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Update on Legal Developments Affecting Employee Benefit Plans

Certain Plans May Be Required to File Report of Foreign Bank and Financial Accounts

The Internal Revenue Service ("IRS") requires each United States "person" who has a financial interest in or signature authority over foreign bank accounts, the aggregate value of which exceeds $10,000, to annually file a Report of Foreign Bank and Financial Accounts ("FBAR") providing certain information regarding such accounts.

This requirement is not new; however, recent indications from the IRS suggest that the reporting requirement may be much broader than once believed. Of particular relevance is the suggestion that tax-exempt employee benefit plan trusts may be subject to these rules if they hold equity interests in foreign investment funds. Questions have also arisen as to who is responsible for reporting such investments. Theoretically, the trust itself, as well as each of its trustees, could be responsible for filing FBARs related to the same accounts.

To date, there are many more questions than answers regarding how the FBAR requirements apply to employee benefit plans. In response to this and other confusion, the IRS has extended the 2008 filing deadline from June 30, 2009 to September 23, 2009 for certain entities that have only recently become aware of their obligation to file an FBAR. Additional guidance from the IRS on these questions should be forthcoming—an IRS comment period on the topic ends on August 31, 2009. In the meantime, plan sponsors can take affirmative steps now to prepare a possible FBAR filing by identifying the foreign investments in their plans.

FTC Confirms That Red Flag Rules Will Not Apply to Certain 401(k) Plans and Health FSAs, But Review of Identity Theft Prevention Measures Is Still Advisable

This week, the Federal Trade Commission ("FTC") addressed a number of open questions regarding the application of its "Red Flag Rules" to employee benefit plan sponsors, and extended its enforcement deadline from August 1, 2009 to November 1, 2009. The rules require financial institutions and "creditors" to develop written programs to detect and respond to patterns, practices or specific activities that are "red flags" for possible identity theft. The extent of the rules' application to plan sponsors has been unclear, particularly with respect to the entities that are considered "creditors," broadly defined as those regularly extending or renewing credit.

Through FAQs published on its website, the FTC has now explained that: (1) an employer does not become a "creditor" solely by permitting participants to borrow from their own individual accounts in retirement plans, such as 401(k) plans; (2) in certain cases, an employer which itself is a financial institution or "creditor" is not required to include any individual retirement plans it sponsors for its employees in its written identity theft prevention program, because under such arrangements participants establish accounts not with the employer, but with the plan, a separate legal entity distinct from the employer; and (3) health flexible spending account ("FSA") sponsors and third-party FSA administrators do not become "creditors" solely by offering or maintaining FSAs that reimburse participants for amounts that they have not yet contributed to their accounts.

This recent guidance is good news for plan sponsors. Although the FTC did not exempt all benefit plans and sponsors from coverage, it has confirmed that sponsoring popular types of plans, such as 401(k) plans and health FSAs, will not generally trigger the written prevention program requirement. Over the next few months, the agency plans to further clarify the types of entities subject to the rules through additional guidance and education efforts.

Regardless of the FTC's determinations, it is important to remember that plan fiduciaries have a general duty under ERISA to protect participant information. The identity theft program required under the Red Flag Rules can serve as a helpful starting point for plan sponsors in developing or updating procedures for protecting participants from identity theft. The FTC has developed an online tool to help covered entities design an identity theft program to meet their specific needs (http://www.ftc.gov/bcp/edu/microsites/redflagsrule/get-started.shtm). As always, the attorneys in Venable's Employee Benefits and Executive Compensation group are available to assist you.

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