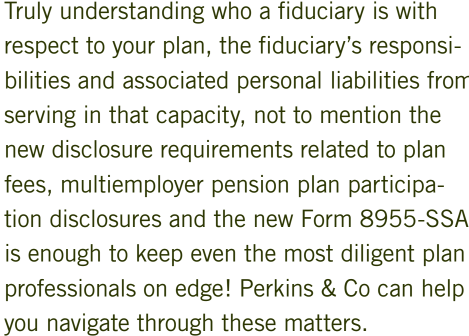
EBP Developments
PERKINS EMPLOYEE BENEFIT PLAN AUDIT PRACTICE GROUP
PERKINS & CO
SPRING 2012
NEWSLETTER

What's New with EBP Audits

THE LATEST BUZZ WORDS AROUND ADMINISTERING YOUR COMPANY'S BENEFIT PLAN ARE FIDUCIARIES AND DISCLOSURES.



Truly understanding who a fiduciary is with respect to your plan, the fiduciary's responsibilities and associated personal liabilities from serving in that capacity, not to mention the new disclosure requirements related to plan fees, multiemployer pension plan participation disclosures and the new Form 8955-SSA is enough to keep even the most diligent plan professionals on edge! Perkins & Co can help you navigate through these matters.

ARE YOU A PLAN FIDUCIARY? YOU COULD BE PERSONALLY LIABLE...

Understanding who is a plan fiduciary may be more complex than expected. The Random House dictionary defines a fiduciary as "a person to whom property or power is entrusted for the benefit of another." It is important to understand a fiduciary is determined either by being specifically named or appointed or unintentionally by the functions one performs.

A *named fiduciary* is someone specifically named in the plan document or appointed by the plan sponsor as being responsible for operating the plan. A trust company and/or an officer of the company specifically named in the plan document is considered to be a named fiduciary.

A *functional fiduciary* is someone who, based on job duties or responsibilities with respect to the plan, acts in a fiduciary capacity. A fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA) is any person who exercises discretionary authority or control over the plan's management and the management or disposition of the plan's assets, renders investment advice for a fee or other compensation with respect to plan funds or property, and has discretionary authority or responsibility in the plan's administration.

Individuals serving on investment committees, selecting service providers to a plan, and/or having influence, discretionary authority or control over a plan are typically considered to be functional fiduciaries.

Personal Liability

ERISA requires that all plan fiduciaries adhere to a very high standard of care, skill, prudence and due diligence in performing their responsibilities. According to ERISA §409, a fiduciary is personally liable to the plan for any losses resulting from a breach, and would also be required to restore to the plan any profits the fiduciary may have made through use of the assets of the plan, and may be subject to other equitable or remedial relief as the court deems appropriate, including the removal of the fiduciary. ERISA

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§502(l) goes on to state that the Department of Labor (DOL) can also assess a civil penalty in the amount of 20 percent of the amount recovered in a settlement with the DOL or awarded in a civil suit against the fiduciary who breached his or her duty or any person who knowingly participated in a breach.

Fiduciary responsibility carries personal liability and there is no "corporate veil," or corporate protection, for fiduciaries. There could also be criminal penalties, including imprisonment. A 2008 Supreme Court decision, LaRue v. DeWolff, Boberg & Associates, Inc., et al., permits individual participants to sue plan sponsors for fiduciary breaches. With this decision, attorneys representing individual participants who believe fiduciary breaches have occurred see hefty "paydays" since U.S. 401(k) assets total over $3 trillion.

How to mitigate Your Fiduciary Risk

Now that you are aware of your responsibilities to the plan, its participants and beneficiaries, including the related personal liability, you should take timely and appropriate steps to mitigate your risk, which may include:

- *Act solely in the best interest of plan participants and their beneficiaries and with the exclusive purpose of providing benefits to them.*
- *Carry out your duties prudently.*
- *Understand and follow the terms of the plan document (unless it is inconsistent with ERISA).*
- *Select and monitor service providers actively.*
- *Develop an investment policy and ensure it is followed.*
- *Diversify plan investments.*
- *Monitor investment performance periodically.*
- *Compile and evaluate all fees and compensation, both direct and indirect, that are paid related to the plan. (See Plan Expenses – Who, What, When, Why? below.)*
- *Pay only reasonable plan expenses.*
- *Engage specialists when necessary.*
- *Document all decisions made regarding the plan.*

Recent Regulatory Developments

In October 2010, the DOL proposed a rule to broaden the definition of a fiduciary. The consequences of the broader definition would be to encompass a larger group of individuals who would be defined as fiduciaries. The proposed change was the subject of much debate. In late September 2011, the DOL announced that it withdrew the proposed rule and would eventually re-propose the rule. This comes after requests from the public and Congress to allow an opportunity for more input on the rule.

It is expected that the revised portions of the rule will clarify the role of those providing investment advice and will be limited to individualized advice directed to specific parties. It is also anticipated that it will address the applicability of the rule to arm's length commercial transactions along with concerns about the impact of exemptions on the current fee practices of brokers and advisers. In addition, the revamped rule is expected to focus on the continued applicability of exemptions that allow brokers to receive commissions related to mutual funds, stocks and insurance products.

DO YOU EVER WONDER WHAT THE TRUE COSTS ARE TO OPERATE YOUR 401(K) TYPE PLAN?

The DOL will continue to coordinate closely with the Securities and Exchange Commission, Treasury Department, Internal Revenue Service (IRS) and the Commodities Futures Trading Commission to ensure that the revised rule is in sync with other ongoing rule making while upholding the separate federal protections that ERISA established for plans and plan participants. The new proposed rule is expected to be issued in early 2012.

PLAN EXPENSES – WHO, WHAT, WHEN, WHY?

Ever wonder what the true costs are to operate your 401(k) type plan? As a plan fiduciary you are required to know so that you allow only reasonable fees to be paid from plan assets. As a plan participant, you want to know so that you can make informed investment decisions when choosing your investment options in your account. The DOL wants to know, too!

The DOL website states that a 1 percent increase in plan expenses paid from plan assets can, over 35 years result in a 28 percent decrease in the ultimate account balance!

For years, many plan sponsors have struggled to truly understand the total expenses paid from their plan's assets. In addition to so-called direct expenses, where the plan clearly is paying for a product or service, most plans also incur what are commonly referred to as hidden or indirect fees (e.g., 12b-1 fees, sub-transfer agent fees, etc.). These fees are deducted directly from the investment earnings and generally have not been separately and clearly disclosed. When carefully reading service agreements and other documents related to plan investments, sponsors should be able to determine the extent of those fees. The challenge has been that the documentation tends to be voluminous and in very fine print making it difficult to fully comprehend. In addition, the various fees and expenses may not be disclosed in a single section but are likely spread throughout the often lengthy document.

In order to increase plan sponsor/fiduciary and participant awareness and understanding of all plan expenses and fees, the DOL has finalized related regulations. Although intended to be the last piece in this puzzle, the regulations regarding the Form 5500, Annual Return/Report of Employee Benefit Plan, added a revised Schedule C, Service Provider Information, to the filing requirements. Schedule C requires that anyone providing services to the plan disclose for reporting purposes not only the direct fees they receive from the plan but also any indirect fees received. For example, the plan may pay a quarterly fee to the plan's corporate trustee – a direct fee – and then the trustee may pay some of that fee to an investment manager who handles the plan's investments – an indirect fee. Both of these fees are generally required to be disclosed on Schedule C.

So how do plan sponsors/fiduciaries educate themselves about the fees and expenses being paid from their plans? That is where the DOL regulations under ERISA §408(b)(2) come into play.

On February 2, 2012, the DOL issued the long-awaited Final Rule on Reasonable Contract or Arrangement Under Section 408(b)(2) – Fee Disclosure also known as the Final Final 408(b)(2) Fee Disclosure Regs. These rules were originally scheduled to be effective in July 2011 and were delayed twice, and with issuance of the Final Final regulations are effective July 1, 2012. These rules require that anyone who provides services to the plan must provide, in writing, a document that clearly sets forth the services to be provided to the plan and fully discloses the costs associated with those services and any additional costs that may be incurred by the plan and in what circumstances. The costs may be disclosed using dollar amounts, percentages or through formulas. Although not required to be used, the DOL has provided a model disclosure of what the document should contain.

DON'T FORGET YOU MUST BE IN COMPLIANCE WITH THE FINAL 408 (b)(2) REGS BY JULY 1, 2012

The service provider must also disclose whether or not they are acting as a fiduciary to the plan – a much higher commitment to the plan and its participants and beneficiaries. Refer to Are you a Plan Fiduciary? on p.1 for further details on identifying plan fiduciaries. For any services provided after July 1, 2012, where a written agreement has not been provided, the service provider will be deemed to be a disqualified person and any transactions between the plan and a disqualified person would result in prohibited transactions.

The fees and expenses being paid from plan assets must also be disclosed to eligible employees, plan participants and their beneficiaries, as appropriate. This rule (ERISA §404(a)(5)), which has also been delayed, is now scheduled to go into effect as of August 30, 2012. This mean that plans with a calendar year end must provide the initial annual fee disclosure to participants no later than August 30, 2012. Plans with a year ending after August 30, (for example a plan year ending September 30) must provide the initial fee disclosure notice to participants no later than November 29, 2012. In addition to the fee information that must be disclosed to all eligible employees, participants must receive information quarterly regarding the fees and expenses that were actually deducted from their accounts during the quarter. This information is required to be disclosed in dollar amounts. Plan sponsors with plans that have a calendar year end must provide the first quarterly disclosure statement to participants by November 14, 2012. For plans on an off-calendar plan year, the initial quarterly statement must be provided to participants no later than 45 days after the quarter during which the initial annual notice was provided.

Plan sponsors/fiduciaries should contact their service providers immediately to ensure the readiness of the appropriate disclosures in order to be in compliance with the fast-approaching new requirements.

EMPLOYERS PARTICIPATING IN MULTIEMPLOYER PENSION PLANS: INFORMATION GATHERING AND COMMUNICATION KEY TO COMPLIANCE WITH EXPANDED DISCLOSURE REQUIREMENTS

Increased transparency is the trend in the world of financial reporting, and this trend is clearly reflected in the new Accounting Standards Update (ASU) for companies that participate in multiemployer defined benefit pension plans. The Financial Accounting Standards Board (FASB) recently completed redeliberations on the standard that becomes effective for public companies later this year. The FASB's September 2010 Exposure Draft on multiemployer defined benefit pension plans generated 330 comment letters. Among those who commented were participating employers, plan trustees and auditors, as well as high-profile industry association representatives. The FASB responded to the concerns of the commenters and eliminated the proposed requirement to disclose the employer's multiemployer pension plan withdrawal liability in the final standard. A summary of the disclosures required by the final standard follows:

Key Provisions in the Final ASU 2011-09 (issued Sept. 21, 2011)

The final ASU requires the following disclosures for individually material plans in which an employer participates:

- *Identifying plan information (e.g., plan name and EIN) such that stakeholders may access additional information from an individual plan's public filing, including its financial statements.*
- *The funded status as most recently certified by the plan's actuary, and any resultant funding rehabilitation plans.*
- *Expiration dates of related collective bargaining agreements.*
- *Minimum funding arrangements, if any.*
- *Whether the employer's contributions represent more than 5 percent of the plan's contributions.*
- *Individual contributions made to material plans, and the aggregate of all other contributions to plans considered to be immaterial for each annual period for which an income statement is presented.*
- *Description of the nature and effect of any changes that would impact the comparability of information for each period an income statement is presented.*

Scope and Effective Dates

The disclosures required by the final ASU are effective for public entities that participate in multiemployer defined benefit pension plans for annual periods in fiscal years ending after Dec. 15, 2011. Non-public entities have an additional year to prepare and must comply with the expanded disclosures for annual periods for fiscal years ending after Dec. 15, 2012. Early adoption is permitted.

COMPLIANCE CORNER

NEW – FORM 8955-SSA, ANNUAL REGISTRATION STATEMENT IDENTIFYING SEPARATED PARTICIPANTS WITH DEFERRED VESTED BENEFITS

In 2011, the IRS released the new Form 8955-SSA, Annual Registration Statement Identifying Separated Participants with Deferred Vested Benefits, and related instructions, which replaces the Schedule SSA that was previously filed with the Form 5500.

The new Form 8955-SSA includes a new question regarding participant statements: "Did the plan administrator provide an individual statement to each participant required to receive a statement?" The IRS has a long-standing requirement that each participant listed on the form be provided an individual statement describing the Form 8955-SSA information filed with respect to that person, including:

- *Name and Social Security number of the participant. Note: While there is no guidance at the current time, many believe that a partial number (e.g., xxx-xx-1234) would be acceptable.*
- *Type of annuity (lump sum, term certain annuity, life annuity, etc.) and type of payment (lump sum, annually, monthly, etc.).*
- *For defined benefit plans, amount of the periodic payment.*
- *For defined contribution plans, the total value of the participant's account.*
- *The individual statement also must contain a notice, if applicable, of any benefits that are forfeitable if the participant dies before a certain date.*

Some plans may fulfill this requirement with a quarterly or annual statement that the plan already sends. However, plan sponsors will want to review this requirement with their record keeper to make sure they are comfortable with the information that is being provided.

Penalties apply for plans that fail to file Form 8955-SSA, or send out the required statements. Penalties that are imposed on the person failing to file the required information include:

- *$1 per participant not reported multiplied by the number of days the failure continues unless reasonable cause can be shown as to why the filing was not timely completed. The maximum penalty is $5,000.*
- *$1 per day for failure to file a notification of a change in the status of the plan (such as a change in the plan name, or a change in then name or address of the plan administrator).*
- *$50 per statement for "willful" failure to furnish the statement or "willful" furnishing of a false statement.*

While there are still unanswered questions, it is clearly important for plan sponsors/fiduciaries to communicate with their service providers/actuaries/Form 5500 preparers to discuss the collection of information, preparation and filing of the Form 8955-SSA, as well as to make sure they have complied with the participant notification requirement.

Helpful websites

http://www.dol.gov/ebsa/
http://www.efast.dol.gov
http://www.irs.gov/
http://ebpaqc.aicpa.org
http://asc.fasb.org

For additional resourses or special editions – http://www.perkinsaccounting.com/what-we-do/practice-groups/accounting-firm-employee-benfit-plans.html

To ensure compliance with Treasury Department regulations, we wish to inform you that any tax advice that may be contained in this communication (including any attachments) is not intended or written to be used, and cannot be used for the purpose of (i) avoiding tax-related penalties under the Internal Revenue Code or applicable state or local tax or (ii) promoting, marketing or recommending to another party any tax-related matters addressed herein.

Material discussed is meant to provide general information and should not be acted on without professional advice tailored to your firm's individual needs.