SUMMER 2014
www.bdo.com

GET TO KNOW BDO – EXECUTIVE AND HR SERVICES

# EBP COMMENTATOR

THE NEWSLETTER OF THE BDO EMPLOYEE BENEFIT PLAN AUDIT PRACTICE

## WHEN CAN YOU TOSS THOSE RECORDS?

### Document Retention for Employee Benefit Plans

When clutter in the back file room gets overwhelming (or yet another server is needed to handle a growing set of electronic files), a proverbial question often arises: when can you toss (or delete) those records?

For management of employee benefit plans, the answer is not necessarily the same as for other company records. There are several factors to take into consideration. One of the most oft-cited factors is the record retention mandated by the regulatory agencies with authority over employee benefit plans. However, document retention related to benefit plans goes far beyond just the regulatory requirements. Plan sponsors should also take into consideration their fiduciary responsibilities and possible litigation exposure under the Employee Retirement Income Security Act of 1974 (ERISA) when establishing such a policy.

From a fiduciary standpoint, plan sponsors will want to retain documents in order to support all plan activities. It is important to understand that hiring a third party service provider does not alleviate the plan sponsor's fiduciary responsibilities when it comes to providing documentation support for benefits. Documents are also required as audit evidence during a plan audit. The lack of sufficient appropriate audit evidence may lead to a modified auditor's report or even a disclaimer opinion. Generally, the Department of Labor (DOL) will reject Form 5500, *Annual Return/ Report of Employee Benefit Plan*, filings that contain modified opinions other than the limited-scope disclaimer that is permitted

▶ Read more

## CONTACT:

**BOB LAVENBERG**
Assurance Partner
National Partner In Charge of Employee Benefit Plan Audit Quality
215-636-5576
rlavenberg@bdo.com

**CONTRIBUTORS:**
Darlene Bayardo
Chelsea Smith Brantley
Bob Lavenberg
Ira Mirsky
Joanne Szupka

To suggest future topics, please contact Darlene Bayardo at dbayardo@bdo.com.

**BDO KNOWS EXECUTIVE HR SERVICES**

For more information from BDO's Executive HR Services Practice, please refer to the Compensation and Benefits Alerts at http://www.bdo.com/publications/tax/.

For previously issued *EBP Commentator* newsletters or special editions, please visit http://www.bdo.com/publications/assurance/.

## NEW DOL GUIDANCE FOR LOCATING MISSING PARTICIPANTS AND DISTRIBUTING ACCOUNT BALANCES

The newly-released DOL Field Assistance Bulletin (Subject: *Fiduciary Duties and Missing Participants in Terminated Defined Contribution Plans)* (FAB 2014-01) replaces FAB 2004-02 and provides updated guidance reflecting available search methods and codification of the DOL safe harbor related to distributions to individual retirement accounts (IRAs), while reiterating the fiduciary's responsibility to act prudently and solely in the interest of plan participants.

FAB 2014-01 acknowledges the demise of letter-forwarding services previously available through the Social Security Administration and the IRS and instead suggests using electronic search tools, certified mail, related plan/employer records, and inquiry of designated beneficiaries as four methods that should all be used ("at a minimum") before abandoning a search to locate missing participants. The bulletin also discusses the need for fiduciaries to demonstrate compliance with ERISA fiduciary standards through proper electronic or paper documentation.

If, after performing all of the directed steps, a sponsor decides to distribute without having successfully contacted the participant, FAB 2014-01 identifies potential distribution options and indicates those the DOL finds unacceptable or has strong reservations about fiduciaries using. A rollover into an individual retirement account or annuity is the DOL's preferred distribution method (it also complies with DOL safe harbor regulations), while withholding an amount equal to the entire account balance, (e.g., turning the money over to the IRS) is not considered an acceptable option. While FAB 2014-01 was geared toward terminated defined contribution plans, plan sponsors can easily look to the same guidance for ongoing plans.

CONTINUED FROM PAGE 1

## DOCUMENT RETENTION

under the DOL Rules and Regulations for Reporting and Disclosure under ERISA.

The absence of documents in defense of litigation can have unintended consequences, such as significant costs, fees and unfavorable judgments. There have been numerous judgments against plan sponsors attributed to lack of documentation supporting the participant benefit calculations.

### REGULATORY GUIDANCE

The regulators, including the DOL, the Internal Revenue Service (IRS) and the Pension Benefit Guaranty Corporation (PBGC), have provided guidance regarding the retention of records.

ERISA contains two provisions that address document retention. ERISA Section 107 mandates that every person subject to a requirement to file any report or to certify any information shall maintain records to provide sufficient detail to verify, explain, clarify and check for accuracy and completeness. Such documents shall be retained for at least six years from the date the report is filed. ERISA Section 209 states that an employer should "maintain records with respect to each of its employees sufficient to determine the benefits due or which may become due to such employees." Proposed DOL regulations issued years back state that participant benefit records must be retained "as long as a possibility exists that they might be relevant to a determination of the benefit entitlements of a participant or beneficiary." While the DOL issued a notice several years later indicating that it anticipated withdrawing the proposed regulations and issuing revised amendments, plan sponsors are still waiting for the revised guidance. Until the amendments are published, plan sponsors should consider whether benefit plan records need to be maintained indefinitely.

The IRS statute of limitations runs for a period of three years from the date the tax form is filed for a given year. Additionally, the PBGC requires that each plan sponsor of a terminating plan (in both standard and distress terminations) must maintain all records necessary to demonstrate compliance with the plan termination provisions. Such records must be maintained for six years after the date when the post-distribution certification is filed with the PBGC.

### ELECTRONIC STORAGE

DOL regulations allow a plan to dispose of original paper records once they have been transferred to an electronic recordkeeping system, unless the resulting electronic records would not constitute a duplicate or substitute record under the plan's terms and federal or state law. Electronic storage of data is more convenient and cost effective for plan sponsors. There are no restrictions on maintaining electronic records but plan management should consider the following:

- Electronic storage security – this is very important since employee benefit records contain personal information particularly desirable to identity thieves. Protection of such data may range from server room lock and key to various forms of encryption. Plan sponsors should also consider any applicable state laws governing the protection of personal information.
- Ease of access to records - delays in providing information for a participant request or during litigation may result in negative consequences.
- Continued advances in technology – there are continuing developments in both electronic storage and data encryption methods (for example, the "cloud"). The plan's document retention methods should allow for migration to more current storage systems to assure the long-term preservation of the data integrity and security.

### CREATING A POLICY

Plan sponsors should consider the ERISA requirements in their overall document retention policy. A practical suggestion is to determine the records that currently exist and sort them into two categories: 1) reporting and disclosure records and 2) benefit determination records. Plan sponsors should also consider the format in which the records are retained (e.g., electronically or in paper form) and where the records are stored (e.g., on-site or off-site). Plan sponsors often rely

Read more

CONTINUED FROM PAGE 2

# DOCUMENT RETENTION

on service provider records regarding the historical plan activity. As the determination of the benefits is ultimately the responsibility of the plan sponsor, it would be prudent for the plan sponsor to maintain copies of all reports generated from service provider systems. This step is even more crucial when there are changes in service providers.

ERISA regulatory guidance does not stipulate the types of records required to be retained. It is important to note that a single type of documentation might serve a variety of purposes. Therefore, it is possible that a record might be eligible for disposal under Section 107, but may still need to be retained under Section 209 requirements.

## PENALTIES

Under ERISA Section 107, there are no specific monetary penalties associated with the record retention requirements. Failure to retain documents under Section 209 results in a civil penalty of $10 for each employee with respect to whom such failure occurs, unless it is shown that the failure is due to reasonable cause.

## CONCLUSION

So, back to the original question, how long should records be retained? Depending on the types of record, the best practice may be "indefinitely."

**A list of records to consider retaining includes, but is not limited to:**

| **Reporting and Disclosure Records** (subject to Section 107's six-year retention requirement) |
|---|
| Forms filed with government agencies (e.g., Form 5500, related schedules and attachments, Form 5300 series, determination letter applications) |
| Summary Plan Descriptions |
| Summaries of Material Modifications |
| Participant benefit statements |
| Plan related minutes/resolutions |
| Participant notices (including dates and methods of delivery) |
| Participant elections (e.g., deferral and investment elections) |
| Nondiscrimination test results |
| Plan financial statements |

| **Benefit Determination Records** (subject to Section 209's indefinite retention requirement) |
|---|
| Original plan documents and all subsequent amendments or restatements |
| Any determination letter issued by the IRS |
| All adoption agreements |
| Any opinion/advisory letter issued by the IRS |
| Census information (including age, compensation history, employment history and beneficiary designations) |
| Participant account records and actuarial accrued benefit analyses |
| Recordkeeping/valuation reports at both the plan and participant level |
| Participant loan documentation (including amortization schedules and promissory notes) |
| Participant distribution forms (including special tax notices, election forms and 1099-R forms) |

## MID-YEAR PLAN AMENDMENTS ALLOWED FOR SAFE HARBOR PLANS

As an exception to the general rule that safe harbor 401(k) and 401(m) provisions must generally be adopted at the beginning of a plan year and maintained throughout the full 12-month year, midyear plan amendments are allowed based on the U.S. Supreme Court's decision in *United States v. Windsor* and related IRS guidance in Revenue Ruling 2013-17 and Notice 2014-19 (Notice 2014-37). The Court's decision essentially held that married same-sex couples are treated as married under federal law.

Plan document terms that are inconsistent with the Court's decision or IRS guidance noted above must be amended to comply. For example, a plan document's definition of spouse would need to be amended if the definition is inconsistent (e.g., if "spouse" is defined by reference to the invalidated section of the Defense of Marriage Act [DOMA] or restricted to a person of the opposite sex). A plan amendment would also be needed if retroactive adoption is desired. The applicable amendments generally would need to be adopted by Dec. 31, 2014, or dates stipulated by IRS Revenue Procedure 2007-44 (Q&A-8 of Notice 2014-19), whichever is later.

Read more

# DOES YOUR RETIREMENT PLAN NEED TO CONSIDER A POSSIBLE FBAR FILING?

It is very likely that your company has been evaluating whether it has an obligation to file the 2013 FinCEN Form 114 (which supersedes Form TD-F 90-22.1), *Report of Foreign Bank and Financial Accounts* (FBAR), to the extent that the company has either a "financial interest" in or "signature authority" over any non-U.S. financial accounts or foreign investments. Sponsors of employee retirement plans also need to determine whether their plan has a financial interest in or signature authority over foreign financial accounts (including bank accounts, brokerage accounts, mutual fund trusts or other foreign accounts) exceeding $10,000 (in aggregate) at any time during the calendar year that would require the annual filing of an FBAR.

In many cases, a plan sponsor may struggle to interpret whether the plan has either a financial interest in or signature authority over certain foreign investments or accounts giving rise to an FBAR filing requirement, because these terms were primarily intended to address typical bank accounts and investments, and not necessarily the manner in which various types of retirement plans and trusts are organized. This makes it particularly important for the plan sponsor to carefully document the specific questions and criteria used as part of its procedures for reviewing investment contracts and making inquiries of custodians and investment advisors/managers to assess whether the plan sponsor has an FBAR reporting obligation in connection with any foreign accounts or investments. While it is certainly possible that foreign investments or accounts held in connection with selected plan funds are exempt from the FBAR filing requirements, a plan sponsor should anticipate that it may be required to provide further detail and support for the exempt determination in response to an FBAR compliance audit, or as part of a "reasonable cause" defense against FBAR penalties.

We are aware of several cases where an investment custodian has advised a plan sponsor that certain foreign holdings were not subject to an FBAR reporting obligation because only the custodian had the authority to direct the disposition of foreign assets held in certain accounts. The preamble to the final FBAR regulations does appear to indicate that a custodial arrangement will not be subject to FBAR reporting, even if the account has foreign assets, if the sub-custodians located in foreign jurisdictions will only take direction from the U.S. principal custodian.

However, we would suggest caution in determining whether to rely solely upon the custodian's stated position, as custodians generally are disclaiming their statements as not providing tax or legal advice concerning the FBAR reporting obligations of the plan sponsor.

If it is determined that an FBAR filing is required in connection with investments of an employee retirement plan, the deadline is on or before June 30 of the year immediately following the calendar year being reported. Beginning in 2013, and for all later years, the report must be filed electronically; there is also no extension available. FinCEN Notice 2013-1 extended the due date for filing an FBAR until June 30, 2015, for certain individuals with only signature authority over, but no financial interest in, a foreign financial account. For those plans that are exempt, now is an excellent time to ensure adequate documentation is prepared supporting a conclusion that the plan does not have a filing requirement under application of the Treasury/FinCEN rules.

Further guidance and details are available on the IRS website at http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Report-of-Foreign-Bank-and-Financial-Accounts-FBAR.

## SOCIETY FOR HUMAN RESOURCE MANAGEMENT (SHRM) ANNUAL CONFERENCE

BDO was an exhibitor and participant at the SHRM Annual Conference & Exposition, which was held in Orlando, Florida, June 22 – 25. This conference is sponsored by the world's largest association of HR management professionals. We enjoyed meeting individuals who stopped by our booth to pick up some great giveaways and register for our gift card drawings.

The four-day event included key speakers addressing a variety of topics (including compensation structures) and two DOL listening sessions on the pending proposed rule on overtime exemptions and the impact to businesses. The *SHRM 2014 Employee Benefit* research report was also released during the conference. The report provides the results of a recent survey regarding types of benefits offered by employers. One notable trend highlighted in the report is the continued shift to 401(k)-style defined contribution plans and Roth 401(k) options. The entire report can be viewed at www.shrm.org/research.

## HELPFUL WEBSITES

**http://www.dol.gov/ebsa/**

**http://www.efast.dol.gov**

**http://www.irs.gov/**

**http://ebpaqc.aicpa.org**

**http://asc.fasb.org**

Read more

# ERISA AND AICPA EMPLOYEE BENEFIT PLAN AUDIT QUALITY CENTER CELEBRATE MILESTONES

This year marks significant milestones for employee benefit plans. In 2014, ERISA turns 40 and the AICPA Employee Benefit Plan Audit Quality Center (AQC) celebrates its 10th anniversary.

## ERISA

President Gerald Ford signed the Employee Retirement Income Security Act (ERISA) into law on Labor Day in 1974. This legislation has endured - much like the U.S. Constitution - despite 40 years of changes that the "founding fathers" could not have envisioned, many of which have been noteworthy.

When ERISA was enacted, defined benefit plans predominated; IRC §401(k) did not exist and investments were generally publicly traded instruments evidenced on paper documents. Additionally, in 1974, the average life expectancy was 68 for men and 76 for women.

Today, the number of defined benefit plans has decreased and 401(k) type plans have become the primary retirement vehicle for most U.S. workers. Plan investment options have shifted to now include alternative and hard-to-value investments. Additionally, life expectancies have increased to age 76 (men) and 81 (women) and continue to rise. All of these factors have created significant challenges under ERISA, especially how to continue to protect retirement income when the primary risks have shifted from the employer responsibility to fund a lifetime benefit to the participant responsibility to save sufficient amounts to provide for retirement income.

Changes have also focused on expanding participation and accelerating vesting of employer-provided contributions and benefits, generally by reducing the maximum age that may be imposed for eligibility to 21 and shortening the vesting period to three or six years. In addition, so-called "break-in-service" rules provide for absences from work that will delay or prevent forfeiture of an affected participant's employer-provided contribution or benefit. On the opposite end of the employment cycle, rules have also been put in place to prohibit a plan from imposing a maximum age for participation (e.g., an eligible 70-year-old could become a participant), in part recognizing the ever-increasing life expectancies of plan participants.

What hasn't changed over the past 40 years is the bedrock intent of ERISA: to secure employee income for the retirement years.

## AQC

The AQC was created 10 years ago, in part as a response to DOL inspections that indicated that there were frequent issues with the quality of the required financial statement audits of employee benefit plans. Starting with about a dozen member firms (of which BDO was a founding member), the AQC now boasts over 2,300 firms that are committed to employee benefit plan audit quality. The AQC is a great source of EBP-related resources and materials for practitioners and plan sponsors. Please contact us if we can assist you in obtaining any of these materials!

## ON THE HORIZON FOR REGULATORY AGENCIES

Due to an increase in assets being rolled out of defined contribution and defined benefit plans to other non-ERISA investment vehicles, the DOL's ERISA Advisory Council (Council) plans to examine some of the factors, including employer communications to departing employees, that influence participant decisions to either leave assets in plans or move them.

The Council indicated that it "will examine the types of communications participants are receiving from their employer when they leave employment and whether the quality of the participant's decision-making can and should be enhanced by communication or other plan design features from the plan sponsor. While the plan sponsors may (or may not) have an interest in keeping participants' assets in the plan because, for example, it affects the level of investment or administrative fees allocated to the individual participants, they may be reluctant to provide meaningful communication to the departing participant out of concern for potential fiduciary liability." For more details, see http://www.dol.gov/ebsa/publications/2014issuestatement3.html.

# RECENT RULING: NO PRESUMPTION OF PRUDENCE FOR FIDUCIARIES

The U.S. Supreme Court recently found in Fifth Third Bancorp v. Dudenhoeffer, that ESOP fiduciaries are not entitled to a presumption of prudence under ERISA in connection with the fiduciary's decision to invest in employer securities. Fifth Third Bancorp fiduciaries were sued alleging they breached their fiduciary duty as imposed by ERISA by continuing to invest in Fifth Third stock despite their knowledge of the stock's precarious value. The court held that ESOP fiduciaries are subject to ERISA's prudent expert standard and that the statutory exception related to ESOPs only relieves fiduciaries from the fiduciary duty to diversify plan investments. Although this decision potentially increases fiduciary liability risk, it may be easier for plan sponsors and fiduciaries to defend ERISA stock-drop cases since the Court now holds plaintiffs to a higher burden of proof under the ruling.

Based on this decision, there are several potential considerations for plan sponsors/fiduciaries. Plan sponsors may want to evaluate plan document language mandating investment in employer securities. Additionally, they may also want to contemplate their approach to monitoring investments in employer securities in accordance with ERISA's prudence requirement while recognizing that ERISA's diversification requirement does not apply. Lastly, outsourcing the plan's employer stock fund management to an independent fiduciary may reduce litigation risk related to an insider's knowledge of non-public information.

Read more

## BDO EBP PRACTICE

BDO is nationally recognized in the field of employee benefit plan consulting and auditing. We audit over 1,200 plans nationwide, ranging from 100 participants to close to 300,000 participants. Our engagements are staffed with accountants experienced with all types of audits including defined contribution (401(k), profit sharing, ESOP, and 403(b) plans), defined benefit (pension, cash balance) and health and welfare plans.

In addition, BDO has a National Employee Benefit Plan Audit Group that meets regularly to develop training and guidance and discuss updates in the industry and auditing practices. Our professionals are regular presenters at local, state and national seminars. BDO's professionals continue to be extensively involved with the American Institute of Certified Public Accountants (AICPA) National Conferences on Employee Benefit Plans. Many of our professionals serve in leadership roles in the accounting profession as senior advisors and are active members of several governing boards and CPA societies. For example, our professionals currently serve on various AICPA committees, such as the AICPA's Joint 403(b) Plan Audit Task Force (we are proud to have representation at the chair level for this committee) and the AICPA Technical Standards Subcommittee of the Professional Ethics Executive Committee. BDO's EBP professionals have also served on the AICPA Employee Benefit Plan Audit Quality Center Executive Committee (immediate past chair) and the Employee Benefit Plan Expert Panel in the past.

## ABOUT BDO USA

BDO is the brand name for BDO USA, LLP, a U.S. professional services firm providing assurance, tax, financial advisory and consulting services to a wide range of publicly traded and privately held companies. For more than 100 years, BDO has provided quality service through the active involvement of experienced and committed professionals. The firm serves clients through 52 offices and over 400 independent alliance firm locations nationwide. As an independent Member Firm of BDO International Limited, BDO serves multinational clients through a global network of 1,264 offices in 144 countries.

BDO USA, LLP, a Delaware limited liability partnership, is the U.S. member of BDO International Limited, a UK company limited by guarantee, and forms part of the international BDO network of independent member firms. BDO is the brand name for the BDO network and for each of the BDO Member Firms. For more information, please visit www.bdo.com.