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BENEFITS REPORT

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Updates to the Employee Plans Compliance Resolution System

KEVIN E. NOLT

The Internal Revenue Service ("IRS") issued Revenue Procedure 2016-51 on September 29, 2016 which updates the current version of the Employee Plans Compliance Resolution System ("EPCRS"), effective January 1, 2017. The current EPCRS, issued in 2013 in Revenue Procedure 2013-12, had become outdated due to changes made to the program in subsequent IRS guidance and the recent curtailment of the IRS' determination letter program for individually designed plans.

EPCRS provides sponsors and administrators of qualified and tax-favored retirement plans (including pension, 401(k) and 403(b) plans) with a process to correct plan errors and to prevent plan disqualification. EPCRS has evolved over the years and has become a very useful tool for sponsors and administrators, not only providing guidance on self-correction of certain common operational and document errors (*e.g.*, excess allocations and missed deferrals) but also providing a vehicle to submit more significant issues to the IRS for its input and approval.

Revenue Procedure 2016-51 includes the following changes to EPCRS:

- allows increased flexibility in correcting overpayments by permitting plans to not demand repayment from participants and beneficiaries under certain facts and circumstances, as provided in Revenue Procedure 2015-27;

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Trucker ✦ Huss Recognized in "Best Law Firms" List

Trucker ✦ Huss, APC is pleased to announce the firm was recently recognized as one of the "Best Law Firms" by U.S. News & World Report and Best Lawyers® in the areas of ERISA litigation, employee benefits law and tax law.

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Litigation – ERISA

National Tier 2
Employee Benefits (ERISA) Law

Metropolitan Tier 1 (San Francisco)
Employee Benefits (ERISA) Law
Litigation – ERISA

Metropolitan Tier 3 (San Francisco)
Tax Law

The 2017 "Best Law Firms" rankings showcase top firms recognized by clients and peers for delivering professional excellence and for high quality ratings. The rankings indicate a unique combination of quality in practice and legal expertise.

- reflects the alternative safe harbor correction methods for elective deferral failures (for example, failure to correctly implement a plan's automatic contribution or automatic escalation feature, or an improper exclusion of an eligible employee from the plan), as provided in Revenue Procedure 2015-28 which encourages early correction of deferral failures by making available reduced corrective contributions by employers;
- eliminates references to the use of the Social Security letter forwarding program for locating missing participants and beneficiaries, which had been eliminated by the Social Security Administration;
- removes references to determination letter requirements in light of the curtailment of the determination letter program for individually designed plans, which generally means that determination letter applications are no longer required for the IRS's approval of certain corrective retroactive amendments;
- provides that the correction of interim amendment and non-amender failures must be made by the date of the Voluntary Correction Program ("VCP") submission, and any corrective plan amendments must be adopted no later than 150 days after the date of the compliance statement;
- removes the user fee schedule from EPCRS and explains that the IRS will provide the EPCRS user fees, including VCP user fees, as part of an annually published list;
- clarifies that Audit Closing Agreement Program ("Audit CAP") sanctions will no longer be based on the maximum payment amount on disqualification, but instead will be based on facts and circumstances (but generally will not be less than the VCP user fee);
- clarifies that the IRS reserves the right to impose sanctions for VCP submissions in excess of the VCP user fee for "egregious" failures;
- eliminates the 50% refund of the user fee that was previously provided in the case of an anonymous

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VCP submission that fails to reach resolution, meaning that if an anonymous submission is pulled the sponsor will lose 100% of the user fee;

- clarifies that compliance statements and closing agreements (issued after a VCP or Audit CAP, respectively) do not constitute determinations that a plan is qualified in form or operation, but only that the plan has been timely adopted or that the specific operational failure has been corrected; and
- provides that the VCP application forms will be provided on the IRS website, rather than as an appendix to the revenue procedure, allowing the forms to be updated without a full update to EPCRS.

While Revenue Procedure 2016-51 is a useful update to EPCRS in light of the changes made over the past few years, it generally leaves the correction principles untouched. Given the curtailment of the IRS's determination letter program, we might see additional changes to EPCRS (*e.g.*, expand the availability of self-correction under certain circumstances). We will keep you apprised of any future guidance or changes to EPCRS.

Plan sponsors and administrators should continue to review their plans in order to address issues that require correction. The Required Amendments List and Operational Compliance List that will now be issued by the IRS on an annual basis should assist with this self-review process. See our July 2016 Benefits Report article on changes to the determination letter application program. Any corrections made after January 1, 2017 will need to follow the guidelines set forth in Revenue Procedure 2016-51.

If you have any questions or need assistance, please reach out to the author of this article or the attorney with whom you normally work.

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The Fifth Circuit Emphasizes that Conclusory Statements will not Satisfy the Pleading Standard for Stock Drop Lawsuits

FREEMAN L. LEVINRAD

On September 26, 2016, the Fifth Circuit, in *Whitley v. BP, P.L.C.* ("*Whitley*"), 2016 WL 5387678 (2016), emphasized that conclusory statements will not satisfy the pleading standard for complaints alleging breaches of fiduciary duty related to retirement plans' investment in employer stock (commonly known as stock-drop cases), as established in *Fifth Third v. Dudenhoeffer* ("*Dudenhoeffer*"), 134 S. Ct. 2459 (2014). After *Dudenhoeffer*, plaintiffs in ERISA stock drop cases must plausibly allege an alternative action that the ERISA fiduciary could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it. The Supreme Court has also clarified that the *complaint itself* must plausibly allege that a prudent fiduciary in the same position could not have concluded that the alternative action would do more harm than good; a court cannot simply presume that the plaintiff's proposed alternatives would satisfy the *Dudenhoeffer* pleading standard. *Amgen Inc. v. Harris*, 136 S.Ct. 758 (2016).

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Whitley involves an employee stock ownership plan ("ESOP") offered to employees of the international oil and gas company BP, P.L.C., ("BP"). BP's 2010 Deepwater Horizon oil spill caused the company's stock to drop significantly in value. Affected participants brought suit, alleging that the plans' fiduciaries breached their fiduciary duty by offering employer stock as an investment option, despite knowing it was artificially inflated. The participants alleged the breach occurred both before the explosion, by BP's misrepresentations regarding its safety improvements and the risk of future accidents, and after the explosion, by BP's misrepresentations concerning the oil spill's magnitude.

The plaintiffs' complaint in *Whitley* presented two alternative actions that the plan fiduciaries could have taken in light of their insider knowledge that would not have violated securities laws: (1) freezing, limiting, or restricting company stock purchases, and (2) disclosing unfavorable information to the public. The plaintiffs alleged that these actions "would not have been more likely to harm the BP Stock Fund than to help it."

After the Fifth Circuit remanded the case for reconsideration in light of *Dudenhoeffer*, the District Court for the Southern District of Texas granted the Whitley plaintiffs' motion to file an amended complaint on the basis that the plaintiffs had plausibly alleged that the defendants had insider information and had plausibly alleged two alternative actions that the defendants could have taken that met the *Dudenhoeffer* standard. The district court then certified the defendants' motion for interlocutory appeal of its ruling on the motion, and the Fifth Circuit's recent opinion arose from this appeal. The Department of Labor ("DOL") filed an amicus brief requesting that the Fifth Circuit uphold the district court's decision and arguing that under the specific facts of the case "no reasonable fiduciary could have concluded that refraining from purchasing stock that was inflated due to the fraudulent concealment of safety problems would have caused more harm than good to the plan participants." (Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellees at 24.) Further, the DOL argued that "although a corrective public disclosure likely would have decreased the value of stock already held by the Plan, a reasonable fiduciary would have understood that such a drop would have eventually occurred anyway once the fraud was revealed… and thus would have acted to stop any further harm to the Plan by refusing to purchase more BP stock until the fraud was disclosed." (*Id.* at 23.) The Securities and Exchange Commission ("SEC") filed a brief coordinated with the DOL, stating that the alternatives proposed by the DOL could be implemented consistent with securities laws. (Brief for the Securities and Exchange Commission as Amicus Curiae in Support of Plaintiffs-Appellees at 7.)

However, unpersuaded by the requests of the DOL and SEC, and the position of the plaintiffs-appellees, the Fifth Circuit found that the plaintiffs' amended complaint was insufficient and remanded the case, under the following rationale:

First, the Fifth Circuit explained that the district court had incorrectly interpreted the *Dudenhoeffer* standard when it stated that "it could not determine, on the basis of the pleadings alone, that no prudent fiduciary would have concluded that [the alternatives] would *do more good than harm*." (*Whitley* at 6.) The Fifth Circuit explained that this is not a statement equivalent to the standard announced by *Dudenhoeffer*, and that under *Dudenhoeffer*, the plaintiff instead "bears the significant burden of proposing an alternative course of action so clearly beneficial that a prudent fiduciary *could not conclude* that it would be more likely to harm the fund than to help it." (*Whitley* at 6.)

Second, the Fifth Circuit held that the plaintiffs had failed to meet this burden, because, aside from conclusory statements that the alternatives "would not have been more likely to harm the [fund] than to help it…. the stockholders do not specifically allege, for each proposed alternative, that a *prudent fiduciary* could not have concluded that the alternatives would do more harm than good, nor do they offer facts that would support such an allegation." (*Id.)* The Fifth Circuit then noted that "it does not seem reasonable to say that a prudent fiduciary at that time could not have concluded that [either of the two proposed alternatives] – both of which would likely lower the stock price — would do more harm than good," and that "[i]n fact, it seems that a prudent fiduciary could very easily conclude that such actions *would* do more harm than good." (*Id.*)

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Whitley demonstrates that conclusory statements that no prudent fiduciary would conclude that a course of action would do more harm than good, without specific facts supporting such allegations, will not meet the pleading standard under *Dudenhoeffer*. However, it is still unclear what type of additional facts will be needed to meet that standard. We will continue to monitor these stock drop cases and will update you of any significant developments.

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Pension Plan Limitations and Other Applicable Limitations for 2017

SHANNON OLIVER AND KEVIN E. NOLT

The Internal Revenue Service has announced the annual cost-of-living adjustments applicable to dollar limitations for pension plans and other items for Tax Year 2017. Many of the pension plan limitations were increased, as the increase in the cost-of-living index met the statutory limits that initiate their adjustment. However, some limitations remain unchanged. Below is a summary of some of the limitations.

Limitations that Have Increased

- The limitation on the annual benefit under a defined benefit plan increased from $210,000 to $215,000. (Code section 415(b)(1)(A)).
- The limitation for defined contribution plans increased from $53,000 to $54,000. (Code section 415(c)(1)(A)).
- For participants who separate from service before January 1, 2017, the defined benefit limitation under Section 415(b)(1)(B) is computed by multiplying the participant's compensation limitation, as adjusted through 2016, by 1.0112. (Code section 415(b)(1)(B), Regs. section 1.415(d)-1(a)(2)(ii)).
- The dollar limitation used for the definition of "key employee" in a top-heavy plan is increased from $170,000 to $175,000. (Code section 416(i)(1)(A)(i)).
- The annual compensation limit increased from $265,000 to $270,000 (Code sections 401(a)(17), 404(l),408(k)(3)(C), and 408(k)(6)(D)(ii)).
- The dollar limitation for determining the maximum account balance in an employee stock ownership plan subject to a 5-year distribution period is increased from $1,070,000 to $1,080,000, while the dollar amount used to determine the lengthening of the 5-year distribution period is increased from $210,000 to $215,000. (Code section 409(o)(1)(C)(ii)).

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- The annual compensation limitation for eligible participants in certain governmental plans that, under the plan as in effect on July 1, 1993, allowed cost-of-living adjustments to the compensation limitation under the plan to be taken into account, increased from $395,000 to $400,000 (Code section 401(a)(17)).
- The dollar amount used to determine excess employee compensation with respect to a single-employer defined benefit pension plan for which the special election under section 430(c)(2)(D) has been made is increased from $1,106,000 to $1,115,000 (Code section 430(c)(7)(D)(i)(II)).

Limitations that Remain Unchanged

- The maximum amount of elective deferrals that may be made to 401(k) plans, 403(b) plans, simplified employee pensions ("SEPs"), and 457(b) plans remains unchanged at $18,000. (Code sections 402(g)(1) and 457(e)(15)).
- The maximum amount of catch-up contributions that individuals aged 50 or over may make to 401(k) plans, 403(b) plans, SEPs, and governmental 457(b) plans remains unchanged at $6,000 (Code section 414(v)(2)(B)(i)).
- The maximum amount of catch-up contributions that individuals aged 50 or over may make to SIMPLE 401(k) plans or SIMPLE retirement accounts remains unchanged at $3,000 (Code section 414(v)(2)(B)(ii)).
- The limitation used in the definition of "highly compensated employee" remains unchanged at $120,000 (Code section 414(q)(1)(B)).
- The compensation amount used for determining required participation in SEPs remains unchanged at $600 (Code section 408(k)(2)(C)).
- The limitation on the exclusion for elective deferrals to SIMPLE retirement accounts remains unchanged at $12,500 (Code section 408(p)(2)(E)).
- The compensation amounts used in defining "control employee" for fringe benefit valuation for Board or shareholder-appointed, confirmed, or elected officers of the employer remains unchanged at $105,000. The compensation amount used for all other employees of the employer also remains unchanged at $215,000 (Regs. sections 1.61-21(f)(5)(i) and 1.61-21(f)(5)(iii)).
- The limitation concerning the qualified gratuitous transfer of qualified employer securities to an employee plan remains unchanged at $45,000 (Code section 664(g)(7)).
- The dollar limitation on premiums paid with respect to qualifying longevity annuity contract remains unchanged at $125,000. (Code section 1.401(a)(9)-6 and Regs. section A-17(b)(2)(i)).
- The $1,000,000,000 threshold the Code utilizes to determine whether a multiemployer plan is a systematically important plan is adjusted using the cost-of-living adjustment. After applying the rounding rule, the threshold used to determine whether a multiemployer plan is a systemically important plan remains unchanged at $1,012,000,000. (Code section 432(e)(9)(H)(v)(III)(aa) and 432(e)(9)(H)(III)(bb)).

The chart on the following page is a quick reference guide to key limits.

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Key Limits From 2011 Through 2016

	2017	2016	2015	2014	2013	2012	2011
401k/403(b)/ 457 Elective Deferrals	$18,000	$18,000	$18,000	$17,500	$17,500	$17,000	$16,500
Annual Defined Contribution Limit	$54,000	$53,000	$53,000	$52,000	$51,000	$50,000	$49,000
Annual Defined Benefit Limit	$215,000	$210,000	$210,000	$210,000	$205,000	$200,000	$195,000
Annual Compensation Limit	$270,000	$265,000	$265,000	$260,000	$255,000	$250,000	$245,000
Catch-Up Contribution Limit	$6,000	$6,000	$6,000	$5,500	$5,500	$5,500	$5,500
Highly Compensated Employees	$120,000	$120,000	$120,000	$115,000	$115,000	$115,000	$110,000
Top-Heavy Plan Key Employee Compensation	$175,000	$170,000	$170,000	$170,000	$165,000	$165,000	$160,000

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The Trucker ✦ Huss *Benefits Report* is published monthly to provide our clients and friends with information on recent legal developments and other current issues in employee benefits. Back issues of *Benefits Report* are posted on the Trucker ✦ Huss web site (www.truckerhuss.com).

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In response to new IRS rules of practice, we inform you that any federal tax information contained in this writing cannot be used for the purpose of avoiding tax-related penalties or promoting, marketing or recommending to another party any tax-related matters in this *Benefits Report*.

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