



Pensions on PEACHTREE 2023





LEGISLATIVE AND REGULATORY UPDATE

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CONGRESS



FREEDOM TO INVEST IN SUSTAINABLE FUTURE ACT (PROPOSED)

- Would amend ERISA to provide:
 - A fiduciary may consider:
 - ESG investment factors in carrying out investment decisions/strategy, etc.
 - “Collateral” ESG factors as tie-breakers between investments that are expected to have similar returns/risk over appropriate time
 - Fiduciary must maintain documentation to demonstrate/substantiate its actions
 - Nothing in ERISA precludes an ESG investment selected in accordance with the above from being a QDIA, if it otherwise qualifies under the QDIA regs
- Will this get anywhere? Probably not



THE IRS



2023 MAJOR INCREASES IN LIMITS

Section	Limit	2021	2022	2023
415(b)	Max DB Benefit	\$230,000	\$245,000	\$265,000
415(c)	Annual Addition	\$58,000	\$61,000	\$66,000
401(a)(17)	Compensation	\$290,000	\$305,000	\$330,000
402(g)	401k, 403b, 457b Defer	\$19,500	\$20,500	\$22,500
414(v)	Catch-up	\$6,500	\$6,500	\$7,500
408(p)(2)	SIMPLE Deferral	\$13,500	\$14,000	\$15,500
414(q)	HCE	\$130,000	\$135,000	\$150,000
416(i)	Key EE Officer	\$185,000	\$195,000	\$215,000
408(k)(2)	SEP Minimum	\$650	\$650	\$750
401(l)	Taxable Wage Base	\$142,800	\$147,000	\$160,200



FAILURE TO RESTATE: THE WAY IT WAS

- On more than one occasion, the IRS said that the failure to timely restate a preapproved plan was a disqualifying document failure
 - IRS provided VCP submission kits
 - IRS offered umbrella Audit CAP correction with PPA restatement
- In 2019, the IRS changed EPCRS to allow self-correction of many document failures
 - Some question about whether it would apply to late restatement



IRS CHANGES ITS TUNE

- May 23, 2022 Employee Benefits News (EBN)
- Failure to timely restate isn't a disqualifying defect
 - The plan is no longer a preapproved plan
- Discussed the consequences in terms of:
 - Cycle 2 DB restatements due 7/31/2020
 - Cycle 1 403(b) restatements due 6/30/2020
- Didn't discuss late Cycle 3 DC restatements due 7/31/2022
 - But it's easy to extrapolate



WHAT DO YOU MEAN IT ISN'T A DOCUMENT FAILURE?

- EPCRS defines a document failure as a plan provision, or the absence of a provision, that on its face causes the plan to violate the Code.
 - Including the failure to timely adopt a required interim amendment
 - Such as the hardship amendment for 401(k) plans
- The Code requires that plan documents spell out what plans must do and restrict those things it cannot do
- The Code does not require periodic restatements
 - Restatements are no longer part of IDPs



EXAMPLE

- Employer has valid Cycle 2 (PPA) defined contribution volume submitter plan
 - Employer entitled to reliance
- Employer timely adopted all amendments to properly reflect plan operations
 - No reliance because the IRS didn't review
 - Assume the amendments themselves satisfied all requirements of the law



EXAMPLE (CONT.)

- Employer doesn't sign a Cycle 3 document
- The Cycle 2 (PPA) document, with the various amendments, correctly states all things the plan must do and forbids those things the plan cannot do
- There is no document failure
 - No required correction
 - No VCP



AM I GOOD? NOT SO FAST!

- The EBN says of a late DB restatement:
 - “If a restatement is not adopted by the Cycle 2 deadline, an employer's retirement plan is no longer a pre-approved plan...”
 - “The employer is no longer considered a prior adopter because the employer hasn't timely adopted a pre-approved plan for the cycle immediately preceding the opening of the current cycle.”



AM I GOOD? NOT SO FAST! (CONT.)

- The EBN says of a late DB restatement (cont.):
 - “The plan therefore is an individually designed plan, and as a result, the plan must be reviewed to determine if there are form defects”



DEFECT?! WHAT KIND OF DEFECTS?

- “Any prior interim and discretionary amendments made while the plan was a pre-approved plan will need to be reviewed and corrected if they do not meet the requirements of IRC 401(a).”
- “The rules for individually designed plans (Rev. Proc. 2016-37, section 5) would govern the remedial amendment period applicable for those, and all other required changes, to determine how far back the form error occurred if one exists.”



KEY DIFFERENCE BETWEEN IDP AND PREAPPROVED

- Preapproved plan interim amendments:
 - Good faith standard
 - So long as amendment is timely and adopted in good faith with the intent of maintaining qualified status, remedial amendment period (RAP) is extended to end of cycle
 - If employer determines reasonably in good faith that amendment is not required (but it actually is), that also is correctable within extended RAP
- IDP Amendments
 - Perfection
 - Amendment must satisfy law as of the end of RAP



END OF RAP FOR IDPS (NON-GOVERNMENTAL)

New Plan

- 15th day of 10th month after end of first plan year
- Could be longer depending on tax return deadline

Interim Amendments Required for Law Changes

- December 31 of 2nd calendar year beginning after item appears on Required Amendments List

Discretionary Amendments

- December 31 of 2nd calendar year beginning after amendment adopted (or, if later, effective)

SO WHAT DOES THAT MEAN FOR LATE RESTATEMENTS?

- EBN: “Any prior interim and discretionary amendments made while the plan was a pre-approved plan will need to be reviewed and corrected if they do not meet the requirements of IRC 401(a).”
- Example:
 - Brand X documents prepares a hardship amendment for a 401(k) plan
 - The amendment satisfies the good faith requirements that apply to preapproved plans
 - The amendment does not satisfy the requirements that apply to IDPs
 - Document failure that must be corrected



HOW FAR BACK DO WE HAVE TO GO?

- Failure to timely restate DB:
 - Go back to Cycle 1 document
 - Based on 2006 Cumulative List
- Failure to timely restate DC:
 - Go back to Cycle 2 document
 - Based on 2010 Cumulative List
- That's when you last had reliance



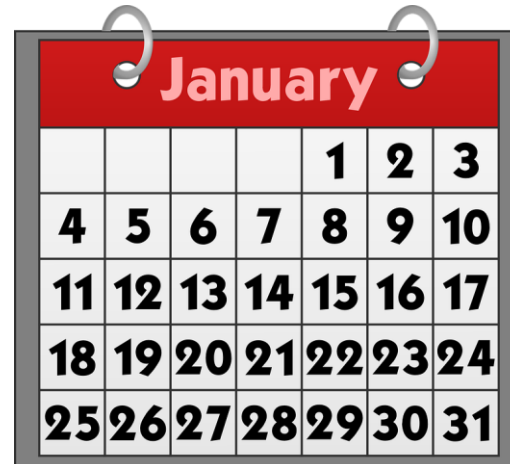
NEW PROPOSED FORFEITURE RULES (TREAS. REG. § 1.401-7)

- Forfeitures in DC plans must be used by the end of the plan year following the plan year in which they arise to:
 - Reduce employer contributions
 - Pay administrative expenses
 - Reallocate to participants
- Regulation recommends specifying more than one use, because a failure to use the forfeitures timely will be a disqualifying failure
- In other words: if they “reduce employer contributions,” and you have no employer contributions, allocate them as an employer contribution before the end of the following plan year!



NEW PROPOSED FORFEITURE RULES (TREAS. REG. § 1.401-7)

- Proposed to be effective as of plan years beginning on or after 1/1/2024
- Forfeitures in existence as of 1/1/2024, no matter how old, are treated as if they arose on 1/1/2024, and must be used by the end of 2025.
- Plans may rely on these regulations while they are proposed



ELECTRONIC SPOUSAL CONSENT – PROPOSED REGULATIONS §1.401(A)-20

- Existing regulations require spousal consent be in the physical presence of notary or plan representative
- IRS notices gave us COVID exceptions for 2020 – 2022
 - Spouse can sign remotely if witnessed by
 - Notary public under state law electronic notary rules
 - Plan representative under IRS rules
- IRS proposed regulations to make the changes permanent with small modifications
 - Taxpayers can rely on the proposed regulations



ELECTRONIC WITNESS OF SPOUSAL CONSENT

- Witness by notary must comply with state laws
 - Plan must also allow in-person notarization [new]
 - Live audio video technology
- Witness by plan representative
 - Must be live audio video technology allowing direct interaction
 - Record and retain conference
 - Present valid photo ID during session and electronically transmit legible copy of signed document to representative
 - Representative must acknowledge and return to spouse



RMD PROPOSED REGULATIONS

- Released in February 2022
- Still waiting for final regulations
- Key definitions; rules for trusts
- If participant died after RBD, annual RMDs continue to beneficiary
 - 10-year cutoff, except for eligible designated beneficiaries



IRS NOTICE 2022-53 ON RMD RULES

- Acknowledges that proposed regulations were issued in 2022 and that regulations on new SECURE rules won't be finalized in time for 2022 RMDs
- Issue: did beneficiaries of participants who died after SECURE was effective and after they had begun RMDs need to take distributions in 2021?



IRS NOTICE 2022-53 ON RMD RULES (CONT.)

- Must understand types of beneficiaries and RMD rules under SECURE 1.0 to understand the issue:
 - Eligible Designated Beneficiaries (EDBs):
 - Spouses, minor children, disabled persons, chronically ill persons, and individuals who are not more than 10 years younger than the participants
 - Distributions may be spread over the EDB's lifetime if they begin within 1 year of the participant's death
 - "Other Designated Beneficiaries" or "ODBs": individuals who are not EDBs
 - ODBs must complete distributions of participant's account by 12/31 of year containing the 10th anniversary of the participant's death

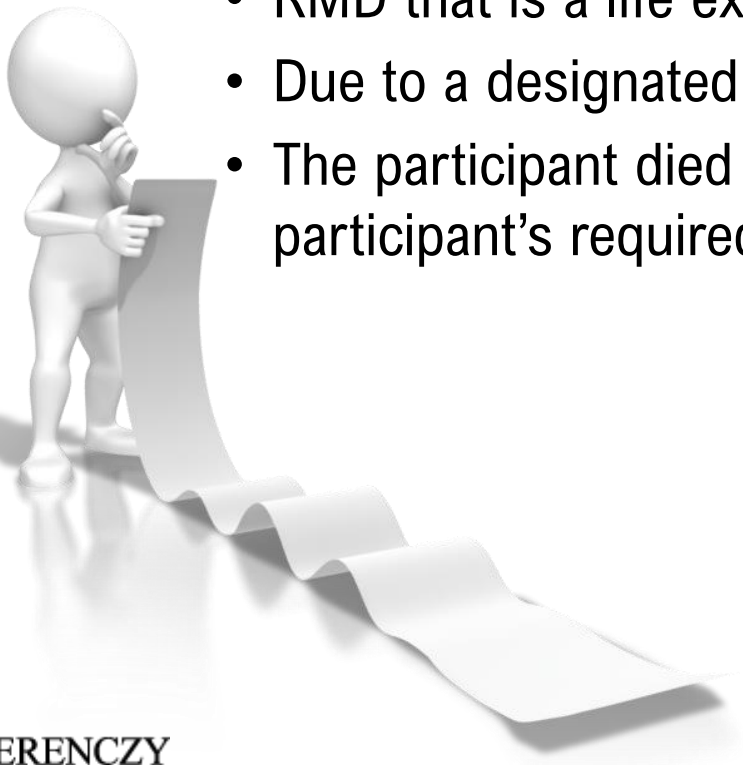
IRS NOTICE 2022-53 ON RMD RULES (CONT.)

- Example: Eve's required beginning date was in 2015, and she has been receiving RMDs. She dies in 2020, after the SECURE effective date. Beneficiary is her daughter, Abby, who is an ODB
 - Proposed regulations provide that Abby must continue to receive RMDs in 2021 under single life table, based on her life expectancy, but must get full balance by not later than 12/31/2030
- But some interpreted SECURE to say that no RMDs are needed so long as ODBs are fully paid out by the end of the year in which the 10th anniversary of the participant's death occurs
- So, Abby got no RMD in 2021. But under Proposed Regs (not issued until 2022), she should have!



IRS NOTICE 2022-53 ON RMD RULES (CONT.)

- Notice gives relief:
 - For 2021 and 2022, no operational failure and no penalty tax for failure to pay “specified RMDs,” defined as:
 - RMD that is a life expectancy payment due from a DC or an IRA;
 - Due to a designated beneficiary following the participant’s death; and
 - The participant died in 2020 or 2021, after SECURE Effective Date and after the participant’s required beginning date



IRS NOTICE 2022-53 ON RMD RULES (CONT.)



- One More Thing ...
 - Under SECURE, if an EDB dies:
 - The entire account must be paid to the EDB's beneficiary (the "successor beneficiary") by 12/31 of the year containing the 10th anniversary of the EDB's death; but
 - If the EDB was taking life expectancy distributions (which was permitted without the 10th anniversary issue pre-SECURE), they must continue to the successor beneficiary in the meantime
 - So, relief also offered to successor beneficiaries (no failure, no penalty) if:
 - The RMD is a life expectancy payment due from a DC or IRA;
 - The RMD is due to a successor beneficiary of an EDB;
 - The EDB died in 2020 or 2021 and after the SECURE Effective Date; and
 - The EDB was taking life expectancy distributions



SUBSTANTIALLY EQUAL PAYMENTS NOTICE 2022-06

- Updates 2002 guidance on what constitutes substantially equal payments
 - Allows distributions before 59 ½ to avoid 10% penalty tax
- 3 ways to show substantially equal payments
 - RMDs
 - Table goes back to age 10
 - Fixed amortization
 - Fixed annuitization

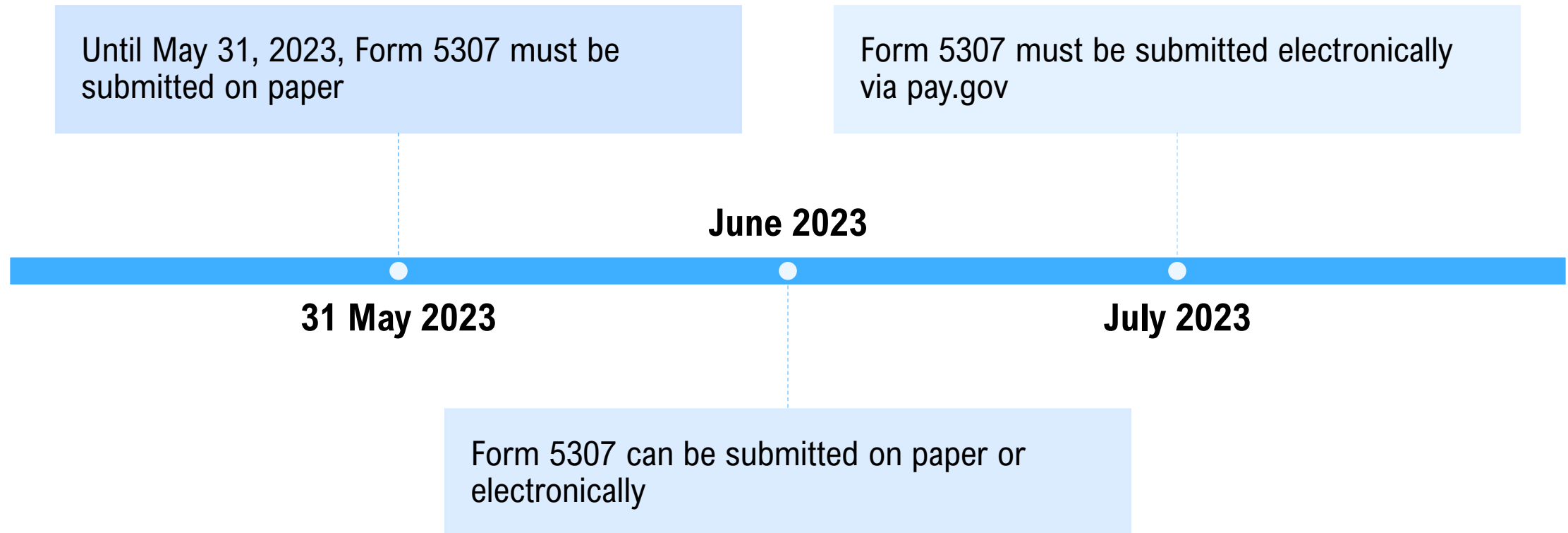


403(B) PLAN DETERMINATION LETTERS

- IRS will start issuing determination letters to 403(b) plans
- IDP uses Form 5300
- Modifications to preapproved uses Form 5307
- Phased in submissions
 - Can submit 6/1/2023 if EIN ends in 1, 2, or 3
 - Can submit 6/1/2024 if EIN ends in 4, 5, or 6
 - Otherwise can submit 6/1/2025
- Details in Rev. Proc. 2023-4



MORE ON 5307 SUBMISSIONS (QUALIFIED OR 403(B))



THIRD CYCLE DB (ANNOUNCEMENT 2023-6)

- IRS approved preapproved 3rd Cycle DB plans at the end of March
- End of 3rd Cycle is 3/31/2025
- That is deadline for restatement of preapproved DB plans and FDL applications for new new IDPs
- Based on 2020 Cumulative List (it'll only be 5 years old by then!)

2025

IRS NOTICE 2023-27: NFTs

- Notice to taxpayers that the Treasury and IRS intend to consider nonfungible tokens (NFTs) to be collectibles, at least in some circumstances
 - “NFT” = “unique digital identifier that is recorded using distributed ledger technology and may be used to certify authenticity and ownership of an associated right or asset”
- Intended approach: “Look-through analysis”
 - Does the NFT represent a right to something that, in itself, would be a collectible?
 - If so, the NFT is a collectible



IRS NOTICE 2023-27: NFTS

- Effect of classification as collectible:
 - For IRAs and individually-directed accounts in qualified plans: investment in collectible is considered to be a taxable distribution to the extent of the purchase value of the collectible
 - Could be disqualifying failure in qualified plan if the distribution is impermissible
- Collectibles under the Code:
 - Art, rugs, antiques, metals/gems, stamps, coins, alcoholic beverages, “any other tangible personal property specified by the Secretary”
- Comments requested on a variety of topics to make this proposed rule administrable – due 6/19/2023



THE DOL



2023 PLAN YEAR FORM 5500

- Big change: DC plans will count participants with accounts – should reduce the number of plans subject to audit
 - The AICPA does not approve!
 - For first plan year, participant count is based on # of participants with accounts on the last day of the year; otherwise, based on count at first day of the year
- Addition of new Schedule for Groups of Plans (Schedule DCG) if plans are being aggregated for Form 5500 purposes – need to have consistent Plan Administrator and named fiduciary
- Addition of new Schedule MEP for multiple employer plans (including PEPs)

2023 PLAN YEAR FORM 5500 (CONT.)

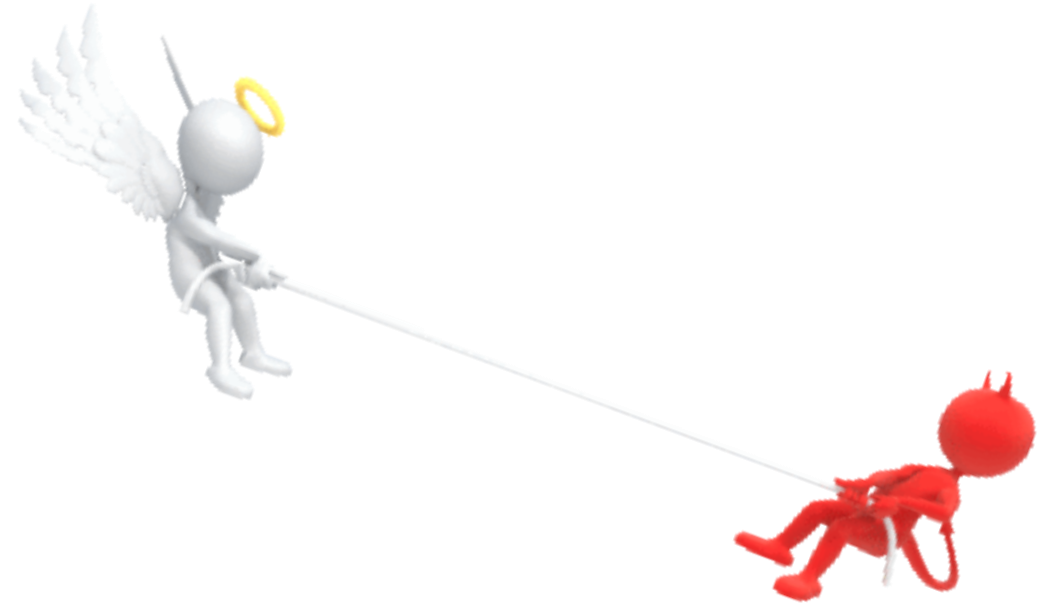
- More detail on administrative expenses
- Additional IRS-based compliance questions
- Additional reporting for PBGC-covered DB plans



VOLUNTARY FIDUCIARY CORRECTION PROGRAM

Pensions on
PEACHTREE
2023

- DOL issued proposed changes to VFCP
- Good news! It allows self-correction of late deposits and no excise tax (and no Form 5330 filing)!
- Bad news! You have to:
 - Fill out forms on the DOL website
 - Keep a ton of paperwork
 - Catch it and correct quickly
 - No reliance until finalized



PROPOSED VFCP CHANGES: DETAILS

- The only breach eligible for self-correction is late deposits of deferrals, participant contributions, and loan repayments
- Requirements to be eligible for self-correction:
 - Correct amounts plus earnings must be deposited to the plan within 180 days of when they should have gone in
 - The amount of lost earnings (which must be calculated using the VFCP Calculator on the DOL's website) cannot be more than \$1,000



PROPOSED VFCEP CHANGES: DETAILS OF SELF-CORRECTION COMPONENT (“SCC”)

- The Procedure:
 - The correcting party is called the “Self-Corrector”
 - The Self-Corrector must:
 - Complete and sign a checklist (the “SCC Checklist”) provided in the proposed regulation;
 - Put together documentation outlining the failure and its correction (using the formal VFCEP application for how this is done);
 - File an on-line notice with the DOL advising it that self-correction has occurred;
 - Sign (or have its authorized representative or another fiduciary of the plan) sign a Penalty of Perjury Statement
 - Send all of the above to the Plan Administrator, who must keep it all for 6 years
 - If an authorized representative does any of this, need letter of authorization

PROPOSED VFCEP CHANGES: DETAILS (CONT.)

- The DOL will then email an acknowledgement of receipt of the online filing and a summary of the Self-correction Notice
 - Documents will promise not to initiate a civil investigation into the failure
- Note: when calculating earnings, must use the date on which deferrals were taken from payroll as the “start date” – any grace period or “normal deferral timing” does not apply
- Note: self-correction without the DOL filing and the other details of the SCC program does not eliminate the risk of DOL adverse action and/or PT and excise tax waiver
 - SECURE 2.0, §305(b)(2) says that EPCRS correction of repayments is enough to avoid PT issue (but not sure when that is effective)

PROPOSED VFCP CHANGES: OTHER THAN SCC

- Permits innocent Plan Officials to apply for VFCP relief even if there was a criminal violation
 - E.g., theft of plan assets by third party. Plan fiduciary can apply for VFCP resolution of the potential breach
 - Must report criminal activity to law enforcement
- Provides for “bulk filing” to cover same problematic transaction in several plans (akin to EPCRS Group VCP filings)
 - Provides language for the notice to employees needed for normal VFCP corrections (DOL says that practitioner-drafted notices are often insufficient)
- Removes restriction that prohibits use of the PTE more than once every three years



FINAL RULE ON ECONOMIC, SOCIAL, AND GOVERNANCE

- Pendulum swings back
- New rule: “Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights,” allows plans to consider ESG factors in selecting plan investments
 - ESG fund can be QDIA
- Encourages exercising proxy rights
- Lots of states have filed suit to overturn these regulations
- Congress voted to overturn the regulation; President Biden vetoed



ERISA LITIGATION



ONGOING LITIGATION ISSUE

- Just how hard is it for a plaintiff-participant to argue that a fiduciary breached its duties due to excess fees, bad investment options, etc.?
 - The Supreme Court, in Dudenhof, mandated that plaintiffs need to make specific claims regarding fiduciary breaches in ESOPs that enabled the court – even just looking at the complaint – to determine that a breach was plausible. The standard is set pretty high
 - In other cases, the courts have looked at whether the plaintiff has to prove that the breach caused damages or the defendant has to show that it didn't
 - The Supreme Court did not review this case, so the circuit courts of appeal are still split
 - The Supreme Court also ruled that an individual participant in a DC Plan can sue for damages suffered only by him/her, not by the plan in total

ONGOING LITIGATION ISSUE

- The latest case is Hughes v. Northwestern, a 403(b) plan case involving two recordkeepers, a gazillion fund options, and revenue sharing
- The question the Supremes considered was: What does the plaintiff have to show in its complaint for the case to withstand a motion to dismiss?



SUPREME COURT FROM 2022: HUGHES V. NORTHWESTERN

- Plan offered both institutional and retail fund options
- Participant/plaintiffs alleged that the fiduciaries breached their duties by retaining more than one recordkeeper for the 403(b) plan, offering retail funds (and not institutional funds), and paying excessive fees
- Question: does a good selection of prudent funds insulate the fiduciaries from liability in relation to bad funds?



HUGHES V. NORTHWESTERN

- On the issue of the funds:
 - Several cases have historically looked at offerings and intimated that, if there are sufficient “good funds,” the fact that there may be some less effective funds is not a breach – that is, that the reasonableness of the funds and fees would be based on the totality of the portfolio
 - e.g., the Hecker v. Deere court said that the presence of a wide range of expense ratios plus the self-directed brokerage accounts in the plan meant that the participants could bypass the “bad choices” of the fiduciaries and invest wherever they wanted
 - In the words of the Appellate Court: offering a diverse menu “eliminated any claim that plan participants were forced to stomach an unappetizing menu”

HUGHES V. NORTHWESTERN

- On appeal, the Supreme Court rejected that position
 - “Fiduciaries must conduct their own independent evaluation to determine which investments may be prudently included. . . **If fiduciaries fail to remove an imprudent investment within a reasonable time, they breach their duty**”
 - Plan investments must be evaluated *both* individually and relative to the entire plan
 - In other words, the fiduciaries have a duty to remove *any* imprudent investment option, regardless of what other options were offered in the plan
- The case was remanded back to the Appellate Court for reconsideration in light of this standard



HUGHES V. NORTHWESTERN – ON REMAND TO 7TH CIR.

- Note: this is dealing with a motion to dismiss
 - Case has not yet been tried on the merits
 - Should the case be allowed to proceed to trial?
 - What is the standard for a motion to dismiss (i.e., what is the minimum that the plaintiffs must show to avoid the dismissal and be allowed to go to trial)?
 - Court rejected Dudenhof high standard outside an ESOP context: plaintiffs must allege enough facts to support a “plausible allegation” of fiduciary breach to survive the motion to dismiss



HUGHES V. NORTHWESTERN – ON REMAND

- So, what is the standard that the plaintiff must meet in its complaint?
 - Plaintiffs must provide enough facts to show that there were *alternatives available* that would have enabled the fiduciary to avoid the breach of duty (e.g., to lower fees for the plan)
 - The defendant may then explain why it reasonably did not such alternate actions
- Again, if the plaintiff wins at this level, all it means is that the case goes to trial
 - Plaintiff must then prove what it alleged in the complaint
 - Defendant may then provide proof that the allegation is incorrect or that its reason not to take the suggested action was supportable or that there were no damages

HUGHES V. NORTHWESTERN – ON REMAND

- The point is: this case will make it easier for the plaintiffs to sue for fiduciary breach if the plan is not an ESOP ... and harder for plan sponsors to have the case dismissed before trial



QUESTIONS?

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