



Pension & Benefits Quarterly

Spring 2018

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“Ask the Experts” Chapter Meeting

On April 19, 2018, the San Francisco Chapter hosted an “Ask the Experts” panel regarding current hot topics for retirement plans. The program featured a panel discussion with four retirement plan experts: (1) **Crystal Johnson**, Principal, CliftonLarsonAllen LLP; (2) **Judith Boyette**, Partner, Hanson Bridgett LLP; (3) **Heather Rabara**, Senior Vice President, Fidelity Investments; and (4) **Jeremy Stoker**, Retirement Plan Adviser, ABD Insurance and Financial Services. The panel was moderated by **Marc Fosse** from Trucker Huss APC.



“ The chapter has been busy this Spring offering quality educational programs and networking opportunities, and there is more to come.”

Kevin Nolt
Trucker Huss

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President's Letter

Bay to Breakers, the NBA finals, warm weather and another wave of required minimum distributions mean Spring is officially here!

Building on the momentum of our highly successful membership event in February, the chapter has been busy this Spring offering quality educational programs and networking opportunities, and there is more to come.

By the time you receive this newsletter, the annual conference that the Western Pension and Benefits Council (WPBC) sponsored with the National Institute of Pension Administrators (NIPA) will have taken place in Las Vegas. WPBC added a fifth track to supplement the four robust retirement-focused tracks offered by NIPA. This was a great opportunity to get continuing education credits, expand your professional network and to spend some time in Vegas. We look forward to feedback from our membership on this event and to continuing our partnership with NIPA for future conferences.

We also are pleased to have our annual half-day conference in San Francisco on Tuesday, June 19th. This year, we are trying something new by moving the conference to the afternoon. The conference will start with lunch and a keynote speaker, move to breakout sessions and end with a happy hour reception. The keynote speaker will address culture, diversity and human resources in the modern workplace. This is an important and timely topic. The conference also includes a session with the Department of Labor (DOL). This is your opportunity to ask the DOL about its hold on the fiduciary rule enforcement and the seven rules on its regulatory agenda for the next year. Come with your questions!

This is our last newsletter of the 2017/2018 program year. I want to take this time to thank the Program Committee for their hard work. The Program Committee members are **Gary Shipper**, Wells Fargo (Co-Chair), **Sandy Purdy**, Lindquist LLP (Co-Chair), **Marc Fosse**, Trucker Huss, **Virginia Sutton**, Johnson & Dugan Insurance, **Jacqueline O'Connor**, Wells Fargo, **Galina Taylor**, WillisTowersWatson, **Claire Eyges**, The Newport Group, **Alison Wright**, Hanson Bridgett, and **Mike Zeld**, Moss Adams. From the ins and outs of HSAs, to the rollercoaster that is the DOL's fiduciary rule, to regulatory insights from a Washington insider, all of our programs this year were top notch. These programs are key to the success of our organization.

Thank you also to all of our chapter sponsors. Your support of our organization enables us to put on the events for our members. You soon will be receiving sponsorship information for the 2018/2019 program year. We have made a few changes to the sponsorship packages including some increased benefits of sponsorship.

Last, I want to thank the members of our Chapter. This organization is about you and for you. Please keep a look out for information this Summer about the events planned for the Fall, including another complimentary membership appreciation event. Details to come!

Kevin Nolt, Director
Trucker Huss, APC

BECOME A WP&BC SAN FRANCISCO CHAPTER 2018-2019 SPONSOR!

SPONSORSHIP REQUIREMENTS

- At least one employee of a prospective sponsor must be a current member of the WP&BC San Francisco Chapter. At least one membership is included in each sponsor package.
- The Chapter will be sensitive to Platinum and Gold level sponsors' interests when matching sponsors to meetings (i.e., avoid meetings with speakers from competing companies).
- Conversely, sponsors must realize they are not buying speaking slots at Chapter Meetings.
- The Chapter Board of Directors reserves the right to decline sponsor applications.
- Sponsors may sign up any time during the 2018-2019 Chapter fiscal year, but benefits may only be enjoyed during that year (July 1, 2018-June 30, 2019) and will not be carried over to the next fiscal year unless specifically authorized by the SF Chapter Board of Directors.

For more information, please contact Terri Fulton, Chapter Account Manager, WP&BC San Francisco Chapter
1900 Point West Way, Suite 222, Sacramento, CA 95815-4706
Phone: (415) 730-5479, Email: terri@wpbcSF.org

PLATINUM \$6,000

(Only 2 slots available)

4 Chapter Memberships
(Total value: \$600)

Exclusive sponsor of Premium Event or
Named Sponsor of all Brown Bag Lunches
Includes:

- Company logo on promotional materials
- Brief remarks by Sponsor's representative (Premium Event)
- Featured display table (Premium Event) or small signage at Brown Bag Lunches

Full page Advertisement in Newsletter
(e-publication)

2 free Chapter Meeting
Member Registrations
(Total value: \$110)
6 free Guest Passes
(Total value: \$570)

Premier listing of company
on the SF Chapter website

Listing in every newsletter
Company name on sponsor
list

4 Registrations (Total value: \$600)
for Premium Event (Transferable to
Chapter Meetings if there is no
Premium Event) plus:

- Company name on invitation and program (differentiated by sponsorship level)
- Company name on sign (differentiated)
- Featured display table to offer promotional material

GOLD \$4,000

3 Chapter Memberships
(Total value: \$450)

Exclusive sponsor of one Chapter
Meeting or several Brown Bag Meetings
Includes:

- Company logo on promotional flier
- Company logo on signs
- Acknowledgement from podium
- Display table with sign

Half page Advertisement in
Newsletter (e-publication)

2 free Chapter Meeting
Member Registrations
(Total value: \$110)
4 free Guest Passes
(Total value: \$380)

Listing of company on the
SF Chapter website by
sponsorship level

3 Registrations (Total value: \$450)
for Premium Event plus:

- Company name on invitation and program (differentiated by sponsorship level)
- Company name on sign (differentiated)
- Shared display table to offer promotional material

SILVER \$2,500

2 Chapter Memberships
(Total value: \$300)

2 free Chapter Meeting
Member Registrations
(Total value: \$110)
4 free Guest Passes
(Total value: \$380)

Quarter page Advertisement
in Newsletter (e-publication)

Listing of company on
the SF Chapter website
by sponsorship level

2 Registrations (Total value: \$300)
for Premium Event plus:

- Company name on invitation and program (differentiated by sponsorship level)
- Company name on sign (differentiated)
- Shared display table to offer promotional material

BRONZE \$1,500

1 Chapter Membership
(Total value: \$150)

1 free Chapter Meeting Member
Registration
(Total value: \$55)
2 free Guest Passes
(Total value: \$190)

Listing of company on the
SF Chapter website by
sponsorship level

1 Registration (Total value: \$150) for
Premium Event plus:

- Company name on invitation and program (differentiated by sponsorship level)
- Company name on sign (differentiated)
- Shared display table to offer promotional material

Member Profile

BASICS

Name: Julie Sachs, FSA, EA

Company: Altman & Cronin Benefit Consultants

Title: Consulting Actuary

Education: BS in Mathematics with high honors from the University of Michigan

Years in the Industry: 13

Please tell us about your first “real” job: I cleaned bathrooms in exchange for dance classes as part of a scholarship program with a pre-professional ballet company.



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BUSINESS BACKGROUND

Nature of your work: I consult with employers who have defined benefit pension plans and help them with plan administration, funding, accounting and reporting.

How you got into the field: I met with a math counselor at Michigan and when they described actuarial science, I was sold.

What you like about the field: I enjoy being a pension actuary because it's multidisciplinary and it helps to ensure participants' retirement dreams.

PERSONAL

Ways you spend free time: You're most likely to find me running trails with my dog and then recovering with activities such as knitting, reading, or baking.

Guiding philosophy: Remember to breathe.

Favorite charities: PAWS Chicago. It's a no kill animal shelter in Chicago and just so happens to be where my dog, Fozzie, rescued me.

Last books read: The Heart's Invisible Furies by John Boyne, When Breathe Becomes Air by Paul Kalanithi, The Power by Naomi Alderman.

Restaurant recommendations: B Patisserie for all the baked goods.

What will you do when you retire: The current dream is to move to the mountains and try to maintain a self-sufficient farm where I can hopefully help rescue more animals and enjoy all of the mountain sports that I love.

Industry Leader Profile

BASICS

Name: Catherine Golladay

Company: Schwab Retirement Plan Services

Title: Senior Vice President, Participant Services and Administration

Years in the industry: 28



AT WORK

What is the nature of your work? I do the important work of helping people save and invest to prepare for retirement. I am responsible for plan implementation as well as helping clients with plan administration, managing participant service centers and support teams, and overseeing third-party advice services and education presenters within Schwab Retirement Plan Services.

What attracted you to join Schwab Retirement Plan Services? When I was looking for a company to join, I recognized that Schwab's core values aligned with my personal values, including hard work and service to others. Schwab has a 'through client's eyes' strategy that is perfectly in sync with my approach to helping participants. Beyond that, the company culture and the opportunities I've been afforded are what have kept me here all these years.

What has been the most surprising thing about your role at Schwab Retirement Plan Services? It wasn't necessarily a surprise to me, but one thing that might be surprising to those new to or outside the industry is that, regardless of personal situation – age, profession, level of accumulated wealth, etc. – overwhelmingly, people are looking for help in maximizing their situation. That is, established professionals want just as much advice as those starting out in their careers. Understanding this desire for personalized help is a driving force behind the work we do at Schwab.

What advice do you have for individuals new to the employee benefits profession?

I would advise new employees, and especially women in the profession, to raise their hands and see the opportunities that open up for them. Being assertive and asking for a shot can be key determining factors in your long-term success and professional fulfillment. One other tip – and something that has been very beneficial to me – is to explore multiple roles within the industry, on both the plan sponsor and participant sides. Broad experiences foster broad perspectives.

What significant changes do you predict for the employee benefits industry in both the near future and the long term? We'll continue to see the industry supporting individuals with a focus on addressing financial stress, especially in the form of managed account services and financial wellness programs. I think we'll also see an even greater emphasis on customer experience. People don't think about their experience by industry – they are comparing their financial services experiences with their experiences using AirBNB, Amazon and a whole host of services and platforms. Employee benefits providers understand this and will increasingly curate a data-driven, personalized experience that combines the best of digital and people. In the long term, it will also be interesting to see how the growth of the 'gig economy' could shape the employee benefits space.

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Industry Leader Profile, *continued*

AT PLAY

When you are not working at Schwab Retirement Plan Services, what is one thing you enjoy doing? I consider myself a foodie, and I really enjoy spending time in my urban garden. To me, eating well is one more way to invest in oneself for the long-term.

What is the most interesting place you have visited and why? Recently, I've had two occasions to travel to Asia, visiting India, Hong Kong and Japan. I very much enjoy learning about and experiencing other cultures up close. And as I mentioned, I'm a foodie, so these have all been amazing culinary destinations!

What movie or play do you recommend and why? I recently saw *Darkest Hour* and would highly recommend it. The movie's portrayal of Winston Churchill showed the power of strong leadership and the hard choices it took for him to unite a nation.

If you could have dinner with a person (dead or alive) that you greatly admire, who would that be and why? I would love the opportunity to have dinner with my late grandmother. Growing up in Ireland, she overcame many hardships and had to rely heavily on others for help. Despite the obstacles, she remained a kind and generous soul. I wish I could have known her better.



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Health and Welfare Updates

By Elizabeth M. Harris
Orrick, Herrington & Sutcliffe LLP

EBSA Issued Proposed FAQs on Implementing Mental Health Parity and Substance Use Disorder Rules

The Employee Benefits Security Administration (EBSA), along with the Internal Revenue Service (IRS) and Health and Human Services (HHS) (together, “the Departments”), have issued proposed guidance in the form of frequently asked questions (FAQs) regarding (1) nonquantitative treatment limitations (NQTLs), and (2) disclosure requirements, in connection with the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA), as amended by the Affordable Care Act and the 21st Century Cures Act. ([Proposed] FAQs About Mental Health and Substance Use Disorder Parity Implementation and the 21st Century Cures Act Part XX).

Nonquantitative treatment limitations

The proposed FAQs were developed consistent with Section 13001(b) of the 21st Century Cures Act. Section 13001(b) requires that the Departments issue clarifying information and illustrative examples of methods that a plan or issuer offering group or individual health insurance coverage can use to disclose information in compliance with MHPAEA. Section 13001(b) also directs the Departments to issue clarifying information and illustrative examples of methods, processes, strategies, evidentiary standards, and other factors that plans and issuers may use regarding the development and application of NQTLs.

Experimental treatment

The FAQs first address whether it is permissible for a plan to deny claims for Applied Behavioral Analysis (ABA) therapy to treat children with Autism Spectrum Disorder under the rationale that the treatment is experimental or investigative. A medical management standard limiting or excluding benefits based on whether a treatment is experimental or investigative is considered a NQTL under MHPAEA. Consequently, a plan may not impose this exclusion more stringently on mental health (MH)/substance-use-disorder (SUD) benefits than it does on medical/surgical benefits.

Dosage limits

The FAQs also provide that a plan does not comply with MHPAEA where it follows professionally-recognized treatment guidelines when setting dosage limits for prescription medications, but the dosage limit set by the plan for buprenorphine to treat opioid use disorder is less than what professionally-recognized treatment guidelines generally recommend. If a plan follows the dosage recommendations in professionally-recognized treatment guidelines to set dosage limits for prescription drugs in its formulary to treat medical/surgical conditions, it must also follow comparable treatment guidelines, and apply them no more strictly, in setting dosage limits for prescription drugs, including buprenorphine, to treat MH/SUD conditions.

ERISA Disclosure requirements for MH/SUD benefits

The FAQs also address several issues relating to ERISA disclosures for MH/SUD benefits. The MHPAEA final regulations provide for express disclosure requirements. Specifically, the criteria for medical necessity determinations with respect to MH/SUD benefits must be made available by the plan administrator or the health insurance issuer to any current or potential participant, beneficiary, or contracting provider upon request. Further, under MHPAEA, the reason for any denial of reimbursement or payment for services with respect to MH/SUD benefits must be made available to participants and beneficiaries.

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Health and Welfare Updates, *continued*

Updated provider network

DOL regulations provide that, if an ERISA-covered plan utilizes a network, its summary plan description (SPD) must provide a general description of the provider network. The list of providers in that SPD must be up-to-date, accurate, and complete (using practical efforts). The list may be provided as a separate document that accompanies the plan's SPD if it is provided automatically and without charge and the SPD contains a statement to that effect.

Health Plan with Low/No Deductible for Male Contraceptives Isn't a HDHP

On March 5, 2018, the IRS issued Notice 2018-12, which provides that plans that cover benefits for male sterilization or male contraceptives before the required minimum deductible is met are not health savings account (HSA) compatible High Deductible Health Plans (HDHPs) under Code Sec. 223(c)(2), so participants in such plans are not eligible to make deductible HSA contributions. However, the IRS provided a transition relief period until 2020.

Background

Code Sec. 223 permits eligible individuals to deduct contributions to HSAs. HSA-compatible HDHPs cannot pay for benefits until the required minimum deductible has been met, except for specified "preventive services" that are listed under both HSA rules (IRC Section 223) and the Affordable Care Act (ACA). The ACA requires non-grandfathered plans (including HDHPs) to cover preventive care on a first-dollar basis (i.e., before the deductible is met).

Preventive services listed under HSA rules include annual physicals, routine prenatal and well-child care, immunizations, and screening devices and tests. ACA preventive care guidelines include contraceptive methods, sterilization procedures and related patient education for women, but do not include benefits or services relating to a man's reproductive capacity, such as sterilization or contraceptives.

The issue has been highlighted recently because at least four states have laws requiring health insurance policies to cover benefits for male sterilization or male contraceptives before the deductible is met (Illinois, Maryland, Oregon and Vermont). Other policies or group health plans also include these benefits even though not required by law.

Because Notice 2018-12 provides that benefits for male sterilization or male contraceptives are not preventive care under the Social Security Act (SSA), and no applicable guidance issued by the IRS provides that these benefits are preventive care within the meaning of Code Sec. 223(c)(2)(C), a health plan that provides benefits for male sterilization or male contraceptives before satisfying the minimum deductible for an HDHP under Code Sec. 223(c)(2)(A) does not constitute an HDHP, regardless of whether the coverage of such benefits is required by state law.

Transition relief

The IRS is aware that certain states require benefits for male sterilization or male contraceptives to be provided without a deductible and that certain states may wish to change their laws in response to the notice, but may be unable to do so in 2018. Until these states are able to change their laws, residents of these states



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Health and Welfare Updates, *continued*

may be unable to purchase health insurance coverage that qualifies as an HDHP, and would be unable to deduct contributions to an HSA.

Consequently, Notice 2018-12 provides transition relief for periods before 2020 (including periods before the issuance of Notice 2018-12), to individuals who are, have been, or become participants in, or beneficiaries of, a health insurance policy or arrangement that provides benefits for male sterilization or male contraceptives without a deductible, or with a deductible below the minimum deductible for an HDHP. For these periods, an individual will not be treated as failing to qualify as an eligible individual under Code Sec. 223(c)(1) merely because the individual is covered by a health insurance policy or arrangement that fails to qualify as an HDHP under Code Sec. 223(c)(2) .

IRS Disaster Relief Available to Disaster Victims in American Samoa

Following a presidential declaration of a major disaster for the portions of one or more states or territories, the IRS, DOL, and Pension Benefit Guaranty Corporation (PBGC) customarily issue releases providing for the extension of various reporting and filing deadlines for employee pension and welfare benefit plans for victims of the disaster in the affected states. The IRS has extended the deadlines for American Samoa, which is a territory covered by parallel PBGC relief.

The filing deadlines on or after February 7, 2018, and on or before June 29, 2018, are extended until June 29, 2018. (AS-2018-01, 3/7/2018).

IRS Issues Quarterly Underpayment Rate Used in EBSA's VFC Program

EBSA has a voluntary fiduciary correction (VFC) program that allows plan fiduciaries to avoid the imposition of civil penalties by self-correcting breaches and reporting them to EBSA. The VFC program uses the federal tax underpayment rate (defined in Code Sec. 6621(a)(2)) to calculate 'lost earnings' and 'restoration of profits'.

The underpayment rate for April 1, 2018 to June 30, 2018 is 5%. The rate for January 1, 2018, to March 30, 2018, was 4%. (Rev. Rul. 2018-7, 2018-13 IRB; IR2018-43).

Disability Plan Benefits Properly Denied

In Cooper v. Metropolitan Life Ins. Co., No. 16-3429 (8th Cir. 2017), a plan administrator properly denied a participant's claim for long-term disability (LTD) benefits where the plan administrator considered all the medical records, attending physicians statement reports, comments, and other information submitted by the participant and her physicians. The plan administrator also consulted with a neutral, independent doctor, with the same specialty as the participant's attending physician, who contradicted the participant's doctor about her claim for disability benefits. Consequently, the Court found a permissible basis for denying the participant's LTD benefit claim.

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HEALTH AND WELFARE UPDATES

Legislative & Regulatory Update Chapter Meeting



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At the March 7, 2018, Chapter meeting, two public policy experts from Charles Schwab presented a legislative and regulatory update entitled, "Policy and Politics in the New Washington." The presenters, bringing a wealth of experience and information to the meeting, were:

- **Michael Townsend**, Vice-President of the Office of Legislative and Regulatory Affairs at Charles Schwab & Co., Inc.; and
- **Karla Maschmeier**, Director and Corporate Counsel in the Office of Corporate Counsel for Charles Schwab & Co., Inc.

Mr. Townsend began and closed the meeting. He has worked in Washington D.C. for nearly 25 years and noted he has never seen such an unconventional approach to the Oval Office. He noted that in the capital city, the new reality reflects each day as its own 24-hour circus and a president that prefers operating without a script - using Twitter as his primary means of communication. Yet, Mr. Townsend pointed out that the market seems unconcerned and that President Trump has had some significant wins in his first year in office, e.g., one Supreme Court and 12 circuit court justices confirmed, tax overhaul passed and the individual mandate repealed.

Mr. Townsend also suggested that the following are the key themes to watch in 2018: new rules and guidance on the new tax law, more Congressional retirements, the Mueller investigation results, activity in North Korea, next steps to resolve immigration issues, the agenda of the Securities Exchange Commission (SEC) and the 2018 Congressional elections.

Ms. Maschmeier focused on the status of the Department of Labor (DOL) fiduciary rule. She reminded the audience that the applicability of the Best Interest Contract and other exemptions had been extended to July 1, 2019. She also suggested that harmonizing the DOL and SEC rules may be a possibility, given the two new "sheriffs" in town, i.e., Jay Clayton, the new head of the SEC, and Preston Rutledge, the new head of the Employee Benefits Security Administration. She also surveyed current court cases being decided regarding the DOL fiduciary.

The event was held on the top floor of the Wells Fargo corporate headquarters. A special thanks to Vanguard as sponsor of the event.





Legislative & Regulatory Update Chapter Meeting, *continued*

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LEGISLATIVE & REGULATORY UPDATE

“Ask the Experts” Chapter Meeting, *continued*

On the morning of the event, the Securities and Exchange Commission (SEC) issued proposed fiduciary duty regulations covering brokers and investment advisers who are providing recommendations to retail customers. After providing a brief summary of the SEC's new rules, the panel jumped into a discussion about various issues facing retirement plans, including:

- Whether vacating the Department of Labor (DOL) fiduciary duty regulations would impact how the experts are advising their clients going forward, and are we sad or glad the DOL fiduciary rules keep being cancelled.
- How the experts are advising their clients about the use of health savings accounts for retirement.
- Stable value funds versus money market in a rising rate economy.
- Best practices for data security for retirement plans and their service providers and what to look for in service provider agreements about obligations for maintaining data security.
- Steps to reduce risks of litigation or reputational harm relating to data security issues.

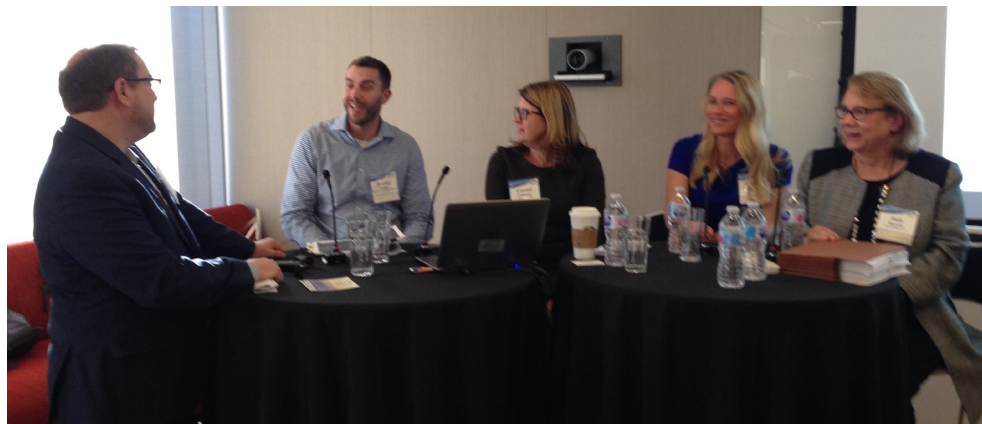
The meeting was held at the offices of Hanson Bridgett. After the panel discussion, members enjoyed a social hour, networking and catching up with colleagues.

A special thanks to Fidelity and T. Rowe Price, the event sponsors.



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From left to right: Marc Fosse, Jeremy Stoker, Crystal Coleman, Heather Rabara, Judy Boyette



“Ask the Experts” Chapter Meeting, continued

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“ASK THE EXPERTS” MEETING

Qualified Retirement Updates

By Ami Givon
GCA Law Partners LLP

Modified Procedures for Pre-Approved Cash Balance Plans: In Revenue Procedure (Rev. Proc.) 2018-21, released March 16, 2018, the Internal Revenue Service (IRS) modified the procedures set out in Rev. Proc. 2015-36 and Rev. Proc. 2017-41 for the issuance of opinion and advisory letters for pre-approved master, prototype, and volume submitter cash balance plans. Among the modifications, which became effective March 16, 2018:

- Master and prototype nonstandardized cash balance plans and volume submitter cash balance plans that are submitted for approval under Rev. Proc. 2015-36 for the second remedial amendment cycle (beginning February 1, 2013 and ending April 30, 2020) may provide that the rate used to determine interest credits is a rate equal to the actual rate of return on plan assets (even if the return includes returns on regulated investment companies held by the plan).
- Master and prototype nonstandardized cash balance plans and volume submitter cash balance plans that are submitted for approval under Rev. Proc. 2017-41 for the third and subsequent remedial amendment cycles may provide that the rate used to determine interest credits is a rate based on (not just equal to) the actual rate of return on plan assets (and even if the return includes returns on regulated investment companies held by the plan).
- References to “hypothetical interest credits” in Rev. Proc. 2015-36 are changed to “interest credits,” consistent with the terminology in Rev. Proc. 2017-41.

Retroactive User Fee Reduction for Form 5310 Applications: In Rev. Proc. 2018-19, issued on March 14, 2018, the IRS modified Rev. Proc. 2018-4, which included changes to the user fee schedules applicable to tax-qualified plans, by reducing from \$3,000 to \$2,300 the user fee for applications on Form 5310, Application for Determination for Terminating Plan. The reduction is retroactive to January 2, 2018. Applicants who paid the \$3,000 user fee will receive a refund.

Required Minimum Distributions for Missing 403(b) Plan Participants and Beneficiaries: In a memorandum issued on February 23, 2018, the IRS directed Employee Plans examiners not to challenge an Internal Revenue Code (Code) section 403(b) plan as failing to satisfy the rules of Code section 403(b)(10) for the failure to commence or make required minimum distributions to a participant or beneficiary if the plan has taken the following steps to locate the intended recipient:

- Searched plan and related plan, sponsor, and publicly-available records or directories for alternative contact information;
- Used any of these search methods:
 - o a commercial locator service;
 - o a credit reporting agency; or
 - o a proprietary internet search tool for locating individuals; and
- Attempted contact via U. S. Postal Service certified mail to the last known mailing address, and through appropriate means for any additional address or contact information (including email addresses and telephone numbers).

If these steps have not been completed, examiners may challenge a 403(b) plan for a violation of Code section 403(b)(10) for the failure to make a required minimum distribution to a participant or beneficiary.

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Qualified Retirement Updates, *continued*

This memorandum corresponds to the one issued on October 17, 2017, directing Employee Plans examiners when not to challenge a qualified plan for a violation of the required minimum distribution rules of Code section 401(a)(9) for the failure to commence or make required minimum distributions to missing participants and beneficiaries.

This guidance, which is not subject to use, citation or reliance, has been incorporated into the Internal Revenue Manual.

Department of Labor (“DOL”) Fiduciary Rule Developments: On March 15, 2018, a three-judge panel of the United States Court of Appeals for the Fifth Circuit released its opinion in U.S. Chamber of Commerce v. DOL concluding that the DOL’s fiduciary rule, including the “Best Interest Contract Exemption” and other related exemptions, should be vacated in their entirety. The court majority opinion held that the DOL did not have the authority to adopt the new fiduciary advice definition, since it was inconsistent with ERISA’s definition of “fiduciary,” and that the DOL’s adoption of the rule failed to pass the tests of reasonableness, as required by the federal Administrative Procedures Act.

At the time this newsletter was finalized, it remained unclear whether the DOL would petition the Supreme Court to review the Fifth Circuit decision. (The DOL did not request the three-judge panel for a rehearing of the matter by the April 15, 2018 deadline for doing so.)

In light of the Fifth Circuit’s decision, the DOL, on May 7, 2018, announced in Field Assistance Bulletin (FAB) 2018-2 an extension, until further notice, of its enforcement policy issued in FAB 2017-2. Under FAB 2018-2, the DOL “will not pursue prohibited transaction claims against investment advice fiduciaries who are working diligently and in good faith to comply with the impartial conduct standards for transactions that would have been exempted in the BIC Exemption and Principal Transactions Exemption, or treat such fiduciaries as violating the applicable prohibited transaction rules.” FAB 2018-2 stated that the Treasury Department and the IRS have confirmed that a similar non-enforcement policy will apply with respect to the prohibited transaction excise tax provisions under Code section 4975.

DOL FAB on Exercise of Shareholder Rights and Economically Targeted Investments: On April 23, 2018, the DOL issued FAB 2018-01 to assist the Employee Benefits Security Administration’s national and regional offices in addressing potential questions about Interpretive Bulletin (IB) 2016-01, relating to the exercise of shareholder rights and written statements of investment policy, and IB 2015-01, relating to “economically targeted investments” – investments selected for the economic benefits, such as those that derive from environmental, social and governance (ESG) factors, apart from the investment return for the plan.

Shareholder Engagement Activities

FAB 2018-01 affirms the DOL’s statement in IB 2016-01 that an investment policy that contemplates engaging in shareholder activities intended to monitor or influence the management of corporations in which the plan owns stock can be consistent with a fiduciary’s obligations under ERISA. Such investment policies are consistent with ERISA’s fiduciary obligations if the responsible fiduciary concludes there is a reasonable expectation that such activities (by the plan alone or together with other shareholders) are likely to enhance the economic value of the plan’s investment in that corporation after taking into account the costs involved. However, that statement was not intended to indicate that an individual plan investor may routinely incur significant expenses in shareholder activities where the plan is just one of many investors. Similarly, IB 2016-01 was not meant to imply that plan fiduciaries, including appointed investment managers, should routinely incur significant plan expenses to, for example, fund advocacy, press, or mailing campaigns on shareholder resolutions, call special shareholder meetings, or initiate or actively sponsor proxy fights on environmental or social issues relating to such companies. Nevertheless, if a plan fiduciary is considering “a routine or substantial expenditure of plan

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QUALIFIED RETIREMENT UPDATES

Continued pg. 16

Qualified Retirement Updates, *continued*

assets to actively engage with management on environmental or social factors, either directly or through the plan's investment manager, that may well constitute the type of 'special circumstances' that the IB 2016-01 preamble described as warranting a documented analysis of the cost of the shareholder activity compared to the expected economic benefit (gain) over an appropriate investment horizon."

ESG Investment Considerations

FAB 2018-01 re-iterated the DOL's previously-expressed views that plan fiduciaries may not sacrifice investment return or take on additional investment risk to use plan investments to promote collateral social policy goals, but may use collateral considerations as "tie-breakers" for an investment choice. But, FAB 2018-01 explained, collateral issues ordinarily are or may present economic considerations that should be considered by a prudent fiduciary along with other relevant economic factors to evaluate the risk and return profiles of alternative investments. Fiduciaries must not readily treat such factors as economically relevant when making an investment decision. As the DOL explained, "it does not ineluctably follow from the fact that an investment promotes ESG factors, or that it arguably promotes general market trends or industry growth, that the investment is a prudent choice . . ."

FAB 2018-01 also clarified that, while IB 2016 noted that an investment policy statement (IPS) may include policies concerning the use of ESG factors to evaluate investments, it is not required to do so. If an IPS does include such policies or guidelines, fiduciaries must adhere to them, but only if doing so is consistent with their ERISA fiduciary duties.

FAB 2018-01 further explained that, in the case of an ERISA section 404(c) plan, the inclusion of an ESG-themed investment alternative in response to participant requests does not require the plan platform to remove or forgo the addition of non-ESG themed investments. However, a decision to favor a fiduciary's own policy preferences in selecting an ESG-themed investment as the plan's qualified default investment alternative would raise questions about the fiduciary's compliance with ERISA's duty of loyalty.

Securities and Exchange Commission (SEC) "Best Interest" Proposals: On April 18, 2018, the SEC voted to release a set of proposed rules and interpretations "designed to enhance the quality and transparency of investors' relationships with investment advisers and broker-dealers while preserving access to a variety of types of advice relationships and investment products." Unlike the DOL's fiduciary rule, the SEC's proposed rules are not specific to relationships with retirement plan investors.

The SEC's proposals include:

- **Regulation Best Interest.** A broker-dealer making a recommendation to a retail customer would have a duty to act in the best interest of the retail customer at the time the recommendation is made, without putting the financial or other interest of the broker-dealer ahead of the retail customer. A broker-dealer would discharge this duty by complying with each of three specific obligations:
 - o Disclose to the retail customer the key facts about the relationship, including material conflicts of interest;
 - o Exercise reasonable diligence, care, skill, and prudence, to (i) understand the product; (ii) have a reasonable basis to believe that the product is in the retail customer's best interest; and (iii) have a reasonable basis to believe that a series of transactions is in the retail customer's best interest; and
 - o Establish, maintain and enforce policies and procedures reasonably designed to identify and then, at a minimum, to disclose and mitigate, or eliminate, material conflicts of interest arising from financial incentives; other material conflicts of interest must be at least disclosed.

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Qualified Retirement Updates, *continued*

- **Investment Adviser Interpretation.** A proposed interpretation reaffirms, and in some cases clarifies, certain aspects of the fiduciary duty that an investment adviser owes to its clients.
- **Form CRS.** Investment advisers and broker-dealers, and their respective associated persons, would be required to provide retail investors a client relationship summary (CRS) through a standard disclosure document. The CRS would highlight key differences in the principal types of services offered, the legal standards of conduct that apply to each, the fees a customer might pay, and certain conflicts of interest that may exist.
- **Restriction on use of “adviser” or “advisor.”** Certain broker-dealers, and their associated persons, would be restricted from using, as part of their name or title, the terms “adviser” and “advisor” as part of their title with retail investors, because doing so may mislead retail customers into believing their firm or professional is a registered investment adviser. Investment advisers and broker-dealers, and the financial professionals who work for them, would be required to be direct and clear about their registration status in communications with investors and prospective investors.

Pension Benefit Guaranty Corporation (PBGC) Proposed Rule Regarding Owner-Participant Changes to Guaranteed Benefits and Asset Allocation: On March 7, 2018, the PBGC issued a proposed rule that would conform its regulations to changes made by the Pension Protection Act of 2006 affecting guaranteed benefits and asset allocation when a plan has one or more participants with certain ownership interests in the plan sponsor. The proposed rule would amend PBGC’s benefit payment regulation by replacing the guarantee limitations applicable to substantial owners with a new limitation applicable to majority owners. Additionally, the proposed rule would amend PBGC’s asset allocation regulation by prioritizing funding of all other benefits in priority category 4 ahead of those benefits that would be guaranteed but for the new, owner-participant limitation. The proposed rule also clarifies that plan administrators may continue to use the simplified calculation in the existing rule to estimate benefits funded by plan assets.



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Western Pension and Benefits Council

San Francisco Chapter Conference

Date: Tuesday, June 19,

Location: SPUR Urban Center
654 Mission Street

Time: 12:30 - 4:30 PM

Join us for an afternoon packed with networking and educational sessions for the Benefits Professional. Lunch will be provided.

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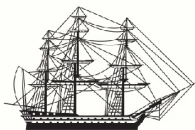


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Contact Kevin Nolt to volunteer!

Spring 2018

The Newsletter welcomes contributions from its members. If you would like to submit a topical benefits-related article for an upcoming issue, please contact the chapter at info@wpbcfsf.org.

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