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webinar

# Hot Topics in Employee Benefits – What We're Seeing


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# Agenda

- Health and Welfare
- Multiemployer Plans
- Fiduciary Considerations
- Plan Sponsor Issues
- Executive Compensation
- Employee Stock Ownership Plans
- Fringe Benefits

# Health and Welfare

Andy Anderson

# Reporting

# Reporting

- Objective:
  - Help participants prove 2015 compliance with individual mandate
    - *Form 1095-B + transmittal form 1094-B = Code section 6055*
  - Show employer avoids 2015 Shared Responsibility excise tax
    - *Form 1095-C + transmittal form 1094-C = Code section 6056*
      - Additional objective: Exchange subsidy determinations
  - Self-insured employers combine both objectives on Form 1095-C—generally!

# Reporting

- Sources:
  – Final regulations issued March 2014
  – Forms, instructions, Q&As available—but significant questions still remain—software filing guide to come
    - *See:*
      – http://www.irs.gov/uac/Questions-and-Answers-on-Information-Reporting-by-Health-Coverage-Providers-Section-6055
      – http://www.irs.gov/uac/Questions-and-Answers-on-Reporting-of-Offers-of-Health-Insurance-Coverage-by-Employers-Section-6056
  – Borrows some, but not all, Form W-2 processes

# Reporting

- General rules:
  - First applies to 2015; first reported 1.31.2016
    - *Voluntary for 2014; Forms for 2014*
  - Applies to insurers, plan sponsors for group health plans
    - *Sponsors are the employer (single ER plan); each employer (MEWA); trustees (multiemployer plan)*
    - *Applies separately to each controlled group member (in order to individually determine Shared Responsibility compliance)*
  - Requires name, address, TIN of responsible individual AND covered dependents
  - Requires coverage by month



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# Reporting

- Filed on calendar year basis—even for non-calendar year plans (special rule for months in 2015 before non-calendar year employers are subject to Shared Responsibility)
- Filed electronically with IRS if file 250+ returns
- Transmittal forms for both
  - *Contains additional information*
- Penalties for noncompliance—good faith for 2015

# Reporting

- Individual mandate
  - Conveys receipt of minimum essential coverage
  - Uses Form 1095-B for insured coverage; certain other self-insured coverage that is not subject to the employer mandate (retired employees + COBRA in year 2 and beyond, etc.)

# Reporting

- Uses Form 1095-C for self-insured coverage that is subject to the employer mandate
  - *Confusing; IRS thinks this is more efficient—but Form 1095-C is merely a mash-up and in no way streamlined*
- In addition to general requirements, adds MEC by month for enrollees
  - *No reporting if not covered for any month in year*

# Reporting

- Employer mandate
  - MUCH more complicated—and not just due to combined individual mandate and employer mandate data elements for self-insured employers
  - Only applies to employers subject to Shared Responsibility rules
    - *2015 partial reprieve if under 100*
  - Only applies to ACA FT employees
  - Completed separately for each controlled group member
    - *Special third-party rules*
    - *Only one form per employee*

# Reporting

- Special multiemployer plan rules
- Additional data includes:
  - *Contact person*
  - *Offer of coverage by month*
  - *Lowest-cost premium for self-only coverage*
  - *ACA FT employee totals by month*

# Reporting

- *Waiting periods*
- *Controlled group data*
- *Multiemployer data*
- *Codes reflecting:*
  - Scope of offer (employee/dependents/spouse)
  - Reasons coverage not offered
  - Offers to individuals who are not ACA FT employees
  - Affordability

– Transmittal Form 1094-C requires additional data

– Alternate methods/simplified reporting

- *Generally useless for many employers*

# Reporting

- Practical observations
  - Determine if you or an insurer bears the burden of the individual mandate—or if the burden is shared
  - Determine which vendor can help (payroll/HRIS/TPA/combination or new vendor) with the employer mandate
  - Start saving data or ensuring that it can be accessed later in 2015
  - Don’t bank on a further delay

# Contingent Workers

# Contingent Workers

- Variations
  - “Kelly Girl” temporary staffing
  - Leasing Organization (co-employment)
  - Payrolling Organization (co-employment)
  - Independent Contractor
- Are they common-law employees?
  - Who has the right to control both the result of the work and the means to accomplish the result?
  - Old question; new consequences

# Contingent Workers

- Employee benefit rules never really bought into co-employment
- Shared Responsibility rules focus on common-law employment status
- Common-law employer shoulders the Shared Responsibility burden
  - Cannot (usually) take advantage of an offer of health coverage from an unrelated employer
  - But, contract terms CAN allow common-law employer to take advantage of leasing organization's offer of health coverage



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# Contingent Workers

- Final Shared Responsibility regulations to the rescue!
- If ACA-compliant health plan offered to employee by leasing organization, this is treated as an offer by common-law employer ***only*** if
  - Fee paid to leasing organization "is higher" than fee paid for same employee if employee did not enroll in health coverage (Final Reg. Section 54.4980H-4(b)(2))
  - Unclear if paying less for employees who reject coverage is also permissible

# Contingent Workers

- Also want to ensure that contract terms
  - Require leasing organization to comply with ACA and offer health coverage that is good enough and affordable to ACA full-time employees; and
  - Indemnify common-law employer if leasing organization's failure to satisfy ACA causes Shared Responsibility exposure for common-law employer

# Contingent Workers

1. Who are your contingent workers?
2. Are they ACA full-time employees?
3. Do they get ACA-compliant health benefits?
4. Do contract terms address questions 2 and 3 and contain appropriate compliance with law and indemnification terms?
5. Do contract terms include ACA final regulation concepts associated with “taking credit” for the leasing entity’s offer of coverage?
6. Will you do business with noncompliant vendors?

# Contingent Workers

- Time frame
  - Ideally know 1-3 ASAP
  - 1-6 nailed down by 2016
    - *Some leeway in 2015 due to 70% “fail to offer” transition rule*
      - Must still recognize the risk of “inadequate coverage” penalties for individuals who fall within the 30% transition rule



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# Multiemployer Plans

Althea Day

# Multiemployer Plans

- Multiemployer Health Plans:
  - Two areas to discuss
    - *ACA employer-shared responsibility rule applied in context of multiemployer health plans*
    - *IRS ACA Reporting Requirements and multiemployer health plans*

# ACA Employer-Shared Responsibility Requirements Applied in Context of Multiemployer Health Plans

- In February, Treasury and IRS issued the final rule on the ACA shared responsibility requirements
  - The final rule is generally applicable as of January 1, 2015
  - Includes a transition rule that applies with regard to multiemployer plans unless and until further guidance is issued
- Transition rule addresses how coverage of some employees under a multiemployer plan impacts an employer's compliance with the shared responsibility requirements

# Liability for the Employer-Shared Responsibility Penalty

- In the multiemployer plan context, the contributing employers will be liable for the employer-shared responsibility penalty
  - The multiemployer plan will not be subject to the employer-shared responsibility penalty

# Contributing Employer Safe Harbor

- Under the transition rule, contributing employers will not be liable for the employer-shared responsibility penalty with regard to their employees <u>for whom the employer has an obligation to contribute</u> to the multiemployer plan, provided:
  - The multiemployer plan *offers* coverage to individuals who satisfy the plan's eligibility conditions, and their *dependents*
  - The multiemployer plan coverage is *affordable* and provides *minimum value*

# Offer of Coverage

- Coverage under a multiemployer plan is considered an "offer of coverage" on behalf of the contributing employer
  - Contributing employers may meet their obligation to offer minimum essential coverage through multiemployer plan coverage, and thereby avoid the *no coverage penalty* with regard to the employees for whom they contribute
- No "opt out" is required as long as the multiemployer plan is of minimum value and is offered to an employee at no cost or at a cost, for any calendar month, that is no more than 9.5% of a monthly amount determined as the federal poverty line for a single individual



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# Dependents

- Dependents to whom coverage must be offered include the employee’s biological children and adopted children (through the calendar month in which the child turns 26)
  – spouses, grandchildren, qualifying relatives, foster children, or stepchildren are not dependents for the coverage requirements
- Through 2015, as long as certain conditions are met, there is transition relief for multiemployer plans that have not offered dependent coverage in 2013 and 2014

# Affordability

- To determine affordability of multiemployer plan coverage, contributing employers may rely on these safe harbors:
  - Generally applicable safe harbors (the W-2 wages, the rate of pay, or the federal poverty line)
  - The full-time employee’s required contribution (if any) for self-only coverage under the plan does not exceed 9.5% of the wages reported to the multiemployer plan (may be based on actual wages or an hourly wage rate set forth in the governing collective bargaining or participation agreement)
  - Coverage that does not require an employee contribution is affordable
- Contributing employers may have to make this determination on a per-employee basis

# Minimum Value

- To meet the minimum value standard, the plan must cover at least 60% of the total allowed costs of benefits under the health plan
  - Contributing employers will not have the ability to determine the minimum value of multiemployer plans
  - Contributing employers should ask the multiemployer plan to confirm that the minimum value requirement is met
- As long as coverage is affordable and of minimum value, the contributing employer will not be subject to the inadequate coverage penalty

# ACA Reporting Requirements as Applied to Multiemployer Health Plans

- The ACA imposes certain IRS reporting requirements with respect to group health plan coverage
  - Reporting requirements are effective for the 2015 calendar year
  - First IRS reporting is due in early 2016
  - Failure to comply with the reporting requirements will result in IRS penalties
    - *With respect to coverage under multiemployer plans, the penalties would apply to the employer, not to the multiemployer plans*

# ACA Reporting

- Two separate reporting requirements
  - IRC Section 6055 requires sponsors of self-insured plans that provide minimum essential coverage during a calendar year to report information about each individual covered by the plan for the prior calendar year regardless of full-time status
    - *Report on Form 1095-B (and a 1094-B Transmittal)*
      - Goes to the covered employee and to the IRS

# ACA Reporting

- Section 6056 requires large employers (of 50 or more full-time employees) to report information about the coverage offered to full-time employees
  - *Report on Form 1095-C (and a 1094-C Transmittal)*
    - Report goes to all full-time employees (regardless of whether they were offered minimum essential coverage) and to the IRS
  - *Multiemployer plans may (but are not required to) file returns for contributing large employers*
  - *The contributing large employers always retain the liability for accurate and compliant reporting*

# ACA Reporting

- *However, there must be only one master Form 1095-C submitted to the IRS with respect to each large employer*
  - This means contributing employers need to get information from the multiemployer plan for the Form 1095-C regardless of whether the multiemployer plan issues returns to covered full-time employees

# Fiduciary Considerations

Julie Stapel

# Looking Into the Future of Company Stock Litigation: *Tatum v. RJR Pension Investment Committee*

- Reverse stock drop case—fiduciaries decided to sell stock over the course of six months and stock price subsequently *increased*
- Not truly company stock—involved stock received in corporate spin-off, so was no longer employer stock
- Held that fiduciaries breached their fiduciary duty by selling stock when (1) the stock fund was required by Plan terms, (2) there was no evidence that the fiduciary committee concluded the stock fund was not prudent, and (3) the fiduciaries reached the six-month timeline with due consideration for alternatives
- Fourth Circuit said that fiduciaries are liable unless they prove that a hypothetical prudent fiduciary *would have* made the same decision—shifting burden to defendants

# Looking Into the Future of Company Stock Litigation: *Tatum v. RJR Pension Investment Committee*

Key Takeaways from *Tatum*

- Make sure that investment decisions are robustly discussed, deliberated, given appropriate time and consideration, and supported by evidence or materials considered.
- Seek outside financial and legal expertise on complex issues, and document the advice and information provided and how it figured into the fiduciary's decision.
- Continue to monitor decisions once they are already made and don't be afraid to reconsider if circumstances change.
- The good news: "So long as a fiduciary undertakes a reasoned decision-making process, it need never fear monetary liability for an investment decision it determines to be in the beneficiaries' best interest."

# Looking Into the Future of Company Stock Litigation: *Harris v. Amgen*

- First post-*Dudenhoeffer* stock drop case.
- Plaintiffs alleged that the Amgen fiduciaries breached their duties by continuing to allow investment in Amgen company stock funds when they knew or should have known the stock price was artificially inflated due to undisclosed issues regarding the safety of various Amgen drugs.
- Ninth Circuit held that the plaintiffs alleged that the fiduciaries were imprudent sufficiently to survive a motion to dismiss.
- No surprise that the Ninth Circuit did not apply the presumption of prudence, but the court did not seem to give much credence to the Supreme Court's cautions and caveats about the basis for claims in stock drop cases.
- Also held that SPD is a fiduciary document (and thus potential fiduciary liability for information in securities law filings incorporated by reference) and that Amgen was a fiduciary based on plan terms.

# Looking Into the Future of Company Stock Litigation: *Harris v. Amgen*

Key Takeaways from *Harris*

- Establish a process for monitoring company stock funds.
- Consider the role of an independent fiduciary.
- Consider reevaluating practices regarding incorporating securities filings by reference into SPDs.
  - Separate documents may be preferable.
- Review plan terms, resolutions, charters, etc. to confirm that the appropriate parties are identified as fiduciaries and that desired delegations are definitive and unambiguous.
  - If the objective of a governance structure is to help shield the plan sponsor from fiduciary liability, make sure the documents do that (and are consistent with one another).

# Plan Sponsor Issues

Mark Simons



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# Qualified Plans – Distributions

- The IRS has clarified in its Notices 2014-54 and 2014-74 that simultaneous distributions from a qualified plan in which both pre-tax and after-tax monies are held can be directed to different destinations.
- Specifically, after having applied the proration factor required by Code Section 72(e)(8), the pre-tax money (including earnings on after-tax contributions) can be sheltered in another qualified plan or a traditional IRA, while the after-tax money can be retained or deposited into a Roth IRA.

# Qualified Plans – Distributions

- Note that the proration factor required by Code Section 72(e)(8) can be separately applied to after-tax contributions that are separately accounted for, pursuant to Code Section 72(d) and IRS Notice 87-13.

# Qualified Plans – Year-End Amendments

- Calendar year plans should adopt an amendment reflecting the U.S. Supreme Court's decision in *U.S. v. Windsor* as necessary by December 31, 2014, and may want to amend for its *Heimeshoff* decision regarding plan statutes of limitation.
- With respect to *Windsor*, the IRS has noted that an amendment may not be needed if a plan does not explicitly define "spouse" to exclude same-sex spouses.
- Sponsors may want to amend their plans nonetheless in the interests of clarity for administrative purposes.



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# Qualified Plans – TDFs

- On October 24, 2014, the IRS ruled that a target date fund (TDF) investment option under which older participants acquire deferred annuities when the target date is reached would not be discriminatory under the “benefits/rights/features” rule of 1.401(a)(4)-4.
- The ruling eliminates any concern that limiting the deferred annuity option to a restricted (and possibly higher paid) class would violate BRF rules, as long as the TDF is part of a single integrated investment program that does not involve privately held company stock.

# Executive Compensation

David Zelikoff





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# ISS Proxy Voting Guidelines

- On November 6, ISS published its policy voting guideline updates for the 2015 Proxy season
  - The updates are effective for annual meetings that occur on or after February 1, 2015
- Included in the update is a change in how ISS will make recommendations with respect to proxy proposals relating to equity compensation plans
  - The Equity Plan Scorecard (EPSC)

# Equity Plan Scorecard

- Under EPSC, ISS will consider the following factors:
  - Plan Cost
  - Plan Features
  - Grant Practices

# Equity Plan Scorecard – ISS Voting Recommendations

- ISS will vote against the equity plan proposal if, after taking into account the above factors, it determines that the plan is not in the shareholders' interests.
- ISS will also vote against a proposal if it includes a plan feature that ISS views as having a significant negative impact on shareholder interests.

# Equity Plan Scorecard – Actions

- If seeking shareholder approval of an equity compensation plan next year, consider whether a favorable recommendation from ISS is an important factor.
- If it is, the terms of the plan should be reviewed to see if it contains any provisions that could potentially result in a negative vote recommendation from ISS.
  - Consider changes to the plan document
- Consider engaging ISS Corporate Solutions to review the proposed equity compensation plan.

# Employee Stock Ownership Plans

Brian Hector

# Impact of Sierra Aluminum Settlement

- The Department of Labor (DOL) and GreatBanc Trust Company reached a settlement in June of this year stemming from a lawsuit brought by the DOL against GreatBanc, alleging that GreatBanc inappropriately relied upon financial projections provided by the ESOP sponsor.
- The settlement arguably applies only to GreatBanc. However, Phyllis Borzi, the assistant secretary of the Employee Benefits Security Administration, suggested a far-reaching application of the settlement when she stated “[o]thers in the industry would do well to take notice of the protections put in place by this agreement.” Thus, the settlement agreement is now considered somewhat of a protocol, or “roadmap,” for ESOP fiduciaries to follow during an ESOP transaction.

# Impact of Sierra Aluminum Settlement

- One of the main points of the settlement agreement centers around the selection and oversight of valuation advisors.
- The trustee must evaluate the independence of the financial advisor by determining whether any conflicts of interest exist. The trustee must obtain written confirmation from the financial advisor that no such conflicts of interest exist and document its advisor selection process in detail.
- During the settlement negotiations, the DOL expressed its disdain over broad disclaimers in valuation firms' engagement agreements that allow the valuation advisor to blindly rely on information it receives from the ESOP sponsor without inquiring as to its reasonableness. The agreement now requires that diligence steps be well documented.
- Although ERISA does not explicitly require that a trustee document every conversation, meeting, or event during an ESOP transaction, properly documenting the transaction may avoid lengthy litigation down the road.

# Impact of Sierra Aluminum Settlement

- The ESOP sponsor must provide the trustee audited unqualified financial statements prepared by a CPA for the preceding five years (or as far back as possible).
- If the financial statements are unaudited or qualified, the trustee must document the bases for its belief that it is prudent to rely on the financial statements and explain how it accounted for the risk of relying on unaudited or qualified financial statements.

# Impact of Sierra Aluminum Settlement

- The trustee must determine the prudence of relying on financial statements provided to the financial advisor, assess the reasonableness of the projections, and document that the information supplied was current, accurate, and complete.
- In addition, the trustee must document in writing its analysis of the valuation report, including the trustee's conclusions for enumerated topics and the bases for those conclusions.

# Impact of Sierra Aluminum Settlement

- The agreement also recognizes the trustee's long-standing right to retain qualified experts to assist the trustee in the exercise of its powers and duties.
- However, the DOL points out that this retention of experts is not a complete defense to establishing a prudent process. The trustee must assess the expert's qualifications and <u>document</u> the process.

# Fringe Benefits

Steven Johnson

# Company Cafeterias & Employer-Provided Meals

## Issues on Audit

- Whether employer-provided meals are furnished “for the convenience of the employer” under section 119;
- Whether eating facility revenues at least equal “direct operating costs” of operating the facility, in compliance with section 132(e)(2); and
- If employer-provided meals do not qualify under section 119 or 132(e)(2), whether the 50% deduction disallowance applies under section 274(n).

# Company Cafeterias & Employer-Provided Meals

- The value of meals an employer provides to employees is includable in employee gross income unless an exclusion applies.
- There are two exclusions from gross income under the Internal Revenue Code:
  - Section 119's convenience of the employer exclusion
  - Section 132(e)(2)'s eating facilities *de minimis* fringe exclusion
- When excludable from employee gross income under either exclusion, employer-provided meals are also:
  - Excludable from employment taxes
  - Fully deductible, as the 50% disallowance for meals under section 274(n) does not apply.

# Company Cafeterias & Employer-Provided Meals

<u>Section 119 Convenience of the Employer Exclusion</u>

- The Regulations interpret "convenience of the employer" to mean a "substantial noncompensatory business reason of the employer." Examples in the Regulations include:
  - Employees available for emergency calls during the meal period
  - Employees restricted to a short meal period, e.g., peak work load during normal meal period
  - Insufficient eating facilities in the vicinity of the employer's premises
  - Food service employees
- This is a facts and circumstances test.

# Company Cafeterias & Employer-Provided Meals

## Section 119 Convenience of the Employer Exclusion

- "Substantial compensatory business reasons" for furnishing meals:
  - Promoting employee morale or goodwill
  - Attracting prospective employees
  - As a means to provide additional compensation to employees
- Whether a charge is made for the meals, and whether employees can accept or decline the meals, are both irrelevant factors.
- As long as there is at least one "substantial noncompensatory business reason," even in the presence of "substantial compensatory business reasons," the section 119 exclusion applies.

# Company Cafeterias & Employer-Provided Meals

## Section 119 Convenience of the Employer Exclusion

- If more than half of the employees who receive meals qualify for exclusion, then all meals the employee furnishes are deemed for the convenience of the employer and are excludable.
- Depending on relative sizes of offices, all employer-provided meals across all offices may be excludable when meals provided at corporate headquarters qualify for exclusion.

# Company Cafeterias & Employer-Provided Meals

## Section 119 Convenience of the Employer Exclusion

- The IRS has stated that it "will not attempt to substitute its judgment for the business decisions of an employer."
- Yet this issue of employer-provided meals is routinely being raised on audit.

# Company Cafeterias & Employer-Provided Meals

<u>Section 132(e)(2) Eating Facility *de minimis* Fringe Exclusion</u>

- The value of employer-provided meals is excludable from employee gross income under section 132(e)(2) when the meals are:
  - Served in a facility on or near the business premises, and
  - Revenue derived (or deemed to be derived) from the facility equals or exceeds the direct operating costs of the facility.
- The direct operating costs test may be applied separately for each cafeteria or collectively across all company cafeterias.

# Company Cafeterias & Employer-Provided Meals

Section 132(e)(2) Eating Facility *de minimis* Fringe Exclusion

- The Regulations define direct operating costs of an eating facility to include only:
  - The cost of food and beverages; and
  - The cost of labor for personnel who perform services primarily on the premises of the eating facility
- Depending on whether employer-provided meals are prepared on-site or catered from off-site, direct operating costs can run between 2/3 and 1/2 of the total cost of providing meals.

# Company Cafeterias & Employer-Provided Meals

Section 132(e)(2) Eating Facility *de minimis* Fringe Exclusion

- Meals that qualify for exclusion under section 119 likewise qualify for exclusion under section 132(e)(2) because the direct operating costs of section 119 qualifying meals are treated as revenues of the eating facility.
- Meals that do not qualify for exclusion under section 119 or 132(e)(2) are taxed at 150% of the direct operating costs associated with those meals.

# Company Cafeterias & Employer-Provided Meals

## Future Guidance

- On August 26, 2014, the IRS released the "Department of the Treasury 2014-2015 Priority Guidance Plan," noting that there are now 317 projects that the IRS intends to work on actively over the next year.
- Item 3 in the Executive Compensation, Health Care and Other Benefits, and Employment Taxes section provides: "Guidance under §§ 119 and 132 regarding employer-provided meals."

# Questions?

**Register for the next webinar in this series:**

March 25, 2015

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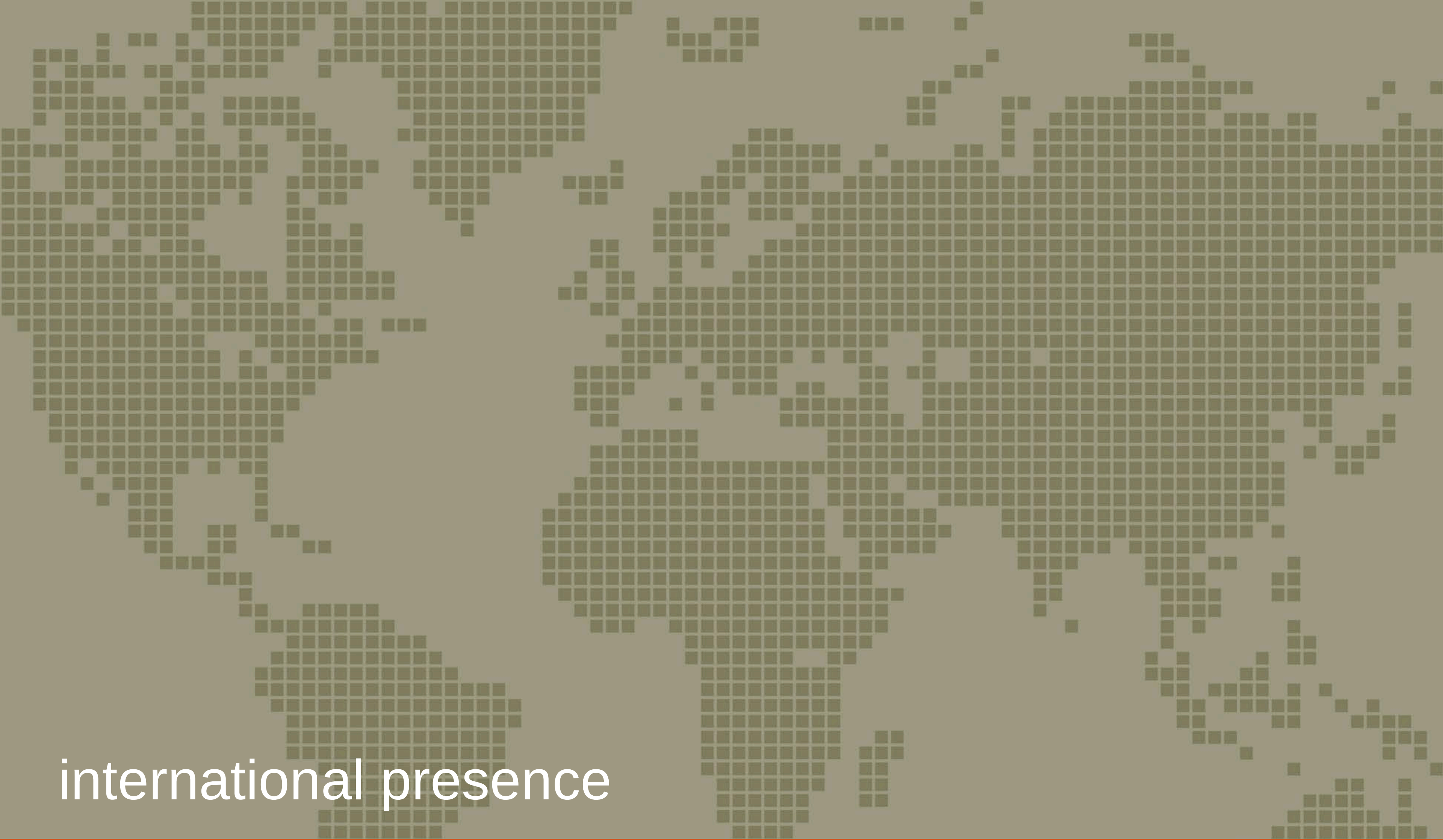

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