



**DIMEO  
SCHNEIDER  
& ASSOCIATES, L.L.C.**

DiMeo Schneider & Associates, L.L.C.  
► FALL 2011

**IN THIS ISSUE:**

- ◆ Refresher on Form 5500 Filing Requirements
- ◆ New 2009 Form 8955-SSA Now Available
- ◆ Supreme Court Decision on *Cigna Corp v. Amara*
- ◆ Update on *George v. Kraft Foods Global*
- ◆ Recent Decision Issued for *Tullis & Mack v. UMB Bank, N.A.*
- ◆ Compliance FAQ

## Retirement Legal and Compliance Update

### ***Refresher on Form 5500 Filing Requirements***

A Form 5500 annual report must be filed every year for every pension benefit plan covered by ERISA. The Form 5500 requirement for pension plans applies regardless of whether the plan is considered a “tax-qualified” plan, benefits no longer accrue, contributions were not made this plan year or contributions are no longer made at all. Beginning in 2009, plans that cover only one participant or plans that cover owners and their spouses do not file a Form 5500, but rather a Form 5500-EZ or Form 5500-SF (Short Form). All other plans should file a Form 5500 using the all-electronic filing system (known as EFAST2) available on the U.S. Department of Labor’s website. The deadline to file a Form 5500 is seven months after the close of the plan year, which for calendar-year plans fell on July 31, 2011 (but because that is a Sunday, the deadline was Monday, Aug. 1, 2011). Generally if the deadline falls on a holiday, Saturday or Sunday, the due date moves to the next business day. Plans that need more time to file should request an automatic extension by completing Form 5558, which will allow a plan an additional 2 1/2 months to file, or extend the time for a calendar-year plan to file until Oct. 15, 2011.

For 2010, there were two main changes to note on the Form 5500. The first change would apply to any plans that are considered “eligible combined plans,” which are also known as “DB(k)” plans and were newly designed beginning in 2010. Such a plan must submit a combined Form 5500, with all of the information, schedules and attachments that would be required for either a defined benefit or a defined contribution plan. The second change relates to short plan year filings for defined benefit plans that are required to file actuarial information. Because of additional regulatory guidance that was published after the 2010 Form 5500 was released, a separate Schedule MB or Schedule SB for 2010 must be completed for any short plan year filings.

If you have questions about these filing requirements, contact your DiMeo Schneider consultant for assistance.

### ***New 2009 Form 8955-SSA Now Available***

The Internal Revenue Service (IRS) recently released the 2009 Form 8955-SSA, which is the Annual Registration Statement Identifying Separated Participants with Deferred Vested Benefits, as well as the applicable instructions. As background, for plan years beginning on or after Jan. 1, 2009, Form 8955-SSA replaces Schedule SSA to satisfy the reporting requirements of IRC section 6057(a), which requires 401(k) plans and other retirement plans

to report certain information relating to separated plan participants with vested benefits that have not been distributed. Schedule SSA was eliminated from the Form 5500 filing requirements to facilitate the all-electronic filing of Form 5500 beginning with the 2009 plan year.

The new Form 8955-SSA is a stand-alone reporting form that is filed with the IRS, not the U.S. Department of Labor. The IRS developed a voluntary electronic filing system for plan administrators who want to file the form electronically. Form 8955-SSA generally must be filed by the last day of the seventh month following the last day of the plan year to which the form applies. The IRS clarified in the FAQs regarding Form 8955-SSA that plan administrators may prepare one Form 8955-SSA covering both 2009 and 2010 reportable employees. However, to do so, the 2010 reportable employees will be treated as reported in 2009, so the plan will need to enter the beginning and ending date for the 2009 plan year on the Form 8955-SSA, with no references to the 2010 plan year.

To provide administrators with additional time to complete and file the new Form 8955-SSA, the IRS announced that the due date for filing the Form 8955-SSA for the 2009 and 2010 plan years is the later of Jan. 17, 2012, or the due date that generally applies for filing the Form 8955-SSA for the 2010 plan year. As a result, the statement that must be distributed to participants is also delayed, and must now be furnished no later than the due date for filing the Form 8955-SSA.

Lastly, Rev. Proc. 2011-31, which was recently released by the IRS, provides specifications for electronic filing with the IRS. The IRS also released frequently asked questions that address specific issues, including how to obtain credentials for electronic filing. Contact your advisor for assistance on this new filing requirement.

### ***Supreme Court Decision on Cigna Corp v. Amara***

---

On May 16, 2011, the U.S. Supreme Court issued its long-awaited decision in *CIGNA Corp. v. Amara*, 536 U.S., 2011 WL 1832824. In the opinion, the court vacated a federal district court's order directing CIGNA Corp. to reform its pension plan due to ERISA notice-provision violations in summary plan descriptions (SPDs) and summary of material modifications (SMMs). The violations occurred when CIGNA converted its existing traditional pension plan into a cash balance plan. The basis of the lawsuit claimed that the conversion of the plan did not comply with the applicable notice requirements under ERISA 204(h) and the SPDs and SMMs were misleading. The district court found that the evidence created a presumption of "likely harm" to plan beneficiaries and that reformation of the plan was warranted under ERISA section 502(a)(1)(B), which authorizes a plan participant or beneficiary to bring a civil action "to recover benefits due to him under the terms of his plan." The Supreme Court granted review to resolve a circuit split addressing the proper legal standard of harm for determining whether ERISA notice violations warrant legal relief.

The court first addressed and then rejected section 502(a)(1)(B) as legal authority for a district court to reform a plan following a violation of ERISA's notice provisions. According to the court, section 502(a)(1)(B) merely provides for enforcing the terms of a plan; it does not authorize reforming terms to conform to representations made in SPDs. The court also rejected an argument put forth by the U.S. solicitor general, which urged that the district court had actually enforced the plan's terms through its reformation order because the terms of the SPDs are themselves part of the plan. In rejecting that line of argument, the court noted that SPDs are communications about a plan; they are not part of the plan itself. This point is of particular interest to plan sponsors, since this concept could be extended to all plans under ERISA, including welfare benefits. Essentially, the court reached the conclusion that the terms of the SPD do not necessarily trump the plan, and changes to the SPD alone may not be treated as changes to the plan.

Although the court held that section 502(a)(1)(B) does not authorize plan reformation, it also held that such relief is authorized by section 502(a)(3), which allows a plan beneficiary "to obtain other appropriate equitable relief" for violations of ERISA. Having decided the basis for a court's authority to reform a plan following an ERISA violation, the court then noted that the legal standard of harm required to obtain "appropriate equitable relief" will depend on the equitable theory through which a court provides relief, and the court remanded the issue to the district court.

Therefore, while an SPD is still a central means of communicating plan terms to participants, miscommunications may be actionable under ERISA Section 502(a)(3). This case reiterates the importance of adopting plan amendments using a formal or “best practices,” process, that includes checking for discrepancies between the existing plan terms. Any communications sent to plan participants should consistently reflect the correct plan amendment, as adopted.

## ***Update on George v. Kraft Foods Global***

---

The U.S. Court of Appeals for the Seventh Circuit issued a recent 2-1 split decision that illustrates the importance of documenting careful, reasoned decision processes for retirement plans, and underscores the importance of using competitive bidding to select and retain service providers and consultants.

### *Unitization of Company Stock Funds*

The plan offered two company stock funds (CSFs). The CSFs were unitized funds, meaning that instead of owning actual shares of company stock in their individual accounts, participants owned “units” comprised of company stock and some minimal amount of cash (approximately 5 percent). Unitization offers several benefits to participants, including allowing participants to quickly sell their interests and allowing the plan to save transaction costs by “netting” participant transactions.

The plaintiffs allege that the plan’s CSFs were imprudently structured as unitized stock funds, causing the plan to experience investment and transactional drag. In support of this allegation, plaintiffs assert that, because of the fund’s cash holding, participants who invested in the CSFs did not recognize as great a return on investment as investors who purchased stock directly (investment drag). Further, plaintiffs argue that, as a result of netting participant transactions, transaction fees were spread across participants based on their *pro rata* share of the fund, incentivizing all participants to trade frequently, which in turn resulted in higher transaction costs for the fund (transactional drag).

The Seventh Circuit did not offer an opinion regarding how to best administer company stock investment options, but simply sent the issue back to the district court for further review. The Court held that the record revealed a genuine issue of material fact as to whether the plan fiduciaries made a decision with respect to the proposed solutions to investment and transactional drag. The Court noted that, although “the Parties cite various e-mails and other correspondence among the Kraft plan fiduciaries and [the record keeper] regarding the cost, and benefits of various solutions to investment and transaction drag ... we can find nothing in the record indicating that defendants ever made a decision on these matters – i.e., that they actually determined whether the costs of making changes to the [company stock funds] outweighed the benefits, or vice versa.” Accordingly, after *Kraft*, plan fiduciaries should be thoroughly documenting all decisions (even decisions to maintain the status quo), particularly once alternatives are considered.

NOTE: In a footnote, the panel emphasized that, on remand, the district court might find that the issues of unitization were “so trivial that a prudent fiduciary would have ignored them,” in which case “the failure to make a decision will not result in liability.”

### *Selection/Retention of Service Providers*

Hewitt has served as the plan’s record keeper since 1995, when the plan hired Hewitt after requesting bids from various record keepers. Since then, the plan has renewed Hewitt’s contract based on its experience and the recommendations of plan consultants.

Plaintiffs allege that prudent fiduciaries would have solicited competitive bids for recordkeeping services on a periodic basis and that defendants’ failure to do so resulted in Hewitt receiving an excessive fee. In support of this contention, plaintiffs offered the testimony of an “expert” in the area of retirement plan recordkeeping services. The expert reviewed the process that defendants followed and opined that the defendants acted imprudently by extending Hewitt’s contract without first soliciting bids from other record keepers. The expert further opined that a reasonable fee for necessary plan recordkeeping services would have been between \$20 and \$27 per participant per year, rather than the \$43 to \$65 the plan paid to Hewitt.

The Seventh Circuit held that, after considering both the opinions of the defendants' consultants and the opinions of the plaintiffs' expert (along with any other admissible evidence), a trier of fact could reasonably conclude that defendants did not satisfy their duty to ensure that Hewitt's fees were reasonable. It is important to remember that nowhere did the court explicitly state how a fiduciary must determine reasonableness of fees. But it is important to note that the absence of soliciting competitive bids played a role in the court ruling against summary judgment on the issue. In other words, the absence of soliciting bids caused enough question for the court as to whether retention of Hewitt was reasonable that one may infer that had the fiduciaries undertaken such an exercise they may have prevailed on their motion to dismiss.

A best practices vendor benchmarking and analysis should solicit bids from multiple service providers. The bids should include proposed custom plan pricing, recommended investment-mapping strategies, as well as service and product comparisons. The analysis should allow plan fiduciaries to understand how the services and investments provided to the plan are priced, and to determine, based on the prevailing market, whether that pricing is reasonable and competitive.

### *Related Developments*

In a related case, plaintiffs allege that defendants breached their fiduciary duties by (1) improperly retaining the Growth Equity Fund and Balance Fund (hereinafter "Funds") after eliminating all actively managed domestic equity investments in the Kraft Defined Benefit Plans in 1999 in favor of passively managed domestic equity investments, and (2) failing to properly monitor the Funds. In response to the defendants' motion for summary judgment, the district court granted the defendants' motion in part and denied it in part.

In granting part of the defendants' motion, the court found that any alleged breaches taking place before July 2, 2002, are time-barred, and that plaintiffs failed to provide evidence of any deficiencies in the manner in which defendants monitored the Funds.

In denying the remainder of the defendants' motion, the court found that: (1) given the defendants' decision to eliminate active investments from the Kraft Defined Benefit Plans, and viewing the record in the light most favorable to plaintiffs, a reasonable jury could find that a "reasonably prudent businessperson with the interests of all the beneficiaries at heart" would not have retained the actively managed investments in the plan after 1999, and (2) based on the investment committees' discussions noting the "challenges of selecting consistently successful active managers, low costs of indexing, [and] performance of indexing in down markets," a reasonable jury could conclude that, despite the differences between defined contribution and defined benefit plans, a prudent fiduciary would have offered indexed investments rather than actively managed investments as plan investment options. Accordingly, the court held that a reasonable jury *could* conclude that the defendants' decision to retain the Funds (or failure to make a decision to remove them) constituted a breach of fiduciary duty. Note that this is not a ruling on the prudence of offering actively managed funds, but rather a ruling against a motion to dismiss the case.

### ***Recent Decision Issued for Tullis & Mack v. UMB Bank, N.A.***

---

In this recent decision, the U.S. Court of Appeals for the Sixth Circuit held that ERISA section 404(c) protected UMB, the plan's trustee, from plaintiffs' claims that UMB failed to disclose material non-public information regarding the plaintiffs' investment advisor. The court found that the plaintiffs offered very little (beyond mere allegations) to support a finding that UMB actually knew that the advisor was a fraud. The Sixth Circuit's ruling was based on the following facts:

- The doctors, not UMB, chose their advisor.
- The doctors gave their advisor a blank check to invest their money.
- The doctors directed UMB to value their investments at cost, without investigation.

Those decisions caused the doctors' losses. The Sixth Circuit held that UMB's conduct therefore fell within the 404(c) safe harbor and the district court's grant of summary judgment to UMB on the doctors' claims was appropriate.

*Secretary of Labor Amicus Brief:* Alternatively, as “friend of the court,” the Secretary of Labor argued that 404(c) should not apply because the doctors’ losses were not “the direct and necessary result” of their control of the investments. The Secretary argued that those losses resulted instead from UMB’s alleged cover-up of the investment advisor’s fraud. The court was quick to dismiss the Secretary’s argument, holding that the Secretary offered little more than complaint cites in support of its theory.

## ***Compliance FAQ: What required plan amendments should my retirement plan include since the EGTRRA Restatement?***

---

Plan amendments may be discretionary in nature (typically revolving around an employer’s desire to change design) and others may be required due to changes in the law. Since the date that plans were restated to comply with the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), there have been several mandated plan amendments. These include:

**Final 415 Regulations:** These regulations provided much-needed clarifications for the definition of compensation, plan aggregation rules, timing of annual additions and corrections methods. This amendment is required for all qualified plans. Adoption was required by the last day of the first interim year starting with limitation years beginning on or after July 1, 2007.

**The Pension Protection Act of 2006 (PPA):** This act contained the most sweeping pension legislation in over 30 years and included a number of significant tax incentives. This amendment is required for all qualified plans. Adoption was required by the end of the 2009 plan year.

**Heroes Earnings Assistance and Relief Tax Act of 2008 (Heart Act):** includes provisions specific to those who serve in the armed forces, and is required for all qualified plans. Adoption is required by the end of the 2010 plan year.

**Emergency Economic Stabilization Act of 2008 (EESA):** This is a discretionary amendment only required for plans incorporating the EESA Midwest Disaster Relief Provisions. If this applies, it must be adopted by the end of the 2010 plan year.

**Worker, Retiree, and Employer Recovery Act of 2008:** This legislation made technical corrections related to PPA of 2006. A plan amendment is required for certain defined contributions plans, and must be adopted by the end of the 2011 plan year, but retroactively effective for plan years beginning in 2009.

**Small Business Jobs Act of 2010:** This act allowed for in-plan Roth rollovers for 401(k), 403(b) or governmental 457(b) plans that accept Roth deferrals. IRS Notice 2010-84 extended the amendment deadline to the later of the last day of the plan year in which the amendment is effective or Dec. 31, 2011, provided the amendment is retroactively effective to the date the plan operationally permitted in-plan Roth rollovers.

Plan sponsors should ensure that they have received all of these amendments from the recordkeeper, third-party administrator or plan document provider that provides statutorily mandated plan amendments. If a plan sponsor does not have such an administrator, they should contact their NFP advisor for assistance.

This material is intended for the exclusive use of clients of DiMeo Schneider & Associates L.L.C. Content and format are privileged and confidential. Any dissemination or distribution of this material is strictly prohibited.

Information is obtained from a variety of sources which are believed but not guaranteed to be accurate. It is not intended to provide specific legal, tax or other professional advice. The services of an appropriate professional should be sought regarding your individual situation. DiMeo Schneider & Associates LLC does not offer legal or tax services.