Between the Health Care Rock and the Retirement Hard Place—Washington Keeps Changing the Employee Benefits Rules

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- Mr. Campbell concentrates his practice in Employee Benefits advice and ERISA litigation, specializing in ERISA Title I issues, including fiduciary conduct and prohibited transactions. He also serves as an expert witness in ERISA litigation. The former Assistant Secretary of Labor for Employee Benefits, head of the Employee Benefits Security Administration, Mr. Campbell was ERISA's primary Federal regulator and law enforcement official. He played a key role in ERISA retirement and health reform initiatives of the prior decade, and his regulatory and policy decisions had a fundamental impact on the structure and operation of ERISA plans, including:
  - Proposing the initial 408(b)(2) service provider and 404(a)(5) participant disclosure regulations
  - Issuing final regulations establishing Qualified Default Investment Alternatives (QDIAs), electronic fee disclosure, and participant access to investment advice
  - Administering an enforcement program reporting more than $2.6 billion in monetary results and more than 200 criminal indictments
  - Directing policy in major litigation, including filing amicus briefs in *RILA v. Fielder* and *LaRue v. DeWolff*

In 2013 We are Going to Debate (and Maybe Change) the Fundamentals

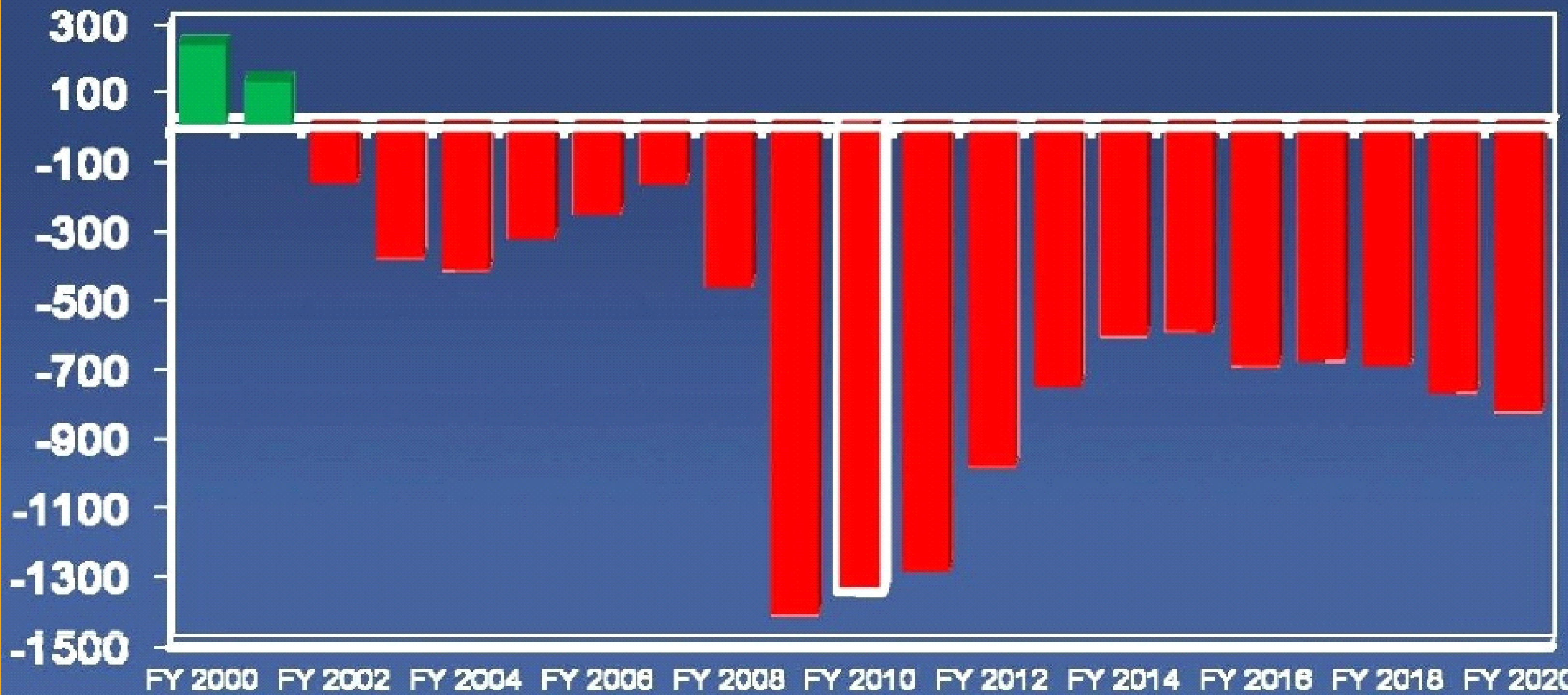
- Debt, Deficit and Taxes—Why Tax Reform Is a Big Threat to Employee Benefit Plans
- Redefining Fiduciary Advice—DOL Seeking Fundamental Change Affecting Retirement Plans, IRAs and Rollovers
- DOL's Tips for Fiduciaries on Selecting TDFs
- 408(b)(2) Round Two (Summary Disclosure)
- Lifetime Income Projections; Abandoned Plans, Perez Nomination, and More

Obama, Congress Must Reach Deal On Budget By March 1, And Then April 1, And Then April 20, And Then April 28, And Then May 1 And Then Twice A Week For Next Four Years

--The Onion, February 27, 2013

WASHINGTON—With the dramatic, across-the-board sequestration scheduled to occur this week, the nation's leading economists have warned that President Obama and Congress must come to a compromise on the budget by Mar. 1, and then again by Apr. 1, and then Apr. 20, Apr. 28, and—after Congress is once again unable to come to a comprehensive agreement to fully stabilize the economy—May 1, along with agreements twice a week, every week, for the next four years.

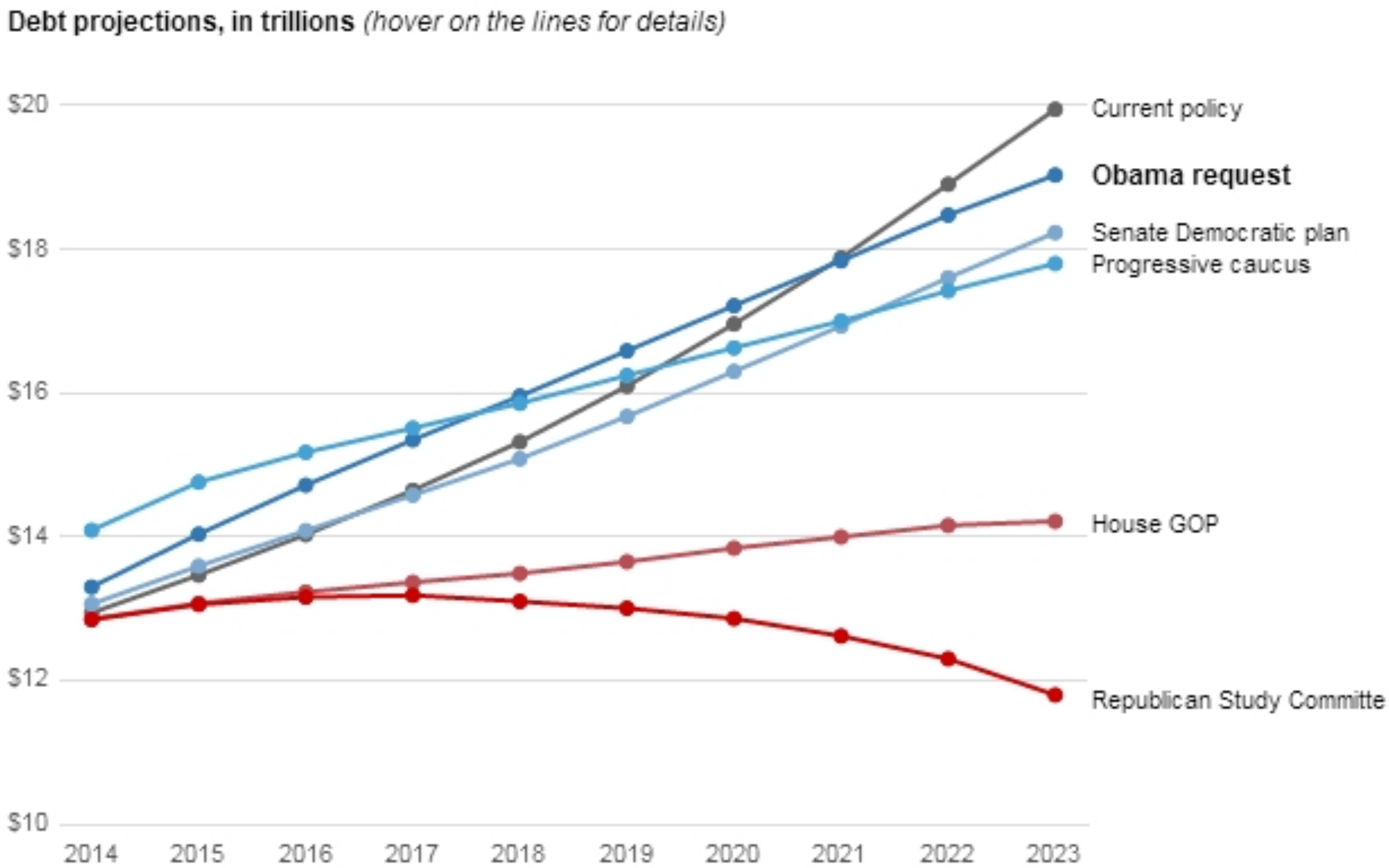
Federal budget surplus/deficit



Source: Congressional Budget Office
(in billions $)*

* Does not reflect American Taxpayer Relief Act provisions.

Battling Budget Proposals



Washington Post, April 10, 2013

Tax Deal Would Put Benefits (Especially Retirement Plans) on the Front Lines

- Taxes part of any budget debate, whether rate changes are on or off the table.
- If no rate changes, increased revenue comes from tax expenditures and loopholes.
- Retirement plans are the second biggest "tax expenditure."
- 10 year scoring inflates "cost" of retirement plans, making debate harder.

Tax Expenditure	2013 Cost ($ billions)
Health	$191
Retirement (DB, DC, and IRAs)	$165
Home Ownership	$146
Cap. Gains/Dividends	$ 84
Charity	$ 49
State & Local Sales Tax	$ 46
Tax-Exempt Bonds	$ 39

Source: OMB FY 2013 Budget

Example—President's 2014 Budget Proposals

- Across-the-board cap on accumulation in IRAs, DC and certain DB plan annuities:
  - ✓ Current law allows people to accumulate "substantially more than is needed to fund reasonable levels of retirement saving."
  - ✓ Cap based on maximum annuity of $205,000 per year in qualified DB plan
  - ✓ Equals about $3 million-$3.4 million in 2013
  - ✓ No additional contributions once cap reached
  - ✓ Plans and IRA trustees must report account balance and annual contribution
  - ✓ What happens when interest rates rise?
- Limit Exclusions and Deductions to 28% for $250,000 or more joint filers ($200,000 single)
  - ✓ Applies to health and retirement as well—essentially lops off value of deductions/exclusions above 28%. ($17,500 for 35% payer saved $6,125, here $4,900).

Redefining Fiduciary Advice—Why Is This Proposed Regulation So Controversial?

- Three Reasons:

1. Prohibited Transaction Rules—Fiduciary status dictates advisor business model and how advisor can be paid.

2. IRAs—DOL to apply new fiduciary standard to advice between IRA provider/ holder

3. Rollovers—Reproposed Rule Likely Will Put New Restrictions on Rollover Solicitations

DOL Guidance on Target Date Fund Selection

- DOL recently issued "Target Date Retirement Funds: Tips for ERISA Plan Fiduciaries"
- ERISA prudent process requires taking into account all relevant factors in making investment selection. New DOL "Tips" discusses TDF-specific relevant factors.
- Plan fiduciaries should read and understand the DOL guidance, and with the assistance of their advisors, incorporate these elements into their fiduciary process and/or IPS.
- Key Point: the QDIA safe harbor <u>does not</u> provide relief for an imprudently selected TDF—plans must be able to show a prudent process to defend TDF selection.

DOL Guidance—the Relevant Factors

- The DOL guidance identifies a number of factors to consider as part of a prudent TDF selection process:
  - Glide path—investing "to" or "through" the target date?
  - Investment strategy—separate from to vs. through, understanding the principal strategies and risks of the fund and its underlying assets
  - Fees and expenses
  - Past performance
  - participant demographics—ages, likely retirement dates, availability of a DB plan, etc.
  - Availability of custom or non-proprietary TDFs
- The "Tips" also suggest plan fiduciaries consider their participant education efforts, compliance with disclosure rules and "commercially available" sources of information about the funds.

408b(2) Part Two—Summary Disclosure

408(b)(2) Has Taken Effect, But DOL's Not Done Yet:

- 408(b)(2) Summary Disclosure—proposal scheduled to be published in May (date will slip).
  - ✓ Current 408(b)(2) regulation deferred the issue—information can be provided in multiple documents.
  - ✓ Proposal would require a guide or summary of the 408(b)(2) information disclosed.
  - ✓ Intent is to help less sophisticated plan fiduciaries and prevent obfuscation.
  - ✓ How burdensome? Depends on what DOL requires.
- 408(b)(2) Guidance—DOL is collecting data from its enforcement efforts and questions from plans/advisors to produce guidance (likely Q&A's). Timing uncertain.

Lifetime Income, Abandoned Plans, New Secretary of Labor Nominee

- Lifetime Income—DOL pre-proposal at White House for review. Will address how a participant benefit statement displays the current account balance as a future stream of income:
  - Will it be mandatory or an elective safe harbor?
  - What methodology?
  - Expected to be published in April
- Abandoned Plans—DOL proposal to allow bankruptcy trustees to be QTAs, limits fees. Comment period closed.
- Secretary of Labor Nominee—AAG Thomas Perez nominated. Controversial due to DOJ job. While no ERISA background, fiduciary rule likely will come up in his nomination process. Nomination could affect timing of proposed rule's publication.

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