EMPLOYEE BENEFIT PLANS

CRITICAL UPDATES ON INDUSTRY DEVELOPMENTS

IN OUR 2021 ISSUE -

1. Upcoming Auditing Standard for Employee Benefit Plans
2. Employee Benefit Plan Cybersecurity: Are you doing enough?
3. SECURE and CARES Acts Update
4. Department of Labor Releases Additional Guidance on Missing Retirement Plan Participants
5. EPCRS Update

Upcoming Auditing Standard for Employee Benefit Plans

Justin S. Renaud, CPA ◦ jrenaud@dopkins.com

1

The American Institute of Certified Public Accountants' Auditing Standards Board recently released Statement on Auditing Standards No. 136, Forming an Opinion and Reporting on Financial Statements of Employee Benefit Plans Subject to ERISA (SAS 136). After a one-year effective date deferral due to the COVID-19 pandemic, auditors of employee benefit plans with a plan year ending on or after December 15, 2021 will be required to comply with SAS 136. The overarching objective of SAS 136 is to address the Department of Labor's (DOL) growing concerns about poor audit quality over employee benefit plans and firms who do not hold significant experience with these types of specialized audits.

In this effort, SAS 136 specifically addresses, expands upon, and, in some instances, revises certain aspects of the following topics as they relate to audits of employee benefit plans subject to ERISA:

- Engagement acceptance.
- Audit risk assessment and response, including consideration of relevant plan provisions.
- Communications of reportable findings with those charged with governance of an employee benefit plan.
- The auditor's responsibilities relating to the ERISA-required supplemental schedules and the Form 5500.
- The form and content of the related auditor's report, including enhanced reporting related to going concern considerations.

Additionally, audits previously referred to as "limited-scope audits" are now labeled "ERISA section 103(a)(3)(C) audits." It should be noted that the SAS does not amend ERISA itself, and plan management's ability to elect such an audit whereby certain investment information held and certified by a qualified institution is excluded remains unchanged. An ERISA section 103(a)(3)(C) audit report will contain a two-pronged opinion that is based on the results of the audit and on procedures performed on certified investment information.

2 Employee Benefit Plan Cybersecurity: Are you doing enough?

John F. Matte, Jr., CPA ◦ jmatte@dopkins.com

In April 2021, the Employee Benefits Security Administration of the U.S. Department of Labor (DOL) issued guidance on best practices for ERISA-covered plans - Cybersecurity Program Best Practices (dol.gov). The DOL begins that release by informing readers that "Responsible plan fiduciaries have an obligation to ensure proper mitigation of cybersecurity risks". The DOL has acknowledged that this is an underserved area of cybersecurity, albeit one with tremendous risk due to large asset balances and personally-identifiable information that are inherent in this space. Along with that acknowledgement, there has been a noticeable increase in incidents, regulatory enforcement, claims and litigation, prompting the DOL and the American Institute of Certified Public Accountants (AICPA) to continue to issue guidance on the topic. Generally, they are finding plan sponsors do not have sufficient entity-wide programs or such programs omit certain pertinent aspects impacting employee benefit plans.

PROTECTING AGAINST CYBER THREATS:
Best Practices for Plan Fiduciaries

Watch an encore presentation of our recent cybersecurity program at www.dopkins.com/videos

The AICPA has developed an entity-level "Cybersecurity Risk Management Framework" for the purpose of effectively documenting and communicating information regarding an entity's cybersecurity risk management program. Consistent with the messaging and timing of guidance released by the DOL, the AICPA recently recommended plan management consider utilizing this framework to assist in developing, designing, and/or documenting the plan sponsor's Cybersecurity Risk Management Program. Utilizing this framework is expected to:

a. Help plan management identify where the plan's cybersecurity processes and controls may need to be shored up;
b. Communicate information regarding the plan's Cybersecurity Risk Management Program to stakeholders, including plan fiduciaries and participants; and,
c. Document the actions and efforts undertaken by the plan sponsor in an effort to fulfill its fiduciary duty under ERISA. In short, the AICPA framework, if utilized properly, can meet the guidance and best practices recommended by the DOL.

Key Takeaways: What You Should Do Now

All plans and plan sponsors should consider working with professionals in the proper fields to build a cybersecurity program that fits their needs and their plan – attorneys, CPAs and cybersecurity experts. All plans should have an understanding of where plan data is stored, who has access to it and how it is transferred. According to the DOL, plan sponsors should also have a "formal, well documented cybersecurity program" that identifies internal and external cybersecurity risks. If you, as plan management or a plan fiduciary, step back and ask yourself, "what am I doing in this space?" and the answer is difficult to come by, you are likely not doing enough, exposing plan participants, the plan sponsor and yourself to risk.

3 SECURE and CARES Acts Update

Vincent Pasini, CPA ◦ vpasini@dopkins.com

In late 2019 and early 2020, Congress passed two pieces of legislation which affected retirement plans. These were the Setting Every Community Up for Retirement Act (SECURE Act) and the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). Both the SECURE Act and the CARES Act continue to affect plans and therefore, plan fiduciaries, into the future.

SECURE Act:

On December 20, 2019 the SECURE Act was signed into law. There are two main provisions which will affect retirement plans in the coming years:

- Changing the age to start taking Required Minimum Distributions (RMDs).
- Requiring employers to offer their retirement plan to long-term part-time employees.

Changing the age to start taking RMDs

With the passing of the SECURE Act, participants must start taking RMDs by April 1st after the year the participant reaches age 72. This is effective for participants whose date of birth is July 1, 1949 or later. Previously, the age was 70 ½. For example:

- If a participant was born on June 30, 1949, the participant must follow the old rules and take RMDs by April 1st after the year the participant reaches age 70 ½ or April 1, 2021.
- If a participant was born on July 1, 1949, the participant must start taking RMDs by April 1st after the year the participant reaches age 72 or April 1, 2023.

Offering retirement plans to long-term part-time employees

With the passing of the SECURE Act, employers must offer long-term part-time employees eligibility to their retirement plan. A long-term part-time employee is defined as an employee who has worked at least 500 hours per year for the previous three years. It is important to note that the hours prior to 2021 are not considered. Based on these rules, the earliest entry for these employees would be January 1, 2024. However, plan sponsors should begin to consider this provision now if it will result in a change to their plan, as they are required to track hours and offer participation beginning in 2024.

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CARES Act:

On March 27, 2020 the CARES Act was signed into law. The intent of the CARES Act was to provide immediate relief to people affected by the coronavirus pandemic and therefore, the majority of the provisions were effective for 2020. However, there are some items to consider going into 2021:

- If the plan adopted the coronavirus related distribution or the loan expansion under the CARES Act, an amendment to the plan document to adopt these provisions is needed by December 31, 2022.
- If a participant did receive a coronavirus related distribution, the participant may repay the distribution within three years to refund the taxes that were paid on the original distribution and restore their account balance.
- A participant had the right to waive their RMD for 2020. In 2021, the RMD should resume being paid to the participant. Plan sponsors should ensure that this is being done by third party administrators.
- The CARES Act allowed for the suspension of loan payments in 2020. If a participant did request to have their loan payments suspended, the recordkeeper should re-amortize the loan with the interest that accrued during the suspension. This should be reviewed by the plan sponsor to ensure this was done accurately.

Plan sponsors and plan fiduciaries should continue to be aware of these provisions as they will continue to affect their plans.

4 Department of Labor Releases Additional Guidance on Missing Retirement Plan Participants

Brendan P. Brady, CPA ◦ bbrady@dopkins.com

Continuing its focus on missing participants in retirement plans, the Department of Labor (DOL) released updated guidance on this topic in January 2021. Included in the DOL guidance is a memorandum describing best practices to prevent, identify, and locate missing participants in pension plans. As examples of best practices, the DOL cites the following:

1) Maintaining accurate census information for the plan's participant population, including implementing procedures to provide participants with the opportunity (and reminders) to update their contact information. This would also include establishing procedures to identify and address potentially out-of-date participant information through such means as monitoring mail that is returned to sender.
2) Implementing effective communication strategies, including clearly identifying plan-related communications and using language that is understandable to participants.
3) Conducting missing participant searches, with a number of search methods described.
4) Documenting procedures and actions, including documenting policies, procedures, and key decisions in writing, and ensuring that third party record keepers are properly performing agreed-upon procedures.

The full memorandum, including additional detail on these best practices, is available at Missing Participants – Best Practices for Pension Plans | U.S. Department of Labor (dol.gov). We remind plan fiduciaries that the fiduciary's responsibility extends to making every attempt possible to locate missing participants. Failing to do so not only constitutes a breach of this responsibility, as determined by the DOL, but may also jeopardize the plan's tax-exempt status if those participants do not receive distributions in accordance with the plan document.

The DOL also released Field Assistance Bulletin No. 2021-01 (FAB 2021-01), which announces a temporary policy allowing terminating defined contribution plans to use the Pension Benefit Guaranty Corporation (PBGC) Defined Contribution Missing Participants Program. Specifically, the DOL announced that it will not enforce regulations requiring the transfer of missing or non-responsive participants' or beneficiaries' account balances to an IRA, certain bank accounts, or to a state unclaimed property fund, if the funds are instead transferred to the PBGC and certain additional guidance is followed. That additional guidance primarily relates to modifications to required notices to participants and beneficiaries, as well as the treatment of uncashed benefit checks. The PBGC does charge a flat fee for certain accounts transferred to the Missing Participants Program, which may be deducted from the participant's account, unless otherwise prohibited by the terms of the plan.

EPCRS Update

Christine Schmitt, CPA ◦ cschmitt@dopkins.com

The IRS Employee Plans Compliance Resolution System (EPCRS) allows a plan sponsor to correct plan operational failures using three correction programs: Self- Correction Program (SCP), Voluntary Correction Program (VCP), and Audit CAP.

Recently the IRS made changes to EPCRS via Revenue Procedure 2021-30. A summary of these changes is as follows:

1) **Overpayment corrections** – revises correction principles relating to failures that occur when participants receive payments from defined benefit plans that exceed what is permitted by the terms of the plan, effective July 16, 2021. The new principles lessen the need to seek repayment from participants who received overpayments, and may not require the plan sponsor to reimburse the plan.
2) **Self-correction for significant failures** – extends the correction period from two to three years, effective July 16, 2021.
3) **Self-Correction for retroactive plan amendments** – increases use of retroactive plan amendments to correct failures by removing the requirement that all plan participants benefit from the retroactive amendment, effective July 16, 2021.
4) **VCP submissions** – eliminates anonymous submissions, effective January 1, 2022.
5) **Pre-Submission conferences** – permits plan sponsors (at no cost) to make anonymous written requests for a conference before submitting to the VCP, effective January 1, 2022. Subsequent to this conference, the VCP request can no longer be anonymous.
6) **Automatic enrollment failures** – extends the safe harbor correction method to correct missed elective deferrals for participants subject to automatic enrollment
7) **De Minimis corrections** – increases the threshold for certain de minimis amounts that do not require correction from $100 to $250.

For a complete copy of Revenue Procedure 2021-30, please see the following link - Revenue Procedure 2021-30 (PDF)

For more information, please contact your existing Dopkins contact or one of the members of our Employee Benefits team:

Brendan P. Brady, CPA
Director
Assurance Services Group
bbrady@dopkins.com

James A. Krupinski, CPA
Director
Assurance Services Group
jkrupinski@dopkins.com

John F. Matte, Jr., CPA
Senior Manager
Assurance Services Group
jmatte@dopkins.com

Chad R. O'Connell, AIF
Senior Investment Advisor
Dopkins Wealth Management, LLC*
coconnell@dopkins.com

Tyler M. Owen, CPA, CFE
Manager
Assurance Services Group
towen@dopkins.com

Vincent Pasini, CPA
Supervisor
Assurance Services Group
vpasini@dopkins.com

Andrew J. Reading, CPA
Partner
Assurance Services Group
areading@dopkins.com

Justin S. Renaud, CPA
Manager
Assurance Services Group
jrenaud@dopkins.com

Christine D. Schmitt, CPA
Manager
Assurance Services Group
cschmitt@dopkins.com

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