

# QUALIFIED PLANS 2008-2

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### 1. **Supreme Court Gives "Green Light" to ERISA Breach of Fiduciary Duty Claims Related to Individual 401(k) Participant Accounts**

Last week, the Supreme Court ruled unanimously that an individual participant in a 401(k) defined contribution plan can maintain a breach of fiduciary duty claim under ERISA, even though the alleged breach affected only the value of his own individual account. LaRue v. DeWolff, Boberg & Assocs., Inc., No. 06-856, 2008 WL 440748 (Feb. 20, 2008).

The decision clears the way for lawsuits by 401(k) participants against plan fiduciaries for alleged mismanagement of the participants' individual accounts. Although some ERISA attorneys are claiming the litigation "floodgates" are

now open, we do not see the decision as especially harmful to plan fiduciaries and sponsors. Actions concerning individual plan accounts are relatively infrequent, and typically do not expose defendants to the risk of large damages awards. We suspect that the real impact of LaRue will depend on how courts hereafter apply the varied reasoning in the majority opinion and in Chief Justice Roberts' concurrence. The majority opinion opens the door for plaintiffs to argue that the limitations imposed by Russell on relief under ERISA apply only to defined benefit plans. Chief Justice Roberts' approach provides an opening for the defense bar to argue that many fiduciary lawsuits are simply disguised claims for benefits – so a fiduciary's conduct arguably should be judged (1) after administrative remedies are exhausted, and (2) possibly under a more deferential standard of review. We discuss these and other aspects of the three opinions in the "unanimous" decision further below.

## **Analysis**

LaRue alleged in the lawsuit that the value of the holdings in his 401(k) account had decreased \$150,000 when his former employer failed to follow his instructions to move his money to different investments. Relying on the Supreme Court's prior decision in Massachusetts Mutual Life Insurance Company v. Russell, 473 U.S. 134 (1985), the Fourth Circuit held that ERISA only authorizes breach of fiduciary duty claims that affect the entire plan and the statute does not permit individualized recovery for alleged fiduciary breaches in cases like LaRue's (Qualified Plans 2007-6). However, several other federal appeals courts had already allowed such suits to proceed.

Justice Stevens wrote for a majority of the Court, reversing the Fourth Circuit's decision. He asserted that the Supreme Court's focus in Russell on protecting the "entire plan" from fiduciary misconduct reflected (1) the fact that defined benefit plans were the predominant form of retirement plan for many years, and (2) the impact that fiduciary misconduct has on the overall solvency of a defined benefit plan. According to the majority opinion, defined contribution plans now predominate and, in connection with such plans, "fiduciary misconduct need not threaten the solvency of the entire plan to reduce benefits below the amount that participants would otherwise receive." Accordingly, the majority opinion concludes that, in connection with defined contribution plans, ERISA section 502(a)(2) "does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's account." While approving LaRue's claim under ERISA section 502(a)(2), the Court did not reach LaRue's other argument that he could seek "make-whole" monetary relief under ERISA section 502(a)(3).

The decision in LaRue was unanimous, but not all agreed with the reasoning adopted by the majority. Justices Thomas and Scalia wrote separately to state their view that the text of ERISA compelled the conclusion that LaRue, as an individual participant, could bring his fiduciary breach claim. In his concurring opinion joined by Justice Scalia, Justice Thomas reasoned that the Russell approach should still be used because a defined contribution plan itself is the entity that has sustained the investment losses, even though those losses are allocated, as a bookkeeping matter, to fewer than all participant accounts. Thus, according to Justice Thomas, a claim to recover losses stemming from a defined contribution plan can be maintained under ERISA section 502(a)(2), even

though the recovery obtained for the plan will be allocated among fewer than all plan accounts.

Chief Justice Roberts, in a concurring opinion joined by Justice Kennedy, questioned whether ERISA section 502(a)(2) should even govern LaRue's claim, suggesting instead that LaRue's claim may essentially be a claim for benefits, not a claim for breach of fiduciary duty. Thus, Justice Roberts ventured that LaRue's claim may be more appropriately brought under ERISA section 502(a)(1)(B), which allows a participant to recover benefits due him under the terms of his plan. Justice Roberts warned that the choice of selecting the right remedial provision to proceed under is significant. He pointed out that recasting a claim for benefits as a fiduciary breach claim could allow participants to circumvent safeguards for plan administrators, such as the requirement that a participant exhaust administrative remedies before filing suit. Justice Roberts did not believe the Court was in a position to answer whether LaRue's claim is appropriately characterized as a claim for benefits since LaRue had not sought relief on that basis, and the court below had not had occasion to address the issue. Still, Justice Roberts made it clear that, going forward, the courts are free to consider the availability of benefit claim relief, and whether that would preclude participants, like LaRue, from proceeding with a fiduciary breach claim.

Although most commentators had predicted that the Court would overturn the Fourth Circuit, many were surprised by the evolving plan "landscape" rationale articulated by a majority of the Court. The conventional wisdom was that the majority would adopt a rationale similar to that advanced by Justice Thomas and Justice Scalia. The Court, in a footnote, also commented on the question of whether LaRue, who had withdrawn his funds from the plan after filing the case, had standing to proceed with a lawsuit. The Court noted that LaRue's withdrawal of funds may have relevance when the case is returned to the lower courts for further proceedings, but advised that the withdrawal of funds did not necessarily make the case moot, given that an ERISA participant with standing to sue may include "a former employee with a colorable claim for benefits."

One thing that is apparent is that LaRue is not the last word on a host of litigation issues affecting defined contribution plans.

## 2. Permissible Payment Events for Performance-Based Compensation Under Code Section 162(m) – The Dust Settles

Last week, the IRS issued Revenue Ruling 2008-13 (Mar. 10 IRS Bulletin) (the "Revenue Ruling"), addressing the scope of the "performance-based compensation" exception to the \$1 million deduction limitation under Code Section 162(m). Specifically, the Revenue Ruling limits the events that may trigger vesting and payment of performance-based compensation under a bonus or incentive plan regardless of whether a performance goal is met. The Revenue Ruling will not apply retroactively and applies generally to performance periods beginning after January 1, 2009.

The Revenue Ruling follows an outcry from public companies and their advisors over a recent private letter ruling ("PLR") on this issue. See PLR 200804004 (Sept. 21, 2007) (Qualified Plans 2008-1). The new PLR contradicts the IRS position in two prior PLRs that many public companies had used as a guide in designing their incentive plans. Following issuance of this PLR, the business and legal communities requested that (1) the IRS reconsider its position on the issue, or (2) alternatively, issue generally applicable guidance applying prospectively only. We summarize the IRS response below.

**Background** – Subject to certain exceptions, Section 162(m) limits to \$1 million the amount of deductible compensation that a public company may pay to certain high-level employees each year. The major exception under Section 162(m) allows a public company to deduct, in addition to the \$1 million annually, all of an employee's "performance-based compensation." Performance-based compensation is compensation that is *payable solely* upon achievement of one or more performance goals, but only if the goals are pre-established and objective, and if certain other requirements are satisfied (for example, the performance goal is determined by the company's compensation committee).

Consistent with the "payable solely" requirement, the regulations under Section 162(m) provide that compensation is not performance-based compensation if the facts and circumstances indicate that an employee would receive some or all of the compensation regardless of whether the performance goal is met. Under an important exception to this rule, compensation may still be

performance-based even if it may be paid on the employee's death, disability, or a change of control – regardless of whether the performance goal is met. Of course, any compensation *actually* paid based on the occurrence of one of these events is not considered performance-based.

**IRS Position** – The Revenue Ruling holds that compensation is not performance-based under Section 162(m) where it may be paid under an incentive or bonus plan not only when a performance goal is met, but also where the employee (1) is involuntarily terminated without "cause" (the definition of "cause" in the ruling does not include the executive's poor performance), (2) voluntarily resigns for "good reason," or (3) retires. The crux of the holding is that compensation payable under a bonus plan with these type of payment triggers – including compensation that is ultimately paid upon the satisfaction of the performance goal – is not performance-based because of the mere existence of these potential payment triggers.

Consistent with the new PLR, the Revenue Ruling states that an employee's termination without cause, resignation for good reason, or retirement, are not events included in the exception under Section 162(m) for death, disability and change in control (i.e., permissible vesting events). Therefore, the IRS holds that compensation that may vest and be paid on such events is not performance-based compensation under Section 162(m). This language strongly suggests that other events not included in the exception that cause vesting and payment of incentive awards regardless of whether a performance goal is met would also be found by the IRS to be impermissible. The IRS provided little additional analysis for these conclusions, stating that (1) an involuntary termination without cause may occur or a good reason may arise (e.g., a reduction in title or base salary) as the result of the employee's poor performance and failure to meet the performance goal, and (2) retirement generally is a voluntary action within the control of the employee.

**Transition Relief** – A key concern arising from the recent PLR was whether the IRS' change in position would be applied to existing incentive arrangements containing the impermissible provisions. If so, many public companies that designed and implemented incentive arrangements based on the IRS position in the prior PLRs – a proposition which is somewhat risky to begin with – might find that they have large compensation expenses that cannot be deducted with related accounting and tax reserve issues.

Although the substantive result of the Revenue Ruling is dissatisfying to public companies, the IRS did provide fairly generous relief on the effective date. Specifically, the Revenue Ruling indicates that its holding will not be applied retroactively to disallow deductions for amounts that otherwise meet the requirements to be considered performance-based under Section 162(m) and that are paid under a plan that has payment terms similar to those described in the Revenue Ruling if either: (1) the performance period for the compensation begins on or before January 1, 2009, or (2) the compensation is paid according to the terms of an employment contract as generally in effect on February 21, 2008 (disregarding future renewals or extensions, including so-called "evergreen" renewals). Thus, payments under a calendar year annual incentive plan for 2009 are protected, not only payments under plans for prior periods.

**Next Steps** – The effective date relief in the Revenue Ruling gives public companies some time to assess its impact on their bonus and incentive plans. However, public companies should begin to look closely at their plans to identify provisions that may vest executives in an amount regardless of whether a performance goal has been satisfied. These types of provisions include the accelerated vesting and payment at target levels of incentive pay upon

- an involuntary termination other than for cause,
- a voluntary resignation for good reason,
- retirement, or
- some other event other than death, disability, change in control.

We note that provisions permitting a pro-rata incentive payment based on the portion of the performance period during which the employee actually performed services should be acceptable as long as payment is still conditioned on achievement of the performance goal.

In addition to bonus and incentive plan documents, other documents that may contain accelerated vesting and payment provisions – including award agreements, employment agreements, change in control agreements, severance plans/arrangements and the like – should also be carefully reviewed. Public companies should consider whether to revise or remove these provisions and the steps required for doing so (e.g.,

need for employee consent, board/shareholder approval requirements).

In recent years, the IRS has begun to increasingly audit public companies on Section 162(m) issues and to take conservative positions on debatable issues under Section 162(m). Many companies' published compensation policies indicate that section 162(m) deductibility is required for the company's programs generally (although some state to the contrary). Moreover, pending legislation would substantially tighten the rules under Section 162(m) (Qualified Plans 2007-4). Thus, public companies should consider limiting their exposure on this and other grey areas under Section 162(m).

### **3. Key Rulings in Recent 401(k) Fidelity Fee Case**

Over the last two years, at least 30 lawsuits have been filed against plan sponsors and/or service providers relating to 401(k) plan fees and, more specifically, revenue-sharing arrangements. (See Qualified Plans 2007-2, -6 and -8 for some recent case summaries.) The February 11 decision denying the defendants' motions to dismiss in Tussey, et al. v. ABB, Inc., et al., W.D.Mo. Civ. No. 2:06-CV-04305-NKL, is noteworthy for (1) its expansive view of what actions may cause service provider to be a "functional fiduciary" under ERISA; and (2) the growing split in authority regarding the potential application of ERISA section 404(c) in these cases. We discuss these issues below.

**Background** – The plaintiffs in the lawsuit are participants in a 401(k) plan sponsored and administered by ABB. Fidelity Trust serves as the plan's directed trustee and Fidelity Management is the investment adviser to the mutual funds offered as investment options under the plan. Plaintiffs claim that ABB and the Fidelity defendants breached fiduciary duties in that

- they allegedly failed to disclose the revenue sharing arrangement between Fidelity Trust and Fidelity Management,
- Fidelity Trust steered the plan toward Fidelity Management managed funds in exchange for revenue-sharing payments, and
- the defendants otherwise failed to capture additional compensation streams for the plan, bargain for lower cost services to the plan, and include

less expensive investment options for the plan.

**Whether Fidelity is a Fiduciary** – One of the principal defenses raised by service providers in the 401(k) fee cases is that they are not fiduciaries under ERISA. Many courts have refused to dismiss the cases on this basis at the initial stages, concluding that whether or not the defendant is an ERISA fiduciary should be determined only after a factual record is developed through discovery. As a result, it was not entirely surprising that the court denied the Fidelity defendants' motion to dismiss on this issue. More interesting was the court's analysis of the actions that it thought could qualify the Fidelity defendants as functional fiduciaries under ERISA.

In other cases against service providers like Nationwide (Qualified Plans 2006-2) and Hartford (Qualified Plans 2007-10), the courts ruled that the service providers may qualify as functional fiduciaries to the extent that they have the right to add, delete or substitute investment options from the platform of investment options selected by the plan sponsor. In this case, the plaintiffs' allegations did not focus on that point, but rather on Fidelity Trust's role in defining the investment options that are on the platform that it offers to plan sponsor clients. Specifically, plaintiffs alleged that Fidelity Trust performed the "first-cut screening" of investment options made available to plan participants, and has "veto authority" over the inclusion of investment options that are not managed or advised by its affiliate, Fidelity Management. The court ruled that these allegations – coupled with ERISA's "expansive definition of fiduciary" – were enough to raise an issue as to whether Fidelity Trust could qualify as a functional fiduciary. According to the court, even if Fidelity Trust is not the "final arbiter" of the plan's decisions, it may still be a fiduciary with respect to choosing funds, and discovery was needed to determine Fidelity Trust's "actual role in administering and/or advising the Plan."

Although recognizing that plaintiffs' theory of liability against Fidelity Management "appears tenuous," the court also ruled that plaintiffs could proceed for now with their claims against the investment adviser. Specifically, the court concluded that plaintiffs' allegations that Fidelity Management "indirectly" exercised discretion over Plan assets "because it paid Fidelity Trust, through revenue sharing arrangements, "to steer the Plan toward mutual funds it advised," were enough to potentially consider Fidelity Management a fiduciary under ERISA. In addition, the court held that "if Fidelity Management set fees paid by Plan assets,

then Plaintiffs may prove that Fidelity Management acted as a *de facto* fiduciary."

**Section 404(c) Defenses** – The court's rulings on ABB's motion to dismiss was more of a mixed bag, with some favoring ABB and others favoring plaintiffs. The court agreed with ABB that it did not have a fiduciary duty to disclose to plan participants the "portion of Plan fees and expenses attributable to the revenue sharing" between Fidelity Trust and Fidelity Management. The court, however, refused to dismiss the lawsuit against ABB based on ERISA section 404(c), which generally provides that, if certain conditions are satisfied, plan fiduciaries are not liable for losses which result from a plan participant's exercise of control over assets in his 401(k) account. The court ruled that ABB was not entitled to dismissal under ERISA § 404(c), because

- section 404(c) is an affirmative defense, which is not properly resolved at the motion to dismiss stage;
- the plan participants' alleged lack of knowledge of the revenue-sharing raised an issue whether, for purposes of section 404(c), any alleged losses were caused by the plan participant's exercise of control; and
- section 404(c) does not "immunize a fiduciary breach involving the selection of investment options for defined contribution plans."

The court recognized that its ruling on the section 404(c) issues was contrary to other decisions, like the Deere case (Qualified Plans 2007-6). The court asserted that Deere "represents a clear minority view," and otherwise went to great lengths to distinguish other cases where courts have applied section 404(c) to bar claims by plan participants.

**Observations** – Based on previously issued DOL guidance, it is generally believed that a plan service provider does not become an ERISA fiduciary by putting together a platform of investment options to market to plan sponsors, even if the investment options offered on the platform is limited to those managed by affiliated investment advisers. Although it is only one decision, the decision in ABB calls that view into question.

As to the court's ruling regarding whether an investment adviser for a mutual fund could be a fiduciary in these circumstances, Fidelity

Management likely has the better argument, and we can see that issue ultimately being resolved in its favor. Nonetheless, the decision could spur plaintiffs in the other service provider cases to file amended complaints or even file additional lawsuits naming the investment advisers as defendants.

Finally, the Deere decision – addressing the applicability of the section 404(c) defense in a fee case – has been appealed to the Seventh Circuit, a court that is highly-regarded for its handling of ERISA issues. We expect its ruling later this year.

#### **4. DOL Proposes Safe Harbor for Remittance of Participant Contributions Under Small Plans**

The DOL announced yesterday a proposed change in the "plan asset" guidelines for when participant contributions must be transmitted to pension and welfare plans with fewer than 100 participants. 73 Fed. Reg. 11070 (Feb. 29, 2008). The proposed rule would create a safe harbor for participant contributions deposited within seven business days of receipt or withholding from an employee's paycheck. This time frame also would apply to participant loan payments regardless of the plan size.

We will distribute our summary and analysis next week. The proposal – which we expect to generate substantial comments (due by April 29) – would not be effective until a final version is published in the Federal Register.

#### **5. DOL Announces Hearing on Proposed Service Provider Fee Disclosure Guidance**

Last December, the Department of Labor ("DOL") published far-reaching proposed revisions to its regulations under the service provider exemption of ERISA section 408(b)(2) and an accompanying proposed prohibited transaction class exemption (Qualified Plans 2007-12). Over 100 comment letters were filed on the proposal – highlighting numerous concerns and complexities.

The DOL has scheduled a public hearing on the proposals for March 20 and (if necessary) 21. 73 Fed. Reg. 10405 (Feb. 27, 2008). Requests to testify are due March 10. We expect that dozens of witnesses may testify representing conflicting viewpoints.

The DOL currently plans to make the final guidance effective 90 days after publication. In anticipation of final guidance, the Administration's budget for DOL enforcement of ERISA in the next fiscal year includes nearly \$2 million for 12 new positions to begin planning regular comprehensive reviews of service providers to ERISA plans. This is intended to facilitate DOL enforcement of the evolving new requirements for fee disclosure and other aspects of plan service provider obligations and relationships.

#### **6. DOL Clarifies Trustee Responsibility to Collect Delinquent Contributions**

DOL Field Assistance Bulletin ("FAB") 2008-01 (Feb. 1, 2008), addresses trustee and "named fiduciary" responsibilities for collecting delinquent contributions under plans covered by ERISA. The FAB discusses how governing trust agreements and other plan documents may allocate responsibility for collecting delinquent contributions. It was issued in response to DOL pension investigations in this area involving documents that purported to disclaim a trustee's responsibility for monitoring the plan's receipt of contributions, determining when contributions may be delinquent, and taking appropriate steps to ensure collection. While the FAB does not necessarily establish new guidance, it indicates DOL's renewed interest in the role of trustees in collecting delinquent contributions and may signal an increased focus on this issue by DOL investigations of financial institutions.

In the FAB, DOL explains that authority over plan assets, including a plan's legal claim for delinquent contributions, must be assigned to (i) a plan trustee with discretionary authority over the assets, (ii) a directed trustee subject to the proper and lawful directions of a named fiduciary, or (iii) an investment manager. Further, the "named fiduciary" of the plan responsible for appointing the plan's trustee – e.g., the employer or other plan sponsor – must ensure that responsibility for collecting contributions is assigned to a trustee (which may be a directed trustee) or an investment manager. If provisions in trust instruments and plan documents are ambiguous, DOL states that these documents should generally be interpreted in a manner that corresponds to ERISA's statutory scheme, rather than in a manner that relieves trustees and investment managers from responsibility for plan contributions.

If a plan's trust or other governing documents does not assign responsibility for collecting delinquent contributions to a trustee or an investment manager, the FAB provides that the named fiduciary responsible for appointing the plan's trustee may be liable for any plan losses resulting from a failure to collect contributions, on the basis that the fiduciary "failed to specifically allocate this responsibility." In addition, no trustee can ever be fully relieved from responsibility for delinquent contributions because a trustee may have obligations under ERISA's co-fiduciary provisions (ERISA section 405) to remedy a situation where the trustee knows that no other party has responsibility for the collecting contributions and that delinquent contributions are going uncollected. The FAB suggests that a trustee or other co-fiduciary may take one or more of the following steps if it is aware that contributions are delinquent:

- advising the named fiduciary or DOL of the breach,
- reporting the breach to other fiduciaries of the plan,
- taking direct action to enforce the contribution obligation on behalf of the plan,
- seeking an amendment of the relevant plan and trust documents, or
- requesting a court order to establish a proper allocation of fiduciary responsibility over contributions.

A co-fiduciary that fails to take steps to remedy a known breach to collect delinquent contributions will not be absolved of liability by the governing plan documents and instruments.

In response to the FAB, we understand that some financial institutions are reviewing their standard trust and other plan documents, as well as their contracts or other agreements with plans. Financial institutions may also wish to review their policies and procedures for taking action in cases where the financial institution may be aware that plan contributions are delinquent.

## **7. IRS Guidance on Application of Accrual Rules to Cash Balance Plans**

On February 1, the Treasury Department and the IRS issued Revenue Ruling 2008-7 (the "Ruling") (Feb. 19 IRS Bulletin), to address the application of the benefit accrual rules for pension plans (known as the "anti-backloading" or "accrual" rules). The Ruling was issued in response to recent controversy over how the anti-backloading rules apply for plans that provide benefits under the greater of a cash balance benefit and a traditional benefit formula. Last year, in the determination letter review process, the IRS began taking the position that plans with these "greater-of" formulas could not, in most cases, satisfy these rules. Following an outcry from employers and many members of Congress, IRS agreed to suspend enforcement of this interpretation until it had analyzed the issue further.

This Ruling provides temporary relief for plans with multiple benefit formulas. Under this relief, a plan under which participants receive benefits based on the greater of two more formulas (e.g., cash balance and traditional pension formula) will be deemed to satisfy the anti-backloading rules if each formula independently satisfies those rules. We understand that the IRS has begun to issue favorable determination letters on this basis.

The Ruling also describes how the IRS understands the existing regulations to generally require an aggregate testing approach for multiple benefit formulas. The IRS has indicated that it is working on new proposed regulations that would allow separate testing in the future. In the meantime, however, the Ruling lays out in detail how the existing regulations apply to greater-of benefit structures, and indicates why these plans may have difficulty satisfying the accrual rules. The Ruling provides other useful insight into how the IRS believes the accrual rules are to be applied to cash balance plans. It is important for plan sponsors with cash balance or multiple formula plans to carefully review this guidance as application of the accrual rules has increasingly become a focus of the IRS and class action plaintiffs. We summarize the guidance and its key implications below.

### **A. Background**

The benefit accrual rules (which apply only to defined benefit plans) of the Code and ERISA require that participants earn pension benefits at a

relatively uniform rate throughout their participation in the plan. The purpose of the rules is to prevent excessive backloading of benefits (*i.e.*, low benefits in a participant's earlier years of service and higher accruals in the later years), which might otherwise allow a plan to circumvent the minimum vesting rules and may unfairly benefit highly compensated employees. To meet the benefit accrual rules, defined benefit plans must satisfy one of three rules described in Code section 411(b) (*i.e.*, the 3% method, the 133 1/3 % method, or the fractional method).

The Ruling analyzes application of the 133 1/3% method and the fractional method (the 3% method is not applicable under the facts of the Ruling) to a plan that was converted from a traditional benefit formula to a cash balance formula. Briefly, these two accrual rule methods work as follows:

- **133 1/3% Method.** The 133 1/3% method requires that the annual rate at which a participant can accrue benefits for any future year must not be more than 133 1/3% of the rate at which the participant can accrue benefits for any earlier year that begins with or after the current year.
- **Fractional Method.** A plan passes the fractional method test with respect to any participant for a year if the participant's accrued benefit equals or exceeds the result obtained by multiplying the "fractional rule benefit" by the applicable fraction for that year. The numerator of the fraction is the number of years of actual participation in the plan, and the denominator is the number of years of participation the participant would have if he continued to participate until normal retirement age. The "fractional rule benefit" is the benefit calculated as if participation continued to normal retirement age and all relevant factors remained constant.

Questions arise under these rules when a plan provides benefits under more than one formula. After lifting the cash balance moratorium for determination letters, the IRS began applying the benefit accrual rules by requiring that benefit formulas be aggregated for accrual testing. In many cases, this causes plans using a greater-of approach to violate the benefit accrual rules because the combination of formulas can produce

periods of small accruals followed by relatively larger accruals. The issue is not limited to cash balance plans and may affect other pension plans with greater-of benefit formulas.

## **B. Relief Granted**

The Ruling provides that plans that use the greater of two or more formulas to determine a benefit will satisfy the accrual rules of Code section 411(b) if each such formula standing alone would satisfy one of the three benefit accrual tests for the years involved. Most plans using a greater-of approach will satisfy the benefit accrual rules when this relief is applied.

This relief is only available to plans that fall under one of three categories:

- 1) as of February 19, 2008, the plan provisions under which the applicable greater-of benefit provisions are provided have been the subject of a favorable IRS determination letter;
- 2) as of February 19, 2008, the plan's remedial amendment period (Code sec. 401(b)) for the greater-of plan provisions had not expired; or
- 3) the plan was held in the determination letter cash balance moratorium as described in IRS Notice 2007-6.

A plan described in (2) or (3) above that is not able to pass the accrual tests (as applied to each formula separately) may be retroactively amended during the determination letter process to reform the benefit formula, provided that the anti-cutback rules of Code section 411(d)(6) are met. In this context, the IRS notes that if a cash balance formula needs to assume a minimum interest rate growth in the cash balance accounts in order to pass the accrual rules, the IRS may require the plan to retroactively add the minimum interest provision.

The IRS relief only applies to plan years beginning before January 1, 2009. The IRS news release that accompanied the Ruling states that the IRS and Treasury anticipate issuing new proposed regulations soon that, when finalized, would apply to plan years beginning on and after January 1, 2009. The news release states that the regulations will allow separate testing for greater-of formulas; however, the IRS has not indicated any details of what rules or limitations can be expected.

### C. **Principles for Application of Benefit Accrual Tests**

The Ruling explains in detail how the benefit accrual rules are applied to a plan using the greater of two formulas absent the relief described above, and sets out the following rules of application.

- **Permissible to Use Different Methods.** The Ruling clarifies that a plan may use different methods in different years to satisfy the benefit accrual rules (e.g., a plan could show satisfaction of the 133 1/3% method in one year and the fractional method the following year). In addition, in any year, a plan can apply different methods to different participants, as long as the classification of participants is not structured to evade the benefit accrual requirements. The Ruling cautions that whether a classification is structured to evade the rules is determined by considering which group of participants is satisfying which of the three accrual rules, and whether the assignment of a participant to a classification will change merely because of the passage of time. Thus, it appears that plans do not have unfettered ability to demonstrate compliance by applying different accrual rules to different participant groups from year-to-year.
- **Different Formulas Must be Aggregated For Testing.** Treasury Regulation section 1.411(b)-1(a) states that if a plan determines benefits under more than one formula, then the accrued benefits under all such formulas must be aggregated in applying the benefit accrual rules. Although this statement could be interpreted a number of ways, the Ruling states that the accrual rate must be determined using a single methodology "such as the increase in the dollar amount of the accrued benefit or the increase in the dollar amount of the accrued benefit expressed as a percentage of compensation for the plan year." The Ruling clarifies that, in the case of a plan with a greater-of benefit, a plan may not test two formulas separately nor may it only test the formula that at that date produces the higher benefit. Rather, each year, it must test the actual increase in benefit that is produced by the combination of those formulas. As noted above, the Ruling provides relief from this "aggregation" approach for most plans through the end of 2008.
- **Benefit Tested.** Regardless of how the plan expresses a benefit or how it defines the accrued benefit, the benefit tested under the accrual rules is an annual benefit commencing at normal retirement age (calculated, if necessary, as the actuarial equivalent of the accrued benefit under the plan). Accruals after normal retirement age are not considered.
- **Factors Held Constant.** To test benefit accruals under the 133 1/3% method (the one rule that most cash balance plans satisfy), all relevant factors used to determine benefits for the current plan year are kept constant in determining the accrual rates for future years. Thus, the cash balance interest crediting rate and conversion factors should be held constant (at the current rates as of the testing date) for future years.
- **A Plan Must Continually Pass From Year to Year.** The Ruling notes that a plan must be able to show compliance with the accrual rules each year, and that the plan may fail in future years due to any number of changes in relevant factors (e.g., increasing pay credits, a decrease in the interest crediting rate, an increase in compensation rate).
- **"Wearaway" May Cause a Violation of the Accrual Rules in Some Circumstances.** In applying the 133 1/3% method, the statute provides that any amendment to the plan in effect for the current year is treated as being in effect for all other plan years. Where a plan amendment freezes the existing traditional benefit formula and implements a new cash balance formula, the prior benefit structure is ignored in applying the 133 1/3% method. The Ruling indicates that even where a period of no benefit accrual (or

"wearaway") results, the accrual rules will be satisfied if the new cash balance formula, standing alone, satisfies the accrual rules. However, if the amendment provides for a transition period during which the traditional benefit continues to accrue, the effect of the traditional benefit must be taken into account in applying the accrual rules after the amendment.

- **Fractional Method May be Available to Cash Balance Plans.** Some courts have held that the fractional method is not available to cash balance plans because the fractional method limits the participant's compensation that can be considered to the 10 prior years of service. Because cash balance formulas generally include compensation for all years of service in calculating benefits, it has not been clear whether the fractional method could ever be available to a cash balance plan. The Ruling allows for the use of the fractional method and indicates that the 10-year compensation limit must be applied to participants with more than 10 years of participation. However, the fractional method may be of limited use because it will be difficult to continue to satisfy the test in future years as compensation increases cause the participant's benefits to increase.

#### **D. Example of Application of Rules Under Existing Regulations**

The Ruling has an example that illustrates the IRS position on how the rules apply to a greater-of benefit. The example involves a traditional defined benefit plan that was converted to a cash balance plan. Participants who were employees at the time of the cash balance conversion were given an opening account balance equal to the present value of their benefit under the traditional formula at the time of the conversion. For participants who were at least age 50 and had 15 years of service at the time of the conversion, the plan provided a four-year transition during which benefits would continue to accrue under the old traditional formula and the participants would be entitled to the greater of the benefit produced under the cash balance formula or the traditional formula. Participants who were not

eligible for the transition benefit would receive the greater of the traditional formula frozen at the time of the conversion or the ongoing cash balance formula. New participants after the conversion only receive benefits under the cash balance formula.

The Ruling analyzes the accrual rules in this example with respect to three major groups. The Ruling does not discuss the application of the 3% method, because the plan formula (both before and after the conversion) is not limited to 33 1/3 years of plan participation, as required by the statute.

**New Employees – Cash Balance Formula Satisfies the 133 1/3% Rule** – The first group analyzed is the group of new employees who became participants after the conversion. The 133 1/3% method is applied to only the cash balance formula. The plan's cash balance formula provides for pay credits that increase from 3% - 7% as participants reach various ages. While the pay credit rates increase at a rate that would violate (on their face) the 133 1/3% method, when interest growth to normal retirement age is considered, the plan passes the 133 1/3% method. IRS notes that each year the plan will need to re-test the benefit formula based on the plan's actual cash balance interest rate in effect at that time. The plan's benefit formula will fail the 133 1/3% method if the interest rate drops below 1.58%.

**Non-Grandfathered Participants – Effect of Wearaway Disregarded** – The second group analyzed is the group of participants who were participants before the conversion and not grandfathered and, therefore, did not receive any transition benefit. For this group, the plan benefit is the greater of the cash balance benefit or the frozen traditional benefit amount determined at the time the cash balance benefit was added to the plan. For this group, after the plan amendment, the traditional formula no longer applies. As a result, the traditional benefit formula is no longer considered in applying the accrual rules. Therefore, the test for this group is applied in the same manner described above for the new employees, and this group also passes the rule using the 133 1/3% method.

**Grandfathered Participants** – The third group analyzed is the group of participants who are grandfathered and receive a four-year transition period during which they will continue to accrue under the traditional formula. This group is divided into three subgroups in the IRS's analysis:

- **Age 61 or Older.** The participants in this group will remain under the

traditional formula until normal retirement age, because the cash balance formula will never be greater than the traditional formula with the continued accruals. The annual rate of accrual for this group is 1.1% for each year (this number is taken from the pre-conversion benefit formula). Therefore, this group easily passes the rule using the 133 1/3% method.

- **Ages 50 to 61 With no Cash Balance Accruals.** For this group, after the transition period accruals and before normal retirement age, the cash balance formula never "catches up" with the traditional formula. Therefore, when looking at the actual accruals, there is a period of no accrual, or wear-away. Because the winning accrued benefit for these participants is never due to the cash balance formula, the accruals for this group are 1.1% for each year until the end of the transition period, and then 0% for any remaining years until normal retirement age. The period of no accrual does not cause this plan to fail the 133 1/3% method and, therefore, this group passes as well.
- **Ages 50 to 61 With Cash Balance Accruals.** For this group, after the transition period accruals, the cash balance formula eventually catches up to the traditional formula, and at that point, these participants will begin to accrue under the cash balance formula. This group will accrue at a rate of 1.1%, followed by a period of 0% accrual, followed by an accrual rate greater than 0%. This positive accrual after a period of no accrual causes the plan to fail the 133 1/3% method for these participants.

Because the 133 1/3% method is not met for this group, the Ruling then applies the fractional method to this group. The Ruling goes through the application of this test for a hypothetical participant and determines that it is met. The Ruling clarifies that this analysis only applies for the current year being analyzed. The plan in the example could fail the fractional rule in future years due to changes such as an

increase in compensation or pay credits or a decrease in the interest rate used for crediting. The Ruling notes that these changes affect the fractional rule test, causing it to be volatile. For this reason, it may not be useful to the plan on a permanent basis.

## **E. Litigation**

Various courts have opined on the application of the benefit accrual rules. A number of courts have analyzed the application of the backloading rules to plans that provide for the greater-of benefits under two different formulas. The Third Circuit and a Connecticut district court in the CIGNA case (discussed elsewhere in this memorandum) both recently analyzed plans using greater-of approaches where the transition between formulas results in an immediate wear-away period following the cash balance conversion amendment. Both courts held that the amendment rule applied as if the traditional formula never existed, ignoring the wear-away period. The Southern District of Illinois applied a similar analysis, and added that where a participant receives a benefit "under one of two separate and mutually exclusive formulas," each formula is tested standing alone. All of the decisions noted that the principal objective of the backloading rules – *i.e.*, to avoid unfairly favoring longer-term employees – is not implicated by the greater-of approaches under these plans. Register v. PNC Financial Services Group, Inc., 477 F3d 56 (3<sup>rd</sup> Cir. 2007); Custer v. Southern New England Telephone Company, 2008 WL 222558 (D. Conn. Jan. 25, 2008); Amara v. CIGNA, D.Conn., No. 3:01CV2361(MRK), Feb. 15, 2008; Wheeler v. Pension Value Plan for Employees of Boeing Co., 2007 WL 2608875 (S.D. Ill. Sept. 6, 2007).

## **F. Conclusion**

As claims relating to age discrimination and lump-sum whipsaw calculations begin to wane as a result of changes made by the Pension Protection Act of 2006, the application of the accrual rules has emerged as a significant new battle ground over the viability of cash balance plans. These rules are complex and their application to cash balance and other hybrid designs are not at all well-defined. It is important that plan sponsors carefully review this issue with their actuarial and legal advisors and closely follow future IRS guidance as well as further litigation developments.

## 8. **Court Upholds Cash Balance Design, But Finds Disclosure Defective**

A federal district court in Connecticut has determined that CIGNA's cash balance plan is not age discriminatory and does not violate the anti-backloading rules, but that CIGNA did not fully comply with the advance notice and summary plan description requirements when it implemented the cash balance changes. Amara v. CIGNA, D.Conn., No. 3:01CV2361(MRK), 2/15/08. As the court states, this case "is yet another in a long list of cases challenging an employer's conversion to a cash balance retirement plan." While the opinion of the court is exceedingly long (122 pages), it is well-organized and well-reasoned. It provides a detailed look at CIGNA's conversion of its pension plan to a cash balance benefit formula in 1998, as well as a good summary of the growing body of case law regarding cash balance plans.

When CIGNA implemented the cash balance benefit, it converted the existing value of the participants' accrued benefits to an opening cash balance account. Thereafter, participants were entitled to receive the greater of their cash balance account benefit or the value of the frozen benefit under the prior formula. Because the opening account balances did not include the value of early retirement subsidies under the prior formula and because relevant interest rates declined in the years following the conversion, many participants experienced a period of "wear-away," during which the value of the frozen prior benefit continued to exceed their ongoing cash balance accounts. A class of approximately 25,000 participants sued CIGNA claiming that basic cash balance formula and the wear-away effect violated the age discrimination rules as well as the anti-backloading rules. Participants also claimed that CIGNA did not adequately inform them of the impact of the changes in violation of the advance notice requirements under ERISA section 204(h) and the summary plan description requirements.

The court's most significant rulings were as follows:

- **Cash Balance Formula is Not Age Discriminatory.** Though the court recognized that there exists a split among courts in the Second Circuit, it sided with the increasing number of pro-employer decisions in other circuits and held that the cash balance benefit

formula is not inherently age discriminatory. Two prior district court decisions on this issue are pending appeals in the Second Circuit. The Seventh, Sixth and Third Circuits have all held that the cash balance formula does not violate the age discrimination rules.

- **Wearaway Was Not Age Discriminatory.** Plaintiffs claimed that the wear-away period affected older employees more than younger employees. The court noted that if that were true there may be a viable age discrimination claim. However, the court found that there was no evidence to support plaintiffs' assertion and it noted that a number of non-age related factors (e.g., service, salary) affect the extent of wear-away for participants. As a result, it did not consider the possible merits of such a claim. In conclusion on this issue, the court stated that "what the Plaintiffs see as age discrimination is merely the transition from one plan that was heavily age-favored to another plan that is still age-favored but less so. In the Court's view, that transition is not age discrimination."
- **Cash Balance Formula's Fluctuating Interest Rate Growth Could Not Cause a Violation of the Anti-Backloading Requirements.** Plaintiffs argued that fluctuating cash balance interest rates will cause the accrual of normal retirement benefits to vary in ways that would violate the anti-backloading requirements. The court flatly rejected this argument finding that the interest rate assumptions must be held constant for all future years in analyzing compliance with the accrual rules. Analyzed in this manner, the court held that the CIGNA plan's cash balance formula passed the accrual rules because no rate within the plan's designated range (4.5%-9%), held constant, results in impermissible backloading.
- **Wearaway Did Not Cause a Violation of the Anti-Backloading Requirements.** Plaintiffs claimed that anti-backloading rules require that

benefit accruals under the prior traditional benefit formula and the new cash balance formula be aggregated. If an aggregate approach is taken, the wear-away period of no accruals followed by actual accruals under the cash balance formula (after the cash balance benefit exceeded the value of the frozen prior benefit) would violate the anti-backloading rules. The court held that aggregation is not required where the prior formula was frozen by the plan amendment that implemented the new cash balance benefit. Under these circumstances, the prior benefit formula and resulting wear-away period are ignored for purposes of applying the anti-backloading rules.

- **Section 204(h) Notice.** The court found that the communications announcing the change in benefit structure to participants did not alert participants to the potential of a significant reduction in the future rate of benefit accrual as required under ERISA section 204(h). The court found that the communications were designed to lead participants to conclude that there would be no reduction in accruals.
- **The SPD.** The court found that CIGNA had a duty to inform participants of the possibility of a wear-away period that could result for many following the implementation of the new cash balance benefit. The court further held that this disclosure claim was viable as long as the plaintiffs could show "likely harm" caused by the faulty communication – no actual damages were necessary. The court held that plaintiffs met this standard because the communications likely misled participants to believe that wear-away was not a likely result and that continued accrual rates under the new formula were roughly equivalent to rates under the prior formula. This deprived plaintiffs of the opportunity to take timely action, such as protesting at the time of implementation, leaving CIGNA for another employer, or filing a lawsuit.

The court did not indicate what damages may be appropriate for the disclosure-related claims. The parties were instructed to brief issues of damages for the court. It is important to note that the 204(h) notice claims relate to a period that pre-dates the current 204(h) statutory and regulatory requirements, which now impose greater disclosure obligations and more specific guidance on the required content of notices.

## **9. IRS Ruling Effectively Blocks Long-Term Care Insurance in 401(k) Plans**

A recent private letter ruling (PLR 200806013) unfavorably resolves an open question as to whether qualified plans can offer qualified long-term care insurance coverage as an option. The tax code generally provides that qualified long-term insurance coverage ("QLTCI") is accident and health coverage, which potentially opens the door to its use in qualified 401(k) and other profit-sharing plans. Under the Code, premiums for QLTCI are deductible (within certain limits) and the benefit payments may be received tax-free. IRC § 219; 7702B.

The employer in the PLR proposed to allow participants to elect to purchase QLTCI with a portion of either elective contributions or self-directed non-elective employer contributions, and proposed to apply the longstanding IRS limitations for incidental life and health insurance (generally up to 25% of contributions) to such purchase. The plan would offer individual QLTCI policies and permit participants to select their own policy.

The PLR applies principles in a longstanding revenue ruling (Rev. Rul. 61-164, dealing with health insurance) and recently proposed regulations (see Qualified Plans 2007-8) to tax the participant currently on the entire premium used to pay QLTCI premiums. The PLR goes on to hold, consistent with the recent proposed regulations, that the use of 401(k) deferrals to make such a deemed distribution violates the in-service distribution restrictions of section 401(k)(2), thus disqualifying the plan.

As noted in Qualified Plans 2007-8, the proposed regulations also create roadblocks to the use of disability coverage by 401(k) plans to continue deferrals and other contributions being made to participant accounts during their disability – and would effectively "overrule" several letter rulings that permit such coverage on a very favorable basis. We understand that the IRS has received a number

of comments opposing this aspect of the proposal, but not necessarily as they would impact QLTCI.

## **10. IRS Defers Effective Date of Certain Funding and Benefit Limitations**

IRS Notice 2008-21 (Feb. 19 IRS Bulletin) generally delays for one year – until 2009 plan years – the effective date of certain proposed funding regulations (Code section 430(f), briefly summarized in Qualified Plans 2007-8), and proposed regulations implementing certain accrued and benefit payment restrictions for underfunded plans (Code section 436, briefly summarized in Qualified Plans 2007-8). Consistent with the proposed funding rules published at the end of 2007 – which by their terms would first apply to 2009 plan years – strict compliance will not be required for 2008 plan years. However, for 2008 –

- taxpayers must follow the statutory provisions and may rely on the proposed rules as a safe harbor, and
- otherwise must follow "reasonable interpretations" of the provisions.

The Notice calls attention to a number of important operating rules in making 2008 funding calculations.

In addition, Notice 2008-21 provides special rules for applying certain aspects of the benefit limitations to small plans with end of year valuation dates, and explains briefly how IRS and Treasury may implement certain pending technical corrections, if enacted.

Comments on the above matters are requested by April 21.

## **11. PBGC Proposes Changes in Annual Reporting under ERISA Section 4010**

Section 4010 of ERISA requires the contributing sponsor and its controlled group members (generally, trades or businesses directly or indirectly linked by an 80% or more ownership interest) to report pension plan and financial information to PBGC each year if certain tests are met. The section 4010 filing is due on or before the 105th day after the end of the "information year" – the fiscal year of the contributing sponsor and controlled group members, or the calendar year if their fiscal years are different. In Technical Update

08-1 (Feb. 21, 2008), PBGC addressed "leap day" this year by providing an automatic one-day extension for section 4010 reporting, if the 105-day period includes February 29, 2008.

PBGC also recently proposed amendments to its regulation on annual financial reporting to conform to Pension Protection Act of 2006 ("PPA") amendments to section 4010 of ERISA, and to make other changes. 73 Fed. Reg. 9243 (Feb. 20, 2008). The amendments would be effective for information years beginning after 2007. Comments on the proposed amendments are due by April 21.

Before the effective date of the PPA changes, section 4010 reporting was required, among other reasons, if the aggregate unfunded vested benefits of defined benefit pension plans in the controlled group at the end of the preceding plan year exceeded \$50 million ("\$50 Million Gateway Test"). PPA amended ERISA section 4010 to replace the \$50 Million Gateway Test with a test based on the "funding target attainment percentage." The "funding target attainment percentage" is the ratio of the value of plan assets for the plan year (reduced by the amount of the prefunding balance and the funding standard carryover balance) over the funding target of the plan for the plan year (determined without regard to the at-risk status of the plan). Under the new test, reporting under ERISA section 4010 is required if the funding target attainment percentage at the end of the preceding plan year for any plan in the controlled group is less than 80 percent ("80% Funded Gateway Test").

ERISA section 4010(d), as amended by the PPA, requires the reporting of additional information that was not required to be reported before, namely, the amount of benefit liabilities determined using PBGC assumptions, the funding target of the plan determined as if the plan has been in at risk status for at least five plan years, and the funding target attainment percentage of the plan. The proposed rule provides detailed guidance on how to determine this information.

Although not in the language of PPA, the Technical Explanation of PPA explains that "[i]t is intended by PBGC may waive the requirement" for section 4010 reporting under ERISA based on the 80% Funded Gateway Test "in appropriate circumstances, such as in the case of small plans." Based on that guidance, the PBGC's proposed rule would exempt from section 4010 reporting controlled groups with aggregate plan underfunding of \$15 million or less (disregarding those plans with no underfunding). This exemption is only applicable if

the reporting obligation arose solely due to the 80% Funded Gateway Test. The "plan underfunding" is equal to the funding target of the plan for the plan year minus the value of plan assets (reduced by the amount of the prefunding balance and the funding standard carryover balance).

The proposed rule would beef up the conditions under which actuarial information must be reported with respect to "small plans," however. Under the current rule, actuarial information generally is not required for plans with fewer than 500 participants. The proposed rule would require, as an additional condition for this exemption, that the plan's underfunding not exceed \$15 million.

Finally, the proposal provides guidance and relaxed rules for reporting for multiple employer plans, as well as transition rules for filers with plan years that begin in 2007 but end in information years that begin after 2007.

## **12. Bush Administration Fiscal Year 2009 Budget Proposals**

On February 4, the Bush Administration released its budget proposals for fiscal year 2009. As in past budgets, the Administration included several benefits-related tax proposals, which we have seen before (Qualified Plans 2007-2). Since it is an election year, there is little likelihood that a Democrat-controlled Congress will take up many of the Bush Administration proposals. Below are some highlights of the benefit-related tax provisions in this year's budget.

**Simplified Retirement and Savings Vehicles.** The budget once again contains proposals to create three new simplified retirement and savings vehicles: the Lifetime Savings Account (LSA), the Retirement Savings Account (RSA) and the Employer Retirement Savings Account (ERSA), in the same format as last year. The maximum RSA contribution is \$5,000 per year and the maximum LSA contribution is \$2,000 per year. We do not anticipate any activity on these proposals in this Congress.

**Charitable IRA Rollover Made Permanent.** The Pension Protection Act (PPA) provision that permits IRA owners who are age 70-1/2 or older to make tax-free IRA distributions (capped at \$100,000) to a tax-exempt charity expired at the end of 2007. The Administration's budget would make this provision permanent. An extension of this provision is likely to be considered later this year.

**Employee Leasing Companies.** The budget again contains a proposal to provide standards for holding employee leasing companies solely liable for Federal employment taxes if they meet certain requirements. As employee leasing has become more commonplace, especially in the small business market, questions have been raised as to the extent to which the employee leasing company or its client is liable for employment taxes on the leased employees. The IRS realizes that leasing companies as a whole are more likely to comply with the employment tax withholding rules than small businesses; accordingly, the Administration supports having clearer standards on when a leasing company can assume the employment tax liability of the company that has leased the employees.

**Standard Deduction for Health Insurance.** The budget would create a new "standard deduction" for individuals who are covered by health insurance and generally eliminate the other tax preferences that are available for health coverage. In general, all individuals who have qualifying health coverage would be provided a standard deduction of up to \$15,000 for those with family coverage and \$7,500 for those with individual coverage, based on the number of months that the individual is covered by the qualifying health coverage. The deduction amount would be indexed to increases in inflation based upon the rise in the consumer price index (CPI), not based upon health care cost inflation. The amount of the standard deduction would not depend on the cost of the coverage purchased, but the coverage would have to meet certain minimum coverage requirements in order to qualify. The new standard deduction would reduce an individual's income for both income and employment tax purposes.

Employers could continue to offer their employees health coverage, but the value of that coverage would be included in the employee's wages for income and employment tax purposes. The itemized deduction for medical expenses would be eliminated, except for taxpayers enrolled in Medicare. Employers could, however, continue to deduct the premiums paid for employee health insurance as a business expense.

Since this is a Presidential election year and the Democrat's candidates have made health care a major issue, it is highly unlikely that the Administration's health care proposals will be considered this year.

**Expansion of Health Savings Account Incentives.** The Administration, which has been a

very strong proponent of health savings accounts ("HSAs"), continues to include several proposals in the budget to provide further incentives for individuals to purchase high deductible health plans (HDHPs) and contribute to HSAs.

**Other Miscellaneous Proposals.** The Administration's budget also contains proposals:

- making permanent the remainder of the tax relief that was enacted in the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) and the Jobs Growth and Tax Relief Reconciliation Act of 2003 (JGTRRA) (PPA 2006 made permanent the changes made by EGTRRA to tax-favored retirement plans and the Saver's credit); and
- applying the Saver's credit to contributions to Section 529 Qualified Tuition Programs.

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