

WHEN THE GOVERNMENT SPEAKS: DOL ENFORCEMENT PRIORITIES

Feb 15, 2013

In this second post in our series of reflections from the recent Tax Exempt/Government Entities meeting with IRS and DoL officials, we'll focus on the areas the DoL officials identified as enforcement priorities and some of the specific items they highlighted.

Health Plans. As we previously posted, the DoL is starting to look at health plans and compliance with health care reform specifically. They have also discovered that many plans lack what they consider to be a formal plan document. They are starting to ask not just for proof of the plan document's existence, but also proof of when it was adopted, going back to January 1, 2010. Plan sponsors who have not adopted wrap plan documents for their health plans may want to consider implementing those soon.

ESOPs. ESOP enforcement continues to be a priority. The officials stated that they believe appraisers are arguably already fiduciaries on the theory that they are providing investment advice (although, in our view, that position is not without its flaws). They noted that trustees still have a duty to prudently select the appraisers and that, even if the appraiser is prudently selected, the trustee still has an obligation to make sure the assumptions on which the valuation is based are reasonable under the circumstances. They also said that trustees should be wary of a seller's role in selecting the appraiser. Oh, and trustees should also *read the appraisal*.

Officials identified the following more egregious practices that they see (which serves as a good list of "watch-outs" when reviewing valuations):

- No discount applied for lack of marketability;
- Failure to take into account the risk associated with having only a single supplier or customer;
- Inflated projections;
- Inconsistencies between the narrative of the valuation and the math in the appendices;
- Use of out of date financial information;

- Improper discount rates;
- Incomparable comparable companies – for example using a large public company as a comparable to a small private company; and
- Failure to test the underlying assumptions.

ERISA Accounts/Budgets. While not an enforcement area, officials expressed the view that excess revenue sharing, 12b-1, and other investment fees that are held in ERISA Accounts or ERISA Budgets should be used to pay proper plan expenses. If there are excesses, they should ideally be allocated to the individuals whose investments generated the fees. However, they acknowledged that this is an area where “rough justice” may be necessary, especially if the excess revenue sharing, 12b-1, and other investment fees are small.

Other Areas. Other areas of focus include:

- Direct investigations of consultants and advisors to plans and plan administrators
- Bankruptcies of plan sponsors – particularly with regard to employee contributions which the Bankruptcy Code expressly states are not part of the Bankruptcy estate and may not be used to satisfy creditors
- Appellate & Amicus participation – The DoL has been very active filing Amicus briefs in employee benefits litigation as part of an effort to influence the court’s outcome. The official from the DoL Solicitor’s office said that one practitioner referred to them as “officious intermeddlers” to which he (jokingly) replied, “That’s what we’re shooting for.”

As we have said before, these statements, the statements are informal and non-binding, and thus cannot be relied upon as official guidance.

MEET THE TEAM



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