2021 Employee Benefit Plans Accounting, Auditing & Regulatory Update



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 December 2021 American Institute of Certified Public Accountants (AICPA) annual Employee Benefit Plans, Accounting, Auditing and Regulatory Update. Below is an update on employee benefit plan hot topics.

I. Legal and Regulatory Hot Topics

Proposed Legislation

During 2021, the House Ways and Means Committee marked up the Securing a Strong Retirement Act of 2021**. While it is uncertain whether the proposed changes will ever become law, there has been bipartisan support for retirement initiations. Some of the proposed regulatory changes include:**

- Expanding automatic enrollment and auto escalation in retirement plans to make it mandatory for new plans;
- Allowing 403(b) plans to invest in collective investment trusts;
- Increasing the required minimum distribution age from the current limit of 72 to up to 75;
- Increasing the limit on catch-up contributions for individuals age 62-64 to up to $10,000;
- Allowing 403(b) Plans to establish multiple employer plans (MEPs) or pooled employer plans (PEPs);
- Permitting qualified student loan payments to be eligible for employer matching contributions;
- Reduce from three to two years the required service before long-term, part-time workers are eligible to contribute to a plan.
- Creating an online searchable "Lost and Found" database maintained by the PBGC to collect information on benefits owed to missing, lost or non-responsive participants and beneficiaries

- Expanding the Employee Compliance Resolution System to correct additional errors and plan failures.

Retirement Plan provisions in the Build Back Better Act reconciliation bill (H.R. 5376)

Provisions include a Mega-IRA contribution limit provision to prohibit new contributions, defined not to include rollovers, to a Roth or traditional IRA if the total value of the individual's IRA and defined contribution accounts exceeds $10 million as of the last day of the previous year. It is effective for tax years beginning after December 31, 2028.That is also the effective date of the provision that imposes new minimum distribution requirements on individuals whose combined Roth IRA, traditional IRA, and defined contribution plan accounts exceed $10 million and whose income exceeds $400,000. These individuals would be required to take a distribution of 50% of the amount by which their aggregate accounts exceed $10 million. For individuals whose aggregate account balances exceed $20 million, the individual would be required to withdraw the lesser of the amount needed to bring the aggregate balance down to $20 million or all funds in Roth accounts, IRAs or defined contribution plans. The bill also prohibits all employee after-tax contributions in qualified plans and after-tax IRA contributions from being converted to Roth regardless of income level, for distributions, transfers, and contributions made after December 31, 2021. It eliminates Roth conversions for both IRAs and employer-sponsored plans for those with taxable income over $400,000, for distributions, transfers, and contributions made in tax years beginning after December 31, 2031.

DOL to propose ESG guidance in early 2022

Environmental, social, and governance (ESG) criteria is a current focus of the DOL. On October 14, 2021, the U.S. Department of Labor (the "DOL") published a proposed regulation, "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights" (86 Fed. Reg.

57272). The proposed rule would largely retain the basic framework of the investment duties regulation while reinstating previous guidance. For example, the proposed rule retains two longstanding principles. First, the duties of prudence and loyalty require ERISA plan fiduciaries to focus on material risk-return factors and not subordinate the interests of participants and beneficiaries to objectives unrelated to the provision of benefits under the plan. Second, the fiduciary act of managing plan assets includes making decisions about voting proxies and exercising shareholder rights. While the framework is the same, the proposed rule would include changes that seem likely to result in greater leeway for fiduciaries to include ESG investments in plans. Final rules are expected in early 2022.

What is the DOL working on?

The Acting Assistant Secretary of the Department of Labor, Ali Khawar, has indicated that environmental, social, and governance (ESG) criteria are a focus of the DOL, as well as making the retirement system more equitable, particularly in enforcement. The EBSA is also looking at ways to expand the number of people who participate in the retirement system. The DOL is also expected to revisit the definition of a fiduciary. Cybersecurity also remains a top concern as the DOL is concerned that cybersecurity hacks could undermine participants faith in the retirement system. The EBSA encourages plan sponsors, providers and participants to review the guidance they sent out in early 2021.

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.**

2022 401(k) Contribution Limit Increases to $20,500

The Internal Revenue Service announced cost-of-living adjustments affecting dollar limitations for pension plans and other retirement-related items for tax year 2022 in Notice 2021-61, Changes include:

- The **limit on contributions** by employees who participate in 401(k), 403(b), most 457 plans, and the federal government's Thrift Savings **Plan** increases in 2022 to $20,500 from $19,500in 2021.
- The **catch-up contribution limit** for employees aged 50 and over who participate in these plans **remains unchanged at $6,500**.
- The limitation for defined contribution plans under § 415(c)(1)(A), i.e. the **limit on total employer plus employee contributions, is increased to $61,000 for 2022 from $58,000 in 2021**
- The **annual compensation limit** under §§ 401(a)(17), 404(l), 408(k)(3)(C), and 408(k)(6)(D)(ii) is increased from **$290,000 to $305,000**.
- The dollar limitation under § 416(i)(1)(A)(i) concerning the definition of "key employee" in a top-heavy plan is increased from $185,000 to $200,000.
- Effective January 1, 2022, the limitation on the annual benefit under a defined benefit plan under section 415(b)(1)(A) of the Code is increased from $230,000 to $245,000.
- The limitation used in the definition of "highly compensated employee" undersection 414(q)(1)(B) is increased from $130,000 to $135,000.

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.

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.

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

EBSA Restores Over $2.4 Billion to Employee Benefit Plans, Participants and Beneficiaries

The DOL has issued its fiscal year (FY) 2021 enforcement fact sheet, highlighting the recovery of over $2.4 billion in direct payments to plans, participants, and beneficiaries. The DOL's EBSA has oversight responsibility for over nearly 734,000 retirement plans. ERISA plans cover approximately 158 million workers and their dependents, and represent assets exceeding $12.9 trillion. In FY 2021, EBSA conducted 1,072 civil investigations, 741 of which (69%) 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 $2.4 billion in recovered assets, $1.946 billion resulted from enforcement actions, and $500 million was generated by benefit recoveries from informal complaint resolution. For the year, the DOL handled 175,986 inquiries, many received through the EBSA's toll-free number and website, and opened 251 investigations based on those inquiries.

Another $34 million came from voluntary programs (the Voluntary Fiduciary Correction Program (VFCP) and the Delinquent Filer Voluntary Compliance Program (DFVCP)), with **EBSA receiving 1,201 VFCP applications and 22,553 DFVCP filings**. EBSA closed 208 criminal investigations, which led to 38 guilty pleas or convictions and the indictment of 72 persons (including plan officials, corporate officers, and service providers) for crimes related to employee benefit plans.

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 of opinion) due to the scope limitation on 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 in accordance with the Plan document;
- determining that the plan's transactions that are presented and disclosed in the financial statements ate in conformity with the plan's provisions;
- providing the auditor with a draft Form 5500 prior to the dating of the auditor's report (see below);
- evaluating whether there are conditions or events, considered in the aggregate, that raise substantial doubt about the entity's ability to continue as a going concern; 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.

Reportable Findings

SAS No. 136 requires the auditor to evaluate whether certain matters identified during the
audit result in "reportable findings," which are defined as matters that are one or more of the following:

- An identified instance of noncompliance or suspected noncompliance with laws or regulations.
- A finding arising from the audit that is, in the auditor's professional judgment, significant and relevant to those charged with governance regarding their responsibility to oversee the financial reporting process.

- An indication of deficiencies in internal control identified during the audit that have not been communicated to management by other parties and that, in the auditor's professional judgment, are of sufficient importance to merit management's attention.

The auditor is required to communicate in writing to those charged with governance on a timely basis reportable findings.

Substantially Complete Form 5500

SAS No. 136 also 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. It is advisable for plan management to plan in advance to prepare or obtain the Draft Form 5500 in its entirety 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 was 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.

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?

If a plan receives an ERISA Section 103(a)3(C) 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 Form 5500. In essence, the system going forward (i.e. 2021 Form 5500s and after), will be set up to flag any reports other than unmodified**. Plan sponsors should work with their auditors to ensure the type of opinion on the Form 5500 is properly reported**.

IRS Revenue Procedure 2021-30 updates EPCRS –

With Revenue Procedure 2021-30, the IRS has updated its Employee Plans Compliance Resolution System (EPCRS). EPCRS permits any plan sponsor of a retirement plan to correct plan failures. The IRS made significant changes and revisions to EPCRS in Revenue Procedure 2021-30 (PDF) that may be beneficial to plan sponsors, participants, and the retirement plan community.

Overpayments Correction Options: Expanded correction principles to allow plan sponsors to fix operational failures when plan participants or beneficiaries receive payments from defined benefit plans that exceed what is permitted by the terms of the plan, effective July 16, 2021. The new principles reduce the need to seek repayment from participants or beneficiaries who received overpayments, and in some cases, do not require the plan sponsor to reimburse the plan for overpayments to participants.

Expansion of Self Correction for Significant Operational Failures: Extends the correction period of significant operational failures from two to three years, effective July

16, 2021.

Expansion of Self Correction for Retroactive Plan Amendments: Makes it easier to use retroactive plan amendments to correct operational failures by removing the requirement that all participants in the plan benefit by the retroactive amendment, effective July 16, 2021.

Removal of Anonymous Voluntary Compliance Program (VCP) submissions: Effective January 1, 2022, Rev. Proc. 2021-30 eliminates anonymous submissions under VCP.

Anonymous Pre-Submission Conferences: Effective January 1, 2022, the IRS will permit plan sponsors or their representatives to make an anonymous written request for a pre-submission conference to discuss a potential VCP submission at no cost to the plan sponsor. Following the pre-submission conference, if the plan sponsor submits a VCP request, it can no longer be anonymous.

Extension of Automatic Enrollment Failures: Extends the sunset of the safe harbor correction method to correct missed elective deferrals for eligible employees subject to an automatic contribution feature in Section 401(k) or 403(b) plans **(from December 31, 2020, to December 31, 2023)**.

Increased Threshold for De Minimis Correction Amounts: Increase from $100 to $250 the threshold for certain de minimis amounts for which a Plan Sponsor is not required to implement correction.

The **EBSA continues to recommend that plan officials correct plan operational errors through the Voluntary Fiduciary Correction Program ("VFCP")** which received 1,201 applications in FY 2021 and the **Delinquent Filer Voluntary Compliance Program ("DFVCP")** which received 22,553 applications in FY 2021.

DOL Sets Second Calendar Quarter of 2022 as Compliance Date for Lifetime Income Illustrations

The EBSA issued on July 26, 2021 Frequently Asked Questions which indicate participant-directed plans must provide lifetime income illustrations on quarterly statements by the second calendar quarter of 2022.

IRS issues 2021 Required Amendment List

The Required Amendments list establishes the end of the remedial amendment period and the plan amendment deadline for changes in qualification requirements for individually designed plans qualified under Code Sec. 401 or Code Sec. 403(b). Generally, the Remedial Amendments (RA) list includes statutory and regulatory changes in plan requirements that are first effective during the plan year in which the list is published. The RA list is divided into two parts:

- Part A covers changes in requirements that generally would require an amendment to most plans or to most plans of the type affected by the change.
- Part B includes changes in requirements that the IRS anticipates will not require amendments to most plans but might require amendments to some plans because of an unusual provision in that particular plan.

The 2021 required amendments list, Part A contains one plan requirement change. This plan requirement change affects plans that participate in the special financial assistance program for financially troubled multiemployer plans that was created by the American Rescue Plan Act of 2021 (PL 117-2). Part B does not contain any changes that may require a plan amendment.

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.

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.

DOL Conducting New Audit Quality Study

The **DOL is currently conducting a new Audit Quality Study based on the plan year 2020 Form 5500 filings**. Correspondence will be sent to the Plan administrator and the CPA firms from which the DOL will request all workpapers that support the audit as well as a demographic questionnaire. The study is expected to last most of 2022 with a formal report issued after its completion. The study is expected to set a baseline on audit quality as most of these audits will be performed under auditing standards prior to the adoption of SAS No. 136. The DOL currently expects to perform another study some time after the adoption of SAS No. 136 to see if audit quality has improved as a result of the new standards.

The most recent statistically based nationwide study on audit quality was 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 2014 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 2019 Form 5500 was 4,557 firms which is a significant drop (nearly 39% decrease) 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 to continue 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 2021** 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.

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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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