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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

Senate Finance Committee Hears Testimony, Publishes Policy Options on Health Care Reform

On May 18, Senate Finance Committee Chairman Max Baucus (D-MT) and Ranking Republican Member Charles Grassley (R-IA) released Financing Comprehensive Health Care Reform: Proposed Health System Savings and Revenue Options, a document describing the policy options for financing health care reform legislation. The document is based largely on the dialogue from the May 12 Finance Committee roundtable hearing. In this roundtable hearing, 13 witnesses participated in a dialogue with the committee (the following links will direct you to the witnesses' written testimony):

- Stuart H. Altman, Sol C. Chaikin Professor of National Health Policy at the Heller School for Social Policy and Management at Brandeis University
- Joseph R. Antos, Wilson H. Taylor Scholar in Health Care and Retirement Policy at the American Enterprise Institute
- Katherine Baicker, professor of health economics at the Harvard School of Public Health
- Leonard Burman, director of the Tax Policy Center at the Urban Institute
- Robert Greenstein, executive director, Center on Budget and Policy Priorities
- Jonathan Gruber, professor of economics at the Massachusetts Institute of Technology
- Michael F. Jacobson, executive director of The Center for Science in the Public Interest
- James A. Klein, President of the American Benefits Council
- Edward Kleinbard, former chief of staff of the Joint Committee on Taxation
- Gerald M. Shea, assistant to the president for governmental affairs of AFL-CIO
- John Sheils, senior vice president at The Lewin Group
- Gail Wilensky, senior fellow at Project HOPE
- Steven Wojcik, vice president of public policy for the National Business Group on Health

The financing policy document includes options to modify the health care income tax exclusion, under which employees are not taxed on (that is, may “exclude” from gross income) the cost of employer-provided health coverage. According to the document, "a number of options could be considered that would limit the value of employer-provided health coverage that is excludible from gross income. The limit could be based on the value of the plan or the income of the insured, or the limit could be a combination of both. Alternatively, the limit could be tied to a percentage of the value of the employer-provided health coverage." Under any and all of these options:

- The dollar amount could be indexed under one of three alternatives: (1) the per capita growth in National Health Expenditures (as calculated by the center for Medicare and Medicaid Services (“CMS”)), (2) changes in the gross domestic product (“GDP”), or (3) changes in the Consumer Price Index (“CPI”);

- Limits on the exclusion could take into account geographic variations in the cost of living, including medical costs;

- The exclusion could also be reformulated as a tax credit, a tax deduction, or a combination of a tax credit and tax deduction;

- the exclusion could be “grandfathered” for employer-provided health insurance coverage under a group health plan maintained pursuant to one or more collective bargaining agreements in effect when the change is enacted until the start of the next collective bargaining agreement; and

- the value of employer-provided health insurance coverage for an employee's taxable year could be determined as the employer-provided portion of the applicable premiums currently excludible for the taxable year for the employee determined under the rules for COBRA continuation coverage.

The document also considers other revenue-raising or -saving options, such as:

- Modification or repeal of the itemized deduction for medical expenses

- Modification or repeal of the special deduction and special unearned premium rule for Blue Cross and Blue Shield or other qualifying organizations

- Modification of health savings accounts (HSAs)(limiting contributions to the lesser of the individual’s deductible under the high deductible health plan or the dollar amount of the maximum allowable aggregate HSA contributions and increasing the additional tax on distributions from an HSA that are not used for qualified medical expenses to 20 percent)

- Modification or repeal of the exclusion for employer-provided reimbursement of medical expenses under flexible spending arrangements (FSAs) and health reimbursement arrangements (HRAs)(limiting the amount of salary reduction contributions that would be excludible from gross income or eliminating the exclusion for salary reduction contributions to a health FSA or HRA)

- Limitation of the qualified medical expense definition

- Modification of the FICA tax exemption

- Extension of the Medicare payroll tax to all state and local government employees

- Modification of the requirements for tax-exempt hospitals

- Imposition of a uniform alcohol excise tax

- Enactment of a sugar-sweetened beverage excise tax

The document also lists the components of the revenue-neutral health care reform fund proposed by the Obama Administration's Fiscal Year 2010 Budget. (These measures are detailed in Pages 272-273 of the Analytical Perspectives budget document and Pages 87-124 of the U.S. Treasury Department's General Explanations of the Administration’s Fiscal Year 2010 Revenue Proposals)

This financing document follows the release of Expanding Health Care Coverage: Proposals to Provide Affordable Coverage to All Americans. Most notably, this paper includes a section on "shared responsibility" regarding mandates for employers and employees. The options include an individual mandate along with various open enrollment periods and guaranteed issue by insurance companies. This section also discusses employer responsibility, including the possibility of a "pay or play" employer requirement, under which large employers would be obligated to provide coverage or pay an assessment to a general health fund.

The coverage document also covers additional measures to expand coverage, including:

- Insurance market reforms (including creation of a health insurance exchange, similar to the Massachusetts "connector," to facilitate enrollment by individuals)
- Making coverage affordable (including tax credits for low-income individuals and small businesses)
- Creation of a public health insurance option (through a Medicare-like plan, a third-party administrator or a state-run public option)
- The role of public programs such as Medicaid and Medicare
- Prevention and wellness
- Long-term care service and support

The committee is expected to consider these options as it develops concrete legislative proposals in the coming weeks.

Congressional Republicans Introduce Health Care Reform Bill

On May 20, 2009, Republican lawmakers in the U.S. Senate and House of Representatives unveiled health care reform legislation. The Patients' Choice Act, sponsored by Senators Tom Coburn (R-OK) and Richard Burr (R-NC) and Representatives Paul Ryan (R-WI) and Devin Nunes (R-CA) seeks to create a market- and choice-based system to ensure universal health care coverage. An official full summary, short summary and question-and-answer document are available.

Most notably, the bill eliminates the income tax exclusion for employer-sponsored health care coverage and replaces it with an advanceable and refundable tax credit of $2,300 per individual or $5,700 per family. The measure would also expand the use of Health Savings Accounts by allowing health insurance premiums to be paid by HSAs without a tax penalty, allowing preventive services to be covered by High Deductible Health Plans and increasing the amount of money HSA owners may annually contribute to their accounts.

The Patients' Choice Act also includes provisions to:

- prevent disease and promote healthier lifestyles through coordinated public investment in prevention and wellness measures;
- create affordable and accessible coverage options through reform of the private insurance market, including establishment of state health insurance exchanges, regional pooling arrangements, independent risk adjustment and standards based on the Federal Employee Health Benefit Plan;
- modernize Medicaid and Medicare;
- reduce costly medical errors by encouraging states to establish expert medical panels to resolve disputes, creation of health courts, or a combination of both; and

- improve transparency of costs and quality by creating a public/private Healthcare Services Commission and empowering the private sector to set standards on price and quality.

Burr and Coburn are members of the Senate Committee on Health, Education, Labor and Pensions. Ryan and Nunes are members of the House Ways and Means Committee. Each of these committees shares jurisdiction over health care matters and the Democratic leaders of these committees are expected to introduce their own health care reform proposals soon.

Tax Equity Legislation Introduced in House, Senate

Members of the U.S. Senate and House of Representatives have introduced the Tax Equity for Health Plan Beneficiaries Act of 2009, legislation to extend the tax exclusion from gross income for employer-provided health coverage – currently provided for employees' spouses and dependent children – to coverage provided to other eligible designated beneficiaries of employees. This legislation will most directly serve workers whose domestic partners or adult children are covered by the employee’s employer-sponsored health plans.

The legislation, which is identical in both chambers, was introduced in the Senate (S. 1153) by Charles Schumer (D-NY), a senior member of the tax-writing Senate Finance Committee, and in the House (H.R. 2526) by Representative Jim McDermott (D-WA), a senior member of the tax-writing House Ways & Means Committee. The bills would revise the tax treatment of health coverage for employees’ non-spouse, non-dependent beneficiaries for the purposes of employer-provided health insurance, the self-employed deduction for health premiums, pre-tax cafeteria plan elections, voluntary employees’ beneficiary associations, account-based health plans (such as health reimbursement arrangements, health flexible spending arrangements or health savings accounts) and payroll tax obligations. This legislation does not impose any mandates on employers and would extend the beneficial tax treatment only to those beneficiaries eligible under the employer plan. Official summaries of both bills (S. 1153/H.R. 2526) and a written example of the issue are available.

Shareholder Bill of Rights Introduced

Senators Charles Schumer (D-NY) and Maria Cantwell (D-WA) recently introduced the Shareholder Bill of Rights Act, which would amend the Securities Exchange Act of 1934 to address "a widespread failure of corporate governance" through separate shareholder approval of executive compensation, shareholder input in board elections, and corporate governance standards for public companies.

Specifically, the bill would:

- require annual votes by stockholders on executive compensation;
- grant stockholders a new right to include their own director nominees in the corporation's proxy statement;
- end the practice of "staggered boards" at all companies, under which a portion of the board is elected each year;
- require that all directors receive a majority of votes cast to be elected; and
- require public companies to split the CEO and board chair positions.

Senate Aging Committee Discusses PBGC Deficit

At a recent Senate Special Aging Committee Hearing, No Guarantees: As Pension Plans Crumble, Can PBGC Deliver? Acting Pension Benefit Guaranty Corporation (PBGC) Director

Vince Snowbarger revealed that the agency's Fiscal Year 2009 deficit has reached $33.5 billion. In his written testimony, Snowbarger asserted that "the increase in the PBGC's deficit is driven primarily by a drop in interest rates and by plan terminations, not by investment losses. The PBGC has sufficient funds to meet its benefit obligations for many years because benefits are paid monthly over the lifetimes of beneficiaries, not as lump sums. Nevertheless, over the long term, the deficit must be addressed."

Committee Chairman Herb Kohl convened the hearing, by stating "The Committee has grave concerns about the agency's viability, especially in light of a report released last week by the PBGC Inspector General questioning whether the agency currently has effective financial oversight."

The hearing also featured testimony from:

- Dallas L. Salisbury, president and CEO of the Employee Benefit Research Institute, who focused on the significant effects of artificially low interest rates on the calculation of both the PBGC deficit and the liabilities of employer-sponsored defined benefit plans;
- Barbara Bovbjerg, director of education, workforce and income security at the U.S. Government Accountability Office, who criticized both the diversified investment strategy initiated in 2008 and the recent legislative relief provided to defined benefit plan sponsors;
- Rebecca Anne Batts, PBGC inspector general, who detailed the recent investigation of former PBGC director Charles E.F. Millard regarding possible conflicts of interest during his tenure.

Millard appeared before the committee briefly, declining to answer any and all questions from the committee, citing the ongoing investigation.

The PBGC announcement could influence additional defined benefit plan funding relief. Much of the opposition to relief has been based on concerns about the agency's present-day financial standing – despite the long-term nature of its future obligations. More deference could be paid to those concerns as legislation is considered by Congress, by limiting the availability of relief or by adding conditions to the use of relief.

Mandatory Sick Leave Legislation Introduced

On May 19, Representative Rosa DeLauro (D-CT) introduced the Healthy Families Act (H.R. 2460), a bill that would allow workers at medium-sized businesses to earn paid sick time for themselves and their families. Under the bill, individuals are entitled to up to 56 hours (7 days) of paid sick time. Workers would earn 1 hour of paid sick time for every 30 hours worked.

Employers that already provide this leave presumably would not have to change their current policies, as long as their existing leave can be used for the same purposes described in the bill. Small employers with fewer than 15 employees would be exempt. Employers can require workers to provide documentation supporting any request for leave longer than 3 consecutive days.

The bill also confers a private right of action to recover damages or equitable relief in both federal and state courts. Damages equal to wages, salary, employee benefits or "other compensation" may be recovered or any actual monetary losses sustained as a result of any violation (up to a sum equal to 56 hours of wages or salary) can be recovered, plus interest and liquidated damages and equitable relief.

Mandated sick leave could have far-reaching implications or establish a precedent for other employee benefits.

RECENT REGULATORY ACTIVITY

IRS Proposes Regulations for Safe Harbor Plan Reduced or Suspended Contributions

The Internal Revenue Service (IRS) has issued proposed regulations regarding suspension or reduction of safe harbor nonelective contributions relating to certain cash or deferred arrangements and matching contributions under 401(k) and 403(b) plans.

The proposed regulations would amend Sections 1.401(k)–3 and 1.401(m)–3 of the Internal Revenue Code to permit an employer sponsoring a safe harbor plan described in section 401(k)(12) or 401(k)(13) that incurs a substantial business hardship (comparable to a substantial business hardship described in Section 412(c) of the tax code) to reduce or suspend safe harbor nonelective contributions during a plan year. These proposed regulations would provide an employer an alternative to the option of terminating the employer's safe harbor plan in such a situation. There is a 30-day advance notice requirement and a requirement that employees be allowed to change their salary deferral elections in order to take advantage of the new rules.

The proposed regulations would allow for the reduction or suspension of safe harbor nonelective contributions under rules generally comparable to the provisions relating to the reduction or suspension of safe harbor matching contributions. Under these rules, a plan that reduces or suspends safe harbor nonelective contributions will not fail to satisfy section 401(k)(3), provided that:

1. All eligible employees are provided a supplemental notice of the reduction or suspension;
2. the reduction or suspension of safe harbor nonelective contributions is effective no earlier than the later of 30 days after eligible employees are provided the supplemental notice and the date the amendment is adopted;
3. eligible employees are given a reasonable opportunity (including a reasonable period after receipt of the supplemental notice) prior to the reduction or suspension of the safe harbor nonelective contributions to change their cash or deferred elections and, if applicable, their employee contribution elections;
4. the plan is amended to provide that the actual deferral percentage (ADP) test will be satisfied for the entire plan year in which the reduction or suspension occurs, using the current year testing method; and
5. the plan satisfies the safe harbor nonelective contribution requirement with respect to safe harbor compensation paid through the effective date of the amendment.

The proposed regulations would also provide that the supplemental notice requirement is satisfied if each eligible employee is given a notice that explains:

1. The consequences of the amendment reducing or suspending future safe harbor nonelective contributions;
2. the procedures for changing cash or deferred elections and, if applicable, employee contribution elections; and
3. the effective date of the amendment.

The proposed regulations would further provide that these same rules that apply to safe harbor plans under Section 1.401(k)–3 also apply to safe harbor plans under Section 1.401(m)–3, except that the plan must be amended to provide that the actual contribution percentage (ACP) test will be satisfied for the entire plan year in which the reduction or suspension occurs using the current year testing method. Because the reduction or suspension of safe harbor contributions can be effective no earlier than the later of 30 days after the notice is provided to all eligible employees and the date the amendment is adopted, an employer that wants to reduce or suspend safe harbor contributions during a year could not implement this change by adopting the amendment at the end of the plan year. In addition, a plan that is amended during the plan year to reduce or suspend safe harbor contributions (whether nonelective contributions or matching contributions) must prorate the otherwise applicable compensation limit under section 401(a)(17) in accordance with the requirements of § 1.401(a)(17)–1(b)(3)(iii)(A). Furthermore, a plan that is amended to reduce or suspend safe harbor contributions is no longer a plan described in section 401(k)(12), 401(k)(13), 401(m)(11), or 401(m)(12) for the entire plan year. Accordingly, such a plan is not described in section 416(g)(4)(H) and, thus, will be subject to the top-heavy rules under Section 416.

The regulations would be effective for amendments adopted after May 18, 2009, but taxpayers may rely on the proposed regulations for guidance pending the issuance of final regulations. If, and to the extent, the final regulations are more restrictive than the guidance in these proposed regulations, those provisions of the final regulations will be applied without retroactive effect.

The IRS is soliciting comments on the proposed regulations. Written or electronic comments must be received by August 17. Requests to testify at a September 23 public hearing on this topic must be received by August 19.

IRS Releases New Indexed Amounts for HDHPs

The U.S. Treasury Department and Internal Revenue Service (IRS) released Revenue Procedure 2009-29, which lists the new indexed amounts, adjusted for inflation, for high-deductible health plans (HDHPs). The following table lists the 2009 amounts and the new 2010 amounts:

	Calendar Year 2009		Calendar Year 2010	
	Self-only	Family	Self-only	Family
Annual Contribution Limit	$3,000	$5,950	$3,050	$6,150
HDHP Minimum Deductible	$1,150	$2,300	$1,200	$2,400
HDHP Out-of-Pocket Limit (includes deductibles, co-payments and other amounts but not premiums)	$5,800	$11,600	$5,950	$11,900

The Revenue Procedure is effective for calendar year 2010.

IRS Issues Guidance on Additional Pension Plan Withholding

On May 14, the Internal Revenue Service (IRS) released Notice 1036p, providing information allowing additional income tax withholding in conjunction with employee pension distributions. The guidance specifically provides an optional procedure and updated tables for employers making pension payments which can be used to offset withholding reductions in the February 2009 wage withholding and advance earned income credit payment tables that reflect the "Making Work Pay" tax credit.

In accordance with the "Making Work Pay" tax credit, enacted under the American Recovery and Reinvestment Act (ARRA), the Internal Revenue Service (IRS) issued as well as the explanatory Publication 15-t, which confirmed that these tables apply to pension benefits as well as earned income. However, retirees may be subject to under-withholding (and therefore additional, unexpected year-end tax liability) under the prescribed withholding tables.

In Notice 1036p, the IRS suggests that plans that had received new directions from retirees to withhold additional amounts (prior to the issuance of Notice 1036p) should seek confirmation from retirees that they want to continue having the additional amounts withheld.

DOL Releases Form for Expedited Review of Denial of COBRA Premium Subsidy

The U.S. Department of Labor (DOL) recently updated its COBRA ARRA webpage with information on application for review of denial of the COBRA premium reduction (recently provided under the American Recovery and Reinvestment Act (ARRA)) and the application form to be used by individuals requesting expedited review. 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.

Under ARRA, employees may appeal an employer's denial of a request for the COBRA premium reduction. DOL will review appeals related to private-sector employer plans and HHS will review appeals for federal, state, and local governmental employees as well as appeals related to group health insurance provided pursuant to state continuation coverage laws. Individuals requesting a review must submit an application form. DOL is required to make a determination within 15 days business days of receipt of a properly completed request for review.

The form includes 10 questions to determine subsidy eligibility and lists the documentation that could assist the DOL in making a determination, including the applicant's COBRA election notice, a “Request for Treatment as an Assistance Eligible Individual” or other form used to request the premium reduction, insurance card, payroll stubs, any documentation detailing the date and circumstances of the termination of the employee's employment, or any documentation the applicant was provided regarding the denial of the premium reduction.

DOL Again Delays Effective Date of Investment Advice Regulations

According to a May 21 news release published on the U.S. Department of Labor (DOL) Web site, the Employee Benefits Security Administration (EBSA) will soon publish a notice further extending the applicability and effective dates of the final investment advice regulations under the Pension Protection Act of 2006 (PPA) to Nov. 18, 2009. The final regulations were initially published on January 21 but the effective date was subsequently changed from March 23 to May 22.

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 was reopened.

As reported in a previous edition, Representative Rob Andrews (D-NJ) has introduced the Conflicted Investment Advice Prohibition Act (H.R. 1988), a bill to replace the ERISA investment advice provisions originally enacted within 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.)

Group Pension Funding Letter Sent to Treasury

On May 8, a letter with more than 200 company signatures was sent to U.S. Treasury Secretary Timothy Geithner urging regulatory action on issues critical to defined benefit pension plan funding.

The letter expresses gratitude for the guidance already provided in the Winter 2009 Internal Revenue Service (IRS) newsletter for employee retirement plans and urges two additional regulatory actions: (1) Companies should be permitted to make new interest rate elections for plan years beginning in 2010 and (2) the funding regulations should not be effective until plan years beginning after December 31, 2009.

The accelerated funding requirements included in the Pension Protection Act and the market driven declines in pension asset values have resulted in extreme and unanticipated jumps in upcoming pension obligations. While some legislative and regulatory relief has been provided, 2009 obligations still present a challenge for many employers and companies are now preparing for large 2010 obligations as well.

IRS Extends Election Deadline for Multiemployer Plans

The Internal Revenue Service (IRS) has issued Notice 2009-42, providing an extension for multiemployer plans to make a defined benefit plan funding election under sections 204 and 205 of the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA). 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 that 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 IRS Notice 2009-31: Election and Notice Procedures for Multiemployer Plans under Sections 204 and 205 of WRERA, an election under Section 204 was to have been made "by the later of April 30, 2009 and the date that is 30 days after the due date of the annual certification of section 432 status for the election year." Plan sponsors were not required to make an election under Section 205 prior to April 30, 2009, even if they had already adopted a funding improvement plan, rehabilitation plan or update so long as it was made before the end of the plan year.

Notice 2009-42 substitutes "June 30, 2009" for "April 30, 2009" for elections under sections 204 and 205 of WRERA.

Obama Administration Budget Update: Latest Documents Issued; Treasury Releases "Green Book"

As expected, the Obama Administration completed its rollout of the Fiscal Year 2010 Budget on May 11, releasing the summary tables, which show aggregate budget projections for the next 10 years; historical tables, which illustrates budget data over the last century; and Analytical Perspectives, which provides a detailed discussion of certain budget concepts and Administration policies. The Analytical Perspectives document, in particular, discusses the budgetary impact of recent legislation such as the American Recovery and Reinvestment Act of 2009 (the stimulus bill) and the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act Of 2008.

Also on May 11, the U.S. Treasury Department released its General Explanations of the Administration's Fiscal Year 2010 Revenue Proposals document, commonly known as the "green book." For each tax proposal in the budget, the Green Book provides an explanation of current law, the reason for the change, the proposal and an estimate of the revenue impact of the proposed change.

Collectively, these documents provide an important basis for the discussion that will ensue around a number of benefits proposals that might be considered in the coming months. Among the key items discussed by these documents:

Savers Credit (Page 266 of Analytical Perspectives, Pages 6-7 of Green Book): These documents do not use identical language, but they appear to update the existing Savers Credit to provide a 50 percent match on a maximum contribution of the first $500 (for individuals) or $1,000 (for families) contributed to a qualified plan or IRA, indexed for inflation.

- The credit would be fully available up to $65,000 adjusted gross income for families.
- The match would be "deposited automatically in the qualified retirement plan account or IRA to which the eligible individual contributed," which would likely require qualified plans to implement systems and processes allowing them to take these matching contributions.
- This provision would be effective December 31, 2010 and apply starting in 2011.
- This proposal aligns with the Savings for American Families' Future Act (H.R. 1961, introduced in the House of Representatives by Representative Earl Pomeroy).

Automatic Payroll Deduction IRAs (Page 266 of Analytical Perspectives, Pages 7-9 of Green Book): Any company in business for at least two years that has 10 or more employees and does not sponsor a qualified plan would be required to implement automatic payroll deduction IRAs.

- The requirement would not apply to employers who simply exclude employees permitted under statutory exclusions (i.e., eligibility period, under age 18, collectively bargained, etc.) but would apply if the employer's exclusion goes beyond the statutory exclusion (for example, if an employer excludes a division or a subsidiary).
- Employees of employers required to have the payroll deduction IRAs would be enrolled at 3 percent unless they provide written participation elections.
- The employer can designate a single IRA custodian or allow participants to choose their IRAs, or send contributions to a savings vehicle specified by statute or regulation. A standard, low-cost default investment and a handful of standard, low-cost investment alternatives would be prescribed by statute or regulation.
- According to the Green Book, there would be "no employer liability or responsibility for determining employee eligibility to make tax-favored IRA contributions" or for opening IRAs for employees (a national Web site would be created to provide information to employees). Employers implementing payroll deduction IRAs (even those not required to do so) would receive a credit of $25 per employee up to $250 each for the first two years.
- The background information for the proposal states that it would allow employers to assist employees in retirement savings "without employer contributions or plan qualification or ERISA compliance" with "costs minimized, through a standard default investment as well as electronic information and fund transfers. Workplace retirement savings arrangements made accessible to most workers also could be used as a platform to provide and promote retirement distributions annuitized over the worker's lifetime."

- In justifying the legislative change, the document notes “Workplace retirement savings arrangements made accessible to most workers also could be used as a platform to provide and promote retirement distributions annuitized over the worker’s lifetime,” which confirms the Obama Administration’s interest in annuitization issues.

- According to these documents, there does not seem to be a requirement (suggested in previous budget documents) requiring employers to implement automatic enrollment for existing qualified plans.

- The provision for automatic payroll deduction IRAs is effective January 1, 2012.

Health Reform Reserve Fund (Page 272-273 of Analytical Perspectives, Pages 87-124 of Green Book): The budget documents also include a section on developing a revenue-neutral fund to defray the expected cost of comprehensive health care reform legislation. Treasury identifies the following revenue-raising measures:

- A limitation on the tax rate at which itemized deductions reduce tax liability to 28 percent,

- Reduction in the tax gap (the difference between the amount owed under the tax law and the amount actually paid on time) and improved compliance;

- Reforms to close tax loopholes; and

- Modification of the alternative fuel mixture credit.

RECENT JUDICIAL ACTIVITY

Second Circuit Appeals Court Dismisses 401(k) Statute of Limitations Case

The Second Circuit Court of Appeals issued a summary order on May 6 dismissing the plaintiff's lawsuit in *Young, et. al. v. General Motors Investment Management Corporation*. This case relates to single stock funds and the relationship of plan disclosures to ERISA’s statute of limitations for fiduciary breach claims (the earlier of six years from last breach of fiduciary duties or three years from actual knowledge of the breach). The plaintiffs had claimed that the provision of disclosure by the employer does not constitute “actual knowledge” on the part of the participant (which dictates the reference point for the statute of limitations).

On March 24, 2008, the U.S. District Court for the Southern District of New York dismissed the case, after which the decision was appealed to the Second Circuit. An amicus (“friend of the court”) brief was filed in support of the defendant, asserting that statutes of limitations are not mere “technicalities,” and are “fundamental to a well ordered judicial system” (as previously stated by the U.S. Supreme Court). The brief furthermore argues that the case demonstrates the need for a meaningful statute of limitations with respect to ERISA retirement plans. The U.S. Department of Labor (DOL) also weighed in on the case, arguing that plan disclosures establish only “constructive knowledge” and that plan participants need to have access to more information for “actual knowledge” of what the DOL calls “complex” legal claims. They also argue that participants should not be presumed to have read the documents and that the plaintiffs have continuing violation claims.

In its order, the appeals court declined to rule on the statute of limitations issue and instead affirmed the lower court's ruling on the "alternative grounds" that plaintiffs failed to state a claim about the "single equity" funds or the plan fees.