Retirement Update
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Internal Revenue Service

Employee Plans Compliance Unit Released Summary Reports on Several Completed Projects

Among the projects recently completed by the Employee Plans Compliance Unit (EPCU)**,** the following projects, which are discussed in detail below, are of interest - 403(b) Universal Availability Higher Education and 403(b) Universal Availability K-12 Project and Follow-Up.

403(b) Universal Availability Higher Education

The Summary Report, which was posted to the IRS website on August 31, 2015, provided the results of an effort that began in June 2011 to review the compliance of Higher Education Institutions with the following requirements of 403(b). http://www.irs.gov/Retirement-Plans/Employee-Plans-Compliance-Unit-EPCU-Completed-Projects-with-Summary-Reports-403b-Universal-Availability-Higher-Education

- Universal availability rules
- Plan document requirements
- List of administrative exclusions described in Notice 89-23.

Both public and private higher institution plans were considered, along with an array of enrollment sizes within such institutions - small, medium and large. The identification of deficiencies will lead to more information on the universal availability rules as well as details on plan document requirements to enhance future compliance.

According to Employee Plans –

> *The areas most noted as needing attention from the 403(b) community include:*
>
> 1. *Plans with "conditioned eligibility," which is not allowed;*
> 2. *Review the required hours of service for eligibility (20 hours per week/1,000 per year);*
> 3. *The importance of having an up to date plan document;*
> 4. *Emphasizing the annual communication requirement to begin or change regular 403(b) and Roth 403(b) elective deferrals;*
> 5. *Discuss the importance of communicating and describing the terms of eligibility to participants.*
>
> *A breakdown of responses by plan size revealed that the larger plans had the fewest number of issues, although the issues found in large plans also existed in the medium and small plans.*

403(b) Universal Availability K-12 Project and Follow-Up

In a Summary Report released September 9, 2015, the EPCU commented on the 403(b) Universal Availability K-12 Project and Follow-Up. http://www.irs.gov/Retirement-Plans/Employee-Plans-Compliance-Unit-EPCU-Completed-Projects-with-Summary-Reports-403b-Universal-Availability-K-12-Project-and-Follow-Up

In an initial project that started in 2006, the IRS sampled schools in all 50 states to look for eligible employees who were not given the opportunity to defer salary under the 403(b) plan. Examples of such overlooked employees include the following who play a support role or are not traditional full time employees:

- bus drivers,
- cafeteria workers,
- janitors,
- substitute or part-time teachers, and
- employees regularly scheduled to work at least 20 hours per week.

Project II, which began in 2010, looked at 250 schools from the initial project responses, to confirm compliance with universal availability rules and any correction undertaken. While the responses were said to be "voluntary," those failing to provide information could risk additional scrutiny from the IRS. According to the IRS:

> *We discovered from Project II that over sixty percent of the schools who initially indicated they excluded certain groups of employees later confirmed those exclusions were either allowable or indicated their first response contained errors. One-fourth of the schools that we followed up with failed to demonstrate they adequately corrected Universal Availability or failed to respond to our inquiry and were referred for examination to confirm compliance.*

Employee Plans Compliance Unit Releases Information on Ongoing Compliance Checks

EPCU published Questions and Answers on Compliance Checks for Terminated Plans with Outstanding Participant Loans Project on September 8, 2015, as well as for Non-Governmental 457(b) Plans Project.

Terminated Plans with Outstanding Participant Loans Project

On the final Form 5500 series, some plan sponsors of terminated plans stated that the plan had investments in participant loans. Approximately 200 plan sponsors of such terminated plans will receive a compliance check letter from EPCU. http://www.irs.gov/Retirement-Plans/Employee-Plans-Compliance-Unit-EPCU-Terminated-Plans-with-Outstanding-Participant-Loans The IRS is concerned that Forms 1099-R were not filed on behalf of participants, beneficiaries and alternate payees who had outstanding loan balances when the plan terminated, since such amounts are taxable.

With respect to the plan sponsor, the IRS indicated that:

> *If the plan sponsor appears to be compliant, or if necessary corrections are made, we will issue a closing letter notifying the plan sponsor that the compliance contact has been resolved.*

For the retirement plan community as a whole, the IRS will identify additional areas requiring education, guidance, or outreach.

Non-Governmental 457(b) Plans Project

On September 1, 2015, EPCU published Questions and Answers about a compliance check letter sent to "Top Hat" plans sponsors that filed Forms W-2 for 2011 showing contributions to a non-governmental 457(b) plan and also filed Form 990. http://www.irs.gov/Retirement-Plans/Employee-Plans-Compliance-Unit-EPCU-Non-Governmental-457b-Plans-Project Tax-exempt entities are allowed to sponsor non-qualified deferred compensation plans for select groups of highly compensated employees, managers, directors or officers.

According to EPCU, the project will learn more about such plans, and review areas of compliance and non-compliance with IRS requirements. Issues to be addressed are as follows:

1. *verify that the deferrals reported on the sponsors' Forms W-2 represent a 457(b) plan;*
2. *determine if the plan sponsor is eligible to have a 457(b) plan, and, if eligible, whether the sponsor is:*
    - *a governmental unit,*
    - *exempt from income tax under IRC Section 501(c), or*
    - *a 'dual status' entity that is both governmental and exempt under 501(c);*
3. *verify that participation in the plan is limited to a select group of highly compensated employees, managers, directors or officers;*
4. *determine whether the plan contains features not permitted in a top hat plan, such as:*
    - *loans,*
    - *age 50 catch-up provisions, or*
    - *contributions placed in a trust for the exclusive benefit of participants; and*
5. *determine whether unforeseeable emergency distributions have been made.*

Based on the findings, there may be a plan audit or correction under the Voluntary Correction Program, which will be accepted by the IRS on a provisional basis outside of the Employee Plans Compliance Resolution System (EPCRS) through standards that are similar to EPCRS.

Guidance Informs Retirement Plan Sponsors about Waivers Available for Electronic Filing of Form 8955-SSA

On September 28, 2015, the IRS published Rev. Proc. 2015 – 47, which offers plan sponsors the opportunity to request a waiver of certain specified filing requirements due to economic hardships. http://www.irs.gov/irb/2015-39_IRB/ar16.html Specifically, those are required to file electronically Form 8955–SSA, *Annual Registration Statement Identifying Separated Participants With Deferred Vested Benefits*, or Form 5500–EZ, *Annual Return of One-Participant (Owners and Their Spouses) Retirement Plan*, to request a waiver of the electronic filing requirement due to economic hardship. http://www.irs.gov/pub/irs-pdf/f8955ssa.pdf and http://www.irs.gov/pub/irs-pdf/f5500ez.pdf. The date of publication is the effective date of the revenue procedure.

The IRS recently published the following revised forms for plans filing under the Voluntary Correction Program (VCP):

- Form 8950, *Application for Voluntary Correction Program (VCP) under the Employee Plans Compliance Resolution System (EPCRS)* http://www.irs.gov/pub/irs-pdf/f8950.pdf

- Form 8951, *Compliance Fee for Application for Voluntary Correction Program (VCP)* http://www.irs.gov/pub/irs-pdf/f8951.pdf

Voluntary Correction Program Filing Forms Revised

According to the IRS, older versions of these forms will be accepted through January 1, 2016. http://www.irs.gov/Retirement-Plans/Revised-Forms-8950-and-8951-Sponsors-May-Temporarily-Choose-to-Use-Prior-Versions The September 24, 2015 announcement states that the IRS prefers that the revised form be completed but the prior forms can be used if the NAICS business code for the plan sponsor included in a cover letter.

Department of Labor

Conflicts of Interest in Investment Advice Comment Period Closed

On September 24, 2015, the comment period for the recently proposed conflict of interest rule closed, after having been reopened. Public comments received and posted to date during the entire comment period total 2,852. In addition, 4 additional research papers on the likely implications of the proposed rules have been added to the website since August 26, 2015. http://www.dol.gov/ebsa/regs/conflictsofinterest.html *Do Financial Advisers Influence Savings Behavior?* by Jeremy Burke and Angela A. Hung is an example of the research papers submitted. http://www.dol.gov/ebsa/pdf/conflictofinterestresearchpaper4.pdf

The DOL's Employee Benefits Security Administration (EBSA) continues to update its dedicated website (linked above) where the following additional information can be located.

- Public hearing transcripts for the hearings held from August 10 – 13, 2015, including opening remarks and 25 panels. http://www.dol.gov/ebsa/regs/1210-AB32-2-Hearing.html

- *Q&A on Small Savers,* which highlights the benefits of the proposed conflict of interest rules on small savers, including households that own IRA accounts but whose IRA assets are only modest in value.

In addition, recent *Department of Labor Blog* posts have addressed the proposed conflict of interest rule. On September 10, 2015, *Best Interest Retirement Advice for Small Savers* was posted by Dr. Heidi Shierholz, chief economist with the DOL. https://blog.dol.gov/2015/09/10/best-interest-retirement-advice-for-small-savers/ Dr. Shierholz highlighted the *Q & A on Small Savers*:

> *Our Q&A on small savers aims to answer some questions and debunk common myths related to these matters, as well as to clarify how the proposed rule will help small savers. The department's goal is to make sure that everyone who seeks retirement investment advice, including small savers, can do so knowing that the adviser they hire will act in their best interests.*

Secretary of Labor Thomas Perez comments on *The State of Retirement* were published on September 17, 2015. http://blog.dol.gov/2015/09/17/the-state-of-retirement/

> *I have said it a hundred times over: this isn't your father's retirement. Long gone are the days of a pension you can't outlive and a gold watch. Here to stay is an era where workers and families are responsible for their own retirement investments…… The department has been working with consumer groups, the financial services industry, states, Congress and others over the past five years to craft a rule that protects retirement savings while allowing brokers and advisers the flexibility to get paid in multiple ways.*

Secretary Perez also noted that states are exploring new ways to expand access to retirement savings. A forthcoming proposed rule will address the concerns about the implications of ERISA on state administered auto-enrollment IRA savings programs that are funded with payroll deductions.

General Accounting Office

GAO Report Examines Sponsor Selection Process When Selecting Qualified Default Investment Alternatives

In a report *401(K) PLANS: Clearer Regulations Could Help Plan Sponsors Choose Investments for Participants* GAO 15-576 sent to Senator Elizabeth Warren on August 25, 2015, the General Accounting Office (GAO) examined the challenges faced by plan sponsors in selecting Qualified Default Investment Alternatives (QDIAs) when meeting their fiduciary duties under ERISA. http://www.gao.gov/assets/680/672140.pdf. The report was based on 227 completed questionnaires from plan sponsors representing the full range of plan sizes and QDIA types, as well as follow ups with some of the plans. Note that the examination of the plan sponsor selection process of QDIAs is quite informative and includes many helpful charts.

As explained by the DOL, the three primary QDIA alternatives are noted below.
http://www.dol.gov/ebsa/newsroom/fsQDIA.html

- *A product with a mix of investments that takes into account the individual's age or retirement date (an example of such a product could be 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 (an example of such a service could be a professionally-managed account); and*
- *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 (an example of such a product could be a balanced fund).*

The GAO emphasized the significance of QDIAs in expanding participation in defined contribution plans and the role played for sponsors adopting automatic enrollment policies. According to the GAO report, plan sponsors found that regulations published lacked clarity, causing concern when QDIAs selected are monitored on an ongoing basis and when the investment community introduces innovative QDIA products. As a result, plan sponsors may not be making the best choices on behalf of plan participants.

According to the GAO, the DOL should assess plan sponsors' existing challenges regarding QDIAs and implement corrective actions, including additional guidance. In a response to the GAO suggestions, Phyllis Borzi, Assistant Secretary, indicated that next steps may include requesting public comments through the Request for Information process or a research project.

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