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Safe Harbors for Employee Benefit Plans

*by John M. Vine, Esq.**

I. INTRODUCTION[1]

The regulations governing the design and operation of employee benefit plans under the Code and ERISA are detailed, complex, and forbidding.[2] Fortunately, regulatory safe-harbor provisions make many of the regulations more accessible. A regulatory safe harbor typically provides that if an employee benefit plan, plan sponsor, or plan fiduciary satisfies the terms of the safe harbor, it complies with the regulation.

Well-designed regulatory safe harbors play a key role in the regulation of employee benefit plans under federal law. Safe harbors are important not only because they help to ameliorate the detail and complexity of the regulations governing employee benefit plans, but also because safe harbors advance the central objective of federal employee benefits law: to promote the creation and protection of employees' benefit rights by cultivating and regulating employee benefit plans.

When it enacted ERISA in 1974, Congress regulated employee benefit plans in a variety of ways. It imposed legal standards on pension plans, governing such matters as plan participation, vesting, benefit payments, and funding. It imposed fiduciary responsibility and reporting and disclosure requirements on both pension and welfare plans. And it subjected both pension and welfare plans to comprehensive enforcement provisions.

Congress recognized, however, that regulation alone would not adequately promote the creation and protection of employees' benefit rights and that if employers responded to more restrictive regulation by not establishing employee benefit plans or by terminating the plans they had already established, employees could be worse off. A leading account of ERISA's enactment concluded that ''Congress chose less stringent measures than it might have because legislators believed that stricter regulation would overburden plan sponsors . . . . Protective measures increase costs, which may lead employers to shut down a plan or reduce benefits.''[3]

For this reason, Congress did not make ERISA as restrictive as it might have.[4] Congress chose instead to cultivate voluntary employee benefit plans by creating a legal environment that gave employers considerable flexibility with regard to their employee benefit

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plans and thereby encouraged them to establish and maintain employee benefit plans voluntarily.

The text of ERISA reflects the choice that Congress made. ERISA begins with Congressional findings regarding the rapid growth and importance of employee benefit plans in commerce and the economy, and with a declaration of ERISA's policy to protect both interstate commerce and the interests of plan participants and their beneficiaries.[5] Consistent with this policy, ERISA allows employers to determine whether to establish benefit plans, to decide on the benefits that their plans will provide, and to select the classes of employees who are entitled to receive those benefits, subject only to ERISA's minimum standards and any applicable collective bargaining agreements.[6] Specifically, ERISA's plan document rule requires an employee benefit plan to be administered in accordance with terms of the plan's governing documents insofar as the documents are consistent with the provisions of ERISA.[7] In addition, ERISA's preemption provision assures employers that their benefit plans will be subject to a uniform body of federal law, largely free of state and local regulation.[8]

The authority that the plan document and preemption provisions give to employers was no accident. Congress deliberately sought to avoid creating a highly restrictive regulatory regime. Congressman Ullman (then Chairman of the House Committee on Ways and Means) stressed this objective:

> I want to emphasize that these new requirements have been carefully designed to provide adequate protection for employees and, at the same time, provide a favorable setting for the growth and development of private pension plans. It is axiomatic to anyone who has worked in this area that pension plans cannot be expected to develop if costs are made overly burdensome, particularly for employers who generally foot most of the bill. This would be self-defeating and would be unfavorable rather than helpful to the employees for whose benefit this legislation is designed.[9]

The committee reports for ERISA also voiced support for the maintenance and growth of voluntary employer-sponsored plans. For example, the report of the Senate Committee on Labor and Public Welfare declared:

> [T]he legislative approach of establishing minimum standards and safeguards for private pensions is not only consistent with retention of the freedom of decision-making vital to pension plans, but in furtherance of the growth and development of the private pension system.[10]

In the years following ERISA's enactment, Congress continued to encourage the maintenance and growth of voluntary employer-sponsored benefit plans. In the Multiemployer Pension Plan Amendments Act of 1980, Congress declared it to be federal policy "to alleviate certain problems which tend to discourage the maintenance and growth of multiemployer pension plans."[11] In the Single-Employer Pension Plan Amendments Act of 1986, Congress declared it to be federal policy "to encourage the maintenance and growth of single-employer defined benefit pension plans."[12] And in 2010, in the Patient Protection and Affordable Care Act, Congress found that the ACA's requirement that individuals maintain minimum essential health care coverage "achieves near-universal coverage by building upon and strengthening the private employer-based health insurance system, which covers 176,000,000 Americans nationwide."[13]

The Supreme Court has recognized on a number of occasions that in enacting ERISA, Congress sought to strike a balance between providing for the enforcement of employees' benefit rights and encouraging employers to establish benefit plans voluntarily. As the Supreme Court recently observed,

> Congress enacted ERISA to ensure that employees would receive the benefits they had earned, but Congress did not require employers to establish benefit plans in the first place. We have therefore recognized that ERISA represents a careful balancing between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans. Congress sought to create a system that is not so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place.[14]

Safe harbors advance Congress's objective of promoting the creation and protection of employees' benefit rights by cultivating and regulating employee benefit plans. By facilitating efficient, effective, and consistent plan administration, safe harbors encourage the voluntary establishment and continuation of employee benefit plans. And by providing concrete guidance on how to comply with Treasury and DOL regulations, safe harbors encourage compliance with the regulatory standards. Without the guidance that safe harbors provide, rule violations and disputes about alleged rule violations would occur more frequently — exposing plans, employers, and service-providers to potentially staggering costs, including litigation costs, and giving employers a powerful incentive to refrain from

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offering (and from continuing to offer) employee benefit plans to their employees. Employees, retirees, and beneficiaries would bear the consequences.

Although there are deficiencies in the guidance that some regulatory safe harbors provide, the deficiencies are attributable to shortcomings in the implementation of the safe harbors, not to an inherent defect in the safe harbor as a form of regulatory guidance. For example, Treasury and DOL regulations do not adequately disclose the existence of all of the safe harbors, do not always make clear what must be done to satisfy the terms of a safe harbor, and do not always clearly identify the consequences of being covered by a safe harbor.[15]

This article examines regulatory safe harbors and explains how they differ from other forms of administrative guidance. The article also explains how well-designed regulatory safe harbors support important policy goals and offers some suggestions for improving regulatory safe harbors in the future.

II. REGULATORY SAFE HARBORS

Regulatory safe harbors provide guidance on compliance with the rules governing employee benefit plans. A regulatory safe harbor typically gives assurance that if specific and objective requirements imposed by the safe harbor are met, one or more regulatory requirements will be satisfied.

In order to establish an authoritative regulatory safe harbor, an administrative agency must act pursuant to authority that Congress has granted to it. Congress has authorized the Treasury and the DOL to interpret the terms of the Code and ERISA.[16] Code §7805(a) authorizes the Treasury to issue all rules and regulations needed for the enforcement of the Code. Similarly, ERISA §505 authorizes the DOL to prescribe regulations that it finds to be necessary or appropriate to carry out the provisions of Title I of ERISA and provides that the regulations may, among other things, define accounting, trade, and technical terms used in Title I.[17] The Departments have established many regulatory safe harbors pursuant to the general grants of interpretive authority in Code §7805(a) and ERISA §505.

A regulatory safe harbor is appropriate when the general rule imposed by a regulation is fact-bound, open-ended, ambiguous, or administratively burdensome. If a regulation specifies precisely what must be done and does not impose excessive administrative burdens, there is likely no need for a regulatory safe harbor. For example, if a regulation requires a plan to admit each otherwise-eligible employee, regardless of the employee's age, the requirement is so specific, and so readily administrable, that there is likely no need for a safe harbor. By contrast, a regulation authorizing in-service distributions from a §401(k) plan to a participant with an ''immediate and heavy financial need'' is a strong candidate for a safe harbor.[18]

Some regulatory safe harbors also have been established pursuant to a specific congressional directive or authorization to provide a safe harbor or other guidance. For example, ERISA §404(c)(1)(A) provides relief from fiduciary liability where a participant or beneficiary of an individual account pension plan ''exercises control over the assets in his account (as determined under regulations of the Secretary [of Labor]).''[19] Similarly, ERISA §404(c)(5) provides relief from fiduciary liability under an individual account plan where, in the absence of an election by a participant or beneficiary, funds are ''invested by the plan in accordance with regulations prescribed by the Secretary [of Labor].''[20] In addition, EGTRRA §657(c)(2)(A) directs the DOL to issue regulations providing safe harbors under which a plan administrator's designation of an institution to receive an automatic rollover and the initial investment choice for the rolled-over funds are deemed to satisfy ERISA's fiduciary standards.

Other safe harbors have been revised pursuant to specific congressional directives. For example, EGTRRA §636(a) directed the Treasury to revise the safe harbor under which a distribution from a §401(k) plan may be deemed necessary to satisfy an immediate and heavy financial need and thereby qualify as a hardship distribution. Section 636(a) directed the Treasury to revise the safe harbor to reduce from 12 months to six months the period during which an employee must be prohibited from making contributions in order for a distribution to be deemed necessary to satisfy an immediate and heavy financial need.[21]

Although most regulatory safe harbors are included in regulations promulgated pursuant to a formal notice-and-comment process, many safe harbors are set forth in informal guidance, such as IRS notices and DOL technical releases.[22]

An employer or a plan that does not conform to the terms of a potentially applicable regulatory safe harbor runs the risk of noncompliance with the general rule imposed by the regulation. For example, if an employer adopts a plan provision that differs from the provision in a safe harbor, both the employer and the plan might be exposed to the risk of litigation claiming that the plan provision conflicts with the Code or ERISA. Similarly, if a plan fiduciary takes action that does not conform to the terms of a safe harbor, the fiduciary might be subject to litigation claiming that the fiduciary violated ERISA's fiduciary duties.[23] Even if the litigation is meritless, the cost of defending litigation can be high. Because safe harbors help to reduce litigation and litigation costs, the incentive to conform to the terms of many safe harbors is powerful.

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The incentive to conform to the terms of a safe harbor is maximized, however, only if plan fiduciaries, employers, and service-providers can rely on the safe harbor with confidence. Because the courts generally defer to a regulation that is issued pursuant to a notice-and-comment process and that reasonably interprets an ambiguous statute, a well-designed safe-harbor provision is typically set forth in a regulation issued pursuant to the issuing agency's notice-and-comment process.

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court instructed the courts to give effect to an agency regulation containing a reasonable interpretation of an ambiguous statute. Under *Chevron*, when a court interprets a statute that has been construed by the administering agency, the court must first ask:

> whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter . . . . If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[24]

The Supreme Court subsequently ruled in *United States v. MeadCorp.* that deference to an agency's interpretation of an ambiguous statute is appropriate ''when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.'' According to the Court, Congress's delegation to an agency of the authority to make law ''may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of comparable congressional intent.'' [25]

The ''ultimate question,'' the Court later explained, is ''whether *Congress* would have intended, and expected, courts to treat [the agency action] as within, or outside its delegation to the agency of 'gap-filling' authority,'' and deference is appropriate ''[w]here an agency rule sets forth important individual rights and duties, where the agency focuses fully and directly upon the issue, where the agency uses full notice-and-comment procedures to promulgate a rule, where the resulting rule falls within the statutory grant of authority, and where the rule itself is reasonable . . . .''[26]

In its 2011 *Mayo Foundation* decision, the Supreme Court found that a Treasury regulation promulgated pursuant to Code §7805(a), authorizing the Treasury to ''prescribe all needful rules and regulations for the enforcement'' of the Code, was ''a very good indicator of delegation meriting'' deference under the Court's *Chevron* decision. The Court observed that the Treasury had issued the regulation after following notice-and-comment procedures, ''a consideration identified in our precedents as a 'significant' sign that a rule merits *Chevron* deference.''[27]

By contrast, the courts give respect to informal agency guidance, but, in general, only to the extent that the informal guidance has the power to persuade.[28] As the Supreme Court has observed, ''[i]interpretations such as those in opinion letters — like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law — do not warrant *Chevron*-style deference.''[29] Thus, for example, lower federal courts have not given *Chevron* deference to IRS revenue rulings.[30] The Supreme Court has observed that the weight given to informal guidance depends on the agency's care, consistency, formality, and relative expertise as well as the persuasiveness of the agency's position.[31]

The distinction between agency interpretations meriting deference and those meriting respect (but not deference) does not turn invariably on the presence or absence of notice-and-comment rulemaking, however. In *Barnhart v. Walton*, the Supreme Court upheld the Social Security Administration's interpretation of its own regulations:

> [T]he Agency's interpretation is one of long standing. And the fact that the Agency previously reached its interpretation through means less formal than ''notice and comment'' rulemaking does not automatically deprive that interpretation of the judicial deference otherwise its due. . . . [*Mead*] indicated that whether a court should give such deference depends in significant part on the interpretive method used and the nature of the question at issue. And it discussed at length why *Chevron* did not require deference in the circumstances there present — a discussion that would have been superfluous had the presence or absence of notice-and-comment rulemaking been dispositive.
>
> In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens

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> through which to view the legality of the Agency interpretation . . . .[32]

Although the courts sometimes find reasons for granting *Chevron* deference even in the absence of notice-and-comment rulemaking or formal adjudication,[33] there is no basis for thinking that those reasons apply to informal safe-harbor guidance regarding employee benefit plans under the Code or ERISA. In fact, there is considerable evidence that Congress intended regulatory safe harbors to be created after giving notice and an opportunity for interested persons to comment. Each of the congressional directives regarding administrative safe harbors refers to regulations.[34]

And when Congress authorized the DOL to prescribe an ''alternative method of compliance'' — a second cousin to a safe harbor, as explained in Section IV.B., below — it authorized the DOL to do so ''by regulation or otherwise,'' and further provided that if the DOL prescribed an alternative method of compliance other than by regulation, the DOL should act only after giving notice and an opportunity for interested persons to comment.[35]

In many cases it does not matter whether a court gives deference or gives respect (but not deference) to an agency's interpretation: the outcome is the same either way.[36] For present purposes, however, the issue is not whether a court will ultimately uphold or strike down a particular regulatory safe harbor. The issue is whether, all other things being equal, well-advised plan fiduciaries, employers, and service-providers are more likely to rely on a regulatory safe harbor for employee benefit plans if the safe harbor is set forth in a regulation rather than in a less formal pronouncement. Given the current state of the law, there is little doubt that they are more likely to rely on a safe harbor that is set forth in a regulation that has been issued pursuant to a notice and comment process.

III. ILLUSTRATIVE SAFE HARBORS

The safe harbors described in this Section III illustrate how safe harbors provide guidance on compliance with the rules governing employee benefit plans. The selection of these particular safe harbors (and the other safe harbors discussed in this article) does not necessarily imply approval or disapproval of those safe harbors.

A. Regulatory Safe Harbors

1. Code §401(k) Hardship Distribution Safe Harbors

Code §401(k) permits most §401(k) plans to provide for distributions upon ''hardship of the employee.''[37] Although the text of the statute does not specify what a hardship is, Treasury regulations provide that a distribution is made on account of hardship only if the distribution is: (1) made on account of an immediate and heavy financial need; and (2) necessary to satisfy that need. According to the regulations, whether there is an immediate and heavy financial need and, if so, the amount necessary to satisfy that need must be determined in accordance with nondiscriminatory and objective standards set forth in the plan document.[38]

The regulations include two safe harbors — one for the immediate and heavy financial need requirement and another for the necessary distribution requirement. The two safe harbors operate independently of one another. An employer may elect to design its plan to conform to one or both of them.

Immediate and heavy financial need safe harbor. The regulations state that whether an employee has an immediate and heavy financial need depends ''on all the relevant facts and circumstances,'' that the need to pay a family member's funeral expenses generally qualifies as an immediate and heavy financial need, that a distribution to buy a boat or a television generally does not qualify as a distribution on account of an immediate and heavy financial need, and that a financial need may be considered immediate and heavy even if it is foreseeable or voluntarily incurred.[39]

The safe harbor that applies to the immediate and heavy financial need requirement provides that a distribution is deemed to be on account of an immediate and heavy financial need if the distribution is for: (1) certain medical expenses; (2) costs relating to the purchase of a principal residence; (3) tuition and related educational expenses; (4) payments necessary to prevent eviction from a principal residence or foreclosure on a mortgage on that residence; (5) burial or funeral expenses; or (6) expenses for the repair of damage to the employee's principal residence due to a casualty.[40]

An employer might want to authorize its §401(k) plan to make hardship distributions to satisfy needs other than those specified by the safe harbor. For example, an employer might wish to authorize a hardship distribution to pay for job relocation expenses incurred by an employee who has not severed from employment. Under the regulations, a §401(k) plan may authorize such distributions in cases where the job relocation expenses create an immediate and heavy financial need.

Necessary distribution safe harbor. According to the regulations, a distribution is necessary to satisfy an immediate and heavy financial need only to the extent that the amount of the distribution does not exceed the amount required to meet the need (after taking into account any taxes or penalties on the distribution). In addition, the regulations state that a

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distribution is not treated as necessary to satisfy a need to the extent that the need may be relieved from the employee's other reasonably available resources. The regulations further provide that, unless the employer has actual knowledge to the contrary, the employer may treat a financial need as not capable of being relieved from the employee's other reasonably available resources if the employer relies on the employee's written representation that the need cannot reasonably be relieved by (1) insurance, (2) liquidating assets, (3) ceasing contributions to the plan, (4) taking distributions and nontaxable loans under plans maintained by any employer, or (5) borrowing from commercial sources on reasonable terms.[41]

The necessary distribution safe-harbor provision states that a distribution is deemed necessary to satisfy an immediate and heavy financial need if (1) the employee has obtained all other currently available distributions and loans under the plan and all other plans maintained by the employer and (2) the employee is prohibited from making elective contributions (such as salary-reduction contributions) and employee contributions to the plan and all other plans maintained by the employer for at least six months after receiving the hardship distribution.[42]

2. Investment Education Safe Harbors

The DOL issued an interpretive bulletin on investment education in 1996. At that time, it was evident that a safe harbor for investment education was needed. Many employees participated in participant-directed individual account plans and were in a position to benefit from investment education, and many employers were interested in providing investment education to their employees.

ERISA defined a fiduciary to include someone who provided investment advice for a fee with respect to plan property,[43] and a DOL regulation defined investment advice, but did not distinguish investment advice from investment education.[44] Mindful of the adage that ''no good deed goes unpunished,'' employers were concerned that if they provided investment education to their employees, claims might be made that they were acting in a fiduciary capacity when they educated their employees and that they were liable under ERISA for their employees' investment losses. Without assurance that they were not acting as fiduciaries when they educated their employees, employers were reluctant to provide investment education to their employees.

The DOL's 1996 interpretive bulletin identified specific actions that an employer could take to educate its employees without providing investment advice and becoming a fiduciary. In the accompanying preamble, the DOL emphasized that the interpretive bulletin presented a series of safe harbors and stated that the information and materials described in the interpretive bulletin represented examples of the types of information and materials that may be furnished to participants and beneficiaries without being considered investment advice. The DOL recognized that there might be many other examples of information, materials, and educational services that would not constitute investment advice and cautioned that no inference should be drawn from the interpretive bulletin with respect to whether the furnishing of any information, materials, or educational services not described in the bulletin constituted investment advice.[45]

The interpretive bulletin was designed to encourage employers to expand their efforts to educate individual account plan participants about investing.[46] Many observers believe that the interpretive bulletin achieved this objective.[47]

3. Group Insurance Plan Safe Harbor

A DOL regulation includes a series of safe harbors describing arrangements that are not classified as welfare plans for purposes of ERISA. Among the arrangements that the regulation excludes from welfare plan status are group insurance programs offered by an insurer to employees under which (1) there are no employer contributions, (2) participation is entirely voluntary, (3) the sole involvement of the employer is, without endorsement, to allow the sponsor to publicize the program, to collect contributions, and to remit them to the sponsor, and (4) the employer receives no compensation, other than reasonable compensation for services actually rendered.[48]

The regulation provides that programs satisfying all four of the foregoing requirements do not necessarily represent borderline cases and that the regulation should not be read as indicating the DOL's views on the scope of the term ''welfare plan.''[49] Likewise, a number of courts have observed that a program that is not covered by the regulatory safe harbor may still be excluded from the definition of ''welfare plan.''[50]

B. Statutory Safe Harbors

From time to time Congress creates statutory safe harbors by amending the law. When it enacted the SBJPA in 1996, Congress established two statutory safe harbors under §401(k). Before the enactment of the SBJPA, §401(k) plans were required to meet a special nondiscrimination test under which the actual deferral percentage (''ADP'') for eligible highly compensated employees could not exceed, by more than a specified margin, the ADP for eligible nonhighly compensated employees. Employer matching contributions and after-tax employee contributions were subject to a similar actual contribution percentage (''ACP'') test. The SBJPA amended the Code to provide that if a

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plan meets a notice requirement and either of two contribution requirements, the plan will not have to pass the ADP and ACP tests.[51]

Both the legislative history of the SBJPA and the Treasury regulations under §401(k) characterize the new notice-and-contribution requirements as safe-harbor requirements.[52] The ADP and ACP provisions were not vague or ambiguous, and in enacting the SBJPA amendments, Congress did not claim to be clarifying those provisions. The notice-and-contribution requirements were justified on the ground that the ADP and ACP tests were unnecessarily complex and burdensome. The committee reports reflect the committees' judgment that the complexity of the ADP and ACP tests was not justified by the marginal additional participation of rank-and-file employees that the ADP and ACP provisions might achieve.[53]

IV. OTHER FORMS OF ADMINISTRATIVE GUIDANCE

Insofar as they encourage employers to establish and maintain employee benefit plans, regulatory safe harbors stand out. Although most forms of administrative guidance encourage or require compliance with the regulatory requirements imposed by the Code and ERISA, few offer significant encouragement for the voluntary establishment and continuation of employee benefit plans.

A. Regulatory Requirements

Most regulatory provisions under the Code and ERISA impose legal requirements that a plan, employer, or service-provider must meet. By contrast, regulatory safe harbors present options rather than mandates: there is no legal obligation to conform to the terms of a safe harbor.[54]

A conventional regulatory mandate says simply, ''You may not do X'' or ''You must do Y.'' This is plan regulation to be sure, but a regulatory mandate does little to cultivate voluntary employee benefit plans.

By contrast, a typical regulatory safe harbor says, in effect, ''You don't have to do Z, but if you do Z, you will comply with the prohibition against doing X (or with the mandate to do Y).'' Assuming that it is not too difficult to do Z, the safe harbor both cultivates and regulates employee benefit plans. By offering a clear-cut way of complying with a complex regulatory mandate, a safe harbor makes it easier for employers to maintain plans and encourages compliance with the regulatory mandate.

B. Alternative Methods of Compliance

Some regulatory provisions governing employee benefit plans identify alternative methods of compliance and require one of the alternatives to be used. Unlike safe-harbor provisions, however, these provisions do not leave open the possibility that other unspecified methods of compliance might also be available.

For example, the Code and ERISA define a year of service for vesting purposes as a 12-consecutive-month period designated by the plan during which the participant completes at least 1,000 hours of service.[55] However, the DOL has issued a regulation permitting plans to use alternative methods to measure an employee's years of service for vesting purposes. One method permits a plan to credit service on the basis of hours worked (rather than on the basis of hours of service) if the plan meets certain requirements.[56] The regulation also allows a plan to credit service on the basis of periods of employment rather than on the basis of hour-counting; for example, a plan may credit service on the basis of weeks of employment if the plan credits an employee with at least 45 hours of service for each week for which the employee completes at least one hour of service.[57] In addition, the Treasury has issued a regulation permitting plans to use the ''elapsed time'' method to measure an employee's service.[58] Unlike safe-harbor provisions, however, the Departments' service-measurement regulations do not suggest that a method not mentioned in the regulations may be used to determine an employee's years of service for vesting purposes.

In addition, ERISA §110 authorizes the DOL to prescribe, ''by regulation or otherwise,'' an alternative method of compliance with ERISA's reporting and disclosure requirements with respect to a pension plan or a class of pension plans. Section 110 further provides that if the DOL prescribes an alternative method of compliance other than by regulation, the DOL may act only after giving notice and an opportunity for interested persons to comment.

Because §110 authorizes the DOL to prescribe alternative methods of complying with ERISA requirements, §110 advances the objective of promoting the creation and protection of employees' benefit rights through plan cultivation and regulation. However, §110 is subject to restrictions that do not apply to the authority to create safe harbors. First, §110 applies only to the DOL; it does not grant authority to the Treasury. Second, §110 applies only to pension plans; welfare plans are addressed by ERISA §104(a)(3), discussed in Section IV.C., below. Third, §110 applies only to ERISA's reporting and disclosure requirements.[59]

A 2010 amendment to the DOL regulation governing participant contributions to employee benefit plans blurred the distinction between a regulatory safe harbor and an alternative method of compliance. Under the regulation, participant contributions are treated

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as plan assets (and become subject to ERISA rules) on the earliest day on which the participant contributions can reasonably be segregated from the employer's general assets.

The 2010 amendment created a safe harbor for participant contributions to a plan with fewer than 100 participants. Under the safe harbor, if participant contributions are deposited with the plan no later than the seventh business day following the day they are received (or withheld) by the employer, the contributions are treated as having been made to the plan in accordance with the regulation's general rule (no later than the earliest day on which the participant contributions can reasonably be segregated from the employer's general assets).[60]

The amendment states that it sets forth ''an optional alternative method of compliance'' and does not establish the exclusive means by which participant contributions are considered to be contributed in accordance with the regulation's general rule. This statement was not included in the proposed amendment to the regulation. In the preamble to the final amendment, the DOL explained that the statement was added in order to respond to concerns voiced by commenters who ''misunderstood the optional safe harbor nature of the proposal and objected to a mandatory requirement of 7 business days for the deposit of participant contributions into small plans.''[61] The statement was thus added to the final rule in order to make clear the DOL's intent that, as a safe harbor, the 7-business-day rule was an option rather than a mandate. The DOL does not appear to have intended, in making this statement, to suggest that there was no difference between a safe harbor and an alternative method of compliance.

C. Reporting and Disclosure Exemptions

ERISA §104(a)(3) authorizes the DOL to exempt ''by regulation'' a welfare benefit plan from all or part of ERISA's reporting and disclosure requirements or to provide for simplified reporting and disclosure for welfare plans if it finds that ERISA's reporting and disclosure requirements are inappropriate for welfare plans.[62] Section 104(a)(3) thus authorizes the DOL to advance the objective of promoting the creation and protection of employees' benefit rights through plan cultivation and regulation.

Both the differences and the similarities between §104(a)(3) and §110 (discussed in the previous Section) are apparent on the face of the statute. Section 104(a)(3) authorizes exemptions for welfare plans, while §110 authorizes alternative methods of compliance for pension plans. Although §§104(b)(3) and 110, taken together, cover both welfare plans and pension plans, the two provisions do not authorize provisions that are as far-reaching as the regulatory safe-harbor provisions. Like §110, §104(a)(3) applies only to the DOL and only to ERISA's reporting and disclosure requirements; §104(a)(3) does not grant authority to the Treasury, and it does not apply to ERISA's other requirements. Moreover, §104(a)(3) authorizes only exemptions for welfare plans, not alternative methods of compliance, while §110 authorizes only alternative methods of compliance. [63]

D. Prohibited Transaction Exemptions

The Code and ERISA also include detailed prohibited transaction provisions. The prohibited transaction provisions forbid plans and plan fiduciaries from engaging in specified transactions, but also provide for exemptions that allow plans and plan fiduciaries to engage in certain transactions that are otherwise barred by the prohibited transaction provisions.[64]

The Code and ERISA provide for both statutory and administrative exemptions. The legislative history of the prohibited transaction provisions indicates that the statutory exemptions — which appear in the text of both the Code and ERISA — were intended to address ''transactions which are deemed desirable to the sound, efficient functioning of employee benefit plans . . . [and that are] likely to be engaged in by fiduciaries of virtually all plans.''[65] Although both the Code and ERISA also authorize the Treasury and the DOL to grant administrative exemptions, a 1978 Presidential Reorganization Plan transferred to the DOL most of the Treasury's authority to grant administrative exemptions.[66]

An administrative exemption may be granted for an employee benefit plan only if the DOL finds that the exemption is: (1) administratively feasible; (2) in the interests of the plan and its participants and beneficiaries; and (3) protective of the rights of participants and beneficiaries. Before an exemption is granted, interested persons must be notified of the pendency of an exemption and be given an opportunity to present their views.[67] An administrative exemption may be conditional or unconditional and may be granted either for a particular fiduciary or transaction, or for a class of fiduciaries or transactions.

Although regulatory safe harbors and administrative prohibited transaction exemptions have some common characteristics, there are also major differences. First, regulatory safe harbors provide guidance under a variety of Code and ERISA provisions, while administrative exemptions provide relief only from the prohibited transaction provisions. Second, regulatory safe harbors are used to clarify regulatory provisions, while administrative exemptions permit transactions that are otherwise forbidden by the prohibited

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transaction provisions. Third, regulatory safe harbors are based on the Departments' rulemaking authority, while the Code and ERISA expressly authorize the Departments to grant administrative exemptions, based on a finding that the exemption is administratively feasible, in the interests of participants and beneficiaries, and protective of the rights of participants and beneficiaries.

E. Enforcement Safe Harbors

An agency responsible for enforcing a statutory or regulatory provision may create an enforcement safe harbor. An enforcement safe harbor provides that the agency will not take enforcement action in circumstances described by the agency in the safe harbor.

An enforcement safe harbor does not offer as much protection as a regulatory safe harbor, however. An enforcement safe harbor applies only to the agency that establishes the safe harbor; it does not bind others who are entitled to enforce the statute. As a result, although a DOL enforcement safe harbor provides protection against litigation by the DOL, it does not offer protection against litigation brought by plan participants and beneficiaries.[68]

For example, in 1992, when the DOL announced an enforcement safe harbor for cafeteria plans, the DOL stated that it would not assert an ERISA violation in any enforcement proceeding solely because of a failure to hold participant contributions to a cafeteria plan in trust.[69] The DOL's cafeteria plan enforcement policy is binding only on the DOL and does not bind plan participants and beneficiaries, who also have standing to enforce provisions of Title I of ERISA.[70] Similarly, when the DOL announced a revised interim enforcement policy regarding the use of electronic media to satisfy certain disclosure requirements, the DOL stated that the enforcement policy did not address the rights or obligations of other parties.[71]

Because only the Internal Revenue Service is authorized to enforce the provisions of the Internal Revenue Code,[72] an IRS enforcement safe harbor[73] might appear to substantially reduce, if not eliminate, the risk of litigation regarding the subject of the safe harbor. An IRS enforcement safe harbor under a Code provision is likely, though not certain, to bar an action by the DOL under a parallel provision of ERISA (if any).[74]

Under ERISA, however, plan participants and beneficiaries also are entitled to enforce both the provisions of Title I of ERISA and the provisions of the benefit plans that cover them.[75] An IRS enforcement policy regarding a Code provision would not bar participants and beneficiaries from bringing litigation asserting their rights under a parallel ERISA provision (if any). Moreover, if a plan provision restates the Code provision or incorporates the Code provision by reference, the plan's participants and beneficiaries might be able to enforce the plan provision, even though they could not enforce the corresponding Code provision directly.[76]

F. Transition Provisions

Employee benefit legislation often becomes effective before the Treasury or the DOL issues final regulations interpreting the legislation.

When that happens, the Treasury or the DOL often provides that, until final regulations become effective, regulated parties may rely on a good faith, reasonable interpretation of the statute, on interim guidance that the Department has issued, or on both.[77]

There are several differences between such transition provisions and a regulatory safe harbor. Transition provisions are necessarily temporary: reliance on a reasonable, good faith interpretation of the statute or interim guidance is typically permitted only until final regulations become effective. By contrast, regulatory safe harbors are typically effective indefinitely.

Another difference is that a transition provision typically has broad application. There is usually no reason to distinguish between plans on an individualized basis under an effective date provision, although distinctions are sometimes drawn for effective date purposes between classes of plans, such as between collectively bargained and non-bargained plans, governmental and non-governmental plans, and newly-established and pre-existing plans. By contrast, regulatory safe harbors are typically applicable to a plan only if the plan meets requirements specified by the terms of the safe harbor.

A third difference relates to the deference the courts would give to a transition provision. Under ordinary circumstances, the agency that issues a transition provision is likely to be bound (and to consider itself bound) by the transition provision, and a court is likely to respect a transition provision that is endorsed by the issuing agency.[78] In any litigation involving plan participants and beneficiaries, however, it is not clear that a court would consider itself bound by a transition provision that was not incorporated in a final regulation. By contrast, a safe-harbor provision might qualify for *Chevron* deference and be binding on all parties, including participants and beneficiaries — at least if the safe harbor is included in a regulation promulgated pursuant to a notice-and-comment process.[79]

G. Presumptions

The Code, ERISA, and the regulations thereunder establish rebuttable presumptions on compliance with

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a variety of statutory and regulatory standards.[80] Although presumptions provide useful guidance, rebuttable presumptions do not provide as high a level of certainty as regulatory safe harbors.

If a ***positive*** presumption applies, it is presumed that a statutory or regulatory standard ***is not*** violated. Although a positive presumption provides protection, it does not completely eliminate uncertainty. First, it can be uncertain whether the presumption applies. Second, even where the presumption applies, it can be uncertain whether the presumption can be rebutted.

The regulations under Code §409A illustrate how a positive presumption works. The regulations provide that an option to purchase stock of an employer does not provide for a deferral of compensation (and is therefore not subject to §409A) if, among other things, the option exercise price is no less than the fair market value of the underlying stock on the date the option is granted. The regulations further provide that, for this purpose, the fair market value of stock that is not readily tradable on an established securities market means the value determined by the reasonable application of a reasonable valuation method. According to the regulations, the use of any one of three specified valuation methods is presumed to result in a reasonable valuation. However, the IRS may rebut the presumption by showing that either the valuation method or the application of the valuation method was grossly unreasonable.[81]

If a ***negative*** presumption applies, it is presumed that a statutory or regulatory standard ***is*** violated. Negative presumptions can be avoided or rebutted. However, rebutting a negative presumption is not the same thing as actually meeting the statutory or regulatory standard.

An illustrative negative presumption appears in Code §280G, which disallows the income tax deductibility of excess parachute payments. Parachute payments are defined by §280G to include a compensatory payment that is contingent on a change in the ownership or effective control of a corporation. Section 280G provides that certain payments (such as payments under a contract entered into within one year before a change in ownership or effective control) are presumed to be contingent on a change in ownership or effective control unless the taxpayer establishes to the contrary by clear and convincing evidence. The regulations under §280G provide, however, that even if the presumption is rebutted, some or all of the payments under the contract may still be contingent on a change in ownership or control. For example, even if the negative presumption for contracts entered into within one year before a change in control is rebutted, the contract may still provide for payments that are contingent on a change in ownership or control.[82]

H. Unsafe Harbors

On occasion, a regulatory safe harbor is coupled with an unsafe harbor. Like a safe harbor, an unsafe harbor provides certainty regarding the application of a regulatory standard. However, unlike a safe harbor, an unsafe harbor describes a plan provision or activity that, regardless of the circumstances, ***violates*** (rather than complies with) the general rule in a regulation.

In general, when a safe harbor is coupled with an unsafe harbor under a regulation, the plan provisions or activities covered by the regulation fall into three categories: (1) safe-harbor provisions or activities, which are deemed to comply with the general rule in the regulation; (2) unsafe-harbor provisions or activities, which are deemed to violate the general rule in the regulation; and (3) all other plan provisions or activities, which must be evaluated in the context of all relevant circumstances to determine whether they comply with the general rule in the regulation.[83]

The value of coupling a safe harbor with an unsafe harbor depends largely on the terms of the safe and unsafe harbors. For example, if a safe harbor is broad enough to cover most commonly-used plan provisions, the coupling of the safe harbor with an unsafe harbor is likely to be quite useful, because the safe harbor protects plan provisions that receive safe-harbor protection and the unsafe harbor identifies specific plan provisions that the regulation forbids or restricts.

By contrast, if the unsafe harbor is very broad, the unsafe harbor might not differ very much, as a practical matter, from a general prohibition or restriction on all plan provisions covered by the regulation. If, however, both the safe and unsafe harbors are very narrow, the safe- and unsafe-harbor provisions might not add very much to the regulation's general rule unless the narrow safe harbor is still broad enough to cover most prevailing practices or sufficiently flexible for the vast majority of plans to satisfy.

For example, the Treasury regulations under Code §409A, governing the income tax treatment of deferred compensation, define ''substantial risk of forfeiture'' by using a series of safe and unsafe harbors. One of the safe harbors applies where entitlement to a deferred amount is contingent on involuntary separation without cause (as long as the possibility of forfeiture is substantial). By contrast, an unsafe harbor applies where entitlement to a deferred amount is contingent on refraining from the performance of services.[84] These provisions illustrate how safe and unsafe harbors can be used, in combination, to provide certainty regarding the meaning of an open-ended term like ''substantial risk of forfeiture.''

As the foregoing discussion of unsafe harbors illustrates, safe harbors are sometimes coupled with other

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forms of guidance, such as an alternative method of compliance, a prohibited transaction exemption, a presumption, or an unsafe harbor.[85]

I. Summary

Regulatory safe harbors differ from most other forms of administrative guidance in one important respect. Regulatory safe harbors effectively advance the congressional objective of promoting the creation and protection of employees' benefit rights through plan cultivation and regulation. Many other forms of administrative guidance effectively advance the congressional objective of protecting employees' benefit rights through plan regulation, but are much less effective in promoting the creation and protection of employees' benefit rights through plan cultivation.

Some forms of administrative guidance (regulatory requirements and unsafe harbors, for example) are quite effective in advancing the objective of protecting employees' benefit rights through plan regulation, but do not materially advance the objective of promoting the creation and protection of employees' benefit rights through plan cultivation.

Other forms of administrative guidance advance the objective of promoting the creation and protection of employees' benefit rights through plan cultivation, but only in a limited way. For example, enforcement safe harbors are not binding on parties other than the agency that issues the enforcement safe harbors; presumptions are rebuttable; prohibited transaction exemptions apply only for purposes of the prohibited transaction provisions; and transition provisions provide only temporary relief. Reporting and disclosure exemptions and alternative methods of compliance, authorized by ERISA §§104(a)(3) and 110, apply only to the DOL and only to the extent the DOL is responsible for ERISA's reporting and disclosure requirements.

The fact that §110 authorizes the DOL to prescribe alternative methods of compliance only under ERISA's reporting and disclosure requirements prompts the question whether Congress, in enacting §110, intended to deprive the Treasury and the DOL of the authority to prescribe safe harbors under the Code or under other provisions of ERISA. There is no evidence that Congress had any such intent. Congress has enacted provisions that explicitly authorize or direct the establishment or revision of safe harbors, and there is no reason to think that §110 (which does not refer to the Code or to interpretive regulations) restricts the Departments' authority to issue interpretive regulations under Code §7805(a) and ERISA §505.[86]

V. BENEFITS OF SAFE-HARBOR PROVISIONS

Well-designed regulatory safe-harbor provisions yield a variety of benefits, including the following:

A. Advancing Congress's Objective

A well-designed regulatory safe harbor advances Congress's objective of promoting the creation and protection of employees' benefit rights by cultivating and regulating voluntary employee benefit plans. Unlike a conventional regulatory mandate, a well-designed safe harbor both cultivates and regulates employee benefit plans by presenting practical options for compliance with regulatory mandates, by encouraging efficient, predictable, and consistent plan administration, and by promoting a regime that allows employers to design their plans to meet both their employees' needs and their own needs.

B. Certainty

A well-designed safe harbor enables plan fiduciaries, employers, and service-providers to be confident that they are acting in accordance with applicable regulatory standards. By conforming their conduct to a safe harbor's specific and objective requirements, they may achieve a level of certainty that they cannot achieve (or cannot achieve as readily) under conventional regulatory mandates.[87]

Certainty is valuable not only because it gives peace of mind to the plan fiduciary, employer, or service-provider, but also because it reduces the risk of litigation alleging noncompliance with the regulation. The less litigation and concomitant administrative and legal costs a plan faces, the more plan resources can be used to pay benefits.

C. Compliance

The availability of a safe harbor and the protection that the safe harbor provides discourage many from taking positions that might violate the relevant statute or regulation. As explained in Section II., above, the incentive to conform to the terms of a safe harbor can be powerful.[88]

D. Plan Administration

A well-designed safe harbor can facilitate plan administration by reducing the burdens on the plan administrator. Plan administrators might find it easier to qualify for a safe harbor than to figure out how to comply with an ambiguous, open-ended, or burdensome regulatory standard. Moreover, because each plan administrator can decide whether to be governed by a regulation's general rule or its safe harbor, the administrator has an opportunity to select the provision that it finds easier to administer.[89]

For example, the Treasury's immediate and heavy financial need safe harbor for hardship distributions offers a non-onerous, though somewhat rigid, alterna-

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tive to compliance with the regulation's general rule. At the same time, an employer that wants to offer a plan with more flexible hardship distribution provisions is free to establish a plan that complies with the regulation's more demanding general rule, rather than with the safe harbor.

E. Consistency

Because it relies on specific and objective requirements, a well-designed safe harbor facilitates consistent plan administration, both within and among plans covered by the safe harbor.[90]

F. Flexibility

Because a safe harbor is not mandatory, it offers more flexibility to plans, employers, and service-providers than does a conventional regulatory mandate.[91]

G. Enforcement

To the extent that plans, employers, and service-providers are covered by a well-designed safe harbor, the safe harbor makes it easier for the IRS and the DOL to discharge their enforcement responsibilities. It is generally far easier to confirm that a plan satisfies the specific and objective requirements of a safe harbor than it is to confirm that a plan satisfies a subjective or fact-bound general standard.[92] For example, it should be much easier for the DOL to determine whether an employer deposited employees' salary-reduction contributions in a small §401(k) plan within the 7-business-day period permitted by the safe harbor for small plans than to determine whether each deposit was made as soon as the contributions could reasonably be segregated from the employer's general assets.

VI. DEFICIENCIES IN SAFE-HARBOR PROVISIONS

Although some safe harbors have deficiencies, the deficiencies are attributable to shortcomings in implementation, not to an inherent defect in the safe harbor as a form of regulatory guidance.

A. No Genuine Choice

It might be claimed that, although safe harbors are technically optional, a safe harbor actually presents an offer that is too good to refuse. For example, when faced with a regulation that offers a safe harbor, an employer might conclude that the regulation's general rule is too ambiguous, that compliance with the general rule is too difficult, and/or that the financial consequences of violating the general rule are too great to justify noncompliance with the safe harbor.

Although some might view a particular safe harbor as too good to refuse, the attractiveness of a safe harbor is not evidence of an inherent defect. A well-designed regulatory safe harbor *should* offer an attractive alternative to the general rule in the regulation. This is really a complaint about the uncertainty or difficulty of proceeding under the regulation's general rule, not a complaint about the safe harbor. As long as the terms of the safe harbor are consistent with the terms of the general rule in the regulation, a complaint that a safe harbor is too attractive is misdirected.

B. Rigidity

It might be claimed that the eligibility requirements imposed by safe harbors are more rigid than the requirements imposed by most general regulatory standards. For example, it is not difficult to imagine financial needs that are immediate and heavy, but not on the list of needs in the Treasury's immediate and heavy financial need safe harbor.

However, even if the safe harbor's eligibility requirements are rigid, a regulation that offers a rigid safe harbor as an alternative to the regulation's general rule provides more flexibility than it would if it did not offer a safe harbor. This is really a claim that some safe harbors should be more flexible, rather than a complaint about safe harbors in general.

C. Risk of Obsolescence

It might be claimed that specific eligibility requirements imposed by a safe harbor can become obsolete over time, rendering them unuseful.[93] Even if there is a significant risk that a safe harbor's eligibility requirements will become obsolete, regulations provide more guidance with a safe harbor than without a safe harbor. This is really an argument for improving the safe harbor (to make it less vulnerable to obsolescence) or for periodic review (and, where appropriate, revision) of the safe harbor, not an argument for dropping the safe harbor altogether.

D. Loss of "In Terrorem" Effect

It might be claimed that, when there is no safe harbor, the uncertainty created by a vague, ambiguous, or fact-bound general rule causes fiduciaries, employers, or service-providers to err on the side of caution and do more for plan participants than a safe harbor would require. The claim might be that if a safe harbor is established, the fiduciary, employer, or service-provider might take advantage of the certainty that the safe harbor provides by limiting its actions to exactly what the safe harbor requires.

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For example, if a regulation requires a pension plan to distribute benefits to a plan participant by the earliest reasonable date following a specified event, an employer might, in the absence of a safe harbor, resolve conservatively the uncertainty over what the ''earliest reasonable date'' is, and cause its plan to distribute benefits within 3 business days following the specified event. If the Treasury establishes a safe harbor, however, permitting benefits to be distributed 30 days following the specified event, it is conceivable that the same employer would adopt the safe harbor's 30-day rule, rather than the 3-business-day rule.

To the extent that this complaint advocates using uncertainty or ignorance to intimidate employers and others into doing more than they are legally required to do, the complaint advocates an unsound policy. To the extent that this complaint is based on the view that the terms of the safe harbor (such as the 30-day rule in the foregoing example) are unreasonably lenient, the claim supports an argument for a *reasonable* safe harbor, not for *no* safe harbor.[94]

E. Misuse of Safe Harbor

It might be claimed that there is a risk that a court or agency will inappropriately take the terms of a safe harbor into account in applying the terms of the general rule imposed by the regulation to a plan, employer, or service-provider that is not covered by the safe harbor.[95] The essence of this complaint is that the regulations should not penalize a party merely because the party does not comply with the terms of what should be an optional safe harbor.

For example, suppose that a regulation requires the present value of a plan's liabilities to be determined on the basis of ''reasonable actuarial assumptions.'' Suppose further that the regulation includes a safe harbor providing that certain actuarial assumptions are deemed reasonable for purposes of this requirement. If a plan makes the required calculation on the basis of assumptions that differ from the safe-harbor assumptions, the plan's compliance with the regulatory requirement should be determined solely by reference to the regulation's general rule (requiring the use of reasonable actuarial assumptions); the safe-harbor assumptions should be disregarded in applying the general rule; and the difference between the plan's assumptions and the safe-harbor assumptions should be irrelevant.[96]

In some cases, a complaint regarding the potential for misuse of the terms of a safe harbor might have merit. However, this complaint relates to the terms and application of individual safe harbors, not to safe harbors in general. A more detailed response to this complaint is set forth in Section VII.B.10., below.

F. Unwarranted Sense of Security

It might be claimed that, in some cases, those who rely on a safe harbor derive too much comfort from the safe harbor. After all, the protection provided by a safe harbor is not necessarily iron-clad — particularly if the safe harbor is an enforcement safe harbor or if the safe harbor was created by informal guidance rather than by a regulation.

This is an argument for greater caution, or for publishing safe harbors in regulations promulgated pursuant to a notice-and-comment process, not for abandoning safe harbors altogether. All other things being equal, plan fiduciaries, employers, and service-providers are more likely to rely on a safe harbor if the safe harbor is set forth in a regulation promulgated pursuant to a notice-and-comment process rather than in a less formal pronouncement.

VII. CONCLUSIONS

A. General Observations

Well-designed regulatory safe harbors effectively advance ERISA's objective of promoting the creation and protection of employees' benefit rights through the cultivation and regulation of employee benefit plans. They present options rather than mandates; they facilitate compliance with the law; they encourage efficient, predictable, and consistent plan administration; they reduce the risk of litigation; and they strengthen a regime that allows employers to offer plans that meet both their own needs and the needs of their employees. Although some safe harbors have deficiencies, the deficiencies are attributable to shortcomings in the implementation of individual safe harbors, not to an inherent defect in the safe harbor as a form of regulatory guidance. Suggested improvements in the Departments' implementation of regulatory safe harbors are set forth in Section VII.B., below.

B. Suggestions

1. Clear Statement of General Rule

A safe-harbor provision should be accompanied by a clear statement of the regulation's general rule and a statement that those who are not covered by the safe harbor are subject to the general rule. It might seem obvious that a regulation with a safe harbor should, like other regulations, clearly set forth the regulation's general rule. However, as the following example illustrates, this basic requirement has not always been satisfied.

Under the Code, an individual is not permitted to make a tax-deductible contribution to a health savings account unless the individual is covered by a high-deductible health plan (''HDHP''). As its name implies, an HDHP generally may not reimburse medical

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expenses until the individual has met a high deductible.

There is a statutory exception that permits an HDHP to cover the cost of preventive care (''within the meaning of §1871 of the Social Security Act, except as otherwise provided by the Secretary'') before the deductible is met.[97] The statute's reference to §1871, however, was mistaken: §1871 does not refer to preventive care. Congress probably intended to refer to §1861, which defines ''preventive services'' and ''additional preventive services.''

In Notice 2004-23, the IRS created a safe-harbor definition of preventive care, but failed to clear up the confusion created by the mistaken statutory reference to §1871. The Notice declared that preventive care ''includes, but is not limited to'' specific listed services (such as routine prenatal and well-child care). The Notice failed to explain what other services might be included in the definition of ''preventive care.'' As a result, it is impossible to know what services might fall outside the safe harbor and still qualify as ''preventive care.'' The Notice created a safe harbor, but did nothing to clarify the meaning of ''preventive care'' under the general rule governing an HDHP.[98]

2. Greater Prominence

The Departments should give regulatory safe harbors greater prominence. The objectives of a regulatory safe harbor will not be achieved if the safe harbor's existence is not widely known. Plan fiduciaries, employers, and service-providers can take advantage of a safe harbor only if they know that the safe harbor exists.

The Departments have not always done as much as they can to make the public aware of the Departments' regulatory safe harbors. Departmental guidance has concealed safe harbors by not using the term ''safe harbor,'' by presenting the safe harbor as an example rather than as an operative provision of the regulation,[99] by presenting a safe harbor as though it were the general rule,[100] and by disclosing the existence of the safe harbor only in informal guidance, rather than in a regulation.[101] The lack of clarity has, on occasion, puzzled even sophisticated practitioners.

When a Department establishes a safe harbor, the Department should clearly state that it is presenting a safe harbor, not a minimum standard or an alternative method of compliance; that the safe harbor is ''safe'' in the sense that the terms of the regulation's general rule are deemed to be satisfied if the terms of the safe harbor are satisfied; that the safe harbor is optional in the sense that there is no legal obligation to be covered by a safe harbor; that in order to be covered by the safe harbor, certain clearly identified requirements must be satisfied; that a party that is not covered by the safe harbor will be subject to the terms of the regulation's general rule, not the terms of the safe harbor; and that no adverse inference will be drawn from failure to be covered by the safe harbor.

3. Notice-and-Comment Process

A safe harbor is a valuable option only if plan fiduciaries, employers, and service-providers can rely on the safe harbor with confidence. All other things being equal, plan fiduciaries, employers, and service-providers are more likely to rely on a safe harbor if the safe harbor is set forth in a regulation promulgated pursuant to a notice-and-comment process rather than in a less formal pronouncement.

In addition, a notice-and-comment process enables an agency to craft a practical final rule that takes into account the views and information submitted by the public and gives the regulated community an opportunity to prepare for the final rule.[102] Although the notice-and-comment process can be time-consuming and cumbersome, and although an agency can obtain views and information from the public without invoking the notice-and-comment process, past experience indicates that the notice-and-comment process can improve the quality of the regulatory product[103] and that informal guidance that is issued without advance notice or public comment can be impractical and disruptive.

Consider, for example, DOL FAB 2012-02, which was issued without the benefit of advance notice and public comment. The FAB was intended to provide guidance on a DOL regulation requiring disclosure of investment-related information to participants and beneficiaries in participant-directed individual account plans. The FAB distinguished ''designated investment alternatives'' (which are subject to the investment-related disclosure requirements) from ''brokerage windows'' and similar arrangements (which are not subject to the investment-related disclosure requirements).

In the FAB, the DOL took the position that if, through a brokerage window or similar arrangement, significant numbers of participants select non-designated investment alternatives, a plan fiduciary has an affirmative obligation to determine whether the non-designated investment alternatives should be treated as designated investment alternatives that are subject to the regulation's investment-related disclosure requirements. At the same time the DOL stated that, as a matter of enforcement policy, when a participant-directed individual account plan offers an investment platform consisting of more than 25 investment alternatives, the DOL will not require ***all*** of the plan's investment alternatives to satisfy the disclosure requirements imposed by the disclosure rules as long as the plan administrator makes the required disclosures for ***certain*** of the plan's investment alternatives.[104]

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The DOL's statements about a fiduciary's obligations regarding non-designated investment alternatives were controversial.[105] In July 2012, less than three months after the DOL released FAB 2012-02, the DOL withdrew the most controversial portions of FAB 2012-02, including the enforcement safe harbor. The DOL stated that fiduciaries of plans with arrangements that enable participants to select investments beyond those designated by the plan are bound by the fiduciary duties of prudence and loyalty, and indicated that the DOL intended to consider how to assure compliance with those duties in a practical and cost-effective manner.[106]

4. Eligibility for Safe Harbor

Regulatory safe harbors are designed to assure plans, employers, and service-providers that if they are covered by a safe harbor, they will comply with the pertinent provisions of the regulations under the Code or ERISA. In order to provide such assurance, a safe harbor must include specific and objective eligibility requirements.

Although most safe harbors include specific and objective eligibility requirements, the DOL has issued a regulation establishing a regulatory safe harbor that fails to provide the requisite guidance. The regulation purports to set forth a safe-harbor means of satisfying ERISA's prudence standard in connection with the selection of an annuity provider or contract for benefit distributions under an individual account plan. According to the regulation, in order to be protected by the safe harbor, a fiduciary must: (1) engage in an objective, thorough, and analytical search for the purpose of identifying and selecting annuity providers; (2) appropriately consider information sufficient to assess the ability of the provider to make all future payments under the contract; (3) appropriately consider the contract's cost; (4) appropriately conclude that the annuity provider is financially able to make all future payments under the contract and that the cost is reasonable; and (5) if necessary, consult with an appropriate expert for purposes of compliance with the safe harbor's requirements.[107]

These are general regulatory standards, not the specific and objective requirements that should be included in a regulatory safe harbor.[108] Without specific and objective requirements, the safe harbor does not provide a fiduciary with the guidance necessary to determine that it is covered by the safe harbor and satisfies ERISA's prudence standard.[109] It is not surprising that the safe harbor has not been widely used,[110] and that the DOL is considering revisions to the safe harbor.[111]

The safe harbor would be more useful if the DOL focused on requirements that can be expressed in specific and objective terms. For example, four subjects that a safe harbor might address are: (1) the criteria that a fiduciary should consider in evaluating an annuity provider's financial strength; (2) how frequently a fiduciary should evaluate an annuity provider's financial strength; (3) how a fiduciary should go about identifying and selecting an expert; and (4) what a fiduciary should ask the expert to do.[112]

5. Plan Document Rule

The Departments should reconcile the terms of their safe harbors with the terms of ERISA's plan document rule. In general, ERISA's plan document rule requires an employee benefit plan to be administered in accordance with terms of the plan's governing documents and instruments insofar as the documents and instruments are consistent with the provisions of ERISA.[113] In accordance with the plan document rule, if a plan is administered in accordance with the terms of a safe harbor rather than the terms of the general rule in a regulation, the plan's governing documents should ordinarily refer to the safe harbor rather than to the general rule.

For example, if a §401(k) plan is administered in accordance with the regulation's "immediate and heavy financial need" safe harbor, and permits hardship distributions only for expenses that the safe harbor identifies as creating an immediate and heavy financial need, it would generally be appropriate for the governing plan document to refer specifically to the safe-harbor provision in the regulation or to refer directly to the specific expenses identified in the regulation's safe-harbor provision (such as medical care, home purchase, post-secondary education, and funeral expenses), rather than to the general requirement that an employee have an immediate and heavy financial need.

The Treasury's regulation is not as clear on this point as it might be, however. The regulation provides that a distribution is made on account of hardship only if the distribution is made on account of an immediate and heavy financial need and that a distribution is "deemed to be on account of an immediate and heavy financial need if the distribution is for" any of the specified safe-harbor expenses. The regulation should make clear whether the "deeming" rule: (1) applies only for purposes of the regulation or for purposes of construing the plan as well; and (2) means that a plan can qualify for the safe harbor without expressly referring to either the safe-harbor provision in the regulation or the specific expenses identified in the regulation's safe-harbor provision.[114]

6. Anti-Cutback Rule

If the Departments provide guidance of the sort described in Section VII.B.5., above, regarding ERISA's plan document rule, the Treasury should also provide

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guidance regarding the anti-cutback rule under the Code and ERISA. The anti-cutback rule provides that a participant's accrued benefit may not be reduced by a plan amendment. For this purpose, a plan amendment is deemed to reduce accrued benefits if the amendment eliminates or reduces an early retirement benefit or a retirement-type subsidy or eliminates an optional form of benefit with respect to benefits attributable to service before the amendment.[115]

The anti-cutback rule is not always as uncompromising as the statutory language might suggest, however. For example, the Treasury regulations under the anti-cutback rule allow an employer to amend its §401(k) plan to narrow the circumstances under which the plan may make a hardship distribution. Specifically, the regulations provide that a §401(k) plan may be amended to specify or modify nondiscriminatory and objective standards for determining the existence of an immediate and heavy financial need, the amount necessary to meet the need, or other conditions regarding eligibility to receive a hardship distributions.[116] This provision appears to permit an amendment to the hardship distribution provision in a §401(k) plan to refer specifically to the safe-harbor provision in the regulation or to refer directly to the specific expenses identified in the safe-harbor provision (such as medical care, home purchase, post-secondary education, and funeral expenses), rather than to the general requirement that an employee have an immediate and heavy financial need.

7. Alternative Safe Harbors

From time to time, both the Treasury and the DOL have included alternative safe harbors, rather than a single safe harbor, in their regulations.[117] This practice recognizes that the plans, employers, and service-providers governed by the regulations are so diverse that all of them cannot always qualify for a single safe harbor. Alternative safe harbors should be offered more frequently. Diversity is a strength to be encouraged, not an inconvenience to be tolerated.

8. Unsafe Harbors

An unsafe harbor can improve the guidance that a safe harbor provides by making clear that provisions or activities that are not covered by the safe harbor may nevertheless meet the requirements of the regulation's general rule. When a regulation includes both a safe harbor and an unsafe harbor, the regulation typically designates: (1) plan provisions or activities that will invariably be deemed to meet the requirements of the general rule (safe-harbor provisions or activities); (2) plan provisions or activities that will invariably be deemed to fail to meet the requirements of the general rule (unsafe-harbor provisions or activities); and (3) plan provisions or activities that might or might not meet the requirements of the general rule, depending on the circumstances. This alerts the public to the "unsafe" provisions or activities without suggesting that *all* provisions or activities that are outside the safe harbor are necessarily inconsistent with the general rule.

9. Presumptions

Typically, when a regulation includes a safe harbor, the only alternative to compliance with the safe harbor is compliance with the regulation's general rule. This approach might be appropriate where the regulation's general rule and safe harbor provide sufficient guidance for all or virtually all plans. In some cases, however, the safe harbor might be too restrictive to meet the needs of many plans; alternative safe harbors might be inappropriate or ineffective; and the regulation's general rule might be too open-ended or too fact-bound to give sufficient guidance to those who are not covered by the safe harbor. In such cases, it might be helpful to supplement the safe harbor with a rebuttable positive presumption covering certain plan provisions or activities.[118] Similarly, if there are additional plan provisions or activities that are not covered by the safe harbor and are unlikely to comply with the regulation, it might be appropriate to assign a rebuttable negative presumption to those provisions or activities.

10. No Adverse Inference

Many safe-harbor provisions state that compliance with the safe harbor is not the exclusive means of satisfying the regulation's general rule. Such statements do not go far enough: they leave open the possibility that an arrangement that is not covered by the safe harbor will comply with the regulation's general rule only if the arrangement is similar to those covered by the safe harbor.

A regulation that includes a safe harbor should state that compliance with the regulation's general rule will be based solely on the terms of the general rule, not on the terms of the safe harbor, and that no adverse inference will be drawn from failure to be covered by the safe harbor. Suppose that a §401(k) plan provides that a distribution is deemed to be on account of an immediate and heavy financial need if the distribution is for any payments needed to pay the participant's defense costs in litigation that threatens to bankrupt the participant. Although these payments differ significantly from those covered by the immediate and heavy financial need safe harbor, there is a strong argument that they are payments made to satisfy immediate and heavy financial needs under the general rule governing hardship distributions.

11. Clearly Identify Safe Harbor's Consequences

A party cannot make an informed election to take advantage (or not to take advantage) of a safe harbor

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unless the electing party is fully informed of the election's consequences, such as the relief that the safe harbor provides. Although the Departments have clearly identified the relief that most of their safe harbors provide, the Departments have not done so in every case.

For example, there has been uncertainty over whether the ERISA §404(c) safe harbor relieves a plan fiduciary of responsibility for prudently selecting and periodically reviewing a §404(c) plan's menu of investment options. To support its position that the §404(c) safe harbor does not provide such relief, the DOL has relied heavily on the preamble to the §404(c) regulation. In its amicus brief in *Hecker v. Deere & Co.*, the DOL argued that the preamble explained that the act of designating a plan's investment options and the periodic review of those options and their managers were fiduciary functions to which §404(c) does not apply and that a footnote in the preamble stated that §404(c) does not relieve fiduciaries of liability for failure to prudently select the plan's investment options and to periodically evaluate the performance of those options.[119]

While several circuits have adopted the DOL's position,[120] others have not.[121] In rejecting the DOL's position, a divided Fifth Circuit panel ruled that the footnote in the preamble did not reasonably interpret §404(c). The panel majority adopted what the majority regarded as the common sense view that §404(c) allows a fiduciary who is shown to have committed a breach of fiduciary duty to argue that, despite the breach, it may not be held liable because the loss resulted from a participant's exercise of control over the investment of the assets in the participant's account. The majority reasoned that, by contrast, if the footnote were followed, §404(c) would apply only where the plan's fiduciaries did not breach a fiduciary duty and thus only where §404(c) protection was unnecessary.[122]

Because regulatory safe-harbor provisions offer elections, it is essential that the text of the safe harbor leave no room for doubt in the mind of the electing party about the relief that the safe harbor provides.[123] Recognizing the importance of this point, the DOL amended its §404(c) regulation in 2010 to "reiterate[] its view that a fiduciary breach or an investment loss in connection with the plan's selection or monitoring of a designated investment alternative is not afforded relief under section 404(c) because it is not the result of a participant's or beneficiary's exercise of control."[124] As amended, the regulation provides that the safe-harbor provision "does not serve to relieve a fiduciary from its duty to prudently select and monitor any service provider or designated investment alternative under the plan."[125]

12. Periodic Review

Any regulatory provision, regardless of whether it is a general regulatory standard or a safe-harbor provision, can become obsolete. Because safe harbors tend to be more specific and rigid than general regulatory standards, the risk of obsolescence is somewhat greater for safe harbors than for general regulatory standards.

Vigilance is the appropriate remedy. All regulations, including but not limited to safe-harbor provisions, should be reviewed periodically to determine whether they have become obsolete.

[1] The following acronyms and short-hand expressions are used in this article: "ACA" (for the Patient Protection and Affordable Care Act, P.L. 111-148); "Advisory Council" (for the DOL Advisory Council on Employee Welfare and Pension Benefit Plans); "AO" (for DOL Advisory Opinion); "Code" (for the Internal Revenue Code of 1986, as amended, 26 USC §§1 *et seq.*); "Departments" for the DOL and the Treasury; "DOL" (for the U.S. Department of Labor); "EGTRRA" (for the Economic Growth and Tax Relief Reconciliation Act of 2001, P.L. 107-16); "ERISA" (for the Employee Retirement Income Security Act of 1974, P.L. 93-406, as amended); "FAB" (for DOL Field Assistance Bulletin); "GINA" (for the Genetic Information Nondiscrimination Act of 2008, P.L. 110-233); "HHS" (for the Department of Health and Human Services); "HIPAA" (for the Health Insurance Portability and Accountability Act of 1996, P.L. 104-191); "HSA" (for Health Savings Account); "IRS" (for the Internal Revenue Service); "MHPAEA" (for the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008, contained in P.L. 110-343, Div. C, Title V.B, §512); "PBGC" (for the Pension Benefit Guaranty Corporation); "PPA" (for the Pension Protection Act of 2006, P.L. 109-280); "PTE" (for prohibited transaction exemption); "RFI" (for Request for Information); "SBJPA" (for the Small Business Job Protection Act of 1996, P.L. 104-188); "SEC" (for the U.S. Securities and Exchange Commission); "TR" (for DOL Technical Release); and "Treasury" (for the U.S. Treasury Department).

[2] *See Conkright v. Frommert*, 130 S. Ct. 1640, 1644 (2010) (ERISA is "an enormously complex and detailed statute").

[3] Wooten, *The Employee Retirement Income Security Act of 1974: A Political History* 272 (2004). *See Swaida v. IBM Ret. Plan*, 570 F. Supp. 482, 488 (S.D.N.Y. 1983) ("Congress recognized that achieving its goal of establishing minimum standards without discouraging the creation and continued funding of pension plans would require a complex balancing of interests that in many instances would best be resolved in an administrative setting"), *aff'd per curiam*, 728 F.2d 159 (2d Cir. 1984).

[4] For example, Congress could have required employers to provide benefits to their employees. In fact,

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early in 1974, the year ERISA was enacted, the Nixon Administration proposed a Comprehensive Health Insurance Program that would have required employers to offer health insurance to their full-time employees. For a variety of reasons, that proposal went nowhere. *See* Richard Nixon, Special Message to the Congress Proposing a Comprehensive Health Insurance Plan (2/6/74) (''Every employer would be required to offer all full-time employees the Comprehensive Health Insurance Plan. . . . The insurance plan would be jointly financed with employers paying 65 percent of the premium for the first three years of the plan, and 75 percent thereafter. Employees would pay the balance of the premiums''); Altman & Shactman, *Power, Politics, and Universal Health Care* 53–61 (2011).

[5] *See* ERISA §2(a), (''The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; . . . that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained . . .''); *id.* §2(b) (''It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries . . .'').

[6] *See Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 833 (2003) (''[E]mployers have large leeway to design disability and other welfare plans as they see fit''); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002) (''Any such provision patently violates ERISA's policy of inducing employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred''); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999) (''ERISA's fiduciary duty requirement simply is not implicated where [the employer], acting as the Plan's settlor, makes a decision regarding the form or structure of the Plan such as who is entitled to receive Plan benefits and in what amounts, or how such benefits are calculated''); *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996) (''Nothing in ERISA requires employers to establish employee benefit plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan''); *id.* at 894 (''ERISA leaves th[e] question of the content of benefits to the private parties creating the plan. . . . [T]he private parties, not the Government, control the level of benefits) (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981)) (internal quotation marks omitted); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983) (ERISA ''imposes participation, funding, and vesting requirements on pension plans. It also sets various uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility, for both pension and welfare plans. ERISA does not mandate that employers provide any particular benefits, and does not itself proscribe discrimination in the provision of employee benefits'' (citations omitted)); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981) (ERISA's preemption provision ''demonstrates that Congress . . . meant to establish pension plan regulation as exclusively a federal concern'').

[7] *See generally* ERISA §§402(a)(1), (b)(4), 404(a)(1); *U.S. Airways, Inc. v. McCutchen*, No. 11-1285 (U.S. 4/16/13); *Kennedy v. Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 303 (2009).

[8] ERISA §514(a). *See also* ERISA §3004(a) (requiring the Departments to issue rules ''designed to reduce duplication of effort . . . and the burden of compliance'').

[9] 120 Cong. Rec. 29198 (1974). 120 Cong. Rec. 29944 (1974) (remarks of Sen. Javits) (''Congress has developed a fair and feasible system of private pension plan regulation. And under this regulation, private plans will develop more rapidly than in the past because the Congress will have assured that pension promises are kept and reasonable expectations built upon those promises are not disappointed''); *id.* at 29210–11(1974) (remarks of Rep. Rostenkowski) (''The goal of this legislation was to strengthen the rights of employees under existing pension systems, while at the same time encouraging the expansion of these plans and the creation of new ones. As a result, the committees found it necessary to develop a delicate compromise between stricter regulations for protection of employees and sufficient inducements for continued participation by employers''); *id.* at 29198 (1974) (remarks of Rep. Ullman) (''This legislation provides urgently needed reform in the pension area. But at the same time, it continues the basic governmental policy of encouraging the growth and development of voluntary private pension plans''); 113 Cong. Rec. 4651, 4653 (1967) (remarks of Sen. Javits) (''I am committed to preserving, fostering, and improving the private pension plan system. . . . It will be a very difficult task to regulate the operation of employee benefit plans sufficiently to assure the legitimate expectations of employee participants while at the same time avoiding undue or unnecessary interference with the operation of these plans. Overregulation or unnecessary regulation would be worse than none, for it would deter the installation and improvement of these much needed programs'').

[10] S. Rep. No. 127, 93d Cong., 1st Sess. 13 (1973); *see also* H.R. Rep. No. 807, 93d Cong., 2d Sess. 2

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(1974) (''The bill encourages provisions for the retirement needs of many millions of individuals. At the same time, the committee recognizes that private retirement plans are voluntary on the part of employers, and, therefore, it has weighed carefully the additional costs to employers and minimized those costs to the extent consistent with minimum standards for retirement benefits''); H.R. Rep. No. 779, 93d Cong., 2d Sess. 2 (1974) (same); H.R. Rep. No. 533, 93d Cong., 1st Sess. 1, 5 (1973) (''[F]ederal mandation of essential improvements has been resisted due to the belief that such legislation might impede plan growth. However, the Committee's inquiries have revealed that the costs associated with the vesting and funding proposals in the Act are sufficiently modest as not to constitute a major impediment to plan growth''); S. Rep. No. 383, 93d Cong., 1st Sess. 10–11 (1973) (''A fundamental aspect of current law, which the committee bill continues, is reliance on voluntary action by employers (and employees under contributory plans) for the establishment of qualified retirement plans. The committee bill also continues the approach in present law of encouraging the establishment of retirement plans which contain socially desirable provisions through the granting of tax inducements. In other words, under the new legislation as under present law, no one is compelled to establish a retirement plan. However, if a retirement plan is to qualify for the favorable tax treatment, it will be required to comply with specified new requirements which are designed to improve the retirement system. Since the favorable tax treatment is quite substantial, presently involving a revenue loss of over $4 billion a year, it is anticipated that plans will have a strong inducement to comply with the new qualification rules and thereby become more effective in fulfilling their objective of providing retirement income'').

[11] 29 USC §1001a(c)(2), as added by §3 of the Multiemployer Pension Plan Amendments Act of 1980, P.L. 96-364.

[12] 29 USC §1001b(c)(2), as added by §11002 of the Single-Employer Pension Plan Amendments Act of 1986, P.L. 99-272.

[13] *See* ACA §1502(a)(2)(D); *cf. White v. Marshall & Ilsley Corp.*, No. 11-2660 (7th Cir. 4/19/13) (''To preserve and encourage ESOPs, Congress exempted fiduciaries of ESOPs from the duty to diversify and limited the duty of prudence so as not to require diversification for such plans'').

[14] *Conkright v. Frommert*, 130 S. Ct. 1640, 1648–49 (2010) (quoting *Aetna Health Inc. v. Davila*, 542 U.S. 200, 215 (2004) and *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996)) (internal quotation marks omitted).

[15] Although this article focuses on the safe harbors established by the Treasury and the DOL, other agencies also have established safe harbors affecting employee benefit plans. *See, e.g.,* CMS, ''Technical Guidance for Non-Federal Governmental Plans'' (8/17/12) (enforcement safe harbor regarding content of adverse benefit determinations and final internal adverse benefit determinations issued under group health plans that are non-federal governmental plans); CCIIO Technical Guidance, ''Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, Group Health Plans and Group Health Insurance Issuers with Respect to the Requirement to Cover Contraceptive Services Without Cost Sharing. . .'' (8/15/12); PBGC Regs. §4000.14 (PBGC safe harbor for use of electronic media); *id.* §4007.8(f), (g), (i) (waiver of penalty); SEC Release No. 34-23170 (4/23/86); interpretive release on scope of §28(e) of the Securities Exchange Act of 1934 and related matters). *See also Seff v. Broward County*, 602 F.3d 1221 (11th Cir. 2012) (employee wellness program covered by safe-harbor provision in Americans with Disabilities Act of 1990, based on district court's finding that wellness program constituted a term of employer's bona fide benefit plan); ERISA Technical Release 86-1 (SEC has exclusive authority to interpret scope of safe harbor under §28(e) of the Securities Exchange Act of 1934, governing soft dollar and directed commission arrangements).

[16] *See, e.g., Massachusetts v. Morash*, 490 U.S. 107, 116 (1989) (''The Secretary [of Labor] . . . is specifically authorized to define ERISA's 'accounting, technical, and trade terms' . . .''). *See also Johnson v. Buckley*, 356 F.3d 1067, 1072–74 (9th Cir. 2004) and the cases cited therein.

[17] *See* ERISA §505.

[18] *See* Treas. Regs. §1.401(k)-1(d)(3)(iii). Similarly, the DOL recognized the need for a safe harbor under ERISA §3(2) (defining ''pension plan'' as a plan ''established or maintained'' by an employer). *See* DOL FAB 2007-02 (''The terms 'establish' or 'maintain' are not defined in ERISA, and uncertainty as to the application of ERISA to . . . programs funded entirely with employee contributions prompted the Department of Labor in 1979 to issue a 'safe harbor' regulation at 29 CFR §2510.3-2(f)'').

[19] ERISA §404(c)(1)(A).

[20] ERISA §404(c)(5).

[21] *See also* PPA §625 (directing DOL to issue regulations clarifying that selection of annuity contract as optional form of distribution from individual account plan is not subject to ''safest available annuity'' standard in DOL Regs. §2509.95-1, but is subject to all otherwise applicable fiduciary standards).

[22] *See, e.g.,* Notice 2012-58, 2012-41 I.R.B. 436 (series of safe harbors for determining who is a full-time employee with respect to whom an employer

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must either provide health coverage or pay a penalty); Notice 2007-6, 2007-2 I.R.B. 272, §III.D.2, F (safe-harbor market rate of return for hybrid defined benefit pension plans and safe harbor for hybrid plan conversions related to mergers and acquisitions); Rev. Proc. 2005-25, 2005-17 I.R.B. 962 (safe-harbor formulas for determining fair market value of life insurance contract); 70 Fed. Reg. 50967 (8/29/05) (same); Notice 2004-23, 2004-15 I.R.B. 725 (safe-harbor definition of preventive care); *Exempt Organizations Determinations Manual*, IRM 7.25.9.3.1 (2-9-99) (three-state safe harbor); *id.* 7.25.9.3.3.1 (nondiscrimination safe harbor guidelines); FAQs About Affordable Care Act Implementation (Parts VIII and IX (5/11/12)) (safe harbors for electronic distribution of summary of benefits and coverage); ERISA Technical Release 2012-01 (look-back/stability period safe-harbor method); ERISA Technical Release 2010-01 (interim enforcement safe harbor); DOL FAB 2004-01 (HSA meeting conditions of group-type insurance safe harbor is not welfare plan); ERISA Technical Release 92-01, *extended by* 58 Fed. Reg. 45359 (8/27/93) (enforcement safe harbor regarding application of trust requirement).

[23] *See, e.g., Peabody v. Davis*, 636 F.3d 368 (7th Cir. 2011).

[24] *Chevron U.S.A., Inc. v. Natural Res. Def. Council Inc.*, 467 U.S. 837, 842–43 (1984) (footnotes omitted).

[25] *U.S. v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

[26] *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173 (2007).

[27] *Mayo Found. for Med. Educ. & Research v. U.S.*, 131 S. Ct. 704, 711–15 (2011); *see also Mass. v. Morash*, 490 U.S. 107, 116 (1989) (DOL regulations entitled to *Chevron* deference).

[28] *See, e.g., Ky. Ret. Sys. v. EEOC*, 554 U.S. 135, 149–50 (2008) (EEOC manual entitled to respect but only to the extent it has the power to persuade and not entitled to *Chevron* deference); *U.S. v. Mead Corp.*, 533 U.S. 218, 229–30 (2001) (Customs ruling letters are not entitled to *Chevron* deference, but are entitled to some deference); *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (''Interpretations such as those in opinion letters — like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law — do not warrant *Chevron*-style deference. . . . Instead, interpretations contained in formats such as opinion letters are 'entitled to respect' . . . but only to the extent that those interpretations have the 'power to persuade' ''); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944) (views of agency ''constitute a body of experience and informed judgment to which the courts and litigants may properly resort for guidance''); *Bradley v. Sebelius*, 621 F.3d 1330, 1338–39 (11th Cir. 2010) (methodology in Medicare Secondary Payer Manual not entitled to deference); *Hecker v. Deere & Co.*, 569 F.3d 708, 710 (7th Cir. 2009) (statement in footnote in preamble to regulation not entitled to full *Chevron* deference); *In re Union Pac. R.R. Emp't Practices Litig.*, 479 F.3d 936, 943 (8th Cir. 2007) (agency interpretation in opinion letter, policy statement, agency manual, or enforcement guideline is not entitled to *Chevron* deference); *Clark v. Modern Group Ltd.*, 9 F.3d 321, 335 (3d Cir. 1993) (courts do not defer to nonregulatory IRS administrative guidance); *Virginia Educ. Fund v. Comr.*, 799 F.2d 903, 904 (4th Cir. 1986) (revenue procedures are mere guidelines without force of law). An agency's interpretation of its own regulation, however, is generally entitled to controlling deference unless the interpretation is plainly erroneous or inconsistent with the regulation, there is reason to suspect that the interpretation does not reflect the agency's fair and considered judgment, or the interpretation would result in unfair surprise. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012); *Auer v. Robbins*, 519 U.S. 452, 461–62 (1997).

[29] *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *see also Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 748 (2004) (''[N]either an unreasoned statement in the [Internal Revenue Manual] nor allegedly longstanding agency practice can trump a formal regulation with the procedural history necessary to take on the force of law'').

[30] *See, e.g., Quality Stores, Inc. v. U.S.*, 693 F.3d 605, 619 (6th Cir. 2012) (revenue rulings do not have the force of law); *Aeroquip-Vickers v. Comr.*, 347 F.3d 173, 180 (6th Cir. 2003) (revenue rulings are reviewed under the *Skidmore* standard, not under the *Chevron* standard); *North Dakota State Univ. v. U.S.*, 255 F.3d 599, 604 n.6 (8th Cir. 2001) (revenue rulings do not have the force of law but are entitled to respectful consideration).

[31] *U.S. v. Mead Corp.*, 533 U.S. 218, 228 (2001).

[32] *Barnhart v. Walton*, 535 U.S. 212, 222 (2002); *Tibble v. Edison Int'l*, No. 11-56628 (9th Cir. 3/21/13).

[33] *U.S. v. Mead Corp.*, 533 U.S. 218, 229–30 (2001).

[34] *See, e.g.,* ERISA §404(c)(1)(A) (providing relief from fiduciary liability where an individual account pension plan allows a participant or beneficiary to exercise control over the assets in his account, ''if a participant or beneficiary exercises control over the assets in his account (***as determined under regulations of the Secretary***)'' (emphasis added)); *id.* §404(c)(5) (providing relief from fiduciary liability where, in the absence of an election by a participant or beneficiary, funds are invested by the plan ''***in accordance with***

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regulations prescribed by the Secretary'' (emphasis added)); EGTRRA §657(c)(2)(A) (directing the DOL to issue ***regulations*** providing safe harbors under which the designation of an institution to receive an automatic rollover and the investment of the rolled-over funds are deemed to satisfy ERISA's fiduciary standards); EGTRRA §636(a) (directing the Treasury to revise the ***regulations*** regarding hardship distributions); PPA §625 (directing DOL to issue ***regulations*** clarifying that the selection of an annuity contract as an optional form of distribution from an individual account plan is not subject to the ''safest available annuity'' standard in DOL Regs. §2509.95-1, but is subject to all otherwise applicable fiduciary standards).

[35] ERISA §110(b). *See also* ERISA §104(a)(2), (3).

[36] *See, e.g., General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 600 (2004) (''[W]e neither defer nor settle on any degree of deference because the Commission is clearly wrong''); *Taproot Admin. Services, Inc. v. Comr.*, 679 F.3d 1109, 1115 & n.14 (9th Cir. 2012) (''As both parties concede, I.R.S. revenue rulings are entitled to the degree of deference articulated by the Supreme Court in [*Skidmore* and *Mead*] . . . . This Court, however, has not definitely resolved the issue of whether revenue rulings are entitled to *Skidmore* deference or the deference articulated by the Supreme Court in [*Chevron*]. We, too, decline to resolve the question, as we conclude that the I.R.S.'s position is persuasive without affording *Chevron* deference . . . .'' (citations omitted)).

[37] *See* Code §401(k)(2)(B)(i)(IV).

[38] *See* Treas. Regs. §1.401(k)-1(d)(3)(i).

[39] *See* Treas. Regs. §1.401(k)-1(d)(3)(iii)(A).

[40] *See* Treas. Regs. §1.401(k)-1(d)(3)(iii)(B).

[41] *See* Treas. Regs. §1.401(k)-1(d)(3)(iv)(A)–(C).

[42] *See* Treas. Regs. §1.401(k)-1(d)(3)(iv)(E).

[43] ERISA §3(21)(A).

[44] DOL Regs. §2510.3-21(c).

[45] DOL Regs. §2509.96-1, -1(d)(4), 61 Fed. Reg. 29586, 29586–87 (6/11/96).

[46] 61 Fed. Reg. 29586 (6/11/96).

[47] *See, e.g.,* Statement of Cynthia Mallett, Vice President for Industry Strategies & Public Policy, Corporate Benefit Funding Division, MetLife, submitted to the 2012 ERISA Advisory Council (8/30/12) (''IB 96-1 has been used extensively by employers that want to help their employees without taking on fiduciary liability for the provision of investment advice''); Statement of Sarah Holden, Senior Director, Retirement & Investor Research on behalf of the Investment Company Institute, submitted to the ERISA Advisory Council Working Group on Spend Down of Defined Contribution Assets at Retirement (7/16/08) (''After the release of Interpretive Bulletin 96-1, educational tools such as newsletters (and other written material), planning calculators, and other Internet-based interactive tools, became widespread''); *cf. White v. Marshall & Ilsley Corp.*, No. 11-2660 (7th Cir. 4/19/13) (''Employees may unwittingly take on more risk than is suitable for their purposes. . . . [T]his kind of litigation does not seem to be an effective solution to the problem of poorly informed plan participants. Perhaps the problem would be better solved through rules such as limits on employee investment in employer stock, or by encouraging or even requiring plans to offer more education about investing'').

[48] DOL Regs. §2510.3-1(j).

[49] DOL Regs. §2510.3-1(a)(4).

[50] *See, e.g., Casselman v. Am. Family Life Assur. Co.*, 35 EBC 1233, at n.1 (4th Cir. 2005); *Anderson v. Unum Provident Corp.*, 369 F.3d 1257, 1263 n.2 (11th Cir. 2004); *Butero v. Royal Maccabees Life Ins. Co.*, 174 F.3d 1207, 1214 (11th Cir. 1999); *Johnson v. Watts Regulator Co.*, 63 F.3d 1129, 1133 (1st Cir. 1995); *Hansen v. Cont'l Ins. Co.*, 940 F.2d 971, 976–78 (5th Cir. 1991); *see also* Brief of the Secretary of Labor as Amicus Curiae, *United Airlines, Inc. v. Airline Pilots Ass'n*, Court of Appeal of the State of California First Appellate Dist. Div. (10/31/11) (''[A] particular arrangement is not necessarily covered by ERISA just because it falls outside the specific safe harbor set forth in the regulation'' (footnote omitted)).

[51] *See* Code §401(k)(12), (m)(11).

[52] *See, e.g.,* H.R. Rep. No. 104-737, 104th Cong., 2d Sess. 243 (1996) (''Safe harbor for cash or deferred arrangements'') (Conf. Rep.); H.R. Rep. No. 104-586, at 109 (''[T]he Committee believes it is appropriate to provide a design-based safe harbor for qualified cash or deferred arrangements.''); S. Rep. No. 104-281, at 76–77 (same); Treas. Regs. §1.401(k)-3; Notice of Proposed Rulemaking, 74 Fed. Reg. 23134, 23135 (5/18/09) (safe-harbor method).

[53] Congress sought to reduce the complexity associated with the ADP and ACP tests, including the recordkeeping necessary to monitor employee elections, the calculations involved in applying the ADP and ACP tests, and the correction mechanism that applied if a plan failed one or both of the tests. *See, e.g.,* H.R. Rep. No. 104-586, 104th Cong., 2d Sess. 108 (1996); S. Rep. No. 104-281, 104th Cong., 2d Sess. 76 (1996). The notice-and-contribution provisions actually provide for alternative methods of compliance, discussed in Section IV.B., below, rather than for traditional safe harbors. Regulatory safe harbors traditionally recognize that there are other methods, not specified by the statute or regulations, of complying with the regulation. The notice-and-contribution provisions, however, do not suggest that another method of compliance (not mentioned in the statute or the regulations) is available. It would have been less confusing if, in enacting the SBJPA, Congress had used

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"safe harbor" and "alternative method of compliance" in the same way that the Departments have generally used those terms and in a way that was consistent with the way Congress itself used "alternative method of compliance" in ERISA §110.

[54] *See, e.g., Peabody v. Davis*, 636 F.3d 368, 376 (7th Cir. 2011) ("[W]hen a plan is noncompliant with §404(c), fiduciaries are denied the statutory safe harbor. However, it does not necessarily follow that any delegation of investment discretion to plan participants violates ERISA") (quoting *Jenkins v. Yager*, 444 F.3d 916, 924 (7th Cir. 2006) (internal quotation marks omitted)); *Sys. Council EM-3, Int'l Bhd. Elec. Workers, AFL-CIO v. AT&T Corp.*, 159 F.3d 1376, 1381 (D.C. Cir. 1998) ("§1.414(*l*)-1(b)(5)(ii) . . . does not mandate the use of the PBGC assumptions, but rather cites them as a 'safe harbor' "); 56 Fed. Reg. 40507, 40512–13 (8/15/91) ("[A]n employer that wishes to allow distributions in circumstances not listed in the deeming provision may permit distributions under the general hardship rules by including appropriate language in the plan"); DOL Regs. §2550.404a-2(a)(2) ("The standards set forth in this section . . . apply solely for purposes of determining whether a fiduciary meets the requirements of this safe harbor. Such standards are not intended to be the exclusive means by which a fiduciary might satisfy his or her responsibilities under the Act . . ."); DOL Regs. §2550.404a-3(a)(3) (same); DOL Regs. §2550.404a-4(a)(2) ("This section sets forth an optional means for satisfying the fiduciary responsibilities under section 404(a)(1)(B) of ERISA with respect to the selection of an annuity provider or contract for benefit distributions. This section does not establish minimum requirements or the exclusive means for satisfying these responsibilities"); DOL Regs. §2550.404c-1(a)(2) ("The standards set forth in this section are applicable solely for the purpose of determining whether a plan is an ERISA section 404(c) plan and whether a particular transaction . . . is afforded relief by section 404(c). Such standards, therefore, are not intended to be applied in determining whether, or to what extent, a plan which does not meet the requirements for an ERISA section 404(c) plan or a fiduciary with respect to such a plan satisfies [the requirements of Title I of ERISA]"); DOL Regs. §2550.404c-5(a)(2) ("The standards set forth in this section apply solely for purposes of determining whether a fiduciary meets the requirements of this regulation. Such standards are not intended to be the exclusive means by which a fiduciary might satisfy his or her responsibilities under [ERISA]"); DOL FAB 2009-03 at n. 13; DOL FAB 2009-01; DOL FAB 2007-02 at n.2; 74 Fed. Reg. 3822, 3832 (1/21/09); 72 Fed. Reg. 60452 (10/24/07); Brief of the Secretary of Labor as Amicus Curiae,*United Airlines, Inc. v. Airline Pilots Ass'n*, Court of Appeal of the State of California First Appellate Dist. Div. (10/31/11). *See also* fn. 50, above.

[55] Code §411(a)(5)(A); ERISA §203(b)(2)(A).

[56] *See* DOL Regs. §2530.200b-3(d)(1).

[57] *See* DOL Regs. §2530.200b-3(e)(1)(ii).

[58] *See* Treas. Regs. §1.410(a)-7; *Johnson v. Buckley*, 356 F.3d 1067 (9th Cir. 2004); *Jefferson v. Vickers Inc.*, 102 F.3d 960 (8th Cir. 1996); *Coleman v. Interco Inc. Divisions' Plans*, 933 F.2d. 550 (7th Cir. 1991); *Swaida v. IBM Ret. Plan*, 570 F. Supp. 482 (S.D.N.Y. 1983), *aff'd per curiam*, 728 F.2d 159 (2d Cir. 1984).

[59] *See, e.g.,* DOL Regs. §§2520.104-4, -23, -27, -48, -49. In addition, ERISA authorizes the DOL to provide "by regulation" simplified annual reporting for a pension plan covering fewer than 100 participants. *See* ERISA §§103(a)(4), 104(a)(2)(A). The DOL has exercised this authority. DOL Regs. §§2520.104-41, -42, -46.

[60] *See* DOL Regs. §2510.3-102(a)(2).

[61] *See* 75 Fed. Reg. 2068, 2071 (1/14/10).

[62] *See* ERISA §104(a)(3).

[63] *See, e.g.,* DOL Regs. §§2520.104-20, -21, -24, -25, -26, -43, -44, -46.

[64] *See* Code §4975; ERISA §§406–408.

[65] S. Rep. No. 127, 93d Cong., 1st Sess. 31 (1973).

[66] Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47713 (10/17/78); Exec. Order No. 12,108, 44 Fed. Reg. 1065 (1/3/79).

[67] *See* Code §4975(c)(2); ERISA §408(a). The legislative history refers to two classes of transactions that were deserving of administrative exemptions: transactions that "should be allowed in order not to disrupt the established business practices of financial institutions" and transactions with the potential "benefit to the community as a whole" and that provide "substantial independent safeguards for the plan participants and beneficiaries." H.R. Rep. No. 1280, 93d Cong., 2d Sess. 309–10 (1974) (Conf. Rep.).

[68] "ERISA explicitly contemplated a dual public and private enforcement system." *Herman v. South Carolina Nat'l Bank*, 140 F.3d 1413, 1423–25 (11th Cir. 1998); *Donovan v. Cunningham*, 716 F.2d 1455, 1462 (5th Cir. 1983). "ERISA gives plan beneficiaries and the Secretary independent rights of action . . . ." Brief of the Secretary of Labor as Amicus Curiae in Support of Plaintiffs' Motion for Class Certification, *In re Beacon Sec. Litig.*, No. 09-cv-00777 (LBS) (AJP), at 5 (filed 1/9/12).

[69] The announcement also provided that, in the absence of a trust, the DOL would not "assert a violation in any enforcement proceeding or assess a civil penalty with respect to a cafeteria plan because of a

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failure to meet the reporting requirements by reason of not coming within the reporting requirement exemptions in DOL Regs. §§2520.104-20 and 2520.104-44 solely as a result of using participant contributions to pay plan benefits or expenses attendant to the provision of benefits.'' ERISA Technical Release 92-01, *extended by* 58 Fed. Reg. 45359 (8/27/93). *See also* 73 Fed. Reg. 11072, 11074 (2/29/08) (prior to effective date of safe harbor for a plan with fewer than 100 participants, DOL will not assert a violation of ERISA based on general rule that participant contributions become plan assets on earliest date on which they can reasonably be segregated from employer's general assets so long as payments were transferred to plan in accordance with 7-business-day safe-harbor period). The 1992 version of the enforcement policy is a revised version of a 1988 enforcement policy. *See* ERISA Technical Release 88-1. In 2010, the DOL confirmed that ERISA Technical Release 92-01 was still in effect and would remain in effect until further notice. 75 Fed. Reg. 2068, 2070 (1/14/10).

[70] *See* ERISA §502(a)(1)–(3).

[71] *See* ERISA Technical Release 2011-03R (''This is an expression of the Department's enforcement policy but it does not address the rights or obligations of other parties'').

[72] *See, e.g., McCarter v. Ret. Plan for the Dist. Managers of the Am. Family Ins. Grp.*, 540 F.3d 649, 651–52 (7th Cir. 2008); *Harris v. Trustmark Nat'l Bank*, 287 Fed. Appx. 283 (5th Cir. 2008); *Trenton v. Scott Paper Co.,* 832 F.2d 806, 810 (3d Cir. 1987); *Reklau v. Merchants Nat'l Corp.*, 808 F.2d 628, 630–31 (7th Cir. 1986).

[73] *Cf. Exempt Organizations Determinations Manual*, IRM 7.25.9.3.3.1 (2-9-99) (nondiscrimination safe harbor).

[74] On occasion, however, the two agencies have disagreed, at least initially, regarding the application of parallel provisions of the Code and ERISA. *See, e.g., Kennedy v. Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 296 n.7 (2009); Letter from Robert J. Doyle, Director, Regulations and Interpretations, Employee Benefits Security Administration, to Evelyn Petscheck, Director, Employee Plans Division (1/16/96) (asking the IRS to reconsider its views on whether funds attributable to employees' contributions may be used to pay down an exempt loan to a leveraged ESOP); *cf.* ERISA §3004(a) (requiring the Secretary of the Treasury and the Secretary of Labor to consult with each other to reduce, among other things, conflicting requirements).

[75] *See* ERISA §502(a)(1)–(3).

[76] *See, e.g., Weil v. Ret. Plan Admin. Comm. of the Terson Co.*, 933 F.2d 106 (2d Cir. 1991); *Crouch v. Mo-Kan Iron Workers Welfare Fund*, 740 F.2d 805, 808–09 (10th Cir. 1984); *Raetsch v. Lucent Techs., Inc.*, 39 EBC 1531 (D.N.J. 2006); *but cf. Harris v. Trustmark Nat'l Bank*, 287 Fed. Appx. 283 (5th Cir. 2008); *Bronk v. Mountain States Tel. & Tel., Inc.*, 140 F.3d 1335, 1338–39 (10th Cir. 1998).

[77] *See, e.g.,* 72 Fed. Reg. 63144, 63148–49 (11/8/07) (''Taxpayers may rely on these proposed regulations for guidance pending the issuance of final regulations. If, and to the extent, the final regulations are more restrictive than the guidance in these proposed regulations, those provisions of the final regulations will be applied without retroactive effect''); *see also* Internal Revenue Service, Department of the Treasury; Employee Benefits Security Administration, Department of Labor; Centers for Medicare & Medicaid Services, Department of Health and Human Services, Final Rules for Nondiscrimination and Wellness Programs in Health Coverage in the Group Market, 2007-1 C.B. 434 (2/5/07) (''The Departments also stated their intent to issue further regulations on the nondiscrimination requirements and that in no event would the Departments take any enforcement action against a plan or issuer that had sought to comply in good faith with §9802 of the Code, §702 of ERISA, and §2702 of the PHS Act before the publication of additional guidance. The preambles to the 2001 interim final and proposed rules noted that the period for nonenforcement in cases of good faith compliance with the HIPAA nondiscrimination provisions generally ended on the applicability date of those regulations but continued with respect to wellness programs until the issuance of further guidance. Accordingly, the nonenforcement policy of the Departments ends upon the applicability date of these final regulations for cases in which a plan or issuer fails to comply with the regulations but complies in good faith with an otherwise reasonable interpretation of the statute''); *cf. Chief Counsel Regulation Handbook*, C.C.D.M. 32.1.1.2.2 (8-11-04) (''Taxpayers generally may not rely on proposed regulations for planning purposes, except if there are no applicable final or temporary regulations in force and there is an express statement in the proposed regulations that taxpayers may rely on them currently'').

[78] *See Pfeil v. State Street Bank & Trust Co.*, 671 F.3d 585, 600 (6th Cir. 2012) (''Although the proposed amendment to the regulation is not binding or even owed any deference in this case, it does provide additional, relevant support for the result we reach'').

[79] *See* fns. 24–33, above.

[80] *See, e.g.*, Treas. Regs. §§1.401(a)-1(b)(2)(iv) (normal retirement age under 55 is presumed to be earlier than earliest age that is representative of the typical retirement age for the industry in which covered workforce is employed), 1.401(k)-1(d)(3)(iii)(A)

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(distribution for purchase of boat or television would generally not be a distribution on account of an immediate and heavy financial need).

[81] *See* Treas. Regs. §1.409A-1(b)(5)(i)(A)(1), (iv)(B).

[82] *See* Code §280G(b)(2)(C); Treas. Regs. §1.280G-1, Q&As-1, -2, -3, -22, -25, -26. Code §4999 imposes a 20% excise tax on the recipient of an excess parachute payment.

[83] *See* Treas. Regs. §1.410(b)-4(c); *see also* Treas. Regs. §1.414(r)-8(b)(2)(iii).

[84] Treas. Regs. §1.409A-1(d)(1) (''[I]f a service provider's entitlement to the amount is conditioned on the occurrence of the service provider's involuntary separation from service without cause, the right is subject to a substantial risk of forfeiture if the possibility of forfeiture is substantial. An amount is not subject to a substantial risk of forfeiture merely because the right to the amount is conditioned, directly or indirectly, upon the refraining from the performance of services'').

[85] *See, e.g.*, Treas. Regs. §1.410(a)-9(b) (alternative method of compliance); Class PTE 86-128, 51 Fed. Reg. 41686 (11/18/86), as amended by 67 Fed. Reg. 64137 (10/17/02) (class exemption); Treas. Regs. §1.401(a)-1(b)(2) (presumption).

[86] *See* cases cited in fns. 50 & 58, above.

[87] *See, e.g.,* 73 Fed. Reg. 11072, 11074 (2/29/08) (''The safe harbor will provide a means for certain employers to assure themselves that they are not holding plan assets, without having to determine that participant contributions were forwarded to the plan at the earliest reasonable date''); 56 Fed. Reg. 63420, 63421–22 (12/4/91) (''By focusing the inquiry on separateness, objective tests can be provided that describe the requirements for determining whether a line of business is operated separately. These objective tests provide certainty to the employer and the Service and permit the regulations to be applied in a uniform manner''); Class PTE 86-128, 51 Fed. Reg. 41686, 41690 (11/18/86) (''The Department believes that, with the adoption of the formula as a 'safe harbor,' affected parties are provided with both the certainty and the flexibility necessary to comply with this condition of the class exemption'').

[88] *See* 73 Fed. Reg. 11072, 11073 (2/29/08) (''[T]he Department believes that adoption of a '7-business day' safe harbor rule would present little, if any, additional risk to plan participants and beneficiaries. In this regard, the Department believes that most employers with small plans that are taking longer than 7 business days to deposit participant contributions will expedite the depositing of those contributions to take advantage of the safe harbor. The Department also believes that where participant contributions are being made by employers with small plans within a period shorter than 7 business days, few employers with small plans will incur the costs attendant to modifying their payroll system in order to hold such contributions for a few additional days'').

[89] *See Kennedy v. Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 300 (2009) (''[A] straightforward rule of hewing to the directives of the plan documents . . . lets employers establish a uniform administrative scheme, [with] a set of standard procedures to guide processing of claims and disbursement of benefits'' (internal quotation marks omitted)); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987) (''Statements by ERISA's sponsors in the House and Senate . . . reflect recognition of the administrative realities of employee benefit plans. An employer that makes a commitment systematically to pay certain benefits undertakes a host of obligations, such as determining the eligibility of claimants, calculating benefit levels, making disbursements, monitoring the availability of funds for benefit payments, and keeping appropriate records in order to comply with applicable reporting requirements. The most efficient way to meet these responsibilities is to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits'').

[90] *See, e.g.*, 56 Fed. Reg. 63420, 63421–22 (12/4/91) (''By focusing the inquiry on separateness, objective tests can be provided that describe the requirements for determining whether a line of business is operated separately. These objective tests provide certainty to the employer and the Service and permit the regulations to be applied in a uniform manner''); *see also Krishna v. Colgate Palmolive Co.*, 7 F.3d 11, 18 (2d Cir. 1993) (''There is a strong interest in uniform, uncomplicated administration of ERISA plans . . .'').

[91] *See, e.g.,* Class PTE 86-128, 51 Fed. Reg. 41686, 41690 (11/18/86) (''The Department believes that, with the adoption of the formula as a 'safe harbor,' affected parties are provided with both the certainty and the flexibility necessary to comply with this condition of the class exemption'').

[92] *See, e.g.,* 56 Fed. Reg. 63420, 63429 (12/4/91) (''The Treasury and the Service believe that objective standards are more administrable and are consistent with the legislative history'').

[93] *See* ERISA Technical Release 2011-03R (''Some commenters expressed the view that the current safe harbor of 29 CFR §2520.104b-1(c) is outdated and limits the ability of plans to realize the benefits of using electronic media to furnish disclosures required by title I of ERISA (e.g., reduction of costs; environmental impact) . . . . The Department is reviewing the E-Disclosure RFI comments for purposes of deter-

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mining whether, and possibly how it would modify the electronic disclosure rules of 29 CFR §2520.104b-1(c)''); DOL, RFI Regarding Electronic Disclosure by Employee Benefit Plans, 76 Fed. Reg. 19285 (4/7/11) (''The purpose of the review is to explore whether, and possibly how, to expand or modify these standards [for the electronic distribution of ERISA-required disclosures] taking into account current technology, best practices and the need to protect the rights and interests of participants and beneficiaries''). *cf.* Treas. Regs. §1.401(k)-1(d)(3)(v) (IRS Commissioner authorized to expand list of deemed immediate and heavy financial needs and to prescribe additional methods for distributions to be deemed necessary to satisfy an immediate and heavy financial need); 71 Fed. Reg. 75014, 75019 (12/13/06) (''The examples serve as safe harbors . . . . The [Treasury, Labor, and HHS] Departments, though, do not want plans or issuers to feel constrained by the relatively narrow range of programs described by the examples but want plans and issuers to feel free to consider innovative programs for motivating individuals to improve their health'').

[94] *See* fn. 88, above.

[95] *See also* 71 Fed. Reg. 75014, 75019 (12/13/06) (''The examples serve as safe harbors . . . . Wellness programs similar to the examples also would satisfy the 'reasonably designed' requirement'') (Treasury and DOL).

[96] *Cf. Sys. Council EM-3, Int'l Bhd. Elec. Workers, AFL-CIO v. AT&T Corp.*, 159 F.3d 1376, 1381 (D.C. Cir. 1998) (''§1.414(*l*)-1(b)(5)(ii) . . . does not mandate the use of the PBGC assumptions, but rather cites them as a 'safe harbor' '').

[97] *See* Code §223(a), (c)(1)(A), (c)(2)(C).

[98] *See* IRS Notice 2004-23, 2004-15 I.R.B. 725.

[99] *See* Treas. Regs. §§1.83-3(c)(4), *Ex. (1)*, 31.3121(v)(2)-1(b)(5), *Ex. 10*; 71 Fed. Reg. 75014, 75019 (12/13/06) (examples serve as safe harbors).

[100] *See* Treas. Regs. §1.414(*l*)-1(n)(1) (defined benefit plan spinoff); *Proujansky v. Blau*, 26 EBC 2384 (S.D.N.Y. 2000) (''I will assume without deciding that the hypothetical 1988 transfer . . . would have failed to satisfy the 'safe harbor' regulation's requirement that 'all of the accrued benefits of each participant are allocated to only one of the spun off plans.' It does not necessarily follow that such a transfer would *necessarily* have violated the requirements of §414(*l*) of the IRC, since the IRS recognizes that the safe harbor rule is not the exclusive method by which a spinoff can satisfy the requirements of §414(*l*) of the Code'' (citation omitted)).

[101] *See, e.g.,* 71 Fed. Reg. 75014, 75019 (12/13/06) (examples serve as safe harbors); Rev. Proc. 2005-25, 2005-17 I.R.B. 962 (safe-harbor formulas for determining fair market value of a life insurance contract).

[102] The value of notice-and-comment rulemaking can be debated. *See, e.g.,* Sunstein, ''*Chevron* Step Zero,'' 92 *Va. Law Rev.* 187, 222–28 (2006)

[103] *See, e.g.*, 57 Fed. Reg. 46906 (10/13/92) (regulations under ERISA §404(c)); 56 Fed. Reg. 47524 (9/19/91) (regulations under Code §401(a)(4)); 58 Fed. Reg. 46773 (9/3/93) (same).

[104] *See* DOL FAB 2012-02, Q&A-30. The FAB emphasized, however, that brokerage windows and similar arrangements were subject to the disclosure requirements relating to plan-related information. *See id.* at Q&As-13, 29.

[105] *See, e.g.,* Letter from Sen. John Kerry to Sec. Hilda Solis (7/24/12), *available at* http://www.americanbenefitscouncil.org/documents2012/401k-fee_qa30_kerry-solis-letter072412.pdf.

[106] *See* DOL FAB 2012-02R, Q&A-39.

[107] DOL Regs. §2550.404a-4.

[108] A safe-harbor provision that is imprecise does not offer the certainty that safe harbors should provide. *See, e.g.,* 72 Fed. Reg. 28604, 28605 (5/22/07) (safe harbor retirement age of at least age 62); 71 Fed. Reg. 20820, 20837 (4/21/06) (''The final regulation provides safe harbor protection under section 404(a) of ERISA for fiduciaries that terminate small plans and directly transfer account balances into specified types of investment vehicles in cases in which the participant or beneficiary fails to elect a form of distribution. The regulation benefits fiduciaries by providing clarity on how to fulfill fiduciary obligations under ERISA . . .'').

[109] *Cf.* 73 Fed. Reg. 58447, 58448 (10/7/08).

[110] *See* statements submitted to DOL and Treasury Lifetime Income Hearing (9/14–15/10) by The ERISA Industry Committee (statement of Allison R. Klausner), ING Insurance U.S., on behalf of The American Council of Life Insurers (statement of Tom Roberts), MetLife (statement of Robert E. Sollman, Jr.), Prudential Retirement (statement of Christine Marks), and the U.S. Chamber of Commerce.

[111] *See* RFI Regarding Lifetime Income Options for Participants and Beneficiaries in Retirement Plans, Questions 30–32, 75 Fed. Reg. 5253, 5357 (2/2/10); Notice of Hearing on Certain Issues Relating to Lifetime Income Options for Participants and Beneficiaries in Retirement Plans, Issue No. 4, 75 Fed. Reg. 48367, 48368 (8/10/07).

[112] *See* note 110, above.

[113] *See generally* ERISA §§402(a)(1), (b)(4), 404(a)(1); *US Airways, Inc. v. McCutchen*, No. 11-1285 (U.S. 4/16/13); *Kennedy v. Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 303 (2009).

[114] *See* Treas. Regs. §1.401(k)-1(d).

[115] Code §411(d)(6); ERISA §204(g).

[116] Treas. Regs. §1.411(d)-4, Q&A-2(b)(2)(x).

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[117] *See, e.g.,* Treas. Regs. §§1.414(s)-1(c) (safe harbor definitions of compensation), 1.415(b)-4(c), 1.415(c)-2(d) (same); Interpretive Bulletin 96-1, 61 Fed. Reg. 29586, 29586–87 (6/11/96) (investment education safe harbors).

[118] *See* Treas. Regs. §1.401(a)-1(b)(2); 72 Fed. Reg. 28604, 28605 (5/22/07).

[119] Brief of the Secretary of Labor as Amicus Curiae in Support of Panel Rehearing, *Hecker v. Deere & Co.*, No. 06-C-719-S (filed 3/17/09).

[120] *Tibble v. Edison Int'l*, No. 11-56628 (9th Cir. 3/21/13) (''Because DOL's interpretation of how the safe harbor functions is consistent with the statutory language, we conclude that the district court properly decided that section 404(c) did not preclude merits consideration of beneficiaries' claims''); *Pfeil v. State Street Bank & Trust Co.*, 671 F.3d 585, 601 (6th Cir. 2012) (''[W]e hold that section 404(c) does not provide a defense to [a claim challenging] the selection of the menu of investment options that the plan will offer''); *Howell v. Motorola, Inc.*, 633 F.3d 552, 567 (7th Cir. 2011) (''[W]e agree with the position taken by the Secretary of Labor in her *amicus curiae* brief that the selection of plan investment options and the decision to continue offering a particular investment vehicle are acts to which fiduciary duties attach, and that the safe harbor is not available for such acts''); *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 n.3 (4th Cir. 2007) (''[A]lthough section 404(c) does limit a fiduciary's liability for losses that occur when participants make poor choices from a satisfactory menu of options, it does not insulate a fiduciary from liability for assembling an imprudent menu in the first instance''); *In re YRC Worldwide, Inc. ERISA Litig.*, No. 09-2593 (D. Kan. 4/15/11) (''Ultimately, the court believes that the Tenth Circuit, if faced with the issue would conclude that although section 404(c) does limit a fiduciary's liability for losses that occur when a participants make poor choices from a satisfactory menu of options, it does not insulate a fiduciary from liability for assembling an imprudent menu in the first instance'' (internal quotation marks and citation omitted)).

[121] *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 310–11 (5th Cir. 2007); *see also Hecker v. Deere & Co.*, 569 F.3d 708, 710 (7th Cir. 2009) (statement in footnote in preamble to regulation not entitled to full *Chevron* deference); *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 445 (3d Cir. 1996) (''[A] fiduciary, who is shown to have committed a breach of duty in making an investment decision, [may] argue that despite the breach, it may not be held liable because the alleged loss resulted from a participant's exercise of control'') (pre-dating effective date of DOL regulation); *Renfro v. Unisys Corp.*, 48 EBC 2870 (E.D. Pa. 2010) (DOL regulation is not entitled to *Chevron* deference because *In re Unisys Sav. Plan Litig.* was based on plain language of the statute and where statutory language is not ambiguous, *Chevron* deference is not applicable), *aff'd on other grounds*, 671 F.3d 314 (3d Cir. 2011).

[122] *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 310–11 (5th Cir. 2007).

[123] The Supreme Court recently cautioned that the practice of deferring to the DOL's interpretation of its own ambiguous regulations could promote vague and open-ended regulations and thereby frustrate the objectives of the notice-and-comment process. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012).

[124] 75 Fed. Reg. 64910, 64927 (10/20/10); *see also* 73 Fed. Reg. 43014, 43018 (7/23/08).

[125] DOL Regs. §2550.404c-1(d)(2)(iv).

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