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Monthly Newsletter – Volume 3, No. 10 – November 8, 2007

Highlights of the Month

1. **Internal Revenue Service and Social Security Administration Issue Limits for 2008**
2. **Employee Benefits Security Administration Launches ERISA Fiduciary Advisor Website and Online Penalty Calculator for Form 5500 Delinquent Filer Voluntary Correction Program**
3. **EBSA Issues Final Regulations for Default Investment Alternatives in Participant Directed Individual Account Plans**
4. **Court Refuses to Reconsider Ruling which Threw Out Retirement Plan Fees Lawsuit against Deere & Co. and Fidelity**
5. **Lawsuit Filed Against Citigroup Inc. Alleging Fiduciary Violations with Respect to the Operation of Its 401(k) Plan**
6. **Department of Labor Issues Field Assistance Bulletin Regarding Periodic Pension Benefit Statements for Non-Participant Directed Individual Account Plans**

Internal Revenue Service and Social Security Administration Issue Limits for 2008

On October 22, 2007, the Internal Revenue Service (IRS) issued the cost of living adjustments applicable to pension plans. The new limits are as follows:

	2008	2007	2006
401(k), 403(b) and 457(b) plan maximum salary reduction	\$ 15,500	\$ 15,500	\$ 15,000
Age 50 catch-up salary reduction contributions	5,000	5,000	5,000
SIMPLE maximum salary reduction (§408(p)(2)(E))	10,500	10,500	10,000
Age 50 catch-up salary reduction for SIMPLE accounts	2,500	2,500	2,500
Defined Benefit Maximum Annual Pension (§415(b)(1)(A))	185,000	180,000	175,000
Defined Contribution Maximum Annual Addition (§415(c)(1)(A))	46,000	45,000	44,000

*One Glenlake Parkway
Suite 700
Atlanta, GA 30328
678.638.6270 phone
678.638.6271 fax
bartlettoneill.com*



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Maximum Compensation Limit (§ 401(a)(17), 404(l), 408(k))	\$230,000	\$225,000	\$220,000
Definition of Highly Compensated Employee Earnings Limit (§414(q)(1)(B))	105,000	100,000	100,000
Definition of Key Employee Earnings Limit for Top-Heavy Plans (§416(i)(1)(A)(i))	150,000	145,000	140,000
SEP Minimum Compensation (§408(k)(2)(C))	500	500	450

In addition, the Social Security Administration has announced the limits that are applicable for 2008:

	2008	2007	2006
Taxable Wage Base			
Social Security	\$ 102,000	\$ 97,500	\$94,200
Medicare	Unlimited	Unlimited	Unlimited
Employer/Employee Payroll Tax Rates			
Social Security	6.20%	6.20%	6.20%
Medicare	1.45%	1.45%	1.45%
Maximum monthly social security benefit	\$ 2,185	\$ 2,116	\$ 2,053
Maximum income without reducing Social Security retirement benefits			
Over age 65	Unlimited	Unlimited	Unlimited
Year attaining age 65	\$ 36,120	\$ 34,440	\$ 33,240
Under age 65	\$ 13,560	\$ 12,960	\$ 12,480
Medicare Part A			
Medicare tax rate	1.45%	1.45%	1.45%
60-day deductible	\$ 1,024	\$ 992	\$ 952
Medicare Part B			
Monthly premium (minimum shown is based on max. \$80,000 income if single; \$160,000 if married)	\$ 96.40 to \$238.40	\$ 93.50 to \$161.40	\$ 88.50
Deductible	\$ 135	\$ 131	\$ 124



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Limits for contributions to health savings accounts (HSAs), and deductibles and out-of-pocket expenses for high deductible health plans (HDHPs) for 2008 are as follows:

	2008	2007	2006
Maximum Contribution to HSAs:			
Individuals	\$ 2,900	\$ 2,850	\$ 2,700
Families	5,800	5,650	5,450
Catch-up contributions, age 55 and over	800	800	700
Maximum Out-of-Pocket for HDHPs:			
Individuals	5,600	5,500	5,250
Families	11,200	11,000	10,500
Minimum Deductible for HDHPs			
Individuals	1,100	1,100	1,050
Families	2,200	2,200	2,100

Employee Benefits Security Administration Launches ERISA Fiduciary Advisor Website and Online Penalty Calculator for Form 5500 Delinquent Filer Voluntary Correction Program

The Department of Labor's Employee Benefits Security Administration (EBSA) has launched a new website, ERISA Fiduciary Advisor, which is designed to assist employers and plan service providers understand their responsibilities with respect to employee benefit plans which are subject to the Employee Retirement Income Security Act (ERISA). The website provides links to resources and tools to assist employers and service providers and provides navigation to ERISA requirements based on answers to a series of questions. The website URL is <http://www.dol.gov/elaws/ERISAFiduciary.htm>.

The EBSA has also established an online penalty calculator for Form 5500 filings under the Delinquent Filer Voluntary Correction Program (DFVCP). The DFVCP allows certain late Form 5500 filers the opportunity to avoid civil penalties by voluntarily correcting delinquent Form 5500 filings and paying a reduced penalty. According to the EBSA, the calculator is designed to calculate the penalty for each plan that is submitted under DFVCP by entering the type of plan, the size of the plan and the number of filings. The calculator provides an amount owed on each plan filing and a final amount due for all filings being submitted for that plan. Filings for separate years may be included in a single submission for a plan. If so, the total DFVCP penalty for that plan may be capped. If all of the filings in the submission are small plan filings (generally, fewer than 100 participants at the beginning of the plan year), the per-submission cap is \$1,500. If any of



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the filings in the submission are large plan filings (generally, 100 participants or more at the beginning of the plan year), the per-submission cap is \$4,000. Although the calculator does not take into account the "80-120" rule (29 CFR § 2520.103-5(d)), that rule is applied for the purposes of calculating the DFVCP penalties. DFVCP penalties for 501(c)(3) organizations and for Top Hat and Apprenticeship programs are subject to a different calculation and cap. To be considered for the plan cap, all of the filings must be included in the same submission, which generally means that they must be included in the same envelope. For more information and examples, you can visit <http://www.dol.gov/ebsa/calculator/dfvcmain.html>. The calculator can be found at <http://askebsa.dol.gov/dfvc>.

EBSA Issues Final Regulations for Default Investment Alternatives in Participant Directed Individual Account Plans

On October 24, 2007, the EBSA published the final regulations for default investment alternatives in participant-directed individual account plans (72 FR 60452) detailing how individual account plans can implement the changes permitted by the Pension Protection Act of 2006 (PPA) with respect to investing participants' assets in the absence of direction from the participants. For plan years beginning after December 31, 2006, the PPA provides that a participant in an individual account plan will be treated as exercising control over the assets in the account with respect to the contributions and earnings which, in the absence of an investment election by the participant, are invested by the plan in accordance with regulations set forth by the Department of Labor (DOL).

In September 2006, the EBSA published proposed regulations which listed six conditions that must be met to relieve a fiduciary of liability for any loss that is a "direct and necessary" result of investing a participant's account in the absence of direction from the participant. The six conditions and the changes from the proposed regulations follow:

1. Assets must be invested in a "qualified default investment alternative" (QDIA). A QDIA may not invest directly in employer securities and may not impose financial penalties or otherwise restrict the ability of the participant to transfer the investment. There were no changes to these conditions from the proposed regulations. In addition, a QDIA must be managed by an investment manager [within the meaning of ERISA § 3(38)] or a registered investment company (registered under the Investment Company Act of 1940). The final regulations have added plan sponsors that are named fiduciaries as permissible managers for the QDIA as well as trustees who meet the requirements of § 3(38)(A), (B), and (C). Under the final regulations, QDIAs constitute one of the following:



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- a. An investment fund product that applies generally accepted investment theories, is diversified so as to minimize the risk of large losses, and is designed to provide varying degrees of long-term appreciation and capital preservation through a mix of equity and fixed income exposures based on the participant's age, target retirement date or life expectancy (e.g., life-cycle" and "targeted retirement date" funds);
- b. An investment fund product that applies generally accepted investment theories, is diversified so as to minimize the risk of large losses, and is designed to provide long-term appreciation and capital preservation through a mix of equity and fixed income exposures consistent with a target level of risk appropriate for participants of the plan as a whole (e.g., a balanced fund);
- c. Same requirements as a. above but provided through an investment management service (e.g., managed account);
- d. An investment product or fund designed to preserve principal and provide a reasonable rate of return, whether or not such return is guaranteed, consistent with liquidity. Such a product must seek to maintain, over the life of the investment, the dollar value that is equal to the amount invested; be offered by a state or federally regulated institution, and will constitute a QDIA for not more than 120 days after the date of the participant's first elective contribution; and
- e. An investment product or fund designed to guarantee principal and a rate of return consistent with that earned on intermediate investment grade bonds, while providing liquidity for withdrawals by participants. Such a product must not impose fees or surrender charges in connection with withdrawals by participants; and principal and rate of return must be guaranteed by a state or federally regulated financial institution. This investment product is only a QDIA with respect to assets invested in such product prior to December 24, 2007.

Funds or products that otherwise meet the requirements of a. through e. are not disqualified solely because they are offered through a variable annuity contract or a common/collective trust fund or pooled investment fund.

2. The participant must first have had the opportunity to direct the investment of assets in his or her account but did not exercise that opportunity. This condition is also unchanged from the proposed regulation.
3. An appropriate notice concerning the investments that may be made on his or her behalf must be furnished to the participant within a reasonable period of time – at least 30 days in advance of the first such investment, and at least 30 days in advance of each subsequent plan year. The final regulations provide further clarification as to the timing and form of these notices. The final regulations eliminate the provision of such notices through the summary plan description or a



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- summary of material modification, requiring a separate disclosure. In addition, the final regulations provide that for purposes of the initial notification, notice must be provided (a) at least 30 days in advance of the date of plan eligibility, or at least 30 days in advance of any first investment in a QDIA on behalf of the participant, or (b) on or before the date of plan eligibility, provided the participant has the opportunity to make a permissible withdrawal under 414(w).
4. The plan must provide that any material provided to the plan regarding the investment, such as account statements and prospectuses, must be provided to the participant. Some minor wording changes were made to the proposed regulations.
 5. A participant must have the opportunity to direct the investment out of the QDIA with the same frequency as available for other plan investments, but not less than quarterly, without financial penalty. The final regulations provided some additional clarification by stating that this provision does not confer greater rights on participants whose accounts are directed to the QDIA than are conferred on other plan participants. The final regulations also contain three conditions applicable to a defaulted participant's ability to move assets out of a QDIA: (a) any participant on whose behalf assets are invested in a QDIA must be able to transfer such assets to other investment alternatives with a frequency consistent with that afforded participants who elect to invest in the QDIA, but not less frequently than once within any three month period; (b) the imposition of any restrictions, fees or expenses (other than investment management and similar types of fees and expenses) during the first 90 days of a defaulted participant's investment in the QDIA is not permitted; and (c) at the end of the 90 day period, defaulted participants may be subjected to restrictions, fees or expenses that are otherwise applicable to participants under the plan who elected to invest in the QDIA.
 6. The plan must offer the opportunity to invest in a "broad range of investment alternatives" within the meaning of 29 CFR 2550.404c-1(b)(3). This provision is unchanged from the proposed regulations.

Court Refuses to Reconsider Ruling Which Threw Out Retirement Plan Fees Lawsuit against Deere & Co. and Fidelity

The U.S. District Court for the Western District of Wisconsin has refused to reconsider its earlier decision that Deere & Co. (Deere) was not obligated to disclose the revenue sharing arrangements in its 401(k) plan. The Court stated that it believed the plaintiffs were rehashing old arguments rather than presenting new evidence of fiduciary breach.



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Background

Hecker v. Deere is one of a series of cases alleging that plan sponsors have paid excessive fees to 401(k) service providers. The 401(k) plan sponsored by Deere & Co. is a participant directed plan, i.e., a plan where plan participants are able to direct the investment of the monies held in their plan account. The Deere plan offered 26 core investment options, 23 of which were managed by Fidelity. The plan also had a brokerage window that included over 2,500 publicly available mutual funds which were not affiliated with Fidelity. Deere paid Fidelity directly for the trust services it provided and the plan paid no fees to Fidelity.

If the provisions of ERISA § 404(c) are implemented correctly, then plan fiduciaries are not liable for the investment choices made by the plan participants. One of the requirements under ERISA § 404(c) is that the participants must receive sufficient information regarding the investment options under the plan in order to make informed decisions. While the plan fiduciaries may not be liable for the investment decisions made by the individual participants, they can still be liable for losses based on the funds they make available to the plan participants and the disclosure of information regarding the investment funds that have been made available to the participants. The *Deere* complaint set forth two basic claims: 1) the plan sponsor violated ERISA disclosure and fiduciary requirements because it failed to disclose revenue sharing arrangements to participants; and 2) the plan sponsor violated ERISA’s fiduciary provisions by “selecting and offering investment options with unreasonably high fees. . .”

Original Decision

The court assumed that the factual allegations contained in the complaint were true. Additionally, the court assumed that the plan sponsor did not disclose information about the revenue sharing arrangements to participants and that the plan sponsor could have negotiated lower fees with Fidelity or could have selected different funds from different providers with lower rates but made no effort to do so.

With respect to the first allegation, the court ruled that ERISA’s current disclosure requirements do not require the disclosure of revenue sharing or other indirect fee arrangements. In this regard, the court found it relevant that the amount of disclosure regarding revenue sharing arrangements is a matter that is currently being addressed by the EBSA. Moreover, the court held that there is no fiduciary requirement – separate from ERISA’s disclosure rules – for that disclosure. With respect to the second allegation, the court held that because the plan sponsor had met the requirements of ERISA § 404(c), the plaintiffs could not bring an action based on excessive fees, even if, as discussed above, it were assumed that plaintiffs could prove that the fees were



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excessive. In addition, the court found that the existence of the brokerage window insulated Deere from any charge that fees on the core funds were excessive. In discussing the 2,500 funds offered through the brokerage window, the court stated “[a]ll of these funds were also offered to investors in the general public so expense ratios were necessarily set to attract investors in the marketplace.” The court found that at least some of the funds offered through the brokerage window must have had reasonable fees.

Latest Action

Three employees of Deere filed a plea asking the court to reconsider its June 2007 ruling claiming that they had uncovered new evidence of ERISA violations by Deere. In its ruling in October 2007, the court refused to reconsider its previous ruling. The court stated that it did not believe there was any new evidence presented. It further stated that "the point of the safe harbor provisions is to preclude claims that, although there was a broad array of fully described options in which to invest, participants might have achieved a better return (or lost less) if only the plan sponsor had chosen different options with better returns or lower costs."

Lawsuit Filed Against Citigroup Inc. Alleging Fiduciary Violations with Respect to the Operation of Its 401(k) Plan

A participant in the 401(k) Plan sponsored by Citigroup Inc. (Citigroup) has filed a lawsuit against Citigroup, the Administrative Committee for the Citigroup plan, and the Investment Committee for the Citigroup Plan alleging breach of fiduciary duties.

Background

Citigroup sponsors the Citigroup 401(k) Plan (Citigroup Plan) which covers employees of Citigroup and its subsidiaries and affiliates. The Citigroup Plan offers participants a menu of investment options, selected by the plaintiffs, for investment of their plan account balances. Citibank is the trustee for the Citigroup Plan and CitiStreet, a joint venture between Citigroup and State Street Bank & Trust, provides administrative and recordkeeping services to the Citigroup Plan for which it is paid fees from the assets of the Plan. The Investment Committee and Administrative Committee are responsible for selecting, monitoring and evaluating the Citigroup Plan's investment options. The investment options included mutual funds offered and managed by Smith Barney Management LLC (Smith Barney) and Salomon Brothers Asset Management Inc. (Salomon), and guaranteed interest contracts and a Stable Value Fund offered and



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managed by Travelers Life & Annuity (Travelers). Smith Barney, Salomon, and Travelers were all affiliates or subsidiaries of Citigroup during the period covered by the lawsuit. In 2005, Citigroup sold Citigroup Asset Management (CAM) to Legg Mason Inc. (Legg Mason). CAM consisted mainly of the mutual fund businesses operated and managed by Smith Barney and Salomon.

Allegations

The lawsuit alleges that the Administrative Committee and Investment Committee, along with Citigroup, violated their fiduciary responsibility to discharge their duties with respect to the Citigroup Plan, solely in the interest of the participants and beneficiaries, as required under ERISA §404(a). The allegations include: 1) that the defendants put the interests of Citigroup ahead of the interests of the participants by choosing investment products and pension plan services offered and managed by Citigroup subsidiaries and affiliates which were inferior to others in the marketplace; and 2) that only after Citigroup sold CAM and would no longer benefit from the Citigroup Plan's investments, did the Investment Committee undertake a review of investment options which led to a decision to terminate all eight of the mutual funds which had been plan options but were part of the business sold to Legg Mason.

ERISA prohibits a plan from investing in the plan sponsor's investment products or paying the plan sponsor fees for services provided to the plan unless the fiduciary or sponsor can demonstrate that the transactions are exempt. ERISA does not permit such arrangements when they are not solely in the interest of the plan or when a prudent, non-conflicted fiduciary would choose differently.

Department of Labor Issues Field Assistance Bulletin Regarding Periodic Pension Benefit Statements for Non-Participant Directed Individual Account Plans

The DOL has issued Field Assistance Bulletin (FAB) 2007-03, *Periodic Pension Benefit Statements for Non-Participant Directed Individual Account Plans*, which provides relief from the 45-day rule for issuance of benefit statements to participants in individual account plans as described in FAB 2006-03. In FAB 2006-03, the DOL provided guidance concerning good faith compliance with the pension benefit statement provisions of ERISA §105, as amended by the PPA. In FAB 2006-03, the DOL indicated that the furnishing of pension benefit statements information not later than 45 days following the end of the relevant period (calendar quarter or calendar year) would constitute good faith



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compliance by individual account plans with the requirement to automatically furnish such statements. Comments provided to the DOL by interested parties indicated that a 45 day time period is not reasonable for profit sharing plans, as many employers do not determine or contribute profit sharing contributions until after the plan sponsor's tax return is completed; nor is it reasonable for non-participant directed individual account plans sponsored by partnerships as they cannot make contribution determinations until after the partnership tax return is completed. In addition, the commenters stated that the valuation of non-readily marketable assets is made by third parties. For these reasons, the DOL has issued FAB 2007-03, which provides additional guidance for non-participant directed plans and indicates that good faith compliance with ERISA §105(a)(1)(A)(ii) will be considered as furnishing statements to participants in such plans on or before the date on which the Form 5500 is filed by the plan, but no later than the date, including extensions, on which the Form 5500 is required to be filed by the plan for the year to which the statement relates.