# Pension Plan Fix-It Handbook

Employee Benefits Series | THOMPSON | November 2017 | Vol. 25, No. 4

## Comments may help ERISA council streamline required plan disclosures

*By Mary B. Andersen, CEBS, ERPA, QPA*

This year, the Employee Retirement Income Security Act (ERISA) Advisory Council for the U.S. Department of Labor (DOL), comprising employee benefits professionals and employee representatives, is focusing on "Mandated Disclosures for Retirement Plans."

Its review—due to be released to the public in final form in late 2017—will address these relevant but often intractable questions for plan sponsors and administrators:

- Are there duplicative disclosure requirements? Can they be combined to lighten the load for plan sponsors and participants?
- How can the content of these reports be improved?
- How well do the disclosures meet the federal readability guidelines?
- How well do the disclosures promote participants' understanding of the plan and facilitate their decision making?

**See *Andersen*, p. 7**

## BICE and related exemptions: Limiting liability before implementation

*By Marcia S. Wagner*

In August, the U.S. Department of Labor (DOL) proposed to extend the transition period by 18 months (in other words, from January 1, 2018, to July 1, 2019) for the full implementation of the Best Interest Contract Exemption (BICE), the Principal Transactions Exemption (PTE), and PTE 84-24 (relating to sales of annuities and other transactions involving insurance companies and agents). The proposal, published in the *Federal Register* on August 31, was followed by a 15-day comment period. We think it is highly likely that the DOL will finalize the proposal (although changes to the proposal are possible).

### What do I do now?

In this uncertain environment, a critical and bottom-line question for financial advisers and financial institutions serving employer-sponsored retirement plans is, "What do I do during the transition period?"

The DOL stated that the Impartial Conduct Standards currently in effect will continue to be the sole conditions for the exemptions during the extended

**See *BICE*, p. 6**

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# *WestRock* ruling leaves employers on hook for extra fees when exiting multiemployer plan

Plan withdrawal liability has been in place for U.S. multiemployer plans since 1980. It includes a heavy penalty that requires employers leaving a multiemployer plan to pay their share of the plan's vested benefits not yet covered by contributions and investment earnings. As a result, healthy companies often seek to leave multiemployer plans before their liability for other financially weaker participating companies soars.

Does the Employee Retirement Security Act of 1974 (ERISA) allow employers to abandon these sinking ships scot-free? No, according to a recent decision by the U.S. 11th Circuit Court of Appeals.

## Background of the case

*WestRock RKT Co. v. Pace Indus. Union-Mgmt. Pension Fund*, No. 16-16443 (11th Cir., May 16, 2017), involved the underfunded Pace Industry union pension, which amended its 2010 rehabilitation plan to require any employer leaving the plan to pay some of the collective funding deficiency. Participating employer WestRock sought court approval to strike the amendment as being contradictory to ERISA.

WestRock also claimed that the Pension Protection Act of 2006 (PPA) allowed employers to bring procedural and substantive challenges to rehabilitation plans. The PPA requires multiemployer pension funds in "critical status" such as Pace's—in general, those less than 65 percent funded—to develop rehabilitation plans aimed at raising and stabilizing funding levels.

## Employer arguments denied

The 11th Circuit, affirming a lower-court decision, denied WestRock on both counts, concluding that ERISA doesn't allow an employer to oppose changes to the rehabilitation plan for a multiemployer plan in critical status.

The court ruled that the disputed rehabilitation plan required the employers involved in the plan to make contributions toward the plan's funding deficiency if they chose to leave the plan. This payment was separate from—and on top of—any withdrawal liability payments that were statutorily required, the court said.

The withdrawal liability for companies attempting to leave a multiemployer plan that's been in place since 1980 can easily amount to several times an employer's net worth. Withdrawal can occur either when an employer files for bankruptcy, permanently ceases operations, or has stopped having an obligation to contribute.

The court also noted that WestRock never alleged that the challenged Pace plan's rehabilitation plan was legally nonconforming: "… WestRock has not cited to any portion of ERISA that explicitly states that a plan sponsor cannot put in place a system for charging withdrawing employers for their share of the accumulated funding deficiency," the ruling stated.

"Given the *WestRock* decision and the overall favoritism that courts show multiemployer plans, contributing employers have few options other than minimizing their participation to the extent possible, and, if economically feasible, withdrawing from multiemployer plans," advised Fisher Phillips law firm Partner Robert C. Christenson in a September 5 client bulletin on the decision. "Contributing employers should carefully monitor the amount of withdrawal liability they face from multiemployer plans, and be aware of any plan rules that could increase that liability."

## PBGC rescue endangered

For several years, the U.S. Pension Benefit Guaranty Corp. (PBGC) has said its projections show its multiemployer guarantee program is likely to run out of money in the next decade, even after changes from federal legislation in recent years that boosted the plan premiums that partially fund it.

The agency has estimated that 10 million people are part of these plans, also known as "Taft-Hartley plans." ❖


## Pension Plan Fix-It Handbook

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*Pension Plan Fix-It Handbook* (ISSN: 2334-1947) (USPS 013-011) is published quarterly by Thompson HR, a division of BLR—Business & Legal Resources, 100 Winners Circle, Suite 300, Brentwood, TN 37027. Periodicals Postage Paid at Franklin, TN, and additional mailing offices. POSTMASTER: Send address changes to *Pension Plan Fix-It Handbook,* P.O. Box 5094, Brentwood, TN 37024-5094.

This newsletter for *Pension Plan Fix-It Handbook* includes a looseleaf supplement to the *Handbook* in February, May, August, and November. For subscription service, call 844-334-8233. For editorial information, E-mail editors@blr.com. Please allow four to six weeks for all address changes.





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# DB plan sponsors' interest in pension risk transfer is accelerating, latest MetLife survey says

Interest in transferring pension risk off their balance sheets and onto insurance companies appears to be accelerating among U.S. defined benefit (DB) retirement plan sponsors, according to a recent poll conducted by insurer MetLife. The poll's results lead MetLife to predict 2017 will be "another very robust year of [pension risk transfer] market activity."

In 2016, there was nearly $14 billion in annuity buyout-related pension risk transfers, based on LIMRA Group data from the fourth quarter of last year, and 9 in 10 plan sponsors in the MetLife survey said they believe the level this year will be at least—or more—active. Of that sampling of plan sponsors, 63 percent said the volume of pension risk buyouts in 2017 will be heavier than in 2016.

## What are the catalysts?

A number of catalysts are leading many DB plan sponsors to continue to take concrete steps to offload their pension liabilities, MetLife said. These liabilities are becoming increasingly difficult for some companies to manage in the current market and regulatory environment.

In the poll, DB plan sponsors were surveyed to:

- Assess the likelihood they would engage in pension risk transfer to achieve their plans' "derisking" goals.
- Determine what specific activities they were most likely to use and for which participant populations.
- Understand the current impetus driving interest in pension risk transfer to an insurance company.
- Gauge knowledge about and preparation for an eventual pension risk transfer transaction, including interest in flexible transaction structures, such as split deals and assets in kind.
- Probe their expectations for 2017's level of transfer activity.

Among the top reasons plan sponsors were considering transferring their pension obligations to an insurer were Pension Benefit Guaranty Corp. (PBGC) premium increases, interest rates, and the impact of changes to mortality tables proposed by the Internal Revenue Service (IRS) in 2016 for use in plan years beginning on or after January 1, 2018. More generally, the respondents also mentioned as triggers for pension risk transfer the regulatory environment and their plan's funded status reaching a predetermined level. Sixty-four percent expressed concerns about PBGC actions inducing them to shed their pension liabilities.

Pension risk transfers can be undertaken in several ways. One way of reducing pension liabilities is for the plan to pay a lump sum to participants who have not yet begun collecting pension payouts. Another option involves the purchase of a group annuity contract from an insurance company, known as an annuity buyout. This transfers some or all of a DB plan's benefit obligations and related risks to an insurer (such as MetLife), while retaining all the plan design features and benefits in which the participants are vested.

More than one-half of the plan sponsors surveyed said they would be most likely to use an annuity buyout to achieve derisking. Forty-three percent said they would prefer using a combination of a lump sum and annuity buyout. This interest in annuity buyouts rose to 57 percent from 46 percent in MetLife's 2016 poll on the same subject. Providing a lump sum only was chosen by 34 percent of the plans.

The manufacturing sector is the industry most likely to consider a buyout, MetLife found.

Among those sponsors that expect to use an annuity buyout alone or in combination with a lump sum, 77 percent said they would consider doing so in the next 2 years.

When selecting an insurer for a pension risk transfer, financial strength of the insurer was the most important

**See *PRT survey*, p. 4**

# IRS adjusts, adds improvements to preapproved plan program

The Internal Revenue Service (IRS) has issued several changes to its preapproved qualified retirement plan program, in line with its phaseout at the beginning of 2017 of much of the determination letter program for individually designed plans. The changes are seen as encouragement for plan sponsors to switch to more standard, streamlined preapproved plans, and have affected the cycle of defined contribution (DC) plans that filed their plans with the agency on October 2.

Sponsors of master and prototype (M&P) and volume submitter (VS) plans should review Revenue Procedure (Rev. Proc.) 2017-41, which on June 30 outlined procedures for issuing opinion letters (see related column, page 1) on the qualification of preapproved plans under Code Sections 401, 403(a), and 4975(e)(7). The Rev. Proc. also modified the IRS preapproved letter program by blending the M&P and VS programs into a single, new opinion letter program.

The Rev. Proc.'s changes became effective October 2 but apply only to opinion letter applications about a plan's third 6-year remedial cycle, along with subsequent cycles. It was published July 17 in Internal Revenue Bulletin 2017-29.

"Many of these changes appear to be designed to make preapproved plans more attractive and usable in place of individually designed plans, but time will tell how effective they will be," said a July 27 Groom Law client bulletin.

## What the changes achieve

The IRS said in the Rev. Proc. that the program is:

- Simplified by eliminating the distinction between M&P and VS plans;
- Liberalized by increasing the types of plans eligible for preapproved status; *and*
- Revised to give more flexibility in preapproved plan design.

Rev. Proc. 2017-41 is likely to be updated. The IRS said it expects to continue revising it "in whole or in part, from time to time," including changes based on public comments it receives.

Plan sponsors also should get ready for some updated Listings of Required Modifications (LRMs), which are expected to be released soon by the IRS. The Rev. Proc. said one LRM containing sample plan language is already available for downloading and use by plans switching to a more universal format.

Although the sample language in the LRM is designed for use in plans that have an adoption agreement format, "in order to expedite processing, Providers are encouraged to refer to the sample language as a guide in drafting plans that do not use an adoption agreement format" as well, according to Rev. Proc. 2017-41.

The IRS on June 30 also issued Notice 2017-37, which set forth the Cumulative List of Changes in Plan Qualification Requirements for Pre-Approved Defined Contribution Plans for 2017 (known as the "2017 Cumulative List"). It spells out changes in the qualification requirement of the federal tax code that must be acknowledged in a plan document submitted to the IRS under the preapproved plan program in order to receive an opinion letter from the agency.

## Conclusion

While the latest Rev. Proc. guidance gives more flexibility, major restrictions remain in many areas.

"Accordingly, plan sponsors and their advisors will want to weigh their options carefully before jumping on the 'preapproved plan' bandwagon. A sponsor who migrates its individually designed plan onto a preapproved form will obtain assurance that its plan document complies with the form requirements of the Code. But the price will include a loss of substantial flexibility over a key part of its overall benefit package," the Groom Law bulletin counseled. ❖

## *PRT survey* (continued from p. 3)

factor cited for annuity buyouts. This consideration was followed by the cost of the annuity transaction and recommendations from their consultant or independent fiduciary.

Just over 60 percent of plan sponsors polled by MetLife have taken preparatory steps for an eventual pension risk transfer transaction, up from 45 percent in 2015. The most common preparatory steps include an evaluation of the financial impact of a transfer, discussions with key stakeholders, data review and cleanup, and exploration of the pension risk transfer methods available in the marketplace.

The *MetLife 2017 Pension Risk Transfer Poll* was conducted between late March and early May 2017. There were 129 DB plan sponsors who participated, with 59 percent of those reporting DB plan assets of $500 million or more. ❖

# Plan fees' rapid decline slowed this year as rates remained flat, NEPC study of DC plan data finds

Retirement plan recordkeeping, trust, and custody fees—in a steep decline for years under pressure from sponsors, participants, federal regulations, and litigation—remained flat for the first time since 2010, according to a new survey.

In the survey, NEPC LLC, a consulting firm, analyzed data from 123 defined contribution (DC) plan respondents with $138 billion in aggregate assets, representing 1.5 million participants. Each plan among NEPC's respondents for 2017 had more than 12,000 participants, and the average plan size was $1.1 billion, the firm said.

The survey showed that DC plans' expenses stayed steady in 2017 at a median annual $59 per participant, up slightly from $57 in 2016. This year's asset-weighted average expense ratio for DC plans was 0.41 percent, or 41 cents per $100 in fund assets, in line with the ratio reported by NEPC in 2016 of 0.42 percent.

## Drop in median fees

In contrast, when NEPC first conducted the fees study in 2006, median fees per participant were $118, and the expense ratio was 0.57 percent.

"After [a consistent decrease] for the past 7 years, it's surprising to see fees flatten out even though we had been anticipating it," Ross Bremen, partner and defined contribution strategist at NEPC, said in a late-August press release about the 2017 survey.

"Plan fees were the lowest in a decade last year, and now the trend has taken a breather. Low fees have been a source of mixed emotions. While sponsors are able to highlight their good work by reducing fees for participants, it's done at the risk of hindering innovation and service. However, we believe there's a good chance fees will lower again next year," Bremen said.

He said he based this forecast on several factors, including sponsors that have been considering share class and contracting changes but have not yet made them. He also said a "significant number" of vendor searches now in progress at plans have not yet been captured.

## Responses on plan design

In addition to plan fees, respondents to the 2017 NEPC survey were asked about plan design. Results show that the median plan offers 23 investment options, compared with 22 options in 2016 and 14 in 2006. Among those investment options, NEPC said, target date funds (TDFs) continue to be the most popular, with 94 percent of plans in the survey offering them. Of those plans, 90 percent use TDFs as their qualified default investment alternative (QDIA), and assets in their TDFs are at a record high of 34 percent.

The findings also showed that 33 percent of plans include passive TDFs and 54 percent have components of a passive tier to complement active options for participants.

## Revenue-sharing trends

The survey also provided some insight about the plans' revenue-sharing activities. The arrangements have generated some controversy in the retirement plan industry arising from their appropriateness for participants with different-sized accounts and for a perceived lack of transparency. Here are some of the key data points:

Seventy-seven percent of plans use some form of revenue sharing but are looking for ways to give excess revenue back to participants. (Revenue-sharing payments are amounts paid to a recordkeeper for hosting an investment fund on the recordkeeper's 401(k) platform. These payments can include 12b-1 fees, shareholder service fees, and subtransfer agency fees. These fees are generally built into the fund's expense ratio, which is the cost charged to investors for management of the fund.) Smaller funds in particular are beginning to eliminate revenue sharing altogether.

- Seventy percent of plans in the NEPC survey use revenue sharing to cover fees. However, almost one-third (29 percent) use a flat dollar charge to pay fees instead.
- Just 5 percent of plans have excess revenue retained by the recordkeeper. Nearly three-quarters (73 percent) use it to offset fees, and one-third (33 percent) return it to participants.
- Sixty percent of nonbundled plans use revenue sharing to offset fees, 24 percent return revenue-sharing dollars to participants, and an additional 30 percent have no revenue sharing.

NEPC annual surveys are intended as a tool to help plan sponsors benchmark their plan fees. The 2017 findings were presented in the *12th Annual NEPC Defined Contribution Plan and Fee Survey*, whose full results are available from the firm. ❖

transition period (in other words, the period in which the exemption is available but compliance with the full conditions of the exemption is not necessary).

Briefly, as reported (see April story), the Impartial Conduct Standards require that the financial institution and its advisers (1) act prudently and in the best interest of the retirement investor without regard to the financial institution's or adviser's interests; (2) charge no more than reasonable compensation; and (3) not make misleading statements. If your plan service providers are in compliance with those standards now, the proposed extension does not otherwise increase or extend their—or your plan's—liability.

However, we note that it is unclear if the DOL will extend its current temporary enforcement policy on the exemptions. The DOL previously stated that it would not take action against financial service providers for failing to comply with the exemptions as long as they were "working diligently and in good faith to comply with the fiduciary duty rule and exemptions" during the transition period, which was then scheduled to end on January 1, 2018. In its August proposal, the DOL asked for comments on whether to continue with this approach, suggesting that the DOL has not yet decided how to handle enforcement of the Impartial Conduct Standards.

For all their many faults, the exemptions, especially the full BICE, provided compliance professionals with a long checklist of specific compliance items. The Impartial Conduct Standards are somewhat vaguer and do not necessarily lend themselves to easy compliance checklists.

## List of steps to take

Below is a nonexhaustive list of steps that financial institutions and financial advisers working with employer plans can take to protect themselves and demonstrate compliance with the Impartial Conduct Standards during the extended transition period, or at least until it becomes more clear what the compliance landscape will look like after the transition period is over. Although no single step listed below is required by law or regulation, we think it is important for financial advisers and institutions to take some steps to implement and enforce the Impartial Conduct Standards.

- Identify and code all retirement investors as Employee Retirement Income Security Act of 1974 (ERISA) plans, non-Title I plans, individual retirement accounts (IRAs), etc. This will help the firm to track disclosures, procedures, etc., that apply to each type of retirement investor.
- Make sure written policies and procedures for ERISA and other qualified retirement accounts such as IRAs and similar accounts (for example, Archer Medical Savings Accounts, health savings accounts (HSAs), Coverdell Educational Savings Accounts, Keogh plans, and sole proprietor 401(k) plans) incorporate the Impartial Conduct Standards and require compliance with those standards in making recommendations to retirement accounts. Periodic compliance training for advisers may be appropriate.
- The DOL fiduciary rule became fully applicable on June 9. If not already done, your vendors should consider revising agreements to make clear the services for which the firm is and is not acting in a fiduciary capacity. Any registered representatives of broker-dealer firms should be licensed as investment adviser representatives, if not true already.
- Implement processes and controls for the delivery of nonfiduciary services to ensure that fiduciary advice is not inadvertently provided.
- Review adviser compensation for recommendations to retirement accounts to ensure that it is reasonable in the context of your financial institution as a whole.
- Review use of proprietary products and investments that generate third-party payments in retirement accounts to make sure use of such products is consistent with the best-interest standard.
- Review all sales and marketing materials and disclosures with a view to identifying and eliminating any statements that could be viewed as misleading or inadvertently deemed to constitute a fiduciary recommendation.
- Review disclosures for retirement accounts to ensure that disclosures are accurate and fairly inform retirement investors of direct and indirect compensation received by the firm and its advisers and potential conflicts of interest.
- IRA rollovers are clearly a point of concern for the DOL, and to the extent your firm advises individuals on IRA rollovers, that activity should be treated as a fiduciary activity unless it can be clearly and conclusively established that the firm's role is purely informational.
- Although internal documentation is not a technical requirement at the moment for IRA rollovers (and rollovers of similar accounts such as Archer

**See *BICE*, p. 8**

## Andersen (continued from p. 1)

- Should the disclosures include labels such as "Action Required," "Action Requested," "No Current Action Required," or "For Information Purposes Only"?
- Would a summary or quick resource guide (QRG) help achieve communication objectives?
- What is the most effective way to distribute and design the communications material?
- Does the size of the company affect communications considerations?

This isn't the first ERISA Advisory Council study of disclosures. Previous councils, as well as a 2013 U.S. Government Accountability Office (GAO) report titled "Clarity of Required Reports and Disclosures Could Be Improved," have recommended a comprehensive DOL review of its list of required benefit plan disclosures. The GAO report may have said it best when it concluded, "Participant disclosures are numerous and do not always communicate effectively."

The 2017 ERISA Advisory Council has asked for industry responses to three proposals:

1. The elimination of the summary annual report (SAR) for health benefit plans not already exempt.
2. The consolidation of various annual notices into a single notice in a standard format.
3. The modification of the summary plan description (SPD) requirements to allow for a short reference tool that would be updated annually. The QRG would direct participants to source material from which they can obtain more information.

The council is considering testimony submitted by plan sponsors, administrators, communications experts, and participant representatives, among others. The testimony is listed on the DOL website and is provided in two sections: one related to health benefit plans and the other to retirement plans.

In this column, we will analyze comment letters received to date relating to retirement plans' required disclosures.

### Comment letter summary

In a nutshell, most respondents agree that the SAR for 401(k) plans adds little to no value. However, one commenter stated that the SAR should be eliminated for most defined contribution (DC) plans but maintained for employee stock ownership plans (ESOPs) and money purchase pension plans.

Most commenters agreed that the notices should be given out all at one time or based on life events. Participants become numb to the flood of plan notices they receive each year and may delete or toss them upon receipt (see Tab 800: Reporting, Disclosure and Plan Communication in the *Handbook*).

### Partial list of required notices

**Defined Benefit Annual Funding Notice**

**Summary Annual Report (SAR)**

**Summary of Material Modification (SMM), if applicable**

**Periodic benefit statements**

**401(k) safe-harbor notices**

**Automatic enrollment notice**

**Qualified default investment alternative (QDIA) notice**

**Internal Revenue Code (IRC) 404(c) notice**

**Joint and survivor notices, where applicable**

**Blackout notice, when applicable**

Comments regarding SPDs were mixed, with some commenters stating these should stay as they are, and others saying that SPDs have become overly complicated and should be simplified.

Electronic distribution also drew some conflicting comments. Many noted that most people use some kind of electronic device today, and that electronic communication is becoming the norm. As such, e-communication has become a viable way of distributing plan disclosure information. At the same time, some comments stated that many participants still like to receive important plan information in paper format.

### Mixed opinions

Let's take a closer look at the two areas that are drawing mixed reviews: electronic disclosure and SPDs.

#### *Electronic disclosure*

Both the Internal Revenue Service (IRS) and the DOL have rules that apply to acceptable electronic communication (see Tab 860: Paperless Reporting and Disclosure). The DOL stipulates that electronic communication can be used for participants who have online access to the documents at work and can print them free of charge. The DOL safe harbor also extends to individuals without a work-related computer, if additional notice requirements are met. The comment letters supporting wider electronic disclosure distribution note that most people

See *Andersen*, p. 8

## Andersen (continued from p. 7)

now routinely use some form of electronic communication. One respondent remarked that a 2015 Pew Research Center study showed that 92 percent of U.S. adults owned a cell phone and 68 percent owned a smartphone. The survey also said that 73 percent of U.S. adults at that time possessed a laptop or desktop computer.

Younger workers prefer receiving notices via text message. Electronic distribution would be more cost-effective for employers, the comments continued.

Those opposed to wider electronic distribution note that the method of delivery should not result in an undue burden on those receiving the information. "Participants should not have to go to a library to read information posted on a website nor should they have to visit a kiosk or other workplace posting to read required disclosures," said one opponent to changing this format of plan disclosure.

Many employers today are faced with multiple generations in the workplace, each with its preferred communication style. Electronic communication is fast and cost-effective, and active participants are generally reachable online. Terminated and retired participants are reachable to the extent that they provide updated e-mail addresses and have access to the Internet. Those in these categories without Internet access can be contacted to the extent they provide current mailing addresses. Perhaps applying the IRS rules regarding autoenrollment in 401(k) plans—participants and beneficiaries receive electronic communication, unless they opt out—provides a viable solution for other types of periodic plan disclosures.

### Summary plan description (SPD)

The DOL has a list of required items that must be contained in the SPD. They are supposed to be written in a manner understandable to the average plan participant. (See Tab 252: Increasing Employee Awareness and Appreciation of the Plan.)

Yet, over the years, lawsuits and fear of litigation have introduced a lot of legalese into the SPD. It's generally not possible to draft an SPD to protect the plan sponsor from lawsuits and at the same time make it understandable to the average plan participant.

Some commenters to this year's ERISA Advisory Council liked the idea of a summary document with quick references to the underlying documents. One commenter suggested that the DOL provide a model summary document for plan sponsors to rely on.

Simplification is key; answering questions for participants about why they are receiving information and what they are supposed to do with it is guaranteed to be helpful.

Communicating complicated employee benefit provisions is not easy. Explaining everything in a way that the average plan participant will understand just may not be possible. Different communication channels for different groups likely will have to be used; one size does not fit all. Let's hope the DOL recognizes this.

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## BICE (continued from p. 6)

Medical Savings Accounts, HSAs, etc.) under the BICE's level fee exemption, firms should nevertheless consider maintaining records in support of the rollover decision.

- Make sure appropriate people (such as the chief compliance officer, general counsel, or their delegates) are made responsible—and do so by formal, written appointment—for overseeing compliance with the Impartial Conduct Standards.
- In addition, or alternatively, these individuals may be indemnified by the financial institution.

The DOL, Internal Revenue Service (IRS), and the Securities and Exchange Commission (SEC) will continue to share audit information and make cross-referrals under existing interdepartmental protocols. Regardless of the stated enforcement position of any of these regulatory bodies, a demonstrated effort to meet the Impartial Conduct Standards during this transition period (whether it ends in 2017 or a later date, as currently proposed) will be a powerful factor in a finding of compliance for the financial institution.

The presence of well-documented client files, formally adopted processes and procedures, evidence of attempts to adhere to such processes and procedures, and internal compliance training will be among the most impactful factors to demonstrate efforts to comply with the Impartial Conduct Standards.

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