



Qualified Plan Corner  
July, 2010

Pending Legislative and Regulatory Developments

Both Congress and the Department of Labor (DOL) have been active in examining employer sponsored retirement plans in response to the economic downturn and in search of potential revenue for federal coffers. Little in the way of new rules have been finalized at the time of this writing; however, several proposals are close to adoption:

**Fee Disclosure** – It is expected that DOL will soon issue regulations with new rules governing fee disclosure by plan service providers to plan sponsors. The rules are expected to be uniform across bundled (where one entity provides all services) and unbundled (where multiple entities provide services) service models in an effort to provide sponsors with information facilitating “apples to apples” comparisons. Major categories of expenses will likely include investment management, recordkeeping and administrative, and transactional. Investment Advisor fees may constitute their own category or may be included in one of those above – it’s too early to know. These regulations are imminent with a possible effective date sometime in 2011.

Additionally, it is expected that service providers will be required to identify whether they are acting in a fiduciary capacity. As discussed below, DOL’s reconsideration of its definition of fiduciary will impact this disclosure by certain service providers.

DOL will likely also issue new regulations relating to expense disclosure by the plan to participants. These regulations are expected sometime this Fall and likely will not be effective until sometime in 2012. It is expected that disclosure will be required at least quarterly and may prove challenging for non mutual fund investments.

**Fiduciary Status Of Those Who Provide Investment Advice** – The current definition of fiduciary found in DOL Regulation 29 CFR 2510.3-21 (commonly referred to as the “3-21(c) reg”) requires that the investment advice be rendered on “a regular basis” for fiduciary status to exist. The “regular basis” requirement would seemingly exempt a broker selling a plan who assists the plan sponsor in selecting the initial menu of investment offerings but does not provide ongoing performance monitoring services or recommendations regarding fund replacements.

DOL is reviewing its definition of fiduciary in the context of investment advice and may remove the “regular basis” requirement. Revision of the current definition is expected sometime this Fall.

**In-Plan Roth Conversions-**

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As you may be aware, conversions of traditional IRA’s to Roth IRA’s are permitted regardless of the taxpayer’s income beginning in 2010. Congress is also considering permitting Roth conversions inside 401(k) plans. Details are thin at this point, but presumably the conversion privilege would apply only to



the participant's deferral balance (and not to employer funded contribution sources). The Senate is expected to incorporate such conversions as a revenue generating measure in pending small business tax legislation.

**Threat To Cross-Tested Plans Thwarted** – Cross-tested plans, also known as new comparability plans, are prevalent in the small employer market as a vehicle for business owners to reach the annual contributions limit (\$49,000 if under age 50 and \$54,500 if age 50 or older for 2010) from all contribution sources (employer and employee funded) while funding benefits for employees in a cost-effective manner.

In May of this year, a proposal was floated in the House that, if enacted, would have substantially reduced the attractiveness of these plans and almost certainly have resulted in termination of many of these plans to the detriment of millions of American workers.

Fortunately, Congressional negotiators agreed to exclude the proposal from the then pending tax bill.

The American Society of Pension Professionals and Actuaries (ASPPA), of which I am a member, was instrumental in removal of the proposal through a grass roots effort that resulted in over 3,000 contacts to Congress opposing the provision.

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