2021 Employee Benefit Plans Update

AICPA EBPAQC Member

As a firm which specializes in the audits of employee benefit plans, we continually monitor accounting, regulatory and current events which

may impact plans. As a member of the Employee Benefit Plan Audit Quality Center (EBPAQC), we recently attended the May 2021 American Institute of Certified Public Accountants (AICPA) annual Employee Benefit Plans Conference. Below is an update on employee benefit plan hot topics.

I. Legal and Regulatory Hot Topics

Department of Labor Announces New Cybersecurity Guidance

The U.S. Department of Labor (DOL) recently announced new guidance **for plan sponsors, plan fiduciaries, recordkeepers and plan participants on best practices for maintaining cybersecurity, including tips on how to protect the retirement benefits** of America's workers. This is the first time the department's Employee Benefits Security Administration has issued cybersecurity guidance. This guidance is directed at plan sponsors and fiduciaries regulated by the Employee Retirement Income Security Act (ERISA), and plan participants and beneficiaries.

The guidance comes in three forms:

- **"Tips for Hiring a Service Provider": Helps plan sponsors and fiduciaries prudently select a service provider with strong cybersecurity practices and monitor their activities, as ERISA requires.**
- **"Cybersecurity Program Best Practices": Assists plan fiduciaries and record-keepers in their responsibilities to manage cybersecurity risks.**
- **"Online Security Tips": Offers plan participants and beneficiaries who check their retirement accounts online basic rules to reduce the risk of fraud and loss.**

The guidance announced on April 14, 2021 **complements Employee Benefits Security Administration's (EBSA) regulations on electronic records and disclosures to plan participants and beneficiaries**. These include provisions on ensuring that

electronic recordkeeping systems have reasonable controls, adequate records management practices are in place, and that electronic disclosure systems include measures calculated to protect Personally Identifiable Information. It also follows up on previous guidance issued concerning cybersecurity including the DOL's Advisory Council on Employee Welfare and Pension Benefit Plans (known as the DOL ERISA Advisory Council), "Cybersecurity Considerations for Benefit Plans".

The AICPA has also created a Cybersecurity Resource Center and Cybersecurity reporting models including a Service Organization Controls (SOC) Report for Cybersecurity. The AICPA has recently issued *Cybersecurity and Employee Benefit Plans: Questions and Answers*, which was prepared by the EBPAQC to help plan auditors understand cybersecurity risk in employee benefit plans, and to discuss cybersecurity risk, responsibilities, preparedness, and response with plan clients. The **DOL, in examinations, is now asking to see employers' written cybersecurity policies and procedures and asking about cybersecurity attacks and responses to them.**

Consolidated Appropriations Act – 2021

The Consolidated Appropriation Act-2021 ("the Act-2021) includes an extension of retirement-based disaster relief, Coronavirus Aid, Relief, and Economic Security Act,("CARES Act") (see below for discussion of the key provisions of the CARES Act). The provisions related to employee benefit plans include.

- ***Temporary Rule Preventing Partial Plan Termination –*** Sponsors of defined contribution retirement plans **will not be treated as having a partial plan termination during the period beginning on March 13, 2020 and ending on March 31, 2021**, if the number of active participants covered by the plan on March 31, 2021 is at least 80% of the number of active participants covered by the plan on

March 13, 2020 -the time the national emergency was declared.

- ***Disaster Tax Relief –*** Like past disaster relief bills, the Act-2021 includes **a temporary extension for individuals to take a retirement plan distribution or loan** if they reside in a presidentially declare disaster area. However, it does not appear to include an extension ofCoronavirus-related distributions (CRDs) or loan provisions under the CARES Act.
- ***Money Purchase Pension Plans –*** The Act-2021 clarifies that money purchase pension plans are included in the types of retirement plans qualifying for the CARES Act provisions.
- ***Minimum Age for Distributions During Working Retirement –*** Certain construction and building trades workers aged 55 or older who are receiving retirement benefits will be allowed to continue working and receiving such benefits.
- ***Relief for Qualified Pension Plan Transfers for Covering Future Retiree Costs***
- ***Employee Retention Tax Credit –*** To help keep additional U.S. workers on payroll and more small businesses and nonprofits afloat, the Act -2021 extends and expands the refundable Employee Retention Tax Credit (ERTC) established under the CARES Act through June 30, 2021. In general, the ERTC covers the wages and benefits—**including 401(k) contributions**—of employees of businesses affected by COVID-19. The ERTC was originally viewed as an alternative relief mechanism for those businesses unable to take advantage of the PPP. However, this legislation also modifies the ERTC for 2020 by allowing businesses with PPP loans to qualify.

Plan sponsors should work with their recordkeepers and service providers to determine how the legislation could impact their Plan.

American Rescue Plan Act of 2021 – Key Benefit Plan Funding Provisions

The American Rescue Plan Act of 2021 (ARPA, HR 1319) has several key benefit plan provisions which are highlighted below. Many of these affect funding provisions for defined benefit plans. Plan sponsors should work with their advisors, actuaries, and ERISA attorneys to understand the implications of these changes.

Extended Period for Single-Employer Pension Plans to Amortize Funding Shortfalls

Defined benefit pension plans are generally subject to minimum funding rules that require the sponsoring employer to periodically make contributions to fund plan benefits. A complex set of rules applies if there is a funding shortfall. Code Sec. 430 specifies the minimum funding requirements that apply to single-employer pension plans under Code Sec. 412. For purposes of calculating the minimum required contribution, Code Sec. 430 generally requires a plan to establish shortfall amortization base with respect to a plan year for which the value of a plan's assets is less than the amount of the plan's funding target. Under pre-ARPA law, a seven-year amortization period generally applied in the case of a single-employer pension plan funding shortfall. (Code Sec. 430(c)(2))

Under ARPA, **all shortfall amortization bases in single-employer plans for certain plan years, and all shortfall amortization installments determined with respect to those bases, are reduced to zero**. Those shortfalls, as recalculated, and all future funding shortfalls, are to be amortized over a period of 15 years, rather than over seven years. Extending the amortization period for funding shortfalls gives plan sponsors a longer period over which to pay for long-term liabilities. The provisions are effective for Plan years beginning after December 31, 2018.

Pension Smoothing for Single-Employer Plans Extended and

Modified

In 2012 and 2015, Congress provided for a 25-year pension interest rate smoothing in order to address concerns that historically low interest rates were creating inflated pension fund obligations. The smoothed interest rates were scheduled to begin phasing out in 2021. **ARPA extends the pension funding stabilization percentages through 2029 and creates a 5% floor.** The 10% interest rate corridor is reduced to 5%, effective in 2020. The phase-out of the 5% corridor is now delayed until 2026, at which point the corridor increases by 5 percentage points each year until it attains (and then remains at) 30% in 2030. A 5% floor is established on the 25-year interest rate averages. The 5% floor helps create stability and predictability on a longer-term basis, so that interest rate variations do not cause excessive volatility and helps to protect funding rules from the extremes of interest rate movements. The provisions are effective for Plan years beginning after December 31, 2019. However, a plan sponsor may elect not to apply the provision to any plan year beginning before January 1, 2022 either for all purposes, or solely for purposes of determining the adjusted fund target attainment percentage under Code Sec. 436.

***Other Provisions of ARPA*:**

- Multiemployer Pension Plans May Retain 2019 Plan Funding Status for 2020 and 2021
- Multiemployer Pension Plans May Extend Funding Improvement or Rehabilitation Periods for 2020 or 2021
- Funding Standard Account Rules Eased for Multiemployer Pension Plans
- Financial Assistance for Underfunded Multiemployer Pension Plans
- Multiemployer Pension Plan PBGC Premium Rates Increased

We encourage you to consult our website at [American Rescue Plan Act of 2021 – Key Benefit Plan Funding Provisions]() for

more information regarding the above ARPA provisions.

Setting Every Community up for Retirement Enhancement Act of 2019

The Setting Every Community up for Retirement Enhancement Act of 2019 (the "SECURE Act") is **one of the most significant pieces of retirement plan legislation in the past decade**. Provisions include:

- Increasing the **auto-enrollment safe harbor** from 10% to 15%.
- Permitting **qualified birth or adoption distributions** where plans could allow participants to take penalty-free in-service distributions from accounts of up to $5,000 for each spouse within one year after birth or adoption of a qualifying child.
- **Increasing the age for required minimum distributions** (RMD's) from age 70.5 to 72; effective for plan years beginning after December 31, 2019.
- **Changing RMD rules** for non-spouse beneficiaries who would have to withdraw balances within 10 years of a participant's death (with some exceptions applying).
- Requiring participation in 401(k) plans by **employees who work at least 500 hours in three consecutive 12-month periods**. However, employers would not be required to provide matching or non-elective contributions to these long-time part-time employees.
- Requiring annual participant statements to defined contribution participants that include an **estimate of the monthly amount they could receive from a life-time annuity**. (The DOL has issued a final rule for lifetime income illustrations).
- Creating a **new safe harbor for employers that opt to include a lifetime income investment option** in their defined contribution plan.
- Directing the DOL and the Internal Revenue Service (IRS) to work to develop rules for filing of **consolidated Form**

5500.

- Providing **relief on non-discrimination for closed defined benefit plans.**
- Increasing the availability of Multiple Employer Plans by **protecting employers in multiple employer plans** if other employers violate certain fiduciary requirements.
- Prohibiting the **use of credit card arrangements** for plan loans.
- The creation of a new retirement vehicle called a **Pooled Employer Plan (PEP)** in which unrelated employers may participate and which is sponsored by a Pooled Plan Provider (PPP).

The SECURE Act also increases several penalties for retirement plans that fail to file timely and accurate forms for filings, notices and statements filed after December 31, 2019. Specifically, the penalty for failure to file Form 5500 is increased to $250 per day not to exceed $150,000 (from $25 per day not to exceed $15,000).

Plan sponsors are encouraged to consult ERISA counsel and their third-party administrators to fully understand the new provisions, the associated plan operation changes and plan amendment requirements. Plan sponsors are also encouraged to read the linked article, "Congress Passes the SECURE Act of 2019", which provides a concise summary of the provisions affecting employee benefit plans and plan sponsors.

Coronavirus Aid, Relief, and Economic Security Act, ("CARES Act")

The CARES Act, H.R. 748 became law in March of 2020. The key benefit plan provisions of the CARES Act were generally available through December 31, 2020. They include:

- **No 10% additional tax for coronavirus-related distribution up to $100,000 without the 10% early distribution penalty. This distribution may be repaid over 3 years. Taxes on these distributions can be**

spread over 3 years (Note that IRS Notice 2020-50 expanded the CARES Act definition of who is eligible for a Coronavirus-related distribution).
- **Standard plan loans can be made up to $100,000.**
- **RMDs waived for 2020.**
- **Contributions to single-employer defined benefit plans delayed.**

Similar to the SECURE Act, Plan sponsors are encouraged to consult ERISA counsel and their third-party administrators to fully understand the new provisions, the associated plan operation changes and plan amendment requirements. Plan sponsors are also encouraged to read the linked article, "Benefit Plan Provisions of CARES Act", which provides a concise summary of the provisions affecting employee benefit plans and plan sponsors.

EBSA Restores Over $3.1 Billion to Employee Benefit Plans, Participants and Beneficiaries

The DOL has issued its fiscal year (FY) 2020 enforcement fact sheet, highlighting the recovery of over $3.1 billion in direct payments to plans, participants, and beneficiaries. The DOL's EBSA has oversight responsibility over nearly 722,000 retirement plans, 2.5 million health plans, and a similar number of other welfare benefit plans. These plans cover approximately 154 million workers and their dependents, and represent assets exceeding $10.7 trillion. In FY 2020, EBSA conducted 1,122 civil investigations, 754 of which (67%) resulted in monetary results for plans or other corrective action. Nonmonetary corrective actions obtained included removal of plan fiduciaries, appointment of independent fiduciaries, and implementation of new plan procedures.

Of the $3.1 billion in recovered assets, $2.602 billion resulted from enforcement actions, and $456 million was generated by benefit recoveries from informal complaint resolution. For the year, the DOL handled 171,863 inquiries, many received through the EBSA's toll-free number and website,

and opened 357 investigations based on those inquiries. Another $12 million came from voluntary programs (the Voluntary Fiduciary Correction Program (VFCP) and the Delinquent Filer Voluntary Compliance Program (DFVCP)), with **EBSA receiving 1,309 VFCP applications and 19,624 DFVCP filings**. EBSA closed 230 criminal investigations, which led to 59 guilty pleas or convictions and the indictment of 70 persons (including plan officials, corporate officers, and service providers) for crimes related to employee benefit plans.

AICPA issues Consequences of COVID-19 Financial Reporting Considerations

As noted in the AICPA's Center for Plan English Accounting, *Consequences of COVID-19 Financial Reporting Considerations,* the coronavirus pandemic (COVID-19) is a human tragedy. We all hope that the effects will be behind us soon, but the disruption and impact is significant. The special report provides reminders to practitioners about financial reporting matters that may need to be considered related to COVID-19. On our website (www.torrillocpa.com), we highlight some of the impact to employee benefit plans which include:

- ***Disclosable Events*** – For calendar year end 2020 financial statements, certain COVID-19 related events may need to be disclosed. Such events could include partial plan terminations (typically when approximately 20% of the workforce has been terminated); suspension of matching, profit-sharing or other contributions; and adoption of provisions in the CARES Act.
- ***Accounting Estimates*** – The assumptions and data supporting certain accounting estimates may be affected by the consequences of COVID-19. For defined benefit plan's the actuarial present value of accumulated plan benefits does have certain accounting estimates related to long-term investment returns, discount rates, mortality tables and retirement assumptions.

- ***Going Concern*** – The ability of an entity to continue as a going concern is affected by many factors. The consequences of COVID-19 may impact those factors. For most defined contribution plans, the ability of the Plan to be a going concern for one year from the financial statement issuance date is likely to be determined by management not to be an issue. This is because defined contribution net assets are mostly investments at market value, and they are available for benefits to participants. For defined benefit plans, however, there is a benefit obligation, which is not limited to net assets available for benefits. For many defined benefit plans, especially those that are fully funded, the ability of the Plan to be a going concern for one year from the financial statement issuance date may be determined by management not to be an issue. This may be because management determines that the Plan has net assets available for benefits sufficient to meet any benefit payments for the next year and for several years beyond. However, plan management for defined benefit plans will also need to consider other factors in making their determination of the plan's ability to continue as a going concern.

Also on our website we provide links to the AICPA Coronavirus (COVID-19) Resource Center, US Department of Labor Coronavirus Resources, and IRS Coronavirus Tax Relief, which continually put out guidance on the impact of the pandemic related to accounting, auditing and regulatory matters.

News on the Legal Front

There has been a **surge in lawsuits** against plans during 2020. While Mega-Plans (those over a billion dollars in assets) are facing class action litigation for claims of high fees related to recordkeeping and investments, there has also been increased litigation against smaller plans. While the volume of litigation has increased, **there have been some notable wins**

by Plan sponsors (Davis vs. Salesforce on October 5, 2020 dismissed lawsuit where plaintiffs alleged expensive investment options). Litigation has also involved matters such as protection of participants personal information; prohibiting cross-selling from service providers; capital preservation products; managed accounts and cybersecurity.

Legal experts continue to recommend that Plan sponsors **have strong fiduciary best practices** including:

- regular meetings of oversight committee;
- establishing, following and documenting a prudent process for retaining investments, service providers and determining their fees;
- benchmarking and negotiating fees regularly; training of fiduciaries; and
- pricing administrative fees on a per participant basis for recordkeeping.

Litigation over bad actors gaining access and stealing a participant's account balance have emphasized that **Plan sponsors should understand exactly who is responsible for breaches at third-party administrators if participant funds are stolen during their processing of transactions**. Those agreements should be in writing and should specify what will happen if a participant's account is compromised. **If the service provider will take responsibility given certain conditions are followed by the participants, what are those conditions and has the Plan sponsor communicated those to the participants? Does the third-party administrator have insurance? Plan sponsors should seek answers to these questions from their third-party administers and those who have custody of participant accounts**.

II. Accounting and Auditing Hot Topics

News in the Auditing World

In July 2019, the AICPA Auditing Standards Board (ASB)

issued AICPA Statement on Auditing Standards No. 136, Forming an Opinion and Reporting on Financial Statements of Employee Benefit Plans Subject to ERISA ("SAS No. 136″ or the "new EBP SAS"). This new standard prescribes certain new performance requirements for ERISA plan financial statement audits and changes the form and content of the related auditor's report to improve audit quality and enhance the communicative value and transparency of the auditor's report. It includes new requirements in all phases of an audit of ERISA plan financial statements including engagement acceptance, risk assessment and response, communication with those charged with governance, performance procedures, and reporting.

Goodbye Limited Scope Audit, Hello ERISA Section 103(a)(3)(C) Audit

Another significant change is that an audit performed pursuant to ERISA section 103(a)(3)(C) will no longer be referred to as a "limited scope audit" but rather going forward will be referred to as an **"ERISA section 103(a)(3)(C) audit.**" The new audit standard includes new performance and reporting requirements specific to ERISA section 103(a)(3)(C) audits. The new EBP SAS notes that an ERISA Section 103(a)(3)(C) audit is unique to EBPs and is not considered a scope limitation. Therefore, the auditor would no longer issue a modified opinion (typically a disclaimer opinion) due to information that is certified by a qualified institution. Instead, a new form of auditor's report has been developed that provides a two-pronged opinion that is based on the audit and on the procedures performed relating to the certified investment information.

Clarity on Management's Responsibilities

As part of the auditor's acceptance of the audit engagement the auditor will request plan management (sponsor/administrator) to acknowledge in the engagement letter management's responsibilities for:

- maintaining a current plan instrument,
- administering the plan,
- providing the auditor with a draft Form 5500 prior to the dating of the auditor's report (see below), and
- when management has elected an ERISA Section 103(a)(3)(C) audit, acknowledges and understands its responsibility for determining whether:
- an ERISA Section 103(a)(3)(C) audit is permissible under the circumstances,
- the investment information is prepared and certified by a qualified institution under the Code of Federal Regulations (CFR) *Labor*, Title 29, Section 2520.103-8,
- the certification meets the requirements of CFR 2520.103-5, and
- the certified investment information is appropriately measured, presented, and disclosed in accordance with the applicable financial reporting framework.

New Representations

In addition, the new standard requires that the auditor obtain certain written management representations at the conclusion of the engagement regarding those responsibilities. It also includes new acknowledgements related to management's responsibilities with respect to the investment certification when management elects to have an ERISA Section 103(a)(3)(C) audit (previously called a "limited scope" audit as noted above).

Focus on Compliance

SAS No. 136 requires the auditor to perform certain procedures when planning and performing the audit that in the past were not expressly required. Most of the required procedures are already included as suggested audit procedures in the extant Audit and Accounting Guide, *Employee Benefit Plans* which our firm already performs. As a result, we do not expect the new requirements to result in significant changes to the audit procedures we perform. However, for some firms, substantial

changes to audit planning and procedures may be necessary.

Substantially Complete Form 5500

SAS No. 136 requires the plan auditor of obtain the agreement of management to provide a substantially complete Form 5500 prior to the dating of the auditor's report. A Form 5500 that is substantially complete is referred to as the Draft Form 5500 and includes all the forms and schedules that could have a material effect, qualitative and quantitative, on the information in the financial statements and ERISA-required supplemental schedules. While the auditor may use judgment as to what substantially complete means based on the facts and circumstances of each employee benefit plan, it is advisable for plan management to plan in advance to prepare or obtain the Draft Form 5500 in a timely manner prior to issuance of the auditor's report.

Effective Date

SAS No. 136 was to be effective for audits of ERISA plan financial statements for periods ending on or after December 15, 2020 but **has been delayed to periods ending on or after December 15, 2021**. This means that 2021 year-end audits that will be performed in 2022 will be required to follow the performance and reporting requirements of the new EBP SAS, including using the new form of the auditor's report. The EBP SAS prohibits early adoption for periods ending before December 15, 2020.

Resources

The AICPA has published At a Glance, New Auditing Standard for Employee Benefit Plans which gives a summary of the changes coming for the benefit plan audits as well as the **audit advisory,** EBP SAS No. 136: ***Forming an Opinion and Reporting on Financial Statements of Employee Benefit Plans Subject to ERISA***.

III. Other legal and Regulatory updates

SAS No. 136 and the Accountant's Opinion – How do we Fill out the Form 5500?

SAS No. 136 was to be effective for audits of financial statements for periods ending on or after December 15, 2020, but have been delayed to periods ending on or after December 15, 2021. The Form 5500 for 2020 had been finalized before the delay by the ASB. As a result, the DOL designed the 2020 Form 5500 as if all firms would be adopting SAS No. 136 during 2020, when it is now expected that less than 10% will adopt for 2020. As a result, the **DOL has said that it recommends that Plan sponsors complete the Form 5500 as if SAS No. 136 was adopted during 2020** whether it was or not. In other words, if a plan receives a limited-scope disclaimer pursuant to 29 CFR2520.100-8 with no other qualifications or scope limitations; it should check off box 3a(1) unmodified and box 3(b)(1) DOL Regulation 2520-103-8 on the 2020 Form 5500 even if the audit was not performed under SAS No. 136. However, don't worry, if Plan sponsors for 2020 Form 5500 continue to check box 3a(3) disclaimer with box 3(b)(1) DOL Regulation 2520-103-9, they should be fine per the DOL, as long as there are no other qualifications or scope limitations. In essence, the system going forward (i.e. 2021 Form 5500s and after), will be set up to flag any reports other than unmodified, but the DOL appears to be acknowledging there will be a transition period until all audits are performed under SAS No. 136**. Plan sponsors should work with their auditors to ensure the type of opinion on the 2020 Form 5500 is properly reported**.

IRS Updates Operational Compliance List

The Operational Compliance list provided by the IRS is intended to help plan sponsors and practitioners achieve operational compliance by identifying changes in qualification and IRC requirements effective during a calendar year The Operational **Compliance List for items effective in 2021 includes:**

- **Long-term employees working at least 500 but less than 1,000 hours per year to participant in a qualified 401(k) plan with a cash or deferred arrangement (SECURE Act, Section 112)**
- **Extension of temporary relief from the physical presence requirement for spousal consents under qualified retirement plans provided certain requirements are satisfied. (Notice 2021-03)**

The Operational **Compliance List for items effective in 2020 included:**

- **Final regulations relating to hardship distributions (84 Fed. Reg. 49651).**
- **Extension of temporary relief for closed defined benefit pension plans (Notice 2019-49).**
- **Additional temporary nondiscrimination relief for closed defined benefit pension plans (Notice 2019-60).**
- **Increase in 10 percent cap for automatic enrollment safe harbor after first plan year (SECURE Act, Section 102).**
- **Rules relating to election of safe harbor 401(k) status (SECURE Act, Section 103).**
- **Portability of lifetime income options (SECURE Act, Section 109).**
- **Employees of church-controlled organizations participating in section 403(b)(9) retirement income accounts (SECURE Act, Section 111).**
- **Penalty-free withdrawals from retirement plans for individuals in case of birth or adoption (SECURE Act, Section 113).**
- **Increase in age for required beginning date for mandatory distributions (SECURE Act, Section 114).**
- **Difficulty of care payments treated as compensation for retirement contribution limitations (SECURE Act, Section 116).**
- **Modification of nondiscrimination rules to protect older, longer service participants (SECURE Act, Section**

205).

- **Modification of required distribution rules for designated beneficiaries (SECURE Act, Section 401).**
- **Provisions relating to plan amendments (SECURE Act, Section 601).**

The Operational Compliance List is not intended to be a comprehensive list of every item of IRS guidance or new legislation for a year that could affect a particular plan.

IRS Examinations and Compliance Checks

The IRS develops compliance projects and performs data analysis to focus on areas of potential non-compliance. You can access a current list of projects at Tax Exempt & Government Entities – Compliance Program and Priorities | Internal Revenue Service. The IRS is also utilizing Research, Applied Analytics and Statistics (RAAS) for indicators of noncompliance as well as referrals and compliance contacts. The IRS is also expanding taxpayer digital communications efforts and use of robotic process automation to make processes more efficient and effective. Compliance contacts are employed to address potential noncompliance using correspondence known as "compliance checks" and "soft letters." The FY 2021 compliance contacts approved include (this list is not all-inclusive):

- ***Worker classification:*** Focusing on retirement plans that were determined to have misclassified employees as independent contractors to determine if the coverage requirements of the IRC are satisfied.
- ***Required minimum distributions:*** Ensuring that large defined benefit plans comply with the applicable IRC sections to begin required minimum distributions.
- ***Participant loans:*** Ensuring that participant loans comply with the IRC rules on maximum loan balances and re-payment rules for early distributions before age 59 ½. Also, verifying whether participant loans of

retirement plans that hold a high percentage of participant loans to total assets of the trust are being repaid timely if the loan balance remains consistent or increases for more than one year.

- ***ESOPs:*** determining that employer stock is properly valued in **ESOPs;** the annual allocation of employer stock meets the nondiscrimination requirements, and the employer loans follow the conditions and terms of the plan document.
- ***403(b) Plans*****: Examining 403(b) plans for universal availability**, excessive contributions and proper use of the age 50 and 15-year catch-up contributions;
- ***Cash Balance Plans:*** Assessing **terminated plan with cash balance features** that may have exceeded IRC Section 415 limitations
- ***Plan liabilities and unrelated business income:*** reviewing Form 5500 for plan liabilities and determining if there are any **taxable unrelated business income activities**.
- ***Overvalued assets:*** reviewing financial information on Form 5500 and targeting plans whose **assets have increased unreasonably from the beginning of the plan year.**
- ***Partial plan terminations:*** Reviewing plans with that have had a significant decrease in plan participants to determine if a partial termination has occurred and if it is in compliance with vesting requirements.
- ***IRC Deduction Violations:*** reviewing IRC 404(a)(7) Deduction Violations to determine if plans are exceeding the **plan sponsor deduction limit** where there is a combination of a defined contribution and a defined benefit plan;

More recent compliance checks have included:

- Final returns with assets;
- Funding deficiencies

- Deductions exceeding 25% of participant contributions;
- Voluntary compliance 150-day compliance statement follow-up;
- Form 500 stop filers;
- End of year/beginning of year assets mismatch; and
- DB Plans missing required actuarial information.

Actions which may increase the odds of your employee benefit plan being examined include: inconsistencies and/or blanks on your Form 5500 compared to prior year filings; sharp reductions in participants; large amounts in "other" on Schedule H. Areas where the IRS continues to see **problems** include **improper contribution and forfeiture allocations; late deposits; eligibility; not timely amending plans; assets not titled in the name of the trust; top-heavy contributions and proper vesting not provided; safe harbor 401(k) notices not timely and unallocated forfeiture accounts.** The IRS reminds plan sponsors that the Plan sponsor is ultimately responsible and will be held accountable for any noncompliance even if such services have been outsourced to third-parties. The Employee Plans Compliance Resolution System is available to plan sponsors to correct any compliance issues. If you receive correspondence from a regulator, always timely respond.

IRS **examinations focus on the plan sponsor's controls over the plan**. If controls are strong and effective, the IRS will likely keep the scope of the examination narrow and focus on a single year. If controls are weak, the examination will likely expand, including to other years and possibly referring in other agencies such as the DOL. A common mistake noted is when plan operations do not follow the terms of the Plan document. The IRS recommends that plan sponsors on at least an annual basis review their plan document to make sure all required amendments have been made and that the plan operations follow the plan document. The IRS website has many helpful tools on controls and examinations including an annual listing of required amendments The Required Amendments List is an annual

list of changes in retirement plan qualification requirements. It also establishes amendment deadlines for individually designed plans.

The IRS has also indicated that it is rolling out taxpayer digital communication for examinations which uses a secure online portal to exchange information with taxpayers.

Oversight

Plan sponsors should ensure that their plan is acting in accordance with the plan document as well as recent legislation. The IRS publishes regularly on its web site list of the typical compliance issues found. **Current noncompliance issues continue to include**:

- Plan documents are not up to date for latest tax law changes, are not signed, or are not in agreement with operations of the plan;
- Plan's definition of compensation does not agree to compensation being utilized for various purposes (deferrals, 415 testing; ADP/ACP requirements) – currently an issue in 50% of examinations;
- Participation errors (including ineligible employees and excluding eligible employees);
- Improper loans (including exceeding statutory limits and repayment periods; failure to obtain spousal consent; failure to report defaults; unreasonable interest rates);
- Hardships;
- ADP/ACP testing is being done incorrectly with faulty data or not at all;
- Limitations (exceeding compensation, annual deferral, catch-up, highly compensated and DC limits);
- Distributions (including failure to prevent impermissible in-service withdrawals and failure to satisfy minimum distributions rules);
- Matching contribution provisions are not followed and

are inaccurately calculated;
- Forfeitures are not being utilized on an annual basis;
- Vesting, including permitting forfeitures to occur for people over 65;
- Failure to timely deposit elective deferrals;
- Terminations/partial terminations that have not been treated as such resulting in improper vesting of participants;
- Acquisitions and failure to include acquired employees and credit proper service amounts;
- The Plan fails to maintain signed adopting employer agreements for all participating subsidiaries under a common control single-employer plan; and
- Lack of internal controls.

Don't Forget – Always Respond to a Notice

Both the DOL and IRS have indicated, that **while there was a pause due to the pandemic, examinations and other notices are now going out**. They have recently reminded Plan sponsors to always **timely respond** to a notice. Otherwise, penalties, can occur. In the end, both agencies indicated they want compliance of the Plan to ensure that participants and taxpayers are protected, but Plan sponsor need to respond and make good faith efforts towards compliance to avoid such penalties.

IRS Issues Plan Withholding Requirements for State Unclaimed Funds

Under Revenue Ruling 2020-24, the IRS has ruled that a **qualified retirement plan must withhold federal income tax from retirement payments it makes to a state unclaimed property fund** and that it must report the payments on Form 1099-R. As a result of this ruling, the IRS issued Revenue Procedure 2020-46, which **added distributions made to a state unclaimed property fund as a new reason to the list of reasons a taxpayer can use to self-certify eligibility for a waiver of the 60-day rollover requirement** for certain eligible

retirement plans. This revenue procedure is effective October 16, 2020.

Fraud Stories – Got Bond?

Why do perpetrators try to steal from employee benefit plans? Because that is where the money is. While all benefit plan sponsors should have robust controls to try to prevent such bad actors from adversely affecting participants, **one of the best ways to protect participants is to ensure the Plan has an ERISA fidelity bond** in adequate coverage amounts to protect plan participants. Under current regulations, most plans are required to have at least $500,000 of coverage.

Lost?

The EBSA continues to focus on missing participants by. **investigating Plan sponsors to ensure they are making good faith efforts to locate participants as well as ensuring they are taking seriously their responsibility to keep accurate and up-to-date records of plan participants**. Red flags noted by the DOL are:

- vested older participants not taking pensions;
- missing/incomplete plan data;
- returned correspondence; and
- uncashed checks.

The U.S. Department of Labor's Employee Benefits Security Administration recently posted new guidance on Missing Participants including:

· Missing Participants – Best Practices for Pension Plans which describes a range of best practices fiduciaries of retirements plans, such as 401(k) Plans should consider as steps their plan could take to help reduce missing participant issues and ensure that plan participants receive promised benefits when they reach retirement age

· Field Assistance Bulletin No. 2021-01, Temporary

Enforcement Policy Regarding the Participation of Terminating Defined Contribution Plans in the PBGC Missing Participants Program which authorizes, as a matter of enforcement policy, plan fiduciaries of terminating defined contribution plans use of the PBGC missing participant program for missing or nonresponsive participant's account balances.

· Compliance Assistance Release No. 2021-01, Terminated Vested Participant Project Defined Benefit Pension Plans which outlines the general investigative approach that will guide all of EBSA's Regional Offices under the Terminated Vested Participants Project and facilitate voluntary compliance efforts by plan fiduciaries.

Found

The **EBSA continues to recommend that plan officials correct plan operational errors through the Voluntary Fiduciary Correction Program ("VFCP")** which received 1,309 applications in FY 2020 and the **Delinquent Filer Voluntary Compliance Program ("DFVCP")** which received 19,624 application in FY 2020.

Audit Quality Efforts Effect? DOL Confirms Audit Ranks are Looking a Little Thinner

The DOL concluded its statistically based nationwide study on audit quality in September 2014 and its formal report was posted on its website (www.dol.gov/ebsa) on May 21, 2015. The deficiency rate in the study was 39% with a downward trend in quality since the prior studies. Peer review findings of quality issues with employee benefit plan audits have also been increasing. Many believe that fee pressure as well as "dabblers" are impacting audit quality. However, through outreach and continued enforcement by the DOL, AICPA and State Boards of Accountancy, the **number of CPA firms performing audits for the 2018 Form 5500 was 4,758 firms which is a significant drop from the 7,329 firms performing audits in 2011**. The word that practitioners need to specialize in

employee benefit plan audits seems to be getting out. In a recent presentation by the Chief Accountant, the number of auditors entering the field has declined by nearly 66% while the number of firms exiting has nearly tripled. Those firms which are exiting are those firms which audit 1-2 plans (52% exit rate), 3-5 plans (30%) and 6-24 plans (10%). **The DOL continues to be very concerned about audit quality and plans direct outreach to plan sponsors, auditors and state boards of accountancy stressing the importance of hiring quality benefit plan auditors,** (see the DOL's Selecting an Auditor for your EBP).

The head of EBSA recently stated that good benefit plan auditors have these 5 key traits:

- A top-down commitment to audit quality standards;
- An audit pedigree in the firm and that audit, not tax or other, personnel perform the audit;
- An employee benefit plan pedigree as the work is specialized and the auditors need expertise in employee benefit plans;
- A robust internal inspection program where someone is looking at the quality of the audits; and
- Knowing when to say no. Auditors should not accept engagements for which they do not have the expertise.

Our audit work was selected by the DOL for review **in 2016** and we are pleased to report **once again** that the **DOL found our audit work to be acceptable with no deficiencies noted.** In 2021, we again passed our Peer Review with no comments. Our Peer Review report is publicly available on the AICPA website at https://peerreview.aicpa.org/public_file_search.html.

Actuarial Mortality Improvement Scale MP-2020 Released

In October 2020, the Society of Actuaries (SOA) updated the Mortality Improvement Scale (Scale MP-2020) that accompanies its most recent Mortality Table (RP-2014).

Scale MP-2020 reflects historical U.S. population mortality experience through 2018. **The SOA estimates that most 2020 pension obligations calculated using Scale MP-2020 are anticipated to be 0.3% to 0.8% lower relative to their Scale MP-2019 counterparts**. Entities should consider the SOA's new data for U.S.-based defined benefit pension and other postretirement benefit plans when making their mortality assumptions for year-end 2020 financial reporting.

The AICPA issued nonauthoritative guidance (Technical Questions and Answers Section 3700, *Pension Obligations*), which indicates that GAAP requires the use of a mortality assumption that reflects the best estimate of the plan's future experience for purposes of estimating the plan's obligation. In making this estimate, GAAP requires that all available information through the date the financial statements are available to be issued should be evaluated. (i.e. the new **mortality tables must be considered by management**).

Mortality Tables for Pension Plans Updated for 2022

In Notice 2020-85, the **IRS provided updated mortality improvement rates and static mortality tables to be used for defined benefit pension plans**. These updated mortality improvement rates and static tables, which are being issued pursuant to the regulations under §430(h)(3)(A), apply for purposes of calculating the funding target and other items **for valuation dates occurring during the 2022 calendar year.** The IRS notice also includes a modified unisex version of the mortality tables for use in determining minimum present value under § 417(e)(3) of the Code and section 205(g)(3) of ERISA for distributions with annuity starting dates that occur during stability periods beginning in the 2021 calendar year. The mortality improvement rates for valuation dates occurring during 2021 are the **mortality improvement rates in the Mortality Improvement Scale MP-2020 Report (issued by the Retirement Plans Experience Committee (RPEC) of the Society of**

Actuaries. (see above). Plan sponsors should work with their actuaries to determine the impact to future funding requirements and upcoming actuarial valuations for these updated mortality tables.

Status of IRS Determination Letter Program

The IRS shared with the attendees at the AICPA conference that in June 2020 it issued its most recent opinion and advisory letters for master and prototype or volume submitter defined contribution plans. Plan sponsors have until July 31, 2022 to adopt these plans. IRS plans to complete its determination letter review for individually designed defined benefit plans by February 28, 2023.



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Who We Are

Torrillo & Associates, LLC specializes in employee benefit plan audits including 401k audits, 403b audits, pension plan audits, and other retirement plan audits. We are licensed in 10 states including Pennsylvania, New Jersey, Delaware, New York and Florida. We are also able to practice in additional states that have passed firm mobility.

Recent Articles

- EPCRS Updated and New ICRS Program Established for Correcting IRA Errors
- IRS Announces Cycle 4 Adoption Deadline for Defined Contribution Pre-Approved Plans
- IRS Issues, Rev. Proc. 2026-30, Application Procedures for Letter Rulings and Nonbank Trustee Approval Letters from IRS Employee Plans
- DOL Issues Proposed Rule for Fiduciary Duties in Selecting Designated Investment Alternatives

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