Health Reform and Retirement Plan Investment Advice Developments

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The following is a summary of some recent health reform developments and a final regulation regarding investment advice under defined contribution retirement plans.

SUPREME COURT WILL RULE ON HEALTH REFORM MANDATE

Since there have been differing opinions from various federal appellate courts on the issue of whether the Patient Protection and Affordable Care Act (PPACA) can require that citizens purchase health insurance from a private insurance company, the U.S. Supreme Court has agreed to rule on the issue. On November 14, 2011, the Supreme Court agreed to review a decision from the Eleventh Circuit Court of Appeals, which held that the mandate was unconstitutional.

The Supreme Court will also rule on whether the rest of PPACA can proceed if the mandate is struck down and on the issue of whether PPACA can constitutionally require that states expand Medicaid coverage to receive funding under PPACA.

The Supreme Court will hear oral arguments on the merits of the case on March 26, 27, and 28, 2012. A decision is expected before the June 2012 end of the current Supreme Court term.

HEALTH REFORM SUMMARY REQUIREMENTS POSTPONED

On August 22, 2011, the three governmental agencies overseeing PPACA (namely, Health and Human Services [HHS], the Department of Labor [DOL], and the IRS) issued proposed regulations describing how all health plans must issue a four-page summary of the provisions of the health plan. The proposed deadline for issuing this summary was March 23, 2012.

According to the proposed regulations, the summary required a different format and information than the typical summary plan description that is issued by employers and/or their insurers to describe the major features of the group health plan.

A large number of comments to the proposed regulations were submitted by employers and insurers stating that the requirements were confusing and the deadline unreasonable. In response, on November 17, 2011, HHS posted a notice indicating that in light of the numerous comments submitted, the final regulations may well differ to a large degree from the proposed regulations. In view of that, the March 23, 2012, deadline is no longer operative, and a new deadline will be established at the time the final regulations are issued.

LONG-TERM CARE INSURANCE WILL NOT BE OFFERED UNDER THE HEALTH REFORM LAW

One of the most controversial provisions in PPACA was a program that would offer long-term care daily benefits in exchange for a moderate premium payment made by the individual. The name of the program was Community Living Assistance Services and Supports (CLASS). As originally envisioned, if an individual paid in premiums for five years he or she would be entitled to a daily benefit of at least $50 to cover long-term care expenses.

The program was criticized at the time the PPACA legislation was being debated, and ever since, as being unsustainable; since the program was voluntary, most likely only those individuals who already had a need for long-term care would sign up for the program. Healthy individuals would never sign up or would wait until some future date when the need was foreseeable since only five years of payments were required to be eligible for benefits.

PPACA required that HHS issue an opinion that CLASS could be maintained for at least 75 years without any addition of taxpayer funds to support it. HHS concluded in October 2011 it would not be able to make such an assertion because of the likely inability of expected premium payments to be able to cover anticipated benefits. Unless a different funding mechanism is identified and PPACA amended to reflect this, it is unlikely CLASS in its current form will be implemented.

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INVESTMENT ADVICE UNDER DEFINED CONTRIBUTION PLANS

Most defined contribution plans under the Employee Retirement Income Security Act of 1974 (ERISA) such as 401(k) or profit-sharing plans permit plan participants to make decisions as to how their own account will be invested. A concern for many years under ERISA has been the fact the typical adviser who works with plan participants may have a conflict of interest either due to commissions or other revenue-sharing arrangements paid by an investment provider to the adviser.

The Pension Protection Act of 2006 added language to ERISA that would encourage the giving of advice in a certain manner that would protect both the plan sponsor and the adviser from liability. Authority to issue regulations under this language was granted to the DOL, which has issued several sets of proposed regulations. Finally on October 24, 2011, a final regulation was issued on investment advice. The new rule took effect on December 27, 2011.

Under this final regulation, an adviser can still receive payments such as commissions or revenue sharing from an investment provider without violating ERISA's conflict of interest rules as long as the advice is provided through an "eligible investment advice arrangement," which is defined as: 1) the fees payable to the adviser do not vary depending on what investment the plan participant chooses; or 2) the adviser uses a computer model that must be certified to the DOL as being unbiased.

Under the level-fee scenario, the arrangement must also be based on accepted investment theories, it must take fees and expenses into account, and the adviser must ask the plan participant for information regarding age, time horizon, risk tolerance, and other investments held by the participant.

A plan participant is entitled to receive each year from the adviser the following information (as described in the regulations):

> *(A) The role of any party that has a material affiliation or material contractual relationship with the fiduciary adviser in the development of the investment advice program, and in the selection of investment options available under the plan;*
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> *(B) The past performance and historical rates of return of the designated investment options available under the plan, to the extent that such information is not otherwise provided;*
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> *(C) All fees or other compensation that the fiduciary adviser or any affiliate thereof is to receive (including compensation provided by any third party) in connection with—(1) The provision of the advice; (2) The sale, acquisition, or holding of any security or other property pursuant to such advice; or (3) Any rollover or other distribution of plan assets or the investment of distributed assets in any security or other property pursuant to such advice;*
>
> *(D) Any material affiliation or material contractual relationship of the fiduciary adviser or affiliates thereof in the security or other property;*
>
> *(E) The manner, and under what circumstances, any participant or beneficiary information provided under the arrangement will be used or disclosed;*
>
> *(F) The types of services provided by the fiduciary adviser in connection with the provision of investment advice by the fiduciary adviser;*
>
> *(G) The adviser is acting as a fiduciary of the plan in connection with the provision of the advice; and*
>
> *(H) That a recipient of the advice may separately arrange for the provision of advice by another adviser that could have no material affiliation with and receive no fees or other compensation in connection with the security or other property.*

Only an adviser who declares himself or herself to be a fiduciary under an ERISA plan can qualify for the protection provided by this regulation. Since many brokers and advisers over the years have refused to accept status as a fiduciary due to the potential liability involved, an open question is how many brokers and advisers will now agree to fiduciary status; and if they do not, should a plan continue to work with such advisers? Finally, the arrangement between the adviser and investment providers must be audited annually by an auditor independent of the adviser, and the audit must be presented to the plan sponsor that in most cases has the fiduciary responsibility of appointing and monitoring investment advisers.

The above discussion is intended to briefly summarize certain recent legal developments in employee benefits, but is not intended to be legal advice and must not be relied upon as such. All readers are urged to raise any concerns they may have based on matters discussed in this column with experienced benefits legal counsel.