Date Issued: 02/15/2003

Benefits e-News: A Value Added Service From Robinson & Cole LLP

Benefits e-News is a monthly electronic newsletter reporting on recent changes in the law affecting employee benefits and other developments affecting plan sponsors and their employees. Benefits e-News provides web links to the Internal Revenue Service, the United States Department of Labor, the United States Department of Health and Human Services HIP HIPAA web site, and the Pension Benefit Guaranty Corporation. Benefits e-News is easy to navigate. To access a web link, position your cursor on the link and click your mouse. To return to Benefits e-News, click the back button on your browser.

We hope that you find Benefits e-News to be informational and helpful. If you know of others who would like to receive this online newsletter (or if you would like to discontinue receiving Benefits e-News), please click here and send us an email message. If there are certain topics that you would like covered in future issues, please let us know.

Blackout Notice Rules Have Become Effective

The Sarbanes-Oxley Act enacted last summer imposed a new requirement on plan administrators to provide advance notice to participants and beneficiaries of any blackout period during which the participants' ability to direct the investment of a self-directed plan account would be restricted. Final rules on the blackout period notice requirements were issued three days before the January 26, 2003 effective date of this new requirement. Although these rules are substantially similar to the interim rules issued in October, a few changes were made. The most significant change liberalizes the requirement of the interim rules that the notice specify the beginning and ending dates of the blackout period. Recognizing the fact that at times it is difficult to accurately provide the exact dates of a blackout period 30 days in advance, the final rules permit the blackout period to be described as the week during which the blackout period is expected to begin and to end. If this more general description is used, participants must be provided with a toll-free telephone number or web site address where they could determine during that week whether or not the blackout had begun or ended. The regulations also revised the definition of “blackout period” to clarify that regularly scheduled investment limitations under a plan do

not fall under the definition of "blackout period" if such limitations are disclosed to participants in an SPD or other permissible manner. The final rules also clarify that plan administrators do not need to provide a blackout notice to an alternate payee while a decision on the qualification of a domestic relations order is pending.

The Department of Labor has also clarified that when imposing civil penalties for blackout notice violations, it will consider the degree or willfulness of the violation and whether a plan administrator acted in good faith under the circumstances when attempting to provide notice to participants.

Schedule SSA Attachments No Longer Permitted on Form 5500

The 2002 Form 5500 will not allow plan sponsors to use attachments to Schedule SSA. Multiple copies of Page 2 of Schedule SSA must be used to report information about participants with deferred vested benefits. Plan sponsors can no longer simply attach spreadsheets or hard copy reports produced by a recordkeeper. This issue is causing great concern among administrators and it is possible that this restriction will change.

SEC Finalizes Rules Restricting Director and Officer Trading

The SEC has issued final rules on the Sarbanes-Oxley Act restriction limiting directors and executive officers from trading in company stock during a retirement plan blackout period. The Sarbanes-Oxley Act prohibited directors and executive officers of a public company from engaging in transactions involving company stock during a retirement plan blackout period. The prohibition applies to all stock acquired by a director or executive officer in connection with his or her service to the company. Under the final rules, if a director or executive officer engages in a transaction involving company stock during a blackout period, the stock will be treated as acquired in connection with his or her service to the company unless the director or executive officer establishes that the stock was acquired from another source. Certain transactions are exempted from the restriction if they occur automatically, under an advance election, or otherwise outside of the control of the director or executive officer. The final rules clarify that the term "director" will have the same meaning as under the '34 Act definition and the term "executive officer" will be have the same meaning as the term "officer" under the Section 16 rules.

Pension and Welfare Benefits Administration Officially Re-Named as the Employee Benefits Security Administration

In order to more clearly communicate the agency's mission of protecting employee benefits, the name of the Pension and Welfare Benefits Administration, an agency of the Department of Labor, was officially changed, effective February 3, 2003, to the Employee Benefits Security Administration (EBSA). The mission, duties and oversight of the agency have not

changed. The EBSA also has a new web site.

The Department of Labor has stated that plan sponsors are not required to update Summary Plan Descriptions to reflect this change. However, since the 'ERISA Rights' provisions of all Summary Plan Descriptions contain references to the Pension and Welfare Benefits Administration, such references should be modified when existing Summary Plan Descriptions are updated.

Internal Revenue Service Rules on Excess Benefit Transaction

If a tax-exempt organization engages in an excess benefit transaction, an excise tax is imposed upon the disqualified person and upon the managers of the organization who participate in the transaction. This rule is also know as the Intermediate Sanctions Rule. An excess benefit transaction is any transaction as the result of which an economic benefit is provided by the tax-exempt organization to or for the use of a disqualified person, if the value of the economic benefit provided exceeds the value of the services provided. Excess benefit transactions generally arise when an individual is over-compensated for services. The Regulations establish a rebuttable presumption that an employee's compensation is reasonable, and not an excess benefit transaction, if three criteria are satisfied:

• The compensation arrangement must be approved in advance by an authorized body of the organization composed of individuals with no conflict of interest as to the compensation arrangement or property transfer;

• Before making its determination, the authorized body obtained appropriate information and relied upon that information as to comparability of compensation; and

• The authorized body adequately documented the basis for its determination concurrent with making that determination.

Recently, the IRS reviewed a transaction under these three criteria and found that the second condition was not satisfied. The IRS held that in order to satisfy the second condition, the information regarding comparability must be obtained in a timely manner and must actually be relied upon in making the determination. Obtaining data at a later date to support an existing compensation arrangement is not acceptable. This decision highlights the importance of having a compensation committee of a tax-exempt organization's board thoroughly research and obtain evidence of comparability that the pay level for executives is reasonable.

President Bush's Budget Includes Proposal for New Savings Accounts

President Bush has proposed sweeping changes to the defined contribution plan arena, including a proposed Employer Retirement Savings Account intended to replace 401(k)

plans, 403(b) plans, 457 plans, SARSEPs and Simple IRAs as part of his 2005 budget. The budget proposal also incorporates two new types of savings accounts—Lifetime Savings Accounts and Retirement Savings Accounts. These new accounts are dramatically different than current IRAs. This portion of the budget proposal has not received much support from either political party and is very unlikely to become law.

“Wrapping” With HIPAA

The Privacy Rules implemented as part of the Health Insurance Portability and Accountability Act (HIPAA) treat various benefit plans differently. For instance, disability and life insurance plans are not “covered entities” regulated by the Privacy Rules. And while self-insured and fully-insured health plans are covered entities under the Privacy Rules, they may be subject to different requirements depending on the amount of health information that the administrator or insurer provides to the plan. Because the Privacy Rules treat these welfare plans differently, employers who sponsor such benefits as part of a “wrapped plan” (where these benefits are all part of the same plan) may want to consider unwrapping such plans to ease their compliance burden.

When deciding whether to unwrap a benefit plan, here are some things to take into consideration:

1. Fully-insured health plans that receive only limited health information have minimal requirements under the Privacy Rules. For these benefits, it may make sense to unwrap a larger plan and segregate these benefits into a plan that can avail itself of the minimal compliance requirements. If you have self-insured and fully-insured health benefits in one plan, you won’t be able to take advantage of the minimal requirements for fully-insured plans.

2. Think about whether it makes sense to designate your wrapped plan as a hybrid entity under the Privacy Rules. This will allow you to designate health care components, which include only those benefits regulated by the Privacy Rules. By designating these health care components of the plan, you can limit Privacy Rules compliance activities to only those benefits that must comply because they are covered by the Privacy Rules. If a wrapped plan that contains both health and non-health benefits does not designate itself as a hybrid entity, then all benefits in the plan will be required to comply with HIPAA’s Privacy Rules.

3. The Form 5500 and Schedule F reporting requirement for stand-alone fringe benefit plans was eliminated last year. If a wrap-around welfare plan currently containing a health insurance plan, a health care flexible spending account, a cafeteria plan and/or a dependent care plan is spun off into separate plans, a

Form 5500 would only need to be filed for the health insurance plan or the health care flexible spending account if there were at least 100 participants in such plan.

There are other issues to consider when deciding whether to unwrap your welfare benefits, and such a decision can impact your HIPAA compliance planning. Be sure to consult with knowledgeable counsel when you undertake this analysis.

For more information, please contact us

Bruce Barth	Dawn Zammitti	John Tannenbaum
860-275-8267	860-275-8320	860-275-8317

ROBINSON & COLE LLP
Boston - Hartford - Stamford - Greenwich - New York

Visit our Employee Benefits and Compensation Practice Group at www.rc.com/PracEBEL.htm