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WEB's ***Benefits Insider*** is a member exclusive publication providing the latest developments from the Nation's Capital on matters of interest to benefits professionals. The content of this newsletter is being provided as a result of a partnership with the American Benefits Council, a premier benefits advocacy organization, which provides its core content, and is edited by Corinne M. Tyler, Employee Benefits Partner in the Cleveland Office of Baker & Hostetler LLP; ctyler@bakerlaw.com.

Articles in this Edition

RECENT LEGISLATIVE ACTIVITY

Legislative Wrap-Up

A flurry of legislative activity occurred at the end of 2007. This Section provides an overview of some of the more important benefits related activity.

The House of Representatives and Senate concluded their business for the year with a flurry of legislative activity. Additional materials are now available with regard to those congressional actions:

- The Senate passed the Pension Protection Technical Corrections Act (S. 1974). The approved text contains some modifications from the measure originally introduced (and which was replicated in the House bill, H.R. 3361). The House, however, ultimately declined to take up the Senate bill. In the next congressional session, the House will need to pass S. 1974 or a similar bill, which could then be approved by the Senate and forwarded to the President for his signature. Sources have indicated that the Senate will not support the use of Pension Protection Act (PPA) technical correction legislation as a vehicle for other controversial pension measures.

- While the Senate did not approve the House-passed version of the Heroes Earnings Assistance and Relief Tax (HEART) Act (H.R. 3997), a tax bill that contained various benefits-related provisions (including a revenue-raising expatriate provision and a one-year extension of existing Mental Health Parity law), it did in fact pass a modified version of the military tax bill, the Defenders of Freedom Tax Relief Act, with many of the benefits-related provisions included. (A Senate Finance Committee summary of the Senate-passed measure has been released as well.) However, the bills are still dissimilar enough that further negotiations between the House and Senate will be necessary before the bill can be sent to the President.

- The House also approved a measure providing Alternative Minimum Tax (AMT) relief for one year, without any of the revenue-raising provisions that had included the taxation of deferred compensation paid by certain offshore entities. Senate Republicans had insisted on a bill without such offsets, and the House agreed to the stripped-down bill after contentious debate.

- On December 14, the Senate passed the Farm, Nutrition, and Bioenergy Act (H.R. 2419), which included a revenue-raising provision to allow governmental section 457(b) plans to include a qualified Roth contribution program. Under such a program, plan participants are permitted to designate elective deferrals that could be otherwise deferred under the plan as Roth contributions subject to the present-law rules. A designated distribution of such contributions (and the income on those contributions) is excluded from gross income if the distribution is a qualified distribution. The proposal is effective for taxable years after December 31, 2007.

In related news, Senate Finance Committee staff appear to have shelved temporarily their proposal to impose a "cap" on nonqualified deferred compensation beyond what is required under Internal Revenue Code Section 409A. Legislators had been considering a dollar cap on the annual accrual of nonqualified deferred compensation equal to the lesser of $1 million or the individual's average annual compensation determined over five years. Failure to satisfy the cap would trigger ordinary income tax plus the 20-percent additional tax under section 409A. The proposal also would have amended Internal Revenue Code Section 162(m) (the "million dollar deduction" limit) to treat any former employees (and their beneficiaries) as continuing to be covered by the section 162(m) limits in the future (e.g., after termination of employment).

Senate Approves Scaled-Down Medicare Legislation

On December 18, the Senate approved Medicare reform legislation without including a number of troublesome provisions for employer-sponsored health plans. The House of Representatives had reportedly come to an agreement with the Senate on the measure and is expected to follow suit. Opposition to various provisions included:

- *Extension of Medicare Secondary Payer for End Stage Renal Disease (ESRD):* It has been urged that the 12-month ESRD payment extension not be included in any end-of-year Medicare legislation. The provision is estimated to save Medicare $1.2 billion over a ten year period, but would likely cost employer-sponsored health plans considerably more than the amount Medicare would save because commercial payment rates for this service are often two to three times higher than the rate Medicare sets for itself for payment for ESRD treatment.

- *Cuts to Medicare Advantage (MA):* It is important to maintain funding for Medicare Advantage plans so that health plan options available to retirees and employers are not restricted. Some MA options such as private fee-for-service (PFFS) plans constitute critical coverage used by employers and unions to meet the needs of retirees who reside in different states.

- *Comparative Effectiveness Research:* While many employer organizations support the concept of comparative effectiveness research, there is strong objection to a new tax on premiums to finance this effort. To add a new tax on health insurance premiums, whether they are self-insured products or fully insured products, undercuts efforts to control costs and maintain or expand coverage.

- *Requiring All MA Plans to Meet Equal Standards:* Currently, employers have the ability to work with managed care organizations to design a Medicare Advantage option that is specifically-tailored for their retirees by obtaining a waiver from CMS. Restrictions will effectively eliminate the ability of nationwide employer plans to design a plan that would offer the same services regardless of where their retirees are located.

A coalition of employer groups sent a letter to members of the House of Representatives and Senate on December 12 to express concerns about these provisions. While the bill approved by the Senate does not contain these provisions, the legislation does include new reporting provisions requiring fully-insured and self-insured group health plans to submit enrollment information to the U.S. Secretary of Health and Human Services to identify plan participants for whom Medicare is the secondary payor.

If the House approves the bill as expected, President Bush is expected to sign the bill when it is sent to his desk.

Harkin, Kohl Introduce 401(k) Fee Bill in Senate

Also in December, Senators Tom Harkin (D-IA) and Herbert Kohl (D-WI) introduced the Defined Contribution Plan Fee Disclosure Act, the first Senate bill to address the disclosure of 401(k) plan fees. Similar to the Fair Disclosure for Retirement Security Act (H.R. 3185) (sponsored in the House of Representatives by George Miller (D-CA)), the Harkin-Kohl bill amends ERISA to expand disclosure of fees by employer sponsors and service providers.

The bill makes a number of modifications in an attempt to address a number of the concerns that had been raised with respect to H.R. 3185. Key elements of the bill include:

- Categories of fees to be disclosed are limited to (1) charges for investment management, (2) charges for recordkeeping and administration, (3) sale charges, including commissions, and charges for advisory services, and (4) other charges.

- It appears that the bill will allow charges to be provided in the form of a formula, such as a percent of assets or a dollar charge. However, a sentence following this language (which appears several places in the bill) requires "consistency throughout the disclosure." Depending on how this consistency requirement is interpreted, the latter sentence could take away the flexibility seemingly offered in the preceding language. The question is whether the disclosure has to provide every charge in a dollar figure if some charges are made in dollar figures or the disclosure must simply be consistent with respect to the same type of charge (for example, all investment management fees as expense ratios).

- The disclosure between service providers and plan fiduciaries is available upon the request of participants (instead of also posted on an intranet site). The service provider disclosure to plan fiduciaries is only required if the total cost for services under the contract equals or exceeds the greater of $5,000 or 0.01 percent of the value of plan assets as of the last day of the preceding plan year. The bill does not require the disclosure of "revenue sharing" payments between affiliates.

- The bill directs the U.S. Department of Labor (DOL) to allow any disclosures to be provided using electronic medium under rules similar to those applicable under the Internal Revenue Code (Code) (sometimes referred to as "the IRS's rules"). DOL is also directed to come up with model notices.

- Information to be included in the quarterly benefit statements is to include information on the historical return and risk of each investment option and the estimated amount that the participant needs to save each month to retire at age 65.

- Unlike the Miller bill, the bill does not apply any mandates with respect to investment options.

The Harkin-Kohl bill would not be effective until 2010, and requires final regulations to be issued a year earlier.

In mid December, the U.S. Government Accountability Office (GAO) released a report, PRIVATE PENSIONS: Low Defined Contribution Plan Savings May Pose Challenges to Retirement Security, Especially for Many Low-Income Workers, which examines the expected retirement savings from defined contribution arrangements such as 401(k) plans. The report, commissioned by House of Representatives Education and Labor Committee Chairman George Miller (D-CA), is based on data from the Federal Reserve Board's 2004 Survey of Consumer Finances (as well as academic studies and expert interviews) and used a computer simulation model to project plan balances at retirement.

In an Education and Labor Committee news release, Miller states that the report "paints a bleak picture of U.S. retirement security for current and future workers," citing the report's finding that 37 percent of workers born in 1990 will reach retirement age with no savings in a 401(k)-style account. He also notes that the problem is particularly acute among low-income workers (who will reportedly save only enough to replace an average of 10 percent of their pre-retirement annual income) and laments the fact that 401(k) plans "are fast replacing traditional pension plans."

The report does state that recent regulatory and legislative changes and proposals could have positive effects on defined contribution coverage, including automatic enrollment and escalation features (which were not as common in the 2004 data used for the study as they are today) as well as the possibility of expanded individual retirement accounts.

According to media reports, Miller used the news conference to unveil the study as an opportunity to promote the H.R. 3185. Miller expressed his desire to bring the measure to the House floor for a vote early in 2008.

House Committee Probes Executive Compensation Consultants

In early December, the House of Representatives Oversight and Government Reform Committee held a hearing on executive pay and compensation consultants. Congress continues to be concerned about disparity in pay and Committee Chairman Henry Waxman (D-CA), in his opening statement for the hearing, explained that "reports of astronomical payouts to corporate CEOs have led many to question the fairness and effectiveness of the system for setting executive pay" and speculated that the use of executive compensation consultants with conflicts of interest "may be fueling this dysfunctional pay system."

The committee heard from a large panel featuring numerous compensation consultants and academic experts, as well as representatives from state government and organized labor. Individual testimony and video of the hearing are available on the hearing page.

In conjunction with the hearing, the committee majority staff issued a report, Executive Pay: Conflicts Of Interest Among Compensation Consultants, based on informational requests to six executive compensation consulting firms. The report finds a connection between the level of services performed by consulting firms and the level of CEO pay.

RECENT REGULATORY ACTIVITY

Treasury and IRS Publish Hybrid Plan Proposed Regulations

In late December, Treasury and the IRS (collectively "Treasury") published proposed regulations in the Federal Register providing guidance on changes to hybrid defined benefit plans made by the PPA. The proposal does not include guidance on the "backloading" issue. We understand the Treasury will continue to review this issue and will publish separate guidance early in 2008.

Although the regulations are generally proposed to be effective for plan years beginning on or after January 1, 2009, the proposal points out the new PPA statutory requirements are generally effective for years beginning after December 31, 2007, (with some provisions effective for periods beginning on or after June 29, 2005) and that plans are permitted to rely on the proposed regulations prior to 2009. Since the proposed regulations do not otherwise provide any alternative for plans attempting to meet the new statutory requirements, this "permissive" language could be interpreted as "essentially mandatory."

Some of the key points in the proposed regulations include the following:

- **Age Discrimination.** The proposed regulations generally provide a safe harbor for age discrimination if, as of any date, a participant's accumulated benefit expressed under one of three formulas (under the terms of the plan) would not be less than any similarly situated, younger participant's accumulated benefit expressed under the same formula. The three formulas for accumulated benefits under the terms of the plan include (1) the accumulated benefit expressed as an annuity payable at normal retirement age (or current age, if later), (2) the balance of a hypothetical account, or (3) the current value of the accumulated percentage of the employee's final average compensation. The proposed regulations would permit a plan that provides the sum of benefits that are expressed in two or more different forms of benefit to satisfy the safe harbor if the plan would separately satisfy the safe harbor for each separate form of benefit.

- **Vesting.** The new three-year vesting requirement for conversions applies to the participant's entire benefit and not just the portion of the participant's benefit that is determined under a statutory hybrid formula. It also applies if the participant is entitled to the greater of two benefits even when the statutory hybrid formula is ultimately smaller than under the other formula. The proposed regulations do not address how the three-year vesting requirement applies to "floor-offset" arrangements.

- **Accumulated Benefit.** The proposed regulations distinguish between the accumulated benefit and the accrued benefit (an annuity beginning at normal retirement age that is actuarially equivalent to the participant's accumulated benefit).

- **Indexing.** The PPA provides for the disregard of certain indexing of benefits (for purposes of the age discrimination rules of section 411(b)(1)(H)) and the proposed regulations specify three indexing methodologies that can be used.

- **Conversion Protections.** The proposal provides guidance alternatives on the new statutory conversion protections (commonly referred to as no "wear-away") and seeks comments on an additional alternative.

- **Has a Conversion Occurred?** Whether a conversion has occurred is determined on a participant-by-participant basis and could include, for example, a job transfer from an operating division covered by a traditional defined benefit plan to an operating divisions covered by a cash balance plan. However, the proposal notes that in the absence of coordination between the formulas, the special conversion protections typically will be satisfied automatically. Mergers and acquisitions could also result in protection requirements.

- **Market Rate of Return.** The proposed rules generally are similar to those described in Notice 2007-6 but do not provide guidance on a number of issues related to market rate of return. It is expected that these issues will be addressed in the first part of 2008 and Treasury explicitly warns plan sponsors that they should be cautious in adopting interest crediting rates other than those explicitly permitted in the proposed regulations until further guidance is issued. The guidance does indicate that the statutory requirement that interest credits will not result in a hypothetical account balance being less than the aggregate amount of the hypothetical allocations would only be applied at the participant's annuity starting date.

- **Reasonable Guarantees or "Greater of" Returns**. The proposed regulation does not provide guidance on the statutory provision that a rate is not considered an above-market rate merely because the plan provides for a reasonable guaranteed rate of return or for a rate of return that is equal to the greater of a fixed or variable rate of return. Nevertheless, the guidance indicates Treasury has concerns that this requirement could result in effective interest crediting rates that are above market rates of return and requests comments on how to avoid that result (and suggests possibilities that appear to preclude a straight equity-based return with a minimum).

- **Pension Equity Plans (PEPs).** The proposed regulations do not include any rules relating to PEPs other than defining a participant's accumulated benefit under a PEP as the accumulated percentage of final average compensation. Treasury is continuing to evaluate comments on PEPs and lists several questions in the proposed regulations.

- **Plan Amendments.** The proposal provides guidance on what types of amendments will and will not qualify for the protected benefit relief contained in the PPA.

- **Employee Contributions.** A benefit formula under a defined benefit plan that provides for a benefit attributable to after-tax employee contributions does not have an effect similar to a lump sum-based benefit formula.

Written comments and request for public hearing must be received by March 27, 2008.

Treasury and IRS Release Proposed Funding Rules

In late December, the Treasury released proposed regulations providing guidance on the determination of plan assets and benefit liabilities for purposes of the new funding requirements for single employer plans included in the PPA. Treasury's proposed regulations would "average" plan assets instead of smoothing plan assets.

The proposal is expected to be effective for plan years beginning after December 31, 2008, but the statutory requirements are effective for plan years beginning after December 31, 2007 (and plan sponsors can rely on the proposed regulations).

DOL Proposes Guidance on Fee Disclosure Between Service Providers and Benefit Plans

The DOL has released proposed guidance addressing fee disclosure under ERISA Section 408(b)(2), which allows plans to contract for necessary services if the compensation paid for the services is reasonable. The guidance consists of two parts: proposed regulations and a proposed class exemption for plan fiduciaries when plan service providers fail to comply with their disclosure obligations, provided certain requirements are met. The guidance also refers to health and welfare plans as well as retirement plans.

The proposed regulations would require that contracts and arrangements between employee benefit plans and service providers include provisions that will ensure the disclosure of information to assist plan fiduciaries in assessing the reasonableness of compensation or fees paid by the plan, as well as the potential for conflicts of interest.

This is the second of three long-awaited defined contribution plan fee disclosure projects undertaken by DOL. The first was the final regulations and revisions to the Form 5500 Annual Return/Report, released November 15. The third project, regarding disclosure by plan sponsors to participants, is expected in early 2008.

An official DOL fact sheet is now available.

Regulatory Guidance on Roth IRAs, Stock Option Grants

Two highly anticipated regulatory items were recently published in the Federal Register at the end of 2007, which were:

- The IRS released Revenue Ruling 2008-05 regarding the loss from wash sales of stock or securities and their effect on individual retirement arrangements and Roth IRAs;
- The Securities and Exchange Commission released SEC Staff Accounting Bulletin No. 110 addressing the valuation of stock option grants for FAS 123 purposes.

There have been a few news stories with regard to the recent announcement of the publication of the Equal Employment Opportunity Commission's retiree health regulations which include:

- U.S. Ruling Backs Benefit Cut at 65 in Retiree Plans (Pear, New York Times, December 27);
- Companies can drop older retirees' health benefits (Luhby, Newsday, December 28);
- Employers let off one health-care hook (Genzer, Marketplace, December 27);
- Ruling Stirs Debate on Retiree Health Care (Maher, Zhang and Koppel, Wall Street Journal, December 28) (Requires a subscription to view).

EEOC Releases Final Regulations on Retiree Health

The Equal Employment Opportunity Commission (EEOC) has released long-awaited final regulations clarifying that the long-standing practice of coordinating employer-provided retiree health coverage with eligibility for Medicare or a state-sponsored retiree health benefit program is not age discriminatory and does not violate the Age Discrimination and Employment Act (ADEA). This practice has enjoyed strong support from the business and organized labor communities but has been challenged for several years by AARP.

In 2000, in the litigation *Erie County Retirees Association v. County of Erie*, the U.S. Third Circuit Court of Appeals disregarded legislative history and held that pre-Medicare coverage, provided to bridge the gap between retirement and Medicare eligibility, violated ADEA. The EEOC has been urged to finalize the proposed rule exempting from the ADEA the coordination of employer-sponsored retiree health benefits with Medicare. This issue has been critically important to retirees, particularly early or pre-Medicare eligible retirees who would likely face significant reductions in their early retiree health benefits if the Commission did not act.

IRS Waives Information Return Reporting Requirement for 2007 ISO Transfers

On December 19, the IRS issued Notice 2008-08, providing guidance that clarifies the return and information reporting requirements for stock transfer in connection with incentive stock options (ISOs) under the Code.

The Tax Relief and Health Care Act of 2006 amended Section 6039 of the tax code to require corporations to make an information return with the IRS, in addition to providing employees with an information statement, following a stock transfer. Notice 2008-08 indicates that the Treasury and IRS will soon issue proposed regulations addressing these information requirements, to be effective retroactively to January 1, 2007.

However, because the regulations have not yet been issued, the IRS is waiving the obligation to file an information return for 2007 ISO stock transfers (but not the requirement to furnish information to employees). The notice also conveys the agency's expectation that these proposed regulations will follow guidance issued before the legislative change (and provided again within Notice 2008-08).

IRS Issues Guidance for Determining "Qualifying Relative"

The IRS has issued Notice 2008-5, which provides guidance for determining whether an individual is a "qualifying relative" for purposes of the Internal Revenue Code Section 152 definition of "dependent." Although the notice does not specifically address employer-provided dependent coverage, the notice likely has implications for individual employers who provide dependent coverage to their employees (through a direct employer subsidy and/or pre-tax employee contributions). This is because under applicable federal tax rules, an employee is allowed to exclude the value of employer-provided coverage attributable to that employee and their spouse along with any qualifying "dependents," as defined by reference to Code Section 152.

As explained in the notice, Code Section 152(a) provides that the term "dependent" means a "qualifying child" or a "qualifying relative." Code section 152 (d)(1)(D) states, however, that an individual cannot be a "qualifying relative" of one taxpayer if he or she is the "qualifying child" of another taxpayer. The notice clarifies that an individual is not a qualifying child of "any other taxpayer" if the individual's parent (or other person with respect to whom the individual is defined as a qualifying child) is not required by Code Section 6012 to file an income tax return and either (1) does not file an income tax return, or (2) files an income tax return solely to obtain a refund of withheld income taxes. The notice includes several examples illustrating the application of the guidance.

PBGC Addresses Determination of Present Value of Maximum Guaranteed Benefit

On December 17, the Pension Benefit Guaranty Corporation (PBGC) released Technical Update 07-04, providing guidance on how to determine the present value of the agency's maximum guaranteed benefit (for the purpose of valuing lump sums) under the Code and ERISA, as provided by the PPA.

PBGC has posted a table on its Web site illustrating the present values of the PBGC maximum guarantee. The valuation methodology is detailed in the Technical Update. The values in the table for a calendar year apply to distributions with annuity starting dates in that calendar year.

Under PPA Section 103(a), there are certain restrictions on the amount of benefit that can be paid in certain prohibited payment forms, such as a lump sum. The Treasury proposed regulations on benefit restrictions for underfunded pension plans on August 28.

PBGC Finalizes Regulations on Premium Rates

On December 17, the PBGC issued final regulations on the agency's premium rates and payment of those premiums under revisions made by the Deficit Reduction Act of 2005 and the PPA. The final regulations are effective January 16, 2008.

The final regulations adjust the flat premium rate, cap the variable-rate premium in some cases and create a new ‘‘termination premium’’ that is payable in connection with certain distress and involuntary plan terminations. The final regulations address the new rate amounts, the methodology for indexing these rates for inflation, and the instances under which the termination premium applies.

IRS Extends Transition Relief for Employer Stock Diversification

On December 19, the IRS released Notice 2008-07, which extends transitional guidance and transitional relief provided under IRS Notice 2006-107 related to the employer stock diversification requirements contained in the PPA. The relief, which allows stable value funds to remain restriction free even though employer stock investments contain restrictions, is extended until final regulations go into effect. (Regulations have not yet been proposed.) According to Notice 2008-07, the regulations are expected to incorporate the transitional relief.

The earlier notice generally prohibited plans from imposing restrictions or conditions with respect to the investment of employer securities that are not imposed on the investment of other assets in the plan. Without the transitional exception, plans could not impose restrictions on the employer stock investment if the stable value fund were not similarly restricted. Plan sponsors were concerned that restricting the stable value fund could result in employees able to sell plan investments, but with no place to invest the proceeds. The earlier notice also provided a transitional exception (now extended) for investment options only available to a fixed class of participants (such as might occur in a merger of plans).

The PPA diversification provisions require that a defined contribution plan (other than certain employee stock ownership plans (ESOP)) must provide participants who have at least three years of service with the right to divest employer securities in their accounts (attributable to employer contributions) and reinvest those amounts in diversified investments (employees can immediately diversify amounts attributable to employee contributions).

PBGC Proposes Regulations on Disclosure of Termination Information Upon Request by Affected Parties

The PBGC, in accordance with Section 506 of the PPA, has issued proposed regulations governing the disclosure of plan termination information. The regulations would require that a plan administrator disclose information it has submitted to PBGC in connection with a distress termination filing, and requires that a plan administrator or plan sponsor disclose information it has submitted to PBGC in connection with a PBGC-initiated termination. The new provisions also mandate that PBGC disclose – upon the request of an affected party – the administrative record in any PBGC-initiated termination. ("Affected Party" is defined to include each participant in the plan, each beneficiary under the plan, each employee organization representing plan participants and PBGC.)

PBGC is soliciting comments on the proposed regulation, to be submitted by February 4, 2008.

IRS Issues Guidance on Corporate Bond Rate

The IRS has issued Notice 2007- 101, providing guidance as to the corporate bond weighted average interest rate and the permissible range of interest rates specified under the defined benefit plan funding requirements of the Internal Revenue Code (as amended by the Pension Funding Equity Act of 2004 and the PPA).

The notice provides guidance on the required corporate bond monthly yield curve (and the corresponding spot segment rates), the 24-month average segment rates, and the funding transitional segment rates as required under the tax code. The notice also provides guidance as to the interest rate on 30-year Treasury securities (in effect for plan years beginning before 2008) as well as the minimum present value segment rates (in effect for plan years beginning after 2007) for determining the present value of assets for cash-outs.

IRS Hears Testimony on Disability Benefits Under Qualified Plans

On December 6, the IRS held a hearing on medical and accident insurance benefits under qualified plans, based on proposed regulations on this topic issued by the IRS on August 20.

These regulations address the tax treatment of long-term care insurance, health insurance and disability insurance held by a 401(k) plan or other tax-qualified retirement plan and would affect administrators, participants and beneficiaries of qualified retirement plans.

The IRS panel heard testimony from three law firm witnesses. The three witnesses all generally agreed that long-term disability insurance should be considered a plan investment and that the proposed regulations, as written, would complicate employer efforts to provide retirement benefits to disabled employees under tax code Section 415(c)(3) (which governs compensation rules in the case of permanent or total disability). The witnesses all cited previous IRS private letter rulings as providing a reasonable approach and called upon the IRS to provide an exception in the regulations so that disabled participants are not taxed on the plan funds used to pay insurance premiums or the insurance proceeds for qualified plan purposes.

IRS officials questioned the necessity of an exception and asked about other possible mechanisms for providing benefits to disabled employees, such as broader deferrals through Section 415(c)(3), or an exception in the regulations coupled with a mandate for provision of disability insurance under the plan. The witnesses all opposed these suggestions as being administratively or financially burdensome.

IRS Issues Notice Allowing 409A Corrections

On December 3, the IRS issued Notice 2007-100, allowing the correction of certain operational failures to comply with Code Section 409A, which addresses nonqualified deferred compensation.

Notice 2007-100 provides relief for certain operational failures that are corrected in the same year. The notice also provides transition relief through 2010 for operational failures up to a certain amount that are not corrected in the same taxable year by limiting the amount of income inclusion and additional taxes. In addition, the notice describes and requests comments on a potential expanded program that would limit the income inclusion and additional taxes under Code Section 409A for certain operation failures involving larger amounts.

On October 23 the IRS issued Notice 2007-89, providing interim guidance for employers and payers under Code Section 409A for calendar year 2007. The guidance sets forth the rules for reporting and withholding, including interim rules on how to calculate the amount of taxable income under 409A.

PBGC Provides Guidance on Flat Premium Rates, Reporting Rules, Lump Sum Assumptions

On November 30, the PBGC announced the amounts of flat premium rates applicable to payment years beginning in 2008, as adjusted for inflation. The 2008 flat premium rates for PBGC's two insurance programs will be $33.00 per participant for single employer plans and $9.00 per participant for multiemployer plans.

As stated in the announcement, the adjustments are based on changes in the national average wage index as defined in section 209(k)(1) of the Social Security Act, with a two-year lag — for example, for 2008, the 2006 index is compared to the baseline (the 2004 index). The new provisions are written in such a way that the premium rate can never go down; if the change in the national average wage index is negative, the premium rate remains the same as in the preceding year.

On November 28, PBGC issued Technical Update 07-2, providing guidance on annual financial and actuarial reporting requirements under the PPA. Under this update, for purposes of the annual employer reporting and reportable events regulations, a plan's unfunded vested benefits and vested benefits amounts are determined as of the relevant year-end "testing date" using the rules for determining the variable rate premium under the law in effect before the enactment of the PPA. The guidance in this Technical Update generally applies (1) under the annual employer reporting regulation, to information years that begin before 2008 and (2) under the reportable events regulation, to event years that begin in 2008.

On December 4, PBGC issued Technical Update 07-3, providing guidance on minimum lump sum assumptions for terminating single-employer plans. Specifically, the update addresses plans that terminate as described in ERISA Section 4041 with a termination date prior to, and a final distribution date on or after, the effective date of changes in the interest rate and mortality table used in calculating minimum lump sum values under the PPA. On November 6, the IRS released applicable interest and mortality assumptions in Revenue Ruling 2007-67, effective for plan years that begin on or after January 1, 2008.

RECENT JUDICIAL ACTIVITY

District Court Rules on Remedies in Citigroup Pension Plan ERISA Litigation

On November 20, the U.S. District Court for the Southern District of New York ruled on remedies in the class-action case of Citigroup Pension Plan ERISA Litigation, in which the court had earlier found that the defendant's retirement plan violated aspects of ERISA. The case is still pending in the U.S. Second Circuit Court of Appeals.

- On the subject of minimum accrual violations, the court rejected further remedies other than those in effect as a result of the plan's compliance with ERISA, as earlier directed by the court.

- On the subject of notice violations, the court ordered that the plan retroactively reform the accrual system (as it interpreted the 133 1/3 percent rule) so that pay credits under the plan are increased and payments are made as is necessary to avoid whipsaw.
- On the subject of age discrimination violations, the court reserved its ruling, noting that "several courts have disagreed with the [District] Court's holding that cash benefit plans discriminate based on age in violation of ERISA."

At issue in the original case is whether the administrator of a cash balance plan failed to satisfy advance notice requirements under Section 204(h) of ERISA when making a purely technical amendment to the plan. If the suit is affirmed, the district court's decision would call into question the efficacy of amendments to numerous traditional defined benefit pension plans and a substantial number of cash balance and other defined benefit pension plans.

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