BENEFITS INSIDER
A Member Exclusive Publication

Volume 48, April 2009

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 Christopher M. Smith, Employee Benefits attorney and Principal of Flexible Benefits Systems, Inc., csmith@fbsi.com.

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RECENT LEGISLATIVE ACTIVITY

TARP Bonus Tax Legislation Introduced in Senate, Passed by House

On March 19, the U.S. House of Representatives approved legislation that would tax bonuses awarded to executives of companies receiving funds through the federal government's Troubled Assets Relief Program (TARP). H.R. 1586, introduced by House Ways and Means Chairman Charles Rangel (D-NY), was approved by a vote of 328-93.

H.R. 1586 would apply a 90 percent tax to "any retention payment, incentive payment, or other bonus which is in addition to any amount payable to such individual for services performed by such individual at a regular hourly, daily, weekly, monthly, or similar periodic rate." It does not include payments that are commissions, welfare or fringe benefits, or expense reimbursements. The tax would apply to any portion of the bonus that exceeds the $250,000 total adjusted gross income limitation (for married or single individuals — $125,000 if married filing separately).

The tax would apply to taxpayers who receive such payments after December 31, 2008, (and in taxable years ending after that date) who receive the payments from a TARP recipient company receiving capital infusions exceeding $5 billion in the aggregate (until the TARP recipient pays back enough to fall under $5 billion). The same rules apply to payments from members of the TARP recipient company's affiliated group or any partnership if more than 50 percent of the capital or profits interest in the partnership are owned directly or indirectly by the TARP recipient company or its affiliated group.

This tax also applies to employees of the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac"). It does not apply if the employee irrevocably waives the right to the payments or pays them back, as long as the employee does not receive any benefit from the employer in connection with the waiver or return of payment. The payment is only subject to the 90 percent tax and not the regular federal income tax.

During debate, House Republicans offered an amendment that would have directed the Treasury Department to come up with a plan to recoup 100 percent of the bonuses, but the amendment failed.

Later on March 19, Senate Finance Committee Chair Max Baucus (D-MT) and Committee Ranking Member Charles Grassley (R-IA), were joined by Committee member Olympia Snowe (R-ME), and a majority of Committee Democrats including Ron Wyden (OR), Blanche Lincoln (AR), John Kerry (MA), Charles Schumer (NY), Robert Menendez (NJ), Bill Nelson (FL), Jeff Bingaman (NM), and Maria Cantwell (WA) in introducing the Compensation Fairness Act of 2009 (S. 651).

This bill differs significantly from the House measure in that it would apply to both the employer and the employees receiving these bonuses. An excise tax of 35 percent would be imposed both on the employer and on the employee on the total amount of retention bonuses and on the balance of non-retention bonuses above $50,000. This means that the bonus in question would be subject to a total of 70 percent excise tax. Some types of equity-based compensation used in non-retention bonuses (such as some types of stock options, stock appreciation rights, and long-term restricted stock) would not be subject to this excise tax if they require a three-year vesting period. Bonuses could also not be considered salaries to avoid payment of the excise tax.

Employees, as in the House bill, would have the option of returning the bonus in order to avoid being subject to the tax. The excise tax would apply to TARP recipients including both Freddie Mac and Fannie Mae.

However, the Senate's legislation would not apply to "small banks", or larger banks that received $100 million or less in TARP or other government assistance. This $100 million threshold is substantially lower than that of $5 billion listed in the House measure. Once a bank repays these TARP loans to a point at which it owes less than $100 million, it will no longer be subject to the excise tax on bonuses going forward. The legislation would be effective for bonuses earned or paid on or after January 1, 2009, or throughout the period in which the employer owed at least $100 million in TARP funds.

The bill also imposes a $1 million cap on all nonqualified deferred compensation earned during a 12-month period. If the limit is exceeded, all nonqualified deferred compensation earned by the employee (including that in previous years) would become taxable and deferred amounts would be subject to a 20 percent penalty tax and interest payment. This $1 million limit is likely intended to be indexed for inflation (as mentioned in the bill summary, but not in the current bill draft) and interest and earnings on the invested amounts above a yet-to-be defined "market rate" would be subject to the cap. There is no mention in the legislation of allowing for the spreading benefit accruals related to this form of compensation.

Again, this provision would apply to large organizations that have received TARP funds in excess of $100 million, and would not be applicable to "small banks" or once the loaned amount falls below $100 million following repayment. The Treasury Department would be required to issue guidance under Internal Revenue Code section 409A to allow an employer to cancel or modify current deferral elections or individual employees to terminate their participation in nonqualified deferred compensation plans without penalty.

Timing for consideration of the Senate bill is still uncertain, and if it is approved the House and Senate bills would have to be reconciled before enactment. While not extended broadly to all companies, the details of these bills, particularly the Senate bill provisions on the $1 million cap are instructive with respect to how future, more broadly applicable legislation might be crafted. They raise several technical concerns that were debated when Congress considered a cap on annual nonqualified deferred compensation in 2007.

Congressional Committees Approve FY 2010 Budget Resolutions with Benefits Provisions

The Budget Committees of the House of Representatives and Senate have each approved separate Fiscal Year 2010 budget resolutions including a number of benefits provisions.

On March 26, the Senate Budget Committee recent approved the following as part of its budget resolution:

- A description of the "deficit-neutral reserve fund" to be used to finance comprehensive health care reform. President Obama provided a blueprint for generating $634 billion for the fund over ten years. The Senate Budget Resolution would leave it up to the Senate Finance Committee and the Senate HELP Committee to develop legislation to accomplish health reform, provided that it is deficit-neutral, is "fiscally sustainable" over the long term and reduces health care cost growth.

- Expansion of the existing “savers credit”. Under President Obama's blueprint, this credit would take the form of a refundable 50 percent match on the first $1,000 of retirement savings for families that earn less than $65,000.

- A requirement that employers that do not offer 401(k) plans must offer automatic enrollment in IRAs. Employees would be permitted to opt out.

The House Budget Committee also approved its budget on March 26. The House resolution includes the "deficit-neutral reserve fund" but does not include the retirement savings provisions.

Politically, much of the focus has been on use of the "budget reconciliation" process for the consideration of health care reform. Senate rules allow legislation considered under the budget reconciliation to be approved by a simple majority, rather than the 60-vote majority that is usually needed in the Senate for the consideration of other legislation. In addition, the Senate's budget reconciliation rules restrict the total amount of time for legislation to be considered under these procedures, which effectively limits the number of amendments which may be offered.

However, both Senate Budget Committee Chairman Kent Conrad (D-ND) and Senate Finance Committee Chairman Max Baucus (D-MT) oppose the use of the expedited budget reconciliation process for the consideration of health reform, arguing that it would make the consideration of far-reaching health legislation much more partisan and divisive and that their preference is to continue to try to develop health reform legislation with broad bipartisan appeal that a substantial majority of the Senate can ultimately support.

For its part, the House Budget Committee approved its budget resolution under the budget reconciliation rules, leading to the possibility that the Senate might nonetheless agree at a later stage to also include health reform legislation under the expedited budget reconciliation rules if the more inclusive, bipartisan path pursued by Baucus stalls or proves unsuccessful.

In response to the party-line approval of the House budget resolution, House Republicans unveiled an alternative budget, dubbed the "Road to Recovery" plan. The Republican plan proposes:

- Providing universal access to affordable health care through tax incentives, allowing individuals to shop for insurance across state lines and reasonable limits on malpractice damages.
- Pursuing entitlement reform by simplifying the current benefit structure in traditional Medicare to include a catastrophic cap on out-of-pocket expenses and addressing waste, fraud, and abuse in the Medicaid program.

House Subcommittee Hears Testimony on Investment Advice

The House of Representatives Education and Labor Subcommittee on Health, Employment, Labor and Pensions recently held a hearing on Retirement Security: The Importance of an Independent Investment Advisor. The hearing sought to address the differences between "conflicted" investment advice and "qualified, independent" investment advice."

The U.S. Department of Labor's (DOL's) investment advice regulations were finalized and issued on January 16 but were subject to the January 21 White House memorandum, which allowed agency heads to consider a 60-day extension of the effective date (and a reopening of the comment period) for regulations that have been published but are not yet effective. On February 2, the U.S. Department of Labor (DOL) Employee Benefits Security Administration ordered a 60-day delay to consider additional comments. The final regulations (which incorporate the class exemption) allow investment advice to be provided in two ways: (1) through the use of a computer model certified as unbiased, or (2) through an adviser compensated on a "level-fee" basis. In addition to an extended effective date, the comment period has also been reopened.

In his prepared remarks to open the hearing, Subcommittee Chairman Rob Andrews (D-NJ) criticized the Bush administration's "last hour" publication of final investment advice regulations and said that the DOL's interpretation of the investment advice provision in the Pension

Protection Act (PPA) had two weaknesses: that affiliates of a service provider would be allowed to give “conflicted advice” and that individual employees, after a rudimentary review of a computer model, may give “conflicted advice” that affects the compensation received by their affiliates or employer, respectively, without any consequences. He noted that the hearing would be the first of a series of hearings on defined contribution plan issues.

Ranking Republican Subcommittee Member John Kline (R-MN), in his opening statement, asserted that now, more than ever, there was a need for quality investment advice for plan participants. Kline stated that ERISA had stood in the way of investment advice for many years (through prohibited transaction limitations) and that the PPA provided concrete measures designed to give more participants access to advice. Witnesses at the hearing included:

- Mercer Bullard, associate professor at the University of Mississippi and founder and President of Fund Democracy, stated that he thought it was appropriate to create limited safe harbors for employers to provide “non-conflicted advice” but not “conflicted advice." In his opinion, the final regulations would squeeze out independent advisers and bring sales abuses that he asserted are common in the retail space to employer plans. Bullard thought the computer-based model should be retained but other DOL guidance repealed as overbroad.

- Melanie Nussdorf, a partner with Steptoe & Johnson LLP (speaking on behalf of the Securities Industry and Financial Markets Association), indicated that the current rules do not provide investment advice to enough participants and that computer programs cannot effectively model all products. Nussdorf added that the final rule and class exemption had provisions that were extremely protective of participants, in fact more protective than previous guidance.

- Sherrie Grabot, CEO of GuidedChoice, an independent investment advice firm, spoke in favor of repealing the final rule. Grabot cited statistics indicating that plans with investments not constrained to one provider outperformed “constrained” plans by 25 to 200 basis points.

- Andrew Oringer, a partner with White & Case, LLP, stated that there is a need to both protect and help plan participants. He indicated that Congress should not entirely prohibit “inside advice” and recommended changing the “conflicted advice rhetoric." Oringer added that he thinks the DOL regulation and exemption provides the right balance between workability and safeguards.

- Ken Baker, corporate director of human resources for Applied Extrusion Technologies, spoke about his company’s experience in hiring an independent investment adviser and making a series of changes to their plan including automatic enrollment and automatic increases. Baker indicated that no employee opted out of the one-percent automatic increase in 2009, which he views as evidence of the success of the changes.

- Charles Jeszeck, with the U.S. Government Accountability Office, testified about a 2007 study based on a Securities and Exchange Commission audit of 24 pension consultants. Jeszeck indicated that 13 of the 24 pension consultants failed to disclose conflict and that the plans advised by those consultants had a 1.2 to 1.3 percent difference in their returns during the study period (2000-2004) compared to plans advised by consultants that did disclose conflicts of interest.

Senate Finance Subcommittee Hears Testimony on Long-Term Care

The Senate Finance Committee’s Health Subcommittee held a hearing on The Role of Long-Term Care in Health Reform. The hearing was convened to look at the role that long-term care should play in the ongoing health care reform debate.

Subcommittee Chairman Jay Rockefeller (D-WV) opened the hearing by stating that it has been almost two decades since the Congress has seriously discussed reform of long-term care (The U.S. Bipartisan Commission on Comprehensive Health Care – also known as the "Pepper Commission" – released its "Call for Action" blueprint for health reform in 1990). He emphasized that there is no public or private long-term care insurance system in the U.S., that payment for long-term care is disjointed and currently available long-term care services are often very expensive. "As we embark on comprehensive health care reform, it is imperative that long-term care be a part of the solution," he said.

Witnesses at the hearing included:

- Judy Feder, senior fellow at the Center for American Progress Action Fund, asserted that people need both health care and long-term care coverage and that people across all ages are in need of long-term care. Feder presented four options for consideration and noted that a better system will require a clearer, more effective public role. Two of the options call for the need to focus on better long-term care services for low income people eligible for Medicaid. She specifically advocated extending Medicaid support for home and community-based care and improving service delivery for Medicare-Medicaid "Dual Eligibles" Adding a long-term care benefit to Medicare and establishing a voluntary public long-term care insurance program were options she highlighted.

- Raymond C. Scheppach, executive director of the National Governors Association, focused on the impact of this growing problem on the states and remarked that there are three fundamental aspects of long-term care reform: coverage and financing, coordination of care and quality. Scheppach said that the main problem is that Medicaid has become the "nation's de facto" long-term care provider and that states will not be able to sustain the economic burden for much longer. He also noted that better integration is also needed between Medicare and Medicaid.

- Dennis G. Smith, senior research fellow in health care reform at The Heritage Foundation, also highlighted the fact that the Medicaid program needs to be reorganized, pointing out that long-term care costs account for approximately 51 percent of Medicaid. He stated that the system should be transformed "from an institution-based, provider-driven model to a person-centered, consumer-directed model".

- Joshua M. Weiner, senior fellow at RTI International, also began his remarks by saying that long-term care should be a component of health care reform. The organization of the system, financing and integration of care need to be improved and there needs to be a shift towards service delivery through community based care. Weiner talked specifically about the role of the private sector and that while it has a definite role, the overall effort will still require large public subsidies due to the substantial costs for this kind of care.

Senate Finance Subcommittee Hears Testimony on Health Care Quality

The Senate Finance Committee's Health Care Subcommittee held the hearing What is Health Care Quality and Who Decides? to receive testimony from research experts in the field of health care quality. In his opening statement, Subcommittee Chairman John D. Rockefeller (D-WV) said, "I believe we must significantly alter federal provider payment policy so that we only pay providers for achieving good health outcomes for patients. In order to transform our system into one that promotes greater quality and improves patient health, we first need a solid understanding of the landscape of quality today." Rockefeller also asserted that "It is important to understand how all the public and private entities that deal with health care quality coordinate their efforts – and if there is room for improvement."

In summing up the hearing, Rockefeller called for administrative leadership in the effort to measure and improve health care quality, starting with Medicare. In particular, he suggested that the Medicare Payment Advisory Commission (MedPAC) – an advisory panel established by the Balanced Budget Act of 1997 to advise Congress on payments to private health plans participating in Medicare and providers in Medicare's traditional fee-for-service program – might be most effective in establishing payment-for-quality standards.

Congressional Committees Hear Testimony on Health Care Reform

Capitol Hill lawmakers continue to prepare for an extensive health care reform debate, with a number of congressional hearings on the topic on March 10. In all cases, witness testimony is available through the individual hearing link.

Senate Finance Committee

The Senate Finance Committee held a hearing on The President's Fiscal Year 2010 Health Care Proposals, with testimony from Peter Orszag, director of the U.S. Office of Management and Budget. In his opening statement, Finance Committee Chairman Max Baucus (D-MT) announced that he and the committee's Ranking Republican Charles Grassley (R-IA) intend to consider legislation in June of this year and send a health care bill to the president by July 4.

Senators asked a variety of questions ranging from drug importation and generic biologics, to home health care, cost containment, quality measurements and comparative effectiveness research. Asked by Baucus whether Congress should suspend traditional "pay-as-you-go" rules for passing legislative reform, Orszag replied that he understood the concern but that a healthcare overhaul would need to be budget-neutral over five to 10 years, with the savings from health care measures realized in the same term, after the reforms were fully implemented. Additional costs would be necessary to implement the program in the near-term. In order to meet their self-imposed timelines, Baucus urged Orszag to finalize the Administration's health care budget plan and related views quickly.

Senate Budget Committee

Orszag also appeared before the Senate Budget Committee later in the day in their hearing on The President's Fiscal Year 2010 Budget Proposal. This hearing focused on the entire budget, not health care alone, although Budget Committee Chairman Max Baucus (D-MT) referred to health care as the "800 lb. gorilla," consuming 17 percent of GDP. Senator Benjamin Cardin (D-MD) asked Orszag about the viability of the $634 billion "reserve fund" for health care reform, to which Orszag reiterated that, while the fund should be considered merely a "down payment" on health care spending, the administration's goal is to devise a "revenue neutral" approach. Senators also questioned Orszag on other elements of health care spending, including quality initiatives like health information technology and comparative effectiveness research.

House Committee on Education and Labor, Health, Employment, Labor and Pensions Subcommittee

The House of Representatives Committee on Education and Labor Subcommittee on Health, Employment, Labor and Pensions held a March 10 hearing on Strengthening Employer-Based Health Care, focusing on the impact of uncompensated care costs on employers who provide health coverage to their workers. Subcommittee Chairman Rob Andrews (D-NJ) opened the hearing by stating that he was particularly concerned by the costs added to the health care system resulting from employers who have the ability to provide health coverage to employees, but choose not to do so. "I believe that an all-employer-participation component is an essential element to health care reform," Andrews said. He said that a requirement for all employers to provide coverage would reduce the number of uninsured individuals, "drive down the overall

cost of the system, prevent further erosion of health benefits for workers, as well as protect their right to choose their own doctor and maintain their existing level of benefits."

During the question-and-answer period, Ranking Committee Republican John Kline (R-MN) cautioned that it was important to protect the central role of ERISA preemption of state regulation of employer-sponsored health coverage so that the numbers of uninsured do not increase even further if employers are unable to provide benefits governed by multiple state laws. Kline also strongly defended the role that employers have played by voluntarily sponsoring health coverage to more than 160 million Americans and said that protecting that role should be a central element of health reform legislation. Subcommittee chairman Andrews closed the hearing by stating that it was the first of several more hearings on health reform that he expected the panel to hold and reiterated his support for meeting President Obama's challenge for enacting health care reform before the end of this year.

Retirement Savings Summit Held in Washington DC

The Investment Company Institute hosted the 2009 Retirement Savings Summit in Washington D.C., featuring in-depth discussions of retirement savings policy with business leaders, academic experts and government officials.

The first session of the summit, "Where We Are on Coverage and Retirement Savings Adequacy" consisted of a panel of economists from ICI, Massachusetts Institute of Technology and the University of Wisconsin. Panelists discussed the recent trends in coverage and preparedness for retirement. Generally, the speakers were positive about the future but emphasized that numerous outside factors would be critical: cautious reform efforts, economic recovery, personal financial planning and health care costs, particularly for retirees.

The second session, "Coverage and Savings Adequacy," focused on strategies for promoting sponsorship of, and participation in, workplace retirement plans. Dave Koshgarian, of Washington Counsel Ernst and Young, facilitated a discussion that featured fellow board member Robert Witcoff of McDonalds Corporation. Witcoff talked about the modernization, reorganization and redesign of McDonalds' defined contribution retirement plan for the company's global employees. Other panelists mentioned certain important initiatives for improving coverage — particularly for lower-income individuals — including financial literacy and automatic enrollment features.

Following these presentations, select staff members from key congressional committees addressed the panel and the audience. Chris Condeluci, tax and benefits counsel from the U.S. Senate Committee on Finance minority staff, foresaw little legislative activity in the area of retirement savings this year, owing to the economic slowdown and the likely need for a revenue source. He also noted that Senate Finance Committee Ranking Member Charles Grassley (R-IA) was a committed opponent of mandates but would be working with Senate Democrats and lawmakers in the House of Representatives to develop retirement savings principles. Derek B. Dorn, tax and pension counsel for Senator Jeff Bingaman (D-NM, member of the Senate Finance Committee as well as the Committee on Health, Education, Labor and Pensions) indicated that automatic payroll-deduction IRAs were at the forefront of Senate Democrats' agenda, along with defined contribution plan fees.

Representative Richard Neal (D-MA), a member of the House Ways and Means Committee and sponsor of the 2008 Defined Contribution Plan Fee Transparency Act (H.R. 3765), spoke during the summit's luncheon. In his remarks he indicated that the Obama administration has raised the profile of 401(k) plans on the agenda, particularly through the recent budget proposals. Neal expects to reintroduce his fee transparency legislation within the next several weeks.

The next session, "The Challenges of Safeguarding and Managing Retirement Assets," examined individuals' investment choices during the saving phase and the need to manage

income in retirement. Tom Mess, from Procter and Gamble, spoke on this panel about his company's profit sharing plan, which recently moved to commingled index funds. He added that Procter and Gamble has a prominent focus on educating employees with specialized planning provided at three different points in an employee's career. Other panelists, mostly from retirement plan service providers, noted the importance of tax-favored savings vehicles and strongly recommended implementing more annuitization options.

Once again, select staff members from key congressional committees gave their reaction to the panel. Greg Dean, general counsel for the minority staff of the Senate Committee on Health, Education, Labor and Pensions, argued that the critical issue is education, not disclosure. He also indicated that lump sum benefit restrictions under the Pension Protection Act of 2006 may come up in legislative form but noted that there are federal regulators who oppose lump sum payments. Jeff Cruz, senior policy advisor for the Senate Special Committee on Aging, discussed the expansion of auto IRAs as a way of compensating for the insufficiency of Social Security. After a discussion of retirement date funds (the Senate Aging Committee held a hearing on target retirement date funds on February 25), Cruz indicated that the committee may urge the U.S. Department of Labor to address certain portfolio concerns.

Representatives of the several co-hosting organizations wrapped up the meeting by stating:

- There is a high level of uncertainty, both economically and politically. With so many potential threats to the system, plan sponsors must carefully prioritize the issues on which to focus.
- The interaction between health and retirement policy will be critical to the success of reform in both areas.
- Despite the extraordinarily difficult times and the concern over defined contribution account balances, there are some reasons for optimism: the fundamentals of the defined contribution system are strong, new innovations are taking hold and the looming issues of entitlement reform and national debt are finally beginning to be honestly discussed.
- The power of innovation, such as target date funds with an annuity as an in-plan option, and longevity insurance. Behavioral modification and possible default annuitization will be important.

GAO Releases Pension Plan Survey Results

The U.S. Government Accountability Office, responding to a request by Senators Charles E. Schumer (D-NY) and Robert P. Casey (D-PA), has released the results of a survey of defined benefit pension plans, examining (1) what changes employers have made to their pension and benefit offerings – including to their defined contribution plans and health benefits – over the last decade and (2) what changes employers might make to their pension plans in the future and how these changes might be influenced by changes in pension law and other factors. The survey consists of data from 44 of the nation's 94 largest defined benefit pension plans, collected between December 2007 and October 2008. (The survey therefore does not capture any meaningful information or trends related to the economic downturn.)

The survey's key findings include:

- Eighty-one percent of responding sponsors reported that they modified the formula for computing benefits for one or more of their DB plans. Among all plans reported by respondents, 28 percent of these plans were under a plan freeze.
- A majority of respondents reported either an increase or no change to the employer or employee contribution to defined contribution plans. About 67 percent of responding

firms plan to implement, or have already implemented, an automatic enrollment feature to one or more of their defined contribution plans.

- All of the responding firms offered health care to their current workers and 80 percent have at least some current workers who will be eligible for retiree health care benefits, although 20 percent of respondents reported that retiree health benefits were to be fully paid by retirees. Further, 46 percent reported that it is no longer offered to employees hired after a certain date.

As for future indications, at the time of the survey most sponsors reported no plans to revise plan formulas, freeze or terminate plans, or convert to hybrid plans before 2012, even in light of recent rules for pension accounting and reporting. A minority of plan sponsors said they would consider forming a new defined benefit plan, if there were reduced unpredictability or volatility in defined benefit plan funding requirements and greater flexibility in accounting for such plans on corporate balance sheets.

These results provide an interesting perspective on the voluntary employer-sponsored benefits system generally and defined benefit plans in particular. However, these results do not take into account the recent economic turmoil and much of the policy debate has been driven by the impact of the recession on companies and their benefits programs.

RECENT REGULATORY ACTIVITY

Important Pension Funding Development: IRS Allows Reasonable Interpretation in Selecting Pension Funding Yield Curve

On March 31, the Internal Revenue Service (IRS) issued a special edition of Employee Plan News clarifying the agency's interpretation of defined benefit pension plan funding rules under Internal Revenue Code Section 430. For many (but not all) sponsors of defined benefit pension plans, this interpretation will result in substantial funding relief.

This informal guidance allows plans to use a spot yield curve from any applicable month for 2009 (January and the four preceding months, for calendar year plans) by stating that such an election would be a “reasonable interpretation” of the defined benefit funding rules and that a “reasonable interpretation” is sufficient for 2009. This will allow plans to use the higher interest rate in October or November to mitigate the otherwise significant increase in their required funding obligation resulting from the dramatic decline in the stock market.

Final regulations on defined benefit pension funding are now being drafted. The IRS guidance anticipates that these final regulations will provide automatic approval for the change (allowing use of the spot yield curve in 2009 regardless of the method used in 2008) but did not discuss whether plans would be locked into the 2009 election for 2010 and later years.

House of Representatives Minority Leader John Boehner (R-OH) and several other members of Congress have suggested their willingness to consider legislation that addresses the pension funding crisis, while Representative Earl Pomeroy (D-ND) has indicated an interest in introducing a pension funding relief bill in the near future. Some Capitol Hill offices have raised concerns about the impact of additional funding relief on plan underfunding and the Pension Benefit Guaranty Corporation (PBGC) deficit and PBGC officials have questioned whether additional relief is needed.

Treasury Department to Issue Guidance Regarding Use of Yield Curve to Determine Pension Liabilities

Tom Reeder (Benefits Tax Counsel in the Office of Tax Policy) recently indicated that the department intends to issue guidance soon on defined benefit plan funding. The guidance is

expected to state that during 2009, a reasonable interpretation of the statutory funding rules would be considered compliance with the law, and that the use of the full yield curve for any "applicable month" would be considered a reasonable interpretation of the statute for calculating plan liabilities.

The so-called "applicable month" issue, which would permit employers to elect to use the full yield curve for any "applicable month" (i.e., for September, October, November, December, or January in the case of a calendar year plan) to determine plan liabilities, is a major issue that will have a very material effect on many companies' funding obligations and on the applicability of benefit restrictions.

Signatures are currently being collected for a joint business group letter on this issue. The letter addresses the applicable month issue, as well as a corollary issue, which is whether plan sponsors need approval to return to the use of the smoothed segment rates for the 2010 plan year.

While the guidance is a very important step forward, it does not obviate the need for further legislative efforts. For example, this issue is of limited help to non-calendar year plans, and this issue does not help with respect to the 2010 plan year, which could be very problematic for some plan sponsors.

PBGC Published Final 4010 Reporting Rule; Issues Guidance on ERISA Section 4010 Reporting

On March 16, the Pension Benefit Guaranty Corporation (PBGC) published final regulations on annual financial and actuarial information reporting, reflecting changes made by the Pension Protection Act of 2006 (PPA) to Section 4010 of ERISA. Section 4010 requires the reporting of actuarial and financial information by controlled groups with pension plans that have significant underfunding. PPA changed the standards for determining which plans are required to report under Section 4010, primarily by replacing the "$50 Million Gateway" test with an "80% FTAP Gateway" test (defined below). Some members of Congress have expressed interest in reversing this PPA provision and reinstating the $50 Million Gateway test.

The preamble warned potential filers that the PBGC expects to update the e-4010 filing application and related materials within a few days and filers should not attempt to enter data for a post-PPA filing until the application is updated (otherwise, the data will be lost). The final rule is effective April 15, 2009, but is applicable to "information years" beginning after 2007.

Under the old "$50 Million Gateway" test, a 4010 filing was required if the aggregate unfunded vested benefits of all plans maintained by members of a controlled group exceeded $50 million, disregarding any plans with no unfunded vested benefits. Under the new "80% FTAP Gateway" test, a 4010 filing is required if the funding target attainment percentage (FTAP) of a plan maintained by any member of the controlled group is less than 80 percent (only plans in existence on the last day of the information year and sponsored by a member of the controlled group are counted but fair market value of the plan's assets excludes contributions receivable). The PBGC disputes assertions that the aggregation rules are too burdensome for companies. Section 4010 filings are also required if (1) the conditions for imposing a lien for missed contributions exceeding $1 million (under ERISA Section 302(f)) have been met for any plan maintained by any member of the controlled group, or (2) the IRS has granted a minimum funding waiver in excess of $1 million to any plan maintained by any member of the controlled group.

The final rule also (1) waives reporting in certain cases for controlled groups with aggregate underfunding of $15 million or less; (2) modifies the standards for determining which plans are exempt from reporting actuarial information; (3) modifies the reporting requirements primarily to implement the PPA changes; (4) provides guidance on reporting requirements for sponsors of multiple employer plans; and (5) makes other clarifications.

On March 26, the PBGC issued Technical Update 09-2, clarifying that for information years starting on or after January 1, 2008, filers may determine benefit liabilities using the form-of-payment assumption described in PBGC's regulations on Allocation of Assets in Single-Employer Plans. Thus, if a benefit is not in pay status and no valid election with respect to the form of benefit has been made, the filer may use the form of benefit that, under the terms of the plan, is payable in the absence of a valid election (generally an annuity form of payment). Filers who use the alternative form-of-payment assumption must report that fact to PBGC using the comment feature of the e-4010 filing application.

IRS Releases Guidance on Defined Benefit Plan Asset Valuation

On March 16, the Internal Revenue Service (IRS) issued Notice 2009-22 providing interim rules on asset valuation methods for single-employer defined benefit pension plans under the Worker, Retiree and Employer Recovery Act of 2008 (WRERA). These rules are applicable for minimum funding purposes as well as the clarified "smoothing" rule. The notice also provides automatic approval for a change in asset valuation method for plan years beginning during 2009 to adopt any permissible asset valuation method. The proposed regulations would be effective for plan years beginning on or after January 1, 2009.

IRS Issues Guidance on Multiemployer Plan Funding Relief under WRERA

On March 27, the Internal Revenue Service (IRS) released Notice 2009-31, instructing multiemployer pension plans how to use the defined benefit funding relief provided in the Worker, Retiree, and Employer Recovery Act of 2008). Section 204 of WRERA provided multiemployer plan relief by permitting plan sponsors to elect to temporarily freeze the status of an endangered or critical multiemployer plan at the same funding status held in the immediately preceding plan year. Section 205 provided that certain multiemployer plans who were certified as being in endangered or critical status could extend their funding improvement plan (in the case of a plan that is in endangered status) or rehabilitation plan (in the case of plans that were in critical status) by an additional three years.

Under Section 432 of the PPA, a multiemployer plan's actuary must certify whether the plan is in endangered status, critical status or neither by the 90th day of the plan year. For calendar year plans, this means that the Section 204 election must be made by April 30, 2009. This is a very short time frame and will require many trustees to quickly decide whether or not to file an election under Section 204 or 205 and send notices to participants, beneficiaries, bargaining parties and the PBGC.

If a Section 204 election is made, the plan's "zone certification" is frozen in the same status as the plan's status for the prior year. Section 204 also provides that the plan that has elected to freeze its status is not required to annually update its funding improvement plan (for plans that are in "endangered" status) or rehabilitation plan (for plans that are in "critical" status). The guidance also explains the effect of the election, the election procedures, the special notice requirement for plans in neither endangered nor critical status as a result of the freeze election and the effect of a WRERA election on Form 5500, Schedule MB and Schedule R filings.

DOL, IRS Continue to Provide COBRA Guidance, Including Model Notices

On March 19, the U.S. Department of Labor issued new guidance on the COBRA premium subsidy enacted through the American Recovery and Reinvestment Act of 2009 (ARRA). This guidance includes the long-awaited model notices as well as answers to updated and expanded "frequently asked questions" (FAQs) on the COBRA provisions and the premium reduction for employers and employees. ARRA requires health plans to notify current and former participants and beneficiaries about eligibility for the premium assistance.

Specifically, the DOL issuance includes:

- The full-version general notice, which must be sent to all qualified beneficiaries, not just covered employees, who experienced a qualifying event at any time from September 1, 2008 through December 31, 2009, regardless of the type of qualifying event. The full version includes information on the premium reduction as well as information required in a COBRA election notice.

  The DOL had informally indicated its intent to modify the parenthetical heading of its Model General Notice (full version). The heading of the model notice was not changed, although the Web page summary of the General Notice (Full Version) was modified with the underlined language below:

  General Notice (Full version) Plans subject to the Federal COBRA provisions must send the General Notice to all qualified beneficiaries, not just covered employees, who experienced a qualifying event at any time from September 1, 2008 through December 31, 2009, regardless of the type of qualifying event, AND who either have not yet been provided an election notice or who were provided an election notice on or after February 17, 2009 that did not include the additional information required by ARRA. This full version includes information on the premium reduction as well as information required in a COBRA election notice.

- The abbreviated general notice, which includes the same information as the full version regarding the availability of the premium reduction and other rights under ARRA, but does not include the COBRA coverage election information. It may be sent in lieu of the full version to individuals who experienced a qualifying event during on or after September 1, 2008, have already elected COBRA coverage, and still have it.

- An alternative notice, which must be sent by insurance issuers that provide group health insurance coverage to persons who became eligible for continuation coverage under a state law. Such issuers may also find the model Alternative Notice or the abbreviated model General Notice appropriate for use in certain situations.

- A notice in connection with extended election periods, which must be sent by any plan subject to the federal COBRA provisions to any assistance-eligible individual (or any individual who would be an assistance eligible individual if a COBRA continuation election were in effect) who had a qualifying event at any time from September 1, 2008 through February 16, 2009 and either did not elect COBRA continuation coverage or who elected it but subsequently discontinued COBRA. This notice includes information on ARRA's additional election opportunity, as well as premium reduction information. This notice must be provided by April 18, 2009.

- FAQs for Employers on the COBRA Premium Reduction, with 13 questions and answers on topics such as eligibility criteria and procedural guidelines.

- Expanded FAQs for Employees on the COBRA Premium Reduction, with 25 questions and answers addressing such topics as premiums, notices and the appeals process.

- Updated FAQs for Employees on General COBRA Provisions, addressing more basic questions about the COBRA program.

Older guidance on the DOL's COBRA guidance Web site includes premium reduction fact sheets for employers and for employees (and Spanish versions for each), IRS Info on the COBRA premium reduction, FAQs (and answers) from the House of Representatives Committee on Ways & Means and general COBRA FAQs for employees.

On March 20, the Department of Labor (DOL) posted additional information related to the COBRA subsidy provisions of the American Recovery and Reinvestment Act of 2009 (ARRA). This information includes a statement by Secretary Hilda L. Solis, information on review of subsidy denials, a Federal Register notice on availability of model notices and a registration link for a COBRA ARRA compliance webcast. For more information and to register for the March 24 web cast sponsored by the DOL, please click here.

The U.S. Department of Labor (DOL) has also posted to its COBRA information page an archived version of its recent compliance assistance webcast. The American Recovery and Reinvestment Act of 2009 (ARRA) provides for premium reductions and additional election opportunities for continuation coverage under COBRA.

The webcast features representatives from DOL, the U.S. Department of the Treasury and the Internal Revenue Service discussing the new COBRA provisions, particularly the model notices and some additional information related to the scope of “involuntary termination” for purposes of eligibility for the COBRA premium reduction.

Obama Administration Convenes Health Care Summit

President Obama recently held a "White House Forum on Health Reform," bringing together various administration officials, congressional leaders and other stakeholders to discuss options and strategies for comprehensive health reform. In his remarks convening the forum, Obama reiterated his desire to enact health reform this year.

The President also announced a series of regional health reform forums to be hosted by governors in several selected states and to expand the opportunity for public involvement on the direction for health reform. These regional meetings will be held in California, Iowa, Michigan, North Carolina and Vermont. "Health care reform is a fiscal imperative," Obama said. "Skyrocketing health care costs are draining our federal budget, undermining our long-term economic prosperity and devastating American families. The time for reform is now and these regional forums are some of the key first steps toward breaking the stalemate we have been stuck in for far too long. The forums will bring together diverse groups of people all over the country who have a stake in reforming our health care system and ask them to put forward their best ideas about how we bring down costs and expand coverage for American families."

The president's Fiscal Year 2010 budget provides for a 10-year, $634 billion "reserve fund" set aside to pay for the reform effort. The fund would be partially financed through limiting tax deductions for individuals making more than $250,000, while the remainder would be generated through a series of payment reforms in Medicare and Medicaid. However, Obama indicated at the forum he is flexible on the details for the new reserve fund and also open to differing approaches to achieving health care reform.

The Obama administration has indicated that a full report will be produced based on the forum discussions. As part of the forum, the White House also launched the healthreform.gov Web site, a site dedicated to the administration's health care efforts.

Phyllis Borzi Tapped as EBSA Chief

On March 25, President Obama announced his intention to formally nominate Phyllis Borzi to be Assistant Secretary of Labor for the Employee Benefits Security Administration (EBSA). EBSA has direct responsibility for all benefits-related regulation at the U.S. Department of Labor. Borzi is well-known to those in the employee benefits community who work on public policy matters.

Borzi is currently Of Counsel for the law firm of O'Donoghue & O'Donoghue and also serves as a research professor at the Department of Health Policy at George Washington University (GWU). Before joining the GWU faculty in 1994, Borzi served as pension and employee benefit counsel for the U.S. House of Representatives Education and Labor Subcommittee on Labor-

Management Relations (now the Health, Employment, Labor and Pensions Subcommittee) and was a member of First Lady Hillary Clinton's Presidential Task Force on Health Care Reform in 1993.

Borzi is also a co-chair of the advisory board of the BNA Pension & Benefits Reporter, a former member of the advisory committee of the Pension Benefit Guaranty Corporation and a member of the Advisory Board of the Pension Research Council at the Wharton School of the University of Pennsylvania.

No date has been set for her Senate confirmation hearings. Appointments by President Obama for other benefits-related positions (e.g. Director of the Pension Benefit Guaranty Corporation) have not yet been announced.

RECENT JUDICIAL ACTIVITY

Stay of San Francisco Health Care Ordinance Denied

An application for a stay of the San Francisco County and City health care ordinance was denied on March 30 by Supreme Court Justice Anthony M. Kennedy, acting in his capacity as justice with responsibility for the Ninth Circuit. The Golden Gate Restaurant Association (GGRA) had applied for the stay to block the local government from collecting employer contributions under the local health care law.

The GGRA was denied rehearing of a full court panel of the U.S. Court of Appeals for the Ninth Circuit on March 9 following the original court's decision in GGRA v. City and County of San Francisco. At issue in the case is whether the city's employer spending requirements are preempted by ERISA and therefore contravene its goal of ensuring that plan sponsors are subject to a uniform body of benefits laws. The GGRA intends to file a petition with the U.S. Supreme Court in the next few months requesting that the Court accept the case for appeal.