




**Employee Benefits Broadcast**  
The Benefits News You Need in 60 Minutes or Less

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**Employee Benefits Broadcast**

**“The Benefits News You Need  
in 60 Minutes or Less”**

**Tuesday, April 24, 2012  
12:00 p.m. – 1:00 p.m. CST**

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## Employee Benefits Broadcast

### Housekeeping Issues

- Call 866.493.2825 for technology assistance
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## Employee Benefits Broadcast

### Today's Topics

- **Risky Business:** Think Before You Merge — The IRS May Have Questions About Your 401(k) Plan Merger
- **In the Spotlight:** Safe Harbor 401(k) Plans — More Than Just Matching or Non-Elective Contributions
- **Fiduciary Fundamentals:** 401(k) Fiduciary Duties — The Bar Has Been Raised



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## Risky Business

# Think Before You Merge — The IRS May Have Questions About Your 401(k) Plan Merger

Galen R. Mason



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## Risky Business

### Acquiring Businesses - Options for 401(k) Plans

- Pre-Close Termination
- Acquire and Retain as Stand Alone
- Acquire and Merge



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## Risky Business

### Acquire and Merge Beware Deferred Baggage

- William Bryen Co., Inc. v. Commissioner, 89 T.C. 689 (1987)
- Determination Letter
  - Instructions/Rev. Proc. require submission documents
  - Failure to disclose material information.
  - Penalty for falsifying information.
  - EP Determination QAB FY 2006.
- Options
  - Find the Documents
  - VCP Non-Amender (Timing)
  - Withdraw the DL request. Not required.
  - Disqualification (Bryen)



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## Risky Business

### Lesson(s)

- Best structures
  - Don't take on the plan
  - Take it on and maintain as a separate plan
  - Make seller get a determination letter (lol)
  - Take it on and merge it (account for clean up costs and risks)
- Get involved in deals!



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## In the Spotlight



### **Safe Harbor 401(k) Plans — More Than Just Matching or Non-Elective Contributions**

Joshua A. Agen



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## In the Spotlight

### **Safe Harbor 401(k) Plans – Overview**

- Minimum levels of matching or other employer contributions
- Must provide initial and annual notices to participants
- No ADP or ACP testing if applicable requirements are met



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## In the Spotlight

### More Than Just Matching or Non-Elective Contributions

- Rules for safe-harbor plans can be more stringent than those that apply to non-safe harbor plans
- IRS reportedly planning audit initiative



## In the Spotlight

### Some Potential Pitfalls (Overview)

- Incorrect definition or application of “compensation”
- Withdrawal restrictions
- “True up” uniformity
- Failure to provide safe harbor notice



## In the Spotlight

### **“Compensation” in Safe Harbor Plans**

- Matching or non-elective contributions must be based on a non-discriminatory definition of “compensation” under Code Section 414(s)
- Safe harbor definition
- Modified safe harbor definition
- Ensure that your plan definition reflects your goals



## In the Spotlight

### **Some Potential Missteps in Application of Compensation**

- Multiple definitions of compensation
- Revised definition or new form of compensation not reflected in payroll system or with third party administrator
- Not identifying or correcting errors



## In the Spotlight

### Withdrawal Restrictions

- Withdrawal restrictions under safe harbor plans more restrictive than under non-safe harbor plans
  - Hardship distributions and in-service withdrawals prior to age 59½ are not allowed from safe harbor contributions.
- Fix: track two “buckets,” one for safe-harbor contributions and one for all other contributions



## In the Spotlight

### “True-up” Uniformity for Matching Contributions

- “Payroll period” method versus annual
- Payroll period method may not reflect total amount of compensation for full year
- If “true-up” contribution provided, must be provided uniformly
  - Cannot provide only for those limited by 402(g)
- If no true-up provided, special timing rule for contributions: no later than the end of the following plan-year quarter





## In the Spotlight

### Failure to Provide Safe Harbor Notice

- Two required safe harbor notices:
  - Initial notice to each newly eligible employee
  - Annual notice of safe harbor provisions to each participant and eligible employee
- Timing of annual notice: reasonable period before each plan year (generally 30-90 days before plan year)



## In the Spotlight

### Failure to Provide Safe Harbor Notice (continued)

- IRS examines for this issue, looking at:
  - Low deferral rates among eligible employees
  - Plan procedures for issuing notices
  - Records showing that plan procedures were followed
- Correction for failure to provide: potential make-whole for missed deferral opportunity, missed matching contribution



## Fiduciary Fundamentals



### 401(k) Fiduciary Duties — The Bar Has Been Raised

Robert E. Goldstein



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## Fiduciary Fundamentals

### Background

- Since enactment of ERISA, almost 36 years ago, one of the biggest challenges for both plan sponsors and participants is the lack of information regarding the fees associated with the services being provided to them and their retirement plans
- This has triggered new disclosure requirements by service providers (to fiduciaries) and by plan administrators (to participants)



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## Fiduciary Fundamentals

- February 3, 2012 – DOL issued final fee disclosure rules
- Effective date – July 1, 2012
- By this date, service providers must make certain disclosures to covered plans for an arrangement to be reasonable so that they are not prohibited transactions under ERISA (and then annually thereafter)
- The new rules also require fiduciaries to furnish participants and beneficiaries information necessary to carry out their responsibilities



## Fiduciary Fundamentals

- Deadline for initial disclosure to participants: August 30, 2012
- Plan administrators: is it time to contact your service providers now regarding the information they need to provide you?
- Disclosures to plan fiduciaries may be made electronically



## Fiduciary Fundamentals

### Plans Covered by the New Rules

- All qualified ERISA retirement plans (DB and DC)
- 403(b) plans subject to ERISA except if the assets consist exclusively of frozen contracts or custodial accounts where the plan sponsor no longer has any contribution obligation and no contributions made since before January 1, 2009
- But sponsors of non-ERISA plans also need to be aware of the new rules due to state fiduciary statutes



## Fiduciary Fundamentals

### Fiduciary-Level Service Provider Disclosures

- Contracts to provide services to benefit plans are deemed not reasonable unless the service provider timely discloses information about the services provided
- If contract isn't reasonable, service provider is treated as having entered into a prohibited transaction



## Fiduciary Fundamentals

### Covered Service Providers Defined

- Providers having contracts with plans who expect to receive \$1,000 or more
- Types: fiduciaries or investment advisors; recordkeepers; brokerage service providers; and providers of accounting, actuarial, appraisal, or valuation services



## Fiduciary Fundamentals

### Required Disclosures

- All services to be provided under the contract
- All direct compensation (i.e., directly from the plan) the service provider expects to receive must be disclosed
- Also, all indirect compensation (i.e., paid from some other third party) the provider expects to receive
- All compensation the service provider expects to receive in connection with the contracts termination (common with insurance company providers)



## Fiduciary Fundamentals

- A service provider who reasonably expects to serve as a fiduciary must furnish a statement that he/she will act as a fiduciary
- Not always easy to determine when a person acts as a fiduciary (sometimes they attempt to contract away their status as a fiduciary)
- The anticipated direct and indirect compensation must be disclosed to the plan's fiduciary



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## Fiduciary Fundamentals

### July 1, 2012 Deadline

- Fiduciaries may want to consider contacting service providers now that they intend to meet their deadline
- This information is critical for plan administrators to
  - assess the reasonableness of the total compensation that a service provider receives from the contract
  - Identify potential conflicts of interest
  - Satisfy reporting and disclosure requirements under Title I of ERISA (e.g., information to be reported on Form 5500, Schedule C)



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## Fiduciary Fundamentals

### Missing Information

- If service provider's disclosures are incomplete, plan fiduciary should notify the service provider
- Service provider then has 90 days to respond
- Plan fiduciary must notify the DOL if the response is not timely received
- Service provider disclosures are required annually



## Fiduciary Fundamentals

### Multi-vendor Situation

- DOL rules require information to be aggregated in multi-vendor situations
- Plan sponsors – expect to be asked to pay a fee to compile this information
- How does the one selected compile all of this information?



## Fiduciary Fundamentals

### Issues to Consider

- Just how much are plan participants paying for these services and are the payments reasonable?
- How do you determine what is reasonable?
- Is good service a factor to consider?
- Recent ABB case



## Fiduciary Fundamentals

### Tussey v. ABB Inc. (Missouri District Court)

- One of the few plan fee cases that has gone to trial
- Decided in March 2012
- ABB was determined to have breached its fiduciary duties
  - by failing to monitor recordkeeping costs (Fidelity)
  - by failing to negotiate rebates from Fidelity or other investment companies that offered investments under ABB's 401(k) plan
  - by selecting more expensive share classes when less expensive share classes were available





## Fiduciary Fundamentals

- by agreeing to pay Fidelity an amount that exceeded market costs for plan services in order to subsidize the corporate services Fidelity provided to ABB (e.g., payroll and recordkeeping for the company's health and defined benefit plans)
- Together, these items totaled \$13.4 million



## Fiduciary Fundamentals

### Participant-Level Disclosures

- ERISA's exclusive benefit and prudence rules impose on fiduciaries the duty to furnish participants information to carry out their own account management and investment responsibilities in an informed manner
- Under the new rules, plan fiduciaries have to provide periodic disclosures of certain plan-related and investment-related information



## Fiduciary Fundamentals

### Participant-Level Disclosures

- These rules apply only to individual account plans (i.e., DB plans aren't subject to the rules)
- Again, non-ERISA plans such as governmental and church plans are also not subject to them



## Fiduciary Fundamentals

### Plan Related Information

- Initial disclosure deadline: August 30, 2012
- Three categories of plan-related information:
  - -- general plan information
  - -- administrative expenses, and
  - -- individual expenses



## Fiduciary Fundamentals

### I. General Plan Information

- circumstances under which participants may give investment instructions
- description of the plan's investment alternatives
- description of any investment managers to whom participants may give investment instructions
- description of any brokerages windows that may be offered



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## Fiduciary Fundamentals

### II. Administrative Expenses

- Plan administrator is required to explain any fees/expenses for general administrative services provided plan-wide that can be charged against individual accounts
- These would include expenses for recordkeeping, accounting, legal, etc.
- The explanation must describe how the expenses are to be allocated



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## Fiduciary Fundamentals

### III. Individual Expenses

- Expenses to be charged against an individual's account for services provided to the individual
- Examples: processing fees for plan loans or QDROs
- Disclosures of individual charges must be provided quarterly



## Fiduciary Fundamentals

### Disclosure of Investment-Related Information

- For each investment alternative, plan administrator must provide:
  - identifying information
  - performance data
  - benchmarks, and
  - fees and expenses
- Investment related information must be presented in a format so that investment performance can be compared



## Fiduciary Fundamentals

### Model Chart

- DOL has issued a model comparative chart to satisfy the comparative format requirement



## Fiduciary Fundamentals

### Final Thoughts

- Single versus multi-vendor plans – is vendor pricing affected by the existence of other providers?
- How do you interpret the volumes of data you will receive?
- Consider hiring a consultant to interpret the pricing of your vendor contracts?



## Fiduciary Fundamentals

### Final Thoughts

- Undertake an overall evaluation of the cost of the services you are receiving
- How do smaller employers afford investment consultants to help them assess the reasonableness of the compensation they are paying
- These issues are also critical to non-ERISA fiduciaries since they can be liable under state fiduciary laws



## Employee Benefits Broadcast

### Questions & Answers



## Employee Benefits Broadcast

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## Employee Benefits Broadcast

### Mark Your Calendar

- The remaining sessions of the 2012 Employee Benefits Broadcast Series will take place on the following dates:
  - July 24, 2012
  - October 23, 2012



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## Employee Benefits Broadcast

### Thank You

- A copy of the PowerPoint presentation and a multimedia recording will be available on Foley's website within 24 to 48 hours:

<http://www.foley.com/employee-benefits-broadcast-april-2012/>

- We welcome your feedback. Please take a few moments before you leave the web conference today to provide us with your feedback:

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