First Quarter 2023

Aon Quarterly Update

Retirement Legal Consulting & Compliance

In this Issue

Editor's Note

by Susan Motter

Welcome readers to our first edition of the *Quarterly Update* for 2023!

As 2022 came to a close, Congress "gifted" plan sponsors with significant retirement plan legislation not seen since the Pension Protection Act of 2006. Specifically, on December 29, 2022, President Biden signed the SECURE 2.0 Act of 2022 (SECURE 2.0) into law as part of the Consolidated Appropriations Act, 2023. We start this edition of the *Quarterly Update* with a report on SECURE 2.0 which provides a number of changes to the Internal Revenue Code and the Employee Retirement Income Security Act of 1974. These changes impact many different types of retirement plans and, among other things, are designed to boost employee savings and increase financial readiness for retirement. Our readers should stay tuned as we will provide more details regarding SECURE 2.0 and its impact in a forthcoming Aon publication.

It's finally here—the long-awaited Internal Revenue Service (IRS) determination letter program for individually designed 403(b) plans! In this edition, we include two articles: the first one focusing on the opening of the program to these plans and a second article reporting more generally on the modifications to the IRS's scope of review of individually designed qualified retirement plans and the extended expiration of the remedial amendment period to amend such plans for tax-qualification requirements.

We close out this edition of the *Quarterly Update* with an eye on compliance and on areas of interest to our readers who are plan fiduciaries. We start with an article regarding our annual Compliance Calendar with key compliance milestones and due dates that apply to qualified retirement plans and health and welfare plans, and we include a link to this important compliance tool.

We follow that reporting with three articles in areas of particular fiduciary focus. First, environmental, social, and governmental (or "ESG") investment guidance for plan fiduciaries has been in a "push-pull" state as White House administrations changed between the political parties. We offer our readers the latest on the final ESG investment rule in a reader-friendly "Q&A" format (including our best practice recommendations).

No retirement plan is perfect. Operational errors and fiduciary breaches happen. We detail in this edition the Department of Labor's (DOL's) proposed changes to its Voluntary Fiduciary Correction Program (VFCP) to encourage more plan fiduciaries to use VFCP to correct fiduciary breaches, and we detail VFCP's newly added self-correction feature.

Lastly, cybersecurity remains a high priority for plan fiduciaries and others, and developments in this fiduciary area of concern continue to quickly evolve. We update our prior reporting with an article on the recent decision in the *Colgate-Palmolive* case and the DOL's continuing efforts to research and develop guidance for plan fiduciaries in the cybersecurity area.

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.

SECURE 2.0 Is Now in Effect!

by Jennifer Ross Berrian

As part of the Consolidated Appropriations Act, 2023, the SECURE 2.0 Act of 2022 (SECURE 2.0) was passed by both houses of Congress and then signed by President Biden on December 29, 2022. Key themes of SECURE 2.0 build on the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE) and include:

- Support for effective and prudent use of defined benefit (DB) pension plan assets;
- Acknowledgement of broader financial challenges that serve as barriers to retirement savings;
- Increasing retirement savings through automation, incentives, and flexibility;
- Improving outcomes in 403(b) plans by allowing access to pooled employer plans and addressing tax issues associated with use of collective investment trusts; and
- Support for employees as they manage income to and through retirement.

SECURE 2.0 includes provisions applicable only to DB plans, to defined contribution (DC) plans, and to both. Certain provisions are already in effect while others have a delayed effective date. In some of the provisions, governmental agencies are directed to study specific aspects of retirement plan administration and issue guidance.

Aon continues to study the legislation and will be working with employers to help them understand what can and should be done, and by when. While we are continuing to develop materials intended to guide employers on the implications of SECURE 2.0, please see the following materials for additional information:

- A high-level Client Alert reviewing the broad themes of SECURE 2.0 (click **here** to access this summary);
- An Aon webinar, “SECURE 2.0 in Action: Improving Retirement Outcomes,” was held on January 12, 2023 (a replay can be accessed **here**); and
- A Client Alert focusing on DB provisions of SECURE 2.0 (click **here** to access this summary).

More To Come!
Aon is developing a Client Alert covering DC plan provisions. Also, stay tuned for additional coverage on SECURE 2.0 in a future Legal Consulting & Compliance *Quarterly Update*.

We Are Here to Help
Please contact your Aon consultant to schedule time to discuss SECURE 2.0 and the impact that it will have on your retirement plans. We’re here to help!

Individually Designed 403(b) Plans Finally Eligible for IRS Determination Letters

by Dan Schwallie

For the first time, individually designed 403(b) plans finally will be able to apply for a determination letter from the Internal Revenue Service (IRS). While it has been possible for an adopter of an IRS pre-approved 403(b) document to rely on an IRS opinion or advisory letter as to whether the pre-approved document provisions satisfy requirements under Section 403(b) of the Internal Revenue Code (Code), adopters of individually designed 403(b) plan documents had no such reliance.

Opening Dates for Determination Letter Submissions

Revenue Procedure 2022-40 permits the sponsor of an individually designed 403(b) plan to submit a determination letter application for an initial plan determination or a determination upon termination of the plan and also under certain other circumstances to be identified by the IRS in guidance published in the Internal Revenue Bulletin (IRB). Noticeably absent is the ability, currently available to 401(k) and other qualified plans, to apply for a determination letter when 403(b) plans merge.

Sponsors of individually designed 403(b) plans are permitted to apply for an initial determination letter according to the following schedule, based on the Employer Identification Number (EIN):

Last Digit of Plan Sponsor EIN	First Date Initial Determination Application May Be Submitted
1, 2, or 3	June 1, 2023
4, 5, 6, or 7	June 1, 2024
8, 9, or 0	June 1, 2025

Sponsors of individually designed 403(b) plans can apply for a determination letter upon the termination of the plan beginning June 1, 2023, regardless of the EIN.

What the IRS Determination Letter Review Considers

The IRS generally will consider in its review those requirements under Section 403(b) of the Code that are in effect, or that have been included in an annually published Required Amendments List (RA List), on or before the last day of the second calendar year preceding the year in which the determination letter application is submitted. The RA List establishes the date the Remedial Amendment Period (RAP) expires for changes in 403(b) requirements set forth on the list. The RAP is the period during which a plan sponsor may correct defective plan language retroactive to the beginning of the RAP. The sponsor will be considered to have satisfied the 403(b) plan document requirements, if all provisions of the plan necessary to satisfy those requirements have been adopted and made effective in form and operation from the beginning of the RAP.

Expiration of Remedial Amendment Period

The end of the RAP varies depending on whether there has been a change in 403(b) requirements, the plan is new, an existing plan is amended, a plan is terminating, and whether the plan is governmental or not. Revenue Procedure 2022-40 clarifies and modifies the provisions of Revenue Procedure 2019-39 that relate to the RAP for individually designed 403(b) plan language defects first occurring after June 30, 2020.

- **Change in 403(b) Requirements.** The RAP with respect to defective language that results from a change in 403(b) requirements expires on the last day of the second calendar year that begins after the issuance of the RA List in which the change appears. The expiration is extended for governmental 403(b) plans to 90 days after the close of the third regular legislative session of the legislative body with authority to amend the plan that begins on or after the date of issuance of the RA List in which the change in 403(b) requirements appears, if later.
- **New Plan.** The RAP with respect to defective language in a new plan, including the absence of required language, expires on the last day of the second calendar year following the calendar year in which the plan is put into effect. The expiration is extended for governmental 403(b) plans to 90 days after the close of the third regular legislative session of the legislative body with authority to amend the plan that begins after the end of the plan's initial plan year.
- **Amendment to an Existing Plan.** The RAP with respect to defective amendment language in an existing plan, other than an amendment resulting from a change in 403(b) requirements (discussed above), expires on the last day of the second calendar year following the calendar year in which the amendment is adopted or effective, whichever is later. The expiration is extended for governmental 403(b) plans to 90 days after the close of the third regular legislative session of the legislative body with authority to amend the plan that begins after the calendar year in which the amendment is adopted or effective, whichever is later.

- **Terminating Plan.** The termination of a plan ends the RAP and generally will shorten the RAP for the plan, regardless of whether the plan is governmental or not. Any retroactive remedial plan amendments, or other amendments required to be adopted to reflect 403(b) requirements that apply as of the date of termination, must be adopted in connection with the plan termination regardless of whether the requirements are included on an RA List.

Plan Amendment Deadlines

Except as otherwise provided by statute or in regulations or other guidance published in the IRB, the plan amendment deadline for defective individually designed 403(b) plan language first occurring after June 30, 2020, is the date on which the RAP with respect to the defect expires, as described above. However, the deadline for an amendment that is not made with respect to such a plan language defect (i.e., a *discretionary amendment*) is the end of the plan year in which the plan amendment is operationally put into effect. An amendment is operationally put into effect when the plan is administered in a manner consistent with the intended plan amendment rather than existing plan terms. The deadline for a discretionary amendment to an individually designed governmental 403(b) plan is extended to 90 days after the close of the second regular legislative session of the legislative body with authority to amend the plan that begins on or after the date the plan amendment is operationally put into effect, if later.

Operational Compliance List

Irrespective of an amendment deadline to comply with a change in 403(b) requirements, a plan must be operated in compliance with those requirements from the effective date of the change. The IRS provides an Operational Compliance List (OC List), updated periodically, to assist plan sponsors achieve operational compliance. However, a plan must comply operationally with each relevant 403(b) requirement, even if the requirement is not included on an OC List.

Aon Can Help

Aon's Retirement Legal Consulting & Compliance consultants are available to work with 403(b) plan sponsors to review individually designed plan document language and obtain a favorable determination letter from the IRS. Aon can also assist plan sponsors in maintaining operational compliance of their plans.

Changes to Determination Letter Program for Qualified Retirement Plans

by Dan Schwallie

In conjunction with opening the determination letter process for individually designed 403(b) plans, Revenue Procedure 2022-40 extends the Remedial Amendment Period (RAP) for new individually designed qualified 401(a) and 401(k) plans. The prior RAP expiration dates, provided in Revenue Procedure 2016-37, were reported in the **Third Quarter 2017** issue of our *Quarterly Update*. Revenue Procedure 2022-40 also modifies the scope of the Internal Revenue Service (IRS) review of individually designed qualified plans submitted for a determination letter and, in certain circumstances, permits a plan for which a determination letter was issued as a result of filing Form 5307 (Application for Determination for Adopters of Modified Volume Submitter Plans) to submit that plan for an initial plan determination on a Form 5300 (Application for Determination for Employee Benefit Plan).

Modified Scope of IRS Determination Letter Review

Revenue Procedure 2016-37, as modified by Revenue Procedure 2019-20, permits the sponsor of an individually designed qualified plan to submit a determination letter application for:

- An initial plan determination;
- Determination upon the merger of plans of previously unrelated entities in connection with a corporate merger, acquisition, or other similar business transaction (apply by the last day of the first plan year following the date the plans merge, provided the plans merge by the last day of the first plan year following the date of the transaction);
- A determination upon termination of the plan; and
- Under certain other circumstances to be identified by the IRS in guidance published in its Internal Revenue Bulletin.

Revenue Procedure 2022-40 modifies the scope of the determination letter review such that the IRS generally will consider in its review those qualification requirements that are in effect, or that have been included in an annually published Required Amendments List (RA List), on or before the last day of the second calendar year preceding the year in which the determination letter application is submitted. The RA List establishes the date the RAP expires for changes in qualification requirements set forth on the list. The plan sponsor will be considered to have satisfied the qualified plan document requirements if all provisions of the plan necessary to satisfy those requirements have been adopted and made effective in form and operation from the beginning of the RAP.

Extended Expiration of RAP for New Individually Designed Qualified Plans

RAPs are the periods during which qualified retirement plans can be amended retroactively to comply with the qualification requirements of the Internal Revenue Code (Code) and correct disqualifying provisions of the plans. Disqualifying provisions include the presence or absence of plan provisions that cause the plan to fail Code qualification requirements. The end of the RAP varies depending on whether there has been a change in qualification requirements, the plan is new, an existing plan is amended, a plan is terminating, and whether the plan is governmental or not. Only the expiration of the RAP for new plans is extended by Revenue Procedure 2022-40.

The RAP with respect to disqualifying provisions in a new plan, including the absence of required language, expires on the last day of the second calendar year following the calendar year in which the plan is put into effect. The expiration of the RAP for new governmental plans, if later, is 90 days after the close of the third regular legislative session of the legislative body with authority to amend the plan that begins after the end of the plan's initial plan year.

Change to Initial Plan Determination

Revenue Procedure 2022-40 modifies the rules for an initial determination letter such that the sponsor of an individually designed plan may submit the plan for an initial plan determination on a Form 5300 unless the plan previously had filed for a determination letter on Form 5300 and had been issued a determination letter as an individually designed plan. Under the revised rules, for example, a sponsor that maintains a plan for which a determination letter has been issued as a result of filing a Form 5307 is now eligible to submit that plan for a determination letter for an initial plan determination on Form 5300. The Revenue Procedure provides examples of whether an initial plan determination has been made with respect to a plan such that the plan is ineligible to submit the plan for an initial plan determination on Form 5300.

Aon Can Help

Aon's Retirement Legal Consulting & Compliance consultants can help plan sponsors of individually designed qualified plans understand how these changes might affect them and their plans. Aon can also assist plan sponsors with maintaining their plan documents and operational compliance of their plans.

Mark Your Calendars Now for Key Compliance Dates

by Linda M. Lee

Welcome to 2023! It is once again time to remind plan sponsors of the importance of keeping their retirement and health and welfare plans compliant with all relevant tax, reporting, and filing obligations under the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (Code).

To alert plan sponsors of the important deadlines, Aon continues to publish its annual Compliance Calendar. This detailed tool is intended to provide plan sponsors and other interested parties with notice of significant due dates and deadlines that are established by the Internal Revenue Service, Department of Labor, and other federal regulatory agencies for benefit-related compliance obligations. The Calendar also is designed to assist plan sponsors maintain compliance with these due dates for critical deadlines, to help promote timely disclosure and compliance with related filing obligations, and to help avoid civil monetary penalties for violations under ERISA and the Code.

We are pleased to share our recently published 2023 Compliance Calendar. Following is an overview of the topics addressed in the Calendar:

- Timing of participant communications and notices (e.g., summaries of material modifications, pension benefit statements, and summaries of benefits and coverage);
- Changes to health plan reporting obligations;
- SECURE 2.0 change to increase the age for required minimum distributions from age 72 to age 73;
- Plan contribution due dates; and
- Filing dates for IRS forms (e.g., Forms W-2 and 1099-R).

Click **here** to download your complimentary copy of the 2023 Compliance Calendar.

Please contact your Aon consultant if you have any questions, or if we can be of assistance with any plan compliance issues.

Final Rule on Proxy Voting/Use of ESG Factors: All You Want to Know!

by Jennifer Ross Berrian

Environmental, social, and governance factors (referred to as "ESG" factors) are a hot topic for fiduciaries managing investments for their retirement plans and determining whether and how to vote proxies for stock held by a plan. Different presidential administrations have had very different opinions about whether plan sponsors should consider ESG factors when selecting investment options and whether plans should vote proxies or not. Final regulations on these topics were issued by the Department of Labor's Employee Benefits Security Administration on November 22, 2022, giving clear directions upon which plan sponsors can rely.

Examples of ESG Factors

Environmental	Social	Governance
• Energy use • Water use • Sustainability • Deforestation • Climate change	• Workplace health and safety • Compensation and benefits • Internal pay equity • Diversity and inclusion • Labor and human rights	• Ethics and compliance • Privacy and cybersecurity • Board structure and composition (including tenure and diversity) • Executive compensation • Audit oversight

Frequently Asked Questions

Q: What do the final regulations say?

A: The final regulations set forth a principles-based approach to fiduciary investment decision making and proxy voting processes rather than focus on ESG factors specifically. ESG factors may be considered among the many factors that fiduciaries consider in making investment decisions and need not be treated differently from other factors. While ESG factors may be considered under appropriate circumstances, there is no requirement to factor them into the decision-making process.

Q: What do plan fiduciaries have to do with respect to choosing investments?

A: When choosing retirement plan investments, plan fiduciaries must comply with the fiduciary duties of prudence and loyalty set forth in the Employee Retirement Income Security Act of 1974 (ERISA).

Q: What does the duty of prudence require when selecting plan investments?

A: The duty of prudence requires fiduciaries to act with care, skill, prudence, and diligence under the prevailing circumstances that a prudent person in a like capacity would use. Fiduciaries must give appropriate consideration to facts and circumstances relevant to the investment, including the role the investment plays in the investment portfolio. The regulations require defined benefit (DB) and defined contribution (DC) plan investment decisions to be relevant to:

- A risk and reward analysis that considers investment horizons, plan investment objectives, and plan funding policy and provides risk of loss and opportunity for gain similar to alternatives in the asset class (risk return factors may include the economic effects of climate change and other ESG factors if appropriate);
- The purposes of the plan; and
- For DB plans: portfolio diversification; liquidity and cash flow; and plan funding objectives.

Q: What does the duty of loyalty require when selecting plan investments?

A: The duty of loyalty requires fiduciaries to act for the exclusive purpose of providing benefits to participants and defraying reasonable expenses of administering the plan. To satisfy the duty of loyalty, the interests in retirement income or financial benefits under the plan cannot be subordinate to other objectives. Investment return may not be sacrificed to promote benefits or goals unrelated to retirement income or financial benefits under the plan.

Plans are not prohibited from considering collateral benefits (including ESG factors) when choosing between two competing investments that equally serve the financial interest of the plan when the duties of prudence and loyalty are met. In DC plans, fiduciaries may consider participant preference when choosing between competing funds that equally serve the financial interests of the plan.

Q: Do the duties of loyalty and prudence limit investment choices?

A: Yes, ERISA fiduciary duties limit fiduciaries' investment choices. Investments may not be chosen only to effect social change, and financial return may not be sacrificed.

Q: What do plan fiduciaries have to do with respect to voting proxies?
A: The ERISA fiduciary duties of prudence and loyalty also apply when determining whether and how to vote on proxies and the exercise of shareholder rights. Fiduciaries have a duty to manage plan assets that includes the appropriate exercise of shareholder rights related to shares held by the plan. When determining whether to vote a proxy, fiduciaries should ensure that the cost and effort associated with voting is commensurate with the significance of the issue to the plan's financial interest. When determining how to vote a proxy, the fiduciary must act solely in the economic interest of the plan.

Q: Do the duties of prudence and loyalty impact proxy voting?
A: Yes, ERISA fiduciary duties have a large impact on proxy voting. Fiduciaries may not vote proxies with the goal of achieving a result other than financial return to shareholders. Having said that, certain ESG factors may be relevant when assessing the possible financial impact of what is being decided by the proxy vote.

Q: Do fiduciaries have to take ESG factors into account when choosing investments?
A: Fiduciaries are not required to consider ESG factors when choosing plan investments.

Q: Do fiduciaries have to vote proxies?
A: Fiduciaries do not have to vote all proxies. However, a fiduciary's duty to manage plan assets includes the appropriate exercise of shareholder rights related to shares held by the plan. When determining whether to vote a proxy, fiduciaries should ensure that the cost and effort associated with voting is commensurate with the significance of the issue to the plan's financial interest. This is different than the prior rule that appeared to actively discourage proxy voting.

Q: If a fiduciary is voting a proxy, does the fiduciary have to consider ESG factors?
A: Fiduciaries do not have to consider ESG factors when voting proxies. However, when deciding how to vote a proxy, the fiduciary is required to act solely in the economic interest of the plan and its participants and beneficiaries. If an outside provider is retained to make decisions on whether and how to vote proxies, fiduciaries must exercise prudence and diligence in selecting and monitoring the outside provider. New rules relating to a plan fiduciary's obligation to assess outside proxy voting firms is discussed more fully below.

Q: What are the risks of noncompliance?
A: As stated above, ERISA imposes fiduciary duties on fiduciaries to retirement plans. Two of these duties, the duty of loyalty and the duty of prudence, come into play when choosing how retirement funds are invested and whether and how proxies are voted. Breaching fiduciary duties can come with very large penalties, including personal liability for fiduciaries, audit problems, and litigation from plan participants. Best practice is to understand the requirements and document a fiduciary process that complies.

Q: When is the final rule effective?
A: The final rule is generally effective on January 30, 2023. Rules regarding the assessment of proxy voting firms and pooled fund manager proxy voting requirements are effective on December 1, 2023.

Q: What is best practice?
A: Best practice is to create fiduciary policies and procedures about how to select plan investments and vote proxies that follow the final rule and take the interests of the plan into account. There should be details about whether and how collateral benefits will be considered when choosing investments. There should also be details about how to choose whether to vote proxies and what factors to consider when doing so. Compliance with the policies and procedures should be documented and retained. The plan's investment policy statement should be updated.

Aon recommends the following next steps:

- Review the plan's current investment lineup and confirm that prior investment decisions were consistent with the new guidance. Consider updating investment policy statements to be consistent with the new fiduciary investment guidance and proxy voting procedures.
- Consider adopting fiduciary investment committee minutes documenting that the prior decisions satisfy the new standard. If the prior investment decisions do not comply with the new final rule, take action to redo the analysis or replace the fund in accordance with the final rule.
- Draft and adopt policies and procedures as explained above.
- If a third party has been retained to make proxy voting decisions, the agreement will need to be reviewed for compliance with the final rule. A process for selecting and monitoring third parties should be developed and documented.
- Review plan documents and trust agreements to ensure that nothing in those documents conflict with the final rule or the fiduciary process adopted to address plan investments and proxy voting.

Need More Assistance?
Please contact your Aon consultant for assistance complying with these final rules.

DOL Proposes Important Changes to VFCP

by John Van Duzer

On November 18, 2022, the Department of Labor's (DOL's) Employee Benefits Security Administration (EBSA) proposed updates to its Voluntary Fiduciary Correction Program (VFCP). VFCP is not to be confused with the Voluntary Correction Program (VCP) offered by the Internal Revenue Service (IRS) to correct certain plan qualification issues.

VFCP was established in 2002, was most recently revised in 2006, and is intended to encourage correction of fiduciary breaches under ERISA. Plan sponsors which choose to correct eligible fiduciary breaches by utilizing VFCP may avoid certain civil penalties and civil enforcement actions.

In order to make use of VFCP under current procedures, a plan sponsor must generally complete a detailed application requiring a fair amount of time and expense, even though the dollar amount of the breach may be relatively small. Upon approval of the application by EBSA, the sponsor will receive a "no-action" letter and will generally not be subject to monetary penalties. Although receipt of a no-action letter is a desirable result, EBSA had received feedback indicating that the time and expense of VFCP is a disincentive to completion of the application, especially when the violations involve small amounts of money.

Proposed Changes to Current VFCP

In order to facilitate more efficient and less costly corrections of fiduciary breaches, and also to encourage greater participation in the program, the proposed changes would (i) clarify certain transactions that are eligible for correction under VFCP; (ii) expand the scope of other transactions currently eligible for correction; (iii) simplify administrative and procedural requirements of VFCP; and (iv) revise the related prohibited transaction exemption (PTE 2002-51) to make conforming changes. (Compliance with the terms of the PTE eliminates certain civil actions and monetary penalties that might otherwise be initiated by the DOL. One of the significant conforming changes is to clarify that excise tax relief is available for transactions that are self-corrected, as further described below.)

- **Delinquent Deposit of Employee Contributions.** The most significant change within this new proposal relates to a failure of a plan to deposit employee contributions into the related trust in a timely manner. This type of failure is the most frequently corrected transaction under VFCP and can occur in the context of pre-tax deferrals, Roth deferrals, other after-tax contributions, or plan-loan repayments to a 401(k) or other retirement plan.

  Under the proposed changes, these types of delinquent deposits could be self-corrected in many cases, although certain restrictions and requirements would continue to apply to this process. Most significantly, the "lost earnings" involved must not exceed $1,000 (as determined by using the DOL VFCP Online Calculator), and the delinquent participant contributions or loan repayments must be identified and remitted to the plan within 180 days from the date of withholding or receipt.

- **Use of Self-Correction.** In addition to the monetary and timing limitations described above, the following restrictions also apply:
  - To use self-correction, the plan or the self-corrector must not be "under investigation;" the phrase "under investigation" is defined broadly to include EBSA investigations of the plan, plan sponsor, or certain other persons involved in plan-related transactions. The phrase also includes IRS examinations of the plan, criminal investigations, and certain investigations by the PBGC or other government agencies.
  - The plan or the self-corrector must use the EBSA online web tool to complete and file a self-correction notice for which an email acknowledgement of the receipt of a properly completed and submitted notice will be sent.
  - The plan or the self-corrector must complete a self-correction Retention Record Checklist (as detailed in Appendix F of the proposal), which also includes preparing or collecting the documents listed in this Appendix and providing copies of the completed Checklist and required documentation to the plan administrator.
  - A "penalty of perjury" statement must be included as part of the self-correction.

  Although the proposed self-correction approach would be less complex than the current process, various restrictions would obviously continue to apply.

- **Other Changes.** In addition to this new self-correction component, other less significant changes are provided which relate to breaches involving (i) various aspects of plan loans; (ii) sales, purchases, and leasebacks of real property and other assets by a plan; and (iii) certain benefit payments made by a plan.

Comments on Proposal and Related Items

Plan sponsors and others wishing to comment on these proposals must have done so by January 20, 2023. Any final changes to VFCP will be communicated at a later date by EBSA. In addition to requesting comments on VFCP changes included within the proposal, EBSA has also requested comments relating to (i) the possible expansion of VFCP to cover additional fiduciary breaches relating to missing participants; (ii) the integration of certain loan corrections with related corrections under the Employee Plans Compliance Resolution System (EPCRS) program maintained by the IRS; (iii) the idea of either permitting or requiring electronic VFCP applications; and (iv) the possible initiation of a pre-audit compliance program, comparable to the pre-audit program recently made available under EPCRS.

All in all, the proposed changes represent good news for plan sponsors and administrators, assuming the changes are finalized in this form. Although the new "self-correction" component involves a number of requirements (more, for example, than the comparable self-correction available under EPCRS), the process is still a significant improvement on the current application process and should be useful to many sponsors and administrators.

Aon's Retirement Legal Consulting & Compliance consultants can assist you in understanding the details and significance of this new EBSA proposal.

Cybersecurity: More Litigation and DOL Interest

by Tom Meagher

As we move into 2023, it is clear that protecting plan and participant data will continue to be a high priority for plan sponsors, fiduciaries, and third-party service providers.

Litigation Continues

Most recently, a court decision (*Disberry v. Employee Relations Committee of the Colgate-Palmolive Co.*) arising out of the U.S. District Court for the Southern District of New York has gained the attention of parties responsible for plan data. The case involves Colgate-Palmolive and a plan participant's claim of a data security/identity theft breach involving the plan fiduciary committee, the plan trustee, and the plan recordkeeper.

The facts of the case and the court's analysis of each party's fiduciary responsibility to protect plan and participant data is particularly instructive in terms of advising employers on how to mitigate the risk of a data security breach involving plans under the Employee Retirement Income Security Act of 1974 (ERISA).

- Plaintiff alleged that the Colgate-Palmolive fiduciary committee and the recordkeeper failed to have prudent processes in place such that an unknown person was able to, within a short period, change the participant's phone number, email address, mailing address, and bank account information and then request an immediate cash distribution (notwithstanding tax penalties associated with a pre-age 59½ distribution), and failed to recognize numerous unsuccessful attempts to access the participant's account in the months prior to the distribution.
- While the Colgate-Palmolive fiduciary committee acknowledged that it was a fiduciary for the plan, it argued (unsuccessfully) that it had not breached any fiduciary duty to the participant or caused the harm that led to the loss of the participant's account balance. The court noted that it could not dismiss the complaint against the fiduciary committee until it was determined whether the fiduciary committee was negligent in the selection of the plan recordkeeper, or if it failed to monitor the recordkeeper's activities and protocols at reasonable intervals to determine if the recordkeeper was acting in accordance with the plan terms and ERISA.
- While the recordkeeper argued that it was not a fiduciary for the plan, the court did conclude that the recordkeeper may be viewed as a "functional fiduciary" in view of the discretion that it exercised with respect to the assets of the plan and thus would not dismiss the fiduciary breach claim against the recordkeeper. The court dismissed the case against the trustee in view of its limited role as a directed trustee.

The court's decision in the case is noteworthy in that the court permitted the plaintiff to continue to pursue her fiduciary breach claim against the Colgate-Palmolive fiduciary committee and the plan recordkeeper relating to a breach of fiduciary duty. From a fiduciary committee standpoint, this litigation should underscore the importance of developing a fiduciary record to support the monitoring of third-party service providers and reviewing internal safeguards that may apply to plan or participant data.

> *". . . protecting plan and participant data will continue to be a high priority for plan sponsors, fiduciaries, and third-party service providers.*

The Department of Labor Continues to Take Notice

While the courts will continue to wrestle with data security and fiduciary responsibilities, the Department of Labor (DOL) continues to look into data security involving plan and participant data. Most recently, the ERISA Advisory Council (EAC) (a group of 15 benefits experts appointed by the DOL to identify emerging benefits issues and report findings and recommendations to the DOL) held hearings in Washington, D.C. to discuss two topics: Cybersecurity Insurance and Employee Benefit Plans and Cybersecurity Issues Affecting Health Benefit Plans. The EAC report is expected in early 2023 and will address the following matters:

- **Cyber Insurance.** The EAC report is expected to address the current market for cybersecurity insurance, including the identity of the insurers, the underwriting standards that are followed, and the safeguards and controls those insurers require or recommend. The EAC's report is also expected to address the terms of typical cybersecurity insurance policies, including who are the "named insureds," what risks (and losses) are covered, exclusions from coverage, the cost of such insurance, limits of liability and deductibles, and the circumstances that could result in a loss of coverage.
- **Health Plans.** The EAC report is expected to address the data security issues and vulnerabilities affecting health plans and faced by plan sponsors, fiduciaries, and service providers. The EAC report is also expected to examine the existing relevant frameworks, approaches, and initiatives tailored to health care and health plan cybersecurity concerns and the interaction between overlapping regulatory regimes (e.g., HIPAA and HITECH) for health plans, and how those competing rules may be impacted by the DOL data security guidance.

Please do not hesitate to let us know if we may be of any assistance in reviewing the fiduciary processes relating to internal data security safeguards or the safeguards in place with third-party service providers for your ERISA plans, or if there is interest in Aon reviewing the terms of any cybersecurity insurance coverages.

Quarterly Roundup of Other New Developments

by Eric Brager, Anne Jackson, Teresa Kruse, and Mark Manning

SEC Mutual Fund Proposal Imposing "Hard 4:00 P.M. Close" Rule

In November 2022, the Securities and Exchange Commission (SEC) proposed amendments to SEC Rule 22c-1 under the Investment Company Act of 1940 as amended that would impact open-end funds. The proposal touches on several areas including how mutual funds manage liquidity risks, swing pricing, frequency of reporting, and a proposed 4:00 p.m. ET "hard close" for transactions in such funds. The "hard close" part of this proposal is intended to facilitate swing pricing, which allows the mutual fund to pass on trading costs on days in which there are significant levels of transactions. The "hard close" component could potentially have a negative impact on participants in defined contribution (DC) plans.

Currently, trades that are placed prior to 4:00 p.m. ET will be completed at the net asset value (NAV) for that day. For DC plans, participant trades placed before 4:00 p.m. ET can be aggregated and submitted for trading at the daily NAV, which often occurs after 4:00 p.m. ET as it takes time for the recordkeeper to aggregate the data among all participants. Under the proposed rule, the recordkeepers would need to aggregate participant trades and complete all necessary calculations prior to 4:00 p.m. ET. This process becomes increasingly complex as many DC plans use multiple mutual funds, and participants have the ability to make several transactions in a single day including rebalancing of their entire portfolios. The process to aggregate trades at a recordkeeper often takes several hours.

Therefore, participant trades under the proposed rule would need to be placed much earlier in the day for a participant in a DC plan to receive the NAV for that day. This could put that investor at a disadvantage compared to other investors who do not have to trade through a participant-directed plan. For example, if a participant decided at 2:00 p.m. ET to sell a mutual fund, the recordkeeper might have an earlier internal close time and could reject that trade forcing the participant to wait until the next trade date to sell the fund. This could have significant financial impact to the participant especially in a volatile market.

This idea was originally proposed by the SEC in 2003 but was not adopted. The proposal would not apply to collective investment trusts, which are utilized by many larger DC plans. The current proposal has a 60-day comment period after publication in the Federal Register.

Aon will provide updates to this proposed rule as they become available.

Is Your Qualified Plan Accountant Independent?

Under the Employee Retirement Income Security Act of 1974 (ERISA), a plan administrator is generally required to retain, on behalf of all plan participants, an independent qualified public accountant to conduct an annual examination of the plan's financial statements and render an opinion to be included with the plan's annual report. After decades of engagement with members of the accounting industry, the Department of Labor (DOL) has updated its guidance on the "independence" requirement for accounting firms which audit qualified retirement plans. Specifically, the DOL issued Interpretive Bulletin 2022-01 which revises a long-standing Interpretative Bulletin issued in 1975 regarding accountant independence by removing certain outdated and unnecessarily restrictive provisions and reorganizing its provisions for clarity. The new 2022 Interpretative Bulletin will be codified as Section 2509.2202-01 in the Code of Federal Regulations and focuses on three areas.

The first area of focus addresses financial interest that an accountant or firm may have in the plan or plan sponsor. Under previous guidance, a single share of plan sponsor stock held by a firm or accountant could rule out an otherwise qualified accountant. The new Bulletin allows for a divestiture window. This allows the accountant or firm to accept a new audit engagement as long as the interest in the plan sponsor stock is disposed of before an initial engagement letter or other written agreement is signed or audit procedures begin, whichever is sooner. This new exception is limited to publicly traded stock.

The second area addressed by the new Bulletin is what other services an accountant or firm may provide to a plan or plan sponsor. The new Bulletin maintains current guidelines detailing that accountants or firms engaged for the financial statement audit for qualified plans are prohibited from plan-sponsor-related employment. However, it does carve out exceptions for an accountant or firm to perform certain services that are not connected to the financial statement audit. Caution is still recommended to avoid prohibited transaction connections with multiple service arrangements.

The third area of the new Bulletin addresses the determination of who is a member of a firm or located in an office of the firm. The Bulletin updates the definition of an office to focus more on a distinct workgroup within a firm, whether it is formally or informally organized. This updates the guidance to align more closely with how firms and offices are organized currently.

This guidance is effective as an interpretation immediately. If you have questions regarding how this may impact the financial statement audit for the 2022 plan year, or if you would like assistance searching for an independent auditor, contact your Aon consultant.

Target Date Funds Continue to Be Targeted
Target date funds (TDFs) have been the focus of recent litigation involving DC plans. A number of recent lawsuits have been filed targeting plan sponsors using BlackRock TDFs, but other TDF providers have been targeted as well. In many of these lawsuits, we have seen an increased level of scrutiny on more than just fees for these funds. In recent cases, there have been claims that plan sponsors may have been overly focused on fees and would have switched providers if they had also focused on other important characteristics.

For fiduciary committees, it is important to have not only a sound process in place to select a TDF provider, but also have a process in place for ongoing monitoring of these funds and providers. The following factors, among other things, are important to thoroughly review and understand as part of this process:

- **Glide Path Risk Level.** The glide path risk level should fit participant goals, demographics, and behaviors;
- **Asset Class Diversification.** The level of asset class diversification should be reasonable to enhance risk-adjusted returns;[1]
- **Asset Class Implementation.** This could be active, passive, or a blended combination of active and passive depending on Committee's objectives;
- **Manager Selection.** For the underlying funds in each vintage, consideration should be given to the quality of underlying investment and whether the manager selection is proprietary or open architecture; and
- **Fees.** Fees should be reasonable for the value provided given the above factors and services provided.

It is also important to note that there is an interconnectedness between these factors that should be considered and evaluated in addition to the individual factors noted above. Aon Investments USA consultants are available to help plan sponsors navigate the evaluation of their TDF providers.

Arbitration May Be on Its Way Out for ERISA Plans
In September 2022, the House of Representatives passed the Mental Health Matters Act, which includes the provisions of another bill called the Employee and Retiree Access to Justice Act (ERAJA). ERAJA is notable since it includes a provision to amend ERISA which would eliminate arbitration clauses, discretionary clauses, class action waivers, and representation waivers in plans governed by ERISA. As we previously reported in the **Fourth Quarter 2019** issue of the *Quarterly Update*, the Ninth Circuit Court of Appeals in *Dorman v. Charles Schwab Corp*. reversed 35 years of precedent and held that class action claims brought under ERISA can be made subject to a plan's mandatory arbitration provisions. Since the *Dorman* case, mandatory arbitration agreements in ERISA plans have continued to be litigated as further discussed in the **Third Quarter 2022** issue of the *Quarterly Update*, where the Sixth Circuit Court of Appeals rejected an employer's attempt to compel arbitration in a qualified retirement plan. If the Senate passes the Mental Health Matters Act with the ERAJA provision intact, arbitration may very well be out for

[1] Diversification does not ensure profit, nor does it protect against loss of principal; diversification among investment options and asset classes may help to reduce overall volatility

ERISA plans and will likely result in more ERISA retirement plan litigation. *Dorman v. Charles Schwab Corp., 934 F.3d 1107 (9th Cir. 2019).*

Aon will continue to monitor the status of this provision and will update you when developments arise.

Employer Response to Lifestyle Changes Post-Pandemic

The recent COVID-19 pandemic has changed the landscape of the way people work and what is important to them. Post-pandemic, they look at their spending and savings through a different lens. Voya Financial's recent survey[2] indicates that people are not looking to spend money on non-essential items like they did prior to the pandemic. They are looking at their long-term future. Though, other research is indicating that people are beginning to spend on activities they can do rather than what they need.

As people begin to spend, savings becomes more difficult even with a dedicated approach. During the pandemic, bad investments may have scared people away from investing, inflationary conditions increased the costs of goods and services, and within the housing market people can no longer rely on low-interest rates. Post-pandemic there is an increased draw on people's financial resources. People will need to become more diligent on what they spend their money on and, as such, where they continue to work.

Voya Financial's research showed that over 60% of respondents would stay with their employer if their employer offered an employer-sponsored retirement plan, competitive salary or compensation package, and flexible hours. Employees regard an employer-sponsored retirement plan as a way for their employer to show that they care about their future. Nearly 70% of survey respondents have plans that include saving for retirement. Over 80% of respondents agree that having a long-term view as either "important" or "extremely important" for them to be able to "stay the course" in a volatile market.

We will learn a lot as we continue to emerge from this historic time. Employees will begin to re-think what is important to them. It will be crucial for employers to recognize the importance of offering a retirement plan as employees want to build their retirement savings in an effective and efficient way. Aon has Retirement consultants available to discuss plan design changes or strategies to increase plan participation in 2023.

Department of the Treasury and the Internal Revenue Service Priority Guidance!

Each year the Department of the Treasury and the Internal Revenue Service (IRS) prepare a list of priorities detailing where they will focus resources for guidance items that are most important to taxpayers and tax administration during the coming year. The 2022-2023 Priority Guidance Plan,[3] published on November 4, 2022, includes a number of carryover items for guidance from prior annual lists (e.g., SECURE Act changes) in the following areas:

- Certain IRS, Tax Exempt and Government Entities, Employee Plans programs, including the Pre-approved Plan Program, the Determination Letter Program, and the Employee Plans Compliance Resolution System (referred to as "EPCRS");[4]
- Loans, distributions, IRAs, and elections, including the 10% additional tax on early distributions under Section 72(t) of the Internal Revenue Code (Code),[3] the application of the normal retirement age within governmental plans under Section 401(a) of the Code, and updating electronic delivery rules;
- Timing of the use or allocation of forfeitures in qualified retirement plans;
- SECURE Act modifications and other issues under Section 401(a)(9) of the Code[3] as well as certain rules governing 401(k) plans;
- Student loan payments,[3] missing participants (including uncashed checks), and multiple employer plans (unified plan rule);[3] and
- Deferred compensation under Section 409A of the Code (including income inclusion).

Aon will continue to track and report on the Priority Guidance Plan as it is updated throughout the year, so stay tuned.

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 Kerry Inc. (settled for $900,000) and LinkedIn (settled, details forthcoming). Additionally, the SEC collected record penalties in fiscal year 2022 enforcement actions ($6.4 billion).[5]

---

[2] Press Release, Voya Financial, Inc., Amid the war for talent, don't forget the retirement plan, Voya survey finds (Nov. 15, 2022)

[3] Joint Statement by U.S. Dep't of Treas. and I.R.S., 2022-2023 Priority Guidance Plan (Nov. 4, 2022)

[4] Legal Consulting & Compliance plans to include additional coverage on The SECURE 2.0 Act of 2022 (SECURE 2.0) in a future *Quarterly Update*

[5] Press Release, U.S. Securities and Exchange Commission, SEC Announces Enforcement Results for FY22 (Nov. 15, 2022)

Plan sponsors seeking to reduce their litigation risk can use a variety of strategies including improving their fiduciary process for plan governance, increasing the number of passive funds in their plans, continuing to monitor investment funds and related expenses, 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

New retirement plan cases continue to add up as 2022 came to a close, with at least 11 new cases being reported this quarter. 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 fee cases (including other claims) this quarter were filed against Allegiant Travel Co. (fund performance, selection, and monitoring); General Mills, Inc. (prohibited transaction); Int'l Union of Elevator Constructors (fund performance, selection, and monitoring); Knight-Swift Transportation Holdings, Inc. (fund performance, selection, and monitoring); Mutual of America Life Ins. Co. (self-dealing); Old Dominion Freight Line, Inc. (fund performance, selection, and monitoring); MassMutual Life Ins. Co. (self-dealing); Quanta Services, Inc. (fund performance, selection, and monitoring); and Lennar Corp. (fund performance, selection, and monitoring and failure to monitor float income). In addition, cases were filed against C&S Jones Group LLC (DOL sued alleging failure to remit employee and employer contributions) and Empower Retirement, LLC (managed account services).

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

Please see the applicable Disclosures and Disclaimers on page **16**.

Recent Publications

ACP Safe Harbor Plan Matching Contribution Vesting Conundrum?

By Daniel Schwallie

Journal of Pension Planning & Compliance (Winter 2023)

This article explains the basis for the IRS's Listing of Required Modifications (LRM) to allow actual contribution percentage (ACP) safe harbor plan matching contributions to have vesting schedules different from the immediate vesting required for traditional safe harbor matching contributions and the two-year cliff vesting required for qualified automatic contribution arrangement (QACA) safe harbor matching contributions.

Click **here** to download and read the article.

Changing Defined Contribution Plan Year from Non-Calendar to Calendar Year

By Daniel Schwallie

Journal of Pension Planning & Compliance (Winter 2023)

A calendar plan year better aligns the various annual defined contribution plan limitations with the typical employee's tax year and permits easier communication of how plan limits apply to plan participants. Employers with non-calendar plan years often have non-calendar fiscal years, but a non-calendar fiscal year generally does not require a non-calendar plan year. This article describes requirements to transition a defined contribution plan to a calendar plan year.

Click **here** to download and read the article.

Aon's Retirement Legal Consulting & Compliance Consultants

Tom Meagher
Senior Partner/Practice Leader
thomas.meagher@aon.com

Linda M. Lee
Project Manager
linda.lee.2@aon.com

Jennifer Ross Berrian
Partner
jennifer.ross.berrian@aon.com

Hitz Burton
Partner
hitz.burton@aon.com

Susan Motter
Associate Partner
susan.motter@aon.com

Dan Schwallie
Associate Partner
dan.schwallie@aon.com

Elizabeth Groenewegen
Associate Partner
elizabeth.groenewegen@aon.com

Stefanie Ray
Associate Partner
stefanie.ray@aon.com

John Van Duzer
Associate Partner
john.van.duzer@aon.com

Clara Kim
Associate Partner
clara.kim@aon.com

Beverly Rose
Partner
beverly.rose@aon.com

Guest Authors

Thank you to the following colleagues who contributed articles to this quarter's publication.

Eric Brager
Associate Partner
Aon Investments USA Inc.
eric.brager@aon.com

Teresa J. Kruse
Senior Consultant
Aon Investments USA Inc.
teresa.kruse@aon.com

Anne Jackson
Consultant
Aon Investments USA Inc.
anne.jackson@aon.com

Mark Manning
Associate Partner
Aon Investments USA Inc.
mark.manning@aon.com

About Aon

Aon plc (NYSE: AON) exists to shape decisions for the better — to protect and enrich the lives of people around the world. Our colleagues provide our clients in over 120 countries and sovereignties with advice and solutions that give them the clarity and confidence to make better decisions to protect and grow their business.

Disclosures and Disclaimers

The article was written by an Aon colleague aligned to Aon Investments USA Inc. ("Aon Investments"), and any investment advice and consulting services is therefore provided by Aon Investments. The information contained herein is given as of the date hereof and does not purport to give information as of any other date.

This document is intended for general informational purposes only and is not intended to provide, and shall not be relied upon for, accounting, legal or tax advice or investment recommendations.

Any accounting, legal, or taxation position described in this document is a general statement and shall only be used as a guide. It does not constitute accounting, legal, and tax advice and is based on Aon Investments' understanding of current laws and interpretation. Aon Investments disclaims any legal liability to any person or organization for loss or damage caused by or resulting from any reliance placed on that content. Aon Investments reserves all rights to the content of this article.

Aon Investments USA Inc. is a federally registered investment advisor with the U.S. Securities and Exchange Commission. Aon Investments is also registered with the Commodity Futures Trade Commission as a commodity pool operator and a commodity trading advisor and is a member of the National Futures Association.