Second Quarter 2021

Aon Quarterly Update

Retirement Legal Consulting & Compliance

In this Issue

Editor's Note

Spring has arrived, bringing with it—renewed optimism for all of our readers!

This edition of the *Quarterly Update* opens with reporting on the American Rescue Plan Act of 2021 (ARPA), the latest round of coronavirus-related economic relief legislation. As ARPA's funding relief is for both single employer and multiemployer pension plans, we anticipate the relief will likely have a significant impact on both plan sponsors and their plans in the near future.

What a difference a quarter makes! In our last *Quarterly Update*, we reported on the final November 2020 regulations in the area of "environmental, social, and corporate governance" (ESG) investments. With the partisan change in the White House in January, we update our reporting on these ESG regulations with the Department of Labor's (DOL's) announcement that it would not be enforcing these regulations (along with many others)!

We next offer a trio of complementary articles. After years of *ad hoc* missing participant guidance through the DOL audit process, we are pleased to include an article on the DOL's long-awaited, definitive guidance regarding best practices for addressing missing participant issues. We follow with an article reporting on the DOL's court actions to compel Metropolitan Life Insurance Company to comply with an administrative subpoena in connection with the DOL's investigation of annuity payments due pension plan retirees. Finally, we close this trio with an article regarding the importance of marital status with respect to the administration of qualified retirement plans (e.g., for purposes of determining the normal form of payment, obtaining spousal consent if required, and the availability of optional payment forms).

In recent editions of the *Quarterly Update*, we have reported on the challenges that plan sponsors and fiduciaries face in addressing their cybersecurity responsibilities for defined contribution (DC) plan data, including the rise in cybersecurity-related litigation. In this edition, we add to our reporting with an article on the U.S. Government Accountability Office's report on fiduciary issues involving cybersecurity and DC plans and its recommendation that the Secretary of Labor develop and issue guidance that identifies minimum expectations for mitigating cybersecurity risks.

We've previously reported on the increased interest by plan sponsors in, and the use of, mandatory arbitration provisions in their qualified retirement plans in recent years. We close out this edition with an article on a recent Second Circuit Court of Appeals decision that appears to split with the Ninth Circuit decision we previously covered. As we know our readers have continued interest in this area, we will continue to monitor the courts, including a pending Seventh Circuit case.

If you have any questions or need any assistance with the topics covered, please contact the author of the article or Tom Meagher, our practice leader.

Susan Motter
Associate Partner

Prior Issues

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Empower Results®

ARPA to the Rescue—Significant Pension Funding Relief

by Ben Bergeson, Matthew Bond, Eric Keener, and Beverly Rose

On March 11, 2021, President Biden signed the American Rescue Plan Act of 2021 (ARPA), the latest round of coronavirus-related economic relief legislation. Among other provisions, ARPA includes funding relief for both single employer and multiemployer pension plans. This relief will likely have a significant impact on these plans and their sponsors in the near and intermediate term. ARPA also provides special funding rules for community newspaper pension plans and expands the restrictions on tax-deductibility of executive compensation under Section 162(m) of the Internal Revenue Code (Code).

The single employer pension funding provisions include a further extension and expansion of interest rate stabilization, which was first enacted in the Moving Ahead for Progress in the 21st Century Act in 2012, and later extended in the Highway and Transportation Funding Act in 2014 and the Bipartisan Budget Act of 2015. Under interest rate stabilization, the segment interest rates used to calculate liabilities for minimum funding purposes are adjusted as needed to fall within a "corridor" around a 25-year average of the segment rates. ARPA narrows the interest rate corridor from 10% to 5% of the 25-year average in 2020. The corridor remains at 5% through 2025, and then expands by 5% per year until reaching 30% in 2030 and beyond.

Significantly, ARPA also adds a 5% floor on the 25-year average of the segment rates before application of the corridor. This further disconnects the funding interest rates from current market rates in a historically low interest rate environment. As a result, plan sponsors taking advantage of the relief may see lower plan funding ratios on a market basis. They may also see higher Pension Benefit Guaranty Corporation (PBGC) variable-rate premiums unless they are at the variable-rate premium cap. In addition to the interest rate stabilization changes, ARPA also makes a permanent change in the amortization period for funding shortfalls, from seven years under prior law to 15 years under the new law.

Plan sponsors have multiple options for when these provisions will take effect. The interest rate stabilization provisions were effective in 2020 by default but can be deferred to as late as 2022, either for minimum funding and benefit restrictions under Code Section 436 or for benefit restrictions alone. The change to the shortfall amortization period is effective in 2022 by default but can be applied as early as 2019. As a result, all sponsors will need to learn about the changes and options and make appropriate decisions and elections.

The optimal effective dates will depend on plan-specific and sponsor-specific factors. Sponsors and fiduciaries may need multiyear projections to understand the potential impact on plan funded status and contribution requirements. IRS guidance will be needed on several issues, including the implications of revising valuation results for prior plan years. Sponsors will also need to consider potential implications beyond minimum funding and benefit restrictions, including plan design, investment strategy, contribution strategy, and pension settlement opportunities.

The ARPA multiemployer pension provisions include a new program that will provide assistance to financially troubled plans through 2051, changes to reduce minimum contribution requirements in the near term (though this may not translate to contribution reductions for participating employers, since employer contributions are generally fixed via collective bargaining agreements), and increased PBGC premiums starting in 2031. The financial assistance for troubled plans is funded by a transfer of federal revenues and does not need to be repaid. Many details of this program remain to be clarified through PBGC guidance. Since the financial assistance does not cover benefits payable after 2051, further action may be needed in the future if a troubled plan's financial status does not substantially improve in the interim. While some prior legislative proposals had included fundamental reform of multiemployer plan funding requirements and plan designs, such as upper limits on liability interest rates and flexibility to create "composite" plans that vary benefits based on plan funding levels, ARPA does not include such provisions. As a result, it is possible that some plans' financial conditions could further deteriorate in the future.

In summary, ARPA makes significant changes to the landscape for single employer and multiemployer pension plans. Plan sponsors should discuss these law changes with their actuarial, investment, and executive compensation consultants to understand the impact on their plans and organizations and determine how best to respond to the opportunities the new law presents. Please contact your Aon consultant for more information.

DOL Will Not Enforce Recent 2020 ESG and Proxy Voting Regulations

by John Van Duzer

In a recent development that caught few observers by surprise, the Department of Labor (DOL) issued an announcement on March 10, 2021 advising that it would not be enforcing its November 2020 final regulations on "environmental, social, and corporate governance" (ESG) investments. As discussed more fully in the **First Quarter 2021** issue of our *Quarterly Update*, those 2020 regulations represented the latest development in an ongoing conflict between Republican and Democratic administrations over these ESG issues. The regulations stated that plan fiduciaries needed to focus on "pecuniary factors" in choosing investment options—i.e., factors that are expected to have a material effect on the risk and/or return of an investment. That earlier guidance also suggested that because ESG factors are typically non-pecuniary, their role should be minimized in the course of making investment decisions.

The March 10 announcement generally provides a more favorable outlook for ESG investments (consistent with prior guidance issued during periods of a Democratic administration). The DOL has apparently heard from a number of public commenters (e.g., asset managers, labor organizations, and investment advisers) suggesting that because of being rushed through the regulatory process, the 2020 regulations failed to properly consider and address substantial favorable evidence about ESG considerations in improving investment value and long-term investment returns. Beyond that, the new rules have apparently had a chilling effect on the appropriate integration of ESG factors into investment decisions. For these reasons, the DOL intends to revisit the prior regulations and will not enforce or otherwise pursue enforcement actions against plan fiduciaries relating to those regulations, unless and until further guidance is issued.

The DOL cautions that it is not precluded from enforcing any requirements of the Employee Retirement Income Security Act of 1974 (ERISA), specifically including the duties of prudence and loyalty under Section 404 of ERISA. Also, note that a plan participant or other private party may still bring a lawsuit under these final regulations (i.e., the regulations have not been revoked or amended), and plan fiduciaries should consider this possibility in the course of making investment decisions.

In addition, the March 10 announcement states that the DOL will (similarly) not be enforcing final DOL regulations on proxy voting and shareholder rights, unless and until further notice. Those regulations were issued on December 16, 2020 and are discussed in more detail in the First Quarter 2021 issue of our *Quarterly Update*. In general, the regulations address a fiduciary's obligation to act prudently and for the exclusive benefit of participants and beneficiaries with respect to the exercise of shareholder rights and proxy voting under ERISA in connection with plan investments in shares of stock. As with the 2020 ESG regulations, the 2020 proxy voting regulations stated that the process of exercising shareholder rights and proxy voting under ERISA may not be structured in such a way as to subordinate the interests of plan participants and beneficiaries to any non-pecuniary objective.

We encourage readers who wish to better understand the significance of these DOL nonenforcement policies and/or to consider changes to their investments or investment policies to contact Aon's Investment and Retirement Legal Consulting & Compliance consultants.

DOL Issues Definitive Missing Participant Guidance

by Alison Katz and Jennifer Ross Berrian

After several years of focusing on missing participants during retirement plan audits, the Department of Labor's (DOL's) Employee Benefits Security Administration (EBSA) issued guidance on January 12, 2021, regarding best practices for addressing missing participant issues. Three key pieces of guidance were issued providing a broad range of insights into practices and policies that prudent fiduciaries should consider for addressing issues with respect to the timely payment of vested benefits. One piece of guidance details the DOL's best practices, another provides insight into audit guidelines, while the third permits plan sponsors of terminating defined contribution (DC) plans to utilize the Pension Benefit Guaranty Corporation's (PBGC's) missing participant program.

Best Practices Regarding Missing Participants

One of the pieces of guidance, entitled "Missing Participants – Best Practices for Pension Plans," contains a wealth of information that plan sponsors should review and utilize. The best practices guidance describes a range of detailed best practices to help reduce and avoid missing participant issues, as well as "red flags" that may indicate a lack of sufficient plan procedures. Careful attention on both fronts will ultimately help plan sponsors ensure that plan participants receive timely payment of the benefits they are owed from the plan and may help resolve or even avoid any future DOL audit.

The best practice guidance, applicable to both defined benefit (DB) and DC plans, focuses on four key areas:

- Maintaining accurate census information for the plan's participant population;
- Implementing effective communication strategies;
- Performing missing participant searches; and
- Documenting procedures and actions, including returned mail handling and uncashed check procedures.

While the list of best practices included in the guidance is extensive, EBSA has noted that not every practice is necessarily appropriate for every plan. Plan fiduciaries have the flexibility to determine which steps are appropriate for their own plan and population and weigh facts and circumstances specific to each plan and participant, as well as consider the balance between the size of the benefit and the cost of search efforts. A rigorous and thoughtful consideration of the appropriate practices for each plan as well as development of documentation as to how the selected procedures will be applied will be an important part of the prudent fiduciary process.

Audit Guidance

Compliance Assistance Release 2021-01 outlines the approach that EBSA regional offices use for the Terminated Vested Participants Project (TVPP). The TVPP is an audit and enforcement initiative geared toward facilitating the timely payment of vested benefits from DB plans. The release outlines the key facets of the TVPP process in an effort to ensure consistent investigative processes nationally and give plan sponsors a clear view into what the audit process entails.

The guidance focuses on four key areas. These include information on plan characteristics that may trigger an audit; information to be requested by the agent; errors that examiners are looking for; and how cases are closed. Some of the errors that the agents are looking for include systemic errors in recordkeeping and administration and inadequate procedures for the following:

- Identifying and locating missing participants and beneficiaries;
- Contacting participants and beneficiaries approaching required commencement dates;
- Explaining the consequences of failure to make a commencement election to participants and beneficiaries nearing required commencement dates; and
- Dealing with uncashed checks.

Use of PBGC Missing Participant Program for Terminating DC Plans

Finally, EBSA issued Field Assistance Bulletin 2021-01 authorizing terminating DC plans to use the PBGC missing participant program for missing or nonresponsive participants' account balances. This will be a helpful tool for plan sponsors terminating DC plans. However, it is important to note that although the use of the PBGC program is permitted, it does not preclude the DOL from pursuing plan sponsors for failure to diligently search for participants and beneficiaries prior to the transfer of account balances.

These three key pieces of guidance establish a roadmap for plan fiduciaries to formalize and document robust plan administration policies and procedures to mitigate future issues with missing and nonresponsive participants, ultimately facilitating timely payment of vested benefits. Aon suggests that all plan sponsors consider and implement the best practices guidance. Please contact your Aon consultant for assistance.

DOL Continues to Pursue Payments to Missing Annuitants

by Tom Meagher

On March 31, the Department of Labor (DOL) went to court to compel Metropolitan Life Insurance Company (MetLife) to comply with an administrative subpoena issued on January 5, 2021 by the Employee Benefits Security Administration (EBSA) in connection with the DOL's investigation of annuity payments due pension plan retirees.

The action by the DOL is based on EBSA's 2019 investigation of MetLife to determine, among other issues, whether MetLife's actions constituted violations of Title I of the Employee Retirement Income Security Act of 1974 (ERISA), whether MetLife's subsequent actions adequately remedied any such violations, and whether information about MetLife's risk transfer business indicates other possible violations.

While the intent of this article is not to get into the merits of the DOL investigation—and MetLife may have any number of defenses to the DOL's claims—MetLife has argued that ERISA does not apply because, once an individual's participant status is properly terminated, there should be no further ERISA obligations to the participant. The DOL counters by stating that ERISA is intended to address situations in which a transaction purports to terminate a participant's or beneficiary's status, but such status is not properly terminated unless an insurance company fully guarantees the entire benefit rights of the individual. Whether MetLife has fully guaranteed the entire benefit to the participant or beneficiary is the question that the DOL is pursuing as part of its investigation involving payments to missing annuitants.

While MetLife has previously settled several missing annuitant-related issues with the New York State Department of Financial Services and the U.S. Securities and Exchange Commission, neither of those settlements address ERISA violations. We will continue to monitor developments between MetLife and the DOL and their impact on both employers and insurers conducting de-risking transactions.

Please do not hesitate to contact **Ari Jacobs** or **Alan Parikh** (Aon's Pension Risk Transfer Team) if you would like to discuss any of these issues in more detail.

Marital Status: When Less is More

by Hitz Burton

Marital status is central to the administration of qualified retirement plans. In a defined benefit (DB) pension plan, and a money purchase plan which is a specific type of defined contribution (DC) plan, marital status determines (i) the normal form of payment (i.e., joint and survivor or single life annuity) from the plan; (ii) whether waiver of the normal form requires spousal consent; and (iii) often, in many plans, the availability of optional payment forms. For 401(k) and other DC plans, marital status will establish the primary or default beneficiary. For all qualified retirement plans, when a participant dies prior to commencing benefits, the participant's marital status as of the date of death will typically establish a specified date by which death benefits, if any, must be paid (or begin to be paid).

Since marital status is critical to plan administration, the natural inclination of some DB plan sponsors is to actively track marital status from an employee's date of hire and throughout their employment period with the plan sponsor and beyond to ultimate retirement. This approach might have made sense historically when more DB pension plans were administered in-house. And this may also continue to make sense for DC plans administered through web-based benefit platforms where beneficiary solicitations can be requested (or confirmed) when participants log in to check balances or make investment changes. But, for DB plans that typically pay benefits at normal retirement (e.g., age 65) or other specified age, the effort associated with the ongoing tracking of marital status for what may be a 30 or 40-year period from initial date of hire to ultimate retirement and benefit commencement may require too great of an ongoing commitment. Rather, the efforts of plan fiduciaries and a third-party recordkeeper may be better directed to other qualified plan or fiduciary compliance-related goals (e.g., locating missing participants).

There are a variety of reasons why tracking marital status over a participant's working career may prove to be difficult, including increased worker mobility and marital status changes among other circumstances. As an alternative to ongoing tracking of marital status, Aon suggests that plan sponsors and fiduciaries direct their attention to focusing their efforts—at the exact moment when it matters most—when the participant contacts the plan to commence benefits or is required to commence benefits under plan terms or based on federal tax law. For example, the benefit election kit, including the distribution election form, should require the participant to make a formal attestation of his or her current marital status.

In certain circumstances, a participant may attest to being single and want to elect a lump-sum distribution. But, how should a plan sponsor respond if it has employment or other records which suggest the participant is actually married (e.g., recent election of employer-provided group medical coverage including coverage for spouse or spouse and family)? While it is reasonable for a plan sponsor to investigate such situations where there is an actual or apparent discrepancy, plan sponsors and fiduciaries should be mindful that requesting copies of a divorce decree or property settlement agreement may make the plan or the fiduciary responsible for complying with the decree or agreement. Nonetheless, it is most important that plan administrators and fiduciaries make the correct payments to the proper parties and avoid situations where incorrect payments may expose the plan to over or underpayment errors or other related operational failures.

One final word of caution on marital status information. If a plan possesses marital status information, even where the information is dated and not generally to be relied upon for benefit commencement purposes (e.g., joint and survivor election paperwork), Aon still recommends that such information be retained. While dated marital information may not be particularly useful for its original or primary intended purpose, the spousal information may still prove useful to a plan if the plan later has difficulty locating the participant to commence benefits at normal retirement or at a tax-required distribution date or to locate a beneficiary where the participant dies prior to benefit commencement.

If you are interested in evaluating your retirement plan's current practices regarding participant marital status and would like our view of administrative best practices for your specific retirement plan, Aon's Retirement Legal Consulting & Compliance consultants are available to help you fully assess your current marital status policy and related procedures and to make recommendations regarding proposed risk mitigation enhancements.

Cybersecurity—GAO Report and New DOL Guidance

by Tom Meagher

Plan sponsors and fiduciaries have long been wrestling with how best to address their cybersecurity responsibilities for defined contribution (DC) plan data. With each new cybersecurity lawsuit comes allegations that the fiduciaries have breached their fiduciary responsibility to the plan and its participants resulting in significant loss of plan data and related assets.

While the courts continue to frame out the responsibility of plan fiduciaries, the U.S. Government Accountability Office (GAO) recently issued a report regarding the fiduciary issues involving cybersecurity and DC plans (GAO Report). The GAO Report was of particular interest in that it noted that plan sponsors and service providers, recordkeepers, third-party administrators, payroll providers, and custodians reported sharing a vast amount of personally identifiable information (PII) and plan asset data to assist them in their respective roles in administering DC plans. The GAO Report went on to note that, while current sources of information on cyberattacks do not break down the numbers by industry—including those specific to DC plans—in recent years, a number of legal claims allege that unauthorized access to and distribution of retirement plan assets have occurred, resulting in a loss in retirement plan assets which, to date, have not been fully recovered. In assessing fiduciary exposure to cyberattacks, the GAO Report also noted that many times cyber insurance policies do not replace funds stolen from participants' accounts and frequently have provisions, such as caps on payouts or exclusions for certain types of attacks, which limit the amount of coverage for a cyberattack. The GAO Report also noted that employers usually purchase cyber insurance for their entire enterprise, which may not be tailored to or adequate for the specific needs of a retirement plan, such as replacing stolen retirement account funds.

The GAO Report concluded by recommending that the Secretary of Labor (i) formally state whether cybersecurity for private sector employer-sponsored DC retirement plans is a plan fiduciary responsibility under the Employee Retirement Income Security Act of 1974 (ERISA) and (ii) develop and issue guidance that identifies minimum expectations for mitigating cybersecurity risks that outline the specific requirements that should be taken by all entities involved in administering private sector employer-sponsored DC retirement plans.

Following issuance of the GAO Report, there have been several new developments regarding the fiduciary obligation to protect participant data. The first involves the case of *Harmon v. Shell Oil* (S.D. Tex. 2021) in which the U.S. District Court concluded that plan data was neither an "investment" nor "participant contributions" and thus was not a "plan asset" under ERISA. The court thereupon dismissed certain of the fiduciary claims against the recordkeeper (Fidelity) and Shell based on a conclusion that plan data was not a plan asset (and thus Fidelity was not a fiduciary under ERISA). Shortly following the *Harmon* decision, the Department of Labor (DOL) issued guidance relating to how plan sponsors should address their risks relating to cybersecurity threats. The DOL guidance notes that responsible plan fiduciaries have an obligation to ensure proper mitigation of cybersecurity risks and sets forth the actions that plan sponsors and fiduciaries should undertake in selecting and monitoring the cybersecurity practices of service providers. The DOL further noted that fiduciaries should consider annual assessments and independent third-party audits to ensure that they have made (and are making) prudent decisions on their service providers and protecting their participant data.

While this new DOL guidance is obviously quite helpful to plan sponsors and fiduciaries, there has been little doubt that plan fiduciaries must act prudently to protect PII from improper use or disclosure and document their efforts.

Aon and its cybersecurity firm, Stroz Friedberg, are available to work with fiduciary committees and plan sponsors in assessing their cybersecurity exposure involving DC plans and how best to address in view of their ERISA obligations.

Second Circuit Rejects Mandatory Arbitration of ERISA Claim

by Hitz Burton

On March 4, in a 2-1 decision, the Second Circuit Court of Appeals in *Cooper v. Ruane, Cunniff & Goldfarb Inc*. held that a participant's fiduciary breach claims brought under the Employee Retirement Income Security Act of 1974 (ERISA) were not subject to a mandatory arbitration provision in an employee handbook intended to cover "all legal claims arising out of or relating to employment" and to which the participant consented.

Cooper, a participant in the DST Systems, Inc. 401(k) and Profit-Sharing Plan (Plan), brought breach of loyalty and prudence claims against the Plan's long-time investment adviser (Ruane, Cunniff & Goldfarb Inc.) for the Plan's concentrated position in the employer securities of an unrelated single employer stock (Valeant Pharmaceuticals). At its peak, the investment in Valeant Pharmaceuticals represented approximately 30% of the Plan's $1.4 billion in assets.

In reversing the prior district court decision which found that Cooper's claims were subject to arbitration, the Second Circuit noted that the participant's ERISA fiduciary breach claims did not "relate to" his employment since the merits of his claims did not involve facts which were specific or uniquely particular to his employment with DST Systems. The Second Circuit then remanded the decision back to the district court for further proceedings consistent with its decision.

Whatever the ultimate disposition of this specific case, the Second Circuit decision in *Cooper* appears to potentially be at odds with the recent Ninth Circuit Court of Appeals decision in *Dorman v. Charles Schwab & Co.* which we previously summarized in the **Fourth Quarter 2019** issue of our *Quarterly Update*. The validity of an arbitration clause was also recently argued on March 30 in the Seventh Circuit Court of Appeals (relating to a provision in the Triad Manufacturing, Inc. Employee Stock Ownership Plan requiring these disputes to be resolved through binding arbitration). That decision is still pending.

As we previously described, plan sponsors have shown an increased interest in and use of mandatory arbitration provisions in their qualified retirement plans in recent years. And the Ninth Circuit's *Dorman* decision was something of a surprise since it held that class action claims alleging an ERISA fiduciary breach could be subject to a plan's mandatory arbitration provisions. While it has generally been thought that a participant's individual claim for benefits (e.g., a claim by a single participant alleging that a plan calculated his final average pay incorrectly by understating his pay or credited service) might be subject to a properly structured mandatory arbitration provision, it was less clear that the same provision could be used to compel arbitration for a fiduciary breach claim.

Unlike an individual claim for benefits, fiduciary breach claims are typically brought by one or more individual participants on behalf of the plan itself. Since fiduciary breach claims can be protective of the plan itself and similarly situated participants, courts have generally been reluctant to enforce an individual's waiver of a right to bring suit and enforce an arbitration clause where, as in *Cooper*, fiduciary breach allegations are made. If, in fact, this apparent disagreement between the Second and Ninth (and eventually the Seventh) Circuits arises, it may be that the U.S. Supreme Court will need to step in to resolve the issue of whether, and under what circumstances, a mandatory arbitration provision can be enforced for various types of claims involving an ERISA retirement plan.

If you are interested in evaluating whether adding a mandatory arbitration provision to your retirement plan makes sense or you are considering adding such a provision as a protective mechanism and would like our input on how to properly structure and adequately disclose such a provision, Aon's Retirement Legal Consulting & Compliance consultants are available to help you fully assess your options and to implement any decision you make.

Quarterly Roundup of Other New Developments

by Sandy Combs, Teresa Kruse, and Jan Raines

Where Oh Where Has My DC Vendor Gone?

Over the last 15 years, we have seen a lot of defined contribution (DC) plan vendor consolidation—Wells Fargo, which previously acquired Wachovia, has sold its recordkeeping business to Principal Financial Group; Merrill Lynch, which had previously acquired AMVESCAP's recordkeeping business, was bought by Bank of America; Ascensus has acquired the legacy BB&T's recordkeeping business from Truist; and Empower has acquired MassMutual's recordkeeping business, following its recordkeeping acquisitions from The Hartford and MetLife—and these are just a few of the examples. We have also seen recordkeepers outsource services to other firms; for example, Vanguard has outsourced recordkeeping and technology operations to Infosys. It's not likely that this consolidation or outsourcing trend will end anytime soon, as organizations find themselves at a crossroads of needing to be profitable, but having to "keep up with the Joneses" with improved technology and more financial tools, while having to continually reduce fees.

If your DC plan recordkeeper is one of many that has been caught up in what seems to be a never-ending saga of vendors buying other vendors, you may be asking yourself, "why should I care?" or perhaps "what do I do now?" One of the key fiduciary principles outlined in the Employee Retirement Income Security Act of 1974 (ERISA) is to always act in the best interests of participants and beneficiaries in the plan. Further, ERISA requires prudent processes be followed when making decisions on behalf of those participants. And one of the primary responsibilities of fiduciaries is to prudently hire service providers.

Let's say the fiduciary committee went through a very thorough and deliberate process to select Vendor A for its DC plan, but then a few years later Vendor A was acquired by Vendor B. While it "sounded like" participants would benefit from the consolidation, the fiduciaries did not perform any due diligence on Vendor B (for example, made no effort to compare what else was available in the marketplace at the time of the vendor consolidation) and have no documentation to prove that the vendor (Vendor B) provides appropriate services (for a reasonable fee) for the participants. This "decision" (no action is still a decision) has now put the fiduciaries at risk if questioned later (or find themselves as defendants in a lawsuit) regarding their "choice" of vendor (or vendor fees).

Performing a vendor search can provide fiduciaries with the appropriate documentation to show that a thorough and prudent process was followed in determining which vendor best meets the needs of the plan and its participants for a reasonable fee. Many fiduciaries will delay performing a vendor search (sometimes for many, many years) because they don't want to change vendors and commence a conversion—but a vendor search does not require a move to a new vendor, though it does permit the plan fiduciary to validate its reliance on the current vendor selection. Of course, if fiduciaries find that another vendor can provide more or better services for a reasonable fee, it may be prudent to make that move—and wouldn't the plan fiduciary want to have the best possible solution for plan participants?

So, if you find yourself with a new DC plan vendor through no fault of your own, it may be time to do a vendor search. It's prudent to find out the impact of the vendor consolidation to plan participants and plan-related fees and compare that to what is available in the marketplace—and then to document the process followed and the decisions made. Aon's Defined Contribution Consulting group has a deep knowledge of DC plan vendor capabilities and an expertise in plan governance and fiduciary processes, and these consultants are available to assist you in performing a vendor search.

A Tale of Two Breaches

Whether it is the best of times or the worst of times, a fiduciary breach has consequences whenever it occurs. After an investigation by the Department of Labor's Employee Benefit Security Administration, the U.S. District Court for the District of Minnesota issued a consent order and judgment against fiduciaries of The Sartell Group Inc.'s retirement plan for failure to remit employee contributions and loan repayments to the plan. In the case of *Scalia v. Sartell Group, Inc.,* the fiduciaries have been ordered to restore the missed payments to the participant accounts and pay a civil penalty. The judgment removed and permanently enjoined one of the fiduciaries from acting as a service provider or fiduciary to any ERISA-covered employee benefit plan and is requiring another fiduciary to undergo no less than eight hours of fiduciary training and education by a nationally recognized authority.

Another breach of fiduciary duty is seen in the case of *Hammer v. Johnson Senior Center.* In this case, an employee of Johnson Senior Center contributed her portion of the health insurance premium from each paycheck. Johnson Senior Center failed to make its health insurance payments to the insurer, and the court ruled that the employer, and certain management employees, were ERISA fiduciaries who breached their duties of loyalty, care, and prudence by failing to properly make the payments for health insurance coverage.

Both of these cases remind plan fiduciaries of the importance of ensuring plan assets (which include employee contributions) are used for the exclusive benefit of the participants and beneficiaries in a plan. Mishandling plan assets (including late payments) can result in a breach of fiduciary duty and a prohibited transaction, which could have personal liability implications for the plan fiduciaries under ERISA.

If your fiduciary or administrative committee has need to provide or update your fiduciary training, Aon's Defined Contribution Consulting group has fiduciary experts who can help committees and their members understand their fiduciary responsibilities under ERISA. *Scalia v. Sartell Group, Inc., 2020 WL 6286199 (D. Minn. 2020); Hammer v. Johnson Senior Ctr., 2020 WL 7029160 (W.D. Va. 2020)*.

Investment Policy Statement (IPS)—Ideally "Specifically Vague"

As a matter of prudent practice, Aon recommends that fiduciary committees establish and follow a written IPS. Having a well-structured IPS helps ensure that roles and responsibilities regarding the plan investments are established, provides guidelines for investment review, and establishes criteria for selecting and eliminating investment funds/managers. While it is not required by ERISA or the Department of Labor (DOL), it can be an important tool in establishing a structured and consistent process for qualified plan fiduciaries. In our experience with DOL audits, one of the first items requested is a copy of the plan's IPS.

A recent article published in PLANSPONSOR titled "Having an IPS Doesn't Necessarily Increase Plan Sponsor Liability" discussed some plan sponsors' resistance to having an IPS out of concern that it increases fiduciary liability. Aon believes that a properly structured IPS reduces overall liability as long as (and this is key) the policies established are prudent—and are followed. Fiduciary liability may be increased by failure to follow the IPS but using and maintaining a properly drafted IPS puts plan fiduciaries in a better position to defend investment decisions. Importantly, the IPS should always allow plan fiduciaries to exercise discretion to accommodate situations that may not quite fit the quantitative policy in the IPS; building in discretion provides flexibility and helps avoid tripwires. That combination of specific guidelines and flexibility has been referred to as "specifically vague," which seems to properly describe the balance needed for a functional IPS. Periodic review of a plan's IPS is recommended; Aon Investment Consultants are always available to assist with drafting or reviewing an IPS.

"ERISA Jail" is Real

The **Third Quarter 2018** issue of our *Quarterly Update* covered the case of *Caldwell & Partners v. Vantage Benefits Administrators.* Vantage Benefits Administrators (Vantage), a third-party administrator, recordkeeper, and fiduciary, was charged with breaching ERISA fiduciary duties due to fraud and misappropriation of plan assets. The co-owners of Vantage, Jeffrey Richie (Chief Executive Officer) and his spouse Wendy Richie, were alleged to have transferred plan assets directly to business accounts and supplied false information to avoid detection.

As a follow-up on this case, Jeffrey and Wendy Richie were indicted by a federal grand jury in October 2018 and accused of embezzling retirement funds from at least 1,000 participants by submitting fraudulent distribution requests and directing the proceeds to a Vantage-owned account. The couple pled guilty in June 2020 and confessed to submitting more than 90 unauthorized distribution requests during the period in question. Wendy Richie pled guilty to two counts of theft from an employee benefit plan and one count of aggravated identity theft, while Jeffrey Richie pled guilty to two counts of aiding and abetting his wife's theft.

While it is somewhat unusual for fiduciaries to be sentenced to prison for fiduciary breaches, in December 2020 Jeffrey and Wendy Richie were sentenced to prison for 7 years and 3 months, and 11 years, respectively. Together they were ordered to pay $20 million in restitution for the embezzlement scheme with the presiding judge noting that "We are proud to hold the Richies accountable for this brazen misconduct." It is anyone's guess as to how much of the $20 million in restitution may be recoverable. *Caldwell & Partners v. Vantage Benefits Administrators, 2018 BL 82574 (N.D. Tex. 2018).*

Retirement Plan Litigation Update

Retirement plan litigation has been prevalent over the past decade impacting corporate plan sponsors, financial institutions that are also plan sponsors, and universities sponsoring 403(b) plans. DC plan cases generally fall into the following three areas: inappropriate or imprudent investment choices; excessive fees; and self-dealing. Recently, several cases involving universities and other institutions have been dismissed (in full or in part) or settled, including cases involving DeMoulas Super Markets Inc. (settled for $17.5M and other remedies); DST Systems Inc. (settled for $26.9M), along with their investment advisory firm Ruane Cunniff & Goldfarb Inc. (settled for $21.4M) and Robert D. Goldfarb, Ruane's CEO (settled for $30.4M); Norton Healthcare and its investment advisor, Lockton Financial Advisors (settled for $5.75M, to be split between both firms); and University of Pennsylvania (settled for $13M and other remedies).

Plan sponsors seeking to reduce their litigation risk use a variety of strategies including improving their fiduciary process for plan governance, increasing the number of passive funds in their plans, and implementing better fee transparency. Aon has a team of plan governance specialists who can work with clients to evaluate their fiduciary processes with an eye to confirming that they are supportive of establishing a prudent process for decision making.

New Retirement Plan Cases

The hits just keep on coming, as the saying goes. The high rate of retirement plan cases being filed against plan fiduciaries continues, and the pace does not seem to be slowing down. Although the list of recently filed cases is only illustrative, it is intended to provide a summary of the types of claims being alleged against plan fiduciaries and their committees. The recent themes of excessive fees and concerns involving target date funds continued this quarter as cases were brought against Takeda Pharmaceuticals U.S.A.; Cognizant Technology Solutions U.S. Corp.; Associated Banc-Corp; Mercedes Benz U.S. Int'l, Inc.; Coca-Cola Bottlers' Ass'n; Columbus Regional Healthcare System; NFP Retirement, Inc.; and Natixis Investment Managers, L.P. In addition, a case was brought against the trustees at American Trust Co. for an unauthorized account access incident. While the employers in these cases may have several valid defenses to these claims, the incidence of claims of fiduciary breaches continues to increase in the current environment.

Aon will continue to track these cases, and others, as they develop.

Please see the applicable Disclosures and Disclaimers on page 10.

Recent Publications

Keeping Your ADP/ACP Safe Harbor Safe under Old and New Rules

By Daniel Schwallie
Journal of Pension Planning & Compliance (Spring 2021)

Actual deferral percentage (ADP) and actual contribution percentage (ACP) safe harbor designs can eliminate the need for ADP and/or ACP testing and ensure that highly compensated employees can maximize deferrals and matching contributions under 401(k) and 403(b) plans. However, there are many nuances to ADP/ACP safe harbor requirements that may be overlooked in design or administration that can cause a plan to lose its safe harbor status. This article considers those requirements including recent guidance on midyear changes to safe harbor plans.

Click **here** to read the article.

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About Aon

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