Federal Legislative & Regulatory Report

Nationwide® Retirement Solutions
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October 2009

Inside this issue

I. Washington Update

There continues to be considerable activity in Washington on health care reform and regulatory reform. With only a few months left in the 2009 legislative session, some House committees are also focusing on retirement plan issues. Although it is uncertain if legislation pertaining to these topics will be enacted this year, recent activity may offer insight regarding legislative and regulatory priorities for 2010.

House Ways and Means Committee Hearing

On Thursday, October 1, 2009, the House Ways and Means Committee, chaired by Representative Charles Rangel (D-NY), held a hearing to examine:

- The impact of the financial crisis on the funding levels of private sector defined benefit plans and whether additional funding relief is necessary.
- Participant access to investment advice in defined contribution plans and whether this advice is unbiased.

The defined benefit discussion centered on the need for funding relief, such as implementing an extended amortization period to make up funding shortfalls due to investment losses that

have occurred over the past years. Although there was agreement that funding relief is needed as soon as possible, witnesses differed on how it should be structured and if changes should be made on the defined benefit funding provisions of the Pension Protection Act of 2006 (PPA).

The investment advice session discussed pre-PPA investment advice arrangements, investment advice rules under PPA, and revisions proposed in the 401(k) Fair Disclosure and Pension Security Act of 2009. Several witnesses expressed concern that the added restrictions in the bill would make it more difficult and expensive for plan sponsors to continue offering advice, which ultimately could lead many employers to abandon providing this service to participants at a time when participants may need investment advice most. It was further noted that the Department of Labor is expected to provide new guidance on the PPA investment advice provisions.

House Financial Services Committee Hearing

On Tuesday, October 6, 2009, the House Financial Services Committee held a hearing to explore key elements of investor protection and the creation of a national insurance office. This hearing – "Capital Markets Regulatory Reform: Strengthening Investor Protection, Enhancing Oversight of Private Pools of Capital, and Creating a National Insurance Office" – included testimony from regulators, industry officials and investor advocates.

Representative Paul Kanjorski (D-PA) discussed draft legislation that incorporates many of the Obama Administration's proposals for investor protections, such as enhancing the authority of the Securities and Exchange Commission, requiring financial advisers and brokers to follow the same strict "fiduciary" standards, and strengthening rules governing the timing and quality of disclosures by investment funds.

Regulatory Guidance Expected: Annuities in 401(k) Plans

Officials from the Departments of Labor (DOL) and Treasury have indicated they intend to move forward on regulatory guidance to facilitate the use of annuities in 401(k) plans to provide lifetime income options for participant assets, as permitted under current laws.

The DOL is expected to release a request for information (RFI) within the next few months to seek information on the current use of annuities in 401(k) plans and how these are illustrated to participants. Treasury officials noted they intend to develop guidance applicable to annuities offered within 401(k)-type plans. The timing and content of any such Treasury guidance is still not certain.

Additional Section 457 Guidance is Expected

Regulations for Section 457 plans have not been revised since 2003. Officials from the Department of Treasury and IRS recently indicated at an employee benefits conference they would be releasing new guidance that would affect government plans and Section 457 deferred compensation plans to address:

- Ineligible plans under Code Sec. 457(f)
- Definition of a governmental plan under Code Sec. 414(d)
- Excess benefit plans under Code Sec. 415(m)

- Welfare benefit plans excluded from Code Sec. 457, such as bona fide sick and vacation leave, severance and death benefit plans
- Eligible rollovers to non-spouse beneficiaries
- Rollovers of payments under Code Sec. 402(l) for retiree medical benefits

Guidance for government plans under Code Sec. 414(d) will be in the form of proposed regulations.

GAO Issues Two Reports on Retirement Savings Plans

The Government Accountability Office (GAO) recently released two reports that may be of interest to plan sponsors, as follows:

1. 401(k) Plans – Policy Changes Could Reduce the Long-term Effects of Leakage on Workers' Retirement Savings examines:
   - The different forms of 401(k) plan leakage;
   - Information participants receive about hardship withdrawals, loans and distribution choices (and cost); and
   - Policies that affect the incidence of leakage.

The report provides recommendations to address leakage, such as by lifting the six-month suspension of contributions when a hardship withdrawal is taken and improvements to the education participants receive on the importance of preserving retirement savings.

2. Retirement Savings – Better Information and Sponsor Guidance Could Improve Oversight and Reduce Fees for Participants. Nationwide provides an extended discussion of this GAO report in Section III of this report, page 11.

Reference Material

Information about the House Ways and Means Committee hearing on Oct. 1, including the witness list and testimony, can be found here: http://waysandmeans.house.gov/hearings.asp?formmode=detail&hearing=690.

Information about the House Financial Services Committee hearing on Oct. 6, including transcripts and presentations, can be found here: www.house.gov/apps/list/hearing/financialsvcs_dem/hr_092909.shtml

The 52-page "Policy Changes" GAO report is available for download from www.gao.gov/new.items/d09715.pdf.

The 58-page "Retirement Savings" GAO report may be downloaded from www.gao.gov/new.items/d09641.pdf.

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II. IRS Issues Guidance Affecting Public Sector Retirement Plans

The following discussions describe recent IRS guidance that affects employer-sponsored retirement plans. ***Click on any of the underlined topics to jump ahead to it.***

PTO Contributions to Retirement Plans

IRS Revenue Rulings 2009-31 and 2009-32 describe contribution of unused paid time off (PTO) to defined contribution retirement plans. PTO may be contributed to a retirement plan annually or at termination of employment as:

- Employer non-elective contributions to a profit sharing plan, or
- Employee elective salary deferrals to a 401(k) plan.

These revenue rulings do not define PTO specifically, but refer to PTO plans that are bona fide sick and vacation plans. Bona fide sick and vacation pay plans are not subject to IRC §409A which governs the funding and taxation of non qualified deferred compensation plans. IRS staffers have indicated informally that PTO could be contributed to governmental 457(b) plans but contributions would be limited by the 457 deferral limits.

Both rulings illustrate PTO contributions from a bona fide sick and vacation pay plan that are made to a private sector profit sharing or 401(k) plans as either an employer non elective contribution if to a profit sharing plan or an employee elective deferral contribution if to a 401(k) plan.

PTO contributions to qualified plan are subject to:

- The §415(c) limitation on annual additions (combined with prior contributions for the limitation year)

Definitions

Plan Year – The plan's accounting which typically is based on the employer's fiscal year, or the calendar year.

Limitation Year – A 12 consecutive month period used to measure compensation for plan purposes which may be the plan year, the calendar or another 12 month period.

401(a)(4) Safe Harbor – Employer non elective contributions must be allocated either as a uniform percentage of compensation or a dollar amount that applies to all employees, allocations of employer contributions that don't satisfy the safe harbor are subject to non discrimination testing.

415 (c) Limit on Annual Additions – The lesser of 100% of compensation or $49,000 for 2009 which includes elective deferrals, employer contributions, employee after tax contributions and reallocated forfeiture contributions.

402(g) Elective Deferral Limit [401(k)/403(b)] – Lesser of 100% of compensation or $16,500 (2009).

401(k) Non Discrimination or ADP Test – This test limits the average deferral percentage of highly compensated participants to a prescribed percentage above the average deferral percentage of all non highly compensated participants for the calendar year.

- The 402(g) limitation applies to elective deferrals to a 401(k) or 403(b) plans ($16,500 for 2009) together with any prior deferrals for the calendar year; **and**
- Applicable non-discrimination testing (private sector plans).

If the contribution limits are not exceed and the applicable non discrimination tests are met, the profit sharing and 401(k) plan will not be disqualified merely because of PTO contributions. Thus, participants will not be taxed on the PTO contributions until they are withdrawn from the retirement plan. Withdrawals from retirement plans may be subject to the 10% early distribution tax prior to age 59½ unless one of the exceptions to this additional tax under IRC 72(t) applies.

These revenue rulings also illustrate the importance aligning the PTO plan provisions with those of the retirement plan as well as the importance of the timing and allocation of PTO contributions to a retirement plan. The following examples of PTO contributions to a retirement plan are based on these revenue rulings.

Annual PTO Contributions

❖ **Employer non-elective contributions to a Profit Sharing Plan**

Company Z maintains a 401(a) profit sharing plan and a PTO plan. All participants in the PTO plan are granted up to 240 hours of PTO each January 1 based on years of service with the company.

The dollar value of the unused PTO at the end of the year is forfeited from the PTO, contributed to the Profit sharing plan as an employer non-elective contribution and allocated to a participant's account as of December 31 to the extent that the contribution in combination with prior contributions for the year do not exceed the profit sharing plan's §415 (c) limits. The Profit Sharing plan year and limitation is the calendar year (January 1 to December 31). Any remaining amounts of PTO that cannot be contributed to the profit sharing plan are paid to the employee on February 28 of the following year.

Example:

Anne participates in the both Company Z's PTO and profit sharing plan. As of December 31, 2009, she has 20 hours of unused valued at $500. Z may only contribute $400 of her PTO to the profit sharing plan for allocation to her account in the 2009 limitation year because of prior contributions made for her in 2009. On February 28, 2010, Z contributes $400 to the profit sharing plan and allocates $400 to Anne's account as of December 31, 2009. Anne receives the remaining $100 in cash on February 28, 2010.

❖ **PTO contributed as an elective deferral**

Company Y maintains both a 401(k) plan and PTO plan. Under the PTO plan participants ratably accrue to 240 hours of paid time off each calendar year on a pay-period basis beginning on January 1. At the end of the year, participants may carry over a limited number of hours to the following year. Amounts in excess of the carryover limit are paid to the participant in the following year.

Both the PTO and the 401(k) plan permit participants to elect to contribute all or a part of the dollar value of the their unused PTO that cannot be carried over to the 401(k) plan beginning as of the third pay period of the following year provided the PTO contributions do not exceed the §415 (c) limits and 401(k) deferral limits for the year. Any amount that cannot be contributed to the 401(k) plan is paid to the participant by February 28 of the following year.

Example:

Bob participates in Company Y's PTO plan and 401(k) plan. As of December 31, 2009, he has the dollar equivalent of $450 in unused time off above the carryover limit. Bob elects to have $270 of his unused PTO contributed to the plan which will be allocated to his 401(k) salary deferral account on February 1, 2010 and treated as a contribution for the 2010 plan year. His $270 contribution to the 401(k) plan is treated as an elective deferral because Bob has a right to elect either a cash payment or have the dollar equivalent of his unused PTO that cannot be carried over contributed as an elective deferral to the 401(k) plan.

PTO Contributions at Termination of Employment

❖ **Non-elective employer contributions to a profit sharing plan**

Company X maintains a PTO plan and a qualified profit sharing plan. Carryover of unused PTO to subsequent years is limited. Contributions of unused PTO at termination of employment are contributed to the profit sharing plan as employer non-elective contributions which are contributed to the profit sharing plan and allocated to the participant's account as of the first day of the second pay period beginning immediately after the participant terminates employment. Any amounts of unused PTO that cannot be contributed to the profit sharing plan are paid to the participant within 60 days of termination of employment.

Example 1:

Charles, who participates in Company X's PTO and the Profit sharing plan, terminates employment on October 1, 2009 with 12 hours of unused PTO. His unused PTO does not exceed the total number of hours in the remaining work days for 2009 plus the carryover limit. His unused PTO at termination of employment is equivalent to $300.

Company X contributes and allocates $300 to Charles' profit sharing account on October 19, 2009. This amount combination with prior contributions to his profit sharing account for the year does not exceed his §415 limits for the 2009 limitation year.

Example 2: *Termination of employment at the end of the year and 100% of compensation limit*

Same as above except Charles terminates employment on December 28, 2009.

Any payment for unused paid time off will be paid to Charles in 2010 and will be the only payment he will receive from the company in 2010. He has $300 in unpaid leave which does not exceed the §415(c) limits for 2010. The Company contributes and allocates $150 to the plan for Charles on January 18, 2010. This contribution is not treated as a contribution for 2009. Company X pays the remaining $150 to Charles on January 18, 2010.

The $150 non elective contribution does not count as compensation for §415 purposes. However, because the PTO could have been carried over and used in 2010 had Charles remained employed, the payment of the $150 to Charles on January 18, 2010 can be included as compensation for 2010 and an allocation of 100% of compensation will not exceed the §415(c) limitation for the 2010 limitation year.

❖ **Employee elective deferral of unused PTO to a 401(k) Plan**

Wonder Widgets has a PTO plan under which participants ratably accrue 240 hours of PTO each calendar year on pay-period basis beginning on January 1, 2009. The PTO plan limits the number of unused hours that that may be carried over into the following year. Any hours in

excess of the carryover limit are forfeited and the dollar equivalent is paid to participants within 60 days after termination of employment.

Wonder Widgets also has a 401(k) plan that provides for salary deferral contributions but does not allow catch-up contributions. The dollar value representing unused paid time off may be paid to the 401(k) plan as an elective deferral by the later of 2½ months after termination of employment or the end of the limitation year that includes the date of severance of employment.

Compensation for purposes of the 401(k) plan includes only amounts actually paid during the limitation year. The 401(k) plan treats contributions of unused PTO as elective contributions as of the first day of the second pay period beginning immediately after the participant terminates employment, provided the contribution does not exceed §415 nor elective deferral limits.

Example 1: *Elective Deferrals and termination of employment during the year*

Doris, who participates in the PTO and 401(k) plan, terminates employment on October 1, 2009. At that time her 15 hours of PTO is worth $300 and does not exceed the sum of hours remaining in work days for 2009 plus the carryover limit.

She has timely elected to have $210 (70%) of her unused PTO contributed as an elective deferral to the 401(k) plan. This amount is contributed to the plan and allocated to her account on October 19, 2009. Wonder Widgets pays the remaining $90 to Doris on October 19, 2009 which will be included in her gross income for 2009.

Example 2: *Elective Deferrals and termination at the end of the year*

Same as above, except Doris terminates employment on December 28, 2009. She has $300 in PTO as of December 31, 2009. Any payment of unused PTO will be paid to her in 2010. She timely elected to have $210 of the unused PTO contributed to the 401(k) plan. Wonder Widgets contributes and allocates this amount to her 401(k) elective deferral account as of January 18, 2010 and pays the remaining $90 to Doris on January 18, 2010. For §415 purposes her total compensation for 2010 is $300: $210 in elective deferrals and a $90 cash payment.

2009 RMD Guidance

Because of the severe economic downturn in 2009, the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA) waived required minimum distributions for 2009 from certain retirement plans including 401(k), 403(b), governmental 457(b) plans and IRAs. Certain amounts distributed as 2009 required minimum distribution may also be rolled over to an IRA or another retirement plan. Without guidance from the IRS, plan sponsors and administrators were unsure if the waiver was optional and if participants could elect to receive a 2009 RMD. Notice 2009-82 provides valuable clarification about the waiver that includes:

- Transition relief through November 30, for a plan that is not operated in accordance with its terms with respect to waived RMDs and certain related payments;

RMD in public sector plans

Generally, a required minimum distribution from a public sector plan is the smallest annual amount that must be withdrawn from a participant's retirement plan account plan beginning with the year the participant reaches age 70½ or retires, whichever is later. In the case of an IRA owner, including a deemed IRA account owner or a 5% owner in a private sector retirement plan, RMDs must begin in the year the participant reaches age 70½.

- Rollover relief for waived 2009 RMD distributions and certain related payments; **and**
- Answers to questions about the 2009 RMD waiver.

This Notice also provides two sample amendments for sponsors who give plan participants and beneficiaries the option of receiving or not receiving their 2009 RMDs. Plan sponsors may adopt the sample amendments or use them to draft their own amendments. Plan sponsors that intend to use the one of the sample amendments may need to tailor the amendment to reflect their plan's particular terms and administrative procedures.

Depending on which sample amendment chosen, the plan can **either:**

- Stop making 2009 RMDs payments unless a participant or beneficiary elects otherwise; **or**
- Continue making 2009 RMDs unless a participant or beneficiary elects otherwise.

If the participant does not make an election, 2009 RMD payments will stop.

Plan Operational Relief

Many plan administrators were unable to modify their procedures in time to reflect the new rules under WRERA for 2009 RMDs. Without guidance from the IRS, plan sponsors were not sure of their options. Notice 2009-82 clarifies that distributions from January 1, 2009 to November 30, 2009, will be considered to have operated according to its terms even if it:

- Paid or did not pay RMDs or *extended RMDs;*
- Did not give participants and beneficiaries the option of receiving or not receiving distributions that included 2009 RMDs; **or**
- Did or did not offer the direct rollover or 2009 RMDs or 2009 extended RMDs.

What is a 2009 Extended RMD?

Extended RMDs are *required minimum distributions* (RMDs) that are:

- One or more of a series of substantially equal distributions (including the 2009 RMDs),
- Made at least annually, and
- Expected to last for the life (or life expectancy) of the participant or the joint lives (or life expectancy) of the participant and designated beneficiary, or expected to last at least 10 years.

Rollover Relief

Payments to a plan participant in 2009 will be treated as eligible for rollover if the payments represent distributions that are equal to the 2009 RMDs, 2009 extended RMDs, or are part or all of a 2009 RMD and an additional amount that would have been eligible for rollover regardless of the RMD waiver.

Other rollover relief included in Notice 2009-82:

- Provides that the 60 day rollover rule will apply no earlier than November 30, 2009 for any previous 2009 RMD distributions,
- Applies the RMD waiver to both spousal and non-spousal designated beneficiary distributions,
- Permits a plan to accept rollovers of 2009 RMD payments back into the plan,

- Clarifies that the 20% mandatory withholding tax on 2009 RMDs that are not directly rolled over does not apply, **and**
- Notes that IRAs do not need to be amended for the 2009 RMD waiver until further guidance is issued.

Additional Guidance

There is additional guidance from the questions and answer portion of Notice 2009-82 which:

- Extends the deadline for an employee or a beneficiary that had until the end of 2009 to choose between receiving distributions under the 5 year rule or the life expectancy rule. They will have until end of 2010 to decide.
- Clarifies that a non-spouse designated beneficiary has until the end of 2010 to make the direct rollover to an inherited IRA and use the life expectancy rule if the employee died in 2008, provided the plan offers the direct rollover option to non-spousal beneficiaries.
- Applies the optional 10% tax withholding rules to a portion of the distribution that includes a 2009 RMD. Any remaining portion that would have qualified as an eligible rollover distribution is subject to 20% mandatory withholding.
- Clarifies that the 2009 RMD waiver, however, does not qualify as an exception to the 10% additional distribution tax under IRC 72(t) on payments from qualified plans and IRAs that are part of a series of substantially equal periodic payments based on life expectancy. If these payments are stopped in 2009, for reasons other than death or disability, prior to age 59½ or prior to 5 years from the date of the first payment, all prior payments under the series of payments will be subject to a recapture tax.

Government plans, including 457(b) plans that have offered participants a choice of waiving or taking their 2009 RMD must be amended by the end of the first plan year beginning on or after January 1, 2012.

Rollovers from Employer Plans to Roth IRAs

IRS Notice 2009-75 – *Rollovers from Employer Plans to Roth IRAs* – describes the federal tax consequences of rolling over an eligible rollover distribution from a qualified, 403(b) or governmental 457(b) plans to a Roth IRA.
Generally eligible rollover distributions that are rolled over to another eligible retirement plan are not included in a distributee's gross income. Eligible retirement plans are qualified plans (401(a) including 401(k plans), 403(b) plans governmental 457(b) plans or IRAs.

A distribution from a designated Roth 401(k) or 403(b) account may be rolled over to another designated Roth 401(k) or 403(b) account or to a Roth IRA. Prior to 2010 rollovers from employer sponsored plan and conversions from non Roth IRAs to Roth IRAs are subject to certain income and tax filing limitations. A taxpayer's modified adjusted gross income

What is a Roth IRA?

A Roth IRA is a type of Individual Retirement Arrangement through which contributions are not deductible and qualified distributions from the Roth IRA are not included in gross income. A qualified distribution from a Roth IRA is a distribution that is made:

- After the 5 year period beginning with the first taxable year the individual contributed to any Roth IRA, and
- After age 59½.

(MAGI) for the year cannot exceed $100,000 and married tax payers must file a joint tax return.

Beginning with 2010 tax year:

- The MAGI restrictions no longer apply for conversions/ rollovers to Roth IRAs, including deemed Roth IRAs. Married taxpayers who file separate tax returns will be eligible to make eligible rollover contributions to a Roth IRA.
- Taxable amounts eligible for rollover from an employer sponsored retirement plan will be subject to mandatory 20% withholding if the distribution is not directly rolled over to another retirement plan or IRA.
- The 5 year holding period for Roth IRA is restarted when amounts from an employer-sponsored retirement plan or non-Roth IRA are rolled into a Roth IRA, unless they are rolled into an existing Roth IRA. In this case, the 5 year holding period applicable to existing Roth IRA would apply to the rollover amount.
- Taxes on Roth conversions/rollovers may be spread over the 2011 and 2012 tax years.

Eligible rollover contributions from 401(k) or 403(b) designated Roth accounts will not be taxed when they are rolled over to a Roth IRA.

Reference Material

IRS Revenue Ruling 2009-31 (revised Aug. 3, 2009):
www.irs.gov/pub/irs-irbs/irb09-31.pdf

IRS Revenue Ruling 2009-32 (revised Aug. 10, 2009):
www.irs.gov/pub/irs-irbs/irb09-32.pdf

Worker, Retiree, and Employer Recovery Act of 2008:
http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h7327enr.txt.pdf

IRS Notice 2009-82 – *Guidance on 2009 Required Minimum Distributions:*
www.irs.gov/pub/irs-drop/n-09-82.pdf

IRS Notice 2009-75 – *Rollovers from Employer Plans to Roth IRAs:*
www.irs.gov/pub/irs-drop/notice_2009-75.pdf

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III. GAO Reports on Fees for Non-ERISA Retirement Plans

The Government Accountability Office (GAO) recently released its report, *Retirement Savings: Better Information and Sponsor Guidance Could Improve Oversight and Reduce Fees for Participants.* This report focuses primarily on fees and oversight of non-ERISA defined contribution plans (DC plans) including 457 and 403(b) plans. In preparing the report, the GAO examined:

(1) The types of fees charged to participants and investments of various DC plans;

(2) How DC plan sponsor actions affect participant fees;

(3) How fee disclosure requirements vary; **and**

(4) The effectiveness of DC plan oversight.

Americans increasingly rely on defined contribution (DC) plans like 401(k) plans and individual retirement accounts (IRA) for retirement income. DC plans and IRAs are important retirement savings vehicles. As shown in the following table, DC plans including 403(b) and 457 plans have approximately 47 million participants.

GAO Estimated Number of DC Plans and Participants, 2007

	Number of plans (in thousands)	Number of participants (in thousands)
401(k)	624	37,492
403(b)	88	6,521
457(b) governmental and tax-exempt	30	3,746

Fees and Investments

Participants in DC plans and IRAs pay a number of fees, including expenses, commissions, or other charges associated with investments and plan operation that may reduce retirement savings over time. Plan sponsors may choose different service arrangements such as bundled and unbundled that may charge different types of fees. A bundled arrangement that provides all services may have lower fees than an unbundled arrangement.

Both 403(b) participants and IRA account owners are more likely to pay higher fees since they are more likely to invest in retail mutual funds and individual variable annuity contracts with higher fees. In contrast, participants in 401(a), 401(k), and 457(b) governmental plans are more likely to invest in institutional mutual funds or group annuity products than retail mutual funds or individual annuities. Sponsors of 401(a), 401(k), and 457(b) governmental plans often pool assets and are able to purchase institutional products with lower fees.

Plan sponsor actions that may increase fees

Fees are one of many factors – such as the historical performance and risk for each investment option – participants should consider in making their investment decisions. Several actions a plan sponsor can take to reduce participant fees include:

- Offering low cost mutual funds in addition to other products,

- Combining or pooling assets to access certain investment products,
- Negotiating with service providers to reduce fees, **or**
- Using the RFP process to lower costs.

Plan sponsor actions that may increase fees include:

- *Participant loans* – Sponsors may incur compliance and administrative costs associated with making sure loan amounts do not exceed limits set by IRS which can be passed on to participants.
- *Higher cost investment options* – May increase costs to participants if an investment option has additional features such as giving participants the option to convert a 401(k) plan account balance into a retirement annuity.

Fee Disclosures

Fee disclosure requirements vary between plans covered under ERISA and those, like government plans, that are not subject to ERISA Title I reporting and disclosure requirements. Even under ERISA, plan sponsor fee disclosures to participants is limited and do not make comparison of investment options easy.

Non-ERISA plans are not federally required to disclose any fee information at all although state laws may require some sort of disclosure. California and Texas have more stringent disclosure requirements than the federal government for 403(b) plans. Florida requires fee disclosure information to participants of some plans but not 403(b) plans. Minnesota state law requires sponsors of a state 457 plan to disclose fees but does not require local school districts to make similar fee disclosures for their 403(b) plans. In some cases plan sponsors may provide some fee disclosure even if they are not required to do so.

Participants receive different fee information based on the regulator of the investment product. The SEC regulates disclosure for mutual funds and variable annuities. State insurance agencies also regulate fee disclosure for insurance products any may require disclosures that list all fees participants pay. Fee disclosures may be presented in different formats making it difficult for participants to compare investment options.

Oversight

State and local governments can also play a role in overseeing DC plans. State and local governments may have established ERISA-like laws for their retirement plans.

All DC plans are subject to the Internal Revenue Code (IRC) which is overseen and enforced by Internal Revenue Service (IRS). In the case of 457 plans, the IRS does not collect enough information to easily enforce certain limits on participants' contributions to 457(b) plans, which could lead to excessive deferrals – especially for participants making catch-up contributions.

Because there are two distinct types of 457(b) plans – governmental plans and tax-exempt plans – the IRS cannot easily differentiate between participants in these plans to evaluate whether or not they are appropriately complying with catch-up contribution limits. IRS identifies plan participants in various retirement plans from information provided on the W-2 form that reports income tax deferrals.

The W-2 code identifying 457(b) plans has not been changed for several years, and does not provide enough information to easily determine whether catch-up contributions are made

appropriately. In 2002, section 457 was amended, allowing 457(b) governmental plan participants age 50 and over the opportunity to contribute $5,500 in catch-up contributions. These contributions are not permitted for participants of 457(b) tax-exempt plans. However, the code on the W-2 form for these two plans remained the same.

Recommendations

The GAO recommends that:

- The Department of Labor and the IRS provide guidance designed for all types of DC plans and suggest ways to cost effectively decrease participant fees that encourages plan sponsors to take actions that result in lower participant fees.
- The IRS collect information to allow the agency to easily differentiate between types of 457 plans.
- The IRS share information about service providers' violations with financial regulators, and work with them to establish a formal agreement for those limited occasions when service provider information can be shared without revealing protected taxpayer information. This agreement should be reviewed periodically and updated as needed.

In addition the GAO report recommends that that Congress should consider:

- Amending ERISA to require sponsors to disclose fee information on each investment option in the plan to participants in a consistent way that facilitates comparisons among the options not only for 401(k) plans, but for all DC plans subject to Title I of ERISA,
- Examining state approaches for fee disclosure to participants in non-Title I plans as models for federal requirements for ERISA plans, and
- Giving the Department of Labor direct oversight of safe harbor 403(b) plans, which are not subject to Title I of ERISA. This will help the DOL determine whether any safe harbor plans are operating outside the safe harbor guidelines and subject to Title I of ERISA.

Reference Material

GAO report, *Retirement Savings: Better Information and Sponsor Guidance Could Improve Oversight and Reduce Fees for Participants:* www.gao.gov/new.items/d09641.pdf

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IV. Keeping watch

You can find the most recent information on issues affecting governmental defined contribution plans, plan sponsors and plan participants on the Employer page of our plan Web site, NRSforu.com. In addition, we report guidance on legislative and regulatory activity relevant to government sector defined contribution plans through:

- *Federal Legislative and Regulatory Report* — distributed monthly and posted on the Legislative / Regulatory tab on the Employer section of NRSforu.com. It's available online and for download.
- *Plan Sponsor Alerts* — published as needed to announce breaking news, and distributed by e-mail and posted in the Plan Sponsor Corner of NRSforu.com.

About this report

JOANN ALBRECHT, CPC, QPA, Plan Technical Consultant, our resident expert on legislative and regulatory issues, prepares this report. As a leading member of the Nationwide Legislative Task Force, she identifies how federal actions may affect your plan and its participants.

Albrecht is a member of American Society of Pension Professionals and Actuaries (ASPPA), currently serving on its Government Affairs Committee, is immediate past chair of the ASPPA Tax Exempt and Government Plans Subcommittee and is a subject matter expert (SME) for the ASPPA Education and Examinations Committee. She is a current contributor to Aspen Publisher's "457 Answer Book."

BOB BEASLEY, CRC, CIC, Communications Consultant, edits it. Beasley brings 20 years of financial services communications experience to your plan. He helped prepare the two most recent editions of the *457 Guidebook* as well as *Fiduciary Fundamentals;* he edits countless newsletters and plan sponsor communications, and in 2001 authored "What you should know about the Economic Growth and Tax Relief Reconciliation Act of 2001."

Beasley serves on the Education and Communication Committee for the Profit Sharing / 401k Council of America and is a member of the National Association of Government Defined Contribution Administrators.

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Information presented in this newsletter was current and accurate as of the date of publication. This information is of a general and informational nature and is NOT INTENDED TO CONSTITUTE LEGAL OR INVESTMENT ADVICE. Rather, it is provided as a means to inform you of current information about legislative, regulatory changes and other information of interest. Plan Sponsors are urged to consult their own counsel regarding this information.