Fourth Quarter 2021

Aon Quarterly Update

Retirement Legal Consulting & Compliance

In this Issue

Editor's Note

Happy autumn to our readers! While the year is winding down, our reporting on areas of interest to our readers continues to expand.

Among the core tenets of sound business management is the identification and minimization of risk. For many companies, the source of greatest risk is the company-sponsored defined benefit (DB) plan. Over the past decade, companies have sought to de-risk their pension obligations through a variety of Pension Risk Transfer (PRT) transactions. We open this edition of the *Quarterly Update* with the latest reporting in this area from one of our experts, as well as provide the steps your company may take to prepare for a PRT transaction.

Sponsors of defined contribution (DC) plans also face significant risks associated with plan administration and investment. One of the most consequential developments to mitigate DC plan fiduciary risk is the pooled employer plan (PEP). We update our prior reporting on the game-changing PEP and what a PEP could do in transferring fiduciary risk.

Since the Department of Labor (DOL) issued cybersecurity guidance earlier this year, plan fiduciaries now realize they have fiduciary responsibility to protect plan and participant data. This edition adds to our prior coverage with information regarding how plan fiduciaries can take steps to ensure compliance with DOL guidance and minimize risks involving their third-party service providers.

Plan sponsors of qualified retirement plans and 403(b) plans are continually seeking ways to self-correct compliance errors (without Internal Revenue Service (IRS) involvement) on a cost-effective basis while mitigating risk. This edition includes reporting on the latest expansion of the IRS's self-correction program and improvements specific to the correction of plan overpayments.

Many voluntary employees' beneficiary associations (VEBAs) are holding more assets than can be reasonably used to pay postretirement health obligations. With the IRS private letter rulings on the redeployment of VEBA assets presently on hold, many employers still face challenges with their VEBAs and how to address otherwise stranded assets. We report the latest on the possible guidance which may be forthcoming from the IRS and the Treasury Department in the form of possible future regulations.

We close out this edition of the *Quarterly Update* with an article covering 403(b) church plans. The SECURE Act clarifies, among other things, which church plans can invest in collective investment trusts.

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

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Associate Partner

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Momentum Continues in the Pension Risk Transfer Market

by Ari Jacobs and Nick Kraver

Over the past 10 years, thousands of corporate defined benefit plan sponsors have effectively implemented Pension Risk Transfer (PRT) transactions. These are commonly structured as single-premium, non-participating, group annuity contracts with U.S. life insurance companies. These transactions may cover only certain pension participants in connection with an ongoing or frozen plan, often referred to as lift-outs, or all participants through a complete plan termination.

2021 is once again an active year in this market. Through the end of the third quarter, we estimate that the insurance industry has written approximately $25 billion in premium, which is close to the amount of premium written in all of 2020. As in prior years, this includes some jumbo transactions (five deals over $1 billion) as well as many smaller deals, too. There are about 20 highly rated insurers in this market, and they focus on different sizes and segments offering a robust set of solutions to pension sponsors.

Defining roles and responsibilities is a critical part of an effective transaction. We encourage plan sponsors to take great care in defining the settlor (employer) role and distinguish it from the plan fiduciary's responsibilities.

- The settlor is primarily responsible for setting the strategy, defining the population that is to be transferred, drafting any plan amendments, and funding the plan as needed.
- The fiduciary is primarily responsible for implementing the decision of the settlor, performing due diligence on the insurers, selecting the winning insurer(s), and ensuring that the participants' benefits are well protected at the selected insurance company(ies).

Settlor Role

The employer in its settlor role will also determine when it is right to transact the annuity purchase. Some common factors employers (plan sponsors) may use in determining if they are ready to move forward include:

- **Funded Status.** As funding status improves, plans are in a better position to de-risk and settle liabilities.
- **Settlement Accounting.** Plan sponsors with sensitivity towards settlement charges will want to consider the timing and size of the transaction.
- **High PBGC Premiums.** A plan with many small-benefit retirees is often a good candidate for a lift-out due to proportionally higher future PBGC premium savings.
- **Interest Rate Environment.** While many plan sponsors have hedged their liabilities through fixed-income investments, others wait for higher rates before seeking to transact.

Fiduciary Role

The fiduciary, often the investment committee or an independent fiduciary, must follow their responsibilities under the Employee Retirement Income Security Act of 1974, including their duty of care and loyalty. In 1995, the Department of Labor published the "safest available annuity provider" guidance under Interpretive Bulletin 95-1 that outlines many of the standards we still follow today. This bulletin outlines six criteria to evaluate when implementing a transaction:

1. Insurer lines of business and exposure to liabilities
2. Insurer size relative to placement size
3. Quality and diversification of insurer's investment portfolio
4. Level of insurer capital and surplus
5. Additional protection from state guaranty funds
6. Structures and guarantees underlying the contract

Preparing for a Transaction

Lift-out transactions can be implemented in about three months if you line up the right resources and prepare accordingly. We would suggest the following:

- **Prepare Census Data.** Implementing a data clean-up project can occur at any time and could result in favorable financial impacts as well as making administration easier and more efficient. If internal resource constraints are an issue, developing a clear, long-term project plan will be greatly beneficial. Outside vendors can also be utilized to help facilitate this process. Starting a PRT transaction with clean data will ensure a smooth and timely process up front and will prevent logistical barriers from occurring during the bidding and transition process.
- **Assess Portfolio and Investment Strategy.** Plan sponsors should be proactive to ensure that they have proper access to liquidity or transferrable high-quality corporate bonds to settle any transaction. This should be documented and consistent with the investment policy statement, which may need to be reevaluated after a transaction as the plan size, funded status, and risks will likely change.

- **Review Plan Documents.** Most plans will allow for lift-outs or plan terminations with proper amendments. However, some may have restrictions or collective bargaining requirements that should be reviewed before beginning the transaction.
- **Define Resources.** Having a team to support the transaction is crucial to executing on time. While the plan's consultant, actuary, administrator, and investment teams will do most of the heavy lifting, the plan sponsor needs to be involved. Also, a fiduciary committee or independent fiduciary will need to be in place to select the insurer.

To learn more about the PRT market and Aon's annuity expertise, please contact the authors of this article or a member of Aon's Annuity Placement Team.

PEPs Are Here!

by Rick Jones

New 401(k) options for employers launched in early 2021. Human Resource managers and executives can get an edge by understanding their value.

For the past several years, pooled employer plans (PEPs) have been gaining momentum from global trends. These next-generation, defined contribution (DC) retirement plans allow employers to band together instead of going it alone. Doing this means less work, less risk, and lower costs for employers. Employees, too, are reaping the benefits, since they may pay lower fees leading to more assets in retirement. Employees will also receive better support leading to improved saving and investing behaviors, which sets them up for better retirement outcomes.

Now, thanks to the SECURE Act, passed by Congress in late 2019, U.S. 401(k) plan sponsors can join PEPs. These new cost-saving retirement options could not have arrived at a better time as the pandemic and resulting economic crisis have caused some employers to focus on essential work activities and have hindered workers' financial wellbeing. Nearly 3 in 10 U.S. employees decreased or stopped saving for retirement during the pandemic[1], on top of Aon research[2] that had already found only one in three U.S. workers will save enough to retire comfortably by age 67.

With this backdrop, PEPs have the potential to shake up the retirement landscape the way 401(k) plans did when they arrived on the scene in 1978. Already more than 100 pooled plan providers have registered with the Department of Labor to offer PEPs. And while PEPs are still in their early days, looking to the past may provide a clue for how they could grow going forward. When large companies like PepsiCo, JCPenney, and Johnson & Johnson adopted 401(k) plans in the early 1980s, the floodgates opened. Similarly, Aon predicts more than half of U.S. employers will be using PEPs by 2030.

Less Work for Management Teams

With traditional 401(k) plans, busy professionals within an employer's organization function as the quarterback between recordkeepers, auditors, legal compliance teams, investment teams, and many others. With PEPs, the process is much simpler.

After specifying the plan design and contribution levels, the job of an employer's management is simply to monitor the plan. The pooled plan provider of a PEP serves as the fiduciary to support the administrative, investment, compliance, consulting, and legal requirements of running the plan. Some PEPs, like Aon's, also provide pre-built communications, financial wellbeing support, and training materials such as videos and emails.

These advantages can be obtained without having to sacrifice the current plan design. By potentially decreasing the work to manage these retirement plans, an employer's management team is freed up to focus more on their organization's mission-critical activities.

Less Risk for Employers

One of the biggest advantages of a PEP is being able to transfer the fiduciary responsibility and liability for investments and administration to a third party. That's become even more important in recent years as the risk of litigation with existing DC plans has

[1] [Americans are forced to raid retirement savings during the pandemic (cnbc.com)]
[2] [Aon—the Real Deal 2018 Retirement Income Adequacy Study-Report]

soared. In 2020 alone, there was a four-fold increase in excessive fee DC plan lawsuits compared to three years ago, and in the last decade, more than $1 billion in settlements has been paid. A PEP can be right for any sized organization that is looking to transfer and reduce risk.

Lower Costs, More Services

The secret to the cost savings for PEPs is economies of scale, for everything from recordkeeping to investment fees. Based on a survey of over 100 employers, the Aon PEP provides an average cost savings of 44% relative to current 401(k) costs across plans of all sizes. Lower fees, in turn, create more retirement savings and better outcomes for employees. Another benefit of scale is that PEPs can offer tools that smaller sponsors could not offer on their own, such as services to help participants manage their student loans or coordinate their retirement plans with health savings accounts.

PEPs will significantly impact the retirement landscape, and employers and employees can reap the benefits. Contact your Aon consultant to learn more and find out if a PEP is the right approach for your organization.

Cybersecurity: Third-Party Service Providers Prepare to Respond

by Tom Meagher

Since the Department of Labor (DOL) issued its cybersecurity guidance back in April 2021, there has been a tremendous amount of activity involving plan fiduciaries. Most notably, plan fiduciaries realized what many long suspected—that they have a fiduciary responsibility to protect plan and participant data.

While many plan fiduciaries may have reached out to their IT organizations to better understand what was being asked by the DOL, it quickly became apparent that plan fiduciaries would need to make some effort to review the data security safeguards in place at third-party service providers. Plan fiduciaries also quickly understood that the DOL viewed this fiduciary obligation as having always applied to plan and participant data.

Since the DOL guidance, a number of service providers have been very proactive in reaching out to their clients to indicate how they have protected plan and participant data. In many cases, the service provider has tracked the DOL's 12 points and attempted to explain how their respective safeguards were responsive to the DOL's concerns. In many other cases, service providers have been silent and will wait for the plan fiduciaries to inquire about data security safeguards.

From a fiduciary standpoint, both situations will require attention. At the outset, to the extent that a service provider has been proactive and provided a response to the DOL's guidance, the plan fiduciaries nonetheless need to review those responses with their internal IT organizations or with other cybersecurity professionals. In many cases, these initial responses by service providers may be at too high a level for a plan fiduciary to rely upon that plan data is adequately protected. In these situations, there may be a number of follow-up questions that may be asked of the service provider to better understand how data is protected and how the service provider will keep plan fiduciaries informed of additional protections that may be added.

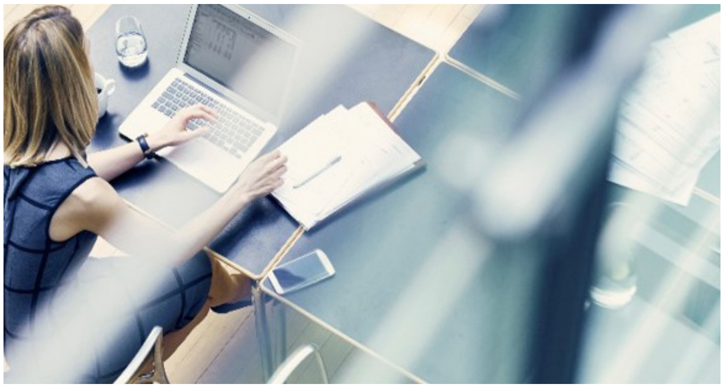
In the situation where the service provider has not yet provided any information regarding its data security protections, plan fiduciaries should reach out to those service providers for such information and be prepared to follow up if no responses are forthcoming, or responses appear less than sufficient.

From an ERISA standpoint, the DOL is most concerned that plan fiduciaries have a prudent process to evaluate and monitor data security safeguards—both within the employer's internal organization and with third-party service providers. While the safeguards can vary from organization to organization (the DOL has previously recognized that no one process is required), it is important that the plan fiduciaries establish a record of having examined the safeguards and—with internal or external support—have concluded that the plan and participant data are adequately protected.

Aon and its cybersecurity professionals will be pleased to work with or support the efforts of clients' internal organizations to review both internal and third-party service provider safeguards to the extent helpful.

Updated IRS Program Improves Self-Correction Options

by Dan Schwallie



The Employee Plans Compliance Resolution System (EPCRS) is a comprehensive system of correction programs for sponsors of retirement plans, including qualified defined benefit, 401(k), and 403(b) plans. Plan failures not eligible for its Self-Correction Program (SCP) can be corrected under EPCRS by application to the Internal Revenue Service (IRS) under its Voluntary Correction Program (VCP) and paying a fee or, for those failures found during an IRS audit, as part of its Audit Closing Agreement Program (Audit CAP).

The latest incarnation of the EPCRS, published July 16, 2021 in Revenue Procedure 2021-30, includes several improvements to self-correct retirement plan failures without a fee or filing with the IRS.

Improvements to Self-Correction Program
The following improvements to SCP were made by Revenue Procedure 2021-30:

- Lengthening the self-correction period for significant failures to the last day of the third (rather than second) plan year following the plan year for which the failure occurred;
- Extending the period to correct (with a lesser qualified nonelective contribution) employee elective deferral failures lasting more than three months to the last day of the third (rather than second) plan year following the plan year for which the failure occurred;
- Eliminating the requirement that a plan amendment increasing a benefit, right, or feature to self-correct an operational failure must apply the increase to all participants eligible to participate under the plan; and
- Extending the sunset of the safe harbor method to correct certain employee elective deferral failures under an automatic contribution arrangement, whether an affirmative election or not, to include failures beginning before 2024.

Improvements Specific to Correction of Overpayments
Plan sponsors may provide recipients of plan overpayments the option of repayment in a lump sum, installments, or an adjustment in future payments, if applicable. In the case of a plan overpayment, no correction is required if the total overpayment is $250 or less, an increase from the prior threshold of $100. The plan sponsor is not required to notify the overpayment recipient that an overpayment of $250 or less is ineligible for tax-free rollover.

Defined benefit plans have two new overpayment correction methods available:

- **Funding Exception Correction Method.** This method provides that corrective repayments are not required for a plan subject to Section 436 of the Internal Revenue Code funding-based limits for single employer plans, if the plan's certified or presumed adjusted funding target attainment percentage determined at the date of correction equals at least 100%. Future benefit payments must be reduced to the correct amount, but no further reductions to an overpayment recipient (or spouse or beneficiary) are permitted. No further corrective repayments from any party are required, and no further corrective repayments from an overpayment recipient (or spouse or beneficiary) are permitted.
- **Contribution Credit Correction Method.** This method reduces the amount of overpayments to be repaid to the plan by a "contribution credit," which is the sum of (i) the cumulative increase in the plan's minimum funding requirements attributable to the overpayments and (ii) certain additional contributions in excess of minimum funding requirements paid to the plan after the first of the overpayments was made. Future benefit payments must be reduced to the correct amount. If the contribution credit reduces the overpayment amount to zero, no further corrective repayments from any party are required, no further corrective repayments from an overpayment recipient (or spouse or beneficiary) are permitted, and no further reductions to future benefit payments are permitted. However, if a net overpayment remains, the plan sponsor or another party must take further action to reimburse the plan for the remainder.

Changes to Anonymous Voluntary Correction Program
The Revenue Procedure eliminates the anonymous submission procedure under VCP and replaces it with an anonymous, no-fee VCP pre-submission conference procedure, effective January 1, 2022.

Timely Self-Correction Reduces Cost of Correction and Avoids Penalties
Correction under VCP involves submitting an application and paying a user fee to the IRS. Correction under Audit CAP can result in a penalty exceeding the VCP user fees and up to the amount of taxes, interest, and late fees that would apply if the plan were disqualified for all open tax years. Timely self-correcting eligible plan failures can avoid such consequences.

Aon's Retirement Legal Consulting & Compliance consultants can assist plan sponsors in correcting known plan failures and by reviewing plans and their administration for possible compliance failures, which can reduce the likelihood of penalties from discovery during a plan audit.

Possible New Life for Stranded VEBA Assets

by Tom Meagher and Jennifer Ross Berrian

Many employers may have overfunded postretirement health voluntary employees' beneficiary associations (VEBAs) for any number of reasons including reduced numbers of retirees, changes to retiree medical programs, better claims experience, or superior investment returns. Whatever the reason, many employers find themselves with excess VEBA assets that either far exceed their postretirement health obligations or will not be used for decades into the future.

For a time, the Internal Revenue Service (IRS) issued private letter rulings that permitted an employer to redeploy its postretirement health VEBA assets for active medical benefits. Subsequently, the IRS decided to cease issuing such rulings and determined that several tax issues needed to be studied further before rulings may be issued. The IRS later added the redeployment of VEBA assets to its "no ruling" list (as provided in Revenue Procedure 2021-3). Despite many employers reaching out to the IRS to encourage that rulings recommence, the VEBA redeployment issue has continued to be unaddressed and failed to make it on to the IRS's and Treasury Department's most recent priority list of projects for inclusion on the 2021-2022 Priority Guidance Plan.

While employers continue to wrestle with how to address overfunded VEBAs, we have continued to monitor developments with our contacts at the IRS National Office. Most recently, we did see a glimmer of hope for employers looking to redeploy VEBA assets without the risk of incurring the 100% excise tax under Section 4976 of the Internal Revenue Code (Code).

The IRS had previously noted an intent to coordinate possible guidance with the Treasury Department through conducting what the IRS refers to as a "stakeholders meeting" during which employers could explain why immediate guidance may be needed. Most recently, we understand that Treasury has been brought up to speed on the issues and does not see a need for such a meeting. While that may appear a bit disappointing, the IRS went on to note that the IRS and Treasury are considering whether to permit the IRS to issue a regulation or other guidance that would indicate that—if certain rules were followed—the redeployment of VEBA assets for other permissible benefits would not result in the 100% excise tax under Section 4976 of the Code. The guidance would not address any other tax issues, but the IRS noted that certain tax issues from the prior private letter rulings appear well settled, e.g., the tax benefit rule would require the redeployed VEBA assets to be taken into income in the year of redeployment.

If regulations are issued, they would be issued in proposed form and would provide for a comment period during which employers could identify any additional issues requiring clarification. If Treasury agrees to the limited approach to avoiding the excise tax (the most significant impediment to redeploying VEBA assets), it may still take some time for the IRS to draft and issue the guidance.

To the extent that Treasury does not agree to the issuance of excise tax guidance, employers will need to await legislative relief or address the redeployment of VEBA assets through other means including postretirement health plan mergers, retiree medical window programs, tax insurance, or other possible strategies.

Aon's Retirement Legal Consulting & Compliance and Retirement actuarial consultants will be pleased to assist clients evaluate the VEBA landscape and address possible approaches to redeploying VEBA assets now and in the future.

Investment in CITs Possible for Certain 403(b) Church Plans

by Dan Schwallie

Generally, plans under Section 403(b) of the Internal Revenue Code (Code) are limited to investing in annuity contracts and mutual funds. However, Section 403(b)(9) of the Code provides an exception for *retirement income accounts* of church plans to the general requirement that assets be invested only in annuity contracts or mutual funds. A 403(b) church plan with a retirement income account (RIA) may invest assets of such account in a collective investment trust (CIT). Thus certain 403(b) church plans can invest in alternatives, including a CIT.

Collective Investment Trust

A CIT is a bank-administered trust that holds commingled assets and meets specific criteria under Treasury regulations regarding fiduciary activities of national banks. Like mutual funds, a key objective of CITs is to lower investment costs through pooling of assets and economies of scale. Unlike mutual funds, CITs are not regulated by the Securities and Exchange Commission or the Investment Company Act of 1940 and, thereby, may have lower investment costs than mutual funds. As CITs have become more available and operationally more similar to mutual funds, 401(k) plans are increasingly investing in CITs, which has generated interest from 403(b) plan sponsors.

Retirement Income Account
An RIA is a defined contribution program established or maintained by a church-related organization that meets certain requirements, such as (i) separate accounting of the RIA's interest in the underlying assets to distinguish that interest from any interest not part of the RIA and (ii) being maintained pursuant to a written plan document, including a statement of the intent to constitute an RIA. RIA assets can be invested in CITs.

SECURE Act Clarifies Which Church Plans Are Eligible to Provide RIAs
There had been some concern as to which employers can maintain an RIA and which employees are eligible for such an account. The preamble to the 2007 final 403(b) regulations states that RIAs are only permitted for church employees and certain ministers. The regulations provide that a church-related organization can maintain an RIA and define a *church-related organization* as a church or a convention or association of churches, including an organization described in Section 414(e)(3)(A) of the Code. This definition includes as a church plan a plan maintained by an organization, whether a civil law corporation or otherwise, controlled by or associated with a church or a convention or association of churches with the principal purpose of providing retirement benefits for employees of a church or a convention or association of churches. The concern was such language suggested that only employees of a church or a convention or association of churches could be eligible for RIAs and not employees of church-controlled organizations, such as church-affiliated hospitals and schools. The SECURE Act amended Section 403(b)(9) of the Code to clarify that an organization exempt from tax under Section 501 of the Code controlled by or associated with a church or a convention or association of churches can establish or maintain an RIA for its employees.

Plans of Church-Controlled Tax Exempt Organizations Can Provide RIAs
A 403(b) church plan of a tax exempt hospital, school, university, or retirement home controlled by or associated with a church or a convention or association of churches can invest in CITs if the plan provides RIAs for employees of such tax exempt organization.

Aon's Retirement Legal Consulting & Compliance consultants can assist 403(b) church plan sponsors in setting up RIAs for participants in the plan, and Aon's Investment consultants can assist such plan sponsors in evaluating CIT investments.

Quarterly Roundup of Other New Developments

by Sandy Combs, Teresa Kruse, and Jan Raines

It's Not Just About the Fees: A Fiduciary Reminder
Litigation for fiduciary breaches relating to excessive administrative and investment fees has become common place over the past several years. Ensuring that *all* fees paid by retirement plans is a resoundingly important fiduciary obligation and one that cannot be ignored. However, there are many other obligations that should also remain at the forefront of each fiduciary's mind. Those obligations include, but are not limited to:

- **Hire Service Providers.** You should have a process in place to review and compare services and costs, and specific criteria that is used to select plan providers; providers may include recordkeeping and/or third-party administrators, investment advisors, and auditors.
- **Confirm Cybersecurity Safeguards.** Recent Department of Labor (DOL) guidance has confirmed that plan fiduciaries are responsible for ensuring that data security safeguards involving both internal operations and service providers are sufficiently protective.
- **Review Plan Provider Contracts.** Ensure the promised services and costs are identified and what your provider agreed to offer to your plan; look for reasonability in termination clauses, notice periods, and whether termination charges exist.
- **Ensure Timely Payroll Contributions and Loan Payments.** Fiduciaries are required to ensure deferrals and loan repayments are timely deposited into participant accounts; late deposits can trigger corrective measures and reporting to the DOL on the Form 5500.
- **Identify All Fees and Confirm Reasonableness.** These may include recordkeeping administration, transactional fees, and costs to participants for managed accounts, advice, and self-directed brokerage accounts.

- **Review Fee Disclosures.** Once you identify all fees, you should review the Covered Service Provider 408(b)(2) Notice and 404(a)(5) Participant Fee Disclosures provided by vendors to ensure the disclosures align with your contracts.
- **Keep Good Records.** The foundation of fiduciary governance is your process; this includes maintaining written minutes of your fiduciary meetings, keeping your plan documents up to date and accessible to the committee, retaining copies of annual required notices, maintaining the investment policy statement, and more. A best practice for fiduciary records is to have a file to store all plan-related documents.

The responsibilities above are not all-inclusive, but rather a list to highlight some of the duties that may seem small. Being a fiduciary requires the duties of loyalty and prudence, and that the fiduciary act for the exclusive benefit of plan participants. Moreover, fiduciaries must discharge their duties in accordance with the documents and instruments that govern the plan.

If your committee has never had fiduciary training or needs a refresher, Aon has fiduciary experts who can help committees understand their responsibilities under the Employee Retirement Income Security Act of 1974 (ERISA)—from both an administrative and an investment perspective.

For more information about your fiduciary responsibilities, and to review Aon's four-part "Fiduciary Committees" series, please refer to the **First Quarter 2020**, **Second Quarter 2020**, **Third Quarter 2020**, and **Fourth Quarter 2020** issues of the *Quarterly Update.*

Taking It to the Top: Supreme Court Agrees to Hear Excessive Fee Case

In *Hughes v. Northwestern University*, participants alleged that plan administrators violated ERISA by failing to make prudent decisions for the two defined contribution (DC) plans available to participants (Northwestern University Retirement Plan and Northwestern University Voluntary Savings Plan). These allegations included, among other matters, continuing to include investments with high management fees and allowing excessive recordkeeping fees (by using multiple recordkeepers and allowing recordkeeping fees to be paid through revenue sharing). Following the trajectory of so many excessive fee cases, Northwestern moved to dismiss, and the district court granted the motion, and the Seventh Circuit Court of Appeals affirmed. The Seventh Circuit found that the low-cost index funds the plaintiffs wanted were available to them and that there were a wide range of options available (similar to other cases that have been brought before the Seventh Circuit). Further, the court noted that ERISA does not require a sole recordkeeper nor does it prohibit payment through revenue sharing arrangements.

Following the dismissal, the plaintiffs appealed to the Supreme Court for review, and the U.S. Acting Solicitor General filed an amicus brief asking the Court to hear the case due to different interpretations and findings from the Third and Eighth Circuits on almost identical allegations. The Supreme Court granted review of the case for its upcoming term starting in October 2021—this will break its long-standing silence on these fund and fee matters. The question the Court agreed to review is "whether allegations that a DC retirement plan paid or charged its participants fees that substantially exceeded fees for alternative available investment products or services are sufficient to state a claim against plan fiduciaries for breach of the duty of prudence."

The Supreme Court has set the case for argument in December 2021. While lower courts have previously held that plan fiduciaries do not need to select the least expensive recordkeeper as long as there is a basis for selecting a more expensive recordkeeper, whatever decision the Court makes will surely impact future litigation and the actions of plan fiduciaries. Aon, along with everyone in the benefits world (and plaintiffs' attorneys), is watching this case closely, and we will update you as it progresses. *Hughes v. Northwestern University, No. 19-1401, 2021 U.S. LEXIS 3583 (July 2, 2021).*

Are You Ready for Some New Electronic Delivery Rules?

The DOL's final regulations regarding electronic delivery of certain retirement plan ERISA-required disclosures were effective July 27, 2020. (See the **Third Quarter 2020** issue of our *Quarterly Update* for more information regarding the new safe harbor options available.) Generally, the DOL indicated that the 2002 safe harbor option was still available, but these new safe harbor options would provide plan administrators with additional ways to deliver certain disclosures and notices to plan participants. Following the issuance of the 2002 safe harbor, the DOL issued some informal guidance related to three specific notifications—delivery of benefit statements (Field Assistance Bulletins 2006-03 and 2007-03), QDIA notices (Field Assistance Bulletin 2008-03), and participant fee disclosure documents (Technical Release 2011-03R). With the release of the 2020 safe harbor options, the DOL indicated that the informal guidance previously issued would sunset (or terminate) 18 months following the effective date, or January 27, 2022.

With the sunsetting of this guidance, plan administrators and recordkeeping vendors need to determine how those disclosures/notices will be delivered *after* January 27, 2022 and ensure that either the 2002 safe harbor rules or the new 2020 safe harbor rules are followed. Plan administrators should (i) review the current electronic processes and procedures in place for delivery of the three items, (ii) determine which safe harbor option is appropriate for future use, (iii) work with the recordkeeper to implement the changes, and (iv) document all processes and procedures for future reference.

Aon's DC plan consultants are available to assist you with navigating this process and confirming that your recordkeeper is ready to deliver ERISA-required notices appropriately.

Participant Fee Disclosures: Are Changes Coming?

In 2012 the DOL began requiring ERISA plan administrators to provide participant fee disclosures to ensure that participants in DC plans understand the investment and administrative fees associated with the plans they participate in and how those fees impact balances in DC plans. Since then, plan sponsors, in conjunction with recordkeepers, have assured that participant fee disclosures include the required information and are provided to participants at the required times (initially prior to enrollment, quarterly, annually, and when changes occur). How successful have fee disclosures been in accomplishing the goal? A recent study, "401(k) Plans: Many Participants Do Not Understand Fee Information, but DOL Could Take Additional Steps to Help Them," by the Government Accountability Office (GAO) sheds some not so positive light on this question.

The GAO provided approximately 1,800 DC plan participants with the annual participant fee disclosure for the plans they participate in and asked questions designed to assess general knowledge related to fee information contained in the disclosures. The GAO found that 45% of participants were unable to use the information provided to determine investment costs, and 41% of participants actually believed that they were paying no DC plan fees. The GAO also reviewed practices implemented by selected countries and the European Union to help retirement plan participants understand and use fee information from disclosures.

As a result of the survey, the GAO recommended five changes to the DOL for participant fee disclosures which include the following: (i) use consistent terminology for asset-based investment fees, (ii) provide participants the actual cost of asset-based investment fees on the quarterly fee disclosures, (iii) provide information concerning the cumulative effect of fees on savings over time, (iv) include fee benchmarks for in-plan investment options, and (v) include ticker information for in-plan investment options, if available. The DOL reviewed the recommendations and indicated that it will not pursue them at this time but will "continue to evaluate the specific information furnished to ERISA retirement plan participants, as well as the format and fashion of delivery." The DOL also indicated that it will engage with stakeholders for their input on the GAO study and will carefully consider the GAO recommendations with a focus on the potential practical impact of mandating such disclosures. It remains to be seen if participant fee disclosures with additional details would result in a greater understanding of the fees associated with DC plans. Aon will continue to track this information and provide updates as it develops.

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 CDI Corp. (settled for $1.8M); Koch Industries (settled for $4M and other remedies); PNC Financial Services Group, Inc. (dismissed); and Transamerica Corp. (settled for $5.4M and other remedies).

Plan sponsors seeking to reduce their litigation risk use a variety of strategies including improving their fiduciary process for plan governance, more closely monitoring recordkeeping and investment fees, increasing the number of passive funds in their plans, and implementing better fee transparency.

New Retirement Plan Cases
At least 13 new cases were filed this quarter against plan fiduciaries with, no surprise, excessive fee cases leading the way. Although the list of recently filed cases is only illustrative and many of the employers involved may have strong defenses to the claims, it is intended to provide a summary of the types of claims being alleged against plan fiduciaries and their committees and to underscore the importance of monitoring fees and expenses. Excessive fees cases were brought against Baptist Health South Florida, Inc.; Carolina Motor Club, Inc. (AAA Carolinas); Generac Power Systems, Inc.; Juniper Networks, Inc.; MetLife Group, Inc.; SeaWorld Parks and Entertainment, Inc.; University of Maryland Medical System; Wake Forest University Baptist Medical Center; and Xerox Corp. In addition, cases involving access to benefit plans, benefit payments, fraud, and self-dealing were filed against Yum Brands, Inc.; Raytheon Technologies Corp.; National Life Insurance Co.; and Russell Investment Management, LLC, respectively.

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

Please see the applicable Disclosures and Disclaimers on page 10.

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Aon plc (NYSE:AON) is a leading global professional services firm providing a broad range of risk, retirement and health solutions. Our 50,000 colleagues in 120 countries empower results for clients by using proprietary data and analytics to deliver insights that reduce volatility and improve performance.

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