Second Quarter 2022

Aon Quarterly Update

Retirement Legal Consulting & Compliance

In this Issue

Editor's Note

The return of spring brings our readers a fresh bounty of trending topics, starting with the Department of Labor's (DOL's) view on plan investment in cryptocurrencies, a notable Supreme Court case involving defined contribution (DC) plans, and the latest in the actuarial equivalence cases.

For well over a decade, cryptocurrencies have been entering (and will continue to enter) the investment marketplace, making news (both positive and negative). Thus, it was only a matter of time before the DOL announced its views on cryptocurrencies as potential investments for DC plans, specifically the fiduciary concerns raised with cryptocurrency investments. We open this edition reporting on the recent DOL Compliance Assistance Release No. 2022-01 in which the DOL serves warning to DC plan fiduciaries to exercise extreme care in pursuing cryptocurrencies as investment options in their plans, with an additional and very specific warning that the DOL will investigate DC plans that offer these as plan investments. With that said, we are aware at this time of at least one major DC plan recordkeeper that announced that it will offer cryptocurrency investments to DC plan participants.

Our next two articles update our readers on the Supreme Court case *(Hughes v. Northwestern University)* and the status of the litigation challenging the actuarial equivalence factors used by the retirement plans named in the suits. The first article reports on the Supreme Court's decision to send back the *Hughes* case (an excessive fees case) to the lower court for reconsideration whether the plaintiff alleged facts which adequately show that a plan fiduciary failed to satisfy the duty of prudence with respect to regularly monitoring plan investments (and fees). Since our last update in the Third Quarter 2021 issue of the *Quarterly Update,* more actuarial equivalence cases have been filed. In this issue we provide you up-to-date information on the status of these cases with an easy-to-read summary at the end of the article.

This issue also includes an article reporting on the case of *Johnson v. Ballad Health* which serves as a reminder to plan fiduciaries of the importance of drafting and maintaining well-written summary plan descriptions (SPDs). Since courts will continue to look for ways to grant or extend benefits to plan participants based on poorly worded SPDs beyond what is written in plan documents, we provide this important update to our Third Quarter 2020 issue of our *Quarterly Update.*

On February 24, 2022, the Treasury Department and Internal Revenue Service issued proposed regulations on required minimum distributions (RMDs) impacting tax-qualified retirement plans, individual retirement accounts (IRAs), and 403(b) plans. We split our coverage of the proposed regulations into two articles: one covering tax-qualified retirement plans (more specifically DC plans, such as 401(k) plans) and IRAs and the other regarding 403(b) plans as our readers might sponsor one type of retirement plan but not both.

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

Susan Motter
Associate Partner

DOL Warns 401(k) Plan Fiduciaries About Crypto Risks

by Himmat Dhaliwal and Mark Manning

The Department of Labor (DOL) recently issued Compliance Assistance Release No. 2022-01 with a warning to plan fiduciaries to "exercise extreme care" if offering cryptocurrencies within a defined contribution (DC) investment menu, including self-directed brokerage windows. This warning comes as the popularity and curiosity of cryptocurrencies continue to rise.

The Compliance Assistance Release raised specific concerns from the DOL due to the significant risks that cryptocurrencies may pose, including the risk of fraud, theft, and loss. Specifically, the DOL outlined five concerns:

1. **Speculative and Volatile Investments.** The Securities and Exchange Commission recently cautioned that an investment in cryptocurrencies is "highly speculative." Cryptocurrencies have experienced high levels of price volatility which can be harmful to participants.
2. **Challenges for Plan Participants to Make Informed Decisions.** Participants could easily be drawn to cryptocurrencies hoping for significant gains. Additionally, most participants are not equipped to fully understand the risks and other characteristics of cryptocurrencies.
3. **Custodial and Recordkeeping Concerns.** Cryptocurrencies are not held and record kept like traditional funds in a DC plan. They are currently held in digital wallets, which can be vulnerable to theft, or through derivatives such as futures.
4. **Valuation Concern.** The valuation of cryptocurrencies remains challenging, and there is no agreed-upon model to value these securities. Additionally, intermediaries may not adopt consistent accounting methods.
5. **Evolving Regulatory Environment.** Fiduciaries need to consider how regulatory requirements would apply to an offering of cryptocurrencies. It is important to note that these investments are not registered, do not have the same disclosures as traditional funds and trusts, and may often be used in illegal activity.

Cryptocurrencies emerged in early 2009, and since their introduction as an asset class, over 18,000 new cryptocurrencies have emerged. The market capitalization of these digital assets is worth over $2 trillion. Apart from being completely virtual, cryptocurrencies are different from other currencies because they use blockchain technology to ensure that all transactions are secure and verifiable.

Interestingly, the banking and financial industries have signaled some acceptance of cryptocurrencies. Several hedge funds have emerged, attracting significant inflows, and both Goldman Sachs and JP Morgan have also reopened their respective cryptocurrency trading desks. Currently, cryptocurrencies can be bought by individuals on exchanges and held in digital wallets or purchased through the futures market. Lastly, several exchange traded funds (or ETFs) and at least one mutual fund are available whose values are based on the price of cryptocurrencies through investments in futures or companies involved in developing or using blockchain technologies.

However, extreme volatility is the key barrier to wider adoption and makes the market appear far too speculative and immature from a fiduciary perspective. Furthermore, the potential for government and central bank intervention to limit the circulation of cryptocurrencies acts as a further barrier. Another key fiduciary risk is that the cryptocurrency market boom has led to a rise in "pump and dump" scams. These scams focus on artificially increasing the price of a specific cryptocurrency by attracting demand, usually from retail investors, and then selling at the newly inflated price. Even though the underlying blockchain technology has real-life uses, it is still difficult to make a persuasive case for investors to engage in today's cryptocurrency markets.

As a result of the concerns from the DOL and given the risks associated with cryptocurrencies, the Employee Benefits Security Administration will be conducting a review of plans that make cryptocurrency investments available to participants. Plan fiduciaries that make cryptocurrencies or related securities available to plan participants can be expected to be questioned about how they have fulfilled their fiduciary responsibilities of prudence and loyalty with regard to these investments. Additionally, without further guidance, plan fiduciaries will potentially need to determine if a brokerage window that allows investments in products whose value is derived from cryptocurrencies remains appropriate.

While exposure to cryptocurrencies in DC plans is likely non-existent in a core investment menu, there might be exposure to cryptocurrencies within a self-directed brokerage window. Aon Investments USA Inc. consultants are available to discuss how this might impact your plan. We will continue to monitor and report on this evolving matter.

Please see the applicable Disclosures and Disclaimers on page 13.

Lots of Choice Does Not Save Imprudent Plan Investments from Lawsuit

by Dan Schwallie

The Supreme Court vacated (cancelled) the decision of the Seventh Circuit Court of Appeals in *Hughes v. Northwestern University.* As reported in the **Fourth Quarter 2021** issue of our *Quarterly Update,* participants alleged that the University's 403(b) plan included investments with excessive investment fees and allowed excessive recordkeeping fees. The district court had granted the University's motion to dismiss the case, and the Seventh Circuit affirmed the dismissal. The Seventh Circuit found that similar low-cost funds were included in the wide range of options available to participants for investment under the plan and that there was no requirement for a sole recordkeeper. Plaintiffs appealed the Seventh Circuit decision to the Court. The Court likely accepted the appeal due to conflicting decisions from the Third and Eighth Circuits on virtually identical allegations.

The Court found the reasoning of the Seventh Circuit "flawed" because the Seventh Circuit had found, as a matter of law, that the availability of lower-cost institutional mutual fund shares along with higher-cost retail mutual fund shares for the same investments eliminated any concerns that the other plan options were imprudent. Applying the Court's holdings in *Tibble v. Edison,* in which the Court had concluded that a plan fiduciary has a continuing duty—separate and apart from the duty to exercise prudence when initially selecting investments—to monitor and remove imprudent trust investments, the Court noted that the Seventh Circuit focused on a plan fiduciary's obligation to provide a diverse "menu" of investment options, but that the Seventh Circuit erred in relying on participants' ultimate investment choices to excuse allegedly imprudent decisions by the University's plan fiduciaries. The Court noted that, "even in a defined-contribution plan where participants choose their investments, plan fiduciaries are required to conduct their own independent evaluations to determine which investments may be prudently included in the plan's menu of options." The Court further stated that, "If fiduciaries fail to remove an imprudent investment from the plan within a reasonable time, they breach their duty."

The Court also appeared to reject the Seventh Circuit's conclusion that "plan participants had options to keep the expense ratios (and, therefore, recordkeeping expenses) low" such that "[t]he amount of fees paid were within the participants' control." The Court remanded (sent back) the case to the Seventh Circuit to consider whether the participants have plausibly alleged a violation of the duty of prudence as articulated in *Tibble.*

The Court's decision strongly suggests that a plan sponsor should not rely on providing a large number of investment choices to participants as a way to reduce or eliminate the employer's (or other plan fiduciary's) responsibility to continually review the prudence of particular investment options offered under a plan. Although the case specifically concerns a 403(b) plan, which was sponsored by a not-for-profit institution, this Supreme Court decision has important implications for any fiduciary of defined contribution plans subject to the Employee Retirement Income Security Act of 1974, particularly considering the ongoing wave of excessive fee lawsuits that have been filed. It will be important to follow how the lower courts interpret the Court's decision in the *Hughes* case when evaluating future fiduciary breach claims.

Aon's Retirement Legal Consulting & Compliance consultants, along with Aon Investments USA Inc. consultants, are available to consult with plan sponsors on the implications of this Court decision as applied to current plan investments and the establishment of appropriate fiduciary processes to monitor plan investments and related fees.

Actuarial Equivalence Lawsuits: Current State of Play

by Jennifer Ross Berrian

As of the date of this *Quarterly Update,* 17 lawsuits have been filed against 14 different plan sponsors (two against AT&T, Rockwell Automation, and UPS) challenging the actuarial equivalence factors used by pension plans to calculate optional forms of benefits and early retirement reductions. Four new cases have been filed since our last report in the **Third Quarter 2021** issue of our *Quarterly Update.* Eight cases are ongoing, one has reached a tentative settlement, and eight have been dismissed.

New Cases

There have been four new cases filed since our last update. These cases include the following: *DuVaney v. Delta Airlines* (flat conversion factors adjusted based upon the age difference between the participant and the beneficiary); *Duke v. Luxottica* (1971 GAM/7%); *Urlaub v. Citgo* (1971 GAM/8%); and a new case filed against UPS, *Brown v. UPS* (1983 GAM/6% with others for grandfathered groups). All four cases are currently pending.

Pending Cases

In addition to the three cases listed above, there are currently four more active cases (five if you include the case that has reached a tentative settlement but has not received final court approval). Interesting highlights from these cases include the following.

- ***Belknap v. Partners Healthcare*** (1951 GAM projected to 1960/7.5%). The district court judge granted the defendants' Motion for Summary Judgment on March 4, 2022, and dismissed the case. Among other factors used to support the dismissal, the judge ruled that:
  - The defendants were properly following the terms of the plan when calculating benefits;
  - The Employee Retirement Income Security Act of 1974 (ERISA) contains no reasonableness requirement and doesn't specify factors to be used when calculating actuarially equivalent benefits;
  - If Congress had intended Section 204(c)(3) of ERISA (relating to determining the actuarial equivalence of an accrued benefit) to require actuarial equivalence to be calculated using reasonable actuarial assumptions, or in some other specific way, it could have done so; and
  - Courts should not be imposing a reasonableness standard that Congress chose to omit.

Unsurprisingly, the plaintiffs appealed the decision to the First Circuit Court of Appeals on March 16, 2022. This case continues, and we should hear more in the coming months.

- ***Masten v. MetLife*** (1971 GAM/6%). On February 21, 2022, the plaintiffs moved to certify a class for the case. The defendants will most likely object. The plaintiffs' proposed class includes all participants and beneficiaries who began receiving benefits from the plan that meet all of the following conditions:
  - They commenced receiving benefits on or after January 1, 2013;
  - Benefits were payable in the form of a joint and survivor annuity with survivor benefits between 50% and 100% of the participant's benefit;
  - Benefits were calculated entirely using the Traditional Part formula; and
  - Benefits were not calculated using two specific plan sections.
- ***Scott v. AT&T*** (tabular factors); ***Berube v. Rockwell Automation*** (1971 GAM/7%, UP-1984/6%, and tabular factors). The action continues in these two cases. Motions for Class Certification should be filed in both cases within the next several months.

Tentative Settlement

- ***Herndon v. Huntington Ingalls*** (1971 GAM/6%). The preliminary settlement agreement was approved by the court on January 31, 2022. The parties agreed to settle for $2.8M, minus attorneys' fees and costs, to be distributed pro rata to class members via increased future payments. The class includes all people commencing joint and survivor benefits on or after May 20, 2013, and before January 18, 2020. The plaintiffs' attorneys have requested attorneys' fees of $700,000 (25% of settlement amount) and costs and litigation expenses of $305,376.98. This case will not be over until the settlement (and requested attorneys' fees and costs) gets final approval from the district court judge. The final settlement hearing to either approve or deny the settlement and the amount of fees and costs is scheduled for May 9, 2022.

Dismissed

The following cases have been finalized and dismissed by the relevant court: *Cruz v. Raytheon* (tabular factors, 1971 GAM/PBGC interest rate, and 1971 TPF&C/7%); *Thorne (Smith) v. U.S. Bancorp* (tabular factors for early retirement reductions); *Brown v. UPS* (1983 GAM/6% and others for grandfathered group); *Torres v. American Airlines* (UP-1984/5%); *DuBuske v. PepsiCo* (tabular factors); *Duffy v. Anheuser-Busch* (UP-1984/6.5% or 7%); *Eliason v. AT&T* (tabular factors); and *Smith v. Rockwell Automation* (1971 GAM/7% and UP-1984/6%).

As the cases continue to wind their way through the court system, we took this opportunity to summarize the cases and their respective status to provide you a quick and efficient way to keep up to date with this litigation. With three new cases filed towards the end of 2021, it appears as if this litigation is going to continue until the courts finally decide a case on the merits (and all appeals are exhausted). While the dismissal of the case against Partners Healthcare was favorable to plan sponsors, that decision was immediately appealed, and it's unknown how the appellate court will decide the issues. We will continue to keep you updated.

Plan Sponsor	Date Filed	Mortality Table / Interest Rate	Chief Complaint	Current Status
NEW CASES FILED IN 2021 AND 2022				
Citgo	8/3/2021	1971 GAM / 8%	Option factors	Ongoing
Luxottica	11/1/2021	1971 GAM / 7%	Option factors	Ongoing
Delta Airlines	12/10/2021	Tabular factors	Option factors	Ongoing
UPS (two separate suits)	4/27/2022	1983 GAM / 6% Others for grandfathered groups	Option factors	Ongoing; initial case dismissed
PENDING CASES				
MetLife	12/30/2018	1971 GAM / 6%	Option factors	Ongoing
AT&T (two separate suits)	10/12/2020	Tabular factors	Option factors; early retirement factors	Ongoing; initial case dismissed
Rockwell Automation (two separate suits)	12/2/2020	1971 GAM / 7% UP-1984 / 6%	Option factors	Ongoing; initial case dismissed
Partners Healthcare	6/28/2019	1951 GAM / 7.5%	Option factors	District Court case dismissed; ruling appealed
TENTATIVE SETTLEMENT PENDING COURT APPROVAL				
Huntington Ingalls	5/20/2019	1971 GAM / 6%	Option factors	Preliminary settlement ($2.8M present value)
DISMISSED/SETTLED CASES				
Raytheon	6/27/2019	1971 GAM / 7% 1971 TPF&C / 7% Tabular factors	Option factors	Settled for $59M (40% of plaintiff's demand for benefit increases less attorneys' fees and costs)
American Airlines	12/11/2018	UP-1984 / 5%	Option factors	Settled after class action denial; case dismissed
PepsiCo	12/12/2018	Tabular factors	Option factors	Case dismissed
Anheuser-Busch	5/6/2019	UP-1984 / 6%	Option factors	Case dismissed
U.S. Bancorp	12/14/2018	Tabular factors	Early retirement factors	Case dismissed

Poorly Drafted SPD Language Can Result in a Fiduciary Breach

by Tom Meagher

While it has been long settled that the terms of the plan document should control any questions relating to plan benefits, the courts will continue to look for ways to extend coverage to plan participants based on poorly worded summary plan descriptions (SPDs). While we touched on this topic more generally in the **Third Quarter 2020** issue of our *Quarterly Update,* the concern is continuing and is underscored based on this recent case.

In the case of *Johnson v. Ballad Health* (E.D. Tenn. Jan. 24, 2022), the employee elected to participate in the employer's long-term disability plan. One of the provisions of that plan permitted an employee to "buy up" a benefit from 60% to 100% of covered monthly earnings, which the employee did. The employee subsequently filed for a disability benefit and sought a benefit equal to 100% of covered monthly earnings.

Since the long-term disability plan document had language that would serve to clarify that the buy-up option was limited to an overall benefit of 60% (and would not result in a 100% benefit), the court applied an "arbitrary and capricious" standard (meaning the court would defer to the plan administrator if the plan administrator has acted reasonably in interpreting the plan) and held for the employer.

However, that is not the end of the story. The Employee Retirement Income Security Act of 1974 requires that an SPD be written in a manner calculated to be understood by the average plan participant and that it be sufficiently accurate and comprehensive to reasonably apprise a participant of his or her rights and obligations under the plan. The court in *Ballad Health* went on to note that the SPD is therefore a fiduciary communication to plan participants and that the information provided in the SPD is a fiduciary activity. Thus, the court reasoned that an employer who furnishes an SPD that is misleading as to the benefits it intends to provide breaches fiduciary duties owed to participants, regardless of whether the statements were made intentionally or negligently.

In deciding the case in favor of the participant, the court noted that the SPD in this case included language that misled the employee into reasonably believing that selecting the buy-up coverage would entitle her to long-term disability benefits based on 100% of her covered monthly earnings. Given the unclear language, the court concluded that the employee reasonably believed that she had purchased the long-term disability coverage equal to 100% of covered compensation.

While employers continue to focus on ensuring that plan documents correctly describe plan benefits, they should not lose sight of the descriptions appearing in the SPD. While employers will likely always include provisions that indicate that the plan document will control, the *Ballad Health* case demonstrates that participants may still succeed in their claims when they allege a fiduciary breach relating to how the benefits are described in plan communications.

Aon's Legal Consulting & Compliance consultants are well equipped to draft plan terms and corresponding SPD language that is consistent and protective of the employer and plan fiduciary while being easy for participants to understand. Please do not hesitate to reach out to us if we may be of assistance.

Proposed Regulations Limit Tax Deferral Strategies

by Hitz Burton

On February 24, 2022, the Internal Revenue Service (IRS) issued proposed regulations for required minimum distributions (RMDs) payable from tax-qualified retirement plans and individual retirement accounts (IRAs). As you may recall, a key component of the SECURE Act was to substantially limit certain long-standing tax deferral strategies previously available under defined contribution (DC) plans and IRAs when a participant (or IRA owner) would designate a non-spouse survivor beneficiary such as a child or grandchild.

Under pre-SECURE Act tax law, non-spouse beneficiaries of DC plan benefits could generally elect to take death benefits measured over their own life expectancies provided payments commenced no later than one year after the participant died or were distributed, in total, within five years. The SECURE Act limits application of the life expectancy rule (i.e., the one-year rule) by establishing a new rule mandating that payments be paid in full within 10 years (the 10-year rule) unless the designated beneficiary (i.e., the beneficiary affirmatively designated by the participant or designated by the terms of the plan document) qualifies as an eligible designated beneficiary. An "eligible designated beneficiary" is a beneficiary designated under the terms of the plan who is the participant's surviving spouse, the participant's minor child, a chronically ill or disabled individual, or an individual not more than 10 years younger than the participant (or IRA owner).

The introduction of this new defined term "eligible designated beneficiary" will add significant complexity to DC plan administration. For example, how to measure the applicable 10-year period will vary based on the type of eligible designated beneficiary. A surviving spouse or sibling of the participant who is not more than 10 years younger will be an eligible designated beneficiary for life. But a minor child will be an eligible designated beneficiary only until he or she reaches the age of majority (assumed under this proposed rule to generally be age 21). After the participant's child reaches age 21, the 10-year rule applies. In an outcome that may surprise practitioners, the 10-year rule applies even if the child is chronically ill or disabled upon reaching age 21 if benefit payments commenced earlier and the child was not disabled or chronically ill at the time payments commenced.

Additional complexities include situations where the eligible designated beneficiary dies before the participant's entire vested death benefit is distributed. In this situation, the beneficiary of the eligible designated beneficiary is not eligible to receive payments over their life expectancy and the 10-year rule applies. Trust beneficiaries also create their own complexity. If the participant previously designated a trust with multiple beneficiaries as the designated beneficiary of a vested account balance, then the life expectancy rule can apply to the beneficiaries who qualify as eligible designated beneficiaries while other designated beneficiaries under the trust will need to take distribution under the 10-year rule.

These new RMD rules generally apply to the beneficiaries of DC plan participants and IRA owners where the participant dies after December 31, 2019. These new rules do not apply to the death benefit paid to non-spouse beneficiaries from defined benefit (DB) pension plans which continue to be subject to the minimum incidental death benefit rules. And, when finalized, these new rules will further differentiate the minimum distribution rules that apply to DC and DB plans.

If you would like help navigating the significant additional administrative complexity associated with these new proposed rules or address any required plan amendments, please reach out to Aon's Retirement Legal Consulting & Compliance consultants. Their contact information is included on the last page of this *Quarterly Update.*

Proposed RMD Rules Bring Changes to 403(b) Plans

by Dan Schwallie

The proposed Treasury regulations on required minimum distributions (RMDs), published in the Federal Register on February 24, 2022, make several notable changes to the RMD rules applicable to plans under Section 403(b) of the Internal Revenue Code (Code) through proposed changes to the 403(b) regulations and anticipate additional changes for such plans. The changes described below are intended to align 403(b) plan rules more closely with qualified plan rules and are proposed to be effective for calendar years beginning on and after January 1, 2022.

Required Beginning Date

The proposed 403(b) regulations would expressly apply the definition of required beginning date (RBD) applicable to 401(k) and other qualified plans to 403(b) plans. This is generally not a change from existing 403(b) regulations. The RBD for 403(b) plan participants generally would be April 1 of the calendar year following the later of (i) the calendar year in which the participant attains age 72[1] and (ii) the calendar year in which the participant retires from employment with the employer maintaining the plan, but the RBD for a 5% owner would be April 1 of the calendar year following the calendar year in which the employee attains age 72 for a 403(b) plan that is not a governmental church plan. *However,* the proposed regulations would permit a 403(b) plan (as well as qualified plans) to uniformly provide that the RBD is April 1 of the calendar year following the calendar year in which the participant attains age 72.

Amounts Not Considered RMDs

The proposed 403(b) regulations would expressly apply the rules applicable to 401(k) and other qualified plans to determine amounts not included when determining whether the RMD requirement has been satisfied for a calendar year, rather than implicitly applying the rules for Individual Retirement Accounts (IRAs). Corrective distributions

[1] Age 70½ applies instead of age 72, wherever age 72 appears in this paragraph, for those employees born before July 1, 1949.

of contributions exceeding the annual addition limit, elective deferrals exceeding the annual limit, or matching contributions exceeding the actual contribution percentage (or ACP) limit are not considered part of an RMD, nor are loans that are treated as deemed distributions or permissible (90-day) withdrawals from an eligible automatic contribution arrangement considered part of an RMD.

Qualifying Longevity Annuity Contracts

The proposed 403(b) regulations would apply the rules for qualifying longevity annuity contracts (QLACs) applicable to 401(k) and other qualified plans, rather than applying the rules for IRAs. Thus, a major difference in the QLAC rules applicable to 403(b) plans is the detailed rules around payments after the death of the employee. Another difference is that the employer (rather than the trustee, custodian, or issuer) may rely on an employee's written representation (or such other form as may be prescribed by the Internal Revenue Service (IRS)), that QLAC premiums paid, which are not paid under a plan, annuity, or contract maintained by the employer or a related employer, do not exceed the limitations on QLAC premiums, unless the employer has actual knowledge to the contrary. A "related employer" is an entity that is treated as a single employer with the employer under Section 414(b), (c), (m), or (o) of the Code.

Anticipated Future Changes

In the preamble to the proposed RMD regulations, the Treasury Department (Treasury) and IRS note they are considering additional changes to further align the RMD rules for 403(b) plans to the rules for qualified plans. For example, each 403(b) plan (like each qualified plan) would be required to make RMDs calculated with respect to that plan, rather than rely on the employee to request distributions from another plan in an amount that satisfies the requirement. The thought is that such changes would treat similar employer-sponsored plans consistently and may facilitate compliance with the RMD rules. In anticipation of proposing such additional changes, the Treasury and IRS are requesting comments by May 25, 2022, on changes to the RMD rules for 403(b) plans, including:

- Administrative concerns;
- Differences between structure or administration that should be considered in applying RMD rules for qualified plans to 403(b) plans; and
- Transition rules that would ease the implementation of such potential changes.

Aon's Retirement Legal Consulting & Compliance consultants are available to provide assistance understanding how these new rules can affect administration of RMDs from your 403(b) plans.

Quarterly Roundup of Other New Developments

by Sandy Combs, Teresa Kruse, Mark Manning, and Jan Raines

Happenings on "The Hill"

Retirement savings plan legislation continues to be discussed in Congress, and supporters hope to see changes enacted to encourage plan participation and to position more Americans to better save for retirement. Most of the proposed legislation has bipartisan support, although prospects for passage in 2022 remain unclear. Recent proposals affecting retirement plans are summarized below.

- **Retirement Improvement and Savings Enhancement (RISE) Act of 2021.** This bill would establish an online "Retirement Lost and Found" database, expand SECURE Act's Pooled Employer Plan provision, increase termination force-out balances from $5,000 to $7,000, and simplify reporting and disclosure requirements.
- **Securing a Strong Retirement Act of 2021.** Often referred to as "SECURE 2.0," this bill would require automatic enrollment for 401(k) and 403(b) plans, allow 403(b) plans to participate in multiple employer plans and invest in collective investment trusts, create an online database for lost retirement accounts, remove the 25% cap on qualified longevity annuity contracts, and clarify the "free look" period to consider the annuity contract.
- **Auto Reenroll Act of 2022.** This bill would amend safe harbors in automatic enrollment plans to encourage employers to automatically reenroll nonparticipants at least once every three years.
- **Enhancing Emergency and Retirement Savings Act of 2022.** This bill would provide penalty-free personal expense distributions to those who experience unexpected emergencies. Distributions of up to $1,000 from tax-exempt retirement plans may be used for emergency personal expenses and are limited to one distribution in a calendar year. The bill would also allow repayment to plans of such distributions over a three-year period.
- **Lifetime Income for Employees Act of 2022.** This bill would modify qualified default investment alternative rules to allow annuity investments. More specifically, this bill would allow fiduciaries of defined contribution (DC) plans to default a portion of participants' accounts into annuity contracts upon providing certain notices to plan participants or beneficiaries and complying with certain prohibitions on liquidity restrictions.

Aon will continue to monitor and report on legislation as updates become available.

New Fiduciary Rules—The Final Countdown

It's been almost two years since the Department of Labor (DOL) reinstated its five-part test (originally issued in 1975) for determining whether a financial institution or investment professional is considered a fiduciary for providing "investment advice." (For more information, please see the **Fourth Quarter 2020** issue of our *Quarterly Update*.) Related to this ruling, the DOL also issued a prohibited transaction exemption (PTE 2020-02), which went into effect February 16, 2021. This PTE allows fiduciaries providing investment advice to receive compensation in exchange for providing that advice without violating Title I of the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code, both of which otherwise prohibit advisers from receiving compensation for advice that could create a conflict of interest. The DOL announced that certain portions of PTE 2020-02 were enforceable after January 31, 2022, but other parts (e.g., specific documentation and disclosure requirements related to rollover recommendations) would not be enforced until July 1, 2022.

The PTE also broadly defined a "rollover" to be a transfer of assets from: (i) a plan to an IRA; (ii) a plan to another plan; (iii) an IRA to a plan; (iv) IRA to another IRA; or (v) one type of account to another (this is not clear, but the DOL gives an example of movement from a commission-based account to a fee-based account). To be eligible for PTE 2020-02, advisers must acknowledge their fiduciary status in writing, disclose services and material conflicts of interest, adhere to Impartial Conduct Standards, adopt policies and procedures, document and disclose specific reasons for why the rollover recommendations are in the investor's best interest, and conduct an annual compliance review.

Plan sponsors and fiduciaries should understand how their recordkeeping or advice partners are addressing these matters, and how they are complying with PTE 2020-02. Aon's Retirement Legal Consulting & Compliance and Defined Contribution Plan consultants are available to assist with reviewing the adviser's policies, procedures, and actual practices to confirm they are in compliance with the DOL guidance regarding rollovers and PTE 2020-02.

Default to Roth—To Consider or Not to Consider

In an article recently published in Pensions & Investments,[1] Aon's Barb Hogg discusses why sponsors of DC plans with an automatic enrollment feature might want to consider defaulting participants to an after-tax Roth contribution, rather than a pre-tax contribution as has been historically used for automatic enrollment plans. One reason given for considering an after-tax Roth contribution is related to payouts of small balances (whether voluntary or involuntary), where participants less than age 59½ are subject to the 10% penalty tax for early withdrawals. With a pre-tax contribution default for automatic enrollment, participants could lose 10% of what they contributed, while the 10% penalty wouldn't apply to the after-tax Roth contributions (only to the earnings on those contributions). Although participants could roll over their payout to an IRA to avoid the 10% penalty, most workers with small balances tend to "take the money and run." A similar situation arises when a participant takes a hardship withdrawal.

Aon's Retirement and Defined Contribution Plan consultants are available to discuss plan design considerations, including the pros and cons of defaulting participants to after-tax Roth contributions in a DC plan with an automatic enrollment feature.

Want to Hear Some Good News?

In today's world, who doesn't want to hear some good news? After two years of the pandemic, continuing social/political division, current economic struggles, the "Great Resignation," and the ongoing situation in Ukraine, it seems safe to say that we can all use a dose of good news. The impact of all the aforementioned issues would seem to lower expectations that any "good news" might apply to the world of retirement. In fact, we might expect just the opposite—but keep reading.

Fidelity recently reported,[2] based on 23,700 corporate DC plans, record increases for 2021 in the average participant account balance ($130,700 for 401(k) plans and $115,100 for 403(b) plans) with 38% of participants in 401(k) plans and 34% of participants in 403(b) plans choosing to increase their deferral rates. It is encouraging to hear that many participants were not deterred by the events of the day.

In other good news, the Plan Sponsor Council of America's 64th Annual Survey[3] reflected that, for the first time, the most common default deferral rate in DC plans with automatic enrollment increased from 3% to 6%. A higher default deferral rate is one of the top contributors to retirement outcomes. Paired with automatic increases (which also saw an increase in the cap applied to auto-increase plans) has proven to effectively increase participant deferral rates over time. If your DC plan currently utilizes automatic enrollment, it may be a good time to review the plan's default deferral rate along with the automatic increase provisions. In addition, for participants who previously opted out of automatic enrollment or are deferring at a rate below the default deferral rate, it may be a good time to consider reenrolling those participants.

[1] Margarida Correia, *Plan sponsors wary of defaulting employees to Roth contributions, Pensions & Investments,* February 28, 2022

[2] Fidelity Investments, *Despite the "Great Resignation," Saving for Retirement Is Still a Priority, as Account Balances and Contributions Reach Record Levels, According to Fidelity,* February 17, 2022

[3] Plan Sponsor Council of America, *64th Annual Survey of Profit Sharing and 401(k) Plans,* December 15, 2021

So, take heart, not all news is bad! With all the struggles of the last two years, it is good to know that participants in retirement plans are, perhaps because of all these issues, saving more and growing their accounts. In addition, plan sponsors are improving plan design and actively helping plan participants achieve better retirement outcomes.

Aon's Retirement and Defined Contribution Plan consultants can assist with a plan design review to assess these and other provisions that may prove helpful in these efforts.

DOL Statement on Private Equity Investment

The DOL recently issued a Supplemental Statement addressing fiduciary issues related to investments of private equity in individual account plans (such as 401(k) plans) that are subject to ERISA. While private equity investments are rarely used in 401(k) plans, the DOL issued an Information Letter in June 2020 stating that plan fiduciaries may offer private equity investments within a managed asset allocation fund in an individual account plan.

The Supplemental Statement, issued in December 2021, was intended to caution fiduciaries on the use of private equities in individual account plans. While the statement does not change the fact that private equity can be included in a managed asset allocation investment, the DOL noted that plan fiduciaries need to follow a thorough process when determining whether to offer private equity. Moreover, plan fiduciaries should possess the necessary expertise (or hire an advisor that does) to make these decisions as private equity investments are more complicated and are subject to potential restrictions on liquidity, longer time horizons, and often have higher fees, among other potential complications.

Aon Investments USA Inc. has experience and knowledge with helping clients invest in private equities and can advise as to the process to be followed, possible investment structures, managed asset allocation funds, and as to whether or not private equities would make sense for a specific plan and its participants.

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 have been dismissed (in full or in part) or settled, including cases involving Land O'Lakes (settled for $1.8M and other remedies); T. Rowe Price (settled for $7M and other remedies); and Walgreens (settled for $13.75M 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. Developing a written record demonstrating the fiduciary process of monitoring these issues is an important risk mitigation strategy.

New Retirement Plan Cases

After a slowdown in the fourth quarter of 2021, new cases in the first quarter of 2022 have made up for the lull. Approximately 23 new cases were filed against plan fiduciaries with, no surprise here, excessive fee cases continuing to lead the way. 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. Excessive fees cases this quarter were brought against Bessemer Trust Co.; Capital One Financial Corp.; The Children's Hospital Corp.; Dartmouth-Hitchcock Clinic; DISH Network Corp.; Exelon Corp.; Fluor Corp.; Hy-Vee, Inc.; L2Harris Technologies, Inc.; Mass General Brigham Inc.; Milliman, Inc.; Molina Healthcare, Inc.; Nokia of America Corp.; PPL Corp.; Ricoh USA, Inc.; Rollins, Inc.; Taylor Corp.; and Voya Financial, Inc., and no doubt others. In addition, cases were filed against Hyatt Corp. (failure to follow the plan document); Raytheon Co. (accrual of benefits); Transamerica Retirement Solutions, LLC (data breach); Velo Corp. of America (prohibitive transactions); and West Monroe Partners, Inc. (ESOP valuation).

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

Please see the applicable Disclosures and Disclaimers on page 13.

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About Aon

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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