Quarterly Employee Benefits Legal Update

Second Quarter 2012

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This memo highlights statutory, regulatory, agency and case law developments in employee benefits and executive compensation that occurred during the second calendar quarter of 2012. This memorandum was prepared to support our clients' need for information on the issues discussed. Recipients should understand that the memo is not intended to address any specific client issue, does not purport to cover every employee benefit related development, and is not a substitute for legal, accounting, actuarial or other professional advice.

Tax Qualified Retirement Plans

A. Individual Account Plans (Including 401(k) Plans)

1. **DOL: 401(k) Plan Adopted by Unrelated Employers Is Not a "Multiple Employer Plan" Under ERISA.** On May 25, 2012, the U.S. Department of Labor (DOL) issued Advisory Opinion 2012-04A, which addressed whether a 401(k) plan established and operated by a limited purpose corporation and adopted by over 500 unrelated employers constituted a "multiple employer plan" under the Employee Retirement Income Security Act of 1974, as amended (ERISA). The limited purpose corporation signed the plan's Form 5500s as the "plan sponsor" and acknowledged that it was the plan's "named fiduciary" under ERISA. Under the plan's participation agreement, the adopting employers agreed to co-sponsor the plan and delegated full responsibility for plan administration to a registered investment advisory firm. The limited purpose corporation and registered investment advisory firm retained the authority to terminate any employer's participation in the plan. In light of these facts, the DOL ruled that the plan was not a single "multiple employer plan," but rather an arrangement under which each participating employer maintained a separate plan for its own employees subject to ERISA's fiduciary, reporting and disclosure requirements. For a plan to be considered a multiple employer plan, it must be established by a bona fide group or association of employees to benefit the employees of the group or association. In this case, the DOL determined that the adopting employers did not collectively constitute a "cognizable group or association of employers" because there was no "employment based common nexus or other genuine organizational relationship that is unrelated to the provision of benefits." The mere execution of identically worded participation and trust agreements was not sufficient. Employers should be aware of the DOL's position on this issue when considering the adoption of a plan purported to be a multiple employer plan.

B. Government and Not-for-Profit Plans (403(b)/457(b))

1. **403(b) Plans Funded Solely with Employee Deferrals May Be ERISA Plans if Offered in Conjunction with a Qualified Pension or 401(k) Plan.** On May 25, 2012, the DOL issued Advisory Opinion 2012-02A, addressing the use of an exemption from ERISA for certain plans maintained under Section 403(b) of the Internal Revenue Code (the "ERISA Exemption"). 403(b) plans are generally subject to ERISA's fiduciary, reporting and disclosure requirements unless:

a. The plan is funded entirely by employee salary deferrals;

b. Employee participation is completely voluntary;

c. All rights under the annuity contract or custodial account are enforceable solely by the employee or beneficiary;

d. The employer's involvement is limited to certain specified activities; and

e. The employer receives no direct or indirect compensation other than reasonable reimbursement to cover expenses incurred in performing its duties pursuant to the salary reduction agreements.

In Advisory Opinion 2012-02A, the DOL stated that a 403(b) plan that satisfied the conditions of the ERISA Exemption would nevertheless constitute an ERISA plan if the employer also maintained a Code Section 401(a) qualified plan (such as a 401(k) plan or money purchase plan), and conditioned employer matching contributions under the 401(a) plan on the employee's salary deferrals to the 403(b) plan. The DOL reasoned that such an arrangement would be inconsistent with the "limited employer involvement" and "completely voluntary" requirements of the ERISA Exemption.

C. Traditional Pension Plans

1. **New Law Includes Pension Funding Stabilization and PBGC Premium Increases.** On July 6, 2012, President Obama signed into law the Moving Ahead for Progress in the 21st Century Act (the "MAP-21 Act"), which includes funding stabilization provisions and Pension Benefit Guaranty Corporation (PBGC) premium increases for single-employer defined benefit plans. The MAP-21 Act took effect immediately.

   The funding stabilization provisions are intended to reduce plan sponsors' minimum required contributions. This is accomplished by establishing a "corridor" for the interest rate used to calculate a plan's liabilities and funded status. Specifically, for plans using 24-month average segment interest rates to determine funded status, the interest rate must be within a fixed percentage (i.e., the "corridor") of the 25-year average of prior segment rates. The corridor (10% for 2012, increasing by 5% per year until it caps at 30% in 2016) is expected to increase the interest rates used to value liabilities for funding purposes, resulting in lower required contributions. The MAP-21 Act also requires that the annual funding notice provided to participants for 2012 through 2014 describe the impact of the funding stabilization rules.

   The MAP-21 Act also provides for increases in (i) PBGC flat-rate premiums from $35 per participant in 2012 to $42 per participant in 2013 and $49 per participant in 2014 (and indexed for inflation thereafter), and (ii) PBGC variable-rate premiums from $9 per $1,000 of unfunded vested benefits ("UVBs")) to $13 per $1,000 of UVBs in 2014 and to $18 per $1,000 of UVBs in 2015. (with potential additional annual increases for inflation beginning in 2013). The MAP-21 Act also established a cap on the variable rate premium of $400 per participant in 2013, adjusted for inflation.

In addition, the MAP-21 Act extends the deadline by which over-funded plans may transfer surplus assets to retiree health accounts from December 31, 2013 to December 31, 2021.

2. **IRS Guidance on Participant Notices of Funding-Based Benefit Restrictions.** ERISA Section 101(j) requires a plan administrator to notify defined benefit plan participants within 30 days after the plan becomes subject to the funding-based restrictions under Code Section 436 (e.g., restrictions on lump sums or other "prohibited payments," early retirement subsidies for participants terminated due to a facility closure, or future accruals). On July 3, the IRS issued Notice 2012-46, which contains Q&As regarding the funding-based restrictions notice requirement, as well as a sample notice. Notice 2012-46 includes the following:

   a. The required content of a Section 101(j) notice.

   b. For each type of funding-based restriction, the date from which the applicable 30-day notification period is measured.

   c. A requirement to provide a notice to affected participants when restrictions on "prohibited payments" (e.g., lump sums) cease to apply in certain circumstances.

   d. There is no requirement to notify a participant of restrictions on prohibited payments if he or she commenced payment before funding-based restrictions take effect.

3. **IRS Proposed Regulations That Would Allow Plan Sponsors in Bankruptcy to Eliminate Prohibited Payment Options.** Under Code Section 436, a single employer defined benefit plan of a plan sponsor in bankruptcy cannot pay any "prohibited payments" if the plan is less than 100% funded. On June 20, 2012, the IRS issued proposed regulations that permit such a defined benefit plan to be amended to eliminate any prohibited payment forms (e.g., lump sums) without violating the anti-cutback requirements of Code Section 411(d)(6) if the following conditions are satisfied:

   a. The plan's enrolled actuary certifies that the plan is less than 100% funded for the plan year during which the amendment is adopted;

   b. The plan cannot make prohibited payments because the plan sponsor is in bankruptcy;

   c. The bankruptcy court issues an order, after notice to affected parties (including plan participants, applicable unions and the PBGC) and a hearing, that eliminating the optional form of payment is necessary to avoid a distress or involuntary termination of the plan before the plan sponsor emerges from bankruptcy; and

   d. The PBGC issues a determination that eliminating the optional form of payment is necessary in order to avoid a distress or involuntary termination of the plan before the plan sponsor emerges from bankruptcy, and the plan's funding is not sufficient for guaranteed benefits.

The IRS has scheduled a hearing on the proposed regulations on August 24, 2012. The IRS has proposed that the regulations will apply to amendments adopted and effective after August 31, 2012.

4. **Plan Sponsors Exploring Pension Plan De-Risking Strategies.** Driven by concern about the impact of fluctuations in the interest rate used to value pension liabilities on the funded status of defined benefit plans, plan sponsors are exploring options for shedding as much of those liabilities as possible. The following are some of the de-risking strategies plan sponsors may wish to consider:

   a. **Adding lump sums.** Ford Motor Company and General Motors (GM) recently offered a voluntary lump sum option to terminated vested participants and/or in-pay retirees who elect that option within a window period. Other plan sponsors are adding a lump sum distribution option. Some plan sponsors are adding lump sums, but only to the extent a participant's lump sum does not exceed a fixed dollar amount. Please note, if a lump sum is offered to terminated vested participants who are not otherwise eligible to commence payment, immediate qualified joint and survivor annuity (QJSA) and qualified optional survivor annuity (QOSA) options must also be offered.

   b. **Purchasing fully-funded group annuity contract for existing retirees.** GM also announced that it purchased a group annuity contract to provide benefits to existing retirees.

   Because these de-risking strategies eliminate a pension plan's responsibility for benefits (either by paying out the entire benefit or transferring it to an insurance company for future payment), they also may result in additional administrative cost savings. However, these strategies would not be available if a plan is less than 80% funded or would become less than 80% funded after shedding such liabilities.

Health and Welfare Plans

A. Health Care Reform

1. **Supreme Court Upholds Affordable Care Act's Individual Mandate; Limits Medicaid Enforcement Mechanism.** On June 28, 2012, the Supreme Court released the long-awaited decision in *State of Florida v. U.S. Department of Health and Human Services* – the challenge to the Affordable Care Act. The Court concluded that:

   a. The Anti-Injunction Act does not bar the Court from issuing an opinion on the constitutionality of the individual mandate;

   b. The individual mandate is constitutional under Congress' specifically enumerated Constitutional power to "lay and collect" taxes;

   c. Congress cannot revoke state Medicaid funding in its entirety as a penalty for failure to comply with the Affordable Care Act's Medicaid expansion.

For more information, see **http://www.seyfarth.com/publications/MA062912**.

2. **Determining Whether a Plan Provides Minimum Value.** The Affordable Care Act requires employers with more than 50 full-time equivalent employees to either provide employees with "minimum essential coverage" or pay a penalty. Moreover, the coverage must (a) be affordable (measured by employee premium costs), and (b) provide minimum value (measured by cost sharing and benefits offered). The Affordable Care Act defined minimum value as a plan that covers at least 60% of the actuarial value of health costs. IRS Notice 2012-31 proposes three alternate ways for employers to determine whether their plans provide "minimum value," as required under the Affordable Care Act -- a calculator, actuarial certification or use of a safe harbor checklist. For more information, see **http://www.seyfarth.com/publications/MA050212**.

3. **Calculating and Paying the Comparative Effectiveness Fee.** The Affordable Care Act imposes a "comparative effectiveness fee" on all insurers and sponsors of group health plans for plan years ending on or after October 1, 2012 (meaning calendar year plans are subject to the fee starting in 2012). The fee, which is intended to pay for governmental research comparing the clinical effectiveness of various medical treatments, amounts to $1 per covered life in the first year, and $2 per covered life in each subsequent year. (The fee sunsets in 2018). Recently proposed IRS regulations clarify how to determine what types of coverage trigger the fee, how to calculate covered lives, and how to pay the fee. For more information, see **http://www.seyfarth.com/publications/MA050912**.

4. **IRS Provides Transition Relief for $2,500 FSA Cap; Delays Amendment Deadline.** Beginning January 1, 2013, the Affordable Care Act limits contributions to a health care flexible spending arrangement (FSA) to $2,500 per year, as adjusted for inflation in subsequent years. The Affordable Care Act left some confusion as to whether the FSA cap was effective for plan years or calendar years beginning after December 31, 2012. Recent IRS guidance clarifies that the cap is effective for plan years beginning after December 31, 2012, meaning off-calendar year plans have a delayed effective date. For more information, see **http://www.seyfarth.com/publications/MA060112**.

5. **HHS Releases Report on Medical Loss Ratio Rebates – Rebates Expected Beginning August 1, 2012.** Employers sponsoring a fully-insured group health plan or benefit option (e.g., an HMO option) could receive a rebate from the insurance policy issuer as soon as August of this year, under the Affordable Care Act's new medical loss ratio rules. The U.S. Department of Health and Human Services (HHS) recently released a report providing a breakdown of this year's rebates. For the full report, see **http://www.healthcare.gov/law/resources/reports/mlr-rebates06212012a.html**. For more information on medical loss ratio rebates generally, see **http://www.seyfarth.com/publications/MA021012**.

B. HIPAA Privacy and Security

1. **Health Plan Identifiers for Electronic Transactions.** HHS has issued proposed regulations requiring health plans (and business associates) to obtain and use a unique health plan identifier (HPID) when a health plan is identified in a standard transaction.

The purpose of the HPID is to reduce administrative costs by easing the identification of parties involved in electronic transactions. The HPID will be a 10-digit code, similar to a credit card number. The regulations also create other entity identifiers (OEIDs), for entities that are not health plans or providers, such as third-party administrators, that may need to be identified in standard transactions. Health plans would be able to obtain HPIDs, and other entities would be able to obtain OEIDs, beginning October 1, 2012. If finalized, the regulations would require health plans to use HPIDs in standard transactions beginning October 1, 2014 (October 1, 2015 for small plans).

The proposed regulations require "controlling health plans" to obtain a HPID. (Use of OEIDs would likely be voluntary.) Controlling health plans could also obtain HPIDs for its "subhealth plans." A controlling health plan is defined as a health plan that:

a. controls its own business activities, actions or policies; or

b. is controlled by an entity that is not a health plan, and if it has a subhealth plan, exercises sufficient control over the subhealth plan to direct its business activities, actions or polices.

(A subhealth plan is defined as a health plan whose business activities, actions or policies are directed by a controlling health plan.)

Employer-sponsored group health plans would likely always be controlling health plans. Further guidance may be necessary to determine whether account-based arrangements, such as health flexible spending accounts or health reimbursement arrangements, will also be required to obtain an HPID.

2. **HIPAA Audits Underway – Protocols Posted.** The U.S. Department of Health and Human Services, Office of Civil Rights (OCR) enforces the privacy and security rules set forth in HIPAA. In 2011, OCR instituted a pilot audit program whereby OCR began analyzing the HIPAA processes, controls and policies in place for selected covered entities, but not business associates. Having started pilot audits last November, on June 26, 2012, OCR posted the protocol(s) it will use to conduct future audits, which will eventually be expanded to include business associates. For their website and these protocols, see **http://ocrnotifications.hhs.gov/hipaa.html**.

   The protocols list the performance criteria on which OCR will focus and the audit procedures OCR will follow when auditing a covered entity's compliance with the security rules, the breach notification rules, and the privacy rules. Under the audit procedures OCR will interview management and members of the workforce, and request and review HIPAA privacy and security documents.

3. **HIPAA Breach Results in $1.7 Million Penalty Settlement.** In addition to auditing covered entities for compliance with HIPAA, OCR investigates breach reports submitted to OCR by covered entities and business associates, as required by law. The Alaska Department of Health and Social Services (DHSS) submitted a breach report to OCR, which triggered an investigation. DHSS reported that a portable electronic storage device

possibly containing electronic-PHI (ePHI) had been stolen from a vehicle of a DHSS employee. After investigating, OCR determined that DHSS did not have adequate policies and procedures in place to safeguard PHI. DHSS recently agreed to pay $1,700,000 to settle the potential violations of the HIPAA security rules. As part of the settlement, DHSS also agreed to comply with a "Corrective Action Plan," whereby DHSS was required to develop and distribute written security policies, obtain certification from all employees who have access to ePHI that they have read and understand the policies, update the security policies at least annually, train all employees who have access to ePHI at least annually on the security policies, and obtain certification from all trained employees that they have received training.

4. **More HIPAA Guidance Coming Soon.** In early June, OCR indicated that it was "extremely close" to publishing a final omnibus HIPAA rule, which was expected to include a final breach notification rule, a final enforcement rule, a final rule implementing changes to the privacy and security standards, and a final rule modifying HIPAA's privacy rule in accordance with the Genetic Information and Discrimination Act. The omnibus rule was sent to the White House Office of Management and Budget (OMB) on March 26, 2012 for review, and the review process usually takes 90 days. Nevertheless, and despite OCR's intention to implement a permanent audit program by December, the OMB announced on June 22, 2012 that it is extending its review of the omnibus rule to an unspecified date in the future.

C. Retirees

1. **Sixth Circuit Finds Employer Liable for Retiree Medical Benefits Provided Under the Predecessor Employer's Collective Bargaining Agreement.** The Sixth Circuit, in the case of *Bender v. Newell Window Furnishings Inc.*, No. 11-1335, 2012 U.S. App. LEXIS 9003, (6th Cir. May 3, 2012), affirmed a U.S. District Court, Western District of Michigan opinion finding Newell Window Furnishings, Inc. (Newell) liable as a successor employer for vested retiree medical insurance and Medicare Part B premium reimbursements to certain retirees. The plaintiffs were bargaining-unit members subject to various collective bargaining agreements with a predecessor employer. Newell became their employer after several changes in ownership. The court noted that "a successor corporation generally is not liable for its predecessors' liabilities unless expressly assumed." However, after examining the collective bargaining agreements, transfer agreements, internal memos and other evidence, the court determined that Newell expressly assumed the predecessor employer's obligation under the collective bargaining agreements to provide vested retiree benefits when it acquired the company. The court also determined that the collective bargaining agreements and extrinsic evidence of Newell's communications to certain employees demonstrated that these employee groups became vested in retiree medical insurance and/or Medicare Part B premium reimbursements upon retirement.

D. State Law Issues/Preemption

1. **Proposition 8 Ruled Unconstitutional by the Ninth Circuit.** On February 7, 2012, the Ninth Circuit affirmed in part a U.S. District Court, Northern District of California decision that Proposition 8 violated the 14th Amendment of the U.S. Constitution. The court held that in amending the California Constitution to eliminate the previously guaranteed right of same-sex couples to marry, Proposition 8 violated the 14th Amendment. The court further held that California voters violated the Equal Protection Clause "by using their initiative power to target a minority group and withdraw a right that the minority group possessed without a legitimate reason for doing so." The judgment was stayed pending appeal. On June 5, 2012, the Ninth Circuit denied a request for a rehearing en banc; however, the case is likely headed to the Supreme Court.

2. **Two More Courts Rule That DOMA is Unconstitutional.** Following on the heels of the Northern District of California's decision in *Golinski v. United States Office of Personnel Management,* two more cases have found the Defense of Marriage Act (DOMA) is unconstitutional based on the equal protection clause. On May 24, 2012, Judge Claudia Wilken of the U.S. District Court for the Northern District of California applied the rational basis test to evaluate the definitions of "marriage" and "spouse" contained Section 3 of DOMA in *Dragovich v. U.S. Department of the Treasury et al.* In ruling that DOMA unconstitutionally discriminates against same-sex spouses by denying them long-term care insurance through a California public-employee pension program (CalPers), the court found that the legislative record contained evidence of anti-gay animus and that the Bipartisan Legal Advisory Group (BLAG), which is defending the case, failed to establish that Section 3 of DOMA is rationally related to a legitimate government interest. Accordingly, Judge Wilken found that Section 3 of DOMA was invalid under the U.S. Constitution's equal protection principles. BLAG has appealed the decision to the Ninth Circuit.

   On May 31, 2012, the U.S. Court of Appeals for the First Circuit held in *Massachusetts v. United States Department of Health & Human Services* that Section 3 of DOMA is unconstitutional under the Equal Protection Clause. However, the court also entered a stay of its decision pending possible review by the U.S. Supreme Court.

Multiemployer Plans/Taft Hartley

A. Traditional Pension

1. **IRS Tax Forum Addresses Extrinsic Documents and Determination Letters.** In a nationwide tax forum, the IRS discussed multiemployer plans that incorporate plan terms into the plan document by reference to ancillary documents, such as collective bargaining agreements and reciprocity agreements. The IRS noted that if a plan which incorporates certain terms by reference receives a favorable determination letter, the letter does not allow the plan to rely on any portions of the document that have been incorporated, unless the exact language of the sections that are being incorporated by reference have been appended to the document as part of the determination letter filing.

2. **U.S. House of Representatives Holds Hearing Regarding Multiemployer Pension Plans.** A subcommittee of the U.S. House of Representatives held a hearing on June 20, 2012, to discuss the challenges facing multiemployer pension plans. Several provisions added by the Pension Protection Act of 2006 (PPA) are set to expire in 2014, which means Congress will need to take action before then. Two issues that were discussed were what to do with liabilities associated with participants whose employers have withdrawn from the plan, and how to address participant demographic changes due to a greater number of retirees.

Executive Compensation

A. Public Company Disclosure

1. **Listing Standards and Disclosure Requirements Regarding Compensation Committees and Compensation Consultants.** On June 20, 2012, the Securities and Exchange Commission (SEC) adopted final rules under the Dodd-Frank Act to: (1) require national securities exchanges to adopt listing standards regarding the composition and independence of listed issuers' compensation committees, as well as the appointment, independence, compensation and oversight of listed issuers' compensation advisers, and (2) require all issuers subject to the SEC's proxy rules to disclose conflicts of interest relating to their use of compensation consultants.

   Once the exchanges' proposed listing standards and requirements under the new rules are approved by the SEC and implemented by the exchanges, issuers will have to comply with such standards and requirements in order for their shares to continue trading on applicable exchanges. The final rules require the exchanges to provide appropriate procedures for listed issuers to have a reasonable opportunity to cure any compliance defects prior to being delisted by an applicable exchange. For a more complete summary, see **http://www.seyfarth.com/publications/MA070212**.

2. **Say-on-Pay Litigation Update.** Recently, defendants (and prospective defendants) have received some additional good news on the say-on-pay litigation front, when several say-on-pay cases were dismissed. *See*, *e.g.*, *Ironworkers Local No. 25 Pension Fund v. Bogart*, Case No. 11-4604 PSG (N.D. Cal. June 13, 2012) (dismissed for failing to make a pre-suit demand on the company's board of directors); *Jacobs Engineering Group Inc. Consolidated Shareholder Derivative Litigation,* LASC Case No. BC454543 (Los Angeles Sup. Ct. March 6, 2012) (dismissed for failing to make a pre-suit demand on the company's board of directors, and because the Dodd-Frank Act did not create a binding obligation on the board of directors through the institution of say-on-pay voting).

   These results certainly put boards with a failed say-on-pay vote in a better position to defend litigation. However, at least one such case has survived a motion to dismiss and several significant settlements. Further, the substantive law on the issue (while developing in defendants' favor) has yet to be settled. Accordingly, a failed say-on-pay vote not only presents shareholder relations issues, but may present litigation risk. In fact,, two new say on pay lawsuits were filed, alleging that boards of directors breach their fiduciary duties by (i) making materially misleading statements in proxy discussions of pay-for-performance policies, and (ii) failing to respond to negative say-on-pay votes. See, *Moskal v. Pandit* (S.D.N.Y. April 19, 2012) (Citigroup); and *Lucas v. Kratz* (Harris Co., TX May 4, 2012) (Helix Energy Solutions Group).

B. Equity Compensation

1. **Corporate Waste.** As a reminder that excess pay lawsuits pre-date Dodd-Frank and are not dependent on its say-on-pay provisions, a Delaware court recently denied a defendant's motion to dismiss a shareholder derivative suit that alleged that a company's board of directors wasted corporate assets by granting themselves time-vesting restricted stock units. The court found that the stock incentive plan under which the units were granted did not afford the directors protection under the business judgment rule, but instead found that the grants must be reviewed for fairness. The court reached to this conclusion despite the fact that the shareholders had approved the stock incentive plan and there was no indication that the grants violated the shareholder-approved terms. See, *Seinfeld v. Slager*, (Del. Ch. June 29, 2012).

C. Tax Issues

1. **Substantial Risk of Forfeiture under Code Section 83.** On May 29, 2012, the IRS issued proposed regulations under Code Section 83 to clarify the definition of "substantial risk of forfeiture," but many of the concepts were already understood by practitioners or have limited practical impact. Under the proposed regulations:

   a. Only two conditions can constitute a substantial risk of forfeiture: (1) conditions that require the individual to remain employed for a specified period of time and (2) conditions that are related to the purpose of the transfer (e.g., performance criteria).

   b. Companies must consider the likelihood of the forfeiture event occurring and the likelihood of enforcing the forfeiture when determining whether a substantial risk of forfeiture exists (i.e., illusory forfeiture conditions are not effective).

   c. A transfer restriction does not constitute a substantial risk of forfeiture. Accordingly, and for example, neither contractual restrictions, restrictions under Rule 10b-5 of the Exchange Act, lock-up agreements, nor insider trading compliance programs will create a substantial risk of forfeiture.

   d. A Section 16 of the Exchange Act restriction will constitute a substantial risk of forfeiture where an option grant constitutes a non-exempt purchase under Section 16 and the optionee sells the underlying stock within six months of the date the option is granted. This circumstance is rare, and therefore, this guidance is of limited use in practice.

2. **Section 83(b) Election.** When an employee receives substantially nonvested property (e.g., restricted stock) from his or her employer, the employee is generally subject to income taxes on the date the property vests. The employee, however, may elect to pay the taxes immediately upon receiving the nonvested property by filing a "Section 83(b)

Election." To assist employees in making an election and understanding its tax consequences, on June 26, 2012, the IRS published Revenue Procedure 2012-29. This revenue procedure contains a sample Section 83(b) Election and a series of examples demonstrating the tax consequences of such an election. Companies transferring restricted stock and other nonvested property to their employees may wish to consult Rev. Proc. 2012-29 when explaining the tax consequences of such restricted stock and the Section 83(b) Election.

3. **Dividend and Dividend Equivalents Under Code Section 162(m).** On June 21, 2012, the IRS issued Revenue Ruling 2012-19. The ruling affirmatively states that dividends and dividend equivalents paid on restricted stock or restricted stock units are separate items of compensation for purposes of the performance based exemption to the Code Section 162(m) tax deduction limits. Accordingly, if a company provides restricted stock or restricted units that vest upon appropriate performance criteria and are thus exempt from the tax deduction limits, the company must still evaluate whether any dividends or dividend equivalents are exempt. If the dividends or dividend equivalents are only paid upon satisfaction of the valid performance criteria, then they will also be exempt from the Code Section 162(m) tax deduction limits. If, however, the dividends or dividend equivalents are paid regardless of the performance criteria, such amounts must be applied toward the tax deduction limits.

D. International Issues

1. **FBAR Filing Obligations for Certain Employees and Officers with Signature Authority Over Foreign Financial Accounts**. Generally, a United States person who has a financial interest in or signature authority over any financial account in a foreign country must file an Report of Foreign Bank and Financial Accounts (FBAR or U.S. Treasury Form TD F 90-22.1) if the aggregate value of the account exceeds $10,000 at any time during the calendar year. This requirement generally requires that officers and/or employees of a company with signatory authority over certain financial accounts file an FBAR. Employees or officers with signature authority over certain foreign pension plan accounts may be required to file an FBAR.

   As we mentioned in our Quarterly Employee Benefits Legal Update for First Quarter 2012, the deadline to file an FBAR for a calendar year is June 30 of the succeeding calendar year. Accordingly, the deadline for 2011 has expired. For more information, see **http://www.seyfarth.com/publications/MA062812**.

Fiduciary

A. Service Provider Disclosures

1. **New Guidance Relating to Retirement Plan Brokerage Windows.** On May 7, 2012, the DOL issued Field Assistance Bulletin 2012-02 (FAB). The FAB provides new information on participant fee disclosures relating to brokerage windows and plans with large numbers of mutual funds. In particular, Q&A 30 of the FAB provides that, if a significant number of participants or beneficiaries use the brokerage window, the plan

fiduciary has an obligation to examine the underlying investments of the brokerage window and determine whether any such investments should be treated as a Designated Investment Alternative (DIA) for which substantial disclosures must be made to participants and beneficiaries. In addition, the FAB suggests that the failure to designate a manageable number of DIAs raises questions as to whether a fiduciary has satisfied its duties.

The guidance given by the DOL in the FAB is vague, and benefit practitioners are now awaiting additional guidance, which the DOL has said is forthcoming with respect to this requirement. However, it appears that one of the purposes of this new requirement is to prevent employers from avoiding the participant fee disclosure obligations by offering a brokerage window in lieu of DIAs.

2. **Failure to Receive Necessary Fee Disclosures from Service Providers.** On February 2, 2012, the DOL issued final regulation section 2550.408b-2(c) (the "Regulation"), regarding required disclosure of fee-related information by service providers to plan fiduciaries. For more information, see **http://www.seyfarth.com/publications/MA020812**. The Regulation requires that plan fiduciaries receive the necessary disclosure from specified service providers by July 1, 2012. The plan fiduciary and service provider are deemed to have engaged in a prohibited transaction if the service provider failed to disclose the required information by the required date.

   If a plan fiduciary has determined that it has not yet received the proper disclosures, the Regulation provides relief from the prohibited transaction and related excise tax if the following conditions are satisfied:

   a. The fiduciary did not know that the service provider would fail to make the required disclosures.

   b. The fiduciary requests in writing the applicable disclosure information.

   c. If the information is not furnished, the fiduciary must notify the DOL not later than 30 days following the earlier of: (i) the service provider's refusal to furnish the requested information; or (ii) the date which is 90 days after the written request is made.

   d. The fiduciary promptly terminates the contractual arrangement with the service provider.

Looking Ahead

A. Tax Qualified Retirement Plans

1. **Participant Fee Disclosures.** For calendar year plans, the deadline by which plan administrators of participant-directed individual account plans (including 401(k) plans) must provide initial fee disclosures to participants and beneficiaries to satisfy ERISA's

fiduciary standards is now August 30, 2012. Thereafter, quarterly updates must be furnished by plan administrators no later than 45 days after the end of each quarter. For calendar year plans, the first quarterly update will be due by November 14, 2012. For more information, see **http://www.seyfarth.com/publications/MA020812**.

2. **Required Amendment for PPA Funding-Based Benefit Restrictions.** The deadline for amending defined benefit plans to comply with the PPA's funding-based restrictions is December 31, 2012. The IRS issued Notice 2011-96, which contains a model amendment that defined benefit plan sponsors may adopt to comply with the benefit restrictions for underfunded plans, as added by the PPA and detailed in Treasury regulations under Code Section 436. The model amendment contains provisions applicable to all defined benefit plans, as well as several optional provisions (as described in Seyfarth's Quarterly Employee Benefits Legal Update for First Quarter 2012). Plan sponsors should consider with counsel what changes to the model amendment may be appropriate for their plan.

B. Health and Welfare

Plan sponsors must distribute or make available a Summary of Benefits & Coverage ("SBC") for each group health plan's benefit package for any open enrollment beginning on or after September 23, 2012. For calendar year plans, this means for the 2013 open enrollment period commencing this fall. The DOL has provided a template SBC that must be followed, in order for purchasers of health care coverage to be able to effectively compare plan options. For more information, see
http://www.seyfarth.com/publications/Summary-of-Benefits-and-Coverage,
http://www.seyfarth.com/publications/MA021312,
and **http://www.seyfarth.com/publications/MA032312**.

C. Executive Compensation

We continue to wait for SEC guidance on a host of Dodd-Frank requirements, including clawbacks and the requirements for disclosing CEO pay in comparison to median company pay.