Attorney Bios

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PRACTICE AREAS

Employee Benefits and Executive Compensation
Labor and Employment
Health Information Privacy and Security and HIPAA Compliance
Pension Plans
Welfare Plans
ESOPs

EDUCATION

University of Texas, J.D., 1987, *With High Honors; Chancellors, Order of the Coif*

London Institute on International Law, 1985

Trinity University, B.A., 1983, *Summa Cum Laude; Phi Beta Kappa*

BAR ADMISSIONS

Tennessee, 1999
District of Columbia, 1991
Texas, 1988

MEMBERSHIPS

Alive Hospice Board of Directors and Personnel Committee Chairman
American Health Lawyers Association

Martindale-Hubbell® AV Peer Review Rated

David Joffe practices in the areas of employee benefits, executive compensation and employment law. David assists clients in establishing and maintaining pension, welfare, deferred compensation and employee stock ownership plans (ESOPs).

Employee Benefits: David advises clients on the design, implementation and administration of qualified and nonqualified benefit plans. He consults with plan sponsors, administrators and fiduciaries of private, governmental, multi-employer and church plans. David has experience with a variety of benefit plan arrangements, including traditional defined benefit pension plans, 401(k) and other thrift plans, profit-sharing plans, SIMPLE plans, IRAs, SEPs, HR-10 or Keogh plans, prototype plans and ESOPs. David counsels employers on the tax aspects of such plans, including qualification issues and reporting obligations. He also regularly advises on related ERISA issues, including reporting and disclosure requirements, participation and vesting issues, fiduciary duties, prohibited transactions and trustee obligations. David routinely advises employers regarding welfare benefit plan issues (insured and self-funded), including the requirements under COBRA, HIPAA and other laws relating to group health, life, disability and retiree medical plans. As a related matter, David prepares and advises employers on Section 125 cafeteria plans, health and dependent care flexible spending arrangements, and Section 501(c)(9) VEBA trusts. He is routinely involved with disputes, including litigation, relating to benefit claims. David represents employers and fiduciaries in compliance issues and with audits conducted by the IRS, DOL and other governmental agencies. He also advises sponsors and administrators on self-correction programs including EPCRS and VFC.

Executive Compensation : David regularly counsels employers and executive management on compensation issues. He has extensive experience with deferred compensation arrangements (e.g. nonqualified deferred compensation plans, excess benefit and top-hat plans, SERPs, golden parachutes, split-dollar agreements and rabbi trusts). He advises executives as well as board members on stock-based compensation issues. David is frequently involved in preparing executive compensation plans and individual executive employment and compensation agreements. He also works with employers on related employment tax issues, including tax reporting and withholding requirements.

B. DAVID JOFFE

Labor and Employment : David counsels employers on a broad range of labor and employment issues. He advises on hiring issues, employment discrimination issues, employee handbooks and policies, e-mail and employee privacy issues, wage and hour requirements, and employment terminations. He regularly advises employers on the many laws affecting them, including the ADA, ADEA, FLSA, FMLA, Title VII and WARN. David regularly advises employers on severance plans and agreements, exit incentive programs, early retirement programs and other employment termination programs involving reductions in force.

David counsels employers on benefits and employment matters relating to mergers, acquisitions and other business combinations. His clients include public and private employers ranging in size from small businesses and professional corporations to large service corporations, governmental entities, manufacturing facilities and hospital systems. David also assists various insurance companies, trustees, third-party administrators and other fiduciaries.

Prior to joining Boult, Cummings, Conners & Berry, PLC, David was a Director and Assistant Corporate Secretary for Mary Kay Inc. in Dallas. He handled matters for the company in the areas of labor and employment, employee benefits, immigration and general litigation--both domestic and international. Prior to joining Mary Kay Inc. in 1994, he practiced for six years with the law firm of Thompson & Knight, P.C. in Dallas.

David was awarded an AV rating, the highest rating possible, from *Martindale-Hubbell ® Law Directory*, the country's foremost legal directory. He is listed in *Mid-South Super Lawyers 2006* for his Employee Benefits/ERISA practice.

PUBLICATIONS

10/19/2007	New Benefit Limits for 2008
09/19/2007	Deadline Approaches for 403(b) Plan Transfers
07/27/2007	Making Changes to Your Retiree Health Benefits? Be Careful What You Say
04/12/2007	Pension Protection Act of 2006: IRS Issues Final Regulations on Annual Benefit Limitations For Tax-Qualified Plans
02/13/2007	Pension Protection Act of 2006: New Guidance on Investment Advice Arrangements
01/10/2007	New Guidance on Reporting and Withholding Requirements for

	Deferred Compensation Plans
12/21/2006	Recent 401(k) Fee Lawsuits: Is Your Plan Vulnerable?
11/27/2006	Pension Protection Act of 2006: New Participant Notices for Defined Contribution Plans Required by December 2, 2006
11/03/2006	Reminder: November 15, 2006 Deadline for Medicare Part D Notices

SPEAKING ENGAGEMENTS

11/01/2007	Current Developments in Employee Benefits
05/24/2007	Are You Ready? Upcoming Regulatory Changes to 403(b) Plans
05/22/2007	Are You Ready? Upcoming Regulatory Changes to 403(b) Plans
05/16/2007	The Pension Protection Act of 2006: Focus on Key Changes for Defined Contribution Plans
05/15/2007	Pension Protection Act: New Planning Opportunities for Retirement Plans
04/19/2007	Planning for the Final 403(b) Regulations (Plus Automatic Enrollment)
02/06/2007-02/07/2007	New Rules for Health Savings Accounts and Wellness Programs

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PRACTICE AREAS

Hospitals and Health Systems
Health Information Privacy and Security and HIPAA Compliance
Employee Benefits and Executive Compensation

EDUCATION

University of Kentucky College of Law, J.D., 2001

University of Michigan, Ph.D., 1993

University of Kentucky, M.A., 1989

University of Kentucky, B.A., 1986

BAR ADMISSIONS

Tennessee, 2002

MEMBERSHIPS

American Bar Association
Tennessee Bar Association
American Health Lawyers Association

Andrew Elbon practices in the areas of employee benefits and executive compensation, and focuses on the design and administration of employee pension and welfare benefit plans. He has significant experience in drafting both tax-qualified and non-qualified retirement plans and with the submission of qualified plans to the Internal Revenue Service for the issuance of favorable determination letters. Andrew also assists plan sponsors to comply with the reporting and other fiduciary requirements of ERISA.

Another focus of Andrew's practice is the protection of health information under the privacy and security regulations imposed on group health plans by HIPAA. He counsels and assists the administrators of group health plans with the inventory of existing uses and disclosures of protected health information and with the establishment of policies and procedures that are required by the HIPAA privacy and security rules.

Andrew is committed to keeping clients informed about the latest regulatory changes that affect the design and administration of employee benefit plans. He frequently contributes to Boult Cummings' Human Resources Counsel Newsletter and eNews Alerts. He is a member of the Tennessee Bar Association, the American Bar Association and the American Health Lawyers Association.

PUBLICATIONS

10/24/2007	Section 409A Update: Internal Revenue Service Extends Deadline for “Operational” Compliance for Nonqualified Plans Until December 31, 2008

SPEAKING ENGAGEMENTS

11/01/2007	Current Developments in Employee Benefits
05/24/2007	Are You Ready? Upcoming Regulatory Changes to 403(b) Plans
05/22/2007	Are You Ready? Upcoming Regulatory Changes to 403(b) Plans

Presentation

Current Developments in Employee Benefits

2007 MTSHRM Legal Workshop

November 1, 2007

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Agenda

- **Default Investment Options and Fund Mapping**
- **Automatic Enrollment and Other Safe Harbor Designs**
- **Deferred Compensation and 409A (Year-End Considerations)**
- **Pension Protection Act Changes for DC Plans**
- **Common Retirement Plan Errors and EPCRS**
- **Fiduciary Issues**
  - Procedural Prudence
  - Selecting Your Advisors
- **Electronic Disclosure**
- **HIPAA Privacy & Security**

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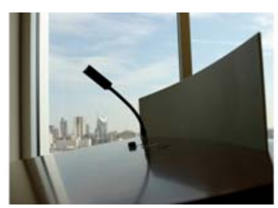
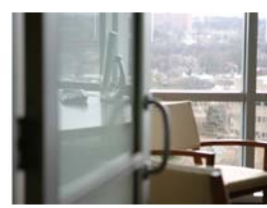

Item #1

Default Investments

and

Fund Mapping




Default Investments

Final DOL Regulations Issued

PPA expands relief for participant investment decisions to cover default investments (whether or not under automatic-enrollment designs)

- **DOL issued final default investment regulations that become effective on 12/24/2007**
- **The final regulations establish four “qualified default investment alternatives” (“QDIAs”)**
- **The stated intent of the final regulations is to encourage:**
  - Automatic enrollment programs
  - Investment in appropriate long-term savings vehicles

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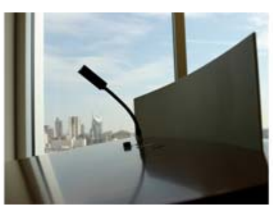


Default Investments

ERISA 404(c) Fiduciary Relief

Must use one of the four QDIAs

- Life-Cycle or Targeted-Retirement-Date Fund
  - Asset mix based on individual participant's age or retirement date
- Balanced Fund
  - Asset mix based on the characteristics of the participants of the plan as a whole, rather than on an individual participant
- Professional Managed Account
  - Asset mix based on individual participant's age or retirement date
- Capital Preservation Account (only for the first 120 days of participation)*
  - If participant does not direct the assets by the end of the first 120 days, the plan administrator will need to direct investments into another QDIA thereafter.

- **QDIA may be a variable annuity contract or a pooled investment fund**

*NOTE: Investments in capital preservation arrangements (e.g., stable-value funds) prior to the effective date are "grandfathered," but future investments must be to a QDIA.

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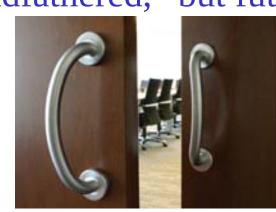



Default Investments

QDIA Notice Requirements

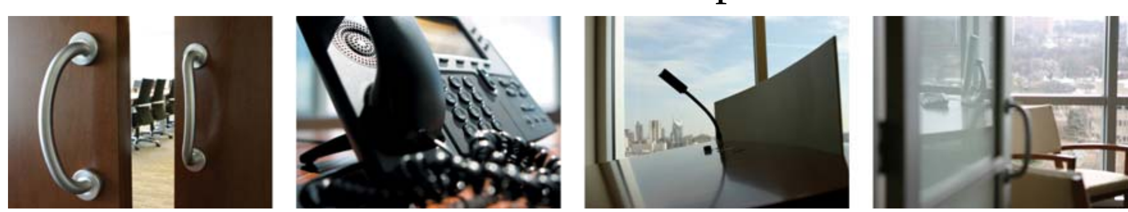
- **Must provide participants with notice at least 30 days before initial eligibility (or at least 30 days before the first investment in the QDIA) and annually thereafter**
- **However, if the plan allows for permissive withdrawals, the notice only needs to be provided on or before the date of eligibility.**
- **The notice cannot be provided in the summary plan description (SPD) or in a summary of material modifications (SMM)**
- **The notice can be provided electronically if the general requirements for electronic delivery are met**




Default Investments

QDIA Notice Requirements (continued)

- **The notice must describe:**
  - the circumstances under which assets are invested in a QDIA;
  - if QDIA is used in connection with automatic enrollment:
    - the circumstances under which elective contributions will be made on behalf of participant;
    - the percentage of such contributions; and
    - the participant rights to elect not to participate or contribute a different percentage;
  - the right to direct the investment of assets in individual accounts;
  - the characteristics of the QDIA, including investment objectives, risk & returns, fees, and expenses;
  - the right to direct assets out of default fund, including a description of any applicable restrictions, fees, or expenses in connection with such transfer; and
  - where participants can obtain information on other plan funds.



Default Investments

Other QDIA Requirements

Participants and beneficiaries must be provided:

- **the opportunity to direct their investments;**
- **materials, such as prospectuses;**
- **The opportunity to direct investments out of the QDIA as frequently as other investments, but at least once every 3 months; and**
- **A “broad range of investment alternatives” as defined by DOL regulations.**

NOTE: Fees that can be imposed on participants that opt out of participation or decide to direct their investments are significantly limited (but ongoing management fees may be imposed).

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Default Investments

Implications of Fiduciary Relief

Implications

- QDIAs are optional. You may still rely on prudent fiduciary rules.
- You may want to review current default investments to determine whether changes are needed to obtain new relief.
- Signals a shift away from money market and stable-value funds.
- Provides for default investments that more closely align with participant's individual needs, while managing fiduciary exposure.
- Relief not exclusive to plans that meet ERISA 404(c) requirements.
- Also covers default investments for beneficiaries.

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Fund Mapping

Fiduciary Relief

Extends ERISA 404(c) relief for "qualified change in investment options" (for example, when replacing an investment fund)

- **Accounts must be reallocated among funds with similar risk/return characteristics**
- **Must provide at least 30 but not more than 60 days advance notice with opportunity to elect alternate investments**
- **Investment option before change must be participant-directed or selected under the new default investment rules**
- **Relief applies only if similar fund exists (for example, relief would not apply to elimination of a company stock fund)**

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Item #2

Automatic Enrollment

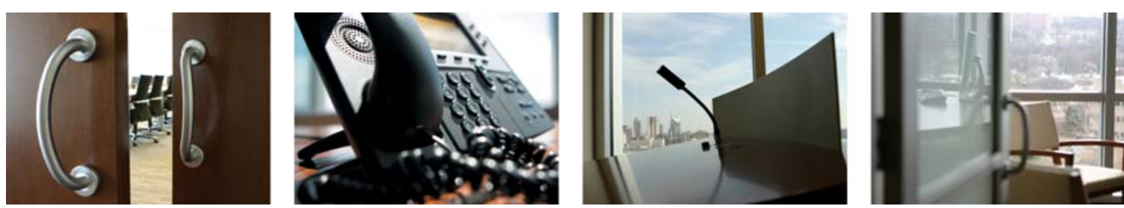
and Other Safe Harbor Designs




Automatic Enrollments and Other Safe Harbor Designs

Key features:

- ***Automatic enrollment*** **(sometimes called "negative election") – participants who fail to make affirmative elections are treated as having made salary deferral elections**
- ***Opt-out option*** **– must have ability to make alternate elections or opt out prospectively (at any time)**
- ***Participant notice*** **– within reasonable period before each plan year. Notice must include:**
  - Right to elect an alternative rate of deferral or to opt out
  - Default investment fund options



Timing of Automatic Enrollment

Automatic contribution arrangements qualify for:

- **2006**
  - **ERISA preemption** of state withholding laws
  - Automatic contribution arrangements are exempt from state laws that restrict payroll withholding without affirmative employee consent (applies only to ERISA-covered plans)
- **2007**
  - **Fiduciary relief** for QDIAs selected for automatic enrollment
- **2008**
  - An option to allow participant **election to unwind** automatic enrollment within the first 90 days
  - **More time** after Plan Year end to make refunds to correct excess deferral contributions (6 months instead of 2½ months)

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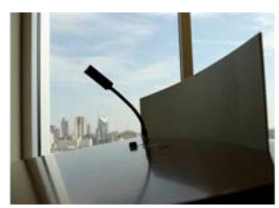



Automatic Enrollment

Considerations

- **Automatically enroll all non-participants or just new hires?**
- **Use an automatic-increase feature or just set a higher default deferral rate?**
- **Effect on matching contribution costs?**
  - Automatic enrollment applied just to new hires will increase participation over several years (but will lower matching contribution costs)
  - Automatically enrollment applied to all participants will increase matching contribution costs
- **Impact on ADP/ACP testing**
- **Increased administrative costs?**
- **Should the employer decide to offer Roth contributions, would automatic enrollment cover Roth, pre-tax, or both?**

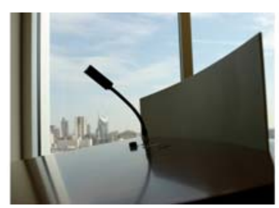
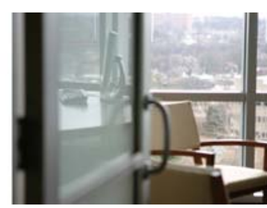
Automatic Enrollment

Allowing participants to unwind

May permit employees to unwind contributions (optional)

- **Election to unwind must occur within 90 days after first deferral**
- **Must include all deferrals plus related earnings, starting with the first deferral and including all payroll periods that began before the date of the election to withdraw**
- **Related matching contributions forfeited (unless final guidance provides otherwise)**
- **Refunded deferrals excluded from ADP non-discrimination testing**
- **Exempt from 401(k) distribution restrictions and early-withdrawal penalty taxes**
- **Taxable in year of distribution**



Automatic Enrollment

Election to unwind automatic enrollment

Should the company offer an election to unwind automatic enrollment?

- **Weigh "safety valve" for those who did not intend to participate against administrative complexity, including**
  - Communicating feature to participants
  - Establishing mechanism for making refund elections
  - Monitoring compliance with timing requirements
  - Tracking earnings
  - Processing distributions
- **For plans without non-elective contributions, may want to offer unwind feature to avoid small-balance accounts**

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Automatic Enrollment

Automatic Contribution Arrangements vs. Qualified Automatic Contribution Arrangements

- **Not all automatic contribution arrangements are "qualified"**
- **Qualified Automatic Contribution Arrangements ("QACAs")**
  - Treated as meeting nondiscrimination testing
  - Plans consisting only of contributions made under the QACA not subject to top-heavy rules
- **Other Automatic Contribution Arrangements**
  - Remain subject to nondiscrimination testing and top-heavy rules
- **For plans that easily pass nondiscrimination testing and are not top-heavy, the QACA rules may not provide any advantage**

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Automatic Enrollment

Qualified Automatic Contribution Arrangements
Nondiscrimination Testing Relief Starting in 2008

QACAs exempt from ADP deferral testing, ACP match testing, and generally top-heavy requirements

- **Must provide all nonhighly compensated employees ("NHCEs") with either**
  - match of 100% of first 1%, plus 50% of next 5% (3.5% total), or
  - 3% non-elective contribution
- **Qualifying contributions must**
  - be fully vested after 2 years
  - comply with 401(k) withdrawal restrictions
  - not be integrated with Social Security
  - be based on a nondiscriminatory definition of compensation

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Automatic Enrollment

Qualified Automatic Contribution Arrangements
Nondiscrimination Testing Relief Starting in 2008

May provide higher level of contributions, if

- rate of matching contribution does not increase as rate of deferral increases
- no highly compensated employee (“HCE”) has a matching rate higher than any non-HCE
- deferrals greater than 6% are not matched (to avoid ACP testing)

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Automatic Enrollment

Qualified Automatic Contribution Arrangements
Required Deferral Rates

- **Default deferral rate requirements:**
  - **maximum** default rate is 10%
  - **minimum** default rate
    - 3% at enrollment
    - after first full plan year of participation, minimum default rate increases 1% annually up to 6%
- **Example: If enrolled March 1, 2008, minimum default rate for a calendar-year plan would be:**
  - 3% for remainder of 2008 and for 2009
  - 4% for 2010
  - 5% for 2011
  - 6% for 2012 and later

May want to set default rate to 6% to avoid annual increases.




Automatic Enrollment

Qualified Automatic Contribution Arrangements
Additional Requirements

- **Automatic enrollment must cover all eligible employees, *except* current employees who**
  - already made elections to participate, or
  - previously declined to participate
- **Employees may opt out (prospectively) at any time**
- **Must provide participant notice**
  - Including reasonable period before each plan year

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Other Safe Harbor Designs

ADP/ACP Safe Harbors

Comparison of New and Current Safe Harbors

	New automatic enroll safe harbor	Current safe harbor	Comments
Automatic enrollment	Graded 3% to 6% automatic deferrals	No requirement	Automatic enrollment may increase match cost
Matching option	100% of first 1%; 50% on 2%–6% (3.5% total)	100% on first 3%; 50% on 4%–5% (4% total)	New safe harbor requires a half percent less total match (at 6% level)
Non-elective option	3% non-elective	Same	Match may cost less
Vesting	Two-year cliff	Immediate	Vesting could recoup some automatic enrollment cost
Eligible compensation – safe harbor contributions	Non-discriminatory definition under Code Section 414(s)	Same	
Eligible compensation – elective deferrals	Unclear; will probably need to be nondiscriminatory	Any reasonable definition under Code Section 414(s)	
Delayed match eligibility	Unclear	Permitted using special testing rules	New safe harbor may require uniform eligibility

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Item #3

Deferred Compensation and 409A

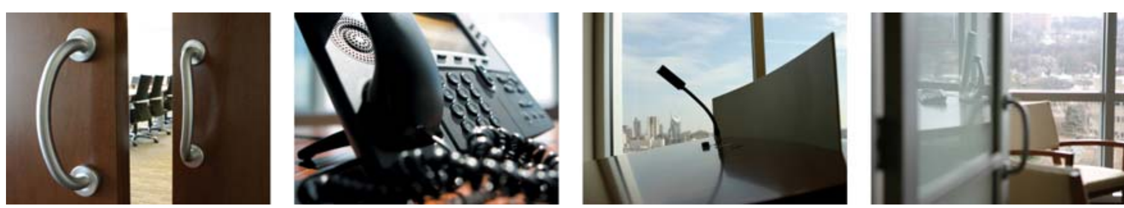



Deferred Compensation and 409A

Transition Relief

IRS issued Notice 2007-86 postponing the deadline for compliance with the final 409A regulations until 12/31/2008

- **Plan Amendments**
  - Employers have under 12/31/2008 to amend plans
- **Operational Compliance**
  - Plans must be administered in good faith compliance with 409A regulations
    - Until 1/1/2008, compliance with either the proposed regulations or the final regulations will constitute good faith compliance
    - After 1/1/2008, compliance with the final regulations (not but the proposed regulations) will constitute good faith compliance
  - Plans may be rely on earlier guidance in Notice 2005-1 in certain cases
  - Plans may provide for new payment elections on or before 12/31/2008 regarding time and form of payment



Deferred Compensation and 409A

Transition Relief (continued)

- **Payment Elections**
  - Plans may continue to allow new payment elections through 12/31/2008 regarding both time and form of payment
  - However, any such elections made in 2008 cannot:
    - Apply to amounts that would otherwise be payable in 2008; or
    - Cause an amount to be paid in 2008 that would not otherwise be payable in 2008
- **Correction Program**
  - IRS intends to establish a correction program in the near future
- **Taking Action**
  - Plan sponsors should consider implementing administrative procedures consistent with the final regulations as soon as possible




Item #4

Pension Protection Act Changes

(for Defined Contribution Plans)

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Pension Protection Act Changes

Participant Investment Advice
Prohibited Transaction Exception

Allows fiduciary advisors to provide investment advice that includes their own funds

- **Advisors must either:**
  - Provide advisor fees that do not vary based on investments selected; or
  - Use an unbiased, computer-generated investment modeling program, subject to conditions and certification
- **Other requirements**
  - Advice must be authorized by an independent plan fiduciary
  - Investment transaction must be "arm's length" and occur solely at the participant's direction
  - Compensation must be reasonable (can be paid from plan assets)
  - Employer has no duty to monitor specific advice given to participants
  - Disclosures (model form to be issued)
  - Annual reports and audits

Employer (Plan Administrator) retains fiduciary responsibility for selecting and monitoring fiduciary adviser




Pension Protection Act Changes

Participant Investment Advice
Implication for Employers

- **Would allow advisors to provide investment advice to participants through their investment advice product/services**
- **Before choosing an investment advice provider, employer should:**
  - Ensure investment advice provider has met all requirements under the new law, including certification if applicable
  - Review fees and services
  - Consider appropriate delivery methods for employee population
  - Consider employer commitment for promotion and reinforcement
- **Employer (Plan Administrator) must periodically review and monitor performance and ensure investment advice services adhere to established standards**
- **Expect marketing push by vendors to add advice/managed accounts**




Pension Protection Act Changes

Annuity Selection

Exemption from "Safest Available" Standard

Directs the DOL to issue regulations clarifying fiduciary standards for selecting annuity contracts for benefit distribution from defined contribution ("DC") plans

- **Interim rule amends Interpretative Bulletin 95-1**
- **Fiduciaries are *not* subject to "safest available" annuity standard for defined benefit ("DB") plans**
- **All other fiduciary standards apply**

Implications for Plans

- **As DC plans take on greater role in providing retirement income, annuities may be an option to mitigate longevity risk**
- **New features and increased flexibility in annuity products may make them more attractive to participants**




Pension Protection Act Changes

Accelerated Vesting
Non-Elective Contributions

	Current law	New law
Matching contributions	Up to: ▪ 3-year cliff; or ▪ 6-year graded	No change
Other (non-elective) contributions	Up to: ▪ 5-year cliff; or ▪ 7-year graded	Up to: ▪ 3-year cliff; or ▪ 6-year graded

- Applies to new contributions starting 1/1/2007
- Now all DC contributions (except safe-harbor) are subject to the same vesting rules
- May use alternative schedules that are at least as generous at each level of service

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Pension Protection Act Changes

Distributions
Miscellaneous Changes

- **Notice for benefit distributions**
  - May be provided up to 180 days in advance instead of 90 days
  - Change is optional
- **Distributions permitted for reservists called to active duty for ≥ 180 days (through 12/31/07)**
  - Exempt from 10% early distribution tax
  - Reservists may “re-contribute” distribution to individual retirement account (“IRA”) subject to certain limits
- **Hardships distributions for events relating to primary beneficiaries**
  - Primary beneficiaries are named beneficiaries with unconditional right to benefits upon death of participant
  - May permit hardship distributions for beneficiaries medical, tuition, or funeral expenses
  - Must continue to meet other requirements (immediate and heavy financial need)
  - Optional feature

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Pension Protection Act Changes

Distributions
Miscellaneous Changes (continued)

- **New "qualified optional survivor annuity" required for qualified plans that offer annuities**
  - Expands the range of spousal survivor annuities that must be offered
- **Non-spouse beneficiaries may roll over qualified distributions to an IRA**
  - Plan must permit this
  - Distribution not subject to direct rollover requirements, notice requirements, or mandatory withholding requirements
  - May include a distribution to a trust
  - May take distributions over beneficiary's life expectancy

Will need to update distribution forms and tax notice

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Pension Protection Act Changes

Effective Dates of Major Provisions

Effective date	Provisions
August 17, 2006 – Date of enactment of legislation	Automatic enrollment pre-emption of state law Standards for annuity purchase
Effective on first day of plan year beginning on or after January 1, 2007	New vesting rules[1,2] Fiduciary relief for default investments Provisions related to investment advice Non-spouse beneficiary rollover to IRA
Effective on first day of plan year beginning on or after January 1, 2008	Automatic enrollment safe harbor Unwind of automatic enrollment deferrals Fiduciary relief for fund mapping[1]

Deadline for adopting required plan amendments: generally, last day of 2009 plan year; operational compliance required in interim

[1] Delayed effective dates for collectively bargained plans
[2] Special effective dates for ESOPs with loans outstanding on 9/26/2005

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Pension Protection Act Changes

Summary of New Required Notices

Notice	Timing
Automatic enrollment pre-emption of state law	30-days in advance/and before plan year
Automatic enrollment testing safe harbor	
Automatic enrollment unwind of deferrals	
Default investments	
Investment changes (fund mapping)	30–60 days before change
Disclosure from fiduciary adviser regarding investment advice	Before providing advice
Participant statements	At least quarterly (for participant-directed individual account plans)
Post Form 5500 information on intranet	Annually

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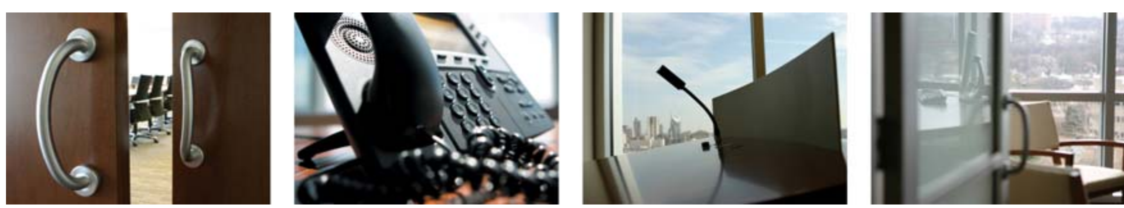
Item #5

Common Plan Errors and ECPRS



Common Plan Errors and ECPRS

Top 10 Reasons to Identify and Correct Mistakes

10. What you don't know CAN hurt you.
9. The law changes.
8. Ignorance may be bliss, but it's not cheaper.
7. An objective review may see problems the plan's third-party administrators don't.
6. Plan participants expect their retirement plan to deliver what's promised.

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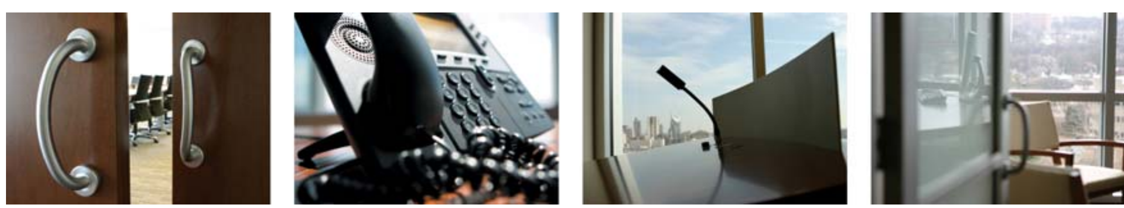
Common Plan Errors and ECPRS

Top 10 Reasons to Identify and Correct Mistakes

5. IRS retirement plan correction programs are available.
4. The IRS encourages use of its do-it-yourself correction program (significant and insignificant errors).
3. The IRS offers voluntary correction programs (VCP).
2. You can be audited.
1. It's the right thing to do.



Common Plan Errors and ECPRS

Top 10 Plan Failures

10. Failure to **amend Plan** for tax law changes
    - GUST
    - Good faith amendments for EGTRRA
    - Final and Temporary § 401(a)(9) regulations
9. Failure to follow the Plan's **definition of Compensation** for determining contributions
8. Failure to **include** eligible employees or **exclude** ineligible employees
7. Failure to satisfy Plan **loan provisions**
6. Impermissible **in-service withdrawals**

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Common Plan Errors and ECPRS

Top 10 Plan Failures (continued)

5. **Failure to satisfy § 401(a)(9) minimum distribution rules**
4. **Adopting a plan that the employer is not permitted to adopt**
3. **Failure to pass ADP/ACP nondiscrimination tests**
2. **Failure to make minimum top-heavy benefit of contribution to non-key employees**
1. **Failure to satisfy the § 415 limits**

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Common Plan Errors and ECPRS

Overview of the ECPRS

If the applicable eligibility requirements are satisfied and plan sponsor corrects a qualification failure under the applicable correction program, the IRS will not treat the Plan as failing to meet the qualification requirements under either § 401(a) or § 403(b)

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Common Plan Errors and ECPRS

General Eligibility Requirements of the ECPRS

Generally limited to failures of qualified plans, 403(b) plans, SEPs, and SIMPLE-IRA plans

Eligibility is a function of:

- The type of plan involved
- Whether the plan or plan sponsor is under investigation
- Whether the failure is egregious
- Whether the plan or plan sponsor has been a party to an abusive tax avoidance transaction
- Whether the plan has a favorable determination letter
- The type of correction proposed
- Whether the failure involves the misuse or diversion of plan assets

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Common Plan Errors and ECPRS

Components of the ECPRS

- **Self-Correction Program ("SCP")**
  - No fee
  - No submission required
  - No reporting required
- **Voluntary Correction Program ("VCP")**
  - Correction with IRS approval
  - Limited submission fee required
- **Audit Closing Agreement Program ("Audit Cap")**
  - Negotiated fee with IRS




Common Plan Errors and ECPRS

Eligibility for Components of the ECPRS

Program	SCP – Insignificant Failures	SCP- Significant Failures	VCP	Audit Cap
Plans Eligible	Qualified Plans, 403(b) plans, SEPs, SIMPLE-IRAs	Qualified Plans and 403(b) Plans only	Qualified Plans, 403(b) plans, SEPs, SIMPLE IRAs	Qualified Plans, 403(b) plans, SEPs, SIMPLE-IRAs
Eligible Failures	Operational	Operational	Operational, Plan Document, and Demographic	Operational, Plan Document, and Demographic
Egregious Failures Eligible	Not Eligible	Not Eligible	Eligible	Eligible
Abusive Tax Avoidance Transaction	Yes, if failure is unrelated to the ATAT	Yes, if failure is unrelated to the ATAT	Yes, if failure is unrelated to the ATAT	Yes, if failure is unrelated to the ATAT
Misuse or Diversion of Plan Assets	Not Eligible	Not Eligible	Not Eligible	Not Eligible
EP Exam or Investigation	Eligible if under EP Exam	Eligible if under EP Exam in Limited Circumstances	Not Eligible	Eligible
Favorable Determination Letter Required	No	Yes	No	No
Fee/Sanction	None	None	Generally, a fixed fee based on Plan size	Negotiated based on maximum payment amount
Written IRS Approval Required	No	No	Yes	Yes

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Item #6

Fiduciary Issues




Fiduciary Issues

Procedural Prudence

Fiduciary Duties

- **Exclusive Benefit Rule**
  - Discharge duties solely in the interest of participants and beneficiaries and for the exclusive purpose of (i) providing benefits to the participants and beneficiaries, and (ii) defraying reasonable expenses of administering the plan.
- **Prudent Man Rule**
  - Discharge duties with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.
- **Duty to Diversify**
  - Must diversify plan investments so as to minimize the risk of large losses, unless under the circumstances it is clearly not prudent to do so.
- **In Accordance with the Document Rule**
  - Discharge duties in accordance with the documents and instruments governing the plan insofar as they are consistent with ERISA.

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Fiduciary Issues
Procedural Prudence
Procedural Issues

- **Issue #1: Contribution Deposits**
  - Participant contributions to retirement plans become trust assets as soon as they can be reasonably segregated from the general assets of the employer.
  - In no event can employee contributions (including loan repayments) be paid to the plan later than the <u>15th business day</u> of the month following the month in which the contributions were withheld or received by the employer.

- **Issue #2: Prohibited Transactions**
  - Parties-in-Interest versus Disqualified Persons
  - Types of Prohibited Transactions (Direct or Indirect)
    - Sale, exchange or leasing of any property
    - Lending of money or extension of credit
    - Furnishing of goods, services, or facilities
    - Transfer to or use of plan assets
    - Acquisition of any employer security or real property in violation of ERISA § 407(a)
  - 406(b) Violations: between a <u>fiduciary</u> and a plan
    - Self-dealing
    - Conflicts of interest
    - Anti-kickbacks

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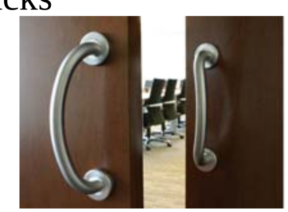


Fiduciary Issues
Procedural Prudence
Procedural Issues (continued)

- **Issue #3: Oversight of Fees**
  - Remember the prudent man (person) and exclusive benefit rules
  - Utilize a "deliberative process" regarding possible changes in investment options examining:
    - nature of problems
    - potential economic impact on plan of any irregularities
    - whether any remedial action may be necessary
  - Obtain information from/about mutual fund and trust fees, in writing, if necessary.
  - Consider putting funds on watch list and monitoring (but remember to follow up)
  - Consider redemption fees, trading restrictions, and holding periods (provided plan allows and disclosures made to participants)
  - Disclose to participants that a fund is under investigation and actions taken
  - Determine whether fund should be eliminated as an option

NOTE: Regulations regarding fee disclosure are likely in the near future!




Fiduciary Issues

Selecting Advisors

Fiduciary Responsibility

A responsible fiduciary must undertake an objective process to assess:

- The qualifications of the provider
- The quality of the services offered
- The reasonableness of the fees charged in light of the services offered

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Fiduciary Issues

Selecting Advisors

Practical Tips in the Selection Process

- Solicit bids
- Consider what services you actually need for the plan
- Ask each potential service provider questions sufficient to determine the quality of the services that they will provide
- Ask each potential service provider to provide a specific explanation as to the services that they will provide and the fees for such services. Also request a list of services that they will not provide.
- If the provider will handle plan assets, make sure the provider has a fidelity bond
- Thoroughly review any agreements or contracts
- Prepare a written record of the process you followed in reviewing potential service providers and the reasons for your selection of a particular provider
- Periodically review performance of service provider
- Renewal – Still required to demonstrate compliance with fiduciary standards in connection with the renewal of agreements with service providers.

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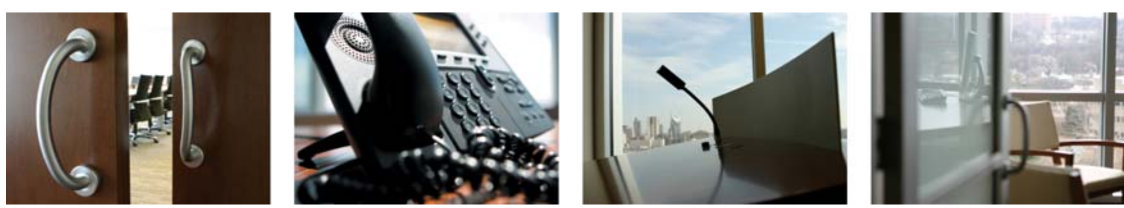
Item #7

Electronic Disclosure



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Electronic Disclosure

IRS Regulations

In 2006, the IRS issued final regulations on the standards for using electronic notices, benefit elections, and consents for benefits plans that are distributed on or after January 1, 2007

- **The regulations serve as a safe harbor for electronic delivery of any notice or election required to be in writing.**
- **The regulations do not apply to notices or disclosures required under ERISA.**
  - Although many of the requirements under the DOL regulations are similar to the IRS regulations

NOTE: For those plan administrators who already use electronic delivery, the regulations provide retroactive protection for distributions on or after October 1, 2000, in the method was consistent with the final regulations.

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Electronic Disclosure
Requirements

- **For Notices**
  - Reasonably designed to be at least as understandable as a paper notice
  - Alert recipient of the significance of the information and provide instructions to access the notice at the time the notice is delivered
  - Must be capable of being retained and accurately reproduced




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Electronic Disclosure

Requirements (continued)

- **For Elections and Consents (in addition to the requirements for notices)**
  - Individual must be effectively able to access the electronic system
  - The system must be reasonably designed to preclude other persons from completing the election or consent
  - The system must provide a reasonable opportunity for the individual to review, confirm, modify, or rescind the election or consent
  - Confirmation of the election must be provided

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Electronic Disclosure

Methods of Delivery

- **Consumer Consent Method**
  - The participant must consent after receiving a disclosure that outlines:
    - The scope of the consent
    - The right to withdraw consent
    - The right to receive the information in paper form
    - The hardware and software requirements for accessing the electronic system
    - The procedures for updating the participant’s electronic contact information

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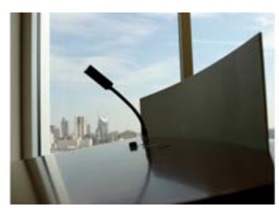



Electronic Disclosure
Methods of Delivery

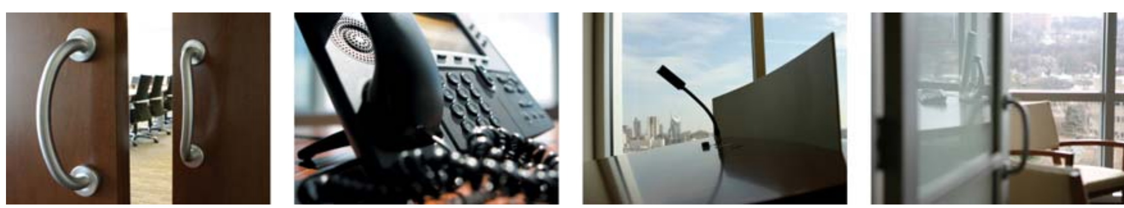
- **Alternative Method**
  - The participant does not have to consent
  - Recipients of notices or disclosures must:
    - Be advised that they may request information in writing at no charge
    - Be “effectively able” to access the electronic system




Electronic Disclosure

Application of the Regulations

- **Electronic delivery is available for any notice, election, or disclosure under:**
  - § § 104(a)(3) or 105 – health or accident plans
  - § 125 – cafeteria plans
  - § 127 – educational assistance plans
  - § 132 – qualified transportation programs
  - § 220 – Archer MSAs
  - § 223 – HSAs
  - Retirement plans under § 401(a), § 403(b), § 408(p), and § 457(b), as well as SEPs, IRAs, Roth IRAs, and deemed IRAs



Electronic Disclosure

Potential Issues

- **Coordination with DOL regulations**
  - In addition to meeting the IRS regulations, the electronic delivery must:
    - Be reasonably calculated to result in “actual receipt”
    - Protect the confidentiality of personal information
  - For active employees, access to the electronic system must be an integral part of their jobs
    - All employees may not have access as an integral part of their jobs
    - Plan administrator must have an alternative method for those that do not meet this requirement
  - For non-employee participants and beneficiaries, DOL regulations generally require a consent and certain disclosures




Item #8

HIPAA Update

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HIPAA Privacy Standards

Key Terms

- Use and Disclosure
- Individual
- Protected Health Information




HIPAA Privacy Standards

Objectives of Special Rules for Group Health Plans

- Restrict disclosures of PHI to, and uses and disclosures of PHI by, plan sponsors
- Reduce burdens on fully-insured group health plans that receive only limited PHI

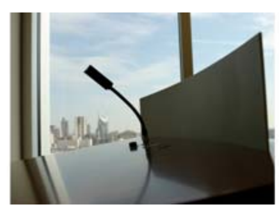



HIPAA Privacy Standards

Amendments to Plan Documents

- **Establish Plan Sponsor's Permitted and Required Uses and Disclosures**
- **Prohibit Disclosures to Plan Sponsor Absent Certification from Plan Sponsor**
  - Plan sponsor will not use or disclosure of PHI other than as permitted or required by plan documents or law
  - Plan sponsor will pass restrictions to its agents and subcontractors
  - Plan sponsor will not use or disclose PHI for employment-related actions or in connection with other benefits
- **Require Adequate Separation Between Plan and Sponsor**






HIPAA Privacy Standards

Individuals' Rights

- Notice of Privacy Practices
- Inspection and Copying of PHI
- Accounting of Disclosures of PHI
- Amendment and Correction of PHI
- Right to Request Additional Privacy Protections




HIPAA Privacy Standards

Business Associates

- **<u>General Rule</u>: Covered Entity may disclose PHI to a business associate if the covered entity has satisfactory assurances from the business associate that it will safeguard the information.**
- **<u>Definition of Business Associate</u>:**
  - Performs, on covered entity’s behalf, an activity involving the use or disclosure of PHI
  - Provides, to a covered entity, legal, actuarial, accounting, consulting, data aggregation, management, administrative, accreditation or financial services involving the disclosure of PHI
  - Does not include members of a covered entity’s workforce or certain financial institutions

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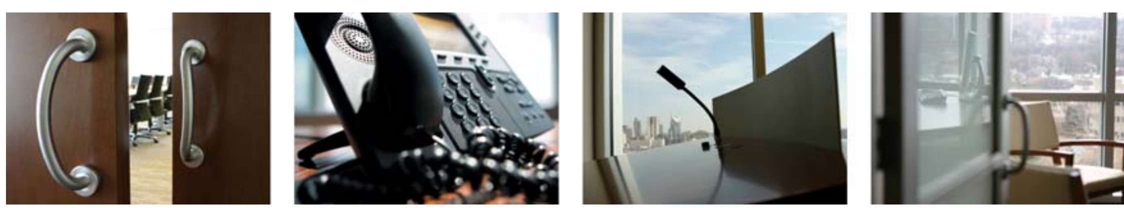

HIPAA Security Standards

Physical Safeguards

- **Implement Physical Safeguards for All Workstations With Access to Electronic Protected Health Information (EPHI) to Restrict Access to Authorized Users**
- **Develop Policies and Procedures:**
  - Limit Physical Access to Electronic Information Systems
  - Receipt and Removal of Hardware and Electronic Media
  - Address Final Disposition of EPHI

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HIPAA Security Standards

Administrative Safeguards

- **Appoint Security Official and Train Workforce**
- **Amend Plan Document**
- **Revise Business Associate Agreements**
- **Develop Written Policies and Procedures:**
  - Allow Authorized EPHI Access
  - Prevent Unauthorized EPHI Access
  - Prevent, Detect, Contain, and Correct Security Violations
  - Respond to Security Incidents and Mitigate Harmful Effects of Security Incidents

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HIPAA Security Standards

Technical Safeguards

- **Prevent Unauthorized Access to EPHI on Electronic Communications Network**
- **Develop Technical Policies and Procedures:**
  - Protect EPHI From Alteration or Destruction
  - Verify Identity of Person or Entity Seeking Access to EPHI
  - Control EPHI Access With Unique User Identification, Emergency Access Procedure, Automatic Logoff and Encryption




Questions and Answers




Appendix

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At Long Last, Final Regulations on Default Investment Options

by B. David Joffe

The Department of Labor (DOL) has issued its long-awaited final regulations on default investment options for individual account plans (such as 401(k) plans). These options are referred to in the regulations as "qualified default investment alternatives" (or QDIAs). The regulations are important because a plan fiduciary who complies with the regulations will generally not be liable for any losses or ERISA fiduciary breaches that occur as a result of investments in a QDIA, though the plan fiduciary must still prudently select and monitor the QDIA. For employers who want to offer automatic enrollment, the regulations help to limit potential fiduciary liability, provided the key requirements of the regulations are met.

Key Requirements

The key requirements to obtain fiduciary relief under the regulations are as follows:

- Assets must be invested in a QDIA.
- Participants and beneficiaries must have been given an opportunity to direct the investment of their accounts but have failed to do so.
- A notice (described below) must be furnished to participants and beneficiaries in advance of the first investment in the QDIA and annually thereafter.
- Materials, such as investment prospectuses, must be furnished to participants and beneficiaries.
- Participants and beneficiaries must have the opportunity to direct investments out of a QDIA as frequently as other plan investments, but at least once every three months.
- Fees that can be imposed on a participant who opts out of participation in the plan or who decides to direct their investments (such as surrender charges or redemption fees) are significantly limited during the first 90 days of the QDIA investment, although ongoing expenses such as investment management fees may be imposed.
- The plan must offer a "broad range of investment alternatives" as defined in the DOL regulation under section 404(c) of ERISA.

QDIAs

The final regulations retain the types of QDIAs set forth in the proposed regulations and add a limited capital preservation option. The four types of QDIAs are as follows:

- A product with a mix of investments that take into account the individual's age, retirement date, or life expectancy (such as a life-cycle or targeted-retirement-date fund);
- An investment service that allocates contributions among existing plan options to provide an asset mix that takes into account the individual's age or retirement date (such as a professionally-managed account);
- A product with a mix of investments that takes into account the characteristics of the group of employees as a whole, rather than each individual (such as a balanced fund); and
- A capital preservation product for only the first 120 days of participation.

At Long Last, Final Regulations on Default Investment Options (continued)

The capital preservation option may be used for plans that want to simplify administration if participants opt out of participation within the 90-day period after the participant's first deferrals into the plan, which is consistent with the new tax "unwind" rule for automatic enrollment. Despite heavy lobbying by the insurance industry, the final regulations do not permit capital preservation options such as stable-value funds to be used on a continuous basis. If this option is used in the first 120 days, plan administrators will need to direct the investments to another QDIA for the period thereafter.

QDIAs must be managed by an investment manager, plan trustee, or plan sponsor who is a named fiduciary or by an investment company registered under the Investment Company Act of 1940. With limited exceptions, a QDIA may not invest contributions in employer securities. The regulations do expand the options for QDIAs to include products and portfolios offered through variable annuity and similar contracts as well as through common or collective trust funds or other pooled investment funds.

It is important to note that a fiduciary will qualify for the relief without regard to which type of QDIA is selected. There is no requirement to select the "most prudent" type of QDIA. The fiduciary is required to exercise prudence in the selection of the QDIA, but it may freely select from the different types of QDIAs. Also, the fiduciary relief is not limited to investments made in automatic contribution arrangements; it apples to other situations such as a participant's failure to provide investment direction following the elimination of a particular investment option, the failure to provide investment instruction following a rollover, or any other failure of participant or beneficiary to provide investment instructions.

The final regulations "grandfather" certain capital preservation arrangements, which should generally include stable-value funds. However, this only applies to investments made before December 24, 2007. This relief should be particularly helpful to plans that have been using stable-value investments awaiting the issuance of the final regulations. It is also welcome relief to investment managers who may have feared a mass exodus from existing capital preservation funds.

Notice Requirements

An initial notice must ordinarily be provided at least 30 days in advance of the date of eligibility or at least 30 days in advance of the date of any first investment in the QDIA. However, if the plan allows for permissive withdrawals within the first 90 days, the notice only needs to be provided on or before the date of eligibility. This is different from the proposed regulations and particularly helpful for plans that have immediate eligibility. The annual notice must be provided at 30 days in advance of each plan year.

The notice must contain the following:

- A description of the circumstances under which assets may be invested in the QDIA; and, if applicable with regard to automatic enrollment, an explanation of the circumstances under which elective contributions will be made on behalf of a participant, the percentage of such contributions, and the right of the participant to elect not to have such contributions made on the participant's behalf (or to elect to have such contributions made at a different percentage);
- An explanation of the right of participants and beneficiaries to direct the investment of assets in their individual accounts;
- A description of the QDIA, including a description of the investment objectives, risk and return characteristics (if applicable), and fees and expenses attendant to the investment alternative;
- A description of the right of the participants and beneficiaries on whose behalf assets are invested in a QDIA to direct the investment of those assets to any other investment alternative under the plan, including a description of any applicable restrictions, fees or expenses in connection with such transfer; and
- An explanation of where the participants and beneficiaries can obtain investment information concerning the other investment alternatives available under the plan.

At Long Last, Final Regulations on Default Investment Options (continued)

The final regulations require that the notice to a participant be written in a manner calculated to be understood by the average plan participant. The notice may not be included in a summary plan description or summary of material modifications, but it may be provided electronically if the general electronic disclosure requirements are met. The DOL did not provide a model notice but indicated that it will consider doing so in the future. The final regulations are expected to encourage automatic enrollment now that fiduciaries will have protection in selecting default investment options.

Plan administrators need to evaluate promptly their options for QDIAs. It is important that fiduciaries devote sufficient time and effort to carefully examine their options. Certain QDIA options may be more complex such as target-date funds that have various target dates and may not have as long a manager track record as other funds. Plan administrators should also plan for advance notice to participants before the regulations become effective on December 24, 2007. On and after December 24th, the grandfathered protection for capital preservation arrangements such as stable-value funds will no longer apply.

If you have any questions about the new regulations, please contact one of the Employee Benefits and Executive Compensation attorneys at Boult, Cummings, Conners & Berry PLC:

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Section 409A Update: Internal Revenue Service Extends Deadline for "Operational" Compliance for Nonqualified Plans Until December 31, 2008

by Andrew Elbon

On October 22, the Internal Revenue Service issued Notice 2007-86, which effectively postpones for another year the deadline for nonqualified deferred compensation plans to comply in operation with the final Treasury Regulations under Section 409A of the Internal Revenue Code (the "409A Regulations" and "Section 409A," respectively). Earlier, in Notice 2007-78, the IRS had extended the deadline for all of the plan documents governing arrangements subject to Section 409A to be in compliance with the new rules, but had left intact the December 31, 2007 deadline for operational compliance with the new Section 409A rules that was established under prior guidance. Under this new relief, nonqualified plans—including contributory savings plans, noncontributory supplemental executive retirement plans (SERPs), and certain severance arrangements—need only be administered in good faith compliance with Section 409A until December 31, 2008, at which time full compliance with the 409A Regulations will be required.

During 2008, plan sponsors may continue to operate nonqualified deferred compensation plans in accordance with the terms of such plans, to the extent such terms are consistent with Code Section 409A and all applicable guidance. In the interim, taxpayers may rely on the earlier guidance in Notice 2005-1, when Notice 2005-1 is inconsistent with the 409A Regulations. If an issue is not addressed in Notice 2005-1 or other applicable guidance, taxpayers may rely on a good faith interpretation of the statute itself. Notice 2007-86 provides that reliance on the 409A Regulations is always a good faith interpretation of the new rules.

Payment election relief has also been extended for another year in Notice 2007-86. Consistent with previous guidance, with respect to amounts subject to Section 409A, a plan may provide for new payment elections on or before December 31, 2008, with respect to both the time and form of payment of such amounts, and the election will not be treated as an impermissible change in the time or form of payment under Section 409A. However, with respect to an election or amendment to change a time and form of payment made on or after January 1, 2008 and on or before December 31, 2008, the election or amendment may apply only to amounts that would not otherwise be payable in 2008 and may not cause an amount to be paid in 2008 that would not otherwise be payable in 2008. For example, with respect to an amount payable upon separation from service, an election may not be made in 2008 to change the amount payable upon a separation from service in 2008.

Notwithstanding the new transition relief provided under Notice 2007-86, plan sponsors should consider implementing as soon as possible administrative schemes that are consistent with the final regulations under Code Section 409A. This is especially the case since, according to Notice 2007-86, reliance on the final regulations always constitutes good faith compliance with Code Section 409A.

If you have any questions about Notice 2007-86 or general compliance with Code Section 409A, please contact one of the Employee Benefits and Executive Compensation attorneys at Boult, Cummings, Conners & Berry PLC:

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New Benefit Limits for 2008

by B. David Joffe

The Internal Revenue Service has announced the cost-of-living adjustments applicable to dollar limitations for retirement plans for 2008. They are as follows:

- The limitation used in the definition of "highly compensated employee" changes from $100,000 to $105,000.
- The annual addition limitation for defined contribution plans is increased from $45,000 to $46,000. For defined benefit plans, the limitation on the annual benefit amount is increased from $180,000 to $185,000.
- The annual compensation limit on maximum compensation that may be considered is increased from $225,000 to $230,000. The dollar limitation for a "key employee" in a top-heavy plan is increased from $145,000 to $150,000.
- For employee stock ownership plans, the dollar amount for determining the maximum account balance subject to a 5-year distribution period is increased from $915,000 to $935,000, while the dollar amount used to determine the lengthening of the 5-year distribution period changes from $180,000 to $185,000.
- The annual compensation limitation for eligible participants in certain governmental plans that allowed cost-of-living adjustments to the compensation limitation under the plan to be taken into account is increased from $335,000 to $345,000.

The following limits remain unchanged for 2008:

- The limitation on the exclusion for elective deferrals, which applies to 401(k) plans and 403(b) annuities, remains at $15,500. The limitation on deferrals under Code Section 457 deferred compensation plans of state and local governments and tax-exempt organizations also remains at $15,500.
- The limitation for catch-up contributions to an applicable employer plan for individuals aged 50 or over remains at $5,000 ($2,500 for SIMPLE arrangements).
- The contribution limitation for SIMPLE arrangements remains at $10,500, and the compensation amount requirement for Simplified Employee Pensions (SEPs) remains at $500.

As a related matter, there are also increases in several pension-related amounts such as the adjusted gross income limitation for determining the retirement savings contribution credit, the deductible amount of an IRA contribution, and the maximum Roth IRA contribution. Also, the Social Security Administration separately has announced that the taxable wage base for computing the Social Security tax (OASDI) in 2008 rises to $102,000 from $97,500, an increase of approximately 4.6%.

If you have any questions regarding the changes in the benefit limits for 2008, please contact one of the Employee Benefits and Executive Compensation attorneys at Boult, Cummings, Conners & Berry PLC:

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