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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.

New Law Imposes Blackout Period Notice Requirements

In July, President Bush enacted the Sarbanes-Oxley Act of 2002. Although the Act is known primarily for its creation of an Accounting Oversight Board and for requiring CEOs and CFOs to certify financial statements, the Act also contained significant provisions affecting employee benefit plans. Consistent with the other provisions of the Act, the benefits provisions are a legislative response to the recent corporate accounting scandals.

Effective January 26, 2003, plan administrators will be required to notify affected 401(k) plan and other defined contribution plan participants and beneficiaries who are entitled to direct their investments if there will be a blackout period lasting more than three business days. A blackout period is any period during which the ability to direct or diversify account investments, obtain loans from the plan or receive a distribution from the plan is restricted. Notification of the blackout period must also be provided to directors, officers, and, if applicable, to the SEC.

In addition to specifying the dates of the blackout period, the notice must:

• Describe the reasons for the blackout period;

• Identify the investments and other rights affected; and

• Include a statement that participants should evaluate the appropriateness of their current investment decisions in light of the upcoming blackout period.

Generally, 30 days notice will be required. However, 30 days notice is not required for regularly scheduled blackouts which are described in the Summary Plan Description, for blackouts that are imposed in connection with a qualified domestic relations order, or for blackouts that are required by securities laws. Additionally, notice of a blackout period can be provided as soon as reasonably possible, instead of 30 days in advance, where delaying the blackout period would be imprudent, where the delay is due to unforeseeable circumstances beyond the control of the plan administrator, or where the blackout period is imposed as a result of a corporate transaction.

The DOL expects to issue regulations regarding blackout periods, including possible penalties for failure to provide the required notice, by the end of the year. It will also issue a model notice for plan sponsors.

In addition to the blackout notice requirements, the new law prohibits directors and executive officers from selling or otherwise transferring their public company stock acquired as a result of their service to the company during a blackout period when 50% or more of the participants in the company's plan are prohibited from selling or transferring company stock in the plan during the blackout period.

Finally, the Act increases the maximum criminal penalties under ERISA for individuals, as well as for non-individuals, such as corporations.

Treatment of Flexible Spending Accounts in an Asset Sale Clarified

The IRS has issued a Ruling providing guidance to employers for dealing with health care flexible spending accounts in an asset sale. In an asset sale, two alternative arrangements can be made by the parties. The transferred employees who had elected to participate in an FSA under the seller's cafeteria plan can continue to participate in the seller's plan after the sale with the current FSA election in effect for the rest of the year. Alternatively, the parties can arrange for the employees' elections to be "rolled over" to the buyer's plan for the remainder of the year. For this type of arrangement to be permitted, both parties cafeteria plan documents must be amended.

IRS Issues Guidance on Merging a Money Purchase Pension Plan into a Profit Sharing Plan

EGTRRA increased the maximum deductible amount that could be contributed to a profit sharing plan to 25%. Consequently, many employers that sponsored both a money purchase pension plan and a profit sharing plan are planning to merge or have merged the money purchase pension plan into the profit sharing plan in order to have greater flexibility in making contributions to the plan. Although such a merger is a relatively simple process, there are technical issues that employers must address in the merger process. The IRS has provided guidance in this respect by clarifying the consequences of such a merger. In a recent Ruling, the IRS stated that the merger of a money purchase pension plan into a profit sharing plan, or the conversion of a money purchase pension plan into a profit sharing plan, will not be treated as a plan termination requiring full vesting of participants if certain requirements are met. Three criteria appear to be required: all of the employees who were covered under the money purchase pension plan must be covered by the profit sharing plan; the plan assets that originated in the money purchase pension plan must retain their money purchase pension plan attributes (e.g. joint and survivor annuity distribution option); and employees must vest in the profit sharing plan under the same or a better vesting schedule that existed under the money purchase pension plan. Additionally, since such a merger or conversion reduces the rate of future benefit accruals, participants must be provided with notice of the change in accordance with the Section 204(h) regulations.

HHS Finalizes HIPAA Privacy Rules

On August 14, 2002, the Department of Health and Human Services finalized its proposed modifications to the Privacy Rules under HIPAA. The modifications had been proposed earlier this year, and the final version generally adopts those proposed provisions. The Privacy Rules regulate most health care providers, nearly all health plans, and health care clearinghouses, all of which are covered entities under these rules.

The two most significant changes from the Privacy Rules, which were initially published in December of 2000, relate to the consent and marketing provisions. In its final rule, DHHS eliminated the previous requirement for health care providers to obtain consent before using an individual's health information for all purposes including treatment, payment, and health care operations. Instead, the Privacy Rules require providers to get an individual's acknowledgement of receipt of the provider's notice of privacy practices. The other significant change addresses how covered entities can use protected health information for marketing purposes. In short, disclosure of an individual's health information for marketing purposes is prohibited without the individual's authorization unless the marketing is done face-to-face or involves a gift of nominal value. "Marketing" is defined to exclude communications about treatment or the covered entity's own products and services. Whether an authorization is required will largely depend on the type of activity conducted and whether it

fits the definition of "marketing."

The final modifications also adopt DHHS's proposed changes to the hybrid entity provisions, incidental use and disclosure, disclosures related to changes in legal ownership, accounting of disclosures, and disclosure for treatment, payment, or operations of another entity. In addition, in certain circumstances, it gives covered entities up to an additional year to amend existing business associate contracts.

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