34TH ANNUAL ISCEBS Employee Benefits Symposium

Ask the Retirement Expert

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STARTING THE CONVERSATION

- Revised EPCRS
- DOL Fiduciary Regulations
- What else?
  - IRS/DOL audits
  - Mergers and Acquisitions
  - Participant engagement
  - Vendor relationships

EMPLOYEE PLAN COMPLIANCE RESOLUTION SYSTEM (EPCRS)

- Rev. Proc. 2015-27 and 2015-28
- Modified, but do not replace Rev. Proc. 2013-12
- General theme, more flexibility, less cost to employer

VCP FEE SCHEDULE

Participants	Fee
<21	$750
21–50	$1,000
51–100	$2,500
101–500	$5,000
501–1000	$8,000
1,001–5,000	$15,000
5,001–10,000	$20,000
>10,000	$25,000

Exceptions
$250 for SEP or SIMPLE IRA
$500 for 401(a)(9) [RMD] violation for <151 participants
50% of fee for non-amender within 1 year; latest one only $375
Approx. 50% of fee for plan loans <25% of participants
IRS can waive fee for terminating orphan plans
Egregious or intentional—MUCH HIGHER

REQUIRED MINIMUM DISTRIBUTION PROBLEM

- Plan problem—operational failure
- Participant problem—50% penalty
- Correction
  - Distribute RMD amounts
    - Including multiple years
  - File under VCP, IRS can forgive 50% penalty
  - $500 fee if less than 150 affected participants, $1,000 fee if 151–300 affected participants

LOAN PROBLEMS

- If less than 25% of participants have loan problem, and that's the *only* problem, then fee is based on # of problem loans. (Starting at $300 for <14)
- Still only corrected by VCP—no self correction
- No flexibility, must follow EPCRS procedure

LOAN CORRECTION

- No taxable income if within the maximum loan period
- Loan too large: repay excess; re-amortize the remaining balance
- Loan period too long: re-amortize to repay within proper period
- Loan default: single sum repayment of late amount or re-amortize
- Employer's fault: employer pays additional interest and then re-amortize balance

OVERPAYMENT

- Too much went to participant
  - Plan provisions
  - Legal requirements
  - Too soon
- Examples
  - 100% to partially vested participant
  - Hardship distribution when no hardship
  - Distributed contribution despite participant failure to meet requirements (e.g. last day of plan year)

EMPLOYEE ELECTIVE DEFERRAL PROBLEMS

- Failure to implement deferral election correctly
  - Affirmative election
  - Automatic contributions
- Failure to give employee the opportunity to make an affirmative election

OVERPAYMENTS

- ER takes reasonable steps for return of overpayment
  - Often goes back into participant's account
- No repayment
  - ER notifies recipient that the Overpayment is not eligible for rollover
  - ER contributes the difference to plan, unless it was a premature distribution (hardship)
- Returned money
  - Placed in suspense account
  - Reallocate to other participants

CORRECT WITHIN 3 MONTHS

- Requirements:
  - Correct deferrals begin no later than fist payday on or after 3 months following when the failure first occurs (or within 1st payday for month after EE notifies ER),
  - ER gives participant notice within 45 days of when the correct deferrals begin
- Correction:
  - No QNEC for missed deferrals
  - QNEC for missed match, plus earnings
    - Within 2 years after end of plan year of failure

CORRECT WITHIN 2 YEARS

- Requirements:
  - Correct deferrals begin no later than first payday on or after 2 years following plan year end (or within 1st payday for month after EE notifies ER)
  - ER gives participant notice within 45 days of when the correct deferrals begin
- Correction
  - QNEC of 25% of missed deferral
  - QNEC for missed match, plus earnings
    - Within 2 years after end of plan year of failure

AUTOMATIC CONTRIBUTION PROBLEM

- Failure to implement automatic contribution or the affirmative election of the participant
- Requirements
  - Correct within 9 ½ months after end of plan year (or within 1^{st} payday for month after EE notifies ER)
  - ER gives participant notice within 45 days of when the correct deferrals begin
- Correction
  - No QNEC for missed deferrals
  - QNEC for missed match, plus earnings
    - Within 2 years after end of plan year of failure

FIDUCIARY REGULATIONS

FIDUCIARY DEFINITION

ERISA defines fiduciary as a person who

1. Exercises any *discretionary* authority or *discretionary* control re: plan management **or** exercises any authority or control re: plan asset management or disposition
2. Renders investment advice re: plan assets for a fee or has any authority or responsibility to do so
3. Has any discretionary authority or discretionary responsibility in plan administration

PERCEIVED PROBLEM

- Financial advisors have conflicts of interest
  - Paid from plan assets
  - Not all investments pay the same rate
- Current system requires “appropriate” investments
  - Not the “best”
  - Not without regard to advisor’s interest
- Fiduciaries must act and advise
  - Exclusively in client’s interest
  - Prudently

DOL'S ACTIONS

- Current regulations ae 25 years old
- 2010—DOL issued new proposed regulations
  - Major push-back
- 2015—New proposed regulations
  - Effective date—intended to be before 1/20/17
  - Detailed economic analysis included in proposed regs.

ADVICE OR RECOMMENDATIONS

- Recommendations to buy, sell or exchange securities, including
  - To take distribution
  - Investment of rollover funds to IRA
- Recommendations on management of securities
  - Including IRA rollover
- Appraisal, fairness opinion or similar statement regarding assets in plan or IRA
- Recommendations by person who will receive compensation for providing above advice

INVESTMENT ADVICE

Current Rule

- Advises the plan as to the value of securities or property, or
- Recommends as to the advisability of investing in, purchasing, or selling securities or other property

2015 Proposed Rule

- Recommends buying, holding, selling securities or other property (including rollovers)
- Recommends management of securities or other property, including rollovers
- Gives an appraisal, fairness opinion, or similar statement concerning value of assets in connection with specific transactions
- Recommends a paid advisor

ADVISOR DEFINITION

Current Rule

- Has discretionary authority over buying or selling of plan assets
- Renders any advice
  - On a **regular basis**
  - Pursuant to an **arrangement** between the advisor & plan
  - The servicers will serve as a **primary basis** for the plan's investment decisions
  - The advisor will render **individualized advice** based on the particular needs of the plan

Proposed Rule

- Represents that it is acting as a fiduciary with respect to the advice or
- Renders advice pursuant to a **written or a verbal** agreement or understanding that the advice is **individualized to, or directed to**, the recipient for consideration in making decisions

PLATFORM PROVIDERS

Excluded as fiduciary if

- Offer a "platform" of investment options
- Services that assist plan fiduciaries in monitoring and selecting investment options
- Providing objective financial data on platform investments

INVESTMENT EDUCATION

- Excludes providing investment education materials
- Based on materials and information provided, not
  - Who provides it
  - Frequency of distribution
  - Whether the materials are combined with other items or not
  - Type of plan, or IRA
- Applies to IRAs and Plans

FEES/COMPENSATION

- Means any fee or compensation received, including
  - Brokeage fees
  - Mutual funds sales fees
  - Insurance commissions
  - Direct and indirect fees

SCOPE OF PROPOSED REGULATIONS

- ERISA §3(21)(A)(ii)
  - ERISA Plans
- IRC §4975€(3)(B)
  - Advisors to IRAs
  - Brokers who make recommendations to IRA owners
  - Includes HSAs, Archer Medical Savings Accounts, Coverdell Education Savings Accounts

PROHIBITED TRANSACTIONS

- Proposed Regs. create new PT and amend others
- Best Interest Contract (BIC) exemption
  - Contractually acknowledge fiduciary status
  - Abide by standards of impartial conduct
  - Permit continuation of commissions and 12-b-1 fees
  - Flexible, principle based rule
  - Focused on “retail” investors
    - IRAs
    - Small plans (<100 participants)

WHAT ELSE?

- IRS/DOL Audits
- Mergers and Acquisitions
- Participant Engagement
- Vendor Relationships