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

Articles in this Edition

RECENT LEGISLATIVE ACTIVITY

House and Senate Approve Final Budget Resolution, Including Benefits Items

On April 29, the U.S. House of Representatives and Senate each approved the final conference report accompanying S. Con Res 13 – the Fiscal Year 2010 budget resolution – including provisions that could affect employee benefits. The non-binding resolution establishes a framework for enactment of President Obama's policy initiatives. It is important to note that inclusion of an item in the budget resolution does not mean it will necessarily become law; nor does exclusion of a proposal from the resolution mean that it will not ultimately be enacted. But, the resolution is an important guideline for identifying Congressional priorities.

Similar to the House-passed and Senate-passed versions approved earlier in the month, the final resolution provides for:

- Deficit-neutral (i.e. supported by increased taxes or spending cuts) reserve funds for several health care issues, including comprehensive health care reform. According to the resolution itself, these funds would be used to make "improvements to health care in America, which may include making affordable health coverage available for all, improving the quality of health care, reducing rising health care costs, building on and strengthening existing public and private insurance coverage, including employer-sponsored coverage, and preserving choice of provider and plan." President Obama's initial budget outline provided a blueprint for generating a $634 billion health care reserve fund over ten years. The conference report specifically reiterates the eight principles expressed in Obama's budget outline.

- Reserve funds to accommodate comprehensive health reform legislation related to Medicare, including measures to "change incentives to encourage efficiency and higher quality care in a way that supports fiscal sustainability."

- Though not specifically addressed in the resolution itself, the final conference report makes reference to a deficit-neutral reserve fund for certain tax relief to accommodate "individual tax relief supporting working families, higher education, and raising participation in retirement saving vehicles, among other purposes. It could also accommodate tax relief and investment incentives for businesses, states, or communities."

The final resolution does not include the original Senate budget resolution recommendations for expanding the existing "savers credit" and requiring that employers that offer a 401(k) plan would be required to automatically enroll their employees in it (unless the employee opts out) and that employers that do not offer 401(k) plans offer automatic enrollment in IRAs (unless the employee opts out).

Executive Compensation Update: House Approves TARP Bonus Bill

On April 1, the U.S. House of Representatives approved H.R. 1664, legislation that prohibits certain compensation (such as bonuses) not based on performance standards for companies participating in the government's Troubled Asset Relief Program (TARP) of the Economic Stabilization Act of 2008. H.R. 1664 also directs the Secretary of the Treasury to develop guidance to help determine "unreasonable and excessive compensation standards." The bill was introduced by House Financial Services Committee Chairman Barney Frank (D-MA) largely as a response to the recent media scrutiny of bonuses paid to American International Group (AIG).

The bill was amended several times before final approval:

- The manager's amendment offered by Frank further clarified that an institution does not become subject to the limitations on compensation set forth in the bill as a result of doing business with an institution that has received a direct capital investment under either the TARP or the Housing and Economic Recovery Act of 2008. The manager's amendment would also:

  - exempt severance pay from coverage if the payment is made in the ordinary course of business to an employee who has been with the institution at least five years prior to dismissal, as long as that payment is not greater than the employee's annual salary or $250,000;

  - require the compensation data that an institution must report annually to the Treasury to include contributions made for the benefit of an employee's immediate family members; and

  - create a Commission on Executive Compensation to study the executive compensation system for recipients of direct capital investments under the TARP and make recommendations for legislative and regulatory action.

- An amendment by Dennis Cardoza (D-CA) would allow the Treasury Secretary to exempt "community financial institutions" from compensation standards established by the Secretary as long as they have not received more than $250 million in TARP funds.

- An amendment by Melissa Bean (D-IL) would allow institutions that enter into a payment schedule with Treasury on terms set by Treasury to no longer be subject to the bonus and compensation restrictions created by the Act. If an institution defaults on its payment schedule, any bonuses and compensation that exceeds the regulatory limits would be subject to clawback.

- An amendment by Gus Bilirakis (R-FL) would clarify that the general rule that excludes an institution doing business with a TARP recipient from the executive compensation limitations does *not* apply when *both* institutions are TARP recipients.

- An amendment by Kathy Dahlkemper (D-PA) would clarify the definition of "executive compensation" to include payments made before, during and after employment, and would make explicit that the definition of compensation considered under the standards to be prepared by the Secretary includes payment of money, transfers of property or provision of services. During debate of this amendment, Dahlkemper clarified that this amendment would also enable the Treasury Secretary to establish standards applicable to retirement savings plans, pension plans and retiree medical benefits provided by the company.

While H.R. 1664 does not extend broadly to all companies, it may be instructive of more broadly applicable legislation that may yet be crafted, just as the recently introduced Compensation Fairness Act introduced in the Senate offers clues to the potential direction the Senate might take in future legislation.

House Subcommittee Examines Health Care Reform

The House of Representatives Education and Labor Subcommittee on Health, Employment, Labor and Pensions recently held a hearing on Ways to Reduce the Cost of Health Insurance for Employers, Employees and their Families. The subcommittee sought testimony from various stakeholders on various health care reform proposals that would guarantee quality and affordable health insurance coverage for all Americans.

In his opening statement, Subcommittee Chairman Rob Andrews (D-NJ) referred to the current circumstance as "a health care finance and legal problem, as opposed to a health care problem." First and foremost, Andrews said, the health care debate must focus on how to allocate costs in a more rational and sensible way.

Ranking subcommittee member John Kline (R-MN) said in his opening statement, "As we discuss ways to reduce the cost of health insurance for employers, we must be mindful of the fact that ERISA is the basis of our voluntary employer-based system, and we must build on what works within that structure. Policies to permit greater pooling of resources to purchase insurance and the development of innovative, cost-efficient benefit designs would expand access by encouraging more employers to provide coverage and reduce costs."

The subcommittee heard from the following witnesses:

- Michael Langan, principal at Towers Perrin, asserted that the best reform options are those that preserve and strengthen the voluntary role employers play as the largest source of health coverage for most Americans. He urged preservation of the federal regulatory framework established by the Employee Retirement Income Security Act (ERISA), reform of the individual insurance marketplace, strengthening state safety net health insurance programs and improving the quality and efficiency of health care.

- Ron Pollack, executive director of FamiliesUSA, recommended strengthening the employer-based system by improving regulation of the market, subsidizing coverage for lower-income individuals and expanding the Medicaid program. He expressed support for employer "pay-or-play" programs.

- William Vaughan, senior health policy analyst for Consumers Union, provided suggestions for reducing health care costs through increased access to information. Most significantly, Vaughan proposed the establishment of a new Office of Consumer Health Insurance Education and Information to educate health care consumers

- Janet Trautwein, executive vice president and CEO of the National Association of Health Underwriters, discussed the strength of the employer-sponsored system and expressed concerns about a possible public program option that would compete with private plans and possibly shift costs to taxpayers.

- William Oemichen, president and CEO of the Cooperative Network in Madison, Wisconsin, spoke about programs that would allow small employers in particular to obtain greater access to coverage. Specifically, he talked about the creation of "Employee Benefit Cooperatives" that provide health care and other benefits to the employees of its shareholder-members.

- David Himmelstein, associate professor of medicine at Harvard University and a national spokesperson for Physicians for a National Health Program, advocated eliminating the current system in favor of a single-payer national health program.

- Karen Davenport, director of health policy at the Center for American Progress, talked specifically about private health insurance market reform and the benefits of a national health insurance exchange.

The question and answer period focused primarily on the fundamental differences between the current, employer-based system and a public, single-payer system advocated by Himmelstein. Representatives Phil Hare (D-IL), John Tierney (D-MA) and Dennis Kucinich (D-OH) were particularly critical of health insurance companies and expressed interest in Himmelstein's recommendations. When the witnesses were asked by Representative David Wu (D-OR) to confirm that individuals are generally satisfied with their employer-sponsored coverage, all agreed that people were satisfied, with the exception of Himmelstein who indicated that people's satisfaction dropped off when they became ill or unable to work and lost coverage. The discussion highlighted that there are not only significant differences between Republican and

Democratic views on health reform, but also significant differences within the Democratic caucus.

The House Ways and Means Committee recently held a similar hearing on Health Reform in the 21st Century: Insurance Market Reforms.

Senate Finance Committee Issues Health Care Delivery Options Paper

Senate Finance Committee Chairman Max Baucus (D-MT) and Ranking Republican Member Charles Grassley (R-IA) issued a 52-page paper, Description of Policy Options – Transforming the Health Care Delivery System: Proposals to Improve Patient Care and Reduce Health Care Costs. The report sets forth possible strategies for reducing costs and improving quality in the health care system in advance of a Wednesday meeting with fellow Senate Finance Committee members. According to a news release and summary issued by Baucus, the document and the subsequent feedback will "inform the creation of the subsequent proposals the Committee will consider for a comprehensive proposal."

The paper covers the following topics (with the following descriptions based on the news release and summary):

- *Promoting Quality Care:* The policy options would attempt to shift Medicare from volume-based purchasing to value-based purchasing. The policy options would establish a value-based purchasing program for hospitals starting in FY 2012, direct CMS to develop plans to establish value-based purchasing programs for home health and skilled nursing facility providers by 2012, strengthen and expand programs that will eventually lead to value-based purchasing for doctors, reduce inappropriate ordering of imaging services like CT scans and MRIs, and start inpatient rehabilitation and long-term care hospital providers on a path toward value-based purchasing programs.

- *Promoting Primary Care:* To encourage more primary care doctors to be part of the system, the policy options would provide primary care practitioners and targeted general surgeons with a Medicare payment bonus of at least five percent for five years, and provide Medicare payment to primary care practices that provide specific transitional care services for beneficiaries with high cost, chronic illnesses.

- *Fostering Care Coordination and Provider Collaboration:* The policy options would seek to foster innovation through chronic care management, promote provider collaboration through revised Medicare payment incentives to hospitals and incentivize payment for accountable care by allowing high-quality providers to share in savings they achieve through the Medicare program through increased collaboration.

- *Infrastructure Investments and Tools to Support Delivery System Reform:* The policy options would invest in health information technology, quality measure development (through a multi-stakeholder effort with the Department of Health and Human Services) and comparative effectiveness research. The policy options would also promote increased transparency by providing patients with information about health care providers. The policy options would strengthen the health care workforce by modernizing the graduate Medicare medical education program and developing a national workforce strategy.

- *Medicare Advantage: Promoting Quality, Efficiency, and Care Management:* The policy options would pay plans for quality improvement, change statutory benchmarks or set benchmarks based on competitive plan bids, provide a bonus payment to Medicare Advantage plans that use evidence-based programs to manage care of the chronically ill and allow plans to continue to offer extra benefits while reducing wide variation among plans.

- *Combating Fraud, Waste, and Abuse:* The policy options would enhance review of health care providers prior to granting billing privileges, leverage technology to better evaluate claims, educate providers to promote compliance with program requirements, monitor programs more vigilantly and penalize fraudulent activity.

Senate Finance Committee leaders have also indicated that they intend to release additional policy recommendations on coverage and financing options in May, in preparation for legislative consideration as early as June.

Andrews Introduces Investment Advice Legislation

On April 22, Representative Rob Andrews (D-NJ) introduced the Conflicted Investment Advice Prohibition Act (H.R. 1988), a bill to replace the ERISA investment advice provisions originally enacted as part of the Pension Protection Act of 2006 (PPA). The bill also appears to affect investment advice arrangements used by many plan sponsors that are based on a 2001 U.S. Department of Labor Advisory Opinion commonly referred to as "SunAmerica". "SunAmerica" approved the use of a computer model developed by an independent third party but subject to different rules than the PPA computer model.

PPA created two exceptions to the prohibited transaction rules for investment advice provided to participants. One exemption generally covered advice provided pursuant to a computer model that satisfied certain requirements. The second exemption generally applied to advice rendered where the adviser's fees do not vary based on the investment option chosen. Accordingly, the U.S. Department of Labor issued final regulations facilitating the use of the PPA exemptions, including permitting advice not generated by a computer model that does not fit within the level fee exemption. These regulations have not yet been allowed to take effect, however, and the Obama Administration will likely withdraw or substantially revise that guidance or otherwise prevent its full implementation. Prior to PPA and in the absence of final regulations under PPA, plan sponsors have typically relied on the "SunAmerica" model.

H.R. 1988 would preclude a plan fiduciary from arranging for an investment adviser to provide investment advice to the plan or to a plan participant unless the investment adviser is an "independent investment adviser," a new term defined by the bill. At this time, it appears that H.R. 1988 would apply the independent investment adviser requirement to the "SunAmerica" model.

Under the bill, an entity can qualify as an "independent investment adviser" in one of two ways.

Advisers may:

- Use a computer model that is subject to statutory rules that are almost the same as the PPA computer model rules. In contrast to the PPA exemptions, the bill does not make any reference to off-model advice while the DOL regulations explicitly permit such off-model advice. In addition, the regulations had confirmed that prior Advisory Opinions (including "SunAmerica") were not affected by the PPA regulations.

Or they may:

- Structure the arrangement so that the adviser receives the same fees regardless of the investment option chosen. H.R. 1988 is more restrictive than the PPA (as interpreted by the regulations and a class exemption) as to what types of advisers can use this "level fee" rule. Fees paid to affiliates are taken into account and neither the adviser nor any affiliate may provide or manage any investments that are offered under any defined contribution plan. Some PPA requirements do not apply, such as the annual audit rule. Additional disclosure requirements, regarding fees and conflicts of interest, may apply. The bill also provides an alternative way to satisfy the level fee component of the second option: to satisfy this alternative, neither the adviser nor any affiliate may receive advice-related fees from any person that markets, sells, manages, or provides investments under the plan. This alternative does not avoid the requirements noted in this paragraph other than the level fee rule. The bill is also more restrictive than PPA on what types of advisers can use this second option.

The bill would be effective for plan years beginning after one year after the date of its enactment. DOL has regulatory authority to deal with compensation paid under pre-existing contracts that would violate the level fee rule (or the level fee alternative described above).

Miller Introduces New 401(k) Fee Legislation

On April 21, House of Representatives Education and Labor Committee Chairman George Miller (D-CA) introduced the 401(k) Fair Disclosure for Retirement Security Act, legislation to address issues relating to fees charged to 401(k) and other defined contribution plans. The bill is very similar to the 401(k) Fair Disclosure for Retirement Security Act (H.R. 3185) from the previous Congress as it was revised before committee approval on April 17, 2008. An official summary of the new bill is also available.

According to an official summary released by Miller, the bill would provide for:

- Disclosure to employers, in the form of a written statement including the services to be provided and a list of total annual charges broken down by (1) plan administration or recordkeeping fees, (2) transaction fees, (3) investment management fees, and (4) other fees. These fees can be expressed in dollars or as a percent of total assets. Personal and/or financial relationships (resulting in a material benefit to the provider) would also have to be disclosed.

- Disclosure to workers, in the form of a standardized information form and fee comparison chart including fee levels as well as historical investment returns. Quarterly benefit statements would also include fee information.

- Mandatory inclusion of at least one "low-cost market-based index fund option," if the employer is to take advantage of ERISA liability protection.

- Department of Labor (DOL) assistance to employers and workers in finding affordable investment options and understanding associated fees and services. DOL would also maintain an annual survey of compliance with the legislation, issue model notices, enforce penalties against employers or service providers and submit reports to Congress.

Estimates, based on the previous year's experience of the plan (or a comparable plan if the plan is new), can be used for the disclosures. Although the official summary references a "low-cost market-based index fund option," actual bill language contains requirements that currently appear impossible to meet. The requirements include: "an unmanaged or passively managed mutual fund with a portfolio of securities designed to substantially match the performance of the entire United State equity market or the entire United States bond market, or a combination thereof, which offers a combination of historical returns, risk, and charges…that is likely to meet retirement income needs at adequate levels of contribution, and which is described in the terms of the plan as offered without any endorsement of the Government or the plan sponsor."

Representative Richard Neal (D-MA), a member of the House Ways and Means Committee, is soon expected to reintroduce his fee legislation from the previous congress, the Defined Contribution Plan Fee Transparency Act (H.R. 3765).

Education and Labor Subcommittee Holds Hearing on 401(k) Fees

On April 22, the House of Representatives Education and Labor Subcommittee on Health, Employment, Labor and Pensions held a hearing on the 401(k) Fair Disclosure for Retirement Security Act (see previous story on the bill's introduction).

In his opening remarks, Subcommittee Chairman Robert Andrews (D-NJ) made reference to the recent highly critical 60 Minutes segment that highlighted 401(k) plans and Education and Labor Committee Chairman George Miller's (D-CA) previous attempts to address disclosure of fees. The newly-introduced legislation, Andrews said, was "eminently reasonable, eminently workable and eminently fair."

Subcommittee Ranking Member John Kline (R-MN) and full Education and Labor Committee Ranking Member Buck McKeon (R-CA) each expressed concerns with the bill in opening statements. McKeon, in particular, urged his fellow lawmakers not to confuse the unprecedented declines in 401(k) account balances with the comparatively modest expense of defined contribution plan fees. They each touted the Savings Recovery Act as a more reasonable approach to promoting retirement savings.

The witnesses testifying at the hearing were:

- Robert G. Chambers, partner with the law firm of McGuireWoods, testifying on behalf of the American Benefits Council, outlined three recommended disclosure principles: the rules must be flexible enough to accommodate the full range of possible investment options, including self-directed brokerage accounts; payments from one service provider to its affiliated service provider are not revenue sharing and should not be required to be disclosed without fiduciary protection; and fees paid by plan sponsors should not be subject to any of the disclosure rules.

- Mercer E. Bullard, founder of Fund Democracy and assistant professor of law at the University of Mississippi, expressed strong support for the bill. In his oral statement as well as his highly detailed and extensive written testimony, Bullard referred to the legislation's reforms "long overdue across the spectrum of financial services in America."

- Kristi Mitchem, managing director, U.S. defined contribution plans for Barclays Global Investors, compared and analyzed defined contribution plans to defined benefit pension plans in terms of contributions, investment quality, portability and lifetime income. Regarding disclosure, Mitchem argued that "participants need information communicated in a way that is easy to understand and facilitates comparison across the full range of designated investment alternatives. To do so, she suggested organizing funds by risk level rather than by asset class.

- Alison T. Borland, retirement strategy leader for Hewitt Associates, asserted the need for much greater fee transparency and disclosure between service providers, plan sponsors and participants. Breaking down the various plan fees, Borland argued, would increase negotiating and purchasing power for fund consumers.

- Julian Onorato, CEO of ExpertPlan, Inc. (an independent plan administrator) expressed support for the legislation, as well as the Defined Contribution Fee Disclosure Act (S. 401) introduced in the Senate by Tom Harkin (D-IA) and Herb Kohl (D-WI), and emphasized the importance of enforcing uniform disclosure of fees and services and encouraging independent investment advice to participants.

- Larry Goldbrum, executive vice president and general counsel at the SPARK Institute, addressed certain misconceptions about the retirement plan industry as well as specific elements of the bill such as required unbundling of services, overly complicated expense details, use of dollar basis disclosures and the mandatory inclusion of an index fund among the plan options.

During the question-and-answer period, committee members asked a wide range of questions about the terminology and nomenclature of investment options, incentives for rollovers from 401(k) plans to IRAs, the challenges of "unbundling" fees and what constitutes reasonable disclosure to participants. In a response to a broad question from Representative Phil Hare (D-IL) about shoring up the retirement savings system generally, Bullard advocated a single payroll deduction retirement account, such as a "lifetime savings account," without using employer plan sponsors as an intermediary.

Kline asked Chambers specifically about liability issues and what kinds of protections are necessary in the legislation. Chambers suggested that lawmakers provide a good faith liability protection for employers that fulfill their basic fiduciary obligations, minor errors notwithstanding. Kline also asked Chambers to describe the plague of "strike suits," in which ill-supported claims of action are brought with the sole intent of settling out-of-court. Representative Joe Courtney (D-CT) followed up on this topic, asking Bullard if the bill itself would expand employers' exposure to lawsuits, with Bullard agreeing that it would.

Early in the proceedings, Miller asserted his strong belief in the bill as introduced but conceded some willingness to modify it.

Rep. Pomeroy Introduces Bill to Expand Savers Credit

Representative Earl Pomeroy (D-ND), a member of the House of Representatives Ways and Means Committee, has introduced the Savings for American Families' Future Act (H.R. 1961), a bill that would expand the Saver's Credit. Formally known as the "Retirement Savings Contributions Credit," the current law Saver's Credit allows low- and moderate-income individuals take a phased-in tax credit of up to $1,000 (up to $2,000 if filing jointly) on voluntary contributions to an employer-sponsored retirement plan or an individual retirement arrangement.

H.R. 1961 would codify the proposal offered in President Obama's Fiscal Year 2010 budget blueprint. The Saver's 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. The credit would automatically go directly into taxpayers' retirement accounts. A one-page official summary of the bill is also available.

An estimate of the measure's expected revenue cost to the federal government is not yet available. The Obama budget outline had estimated the Saver's Credit proposal (along with the automatic-enrollment IRA proposal) to cost $55 billion over ten years. Hearings and consideration by the Ways and Means committee have not yet been scheduled.

RECENT REGULATORY ACTIVITY

IRS to Pre-Approve Prototype 403(b) Plans

On April 14, the Internal Revenue Service (IRS) released Announcement 2009-34, publicly stating its intent to establish a program for the pre-approval of prototype plans under Section 403(b) of the Internal Revenue Code. The announcement includes a draft revenue procedure containing IRS's proposed procedures for issuing opinion letters on the acceptability of the form of prototype plans. In addition, the IRS also released draft sample plan language for use in drafting 403(b) prototype plans.

This announcement is significant because the IRS has never before offered a prototype program for 403(b) plans. The IRS is seeking public input before finalizing these procedures and sample plan language. Comments are due by June 1.

DOL Updates Guidance on COBRA Expansion

The U.S. Department of Labor (DOL) has updated its list of guidance items on the DOL COBRA issues Web site. The new and updated guidance includes 14 new questions and answers added to the Frequently Asked Questions on the COBRA Premium Reduction document (the new text focusing on model notices).

As reported in previous editions, the American Recovery and Reinvestment Act (ARRA) included a temporary subsidy of continued COBRA coverage for individuals (within certain income limits) who have been involuntarily terminated from employment on or after September 1, 2008, through December 31, 2009.

The DOL update follows the Internal Revenue Service (IRS) release of Notice 2009-27, which provided new guidance on the COBRA subsidy, relating particularly to the interpretation of "involuntary termination." This link is also highlighted on the DOL COBRA page.

IRS Investigating Retiree Tax Withholding Issue

In accordance with the ARRA "Making Work Pay" tax credit, the Internal Revenue Service (IRS) has issued new wage withholding and advance earned income credit payment tables as well as the explanatory Publication 15-t, which confirms that these tables apply to pension benefits as well as earned income. It has come to the attention of some organizations that if employers use the prescribed withholding tables, retirees may be subject to additional, unexpected year-end tax liability.

The U.S. Treasury Department and IRS are aware of the concerns companies have that retirees may be subject to under-withholding and has acknowledged the challenges of communicating the potential for the unexpected liability to plan participants. Treasury and IRS are considering ways to address these concerns through the regulatory process.

Regulatory Agencies Seek Information on 2008 Mental Health Parity Law

On April 27, the U.S. Treasury Department Internal Revenue Service, the U.S. Department of Labor Employee Benefits Security Administration and the U.S. Department of Health and Human Services Centers for Medicare & Medicaid Services jointly issued a Request For Information (RFI) regarding the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act (MHPAEA), enacted in October 2008. The requirements under the new law are effective for plan years beginning on or after October 3, 2009 (January 1, 2010 for calendar year plans and collectively bargained plans).

The request for information invites public comments on potential costs and burdens of the new law, such as:

- What policies, procedures, or practices of group health plans and health insurance issuers may be affected by MHPAEA? What direct or indirect costs or benefits would result? Which stakeholders will be affected?
- Are there additional paperwork burdens related to MHPAEA compared to those related to the original1996 mental health parity law, and, if so, what estimated hours and costs are associated with those additional burdens?
- Are there unique costs and benefits for small entities subject to MHPAEA (that is, employers with more than 50 employees that maintain plans with fewer than 100 participants)? What special consideration, if any, is needed for these employers or plans? What costs and benefits have issuers and small employers experienced in implementing parity under state insurance laws or otherwise?

The agencies also request comments to assist them in the development of regulatory guidance and are interested in these specific areas:

- The statute provides that the term “financial requirement” includes deductibles, co-payments, co-insurance, and out-of-pocket expenses, but excludes an aggregate lifetime limit and an annual limit. The statute further provides that the term “treatment limitation” includes limits on the frequency of treatment, number of visits, days of coverage, or other similar limits on the scope or duration of treatment. Do plans currently impose other types of financial requirements or treatment limitations on benefits? How do plans currently apply financial requirements or treatment limitations to (1) medical and surgical benefits and (2) mental health and substance use disorder benefits? Are these requirements or limitations applied differently to both classes of benefits? Do plans currently vary coverage levels within each class of benefits?
- What terms or provisions require additional clarification to facilitate compliance? What specific clarifications would be helpful?
- What information, if any, regarding the criteria for medical necessity determinations made under the plan (or coverage) with respect to mental health or substance use disorder benefits is currently made available by the plan? To whom and how is this information currently made available? Are there industry standards or best practices with respect to this information and communication of this information?
- What information, if any, regarding the reasons for any denial under the plan (or coverage) of reimbursement or payment for services with respect to mental health or substance use disorder benefits is currently made available by the plan? To whom and how is this information currently made available? Are there industry standards or best practices with respect to this information and communication of this information?
- To gather more information on the scope of out-of-network coverage, the agencies are interested in finding out whether plans currently provide out-of-network coverage for mental health and substance use disorder benefits. If so, how is such coverage the same as, or different than, out-of-network coverage provided for medical and surgical benefits?
- Which aspects of the increased cost exemption, if any, require additional guidance? Would model notices be helpful to facilitate disclosure to federal agencies, state agencies, and participants and beneficiaries regarding a plan’s or issuer’s election to implement the cost exemption?

Iwry Appointed to Treasury Post for Benefits Policy

President Obama has appointed J. Mark Iwry as Deputy Assistant Secretary for Tax Policy for Retirement and Health Policy, a new position at the U.S. Treasury Department. This position does not require U.S. Senate confirmation and Iwry has already started in this role, effective April 27. Iwry served as benefits tax counsel at the Treasury Department, overseeing employee benefits and compensation issues, from 1995 to 2001 under Secretaries Robert E. Rubin and Lawrence H. Summers.

Until his appointment, Iwry had been serving as a nonresident senior fellow in the economic studies program at the Brookings Institution. Along with William G. Gale and David C. John, Iwry led the Retirement Security Project (RSP), which conducts research and analysis to promote solutions to improve workers' retirement income. President Obama's automatic enrollment-based savings initiatives, included in his proposed Fiscal Year 2010 Budget, were based on RSP recommendations.

Prior to his government service, Iwry was an attorney in private practice, specializing in pensions, executive compensation, health care, and other employee benefits. He has been an adjunct professor at George Washington University National Law Center, chair of the D.C. Bar Employee Benefits Committee, a member of the White House Task Force on Health Care Reform, and a member and former staff director of the bipartisan Presidential Transition Study Group at Harvard's Kennedy School of Government.

Iwry is an honors graduate of Harvard College and Harvard Law School, and holds a master's degree in Public Policy from Harvard's Kennedy School of Government. Among other publications, he is a co-author of The 401(k) Handbook (Thompson Publishing, 1991) and has lectured widely on pension and employee benefits issues.