

March 2009

Legislative and regulatory developments emerged quickly in February:

- President Obama signed the American Recovery and Reinvestment Act. The Act's terms reflect the public's desire for executive compensation curbs and board independence, which may have a domino effect on all public companies, not just those receiving TARP funds.
- Senator Harkin introduced the Defined Contribution Fee Disclosure Act. The proposed act highlights a pressing issue — for Congress, the DOL and plaintiffs' attorneys — that employers will need to follow and respond to.
- The DOL released a Field Assistance Bulletin providing interim guidance on ERISA's annual funding notice.
- The IRS released final regulations regarding automatic contribution arrangements.

In the courts, the Seventh Circuit dismissed participant claims that the plan sponsor and its service providers violated their ERISA fiduciary duties by failing to adequately disclose fee structure. Even so, the "excessive fee" issue remains both controversial and unresolved.

Also in this issue: a quick guide to plan sponsor action items for 2009.

LEGISLATIVE DEVELOPMENTS

American Recovery and Reinvestment Act of 2009 Signed

President Obama signed the American Recovery and Reinvestment Act of 2009 (ARRA), which imposes a number of executive compensation restrictions and corporate governance standards applicable to all past and future recipients of financial assistance from the federal government under the Troubled Asset Relief Program (TARP). Among other things, the ARRA requires shareholders to have a nonbinding "say on pay" to approve the compensation of executives as reflected in the proxy materials and requires companies to have a compensation committee comprised solely of independent directors. The ARRA also includes a tax-free federal subsidy for certain "assistance eligible" individuals and their family members — 65% of the cost of their COBRA premiums for up to nine months, for coverage beginning March 1, 2009.

Insight: Increasing public calls to curb executive compensation and require board independence may ultimately result in changes affecting all companies, not just those receiving TARP funds. At a minimum, it seems likely that some form of broadly applicable say-on-pay legislation will be enacted in the foreseeable future. Companies in all sectors should carefully review their executive compensation programs for their senior officers to ensure that:

- the programs are aligned with the interests of shareholders
- related governance procedures appropriately reflect changes made by the ARRA.

At the time the *Update* went to press last month, the COBRA health continuation subsidy included in the pending ARRA legislation was 60%. The final version of the ARRA sets the subsidy at 65%. Both the Department of Labor (DOL) and the Internal Revenue Service (IRS) launched new Web pages with preliminary guidance to help employers comply with the new COBRA subsidy. The DOL's page will eventually contain a model notice to employees about the subsidy. The IRS's page includes frequently asked questions and a revised Form 941, the employer quarterly payroll tax return. Form 941 was revised to address how employers will be reimbursed for the COBRA subsidy. Employers may find that they have many more COBRA participants than previously and will need to review the potential need for establishing FAS 112 liabilities in their quarterly financial statements. In addition, employers that were planning on providing subsidized COBRA for involuntary terminations may wish to rethink their strategy.

401(k) Fee Disclosure Act Introduced

Senator Harkin's Defined Contribution Fee Disclosure Act of 2009 would require, among other things:

- service providers to disclose to defined contribution plan administrators the services to be provided, the entities that will be performing such services (including affiliated or third-party providers), the expected total annual charges and the relationships between parties with financial interests in the plan
- plan administrators of participant-directed defined contribution plans to provide participants with advance notice of information about investment options, including an investment's objectives, risk level, historical return of investment options under the plan and an investment comparison chart disclosing the potential service fees imposed on those investments.

Insight: Fees continue to be a pressing issue for Congress, the DOL and plaintiffs' attorneys. Any required fee disclosure will entail greater cooperation between vendors and plan sponsors. When negotiating service contracts with vendors, plan sponsors should be thinking about how compliance with future fee disclosure laws and regulations should be addressed in these contracts, including whether or not compliance should be addressed as part of the vendor's performance standards.

REGULATORY DEVELOPMENTS

Annual Funding Notice Interim Guidance Issued

The DOL released a *Field Assistance Bulletin* (FAB) that provides interim guidance regarding ERISA's annual funding notice. The FAB contains technical guidance in Q&A format and includes a model annual funding notice. It indicates that the DOL will treat defined benefit plan sponsors as in compliance if they follow a reasonable, good faith interpretation of the requirements with respect to matters not addressed in the FAB.

Insight: Plan participants may view the notice as highly technical and difficult to understand. As a result, participants could draw erroneous conclusions about how the plan's funded status will impact benefit payments. Plan sponsors may wish to:

- take steps to reduce the possibility of confusion and misinterpretation by providing a high-level summary of the purpose and content of the notice in "plain English" or by adding additional language to the notice
- consider how to respond quickly to questions that participants will surely raise after the notice is distributed
- review with their actuaries the methodology used to value assets that will be set forth in the notice.

The *Field Assistance Bulletin* can be found at: <http://www.dol.gov/ebsa/pdf/fab2009-1.pdf>.

Automatic Contribution Arrangements Finalized

The IRS released final regulations relating to automatic contribution arrangements:

- The final regulations relating to qualified automatic contribution arrangements (QACAs) generally apply to plan years beginning on or after January 1, 2008.
- The regulations regarding eligible automatic contribution arrangements (EACAs) generally apply to plan years beginning on or after January 1, 2010.

Insight: The trend of employers to discontinue matching contributions may cause an increase in automatic enrollment arrangements as a way to encourage employees to continue making 401(k) plan contributions. Unlike QACAs, EACAs and other automatic enrollment arrangements do not require employer contributions, and passing ADP testing is not guaranteed. Because there were some significant changes from the proposed regulations, plan sponsors should review their 401(k) plans, forms and participant notices to determine if revisions are required or desired to reflect technical and design-oriented changes required by these final regulations. For example, the final regulations:

- clarify how to apply the minimum deferral percentage requirement
- allow plan sponsors to institute annual reenrollment procedures
- explain how plan sponsors can comply with the notice requirements for new employees.

The final regulations can be found at: <http://edocket.access.gpo.gov/2009/pdf/E9-3716.pdf>.

COURT DECISIONS

Are Your 401(k) Fees Excessive?

In the first appellate decision of its kind, the Seventh Circuit dismissed participant claims that the plan sponsor and its service providers violated their ERISA fiduciary duties by “providing investment options that required payment of excessive fees and costs and by failing adequately to disclose the fee structure to plan participants.”

Insight: The basis of the court’s decision was that the plan, which offered an open brokerage account, provided a wide array of investment options, including some options with low fees. The employee benefits community is split on the rationale of the Seventh Circuit. Excessive fee cases are prevalent in all circuits, and the issue is not settled by any means. (See Senator Harkin’s proposed legislation above.) Prudence would suggest that plan fiduciaries continue to monitor fees as part of their regular plan governance procedures.

The case, *Hecker v. Deere & Co.*, can be found at: <http://caselaw.lp.findlaw.com/data2/circs/7th/073605p.pdf>.

IMPORTANT ACTION ITEMS FOR 2009*

Retirement Plan Action Items

- Compliance calendars should be updated to reflect the deadline changes imposed by PPA, WRERA and the HEART Act. The changes include, for example:
 - a 180-day window for distribution notices
 - a 90-day withdrawal window for EACAs
 - a six-month window to distribute excess contributions from 401(k) plans
 - mandatory non-spouse beneficiary rollover rights.
- Coordinate with vendors and send employee communications regarding the suspension of the minimum required distributions applicable to 2009. (*Please see our February 2009 issue for a discussion of outstanding issues relating to the minimum required distribution waiver.*)
- Prepare for the onset of any applicable defined benefit plan benefit restrictions based on funded status.

*All dates assume calendar-year plans.

- Defined benefit plans must distribute the annual funding notice by April 30. *Plan sponsors should consider sending the notice in advance of the deadline, to be reasonably certain that it is delivered on time.*
- Plans must be amended to reflect final Internal Revenue Code section 415 regulations by September 15.
- PPA amendments must be adopted by December 31.
- 403(b) plan documents must be in place by December 31.
- Certain HEART Act amendments must be adopted by December 31.

Health and Welfare Plan Action Items

- Implement COBRA subsidy program and procedures.
- Update business associate agreements and internal policies to reflect changes in privacy rules.
- Review plans for compliance with the broadened scope of mental health benefits.
- Review medical plan forms for compliance with new restrictions on sharing, collection and use of genetic information.
- Employers with any employees residing in Massachusetts need to review their medical plans and their notice procedures for compliance with the state's Health Care Reform and Minimum Creditable Coverage laws.

CONTACT

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