THE WAGNER LAW GROUP
A PROFESSIONAL CORPORATION

TALKING POINTS

1. BRIEF OVERVIEW OF CHANGES SINCE THE LAST PLAN SPONSOR NATIONAL CONFERENCE

a. How much has changed in the last 12 months for plan sponsors to be aware of? Has this been a busy regulatory time?

- Three areas have seen significant change over the past year:

  Regulatory

  - As discussed later, the Department of Labor ("DOL") has proposed regulations that would expand the definition of a fiduciary under ERISA and revise its class exemptions for certain arrangements that would otherwise run afoul of ERISA.
  - The principal effect of the proposed regulations, if adopted, would be on the retirement industry. Plan sponsors may feel the effect if advisors exit the so-called retail market consisting of plans with fewer than 100 participants, plan participants and beneficiaries, and IRA owners. Financial advisors will in any event likely change the terms on which they provide advice and the services they provide.
  - The IRS has now finalized its regulations authorizing qualified longevity annuity contracts ("QLACs") that commence at an age later than retirement (but not later than age 85) thereby allowing participants to self-manage a significant portion of their assets until commencement of the annuity.
  - The IRS and the DOL together have issued guidance facilitating plan investment in target date funds ("TDFs") whose assets include deferred annuities paying lifetime benefits.

  Judicial

  - The Supreme Court has been active in the retirement plan area, issuing two major decisions, with a third decision expected this month.
  - In Dudenhoeffer v. Fifth Third Bancorp, decided last June, the Court held that there is no presumption that an individual account plan's investment in employer securities is prudent when the employer stock declines significantly in value. At the same time, however, the Court indicated that it may be more difficult in future to mount stock drop cases against plan fiduciaries, because fiduciaries may generally rely on the market price of the stock in making buy-sell decisions.

- In Tibble v. Edison International, decided on May 18, 2015, the Court held that a potentially improper investment made more than six years before the case was brought, and therefore outside the six-year statute of limitations, could be actionable based on the plan fiduciaries' duty to conduct regular reviews of plan investments. Although the level and intensity of investment review after the initial selection of an investment that is needed to avoid a fiduciary breach is yet to be determined, the need for such review has been established.

- Plan advisors should watch the future development of the Tibble case which has been returned to the appeals court to determine how often and how deeply fiduciaries must look at plan investments to satisfy their monitoring duty. For their part, plan sponsors should seek input from their investment advisors and conduct investment reviews in accordance with the standard yet to be enunciated in Tibble.

- The Supreme Court heard oral arguments in Obergefell v. Hodges on April 28, 2015. The specific question in Obergefell is whether a state can be forced to issue a death certificate identifying a same-sex spouse as anything other than married; it does not directly involve retirement plan benefits. But this case, and the three case consolidated with it, present two broader issues: whether a state can deny same-sex partners the right to marry, and whether a state may refuse to recognize a same-sex marriage performed in a state that permits same-sex marriages. A decision is expected later this month.

- In Texas v. United States, decided on March 26, 2015, a U.S. District Court in Texas enjoined the DOL's rule under the Family and Medical Leave Act ("FMLA") extending projected job leaves to absences to care for a same-sex partner or that partner's children. Relying on Section 2 of DOMA, the provision at issue in Obergefell, the court enjoined the DOL from enforcing the FMLA rule in Texas, Arkansas, Louisiana and Nebraska. Section 2 of DOMA permits states to refuse recognize same-sex marriages performed under the laws of other states, and the court held that the DOL exceeded its authority in requiring Texas and the other states to recognize same-sex marriages.

Legislative

- Section 4062(e) of ERISA, administered by the Pension Benefit Guaranty Corporation ("PBGC"), imposes liability on the sponsor of an underfunded defined benefit plan when cessation of operations at a facility results in loss of jobs above a threshold percentage. Under an aggressive PBGC enforcement policy, the sale or relocation of a facility was treated as a cessation of operations, triggering Section 4062(e) liability, even if no jobs were lost because the facility moved to a new location.

- Effective December 16, 2014, Section 4062(e) of ERISA has been amended to change the threshold percentage at which liability is imposed, from 20% of the employees covered by the pension plan to 15% of employees eligible to participate in any plan of the employer, including a 401(k) plan.

- The amended version of Section 4062(e) incorporates two significant exemptions: small plans with fewer than 100 participants are not subject to liability, even if there is a cessation of operations at a facility, and plans that are at least 90% funded are exempt.

- Since 2012, the PBGC's enforcement policy has been not to initiate action under Section 4062(e) against financially strong plan sponsors. That policy continues and with the above new exemptions much of the uncertainty that plan sponsors had as to whether a plant closing or sale may result in liability has been eliminated.

b. Why does the retirement space seem to always be changing and shifting in terms of the regulatory and legislative environment? Should sponsors expect this to continue or even accelerate in the years ahead?

- The principal drivers of the constant changes in legislation and regulations affecting retirement plans have been, and can be expected to continue to be, the federal government's need for revenue (particularly from a source that does not appear to be a tax increase) from the tax benefits afforded to both employers and employees through tax-qualified plans, and important social changes, exemplified by the speed with which same-sex marriage has been accepted. This latter phenomenon also illustrates the importance of the third branch of government, the judiciary, in reflecting (some would say, driving) social change.

c. Final preliminary, what should sponsors know about where they can seek help and what forms of support are available?

- At a high level, from professional and industry support groups such as the present conference and the publications provided by its sponsor. At a day-to-day level, from the plan service providers represented at this conference.

2. DOL'S NEW FIDUCIARY PROPOSAL

a. Is it accurate to say that the number of service providers counted as fiduciaries to the plans they serve will greatly increase as a result of the proposal's broadening of the scope of advisers treated as fiduciaries?

- This is an accurate observation, because the new four-prong test for investment advice, which is the basis for classification as a fiduciary, makes it much easier to fall into the fiduciary classification than the old test. For example, unlike the old test, there will no longer need to be a mutual understanding between the parties that the advice will be individualized and that it will serve as a primary basis for decisions.

- The advice does not even need to be individualized if it is specifically directed to a retirement client.

- Even one-time advice that is not provided on a regular basis could potentially be viewed as fiduciary advice.

- A plan sponsor is entitled to expect that investment recommendations from a fiduciary will be based solely on the best interests of the plan and its participants, not on the investment that will result in the most compensation for the adviser.

b. What does it mean that the DOL is taking an exemptions-based approach to a stronger fiduciary standard?

- Because of the broad scope of the proposed fiduciary rule, the DOL proposal includes six carve-outs from the fiduciary definition. So long as a provider falls under one of these six categories, the provider will not be deemed to be a fiduciary even when providing investment-related recommendations to retirement clients.

- One of these carve-outs applies to employees of the plan sponsor, so that if members of the sponsor's Treasury Department advice the plan, they will not be treated as fiduciaries.

- The breadth of the proposal also creates a need for exemptions so that traditional business models and practices of providers can be preserved if they are consistent with the best interests of retirement investors

- These exemptions are said to be principles-based, meaning that they provide guidelines but avoid hard and fast rules.

- The best interest principle at the heart of the exemptions comes down to whether a provider has acted with prudence based on the specific needs and goals of the retirement investor.

c. Do you expect providers to frequently use the best interest contract exemption contained in the proposed regulation?

- If a provider has a fee structure that is more complicated than a percentage of assets under management, an hourly fee or a flat retainer and services plans with fewer than 100 participants, the provider will almost surely be forced to rely on this exemption, which is affectionately nicknamed the "BIC exemption".

- The real purpose of the BIC exemption is to allow plan providers to receive variable compensation, such as commissions, that would otherwise be prohibited because this kind of compensation creates a conflict of interest on the part of the advisor: the provider has an incentive to recommend the investment that pays the most compensation, while plan sponsors have an obligation to see that provider compensation is no more than reasonable.

- The BIC exemption requires the provider to enter into a written contract with the plan to be guided solely by the plan's best interests. The terms of this contract must meet regulatory specifications or the provider will not qualify for the BIC exemption. The plan can sue the provider if it breaches this contract which the DOL views as an enforcement tool.

- The BIC exemption will not apply to plans with 100 or more participants, because the DOL views the fiduciaries of these plans as more sophisticated and, therefore, having the ability to distinguish between a sales pitch and solid fiduciary advice.

d. What is the likely impact on rollovers and plan distributions?

- The DOL proposal clarifies that fiduciary advice will cover recommendations to take rollovers from a plan as well as investment recommendations for rollover assets.

- The proposal also indicates that recommendations relating to the investment management of the assets of a plan or IRA is fiduciary advice. In other words, recommending an investment manager will also count as covered advice. This includes recommendations as to the investment management of rollover assets.

e. Is all of this set in stone, or will we see changes before the new rule is finalized?

- In politics, you can never be 100% certain of what is going to happen, but the current Administration has made it clear that the DOL fiduciary proposal is a priority.

- There is increasing Congressional pressure to slow down the pace toward finalization of the new rule, but it is not clear if this will be sufficient to withstand White House pressure.

- Public comment, now extended to July 21 (with a further 30-45 days after a public hearing), is likely to result in some technical changes and the DOL has requested comment on certain issues.

- Industry groups whose interests are negatively affected can be expected to fight for change. For example, certain investment assets are not covered by the BIC exemption, including privately-placed debt securities, non-traded REITs and alternative investments like hedge funds and private equity. Since this could affect the ability of brokers to earn commissions on these products, we can expect a fight from them on this point.

3. RETIREMENT PLANNING AND LIFETIME INCOME OPTIONS

a. Different regulators and lawmakers have been talking for years about improving access to in-plan lifetime income options. Is anything new on this front in the last 12 months?

- In July 2014, the IRS finalized regulations proposed in 2012 designed to promote longevity annuities in defined contribution plans. Under the regulations, qualifying longevity annuity contracts ("QLACs") are excluded from the required minimum distribution calculation if they meet certain requirements. The final regulations became effective July 2, 2014, and permit the exchange of a non-compliant contract issued before that date for a new contract that satisfies the QLAC requirements.

- To qualify as a QLAC, an annuity must be purchased from an insurance company and the contract must state that it is intended to be a QLAC. A QLAC must provide that distributions commence no later than the month following the participant's attainment of age 85. A QLAC cannot provide a variable annuity, indexed annuity or similar type of benefit, but must provide a predictable stream of income. Nor may a QLAC allow a lump sum distribution, cash surrender right or other similar feature. It may, however, be a participating annuity paying dividends or an increasing annuity providing for cost-of-living increases.

- Aggregate premium payments for QLACs cannot exceed the lesser of $125,000 or 25% of the participant's account balance (aggregating the participant's balance under all qualified plans, 403(a) and (b) plans, governmental 457(b) plans and IRAs). The dollar limit is adjusted for inflation in $10,000 increments. The percentage limit is supplied on a plan-by-plan basis, except for IRAs where all account balances are aggregated.

b. What are the fiduciary challenges that have slowed or stalled greater use of in-plan lifetime income options? Worries about solvency of insurers, for example?

- The Department of Labor has made clear that the selection of an annuity provider and annuity products is a fiduciary act governed by ERISA, including the duty to act prudently and solely in the interest of plan participants.

- While the DOL has long provided fiduciary guidance on the selection of immediate distribution annuities for defined benefit pension plans, requiring "the safest annuity available", it was not until 2008 that it provided a safe harbor specifically for defined contribution plans. The safe harbor, however, covered only immediate distribution annuities and not deferred annuities. Nor did it directly address group annuities or the newer "guaranteed lifetime withdrawal benefits" ("GLWB") that can be added to a group annuity contract, allowing a guaranteed withdrawal amount each year. Despite the lack of guidance, some plan sponsors (United Technologies, for example) have begun to offer a GLWB option to their 401(k) plan participants.

- Under the DOL guidance for defined contribution plans purchasing immediate distribution annuities, the safe harbor has five elements:
  - The plan sponsor must observe general procedural prudence;
  - It must consider the annuity provider's ability to make future payments;
  - It must consider the annuity's cost in relation to benefits and services;
  - The plan sponsor must then draw appropriate conclusions based on this information; and
  - Seek expert advice as necessary.

- Perhaps as important as the regulatory hurdles that lifetime income options must clear is both the public's and the financial industry's failure to understand this complex subject. With the rise of 401(k) plans, retirement funds have been seen as a pot of money rather than a stream of income. The financial industry has historically been focused on the accumulation phase of retirement planning rather than the decumulation phase.

c. Will annuitization and income guarantees continue to be such a hot topic? Are they necessary for the ultimate success of the DC system or can the participants be trusted to spin down their own accounts?

- Yes, because of three factors:
  - Demographics of an aging population with improving mortality;
  - Perceived increasing inability of Social Security to meet retirement income needs;
  - The financial industry will increasingly come to embrace lifetime income options; and
  - The strength of the insurance industry lobby which will keep the annuitization alternative in front of Congress.

4. WHAT IS GOING ON WITH STATE-BASED IRAS AND PUBLIC-PRIVATE PENSION PROPOSALS?

a. Some states, such as Illinois and Washington, have recently launched IRA programs to support employees of small businesses and industries that do not have a strong workplace savings tradition. How might these programs affect corporate plan sponsors?

- In September 2012, the California legislature took steps to authorize the first automatic IRA program. Under this state-administered program, which has yet to go into effect, employers with 5 or more employees and no other retirement plan will be required to participate, and their employees will be automatically enrolled and contribute 3% of pay through the employer's payroll system. However, automatically enrolled employees would be allowed to opt out.

- Before implementation of the California program, a legal and market analysis must be performed to determine whether the legal and practical conditions for implementation can be met. It is anticipated that this study will not be completed until late 2015. Additional legislative authorization would then be required to implement the program.

- Other states, such as Illinois and Washington, have followed in California's footsteps. The Illinois legislature adopted a clone of the California program last December. The Illinois program provides for automatic payroll contributions to an IRA for employees of a business in existence at least two years that has 25 or more employees, unless the employer offers another retirement savings option. The Illinois program cannot go into effect before 2017 and clearance is obtained from the DOL and IRS. These federal approvals may be problematic, since the DOL must rule that the IRA program is not an ERISA plan. Employers with Illinois workers are taking a wait-and-see attitude.

- The proposed Washington state program, known as "Start", is different from its California and Illinois predecessors in that participation by employers would be voluntary. Contributions would be administered by a state board which would contract out its responsibilities to private recordkeeping and asset management firms. The program is contingent on IRS approval.

- The proposals for state-run retirement plans say that their plans are not designed to be subject to ERISA and that participating employers will not be treated as fiduciaries. However, it is very doubtful that the federal government will grant an exemption from these rules. A state-sponsored arrangement that is not exempt from ERISA would be no more than a multiple employer plan under which the sponsor of each separate employer plan has delegated certain plan sponsor responsibilities to third parties. In this case, the recipient of the authority would be a state government which may or may not contract out these duties to other organizations. As a co-fiduciary, the employer could be liable for the actions of the state or its agent.

- Private plan sponsors could be affected if a state that maintains an IRA program establishes minimum standards for employer-sponsored pension plans in order for a plan sponsor to avoid participation in the state program. If not preempted by ERISA, this could push employers to modify their plans to meet state standards.

- A significant effect of these government-controlled retirement programs would be to discourage certain employers from establishing new plans under the private pension system, since they could point to the state program as meeting their retirement obligations. In the long run, government-sponsored plans could also diminish employee, as well as employer, support for employer-provided plans and could eventually crowd them out.

b. What is the status of the myRA program?

- To encourage the savings habit, in 2014 the President ordered the Treasury to create a new "starter" retirement savings program called "myRA". These are Roth accounts for people who do not have employer-sponsored plans. They are offered through employers who volunteer to participate in the program. Married couples can invest if they make less than $191,000 (2014 limit). Once the balance of a myRA reaches $15,000 (or after 30 years), however, participants would be required to roll it over to a traditional private-sector Roth IRA.

- MyRAs have a single investment option – a Treasury bond that offers the same interest rate return as the G-Fund in the federal Thrift Savings Plan. This investment entails low risk and low returns. The latter should be a concern for younger employees capable of absorbing more risk as they seek to build retirement savings.

- A pilot program was established to accept myRA contributions only last December but participating employers seem to consist mostly of government agencies. Word is that they are off to a very slow start.

- Also last December, the DOL ruled that myRAs are not ERISA-covered plans. For those that would seek to extend this conclusion to state-sponsored IRA programs, it should be noted that DOL's reasoning emphasized the voluntary nature of the program as well as its federal sponsorship.

- Commercia, a Dallas-based bank, was picked to manage the myRA program and the Treasury directs workers to its website to sign up. Treasury has set up a payroll deposit system to handle contributions, but since this would require the cooperation of private-sector employers, it is reportedly exploring other options to make contributions.

- Treasury has done little to promote myRAs and is not actively recruiting participants. Unless this changes and there is an upsurge in demand from employees, the program's impact on plan sponsors should be negligible.

c. What else is the government doing to make private DC and DB plans more efficient? Have we seen any expansion of multiple employer plans?

- In his proposed SAFE Retirement Act of 2013, Senator Orrin Hatch attempted to address the need for expanded access to retirement savings programs by creating a retirement savings vehicle ("Starter 401(k)s") with individual accounts controlled by participants who would be able to contribute up to $8,000 annually.

This relatively modest contribution (which is less than a full 401(k) salary deferral but more than can be put in an IRA) would not be required to meet discrimination testing. Under the SAFE Retirement Act, there would be no required employer contributions, and to encourage employees to participate, automatic deferrals could range from 3% to 15% of compensation, subject to a participant's opting out. There has been no movement on this modest proposal.

- Likewise, there has been little overt progress for Sen. Tom Harkin's contrasting proposal, the USA Retirement Funds Act, that would establish a new universal retirement system to be managed by licensed and regulated entities established pursuant to the legislation. On the surface at least, these managing entities would be privately-run in the manner of a credit union. USA Retirement Funds would involve automatic enrollment and financing by employee deferrals and voluntary employer contributions made through an employer's payroll system. Employee accounts would be annuitized at retirement and pay a regular stream of income, thus paying homage to the need for lifetime income. This proposal severely limits participant access to funds until retirement age.

- Multiple employer plans ("MEPs"), which centralize certain plan functions, are an alternative that has developed to ease plan administration, meet compliance requirements, including plan amendments, and relieve the burden of overseeing plan investments and evaluating plan expenses. As is well known, a 2012 DOL advisory opinion concluded that a popular variant of this technique involving unrelated plan sponsors constitutes a series of separate plans sponsored by each employer rather than a single plan.

- The major consequence of the DOL's ruling is that each participating employer is obligated to file a separate annual report on Form 5500. These employers will also individually need to satisfy ERISA's plan audit requirement, although this would be a non-issue for small participating employers with fewer than 100 eligible participants.

- The DOL has not backed away from its 2012 position on MEPs and in fact has made life a little harder for MEPs by requiring more information on Form 5500. The instructions for the 2014 annual report newly require multiple employer pension plans to include an attachment listing each participating employer in the plan during the plan year, along with its employer identification number and a good faith estimate of each employer's percentage of the total contributions (including employer and participant contributions) made during the year.

- On the plus side, the DOL ERISA Advisory Council recently issued a report to the DOL pointing out that plan sponsors can gain access to expertise and technology, achieve economies of scale, and reduce costs by joining a MEP. The council recommended that the DOL facilitate the use of MEPs as a means of encouraging plan formation and easing administrative burdens. Further,

- The council suggested development of safe harbors for MEP sponsors and adopting employers that would not expose them to liability for acts of non-compliant adopting employers.

- The council also advocated creation of a sample structure for MEPs to ensure against conflicts of interest and prohibited transactions.

5. LOOKING TO THE IRS AND OTHER REGULATORS

a. Has the IRS made any fundamental or important changes in the last year?

- As previously mentioned, last July saw the finalization of QLAC regulations permitting 401(k) participants to use their plan account balances to purchase qualifying longevity annuity contracts without concern for the required minimum distribution rules.

- Revenue Procedure 2015-28, issued and in April, amends the Employee Plans Compliance Resolution System ("EPCRS) so that implementation errors with respect to automatic deferrals can be fixed more easily. The new rules apply to the following operational errors:

  - 401(k) and 403(b) plans that have failed to effectuate automatic contributions or affirmative deferral elections by a participant;

  - Failure to carry out automatic escalation of the rate of deferral where called for by the plan; and

  - Improper exclusion of an employee from a plan with an automatic contribution feature by failing to implement the employee's affirmative deferral election.

- Under the new EPCRS correction methodology, where the failure to implement an automatic contribution or an affirmative deferral election is detected and contributions or deferrals begin by the end of the 9½ month period after the end of the plan year of the failure, a make-up contribution will not be needed, although the plan sponsor will be required to make a corrective contribution for missed matching contributions adjusted for earnings.

- A similar safe harbor correction method applies to failures to implement employee deferral elections or to give an employee an opportunity to elect in a plan without an automatic contribution feature. When correct deferrals begin within 90 days of the failure, no contribution to compensate the employee for the missed deferral opportunity is required. However, matching contributions (and earnings) for the period of the failure must be made.

- Under the revised EPCRS correction procedure, when correct deferrals begin more than three months after the deferral failure first occurred but no later than the end of the second plan year following the plan year in which the failure occurred, a make-up contribution equal to 25% of the missed deferrals will be required in place of the generally applicable 50% contribution.

- Another new IRS revenue procedure issued in April, Rev. Proc. 2015-27, clarifies existing correction rules for overpayments to plan participants. Under the new rule, plans have more flexibility to correct this plan failure and do not have to seek the return of overpayments from affected plan participants or beneficiaries in every situation. However, the requirement that the employer make the plan whole has not been relaxed.

- To qualify for relief from ADP and ACP testing, safe harbor 401(k) plans must make certain matching or nonelective contributions <u>and</u> meet specific notice requirements. Under regulations issued at the end of 2013 and first applicable to plan years beginning in 2015, the notice requirement if a sponsor wishes to suspend safe harbor contributions has changed. The revised rules allow mid-year reduction or suspension of safe harbor matching contributions if the employer is operating at an economic loss or had included notice of a potential reduction/suspension in its annual safe harbor notice to participants. As before, employers must follow certain procedural requirements, such as adopting a plan amendment before the end of the year and giving participants supplemental notices. Annual safe harbor notices should be modified to include language about mid-year reduction or suspension of contributions.

b. Has there been regulatory action from other agencies, such as FINRA, the SEC or EEOC?

- Last July, the SEC adopted amendments to the rules that govern money market mutual funds to address risks of investor runs on these funds. The new rules require a floating net asset value (NAV) for institutional prime money market funds, which allows the daily share prices of these funds to fluctuate. Fund boards were also given new tools -- liquidity fees and redemption gates -- to address runs. These new rules are effective in 2016 and only affect institutional prime funds. Retail money market funds will keep their longstanding $1 per share value.

- If a 401(k) plan uses a prime money market fund, it may be necessary to explain the change to plan participants and correct the impression that they cannot lose money in the plan's money market fund. Plan participants should also be alerted to the possibility that redemption fees will be applied to the plan's money market fund.

- The underlying credit quality of the investments in the money market fund used by the plan should be reviewed and the fund replaced if it is weak.

- Recordkeepers should be directed to show these fees and/or restrictions on their website.

c. There has been a perceived increase in challenges to health and welfare programs, for example under the Americans with Disabilities Act. To what can this be attributed?

- Physicians, hospitals, health insurers and employers have substantial discretion with regard to healthcare undertakings that conflict with the ADA's aspirational goals. When it comes to plan design issues, the courts will generally side with employers, since this affects the allocation of resources. In other words, formulary limits are safe. When the claim of a person with a disability is seen as a discriminatory denial of access to healthcare, however, the plaintiff has the advantage.

- In April, the EEOC issued proposed regulations providing guidance on the extent to which the ADA permits employers to offer incentives to employees to promote participation in wellness programs that are employee health programs. The ADA restricts the medical information employers may obtain from employees and makes it illegal to discriminate against individuals on the basis of disability. Participation in wellness programs, which may entail health risk assessments and biometric screenings measuring weight, cholesterol and blood pressure, must be voluntary. Prior to their release, the EEOC commenced lawsuits based on the principles contained in the proposed regulations with respect to the voluntary nature of wellness programs. This litigation posture may be the basis for the perceived increase in discrimination claims against certain health programs.

6. <u>WINDSOR</u> AND OTHER SAME-SEX MARRIAGE CASES

a. What changes have the last year brought in terms of the treatment of same-sex spouses under ERISA and all the other laws and rules applying to retirement plans?

- Interpreting the Supreme Court's 2013 decision in <u>United States v. Windsor</u> declaring the definition of marriage in Section 3 of the Defense of Marriage Act ("DOMA") unconstitutional, the IRS and DOL both adopted a "place of celebration" rule under which a same-sex marriage validly entered into in a state authorizing same-sex marriages is recognized even when the married couple resides in a state that does not permit or recognize the validity of same-sex marriages. <u>Windsor</u> did not address Section 2 of DOMA, which gives individual states the right not to recognize same-sex marriages performed in other states.

- The Windsor decision was followed in a Pennsylvania case, also in 2013, which applied Illinois law to require the recognition under ERISA of a same-sex marriage performed in Illinois.
- In Roe v. Empire Blue Cross Blue Shield, decided in May 2014, the court declined to require a self-insured medical plan to provide coverage to the same-sex spouse of an employee. This case, brought under ERISA and not state law (since the medical plan was self-insured), was affirmed on appeal in December 2014. According to the court, ERISA grants broad discretion to plan sponsors as to welfare plan coverage and does not include an anti-discrimination provision.

b. What does it all mean practically for a given plan sponsor? More than a few tweaks to the plan documents?

- The impact on individual employers of Windsor and subsequent same-sex marriage cases will depend on the location of the employer's operations. For employers with employees in states that do not recognize same-sex marriages, much will depend on the outcome of the Obergefell case. If the plaintiffs in Obergefell are unsuccessful and the Supreme Court rules either that states are not required to license same-sex marriages or that, while not required to license same-sex marriages, they can refuse to recognize same-sex marriages validly performed in other states, plan changes to carve out a separate marriage definition for participants residing in non-performing or non-recognizing states may be necessary. The extent of these changes will depend on the scope of the Supreme Court's decision and the reaction of the IRS and DOL.

- For plan sponsors that operate only in recognizing states and whose plans now have a definition of spouse that satisfies the current federal rules, there should be little impact.