

EMPLOYEE BENEFIT PLANS

AN UPDATE ON INDUSTRY DEVELOPMENTS

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Employee Benefit Plan Cybersecurity Considerations

There continues to be increasing concern about risks relating to privacy, security, and fraud for employee benefit plans as a result of plans utilizing electronic means to perform financial transactions and interface with plan participants. Because most employee benefit plans are regulated by ERISA, it is important for fiduciaries to be aware of the effect breaches of cybersecurity have on participants and beneficiaries, and their associated fiduciary duties. This topic has been drawing increasing attention from the Department of Labor, and in late 2016, the ERISA Advisory Council issued a report to the Department of Labor discussing common cyber risks to employee benefit plans and detailed considerations for managing cybersecurity risks. This report outlines elements of cyber risk management strategies and emphasizes the need for Plan sponsors and administrators to understand the cybersecurity risks inherent in their plan operations in order to develop a cybersecurity strategy specific to protecting their employee benefit plans' data and assets.

Focus on Internal Controls and Fiduciary Documentation

Regulators have increased focus on internal controls during audits of employee benefit plans. Audits by regulators often begin with a review of internal controls. The focus is to determine if the plan sponsor has sufficient controls in place to prevent or timely detect errors. The IRS has made available on its website sample internal control questions that agents could ask during their examination of plans. See [http://www.irs.gov/Retirement-Plans/EP-Team-Audit-\(EPTA\)-Program-Internal-Control-Questionnaire](http://www.irs.gov/Retirement-Plans/EP-Team-Audit-(EPTA)-Program-Internal-Control-Questionnaire). Regulators also continue to focus on fiduciary oversight of plans during their examinations. For example, if a plan receives a management letter at the conclusion of a financial statement audit, the plan's fiduciaries are expected to document their review of the management letter and determination of appropriate responses to the deficiencies noted. Additionally, the plan's fiduciaries should be documenting how they are ensuring they are familiar with ERISA and recent regulatory developments affecting plans (e.g. by attending training).

Changes to IRS Determination Letter Program

IRS Revenue Procedure 2016-37, which was effective January 1, 2017, makes significant changes to the IRS's determination letter program. Most importantly, Rev. Proc. 2016-37 eliminates the ability for individually designed benefit plans to obtain periodic determination letters from the IRS. Plan administrators of individually-designed plans are now entirely responsible for ensuring that Plan documents are updated to remain in compliance with revisions to the Internal Revenue Code, with no means for receiving periodic assurance of the plan's tax-exempt status from the IRS. In the event of revisions to the Internal Revenue Code affecting employee benefit plans, this increases the risk that individually designed plans may not be designed and operated in accordance with applicable sections of the Code. To assist sponsors of individually-designed plans ensure that all required amendments to Plan documents are made, the IRS will publish a required amendments list on an annual basis (see <https://www.irs.gov/retirement-plans/required-amendments-list>). The determination letter program remains available for pre-approved plans submitted for approval by providers or mass submitters; one way sponsors of individually designed plans can mitigate the risk of noncompliance with the Code is to switch to using a pre-approved plan document. In an effort to encourage plans to use pre-approved plan documents, the IRS issued Revenue Procedure 2017-41 in June 2017. This Revenue Procedure, which has an effective date of October 2017, increases the types of plans eligible for pre-approved status and allows greater flexibility in the design of pre-approved plans.

Proposed Changes to Employee Benefit Plan Auditor Reporting

In response to a request from the Chief Accountant of the DOL, the Auditing Standards Board (ASB) began a project in 2015 to consider how employee benefit plan auditors' reports could be strengthened.

As a result of this project, the ASB released a proposed standard for reporting on audits of employee benefit plans in April 2017. This proposed standard, if enacted, would be effective for Plan years beginning after December 15, 2018 and make significant changes to auditor's reports for employee benefit plans. Most significantly to Plan fiduciaries, the proposed standard would require auditors to include in their reports compliance findings from the audit. For example, if the auditor identified instances where vesting was incorrectly calculated for distributions, this would be disclosed in the auditor's report under the proposed standard. As audited financial statements, including the auditor's report, are included with publicly available Form 5500 filings, details of audit findings would be available to the public under this proposal.

Form 5500 Improvement and Modernization Proposal

The EBSA, IRS and PBGC have proposed changes to Form 5500 effective for plan years beginning on or after January 1, 2019. Key proposed revisions include:

- For defined contribution plans, the participant count will now be based on account balances, rather than eligibility.
- All group health plans will be required to file Form 5500, regardless of size or funding, and a new schedule will be added including data regarding group health plans.
- Additional disclosures would be required related to:
 - The number and value of uncashed checks
 - Matching contributions
 - Master trust investments
 - Automatic enrollment and auto-escalation
- Plans would be required to disclose audit matters such as:
 - Name of the engagement partner
 - Information about the audit firm's peer review
 - Significant matters discussed by the auditor with those charged with governance
- The signed certification statement from the certifying party will be attached to the Form 5500 for limited scope audits.
- A separate schedule C would be required for each service provider, with required identification of ERISA accounts and related party compensation.
- Schedule H would require more detailed reporting on the types of assets held by a plan and the types of expenses incurred.
- A trustee would be required to sign Schedule H.
- Schedule SB will require additional information regarding retirees, beneficiaries, and terminated vested participants.
- A separate schedule will be added for Employee Stock Ownership Plans, including information such as whether stock is readily tradeable on an established securities market, information on securities acquisition loans, and other compliance questions.

Updated Employee Plans Compliance Resolutions System (EPCRS)

The IRS released Rev. Proc. 2016-51 to update EPCRS for correcting certain plan matters of non-compliance. Key items updated by 2016-51 include: a) model forms located on the IRS website for a Voluntary Correction Program (VCP) submission; b) safe harbor correction methods for employee elective deferral failures; c) clarification of methods to correct certain overpayment failures such as annual additions; and d) Determination letter applications no longer permitted to be submitted as part of corrections that include plan amendments. The update supersedes other revenue procedures about EPCRS, is effective January 1, 2017 and is located at <https://www.irs.gov/pub/irs-drop/rp-16-51.pdf>.

New Mortality Improvement Scale

On October 20, 2016, The Society of Actuaries (SOA) released an updated mortality improvement scale (Scale MP-2016) that includes three additional years of mortality data. GAAP requires plan sponsors to evaluate all available information through the date the financial statements are issued in determining the best estimate of the plan's future experience with respect to each individual assumption. The SOA has determined that Scale MP-2016 provides the best mortality estimate to be used in determining pension plan obligations. Plan sponsors may use an alternative method if they can demonstrate that its mortality experience of its employees differs and the alternative method is more appropriate. The updated table shows mortality improvement lower than previously expected and could result in lower pension liabilities by 1% - 2%.

The Treasury Department and IRS do not yet require that defined benefit plans use the SOA's most recent mortality tables to calculate their funded status, but have issued proposed regulations that would require defined benefit plans to use MP-2016 mortality tables for plan years beginning on or after January 1, 2018. As the MP-2016 tables show improvements in mortality compared to the tables currently used for calculating funded status, the transition to using updated mortality tables could result in increases in the amount of required contributions to defined benefit plans.

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