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Latest Posts

06.26.2018 **Cyber Liability Insurance for Employee Benefit Plans: Hackers and Malware and Phishing – Oh My!**
By Laura L. Fischer

Cyberattacks have managed to invade all walks of life, and employee benefit plans are no exception. When a plan is attacked, the fallout can be overwhelmingly expensive and burdensome to correct. Many plan sponsors are purchasing cyber liability insurance coverage to supplement their data security measures. Understanding those policies – and their exclusions – is important for sponsors who are exploring such coverage.

05.23.2018 **Federal Appellate Court Decision Highlights Importance of "Firestone" Language**
By Kenneth A. (Ken) Mason

In a recent decision, the Sixth U.S. Circuit Court of Appeals resolved an important question in a way that should put administrators of ERISA plans in a far stronger position vis-à-vis claimants who disagree with the administrators' plan interpretations. Essentially, the court in *Clemons v. Norton Healthcare Retirement Plan* held that the contract-interpretation doctrine of "*contra proferentum*" has no application once a court has determined that a plan document grants the administrator the type of broad discretion approved by the U.S. Supreme Court in its 1989 *Firestone*decision.

05.21.2018 **Health Plans' Anti-Assignment Clauses Upheld by Two More Federal Appellate Courts**
By Robert A. Browning

Over the past two months, the United States Court of Appeals for both the Ninth Circuit and the Third Circuit have upheld "anti-assignment" clauses in ERISA-governed health plan documents. These holdings – which adopt the same position previously taken by the First, Second, Fifth, Tenth, and Eleventh circuits – are a blow to healthcare providers that attempt to bring suits against employer-sponsored health plans (or the insurance companies funding benefits under those plans) as "assignees" of individual plan participants.

04.25.2018 **The SEC's Fiduciary Proposal – Form CRS**
By Beth Miller

On April 18, the Securities and Exchange Commission issued a proposal package that includes two new rules and one interpretative release. The package consists of three components – Regulation Best Interest, Investment Adviser Standard of Conduct Interpretation, and Form CRS – Relationship Summary. According to the SEC, the proposal is intended to balance investor protections and regulatory requirements with investor access and choice. Each component of the proposal is available for public comment for 90 days after publication in the Federal Register.

In a series of three articles, Spencer Fane LLP describes the SEC's proposal and potential impacts on broker-dealers and investment advisers. This third article describes the Form CRS – Relationship Summary portion of the SEC's fiduciary proposal.

04.24.2018 **The SEC's Fiduciary Proposal – Investment Adviser Standard of Conduct**
By Beth Miller

The Securities and Exchange Commission voted on April 18 to issue a proposal package that includes two new rules and one interpretative release. According to the SEC, each component of the proposal – Regulation Best Interest, Investment Adviser Standard of Conduct Interpretation, and Form CRS – Relationship Summary – is intended to enhance investor protections and regulatory clarity while maintaining investor access and choice. Each part of the SEC's proposal is available for public comment for 90 days after publication in the Federal Register.

In a series of three articles, Spencer Fane LLP describes the SEC's proposal and potential impacts to broker-dealers and investment advisers. This second article describes the Investment Adviser Standard of Conduct Interpretation.

04.23.2018 **The SEC's Fiduciary Proposal – Regulation Best Interest**
By Beth Miller

In an open meeting on April 18, the Securities and Exchange Commission voted four to one to issue two new rules and one interpretative release that are intended to provide investor protections and regulatory clarity, as well as investor access and choice. Specifically, the SEC issued Regulation Best Interest, Investment Adviser Standard of Conduct Interpretation, and Form CRS – Relationship Summary. Each component of the SEC's proposal is available for public comment for 90 days after publication in the Federal Register. In a series of three articles, Spencer Fane LLP describes the SEC's proposal and potential impacts on broker-dealers and investment advisers. This first article describes the Regulation Best Interest portion of the SEC's fiduciary proposal.

03.21.2018 **Here We Go Again… Fifth Circuit Strikes Down DOL's Fiduciary Rule**

By Gregory L. Ash

In a significant blow to the Department of Labor's controversial regulation re-defining what constitutes an investment-advice fiduciary, a split three-judge panel of the Fifth Circuit Court of Appeals ruled on March 15 that the DOL exceeded its authority when creating the rule. The 2-1 decision of the appellate court strikes down the regulation and its associated prohibited transaction exemptions in their entirety. (*Chamber of Commerce v. U.S. Dept. of Labor* (5th Cir. March 15, 2018)). In its wake, the court's decision leaves even more of the confusion that has plagued the DOL's 2016 rulemaking.

03.08.2018 **Investment Advisers and Conflicts Of Interest**

By Beth Miller

The Department of Labor and the Securities and Exchange Commission have expressed concerns regarding potential conflicts of interest that investment advisers do not explicitly disclosed. Thus, plan fiduciaries may not be aware of such conflicts when they engage and monitor their plan's investment consultant. These concerns were recently highlighted when the SEC launched an initiative in connection with investment advisers' selection or recommendation of a higher-cost mutual fund share class for their clients when a lower-cost share class of the same fund is available. The SEC's initiative reminds plan fiduciaries of the importance of obtaining appropriate information to fulfill their fiduciary obligations when engaging and monitoring investment advisers.

02.20.2018 **SEC Launches Share Class Selection Disclosure Initiative**

By Beth Miller

The Securities and Exchange Commission recently announced a temporary program for investment advisers who may have inadequately disclosed potential conflicts of interest related to their selection or recommendation of mutual fund share classes. Participation in the program, however, is not without its drawbacks.

02.19.2018 **Congress Eases Restrictions on Hardship Withdrawals**

By Kenneth A. (Ken) Mason

Buried in Sections 41113 and 41114 of the recent Bipartisan Budget Act of 2018 are provisions designed to facilitate hardship withdrawals from 401(k) and 403(b) plans. Because these provisions take effect for plan years beginning after December 31, 2018, sponsors of these plans will want to consider whether to broaden their hardship withdrawal provisions – or even *add* such provisions.

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