Current Benefits Issues, New Guidance, What's on the Horizon

Tulsa Employee Benefits Group

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New Proposed Rule for Investments in Defined Contribution Plans

March 30, 2026 Proposed Rule

- Proposed regulation
- Implements President Trump's directive in Executive Order 14330 regarding alternative investments
- Clarifies a fiduciary's duty of prudence under ERISA in connection with selecting designated investment alternatives for participant-directed individual account plans (e.g., 401(k) plans)
- Provides a safe harbor for the duty of prudence

Overarching Goal

Overarching goal of the proposed regulation is:

- Alleviate certain regulatory burdens
- Alleviate litigation risk

(Both of which interfere with the ability of American workers to achieve the competitive returns and asset diversification necessary to secure a dignified and comfortable retirement)

Three Key Principles

1) A need to affirm ERISA as a law grounded in process
2) ERISA gives maximum discretion and flexibility to plan fiduciaries in selecting designated investment alternatives, including alternative assets
3) When ERISA fiduciary decision-making follows a prudent process – such as that reflected in this proposed rule – arbiters of disputes should defer to fiduciaries under a presumption of prudence

Core Fiduciary Duties

- Loyalty
- Prudence
- Diversification
- No prohibited transactions

Typical Current Structure

- Charter
- Committee
- Investment consultant
  - 3(21)
  - 3(38)

Duty of Prudence

ERISA 404(a)(1)(B)

"[A] fiduciary shall discharge his duties with respect to a plan . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."

Plan Investment Menu

- Fiduciary with responsibility for plan investments has a **duty to act prudently when establishing a diversified menu** of designated investment alternatives
- To enable participants to **maximize the risk-adjusted returns, net of fees**, on investment across the entire portfolio in the plan

1979 Regulation

In 1979, the DOL published a regulation on this topic

- This "Investment Duties" regulation provides a fiduciary must:
  1) Give "appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment . . . ."; and
  2) Have "acted accordingly"

New Proposed Regulation Supplements the 1979 Regulations

- The new proposed regulation supplements and expands on the 1979 regulation in the context of selecting **designated investment alternatives (any investment option that participants can choose)** for participant-directed individual account plans by:
  - Identifying six factors; and
  - Demonstrating what it means for a fiduciary to "act accordingly" and therefore to be prudent

Commentary in the Preamble

- DOL interprets ERISA 404 as providing **"greater flexibility"** in the making of investment decisions by plan fiduciaries than might have been previously provided
- Duty of prudence applies to the selection of designated investment alternatives
- Duty of prudence focuses **on process at the time of the decision** – "largely a process-based inquiry"
- "Prudence **does not mean clairvoyance**"

Commentary *(cont'd)*

- Duty of prudence **does not contain categorical restrictions** on investments
- Decisions based on a prudence process are entitled to **"significant deference"**
- "[U]nder a prudence inquiry, there is **no one single right answer** given the almost innumerable appropriate options available to fiduciaries."
- ERISA fiduciaries have a **"continuing obligation"** to monitor all investments

Commentary *(cont'd)*

- "ERISA's duty of prudence applies not just to the selection of each designated investment alternative but **also to the collection of designated investment alternatives as a whole** – i.e., to both the individual parts and the sum." (What does this mean?)
- "When a plan fiduciary objectively, thoroughly, and analytically considers, and makes a determination following the described process with respect to, any of the six factors . . . **its judgment regarding the factor or factors is presumed to be reasonable and is entitled to significant deference."**

Executive Order 14330

- Issued August 7, 2025
- "Democratizing Access to Alternative Assets for 401(k) Investors"
- "[E]very American preparing for retirement should have access to funds that include investments in alternative assets" – when the plan fiduciary determines it is appropriate
- **Directed the DOL to propose regulations or other guidance that clarify ERISA fiduciary duties where alternative assets are made available**

"Alternative Assets" Defined

1) **Private market investments** – direct and indirect interests in equity, debt, or other financial instruments that are not traded on public exchanges (often set up as partnerships in which a general partner manages money on behalf of limited partners)
2) **Real estate**
3) **Digital assets** – wide variety of assets that can be stored and transmitted digitally, including cryptocurrencies such as Bitcoin and other tokens

"Alternative Assets" defined *(cont'd)*

4) **Commodities** – ranging from metals to corn
5) **Infrastructure investments** – everything from water treatment plants to airports to highways (may be considered a type of real estate investment)
6) **Lifetime income investment strategies** – designed to provide individuals with a predictable stream of income for their lives (e.g., an annuity)

Defined Contribution Plans v. Defined Benefit Plans

- Public and private defined benefit plans are already investing in alternative assets
- Defined contribution plans do not offer alternative assets and have steered away from them

Proposed Rule Does More than the EO Required

- "Providing guidance only with respect to those asset allocation funds that invest in alternative assets could create the impression that those asset allocation funds are either favored or disfavored. They are not."
- The DOL thus decided to issue a broader more general rule that follows President Trump's Executive Order but is also broader

Future Guidance

- DOL "anticipates issuing interpretive guidance in the near term concerning fiduciary obligations under ERISA to monitor designated investment alternatives following their inclusion on a plan's investment menu."
- In the meantime, the factors and processes (or substantially similar) outlined in the new proposed regulation apply to this ongoing duty

Six Factors = Safe Harbor

1) Performance
2) Fees
3) Liquidity
4) Valuation
5) Benchmarking
6) Complexity of the designated investment alternative

Auditor Perspective
Common Issues and Challenges

Common Issues and Challenges

Eligibility

- Notification
- Auto enrollment
- Auto escalation
- Improper inclusions/exclusions
- Untimely entry
- Rehires
- Participant data
- LTPT EEs

Common Issues and Challenges

Contributions

- Definition of compensation
- Calculation/True up
- Allocations
- Late remittances
- End of year or hours
- Classification

Common Issues and Challenges

Distributions

- Vesting
- Forfeitures/Expense Budget Accounts (Revenue Sharing)
- Uncashed checks
- Loans
- Self-certification

Common Issues and Challenges

Other

- Failure to amend and/or executed documents
- Change in service providers and inadvertent changes
- Form 5500
  - » Late filing vs incomplete filing
- Census errors - reconciliation (completeness) and accuracy
- Testing
- SOC 1 reports and CUECs
- Internal controls
- Proper monitoring
- Minutes

Retirement Plan Corrections: Changes in EPCRS and correction approaches for common corrections – impact on financial statements

Revenue Procedure 2021-30

- Sets forth the IRS Employee Plans Compliance Resolutions System ("EPCRS"), a system of correction programs for sponsors of qualified plans that have failed to satisfy the requirements of section 401(a) of the Internal Revenue Code
- In addition to setting forth the requirements of the correction programs, Revenue Procedure 2021-30 sets forth correction principles, rules of general applicability, and certain acceptable correction methods under EPCRS

Benefits of EPCRS

- EPCRS provides a formalized mechanism for plans to:
  - Avoid disqualification as a result of having qualification failures
  - Engage in a correction of a qualification failure that occurred previously
  - Without EPCRS "cover," the correction itself could be viewed as an additional, independent qualification failure

EPCRS Components

The components of EPCRS are:

1) Self-Correction Program (SCP), under which a plan sponsor that has established compliance practices and procedures may self-correct certain plan failures without payment of any fee or sanction, provided certain conditions are satisfied;

2) Voluntary Correction Program (VCP), under which a plan sponsor, at any time before examination, may pay a limited fee and receive the IRS's approval for correction of a plan failure; and

3) Audit Closing Agreement Program, under which a plan sponsor may correct certain plan failures identified on examination and pay a sanction.

Self-Correction Program (SCP)

- Under SCP, a plan sponsor of a qualified plan generally may self-correct certain significant operational failures and plan document failures by the last day of the third plan year following the plan year for which the failure occurred and may correct certain insignificant plan failures even if they are discovered on examination
- To be eligible to self-correct a failure in a plan eligible for correction under EPCRS, a plan sponsor must have established practices and procedures designed to promote and facilitate overall compliance with applicable Code requirements

SCP *(cont'd)*

- In addition, to be eligible for correction of significant plan failures under SCP, a qualified plan must, as of the date of correction, be the subject of a favorable letter
- Under SCP, a plan sponsor must self-correct a failure in accordance with the principles and rules of general applicability set forth in section 6 of Revenue Procedure 2021-30

SECURE 2.0 Change: "Eligible Inadvertent Failure"

- Section 305(a) of the SECURE 2.0 Act generally provides that, any "eligible inadvertent failure" to comply with the rules applicable under section 401(a) of the Code may be self-corrected under EPCRS at any time (no time limit)
- Except to the extent that the failure was identified by the Secretary prior to any actions that demonstrate a specific commitment to implement a self-correction
- But the self-correction must be completed within a reasonable period after identification of the failure

"Eligible Inadvertent Failure" *(cont'd)*

- Section 305(e) of the SECURE 2.0 Act defines an eligible inadvertent failure as a failure that occurs despite the existence of practices and procedures that satisfy the standards set forth in section 4.04 of Revenue Proc. 2021-30 (or any successor guidance)
- Under section 305(e), an eligible inadvertent failure does not include any failure that is egregious, relates to the diversion or misuse of plan assets, or is directly or indirectly related to an abusive tax avoidance transaction

Update to Revenue Procedure 2021-30

- Section 305(g) of the SECURE 2.0 Act provides that the Secretary shall revise Revenue Procedure 2021-30, or any successor guidance, to take into account the provisions of section 305 not later than the date that is two years after the date of enactment of the SECURE 2.0 Act
- This update has not yet occurred

Importance of Quick Discovery and Quick Correction

- For SCP purposes, self-correction must occur within a "reasonable time" after identification of the failure – this is defined as 18 months
- Other approved correction methods also encourage early detection. For example, with a failure to implement a deferral error:
  - *Failures That Do Not Exceed Three Months*. No QNEC is required for missed elective deferrals
  - *Failures that Exceed Three Months But Not Three Years*. 25% QNEC if "correct deferrals begin no later than the earlier of the first payment of compensation made on or after the last day of the third plan year following the plan year in which the failure occurred or, if the Plan Sponsor was notified of the failure by the affected eligible employee, the first payment of compensation made on or after the end of the month after the month of notification."

SCP

- Historically, “significant” v. “insignificant” issue really mattered
- If “significant” error, had to be corrected within three years
- But this framework is no longer relevant
- Almost anything can be self-corrected within 18 months of discovery

VCP

When VPC is used

- VCP generally allows for all types of corrections at any time, not just operational failures
- Under VCP, correction is voluntary, no IRS sanctions
- IRS audit prohibited pending VCP closure
- Available prior to notification of audit by IRS
- VCP process requires supporting documentation
- IRS fee involved is based on participant count

Advantages of SCP v. VCP

- SCP correction can be accomplished quickly, on the plan sponsor's timetable, with no need to wait for IRS approval of correction
- No application fee

Disadvantages of SCP

Disadvantages/Limitations of Self Correction:

- Self correction has limited availability
  - Can't be used for demographic and employer eligibility failures
  - Limited availability for retroactive amendment corrections
- Self correction involves some degree of risk
  - Risk that method of correction chose will be unacceptable to an IRS examiner

Disadvantages of VCP

- IRS filing fees for approval of a correction
- More expense for plan sponsor associated with preparing application
- Significant (in some cases) amount of time until the IRS approves the correction
- IRS may not agree with proposed correction method

When is VCP Typically Used?

- Certain types of failures where it is required
- Difficult operational failures
- Retroactive amendments that would otherwise be a cutback
- IRS staffing and the types of issues typically create a long, extended process

General Principle

- Restore the plan to the position it would have been in had the error not occurred
- Without regard to how long ago the error started, i.e., there is no limitations period

Trump Accounts

Trump Accounts

- A Trump account is a type of traditional individual retirement account (IRA) that is established for the exclusive benefit of an eligible individual
- An eligible individual is any individual (a) for whom an election is made to establish a Trump account, (b) who has not attained age 18 before the close of the calendar year in which the election is made, and (c) for whom a social security number has been issued before the date of the election

Trump Accounts *(cont'd)*

- There are five types of contributions that can be made to a Trump account:

  1) a pilot program contribution from the federal government of $1,000 for an eligible child,

  2) qualified general contributions (funded by states (or political subdivisions), the United States, the District of Columbia, Indian tribal governments, or Internal Revenue Code (Code) section 501(c)(3) tax-exempt organizations) for members of a qualified class of account beneficiaries,

Trump Accounts *(cont'd)*

- Five types of contributions *(cont'd)*:

  3) employer contributions that are not includible in the gross income of the employee under Code section 128 (section 128 employer contributions),

  4) qualified rollover contributions, and

  5) contributions from other sources (such as the account beneficiary, parents, or any other person)

Trump Accounts *(cont'd)*

- Code section 128(a) provides that an amount paid by an employer as a contribution to the Trump account of an employee or of any dependent of such employee pursuant to a "Trump account contribution program" is excludible from income of the employee
- The amount excludible with respect to any employee shall not exceed $2,500 (subject to cost-of-living adjustments after 2027)

Trump Accounts *(cont'd)*

- A "Trump account contribution program" means a separate written plan of an employer for the exclusive benefit of its employees to provide contributions to the Trump accounts of such employees or dependents of such employees
- The Departments of Labor and Treasury anticipate issuing separate guidance on how to structure employer contributions to Trump accounts to ensure that they are not subject to the Employee Retirement Income Security Act of 1974 (ERISA) coverage framework

Questions?