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Deadlines and Developments

EMPLOYEE BENEFITS & EXECUTIVE COMPENSATION UPDATE

December 2013

Following is a list of significant developments and deadlines in the areas of Welfare Plans, Qualified Plans and Executive Compensation. The list is not exhaustive but is intended to cover key updates in these three areas that may be applicable to our clients.

WELFARE PLANS UPDATE

APPLICABLE LAW/GUIDANCE	DESCRIPTION	EFFECTIVE DATE/DEADLINE
Health Care Reform		
Patient Protection and Affordable Care Act, Public Law 111-148 **Health Care and Education Reconciliation Act, Public Law 111-152** ***Nat'l Federation of Independent Business et al. v. Sebelius*, U.S. No. 11-393, June 28, 2012, available here** **For general information concerning PPACA's requirements and links to applicable guidance, click here (DOL) or here (IRS)**	Additional requirements for sponsors of group health plans continue to become effective pursuant to the Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act (together, PPACA). Many of PPACA's requirements have already gone into effect; however, additional requirements (summarized below) became effective during 2013 or will become effective in 2014. For a copy of our Mayer Brown Legal Update "US Health Care Reform—Effect on Employers and Employer-Sponsored Plans," click here.	Various

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IRC Section 4980H **IRS Notice 2013-45, available here** **IRS Proposed Regulations, 78 Fed. Reg. 218, January 2, 2013, available here** **IRS Proposed Regulations, 78 Fed. Reg. 54996, September 9, 2013, available here** **IRS Proposed Regulations, 78 Fed. Reg. 54986, September 9, 2013, available here**	**Employer Shared Responsibility Mandate/Excise Tax/Reporting Requirements.** The Internal Revenue Service (IRS) delayed the effective date of penalties to be imposed on certain "applicable large employers" that provide no group medical coverage, unaffordable coverage, or coverage that does not provide minimum value to full-time employees from January 1, 2014 to January 1, 2015. The postponed deadline relates to a delay in requiring certain reporting that will give the IRS information required to assess the penalties. Although compliance with the reporting requirements is not required until 2015 (with the first reports being due in 2016), the reporting requirements will require collection of substantial data, so employers should be taking steps towards compliance. The IRS encourages employers to voluntarily comply with the reporting rules for 2014, if possible.	January 1, 2015
	Various Requirements. For plan years beginning on and after January 1, 2014, the following restrictions apply to group health plans: • Waiting periods in excess of 90 days are prohibited. • Pre-existing condition exclusions are prohibited. • No annual dollar limit is allowed on essential health benefits. • Plans that offer coverage for children must cover those children through age 26 regardless of the availability of other coverage. This requirement previously applied to non-grandfathered plans, but prior to January 1, 2014, a grandfathered plan was not required to cover an adult child eligible for coverage under an employer's group health plan other than that of the child's parent. • Non-grandfathered plans may not impose an in-network out-of-pocket maximum above stated limits ($6,350/person, $12,700/family for 2014). • Non-grandfathered plans must provide coverage for certain clinical trials. • Non-grandfathered plans may not discriminate against providers.	Plan years beginning on and after January 1, 2014
IRC section 125(i) **IRS Notice 2012-40, available here**	**Limitation on Health FSA Contributions.** Beginning in 2013, employee salary reduction contributions to health flexible spending accounts (FSAs) are limited to $2,500 per year (indexed for inflation). The limit remains at $2,500 for 2014.	Plans were required to comply in operation January 1, 2013. Deadline for amending plans is December 31, 2014.

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IRS Notice 2013-71, available here	**Health FSA Carryovers.** In light of PPACA's $2,500 limit on health FSAs, the IRS has modified the "use-it-or-lose-it" rule that applies to such arrangements. Beginning with the 2013 plan year, plan sponsors may allow participants to carry over up to $500 of unused funds to the next plan year. The carryover may be permitted instead of (but not in addition to) the previously available "grace period" pursuant to which plans may allow participants to use funds remaining at year-end to cover medical expenses incurred during the first 2-1/2 months of the subsequent plan year. This does not affect the availability of the use of a run-out period under the plan.	Immediately. Sponsors that chose to allow the carryover must amend the cafeteria plan to reflect the new rule. Deadline for amendment depends on whether the plan currently offers a grace period. In general, amendment to reflect carryover will be required by the end of the plan year in which the carryover is implemented, but transition relief applies for implementation in 2013.
Transition relief for cafeteria plan elections was originally provided in preamble to proposed regulations relating to shared responsibility payment — IRS Proposed Regulations, 78 Fed. Reg. 218, January 2, 2013, available here **Clarified in IRS Notice 2013-71, available here**	**Change in Status Relief.** The IRS clarified previously announced transition relief with respect to changes in salary reduction elections under a section 125 cafeteria plan. Under the "change in status" rules that normally apply to such plans, mid-year changes relating to pre-tax payment of health plan premiums are only allowed under limited circumstances and would not generally be permitted in connection with enrollment or disenrollment due to PPACA (*e.g.*, the individual mandate, availability of coverage on the Exchange). The transition relief, which applies only to non-calendar year plans, allows employers to amend their plans to offer the ability to make a single change during non-calendar plan years beginning in 2013 to either revoke an existing salary reduction election or make a prospective salary reduction election, as applicable.	Applicable to non-calendar year plans with plan years beginning in 2013. Plans must be amended to reflect this relief, if applicable, no later than December 31, 2014.
Final Regulations, 77 Fed. Reg. 8668, February 14, 2012, available here **For templates, instructions, sample language and related materials, click here** **For FAQs, click here**	**Summary of Benefits & Coverage/Notice of Changes.** Plan administrators of self-insured plans (or health insurance issuers in the case of insured arrangements) are required to provide participants and beneficiaries in group health plans with a Summary of Benefits and Coverage (SBC) (and a uniform glossary of defined terms upon request) in accordance with guidance provided by Health and Human Services (HHS), Department of Labor (DOL) and IRS. Generally, SBCs must be provided at the time of enrollment in the plan, at renewal (or open enrollment), and within 7 days after request. The penalty for failing to comply is $1,000 per day, applied separately for each failure with respect to a participant or beneficiary. Government agencies have published templates, instructions, and sample language for use in	Ongoing obligation

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	creating the SBC. The DOL updated its previously published template for the SBC in April of this year and has also published guidance in the form of questions and answers posted to its website. In addition, material modifications (other than changes made at renewal time) that would change the information contained in the SBC are subject to a 60-day advance notice requirement.	
DOL Technical Release 2013-02, available here **For model notice and FAQs, click here**	**Notice of Exchange Option.** PPACA amended the Fair Labor Standards Act (FLSA) by adding new section 18A, which requires employers subject to the FLSA to provide each employee with a written notice containing information regarding the exchanges.	October 1, 2013 for existing employees; ongoing obligation to provide notice to new hires
For revised model COBRA notice, click here	**Revised Model COBRA Election Notice.** In connection with DOL guidance concerning the Notice of Exchange Option, the DOL has issued a revised model COBRA election notice that should be used beginning January 1, 2014. The revised model notice also reflects certain PPACA changes, including the removal of pre-existing condition exclusions.	January 1, 2014
Interim Final Regulations, 75 Fed. Reg. 43330, July 23, 2010, available here **Amendments to Interim Final Regulations, 76 Fed. Reg. 37208, June 24, 2011, available here** **For model notices and other technical guidance, click here**	**Claims & Appeal Processes.** In addition to regular claims procedures under ERISA, non-grandfathered group health plans must now comply with mandatory external claims review processes. Internal claims review processes may also need to be modified to comply with the new rules. If a plan does not "strictly adhere" to claims procedures mandated by PPACA, the claimant will be deemed to have exhausted the claims and appeal process and may proceed to other available remedies, including judicial review. Substantial compliance is not sufficient to meet the strict adherence standard.	July 1, 2012 (applies to non-grandfathered health plans)
IRS Final Regulations, 77 Fed. Reg. 72721, December 6, 2012, available here	**Comparative Clinical Effectiveness Research Fees (also known as PCORI).** Sponsors of self-insured group health plans and issuers of health insurance policies are subject to fees imposed for each plan year ending after September 30, 2012 and before October 1, 2019 (generally, 2012-2018 for calendar year plans). These fees provide funding for the Patient-Centered Outcomes Research Institute, a nonprofit corporation established through PPACA to facilitate the making of informed health decisions by patients, clinicians, purchasers, and policy-makers. The final regulations generally adopt many of the provisions of the proposed regulations, with certain clarifications. For example, the final regulations clarify that retiree-only arrangements may be subject to the fees and that continuation coverage such as COBRA	2012-2018 for calendar year plans; fees for 2013 to be paid by July 31, 2014

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	must be taken into account in determining the fees, unless the arrangement is otherwise excluded. The final regulations also clarify questions regarding the determination of "lives covered" in cases where an individual is covered by multiple arrangements. Generally, the amount of the fee for 2013 is equal to $2 times the average number of lives covered. Plan sponsors must report and pay the fees for 2013 using IRS Form 720 no later than July 31, 2014.	
HHS Final Regulations, 78 Fed. Reg. 5410, March 11, 2013, available here **HHS Proposed Regulations, 78 Fed. Reg. 72322, December 2, 2013, available here**	**Transitional Reinsurance Program Fees.** Beginning in 2014, health insurance issuers and self-insured plan sponsors will be subject to an additional fee for each individual covered by the plan. This fee, which is primarily intended to provide funding to insurers that incur high claim costs due to changes taking effect in 2014, is estimated to be $63 per covered life for 2014. Sponsors of self-insured plans remain ultimately liable for the fees but the fees may be remitted by third-party administrators on their behalf. The mechanics for payment of this fee differ from the PCORI fee described above in that contributing entities are to notify HHS by November 15 of each applicable year of the number of covered lives subject to the fee. HHS will then notify the entity of the amount that must be paid. Under proposed regulations, the fee will be split so that a portion is payable at the beginning of the calendar year following the applicable benefit year and the remainder will be payable in the last quarter of the calendar year following the applicable benefit year. The regulations contain information concerning alternative methods for determining the number of covered lives.	January 1, 2014 through December 31, 2016, with first payment being due early 2015
IRS Notice 2013-54, available here **DOL Technical Release 2013-03, available here**	**Application of Certain Market Reform Provisions to Certain Employer-Provided Arrangements.** In general, Health Reimbursement Arrangements (HRAs) (other than retiree-only plans, which are exempt) may comply with PPACA's prohibition on annual limits on the dollar amount of essential health benefits and requirement for coverage of certain preventive services without cost-sharing only if "integrated" with coverage under another group health plan that satisfies those requirements. The IRS and DOL released guidance that clarifies the types of arrangements that may be considered "integrated" with an HRA for purposes of satisfying these requirements. The guidance also addresses the extent to which health FSAs that are not excepted benefits are subject to PPACA's market reform requirements. Finally, the guidance clarifies that employee assistance programs constitute excepted benefits not subject to the market reform requirements as long as they do not provide significant benefits in the nature of medical care or treatment (determined by the employer using a reasonable, good faith interpretation).	Plan years beginning on and after January 1, 2014, but taxpayers may apply for all prior periods

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IRS Final Regulations, 78 Fed. Reg. 33158, June 3, 2013, available here	**Incentives for Nondiscriminatory Wellness Programs.** The current statutory framework applicable to wellness programs is largely unchanged, with a few notable exceptions applicable to health-contingent wellness programs. Most significantly, for plan years beginning on or after January 1, 2014, the maximum permissible reward is increased from 20% to 30% of the cost of health coverage; provided, however, that with respect to a program designed to prevent or reduce tobacco use, the maximum permissible reward is increased to 50% of the cost. In addition, guidance was provided as to furnishing a "reasonable alternative standard" and a program being "reasonably designed" to promote health or prevent disease. Finally, new sample language was provided that could be used by plans to disclose the availability of other means of qualifying for the reward.	Plan years beginning on and after January 1, 2014
Interim Final Regulations, 75 Fed. Reg. 34538, June 17, 2010, available here **IRS Notice 2011-1, available here**	**Miscellaneous.** • Plan sponsors that wish to retain the grandfathered status of existing group health plans must continue to include a notice of grandfathered status in any plan materials provided to a participant or beneficiary describing the benefits provided under the plan. • We continue to await guidance on many other aspects of PPACA, including nondiscrimination rules that are to be similar to those applicable to self-insured health plans and will apply to non-grandfathered fully insured group health plans. Government agencies announced that they will not enforce these requirements until guidance has been released. Regardless of the moratorium on enforcement, caution should be exercised when entering into any arrangement that may be subject to the nondiscrimination rules, such as an executive employment agreement or severance agreement, unless such agreement includes a provision that permits modification after guidance is issued in a manner that complies with the rules.	N/A
Other		
***United States v. Windsor*, 570 U.S. __ (2013), available here** **IRS Revenue Ruling 2013-17, available here** **IRS Notice 2013-61, available here** **DOL Technical Release 2013-04, available here**	**Defense of Marriage Act.** In *U.S. v. Windsor*, issued June 26, 2013, the Supreme Court ruled that Section 3 of the Defense of Marriage Act is unconstitutional. Section 3 had barred same-sex couples from being recognized as "spouses" for purposes of various federal laws and for the purpose of receiving federal benefits. The ruling has far-reaching implications for employee benefits as well as the administration of the tax laws. In Revenue Ruling 2013-17, the IRS adopted a "place of celebration" rule, *i.e.*, same-sex couples who are legally married in jurisdictions (domestic or foreign) that recognize their marriages will be treated as married for federal tax purposes regardless of where they reside or whether their state of residence treats their marriage as legal. The IRS has stated that it	IRS guidance is generally effective September 16, 2013. Retroactive application will be the subject of further guidance.

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IRS Notice 2014-1, available here	intends to issue further guidance on the retroactive application of *Windsor* to employee benefit plans and arrangements. In Notice 2013-61 the IRS provided guidance for employees and employers on making claims for refunds and adjustments for federal employment taxes with respect to certain benefits provided to same sex spouses (*e.g.*, group health insurance). In Technical Release 2013-04 the DOL also adopted a place of celebration rule for purposes of ERISA. Technical Release 2013-04 does not apply for purposes of other labor laws. For health and welfare plans, the Supreme Court's decision and IRS guidance change the federal tax consequences of employer-sponsored welfare benefits coverage for same-sex spouses, impose additional COBRA obligations and potentially impact reimbursements under health flexible spending accounts. We discuss the implications of the foregoing IRS and DOL guidance and other DOMA issues in our client update, available here. Subsequent to our client update, the IRS issued Notice 2014-1, which provides additional guidance specific to certain types of welfare plans in light of *Windsor*. Issues addressed in Notice 2014-1 include mid-year election changes under cafeteria plans, reimbursements under flexible spending account arrangements and contribution limits for health savings accounts (HSAs) and dependent care assistance programs.	
HHS Final Regulations, 78 Fed. Reg. 5566, January 25, 2013, available here **Model Notice of Privacy Practices is available here**	**HIPAA/HITECH Final Regulations.** HIPAA-covered entities must comply with final regulations implementing the provisions of the Health Insurance Technology for Economic and Clinical Health Act (HITECH). Generally, compliance with the final rules was required by September 23, 2013. For group health plans, compliance likely involved updating and possibly entering into new business associate agreements (transition rule for agreements in effect before January 23, 2013 applies through September 23, 2014), updating Notice of Privacy Practices, and updating HIPAA policies and procedures.	September 23, 2013
Final Regulations, 78 Fed. Reg. 68240, November 13, 2013, available here **Interim Final Regulations, 75 Fed. Reg. 5410, February 2, 2010, available here**	**Mental Health Parity.** Final regulations were released.	The final regulations apply for plan or policy years beginning on and after July 31, 2014. Prior to that date, plans must comply with the interim final regulations, which were released in 2010.

QUALIFIED PLANS UPDATE

APPLICABLE LAW/GUIDANCE	DESCRIPTION	EFFECTIVE DATE/DEADLINE
Qualified Plans Guidance and Deadlines		
***United States v. Windsor*, 570 U.S. __ (2013), available here** **IRS Revenue Ruling 2013-17, available here** **IRS Notice 2013-61, available here** **DOL Technical Release 2013-04, available here**	These materials are described above in the Welfare Plans Update. In the case of qualified plans, *Windsor* and the new IRS guidance will affect a number of issues, including, but not limited to, spousal consents to distributions, hardship withdrawals, minimum required distributions, and QDROs. For more information on the implications of the DOL and IRS guidance, see our client update, available here.	
IRC sections 401(a)(29), 436 **IRS Notice 2012-70, available here**	Defined benefit pension plans (other than multiemployer plans) to which the minimum funding standards of IRC section 412 apply must be amended to comply with the requirements of IRC section 436, which imposes limitations with respect to benefit payments and accruals in the event the plan becomes underfunded. IRS Notice 2011-96, available here, contains a sample plan amendment that plan sponsors may adopt to satisfy IRC section 436. In Notice 2012-70, the IRS announced that it would extend the deadline for sponsors of defined benefit plans to adopt an interim amendment to comply with benefit restrictions under IRC section 436.	Plans must be amended, if applicable, by the latest of the following dates: • The last day of the first plan year beginning on or after January 1, 2013; • The last day of the plan year for which IRC section 436 is first effective for the plan; or • The due date, including extensions, of the employer's tax return for the tax year that contains the first day of the plan year for which IRC section 436 is first effective for the plan.

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Rev. Proc. 2007-44, Sec. 5.05(2), available here	Sponsors of qualified plans must adopt amendments reflecting any discretionary plan changes that were put into effect in the 2013 plan year.	Generally, December 31, 2013 (or the last day of the plan year that begins after January 1, 2013 for non-calendar year plans).
Rev. Proc. 2013-6, available here	In Rev. Proc. 2013-6, the IRS updated procedures for issuing determination letters on the qualified status of pension, profit-sharing, stock bonus, annuity, and employee stock ownership plans under tax code sections 401, 403(a), 409, and 4975(e)(7), and on the tax-exempt status of related trusts or custodial accounts under tax code Section 501(a). Prior to Rev. Proc. 2013-6, submission of a working copy of the plan in a restated format could be submitted for review as long as the plan sponsor separately submitted the executed amendments that were integrated into the working copy. However, under the new guidance, individually designed plans must be restated when they are submitted for determination letter applications.	February 1, 2013 Plan sponsors that are Cycle C files must adopt plan restatements no later than January 31, 2014, to meet filing deadline (as discussed in more detail, below).
IRS Revenue Procedure 2007-44, available here **IRS Notice 2012-76, available here**	Plan sponsors that are Cycle C filers (EIN ending in 3 or 8) must file plans for a new determination letter with the IRS no later than January 31, 2014. IRS Notice 2012-76 contains the 2012 Cumulative List of Changes in Plan Qualification Requirements to be used by plan sponsors and practitioners submitting determination letter applications in Cycle C. As stated earlier, plans must be restated for submission of a determination letter application to the IRS. This is a new requirement that applies beginning with the current Cycle C filings.	January 31, 2014
IRS Revenue Procedure 2012-50, available here	IRS Revenue Procedure 2012-50 states that sponsors of individually designed governmental plans may elect Cycle E, instead of the earlier Cycle C, to make remedial amendments. To elect Cycle E, the sponsor must simply file a determination letter application during the submission period for the next Cycle E, which is from February 1, 2015 through January 31, 2016.	January 31, 2016
IRS Announcement IR-2013-86, available here	On October 31, 2013, the IRS announced cost-of-living adjustments with respect to the various limitations for pension plans and other benefits-related items for 2014.	January 1, 2014
American Taxpayer Relief Act of 2012, available here	The American Taxpayer Relief Act of 2012 expanded the ability of a	Generally, if applicable, an

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IRS Notice 2013-74, available here	participant to make an in-service transfer of amounts held under a qualified plan to a designated Roth account under that same plan. The plan must include a "qualified Roth contribution program," meaning that the plan must allow participants to make designated Roth contributions. The plan must be amended specifically to provide for such in-service transfers. There is no requirement that the Roth feature be in place as of the date the legislation was enacted (*i.e.*, the in-service transfer feature may be added at the same time a Roth contribution feature is added to the plan). IRS Notice 2013-74 provides guidance on in-plan Roth rollovers.	amendment must be adopted by the later of: • the last day of the first plan year in which the amendment is effective; or • December 31, 2014.
IRS Revenue Procedure 2013-12, available here	The IRS issued Rev. Proc. 2013-12, which updates the Employee Plans Compliance Resolution System (EPCRS) for sponsors of retirement plans that have failed to meet requirements of sections 401(a), 403(a), 403(b), 408(k), or 408(p) of the Internal Revenue Code (IRC). Plan sponsors can use EPCRS to correct certain plan failures through the program's Self-Correction Program, Voluntary Correction Program, or Audit Closing Agreement Program and continue to provide their employees with retirement benefits on a tax-favored basis.	Generally effective April 1, 2013.
IRS Final Regulations on Reduction or Suspension of Safe Harbor Contributions, 78 Fed. Reg. 68735, November 15, 2013, available here	Safe harbor non-elective employer contributions under section 401(k) and safe harbor matching contributions under section 401(m) may be reduced or suspended by adopting a mid-year amendment if *either* (i) the plan sponsor shows that it is operating at an "economic loss," *or* (ii) the plan's safe-harbor notice for the year in which the reduction or suspension occurs states: • Contributions might be reduced or suspended mid-year; • A supplemental notice will be provided if reduction or suspension occurs; and • A reduction or suspension will not apply until at least 30 days after the supplemental notice is provided.	Plans may be amended beginning on the following dates: November 15, 2013 for safe harbor non-elective employer contributions January 1, 2015 for safe harbor matching contributions
Puerto Rico Treasury Department ("Hacienda") Circular Letter No. 13-02, available here	On May 28, 2013, the Puerto Rico Treasury Department extended the deadlines for adopting retirement plan amendments that reflect the requirements of the 2011 Puerto Rico Internal Revenue Code. This guidance also extends the deadline for submitting applications for	The deadline for amending plans is the later of: • April 15, 2014; or

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	Puerto Rico determination letters. These extensions apply to both dual-qualified and Puerto Rico-only qualified plans with respect to qualification under Puerto Rico tax laws.	• 3½ months after the close of the employer's tax year for employers with a non-calendar tax year. The deadline for requesting a Puerto Rico determination letter is the later of: • April 15, 2014; or • 3½ months after the close of the employer's tax year for employers with a non-calendar tax year.
ERISA Title I Developments		
ERISA Section 404(a) **DOL Regulations Section 2550.404a-5,** available here **DOL Field Assistance Bulletin 2012-02R,** available here **DOL Technical Release 2011-03,** available here **DOL Field Assistance Bulletin No. 2013-2,** available here	The Regulations under Section 404(a) of ERISA required administrators of participant-directed plans to provide initial disclosures to participants no later than August 30, 2012, and require administrators to furnish updated disclosures at least annually thereafter (*i.e.*, within 12 months of the date of the initial disclosure). In response to concerns that this deadline may not line up with the deadlines for other types of participant disclosures, the DOL released Field Assistance Bulletin No. 2013-2 (FAB 2013-2), which establishes a temporary enforcement policy that permits a one-time "reset" of the timing for delivery of the updated disclosures. Per FAB 2013-2, the DOL will not take enforcement actions based on the timeliness of 2013 updated disclosures that are furnished no later than 18 months after the initial disclosures were provided (*i.e.*, by February 28, 2014 if the initial disclosures were made on the last permitted date, August 30, 2012). In addition, to afford relief for administrators who furnished the 2013 updated disclosures by the August 30, 2013 date, the DOL will not take enforcement actions against such administrators based on the timeliness of the 2014 updated disclosures, provided that they are furnished no later than 18	Disclosures must be provided (i) to new participants before they can direct their investments, (ii) quarterly (with respect to certain information), and (iii) annually. Notice of changes must be provided at least 30 days and not more than 90 days before the changes take effect, unless unforeseeable circumstances prevent notification within this timeframe and then as

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	months after the 2013 updated disclosures were provided. FAB 2013-2 does not modify the other requirements of the Regulations, including the obligation to furnish (i) quarterly disclosures of individual expenses incurred by participants, (ii) notice of changes to information disclosed, and (iii) investment-related information via a website.	soon as reasonably practicable.
DOL Advisory Opinion 2013-01A, available here	In Advisory Opinion 2013-01A, the DOL explored questions relating to the application of ERISA's fiduciary and prohibited transaction provisions to "cleared swap" transactions (under Dodd-Frank) and concluded as follows: • A clearing member is not acting as an ERISA fiduciary when it exercises contractually predetermined rights (*e.g.*, close-out and/or risk reducing transactions in connection with liquidating a plan's positions as a result of its default). • A plan's assets consist of its rights under the agreement relating to the "cleared swap"—the margin posted by the plan with a clearing member (or a central clearing party) does not constitute "plan assets" for purposes of ERISA. • A clearing member facilitating a "cleared swap" on behalf of a plan is a service provider and a "party in interest" to the plan. Accordingly, certain transactions between the plan and the clearing member that occur in connection with the "cleared swap" will need to comply with the terms of a prohibited transaction exemption. • A central clearing party is not a "party in interest" to a plan solely by reason of providing clearing services and acting as a counterparty.	N/A
DOL Advisory Opinion 2013-03A, available here	In Advisory Opinion 2013-03A, the DOL explored the question of whether "revenue sharing" payments received by the plan recordkeeper constitute "plan assets" under ERISA. Under the arrangement in question, the recordkeeper retained all of the "revenue sharing" payments received in connection with the plan's investments. The recordkeeper was not required to and did not establish a separate bank account or custodial account to hold the "revenue sharing" payments. Instead, the recordkeeper held the "revenue sharing" payments as part of its general assets. In accordance with the terms of the agreement (or directions from the plan's fiduciaries),	N/A

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	the recordkeeper could apply the revenue sharing credits to pay plan expenses (including expenses relating to accountants, consultants, actuaries or legal services) or could agree to deposit the credits directly into a plan account. Consistent with past guidance, the DOL looked to ordinary notions of property rights, under which the assets of a plan generally include any property (tangible or intangible) in which the plan has a beneficial ownership interest. The DOL concluded that once deposited into a plan account, the payments would constitute "plan assets." However, while the "revenue sharing" payments were kept as general assets of the recordkeeper, the payments did not constitute "plan assets." The DOL noted that the plan's contractual right to receive the "revenue sharing" payments (or to direct that such payments be applied to plan expenses) constituted an asset of the plan. In addition, if the plan recordkeeper failed to apply the "revenue sharing" payments as required under its contract with the plan, the plan would have a claim against the recordkeeper for the amount owed and this claim would constitute an asset of the plan.	
DOL Notice RIN 1210-ZA15, available here	The DOL's Employee Benefits Security Administration issued a notice on January 29, 2013 describing changes to the Delinquent Filer Voluntary Compliance Program that have been made since 2002. Administrators of employee benefit plans subject to Title I of ERISA who fail to file annual reports on a timely basis can be subject to civil penalties. The DFVC Program is intended to encourage delinquent plan administrators to comply with their annual reporting obligations under ERISA through the assessment of reduced civil penalties. Most significantly, this notice highlights the DOL's final regulation mandating electronic filing of annual reports and describes an online penalty calculator and Internet-based payment system for the DFVC Program.	January 29, 2013
ERISA Title IV Developments		
***Sun Capital Partners III, LP v. New England Teamsters and Trucking Industry Pension Fund*, 724 F.3d 129, (1st Cir 2013), available here**	Under the Multiemployer Pension Plan Amendments Act (MEPPA), "trades or businesses" under "common control" with an employer that participates in a multiemployer plan are jointly and severally liable for any withdrawal liability of the sponsor. In July 2013, in a highly fact-specific analysis, but with potentially broad implications, the First Circuit held that a private	N/A

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	equity fund constituted a "trade or business" for purposes of determining whether such fund was liable for the withdrawal liability of one of its portfolio companies. The First Circuit remanded to the district court the issue of whether a second private equity fund constituted a trade or business and the issue of whether the funds were under common control with the portfolio company. (See Mayer Brown alert here.)	
***Lee v. Verizon Communs, Inc.*, Civil Action No. 3:12-CV-4834-D (N.D. Tex., 2013), available here**	In 2012, Verizon entered into an agreement to transfer to Prudential Insurance Company $7.4 billion in pension obligations with respect to 41,000 retirees (already in pay status) under the Verizon Management Pension Plan. Two classes of retirees (those whose benefits had been transferred to Prudential and a second group whose benefits remained in the pension plan) brought suit against Verizon for various violations of ERISA's disclosure and fiduciary duty requirements. In June 2013 the district court dismissed the suit, but gave plaintiffs 30 days to replead their case. Significantly, the court held that the adoption of a plan amendment directing the purchase of an annuity is a design or settler function, rather than a fiduciary one, and thus that it could not entail a breach of fiduciary duty. In contrast, the implementation of the amendment (*e.g.*, the selection of the insurance carrier) is a fiduciary function. The court dismissed plaintiffs' claims with respect to implementation, however, on the ground that plaintiffs had not alleged the elements necessary to establish a breach of fiduciary duty. The retirees have filed a second amended complaint.	N/A
***Pension Benefit Guar. Corp. v. Asahi Tec Corp.*, 839 F. Supp. 2d 118 (D.D.C., 2012), available here**	Under Title IV of ERISA, all members of a plan sponsor's controlled group are jointly and severally liable for unfunded pension plan liabilities upon the plan's termination. Upon the termination of an underfunded plan, a lien arises in favor of the PBGC for the amount of the shortfall, though in the typical case all of the members of the controlled group are insolvent. While ERISA does not distinguish between foreign and domestic members of a controlled group for purposes of joint and several liability, whether a US court would assert jurisdiction over a foreign corporation for unfunded pension liabilities solely on the basis of common ownership was not clear. The *Asahi* case involved a Japanese parent company that had purchased a US subsidiary with a defined benefit plan. The subsidiary later became bankrupt and the plan was terminated by the PBGC, which sued to collect the underfunding from Asahi. The district court ruled that although Asahi	N/A

APPLICABLE LAW/GUIDANCE	DESCRIPTION	EFFECTIVE DATE/DEADLINE
	had no presence in the US (*i.e.*, no employees, offices or assets in this country) and no responsibility for the maintenance or termination of the pension plan, the court nonetheless had jurisdiction over Asahi and ruled that it was jointly and severally liable for the unfunded plan obligations. The court based its decision in large part on the fact that Asahi had purchased the stock of the US subsidiary while being fully aware of potential ERISA liabilities, and accordingly, the court was untroubled by Asahi's lack of presence in the US.	
PBGC Technical Update 13-1, available here	The Pension Protection Act of 2006 modified the way the PBGC variable rate premium (VRP) is calculated. The PBGC has previously proposed regulations that would conform certain calculations for reportable events to the methodology for calculating VRPs, and has also issued a series of technical releases providing temporary guidance pending the issuance of final regulations. Technical Update 13-1 extends, for 2013 and later plan years, the reportable event guidance contained in Technical Update 11-1. In general, Technical Update 11-1 provides that for funding-related determinations for purposes of waivers, extensions, and the advance reporting threshold test under the reportable events regulations, a plan's unfunded vested benefits (UVBs) and the value of its assets and vested benefits are determined for a plan year (beginning in 2012) in the same manner as for variable rate premiums for the preceding year. For missed quarterly contributions, the guidance waives or simplifies the reporting requirements for certain categories of small plans.	Plan years beginning after 2012
PBGC Proposed Regulations on "Reportable Events and Certain Other Notification Requirements," 78 Fed. Reg. 20039, April 3, 2013, available here	The PBGC has issued proposed regulations on reportable events that would supersede regulations proposed in 2009. The new proposed regulations eliminate many reporting requirements where (i) the company or plan is financially sound (based on standards contained in the regulations), (ii) the plan is small, or (iii) the PBGC is able to obtain the financial information from other sources. Commentators have noted (i) that the PBGC already has appropriate tools to identify at-risk plans within the existing reportable events rules, and the Pension Protection Act of 2006 (PPA) is working to protect the interests of the PBGC and plan participants, (ii) that the proposed regulations would require plan sponsors to divert a portion of plan contributions to pay service providers to help comply with	N/A

APPLICABLE LAW/GUIDANCE	DESCRIPTION	EFFECTIVE DATE/DEADLINE
	burdensome regulatory requirements without materially enhancing the financial position of the PBGC, and (iii) that the safe harbors in the proposed regulations do not properly identify at-risk plans and would cause unnecessary burdens for plan sponsors.	
PBGC Premium Proposed Rule, July 23, 2013, available here	The PBGC has issued proposed regulations designed to make its premium payment rules more effective and less burdensome. The proposed regulations would simplify due dates, coordinate the due date for terminating plans with the termination process, make conforming and clarifying changes to the variable-rate premium rules, and provide for relief from penalties.	The proposed regulations would be effective starting in 2014, if finalized.
PBGC Request for Information on Missing Participants in Individual Account Plans, June 21, 2013, available here	The PBGC has requested information from the public to assist it in making decisions about a possible new program to deal with the accrued pension benefits of missing participants in terminating individual account plans. The PBGC has asked for feedback on the level of demand for such a program or for a database of missing participants, the availability of private sector missing participant locater services, potential program costs and fees, electronic filing, and other issues.	Comments were due August 20, 2013.
PBGC Premium Rate Increases, November 6, 2013, available here	The flat-rate premium for single-employer plans will increase to $49 per participant (up from $42 in 2013). The variable-rate premium will increase to $14 per $1,000 of unfunded vested benefits with a per-participant cap of $412 (up from $9 with a $400 cap in 2013). The flat-rate premium for multiemployer plans will remain at $12 per participant.	Plan years beginning in 2014

EXECUTIVE COMPENSATION UPDATE

FEDERAL TAX UPDATE			
CODE SECTION/GUIDANCE ISSUED	**ISSUE ADDRESSED**	**COMMENTS**	**EFFECTIVE DATE**
IRC Section 162(m)			
IRC Section 162(m)(6): Proposed Regulations **78 Fed. Reg. 19950, April 2, 2013, available here**	In general, IRC section 162(m)(6) limits a covered health insurance provider's deduction for compensation to $500,000 for tax years beginning after December 31, 2012. The IRS issued proposed regulation section 1.162-31 on April 2, 2013. The IRS previously released Notice 2011-2, which provides guidance on certain issues under IRC section 162(m)(6).	The proposed regulations describe rules for determining whether entities are subject to the $500,000 limit and for determining how the limit is allocated to years of service for various types of compensation, including equity and deferred compensation. Entities subject to the limit include covered health insurance providers (generally defined as entities that receive premiums from providing health insurance) and other entities treated as a single employer with such covered health insurance providers as detailed in the proposed regulations.	The proposed regulations apply to taxable years that begin after December 31, 2012 and end on or after April 2, 2013. Taxpayers may rely on these proposed regulations until the issuance of final regulations.

FEDERAL SECURITIES LAW UPDATE			
DODD-FRANK SECTION	**ISSUE ADDRESSED**	**COMMENTS**	**EFFECTIVE DATE**
Dodd-Frank Section 952 **Compensation Committee Requirements**	Section 952 of the Dodd-Frank Act requires national security exchanges to require listed companies to meet certain independence requirements for members of the compensation committee and certain advisers to the compensation committee.	On January 11, 2013, the SEC approved the compensation committee listing standards for the New York Stock Exchange and the NASDAQ Stock Market. For a copy of the Mayer Brown legal update on the SEC approval, click here. Generally, affected companies needed to adopt amendments to compensation committee charters to comply with the new listing standards prior to July 1, 2013. For a copy of the Mayer Brown legal update on amendments to compensation committee charters, click here.	Generally, NYSE- and NASDAQ-listed companies have to comply with the committee independence requirements on the earlier of the listed company's first annual meeting after January 15, 2014, or October 31, 2014.

FEDERAL TAX UPDATE			
CODE SECTION/GUIDANCE ISSUED	**ISSUE ADDRESSED**	**COMMENTS**	**EFFECTIVE DATE**
Dodd-Frank Section 953(b) **Executive Pay for Performance** **Proposed Rules, available here**	Section 953(b) of the Dodd-Frank Act requires disclosure regarding the ratio of the annual total compensation of the CEO to the median annual total compensation of all employees of the company. On September 18, 2013, the SEC proposed pay ratio disclosure rules.	The proposed rules generally would require public companies to disclose the median of the annual total compensation of all employees other than the chief executive officer (generally including all employees of the company and its subsidiaries as of the last day of the previous fiscal year, including employees based outside of the United States, part-time employees, temporary employees, and seasonal employees), the annual total compensation of the chief executive officer, and the ratio of these amounts, in filings that require executive compensation disclosure. The proposal would permit a company the flexibility to select a method for determining the median annual total compensation of all employees that is appropriate for such company's business and compensation practices. For a copy of the Mayer Brown legal update on the proposed rules, click here.	The initial pay ratio disclosure would be required with respect to compensation for a company's first full fiscal year that begins after the final rules are adopted. Assuming rules are adopted in 2014 (which is the assumption in the example that the SEC provided in the proposing release), the pay ratio disclosure for calendar year-end companies would be required with respect to 2015 compensation, with such disclosure first appearing in proxy statements and annual reports on Form 10-K filed during 2016.

EMPLOYEE BENEFITS & EXECUTIVE COMPENSATION PRACTICE

Mayer Brown has a comprehensive ERISA, employee benefits, and executive compensation practice serving as legal counsel to clients across the United States and around the globe, including several Fortune 500 companies, churches, universities, hospitals, and other tax-exempt employers. If you would like additional information on the employee benefits topics discussed in this update or on any other employee benefits issues, please contact one of the attorneys listed below.

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