



R O B E R T B . S T E V E N S O N<sup>1</sup>  
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O F C O U N S E L

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A N T H O N Y S . H A R T I I I  
R I C H A R D L . S A N D E R S O N , J R .  
M I C K E Y B A R T L E T T

## **Stevenson Keppelman Associates**

### **2008 Year-End Newsletter November 2008**

Yikes! It is hard to believe that another year has passed! 2008 has been another busy year in employee benefits, compounded by a historical market meltdown. (Remember Labor Day? Both gasoline and stocks were comparatively expensive!)

Below is a short summary of some current developments, with the primary Stevenson Keppelman Associates' contact person named in parenthesis. **This includes deadline-oriented matters.** You should review and confirm compliance. Contact us with any questions or concerns.

**TO BE PERFECTLY FRANK:** This is not legal advice tailored to your specific situation. But in the case of our clients, we are using this newsletter to call these issues to your attention. What follows is a discussion of legal opportunities or requirements. We will count on you to contact us as appropriate for follow up.

Let us also take this opportunity to reaffirm our partnership with our clients. We appreciate your confidence in us. In turn, we work hard for you, and provide quality advice at low cost. The world of commerce is in turmoil. Let us know what we can do to help you sustain and prosper.

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## **1. Retirement Plan Investment Turmoil** **(Bob Stevenson)**

Financial markets are in turmoil. Defined benefit plan funding is looking scary, despite PPA interest rates that will somewhat soften the asset-meltdown. Defined contribution accounts are shrinking like cotton in a hot dryer. There may be concerns for your own business. What is a plan sponsor to do? What are plan fiduciaries to do?

First of all, remember the difference between your plan sponsor hat and plan fiduciary hat.

**PLAN SPONSOR:** Being plan sponsor is generally not an ERISA fiduciary function. Wearing this “settlor” hat (the settlor creates a trust), the plan sponsor creates, designs, amends and terminates ERISA plans of all kinds. These activities are constrained by certain laws and by collective bargaining agreements, where applicable.

If it is becoming difficult to budget for retirement plan funding, remember that with rare exceptions, freezes and terminations may only occur prospectively. Contact us at your earliest point of concern. There are advance notice requirements and advance amendment requirements in defined benefit plan freezes. Even the reduction or freeze of a 401(k) match requires advance action.

If you are closing a plant or facility, there are special notice requirements to PBGC where DB plans are involved. This may lead to posting a letter of credit for five years. Think in advance.

If things are really bad and Chapter 11 looms, contact us in advance. Especially for DB plans, but also as to certain DC issues, there is a complex interaction of tax, labor law, PBGC and bankruptcy rules to navigate. We took major steel companies through Chapter 11.

Although the act of sponsoring a plan is not a fiduciary function, as plan sponsor, you (which “you” hope is the legal entity, and not “you” personally), are the ultimate plan fiduciary. You will appoint investment fiduciaries, trustees, etc. Do so wisely, and be sure your in-house personnel who handle these functions are optimally informed and optimally protected from individual liability exposure. How? Legal training, good investment advice, proper committee charters, and perhaps the purchase of ERISA fiduciary liability insurance.

**THE TAKE AWAY: Be vigilant to business changes that may impact your benefit programs. Contact benefits counsel at the first whiff of trouble.**

**PLAN FIDUCIARY:** Re-read the preceding paragraph. You (the plan sponsor) can’t insulate yourself from ERISA responsibilities or potential liability, but you can enhance your performance and best position yourself against possible liability claims.

This is a critical time to update your designations of fiduciary duties, even in-house. You should create, review or update committee charters for the people in your operation who are responsible for ERISA matters. This includes DB and DC investments, and administrative decisions in retirement plans and welfare plans (such as medical, disability, etc.) Proper charters make things “work right” and also provide maximal individual liability protection.

We always recommend retention of fee-based fiduciary advisors to all funded plans, DB or DC. Don’t buy a “bundled” 401(k) product with a financial institution without careful advance diligence. You may be getting ripped off on investment fees, administrative costs, or both. You are getting substandard and conflicted “legal advice” from the non-lawyers at these institutions. 401(k) fee

lawsuits have become a cottage industry for plaintiffs' lawyers, and have been enabled by recent U.S. Supreme Court precedent and Department of Labor briefs in such cases.

If you have retained independent investment advice (which is a good thing!), ask us to review the agreements! These are arm's length contracts. The advisor wants to cut itself the best deal, and most protection, going into your arrangement. Someone familiar with the issues should negotiate on your behalf. We routinely turn advisors' proposed agreements into masses of redlining, getting our clients a fair deal in the process.

In plans with individual investment managers, their agreements need similar review. The same considerations apply, in spades. Managers like you to indemnify them for 99 things, they like to stand behind one or two. Reverse that ratio.

Be sure your DC plan is properly configured, and is taking the right steps, so that participants (and not you) are responsible for participants' asset-allocation decisions. You are responsible for the wisdom of selecting funds for inclusion in the menu of choices among which participants may invest (and that's where a fiduciary investment advisor helps.) But participants will be responsible for their choices among the funds, and even for "default investments" IF you have met requirements of ERISA Section 404(c). You should periodically audit your 404(c) compliance, and all of your fiduciary structures. These things need course corrections from time to time.

**THE TAKE AWAY: Don't overlook your fiduciary duties. Adopt committee charters, don't let them get stale, and the remainder of good governance will tend to follow. The result will be optimal fiduciary performance, better investment results (for you and participants) over time, and reduced liability exposure.**

**In view of market conditions and 401(k) lawsuits, this should be a priority item for all plan sponsors.**

## **2. Deadline for Code § 409A Compliance is December 31, 2008**

**(Tim McGraw)**

As a reminder, the compliance deadline for Section 409A of the Internal Revenue Code of 1986, as amended (the "Code") is December 31, 2008. By this date, you should have formally amended and adopted specific language for all nonqualified plans and/or agreements to comply with Code § 409A. Some of the items that must be considered include:

- **Time of Distribution:** Each plan or agreement must contain an allowed distributable event (separation from service, death, disability, unforeseen emergency, change in control, or a fixed and determinable time in the future.) In addition, the document must specify the time for payment after the occurrence of these events.
- **Form of Distribution:** Each plan or agreement must provide for the form of distribution (lump sum, installments, annuity).
- **Initial Elections:** If the plan or agreement permits any type of election to defer compensation, such election must be made in the year before the year in which the services are to be performed. For deferrals of performance-based compensation, the deferral election can occur later than the start of the performance period, but no later than at least 6 months prior to the end of the performance period.

- Specified Employees (top paid 50 officers) of publicly held corporations are not permitted to commence distributions until 6 months after their separation from service. Publicly held companies include those with foreign parents which are publicly traded overseas.
- Second Elections (changing the time or form of payment set in the initial election described above): Must be set forth in the plan document and must not permit any subsequent deferrals unless the election is made at least 12 months before the scheduled distribution date and the distribution is then delayed at least 5 years past the scheduled distribution date.
- The plan must not permit any accelerated distributions (e.g., no haircut provisions allowing earlier payment of less money).
- If the plan or agreement is considered “linked” to a qualified plan to determine the time of distribution, such plans must be “delinked” by December 31, 2008.

Last Chance Election: Taxpayers are permitted one last opportunity to change any existing election as to the time and form of payment for any plans or arrangements subject to Code § 409A, and employers may amend their plans to provide for such elections, if:

- (1) The election and amendments are made no later than December 31, 2008; and
- (2) The new election may not accelerate payments into 2008; and
- (3) The new election may not defer into a later year amounts that are otherwise payable in 2008.

Beginning January 1, 2009, you will not be able to rely upon a good faith interpretation of the regulations; actual compliance is required, which includes a written plan document that is compliant in all respects with Code § 409A.

Remember that nonqualified plans include base salary and bonus deferral plans, SERPs, excess 401(k) or defined benefit plans, certain stock options and equity based compensation, change in control agreements, employment agreements, severance agreements, and certain post-employment fringe benefits. Essentially, any compensation that is earned (by virtue of a legally binding right) in one year and paid in a subsequent year may be subject to the rules under Code § 409A.

Penalties for noncompliance include immediate taxation of deferred amounts, 20% additional tax on deferred amounts, and interest.

Even if you have already made amendments to your plans and arrangements, it may not be a bad idea to adopt an umbrella resolution providing that if there are any nonqualified plans or arrangements entered into with any of your service providers that have not been specifically amended by December 31, 2008, then the plan or agreement shall be deemed to have been amended with to a pre-established time and form of distribution (for example, a lump sum upon separation from service, and if the service provider is a Specified Employee, such distribution shall be a lump sum paid on the 1st day of the seventh month after the separation from service.) You could then attach your inventory of deferred compensation arrangements and plans to this umbrella resolution. We are not sure if the IRS will agree with this approach, but there is no harm to adopting the resolution and it forces you to inventory of all of your identified deferred compensation arrangements and plans.

**THE TAKE-AWAY: After years of extensions on the 409A deadline, it’s “go time.” You should inventory your nonqualified plans, employment agreements, severance plans, bonus plans, and other compensation devices. If you have any doubt on (a) whether 409A may apply to the arrangement, or (b) whether 409A compliance has occurred, please contact us very soon! Neither of us wants to spend New Year’s Eve rewriting nonqualified plans!**

**3. Final Income Tax Regulations on Definition of Normal Retirement Age  
and  
Pension Protection Act Provision Permitting In-Service Distributions at Age  
62--SOME NEW REQUIREMENTS, SOME NEW OPPORTUNITIES**  
**(Tony Hart)**

**Background:**

2007 Final Income Tax regulations provide an exception to the general rule that pension benefits be paid only after retirement by permitting a pension plan to commence payment of retirement benefits after the participant has attained normal retirement age even if the participant has not yet had a severance from employment. The Pension Protection Act of 2006 also provides an exception to the general rule by permitting a pension plan to provide that in-service distributions may be made to participants who have reached age 62.

**Potential Problems:**

**A. A normal retirement age prior to age 62.**

The 2007 final regulations require a pension plan's normal retirement age to be no earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed. These regulations provide: (1) a normal retirement age of 62 or later (or age 50 or later if substantially all of the participants of a plan are qualified public safety employees) is deemed to satisfy the requirement, (2) a normal retirement age lower than 55 is presumed not to satisfy the requirement unless the commissioner of Internal Revenue Service determines otherwise on the basis of facts and circumstances, and (3) whether a normal retirement age that is at least 55 but below 62 satisfies the requirement is based on facts and circumstances. Therefore, a normal retirement age prior to age 62 could be a problem since it must meet a facts and circumstance test in determining whether it is reasonably representative of the typical retirement age of the industry in which the plan participants are employed.

**B. A normal retirement date upon completion of a stated number of years of service.**

The IRS has stated that a plan under which a participant's normal retirement age changes to an earlier date upon completion of a stated number of years of service typically will not satisfy the vesting or accrual rules of section 411 of the Code.

A plan may provide benefits based on completion of a stated number of years (such as 30 years of service). However, distribution of such benefits generally could not begin before the earlier of (1) severance from employment, or (2) age 62.

**THE TAKE-AWAY: Review your plans' early retirement features. In certain cases, you may need to take action to change or justify early ages. In other cases, you may want to take advantage of earlier in-service distribution ages than were previously permitted.**

#### **4. Mental Health Parity Provisions Contained in the Emergency Economic Stabilization Act of 2008.**

**(Tim McGraw)**

The Emergency Economic Stabilization Act of 2008 expands the mental health parity requirements for group health plans. The legislation eliminates the sunset provision under which existing provisions would have expired on December 31, 2008, and adds new requirements regarding mental health and substance use disorder benefits that apply for plan years beginning after October 3, 2009 (with a delayed effective date for certain plans maintained pursuant to a collective bargaining agreement). Highlights of the new requirements are set forth below.

- The existing mental health parity provisions that require parity between medical benefits and mental health benefits in the application of annual and aggregate lifetime limits have been expanded to apply to “substance use disorder” benefits.
- Group health plans that offer both medical benefits and mental health or substance use disorder benefits must ensure that deductibles, co-payments, co-insurance, and out-of-pocket expenses that apply to mental health or substance use disorder benefits are no more restrictive than the most common or frequent deductibles, co-payments, co-insurance, and out-of-pocket expenses that apply to substantially all medical benefits covered under the plan. Separate cost-sharing arrangements that apply only to mental health or substance use disorder benefits are not permitted.
- Treatment limitations (including limits on the frequency of treatment, number of visits, days of coverage, etc.) that apply to mental health or substance use disorder benefits may not be any more restrictive than the most common or frequent limitations that apply to substantially all medical benefits covered under the plan.
- The criteria for medical necessity determinations for mental health or substance use disorder benefits must be made available to participants, beneficiaries, or contracting providers upon request.
- The reasons for denial of mental health or substance use disorder benefits must be provided to the participant or beneficiary upon request.
- If a plan provides both medical benefits and mental health or substance use disorder benefits and offers coverage for out-of-network medical benefits, then coverage must also be provided for out-of-network mental health or substance use disorder benefits “in a manner that is consistent with” the parity requirements.
- The “Increased Cost Exemption” applies if the increased cost of applying the parity requirements to mental health and substance use disorder benefits exceeds: (1) 2% of the actual total plan costs in the first plan year in which the parity requirements are applied; and (2) 1% in each of the subsequent plan years.
  - Cost-increase determinations must be made and certified by qualified and licensed actuaries.
  - Plans that qualify for and elect to apply the cost exemption must provide notice to participants, beneficiaries, and the appropriate government agencies or such election.

- “Small Employers” are exempt from the parity requirement. Small Employers include employers that employed an average of at least 2 employees but no more than 50 employees during the preceding calendar year, determined on a controlled group basis.

**THE TAKE-AWAY: Although compliance is generally not required until the 2010 plan year, it is not too early to consider the cost of these new mental health parity provisions to determine whether you can afford to continue to offer mental health benefits in your group medical plan.**

## **5. Reminder About Certain Required Distribution Notices in D.B. and D.C. Plans.**

**(Nancy Keppelman)**

In a continuing effort to prevent participants from spending retirement money before reaching retirement, Congress added a new “notice of consequences of failure to defer” in the Pension Protection Act of 2006. All qualified retirement plans are required to advise participants who are receiving distributions before normal retirement age about the consequences of taking an early distribution, and what they are giving up by failing to defer the distribution until retirement. We advised you of this requirement in early 2007, which at that time required a “reasonable attempt” to draft such a notice.

In October 2008, the IRS issued proposed regulations under Code Section 411(a)(11) regarding this requirement to provide a description of the consequences of failing to defer receipt of a distribution. The proposed regulations provide that notice describing the participant’s right to defer receipt of a distribution must contain the following:

- (1) A description of the federal income tax consequences of failing to defer;
- (2) For defined benefit plans, a statement of the amount payable under the normal form of benefit both upon immediate commencement and upon commencement when the benefit is no longer immediately distributable;
- (3) For defined contribution plans, a statement that some currently available investment options might not be generally available outside the plan and contact information for obtaining additional information on fees and expenses that apply to the participant’s account;
- (4) For defined contribution plans, a statement that fees and expenses (including administrative or investment-related fees) outside the plan may be different than fees and expenses that apply to the participant’s account and contact information regarding such fees and expenses; and
- (5) An explanation of any provisions of the plan, and the provisions of an accident or health plan, that could reasonably be expected to materially affect a participant’s decision whether to defer receipt of the distribution.

There are several other notices a defined benefit pension plan must give participants at the time of a distribution:

- Relative Value Disclosures. Participants must be told the relative value of each of a plan's forms of payment, as compared to the qualified joint and survivor annuity ("QJSA") for married participants. In many cases, each optional form of annuity payment has about the same value as the QJSA, but even so, the plan must tell participants this. If the plan offers a lump sum distribution, the lump sum may not have the same relative value as an annuity form of distribution, particularly if the plan has a generous early retirement annuity and the lump sum is based on the normal retirement benefit. We advised our clients about this requirement when it became effective some years ago.
- Suspension of Benefits Notices. A plan may "suspend" the monthly payments to participants who retire and then return to work after normal retirement age, or who continue to work beyond normal retirement age. If the participant works more than 40 hours in a month, and the employer notifies the participant about the suspension of benefits (in a "suspension of benefits notice"), the plan can "permanently suspend" (never pay) the value of that month's payment. If the plan doesn't give suspension of benefits notices, then when the participant retires on a late retirement date, the participant must receive a pension equal to the greater of the benefit earned to the late retirement date, or the benefit earned to the participant's normal retirement date, actuarially increased to include the value of the monthly payments which were suspended after normal retirement.
  - This is a very old requirement. We've counseled with many of our clients about this notice, which is difficult to administer due to the problems of tracking which participants work beyond normal retirement age and which work at least 40 hours in any month. Those clients pay the "greater of" benefit described above.
  - If you aren't familiar with this requirement, and you have employees who work beyond normal retirement age, it might be advisable to call us, so we can (1) check your defined benefit plan document to see whether you should be giving suspension of benefits notices and (2) counsel with you and your plan administrator about paying the "better of" benefit, if required by the plan or required because no suspension of benefits notices have been given.

This is also a reminder that any plan which offers participants an annuity form of payment, must now offer an alternative to the automatic qualified joint and survivor form of payment for married participants. This is the "qualified optional joint and survivor annuity", which is (1) a joint and 75% to survivor annuity for a plan with a QJSA that has a 50% up to 75% survivor benefit, or (2) a joint and 50% survivor annuity for a plan with a QJSA that has a 75% up to 100% survivor annuity. This qualified optional joint and survivor annuity requirement became effective January 1, 2008 for plans on a calendar year. We advised you of this requirement in a 2007 newsletter and have counseled with some of our clients about implementing this new form of distribution. Plans must be amended by the end of the plan year beginning in 2009 to include this new form of payment.

**THE TAKE-AWAY: We encourage a review of your plan's distribution procedures. The rules are technical and have become moreso over the years. Both forms and procedures must be complete and accurate. Shortcomings can be very costly to correct. It can be pesky when participants, spouses or beneficiaries claim they received inadequate information and, with the benefit of hindsight, want a "do-over" decision. An ounce of prevention is worth pounds of cure here.**

## 6. Cafeteria Plan Regulations

(Tim McGraw)

Your cafeteria plan may need updating for the proposed regulations that were issued last year under Code § 125 and are scheduled to become effective January 1, 2009. We have heard on good authority that the effective date of these regulations will be extended for another year, but we can't bank on that. Either way, it is a good time to review your cafeteria plan for these recent legal changes.

Highlights of the proposed regulations include the following:

- (1) The IRS proposed regulations specify what needs to be in the written plan document, including:
  - Description of benefits
  - Eligibility rules
  - Procedure for making irrevocable elections
  - Change in status events
  - State how contributions are made to plan
  - Maximum amount of elective contributions
  - Plan year
  - Uniform coverage and use-or-lose rules if FSA
  - Specify that only employees may participate
  - Grace period must be written if adopted
  - All provisions must apply uniformly for all participants
- (2) The new IRS regulations specify a method of imputing income for group-term life insurance offered through a cafeteria plan, which method may be different than the one used by your Payroll Department or Payroll service provider.
- (3) The new IRS regulations have formalized the discrimination tests that must be performed annually to demonstrate that the cafeteria plan benefits do not discriminate in favor of your highly compensated employees. The discrimination rules replace a hodge-podge of discrimination rules that have applied to cafeteria plans and constituent plans (medical under 105(h), group life, dependent care, etc.) for decades. This hodge-podge was often overlooked. Once the regulations are finalized, we expect that IRS will be more likely to audit and enforce the cafeteria plan discrimination rules. **Many plan sponsors have rarely, if ever, tested plans for compliance. Failure to do so going forward is likely to carry expensive and disruptive consequences.**
- (4) The new IRS regulations make it clear that non-compliance with the written plan document requirement or the operational compliance requirements, including the nondiscrimination rules, will result in income inclusion for Federal income and employment tax purposes.
- (5) The general effective date for these regulations is for plan years beginning on or after January 1, 2009. However, we have heard whispers that these may be extended until January 1, 2010.

**THE TAKE-AWAY: Clearly, it is time to review your cafeteria plan document, related payroll procedures, and discrimination testing for compliance with the proposed regulations.**

## **7. DOL Forwards New FMLA Regulations to OMB for Approval**

**(Nancy Spezia)**

Earlier this year, the White House imposed on all federal agencies a deadline of November 1, 2008 for the issuance of any new final regulations (while reserving the right to allow exceptions to the deadline). On October 20, 2008, the U.S. Department of Labor ("DOL") forwarded revised Family and Medical Leave Act (FMLA) regulations to the Office of Management and Budget (OMB) for approval. If approved, the regulations could be issued in the next few weeks.

The scope of the DOL regulations forwarded to OMB is unclear. The DOL was preparing final regulations to implement the military family leave amendments to the FMLA. DOL also proposed changes to the existing FMLA regulations in light of case law and statutory developments following the enactment of the original regulations, some 15 years ago. The final FMLA regulations will require FMLA policy updates both as to form and operation.

**THE TAKE-AWAY: Stay tuned!**

## **8. Americans With Disabilities Act – New Law Takes Effect January 1, 2009**

**(Nancy Spezia)**

On September 26, 2008, President Bush signed the ADA Amendments Act of 2008. The amendments refocus ADA on protecting against discrimination in hiring, employment and public accommodation rather than the threshold determination of disability. The new amendments, among other things, expand the definition of disability, eliminate consideration of mitigating measures in determining disability, relax the standard of proof for individuals "regarded as" or perceived to be disabled, and updates the list of activities that constitutes a "major life activity". Going forward, individuals will more easily qualify as disabled. This, in turn, will increase the number of requests for accommodations and possibly disability discrimination claims. That said, to qualify as disabled the individual still must be able to perform the essential functions of the job, with or without accommodation. And it remains the case that a successful ADA claim requires that the individual prove the accommodation was inadequate or that the individual was otherwise discriminated against because of the disability.

**THE TAKE-AWAY:** Human resources personnel should become familiar with these changes. The expanded scope of the ADA will likely result in more employees falling within ADA protections as "individuals with disabilities." It is time to review your employment policies, to include tailored job qualifications and reasonable accommodations standards. This will best position you to avoid running afoul of new legal requirements.

## **9. New Department of Labor Guidance on “Social Investing,” Proxy Voting, and Investment Policy Statements**

**(Andrew Stumpff)**

The Department of Labor (“DOL”) has issued two new Interpretive Bulletins concerning plan fiduciaries’ duties. Interpretive Bulletins § 2509.08-1 and § 2509.08-2, published October 17, focus mainly on the issue of “social investing” by fiduciaries, the practice of taking noneconomic considerations into account in making investment and voting decisions. The Bulletins also contain guidance, however, about investment policy statements, delegation of duties to investment managers, and the importance of documenting fiduciary decisions in writing.

Social investing. ERISA attorneys have for many years debated the extent to which plan fiduciaries may take noneconomic considerations into account when making decisions involving plan assets. For example, the fiduciary of an employer’s retirement plan may prefer to avoid using plan assets to buy shares of the employer’s competitor, despite the fact those shares may be a promising investment. Other examples of “social” or “economically targeted” investing include a plan fiduciary’s preference for investing only in environmentally conscious companies, or unionized employers.

In Interpretive Bulletin § 2509.08-1, the DOL has made its strongest statement yet that economically targeted investing will be permissible only in rare circumstances under ERISA. Starting from the proposition that “ERISA’s plain text does not permit fiduciaries to make investment decisions on the basis of any factor other than the economic interest of the plan,” the DOL concludes that ERISA’s fiduciary standards permit a fiduciary to take noneconomic considerations into account in choosing among alternative investments only if the alternatives are “economically indistinguishable.” Thus, for example, a fiduciary may not decline to invest in a competitor of the sponsoring employer unless there is an alternative investment available that is equal or superior to that investment, under an analysis that includes both quantitative and qualitative factors, such as risk.

Proxy voting. The DOL takes an even stricter view regarding the use of noneconomic factors in proxy voting decisions with respect to shares owned by a plan. This issue comes up in the context of “shareholder activism” campaigns, which can center on a range of issues from executive compensation to global warming. In deciding how to vote, under Interpretive Bulletin § 2509.08-2 a fiduciary must consider “only factors that relate to the economic interest of participants and their beneficiaries in plan assets, and shall not use an investment policy to promote myriad public policy preferences.” Issues on which proxy activism might be appropriate include the appropriateness of executive compensation and a corporation’s policy regarding mergers and acquisitions; but the use of plan assets “to further policy or political issues” would violate ERISA Section 404. Interestingly, the DOL states that if a fiduciary concludes it would be too difficult or expensive to determine which position on a proxy issue would be most to the plan’s economic benefit, the fiduciary should refrain from voting at all.

Investment managers and investment policy statements. The DOL takes the occasion of the Interpretive Bulletins to note that investment duties such as proxy voting may be delegated by plan fiduciaries to investment managers, and to reaffirm that the creation and maintenance of a plan “investment policy statement” is consistent with the fiduciary requirements of ERISA. The DOL reminds fiduciaries that if responsibility for voting has not been delegated to an investment manager, the plan trustee retains that responsibility (subject, in the case of a directed trustee, to the directions of the named fiduciary). The DOL suggests it would be important to include in an investment policy statement, as part of the plan’s general guidelines for plan investments, a statement of proxy voting policy.

**THE TAKE-AWAY:** We recommend that our clients retain third-party fiduciary advisors, and that the advisors at least advise you on proxy voting. Your advisors are in the investment business; this should be part of their advice, and should not become your do-it-yourself project.

Written records. One lesson to be drawn from the new Investment Bulletins is the importance to fiduciaries of maintaining written records of the bases for their decisions. For example, in the case of economically targeted investments, the DOL states that fiduciaries who take noneconomic factors into account “will rarely be able to demonstrate compliance with ERISA absent a written record demonstrating that a contemporaneous economic analysis showed that the investment alternatives were of equal value.”

In light of this new guidance from the DOL (and in general, as good fiduciary practice), plan fiduciaries are well-advised to make sure they have implemented and updated a comprehensive, careful investment policy statement, and that they regularly document, in writing, the basis for all fiduciary decisions made with respect to plan assets.

**THE TAKE-AWAY:** There have been many recent developments in ERISA investment issues for both DB and DC plans. This is an important time to review and update (a) your in-house fiduciary structures (committee charters, etc.) and (b) your third-party agreements with advisors.

## **10. Heroes Earnings Assistance and Relief Tax Act of 2008 (“HEART”)**

### **(Mickey Bartlett)**

The recently enacted Heroes Earnings Assistance and Relief Tax Act of 2008 (“HEART”) provides targeted tax relief for members of the military and their families.

#### **Cafeteria Plan Changes**

Optional Cafeteria Plan Relief from “Use or Lose” Rule. HEART provides members of the military and their families relief from the “use or lose” rule applicable to health flexible spending arrangements (“health FSAs”) by allowing the distribution of unused amounts to reservists ordered or called to active duty for 180 days or more or for an indefinite period. HEART applies to distributions made on or after June 18, 2008. A distribution may not be made before the cafeteria plan is amended to provide for such feature. Please let us know if you would like help adding this provision to your Health Flexible Spending Arrangement.

#### **Retirement Plan Changes**

Survivor Benefits. The HEART Act requires tax-qualified plans, 457(b) plans and 403(b) annuity plans to provide that any benefit (other than benefit accruals relating to the period of military service) that is available to employees who die while actively employed also be available to participants who die on or after January 1, 2007, while performing qualified military service. Examples include accelerated vesting and ancillary life insurance benefits. (This will require a plan amendment by the last day of the plan year beginning in 2010.)

Optional Benefit Accruals. Under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), qualified plans must credit service for vesting and benefit accrual purposes for employees who return to active employment from qualified military service. The HEART Act provides that retirement plans may choose to credit service for benefit accruals for participants who were unable to return from active military service due to death or disability occurring after 2006. Such individuals would be treated as if they had returned to work on the day before death or disability and then had terminated employment on the date of death or disability.

Penalty-free Withdrawals. The HEART Act makes permanent the exemption from the 10% early distribution penalty for distributions to individuals called to active military service for a period of at least 180 days or indefinitely.

Military Differential Wage Payments. Beginning January 1, 2009, differential wages paid by employers to employees who are on active duty in the uniformed services for more than 30 days are subject to income tax withholding and must be treated as compensation for retirement plan purposes. (This will require a plan amendment by the last day of the plan year beginning in 2010.)

Distributions. Effective for plan years beginning after 2008, a participant on military leave for at least 30 days is eligible to receive distributions on account of severance from service while on military leave. This permits receiving a distribution of salary deferrals from a Code Section 401(k), Code Section 403(b), or eligible Code Section 457 plan. Individuals who take such distributions can't make salary deferral contributions for six months after the distribution date.

Retirement Plan Amendments. Plans do not have to be amended until the last day of the 2010 plan year. Governmental plans have different amendment dates.

**THE TAKE-AWAY:** Some of these new provisions are mandatory, others are optional. The mandatory ones become effective in 2009. Please calendar the need for these future amendments, and take these new provisions into account as they become effective.

## **11. Michelle's Law Protects Seriously Ill College Students on Group Health Plans**

**(Mickey [a/k/a "Michelle"] Bartlett)**

Michelle's Law requires that group health plans continue coverage for college students who are covered based on their enrollment in post-secondary education (e.g., on parent's coverage) and who take a medically necessary leave of absence from school. Coverage must be continued until the earlier of one year from the date of the academic absence, or the date on which coverage would otherwise terminate under the plan's terms. Such students must be entitled to the same benefits during the medically necessary leave of absence, as would apply if they had not taken a leave and had continued to be a college student. Any requests for certification of a dependent's student status must contain an explanation of a dependent child's rights under Michelle's Law.

What's not clear at this point is how Michelle's Law will interact with COBRA, a law that protects individuals that lose eligibility for coverage under a group health plan. There's still time for this to unfold though since Michelle's law doesn't take effect until the first plan year beginning on or after October 9, 2009.

**THE TAKE-AWAY:** Please keep this in mind for your 2010 plan year. We hope to have necessary guidance for you in advance of your open enrollment periods next fall.

## **12. Mandatory Medicare Secondary Payer Reporting**

**(Mickey Bartlett)**

Currently, the Center for Medicare and Medicaid Services (CMS) obtains information on other health care coverage by randomly auditing group health plans and through voluntary data sharing agreements (VDSA's) entered into with employers. The Medicare, Medicaid and SCHIP Extension Act of 2007 ("MMSEA") amends the Medicare Secondary Payer (MSP) provisions of the Social Security Act to require mandatory reporting for group health plan arrangements effective January 1, 2009, and for liability insurance (including self-insurance), no-fault insurance, and workers' compensation effective July 1, 2009. Insurers and third-party administrators (or in the case of a group health plan that is self-insured and self-administered, a plan administrator or fiduciary) will be required to submit data to CMS that is needed to identify individuals for whom Medicare is the secondary payer. The penalty for non-compliance is \$1,000 per day per person for which the data should have been submitted.

**THE TAKE-AWAY: Contact your insurers and third party administrators to make sure they will be ready to meet the new reporting requirements by the deadline. Ask them whether they are charging any additional administrative fees for meeting the requirements .**

## **13. Inflation Adjusted Limits for Qualified Plans for 2008**

**(Rebecca Kerr)**

	<b><u>2009</u></b>	<b><u>2008</u></b>
Elective Deferrals 401(k) and 403(b)	\$ 16,500	\$ 15,500
457 Deferral Limit	\$ 16,500	\$ 15,500
Annual Benefit Limit	\$ 195,000	\$ 185,000
Annual Contribution Limit	\$ 49,000	\$ 46,000
Annual Compensation Limit	\$ 245,000	\$ 230,000
Highly Compensated Threshold	\$ 110,000	\$ 105,000
Social Security Cap	\$ 106,800	\$ 102,000
Top-Heavy Key Employee Compensation	\$ 160,000	\$ 150,000
Catch-Up Contributions	\$ 5,500	\$ 5,000
SIMPLE Contributions	\$ 11,500	\$ 10,500
SIMPLE Catch-Ups	\$ 2,500	\$ 2,500

**Please let any of us at Stevenson Keppelman Associates know if you would like additional information regarding any of the items discussed in this communication. This communication does not constitute legal advice, as we must address your specific facts in rendering legal opinions.**