disclosures for any previous periods presented for comparative purposes. However, comparative disclosures are required for periods ending after initial adoption.

▶ TIMELINESS OF THE REMITTANCE OF PARTICIPANT CONTRIBUTIONS

The DOL's EBSA continues to focus on the timeliness of participant contribution remittances into a contributory plan. Participant contributions are plan assets on the earliest date that they can be reasonably segregated from the employer's general assets but, for pension plans, no later than the 15th business day of the month following the month in which the participant contributions were withheld or received by the employer. The latest date for forwarding participant contributions to health plans is 90 days from the date on which such amounts are received or withheld by the employer.

The DOL published a final rule in January 2010 establishing a safe harbor period for small pension and welfare benefit plans (those plans with less than 100 participants) of seven business days following receipt or withholding by employers. The final rule is consistent with the proposed rule that was issued by the DOL in February 2008. Due to the lack of information to evaluate the current practice and to assess the costs and benefits for large pension and welfare plans (those plans greater than 100 participants), the DOL did not expand the safe harbor to cover such plans.

Failure to remit or untimely remittance of participant contributions constitutes a prohibited transaction under ERISA Section 406, regardless of materiality. Such transactions constitute either a use of plan assets for the benefit of the employer or a prohibited extension of credit. Such transactions, in certain circumstances, may even be considered an embezzlement of plan assets.

DOL Advisory Opinion 2002-2A concluded that participant loan repayments paid to or withheld by an employer for purposes of transmittal to the plan become plan assets as of the earliest date on which such repayments can reasonably be segregated from the employer's general assets.

Beginning with the 2009 Form 5500, the instructions to line 4a of Schedules H and I set forth a new standardized schedule for reporting delinquent participant contributions and permit the inclusion of delinquent participant loan repayments on line 4a of Schedules H and I. Plan sponsors faced with remitting delinquent participant contributions and loan repayments should consider applying to the DOL's Voluntary Fiduciary Correction Program ("VFCP") and should refer to http://www.dol.gov/ebsa/compliance_assistance.html for additional information.

▶ DOL FINAL RULES ON PENSION DISTRIBUTIONS UNDER QUALIFIED DOMESTIC RELATIONS ORDERS ("QDROS") RELEASED

In June 2010, the DOL issued final rules under the Pension Protection Act of 2006, which clarify that a domestic relations order would 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. The rule includes examples to address various circumstances involving the timing of a domestic relations order. The rule is intended to provide more clarity and simplify compliance for plan administrators so that plan participants and beneficiaries can receive their benefits as ordered.

BDO'S EMPLOYEE BENEFIT PLAN AUDIT PRACTICE IN THE NEWS...

Bob Lavenberg, National Employee Benefit Plan Audit Practice Leader, has presented extensively with regard to the new audit and tax regulatory environment for 403(b) Tax Sheltered Annuity plans both internally and externally for the AICPA and various state CPA societies.

Bob Lavenberg; Lara Stanton, Director, National Assurance, Audits of Employee Benefit Plans; and **Roland O'Brien**, Director Employee Benefit Plans – Philadelphia Office instructed at the Pennsylvania Institute of CPAs Employee Benefit Plans Conference on May 3rd and 4th, 2010 in Lancaster, Pennsylvania.

Bob Lavenberg and **Monique Elliott**, Assurance Director, Employee Benefit Plan Group, spoke on May 24, 2010 at the North Carolina Association of CPAs 2010 Hot Topic Conference: Employee Benefit Plans in Cary, North Carolina on the topic of 403(b) plans.

Tricia Van Vliet, Director, National Employee Benefit Plan Practice, presented at the West Michigan Management Information & Business Show held in Grand Rapids, Michigan on June 10, 2010.

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▶ NEW PENSION FUNDING RELIEF

On June 25, 2010 President Obama signed the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act (H.R. 3962), which provides funding relief for defined benefit pension plans. Under the law, single employer plans will be allowed to elect relief through extended amortization periods for any two plan years during the four-year period of 2008-2011. Plans will be able to choose amortization periods of 9 or 15 years instead of the usual 7 years. The law also provides penalties in the form of increased pension contributions from employers that accept funding relief at the same time they award excessive employee compensation, dividends or stock redemptions.

▶ DOL ISSUES NEW INTERIM RULES ON FEE DISCLOSURES

On July 16, 2010 the DOL issued new interim rules on fee disclosures, which will become effective on July 16, 2011. Stayed tuned to future editions of the *EBP Commentator* for additional details.

▶ IRS 401(k) COMPLIANCE CHECK QUESTIONNAIRE

The IRS recently announced that its Employee Plans Compliance Unit ("EPCU") has mailed out a letter and instructions to a random sample of 1,200 employers that sponsor 401(k) plans asking them to complete a "401(k) Compliance Check Questionnaire."

Through a secure Web site, the EPCU will collect responses on: demographics, participation, employer and employee contributions, top-heavy and nondiscrimination testing, distributions and plan loans, other plan operations, automatic contribution arrangements, designated Roth features, IRS voluntary compliance and correction programs, and plan administration.

The information gathered will provide comprehensive information on 401(k) plans, and will help EPCU maximize resources for education, outreach, guidance, and enforcement efforts while minimizing the burden to compliant plan sponsors. The

employers selected to participate were taken from a random sample of 401(k) plan sponsors that filed a Form 5500 for the 2007 plan year.

▶ WHAT IS A SAS 70 REPORT AND WHY IS IT RELEVANT?

That is a very important question that plan sponsors often find themselves asking. The SAS 70 report is issued by service organizations to provide detailed descriptions of procedures and controls in place to ensure proper and accurate processing of data submitted by the plan sponsor.

When available, plan sponsors should obtain **and read** the SAS 70 reports from their outside service providers including payroll processors, record keepers, trustees and/or custodians, and any other significant service providers related to the employee benefit plan. Many times SAS 70 reports are lengthy and can be overwhelming, but it is the plan sponsor's responsibility to understand the controls that exist to ensure proper processing and recording of the plan's data and transactions. In addition, in order for controls to work properly at the service provider, certain user controls should also be in place at the plan sponsor. Therefore, it is also the responsibility of the plan sponsor to identify the user controls in the report and make sure those controls are appropriately designed and implemented within the organization, where applicable to their specific plan's provisions and operation. For example, controls should be in place at the plan sponsor to ensure payroll records are complete and accurate prior to submitting them to a record keeper to process. Additionally, the plan sponsor should understand the potential impact of any exceptions noted in the report, and identify any mitigating controls at their own organization to verify that the control objectives are, in fact being achieved.

The SAS 70 reports covering significant controls will be requested by the plan's auditors in connection with the annual employee benefit plan audit. These reports are used by the plan auditors to plan their procedures based upon an evaluation of controls in place at the service organizations, as well as at the plan sponsor location. An ideal SAS 70 report covers all key control

HELPFUL WEBSITES

<http://www.dol.gov/ebsa/>

<http://www.efast.dol.gov>

<http://www.irs.gov/>

<http://ebpaqc.aicpa.org>

<http://asc.fasb.org>

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<http://www.bdo.com/publications/assurance/ebp.aspx>

objectives applicable to the plan operations and related controls may allow the auditors to decrease the extent of detailed testing in the plan's audit. Plan sponsors can also work with their plan auditors to identify any deficiencies in the SAS 70 report and communicate that information to the service organization. The service organization can then use this information to improve future SAS 70 reports to make them more effective for their clients and their auditors.

In January 2010, SSAE 16 – *Statements on Standards for Attestation Engagements – Reporting on Controls at a Service Organization* superseded SAS 70 for service auditor's reports for periods ending on or after June 15, 2011. These standards should not have any effect on the plan sponsor's responsibility with regard to a SAS 70 report, but plan sponsors should be aware of this change.

Please contact your local BDO contact, Lara Stanton lstanton@bdo.com or Becky Thompson rthompson@bdo.com with any questions.

BDO EBP PRACTICE

BDO is nationally recognized in the field of employee benefit plan consulting and auditing. We audit nearly 1,000 plans nationwide, ranging from 100 participants to close to 300,000 participants. Our engagements are staffed with accountants experienced with all types of audits including defined contribution (401(k), profit sharing, ESOP, and 403(b) plans), defined benefit (pension, cash balance) and health and welfare plans. We have extensive ERISA knowledge of audit and filing requirements, including full-scope, limited-scope, Form 11-K filings and Master trusts.

In addition, BDO has a National Employee Benefit Plan Audit Group that meets regularly to develop training and guidance and discuss updates in the industry and best auditing practices. Our professionals are regular presenters at local, state and national seminars. BDO's professionals continue to be extensively involved as Chair of the American Institute of Certified Public Accountants ("AICPA") National Conferences on Employee Benefit Plans. Many of our professionals serve in leadership roles in the accounting profession as senior advisors and are active members of several governing boards and CPA societies. For example, our professionals serve on various AICPA committees, such as the Executive Committee of the Employee Benefit Plan Audit Quality Center (Vice-Chair) and have served on the Employee Benefit Plan Expert Panel.

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