Late Breaking Developments

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SOCIETY OF ACTUARIES
Antitrust Compliance Guidelines

Active participation in the Society of Actuaries is an important aspect of membership. While the positive contributions of professional societies and associations are well-recognized and encouraged, association activities are vulnerable to close antitrust scrutiny. By their very nature, associations bring together industry competitors and other market participants.

The United States antitrust laws aim to protect consumers by preserving the free economy and prohibiting anti-competitive business practices; they promote competition. There are both state and federal antitrust laws, although state antitrust laws closely follow federal law. The Sherman Act, is the primary U.S. antitrust law pertaining to association activities. The Sherman Act prohibits every contract, combination or conspiracy that places an unreasonable restraint on trade. There are, however, some activities that are illegal under all circumstances, such as price fixing, market allocation and collusive bidding.

There is no safe harbor under the antitrust law for professional association activities. Therefore, association meeting participants should refrain from discussing any activity that could potentially be construed as having an anti-competitive effect. Discussions relating to product or service pricing, market allocations, membership restrictions, product standardization or other conditions on trade could arguably be perceived as a restraint on trade and may expose the SOA and its members to antitrust enforcement procedures.

While participating in all SOA in person meetings, webinars, teleconferences or side discussions, you should avoid discussing competitively sensitive information with competitors and follow these guidelines:

• **Do not** discuss prices for services or products or anything else that might affect prices
• **Do not** discuss what you or other entities plan to do in a particular geographic or product markets or with particular customers.
• **Do not** speak on behalf of the SOA or any of its committees unless specifically authorized to do so.
• **Do leave** a meeting where any anticompetitive pricing or market allocation discussion occurs.
• **Do alert** SOA staff and/or legal counsel to any concerning discussions
• **Do consult** with legal counsel before raising any matter or making a statement that may involve competitively sensitive information.

Adherence to these guidelines involves not only avoidance of antitrust violations, but avoidance of behavior which might be so construed. These guidelines only provide an overview of prohibited activities. SOA legal counsel reviews meeting agenda and materials as deemed appropriate and any discussion that departs from the formal agenda should be scrutinized carefully. Antitrust compliance is everyone’s responsibility; however, please seek legal counsel if you have any questions or concerns.
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# Acts one and two

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SECURE ACT’s relief for closed and frozen plans: Benefits, rights and features (BRFs)

• Deemed to pass benefit, right, or feature (BRF) rules if meet the following conditions:
  • Pass BRF testing during the year the plan was closed, plus the following 2 years
  • Once closed, there are no subsequent amendments that favor highly compensated employees (HCEs)
  • For the 5-year period preceding closing the plan, there were no substantial increases in coverage or value of BRF (unless grandfathered)
  • Substantial increase in coverage → more than 50% increase
  • If closed before April 5, 2017, deemed to satisfy these requirements
SECURE ACT’s relief for closed and frozen plans: Testing with aggregation and on a benefits basis

• New alternative rules to pass nondiscrimination testing (NDT) and coverage testing through aggregation of DB & DC plans, and on a benefits basis

• DB plan must meet the following requirements:
  • Closed group
  • Passes NDT and coverage testing for plan year it was closed plus 2 following plan years
  • Plan is not amended after it is closed to significantly favor HCEs
  • For the 5-years preceding the date the plan was closed, the plan did not have any substantial increase in coverage or value of benefits provided

• DC plan must either (i) provide matching contributions, (ii) provide 403(b) annuity contracts funded by either matching or nonelective contributions, or (iii) be an ESOP
SECURE ACT’s relief for closed and frozen plans: Replacement DC plans

• Can test a DC plan on a benefits basis if there are
  • Frozen DB plan benefits for a select group of participants
  • Additional DC plan benefits provided to same group of participants

• Must meet the following requirements:
  • Plan provides DB-replacement contributions for closed group
  • Passes 410(b) Classification Test for 3-Year period after closure
  • No subsequent discriminatory amendments
  • No increase in coverage or value of benefits for past 5 years (unless grandfathered)
SECURE ACT’s Relief for Closed and Frozen Plans: Minimum participation testing relief

• Minimum participation testing is deemed to be satisfied if the following are met:
  • Plan is either amended to (i) cease all benefit accruals, or (ii) provide future benefit accruals only to a closed group of participants
  • Plan satisfied the minimum participation test as of the effective date of the plan close or benefit freeze date
  • Plan had no substantial increase in coverage or value of benefits for 5-year period preceding close date
    • If the amendment to close or freeze the plan was adopted before April 5, 2017, requirement is deemed to be satisfied
Highlights of 2020 IRS guidance

March 6, Notice 2020-14
Provides the 2020 Cumulative List of Changes in Plan Qualification Requirements for Pre-Approved Defined Benefit Plans (2020 Cumulative List)

May 28, Notice 2020-35
Delayed until July 15, 2020, deadlines for certain filings and notices if due on or after March 30, 2020, including:
• Key deadlines for multiemployer plans (zone certifications and zone notices, adoption and update to funding improvement plans (FIPs) or a rehabilitation plans (RPs)
• CSEC plans’ contribution deadlines and certifications
• Application dates for funding waivers and substitute mortality tables

June 3, Notice 2020-42
Provides temporary relief from the physical presence requirement for participant elections required to be witnessed by a plan representative or a notary public if made during 2020

June 19, Notice 2020-50
Provides guidance on enhanced access to plan distributions and loans:
• Expands categories of “qualified individuals” eligible for CARES Act distributions and loan treatment
• CRD can be included in income in equal installments over the three-year period of 2020, 2021 and 2022
• Can have up to 3 years to repay CRD and effectively undo the tax consequences of the distribution

June 23, Notice 2020-51
Guidance relating to 2020 RMD waivers allowed by the CARES Act, as well as relief for rollovers

July 30, Update to Q&A 15
Q&A addresses partial plan terminations and employees termed/rehired in 2020 due to COVID-19:
• Employees generally are not treated as having an employer-initiated severance from employment for purposes of calculating the turnover rate used to help determine whether a partial termination has occurred during an applicable period, if they’re rehired by the end of that period
• As such, employees terminated due to COVID-19 and rehired by the end of 2020 generally would not be treated as having an employer-initiated severance from employment for purposes of determining whether a partial termination occurred during the 2020 plan year
August 6, Notice 2020-61
Guidance on DB single-employer provisions of the CARES Act; clarifications included:
• The extended due date can apply to contributions in excess of the minimum requirement
• A contribution made after the due date of the plan sponsor’s tax filing (with extensions) will not be deductible for that tax year
• An election made to apply the prior plan year’s AFTAP may be revoked
• The 2020 AFTAP must still be certified, even if it does not apply for 2020, because it will be the basis for the 2021 presumptive AFTAP

August 6, Notice 2020-62
Provides updated safe harbor explanations to satisfy disclosure requirements to recipients of eligible rollover distributions (402(f) notices) to reflect recent changes under the SECURE Act, including the increase in RMD’s RDA to 72

September 3, Notice 2020-68
Provides guidance on certain changes under the SECURE Act, including participation of long-term, part-time employees in 401(k)s

September 10, Announcement 2020-17
For required contributions with an extended due date under the CARES Act, the due dates for reporting and paying excise taxes under IRC sections 4971(a)(1) and 4971(f)(1) are postponed until January 15, 2021
CARES Act’s delayed due date: Why not wait?

- Maximum deductible rules unchanged; must contribute by plan sponsor’s tax filing due date to recognize for that fiscal year
- No change in Form 5500 due date for 1-1 plan years; thus, plan sponsor will need to file SB twice
- Interest still accrues up to date of contribution
- January 1 may not really be an option
- Cannot recognize as accrued for PBGC VRP; fixed with press release on September 21 (see TU 20-2), but will need to file twice
PBGC lump sum assumptions

• September 9, 2020, PBGC published a final rule modernizing the assumptions used to determine de minimis lump sum benefits in PBGC-trusteedsingle-employer plans
• ‘Modernization’ → switching to 417(e) assumptions
• Instead of publishing the ‘legacy’ interest rates each month, table in appendix C will replicate the PBGC’s methodology
• Why you might care:
  • Some plans (relatively few, per the PBGC) use PBGC legacy lump sum interest rates
  • These plans may need to be amended
• Effective January 1, 2021
Professionalism requirements

ASOP No. 4 - Measuring Pension Obligations and Determining Pension Plan Costs or Contributions

- Second exposure draft issued Dec. 2019; comment deadline was July 31, 2020; may not see next round until 2021
- Solvency value changed from “investment risk defeasement measure” to “low-default-risk obligation measure”
- Many other changes in there

ASOPs No. 27 & 35 - Selection of Economic (27) & Demographic and Other Noneconomic (35) Assumptions for Measuring Pension Obligations

- New standard effective Aug. 1, 2021
- New sections on combined effect of assumptions, reviewing prior assumptions, phasing assumptions and documentation
- Includes disclosure of why prescribed assumptions set by another party don’t conflict with what the actuary considers reasonable
- Expanded standards for mortality

ASOP No. 56 - Modeling

- DOES apply to pensions
- Addresses reliance on models developed by others; must understand the model and its intended purpose
- Must disclose if have “limited ability either to obtain information, or to understand the underlying workings of the model”; still must make a “reasonable attempt” to have a basic understanding
- May rely on experts
- Includes documentation and disclosure

U. S. qualification standard

- Exposure draft issued September 2, 2020; comments due October 30
- Changes to description of basic education requirements
- No more references to SOA specialty tracks
- Sections relating to EAs were rewritten
HEROES Act
Proposal to Stabilize Pension Interest Rates

• Narrow the 10% interest rate corridor to 5%, effective 2020

• Delay the phase-out until 2026, then, as under current law, expand the corridor by 5% annually until it attains 30% in 2030 (remaining there)

• Place a 5% floor on the 25-year interest rate segments
• 15-year amortization, instead of 7 year-amortization, effective for plan years starting in 2020.

• Fresh start for the 2020 plan year, so all shortfall amortization bases (and installments) are reduced to zero and the entire unfunded liability is amortized over 15 years.
HEROES Act Status

• Chances of enactment quite uncertain for 2020.
Thole v. U.S. Bank

In *Thole v. U.S. Bank*, the Supreme Court held that participants in a DB plan cannot generally sue plan fiduciaries with respect to alleged fiduciary mismanagement of plan assets. The conventional wisdom is that this case relates to participants’ rights with respect to overfunded DB plans, but the holding of the case goes further than that and can possibly apply with respect to some underfunded plans too.
Thole v. U.S. Bank

• “[Lead plaintiffs] Thole and Smith have received all of their monthly benefit payments so far, and the outcome this suit would not affect their future benefit payments. . . . The plaintiffs therefore have no concrete stake in this lawsuit.”
Thole v. U.S. Bank

• “According to the plaintiffs’ *amici*, plan participants in a defined-benefit plan have standing to sue if the mismanagement of the plan was so egregious that it substantially increased the risk that the plan and the employer would fail and be unable to pay the participants’ future pension benefits. . . . But the plaintiffs do not assert that theory of standing in this Court. . . . It is true that the plaintiffs’ complaint alleged that the plan was underfunded for a period of time. **But a bare allegation of plan underfunding does not itself demonstrate a substantially increased risk that the plan and the employer would both fail.**” [emphasis added]
Definition of Fiduciary

• **Fiduciary definition.**
  • Background: 1975 regulation. Five-part test: (1) investment-related recommendation made (2) on a regular basis, (3) pursuant to a mutual understanding that (4) the recommendation will be a primary basis for investment decisions, and (5) the recommendation will be individualized to the recipient.
  • 2016 Obama DOL rule. Fiduciary status triggered by any individualized investment-related recommendation, including sales pitches.
  • 2018: court invalidates Obama rule, returning the law to 1975 regulation.
  • Preamble to 2020 proposed exemption: generally would resurrect 2016 rule. Likely invalid.
  • Biden: almost certainly will try to resurrect 2016 rule. Legal authority unclear.
Definition of Fiduciary

• **Effect of fiduciary definition change.** Very broad effects of 2016-type rule. Examples of fiduciary actions under such a rule:
  
  • Brainstorming with clients about liability driven investing.
  • Suggesting possible investment managers to interview.
  • Informal discussions of market trends.
Tax Equalization Proposals

• **Equalizing the Tax Benefits of Defined Contribution Plans:** *Unlikely but it can’t be ruled out due to endorsement by Biden and recent publicity.* For example, assume that two employees, one in the 35% bracket and one in the 22% bracket, each contributes $1,000 to a 401(k) plan. The first employee has tax savings of $350 by being able to exclude that contribution from income, while the savings for the second employee are only $220. The tax benefits of all employees could be equalized by converting the exclusion from income to a credit, such as a 22% tax credit, so both employees are taxed on the $1,000 but are both given a $220 credit attributable to their contribution.

• **Saver’s Credit enhancements.** More likely, increases and refundability of the Saver’s Credit will be pursued.
Required Minimum Distributions ("RMDs")

- CARES Act relief for 2020 RMDs for IRAs and DC plans, including 2020 distributions attributable to 2019.

- Can individuals who took RMDs in 2020 roll them back in? Yes, if rolled back by August 31, 2020:
  - Relief from the 60-day rollover period.
  - Relief is granted from the rule limiting IRA rollovers to one per year if rolled back to the same plan.
  - Relief from the prohibition on rolling over periodic payments made from plans.
  - Relief for non-spouse beneficiaries who received 2020 RMDs.
Coronavirus-Related Distributions

For 2020 (through 12/30/20), the CARES Act:

• Provides an exception to the 10% early distribution penalty for coronavirus-related distributions ("CRDs") from all types of plans (including defined benefit plans, for example) and IRAs;

• Exempts such CRDs from the 402(f) notice requirements and mandatory 20% withholding applicable to eligible rollover distributions (no exemption from 10% withholding regime);

• Permits the individual to include income attributable to CRDs over the three-year period beginning with the year the distribution would otherwise be taxable; and

• Permits recontribution of CRDs to a plan or IRA within three years, in which case the recontribution is generally treated as a direct trustee-to-trustee transfer within 60 days of the distribution.
Coronavirus-Related Distributions – Continued

- To be a CRD, a distribution (not including a deemed distribution of a loan amount) must be made on or after 1/1/20 and before 12/31/20 to an individual (either a participant or a beneficiary) (a “qualified individual”):
  - who is diagnosed with the virus SARS-CoV-2 or with coronavirus disease 2019 (COVID-19) by a test approved by the Centers for Disease Control and Prevention,
  - whose spouse or dependent is diagnosed with such virus or disease by such a test, or
  - who experiences adverse financial consequences as a result of being quarantined, being furloughed or laid off or having work hours reduced due to such virus or disease, being unable to work due to lack of child care due to such virus or disease, closing or reducing hours of a business owned or operated by the individual due to such virus or disease, or other factors described in IRS Notice 2020-50.
Coronavirus-Related Distributions – Continued

• Unless it has knowledge to the contrary, an employer may rely on a certification by a participant that he or she satisfies at least one of the factors listed in the CARES Act or Notice 2020-50 for eligibility for a CRD.

• A qualified individual is permitted to designate a distribution as a CRD, even if the distributing plan chooses not to make available CRDs.

• The IRS has stated: In general, it is anticipated that eligible retirement plans will accept recontributions of coronavirus-related distributions, which are to be treated as rollover contributions. However, if a plan does not accept any rollover contributions, the plan is not required to accept recontributions of coronavirus-related distributions.
Coronavirus-Related Distributions – Continued

• This special tax treatment would be limited to aggregate distributions of $100,000 per individual.

• 401(k), 403(b), and governmental 457(b) plans would be permitted, but not required, to make CRDs even if distributions would not otherwise be permitted (i.e., no severance from employment, hardship, etc.). It does not appear that they would be required to accept any repayments, but it is not clear.

  • Distributions not otherwise permitted generally would not be permitted until the employer formally agrees to amend the plan to permit some or all such distributions. For example, the employer might decide to not to allow such distributions or to limit them to $50,000.

  • The actual plan amendment may generally be delayed until the last day of the 2022 plan year (2024 for governments), and would be retroactive to the date that the plan began implementing the new rules.
ESG Factors

The Department of Labor has issued a proposal regarding the ability of an ERISA fiduciary to consider environmental, social, and governance (“ESG”) factors in making decisions regarding investments.

- **Tie-breakers unlikely.** The new regulation would impose documentation requirements if ESG factors are considered as a “tie-breaker.” The preamble notes DOL is very skeptical that any two investments would actually be otherwise identical.

- **QDIA prohibited.** The proposal continues the position the DOL took in 2018 that ESG-themed investments cannot be used as QDIAs.

- **May not be possible to consider participant preferences.** DOL’s 2018 guidance supports the notion that a plan can add an ESG-themed investment to a defined contribution plan menu in response to participant requests. The proposed regulation does not incorporate this idea. Rather, the proposal would require fiduciaries to use only objective risk-return criteria and document its selection and monitoring of an investment.
Proxy Voting

DOL has issued a proposal regarding proxy voting under ERISA. The proposal states that in deciding whether and how to exercise shareholder rights:

A fiduciary must not “subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to any non-pecuniary objective, or sacrifice investment return or take on additional investment risk to promote goals unrelated to those financial interests of the plan’s participants and beneficiaries or the purposes of the plan.”

In addition, DOL states its view in the preamble to the Proxy Voting Proposal that “fiduciaries must be prepared to articulate the anticipated economic benefit of proxy-vote decisions in the event they decide to vote.”
SECURE 2.0
PBGC Financial Status

• PBGC’s multiemployer program projected to become insolvent by FY 2026 or FY 2027. The multiemployer program’s projected deficit as of the end of FY 2029 is $82.3 billion.

• PBGC’s single employer program is likely to have a surplus of $46.3 billion by the end of FY 2029 (compared to its September 30, 2019 surplus of $8.7 billion). This is obviously a huge projected surplus, reflecting an increase of $19.6 billion from the projected surplus of $26.7 billion a year ago. I would, however, add one important note about this projection.

  • The one development that could really threaten the single employer program would be a signal that the PBGC’s single employer program could be tapped to pay for multiemployer plan benefits. A signal that single employer plans could be forced to pay for multiemployer plan benefits would greatly accelerate the exodus from the system, leaving PBGC with primarily unhealthy companies that cannot afford to exit the system.
DOL has issued an interim final rule implementing the SECURE Act requirement that participants in ERISA-governed individual account plans must be provided, at least once a year, a lifetime income illustration.

- The rule is applicable to pension benefit statements furnished after September 18, 2021. DOL states that it intends to issue a final rule prior to the effective date, with an adoption date that is sufficiently in advance of the effective date to minimize compliance burdens.
- The illustration must show the single life and QJSA (at 100%) equivalent to the account balance.
- Assumes the participant is the older of age 67 or actual age, with no projected account earnings or contributions.
- All other assumptions specified.
- Fiduciary protection.
2020 VIRTUAL ANNUAL MEETING & EXHIBIT