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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

PLEASE NOTE: The legislative stories below were accurate as of press time but may have been subsequently charged or updated as a result of ongoing congressional action. The WEB Benefits Insider will follow up on these issues and provide a comprehensive update in the August Issue.

Healthcare Reform Update: House of Representatives

On June 19, the leaders of the House of Representatives committees with jurisdiction over health care reform – the Ways and Means Committee, the Education and Labor Committee and the Energy and Commerce Committee – released **a discussion draft of health care reform legislation**.

The House bill addresses the following key topics:

- *Access to Coverage and Choice:* the measure establishes a national health insurance exchange with a public health insurance option, provides for insurance market reforms including guaranteed issue, and directs a new independent advisory committee to recommend a benefits package that will serve as the basic benefit package for coverage in the exchange and over time will become the quality standard for employer plans.

- *Affordability:* the measure provides sliding scale affordability credits (phasing out at 400 percent of the federal poverty level), expands Medicaid to individuals and families with incomes below 133 percent of the federal poverty level and caps total out-of-pocket spending.

- *Shared Responsibility:* the measure includes an individual mandate for most Americans and an employer pay-or-play mandate under which employers will have the option of providing health insurance coverage for their workers or contributing a percentage of their payroll. (The draft text lists this contribution as eight percent of payroll but the official bill summary lists the contribution as six percent of payroll.)

- *Prevention and Wellness:* the measure expands community-based programs to deliver prevention and wellness services and initiates new data collection efforts to better identify and address racial, ethnic, regional and other health disparities.

- *Workforce Investments:* the measure includes increased funding to the Increases to the National Health Service Corporation and extends outreach and education to individuals going into health professions including primary care, nursing and public health.

- *Controlling Costs:* the measure reforms Medicare to reward quality, efficient care, authorizes new tools to address waste, fraud and abuse within the entire health care system and attempts to streamline administrative burdens.

The Energy and Commerce Committee held several days of hearings on the comprehensive health reform discussion draft with testimony from the federal government, the medical and provider communities, employers and employees and the views of insurers, including testimony from U.S. Health and Human Services Secretary Kathleen Sebelius.

The full Education & Labor Committee also held a hearing on the "tri-committee" draft proposal for health care reform. The hearing covered a wide variety of topics, including the potential for cost-shifting resulting from a public plan option, the unintended consequences of an employer pay-or-play mandate, methods for achieving higher quality outcomes, the use of comparative effectiveness research and possible tax consequences of health care reform. All witnesses' written testimony is available on the hearing Web site.

The House Ways and Means Committee also held a hearing on Health Reform in the 21st Century: Proposals to Reform the Health System, with testimony from employer, employee and medical provider advocacy groups.

Healthcare Reform Update: Senate Committee on Health, Education, Labor and Pensions

On June 9, the Senate Committee on Health, Education, Labor and Pensions (HELP) released legislative text of the American Health Choices Act. The 615-page bill includes issues of quality, fraud and abuse, wellness, health care workforce and disability/long-term care. The bill as originally unveiled did not include a public plan option or an employer "pay-or-play" mandate. An official section-by-section narrative summary of the bill, including various policy options, is now available.

The bill as released also did not include financing measures, such as a reduction or elimination of the tax exclusion for employer-provided coverage, since the HELP committee does not have jurisdiction over the tax code. Changes in the employee tax exclusion and other financing options are still under active consideration by the Senate Finance Committee, however, which does have jurisdiction over the tax code and is expected to release its own health reform proposals.

The HELP committee has released more detailed section-by-section summaries of Titles II, III, V and VI of its legislation. These summaries are:

- Title II: Improving the Quality and Efficiency of Health Care
- Title III: Improving the Health of the American People
- Title V: Preventing Fraud and Abuse
- Title VI: Improving Access to Innovative Medical Therapies

With regard to both the Senate and House of Representatives proposals, the Kaiser Family Foundation has created a useful resource, the side-by-side comparison tool, on its health reform gateway page. This resource includes detailed summaries of various comprehensive health reform legislation proposals on a number of different subjects.

Comparative Effectiveness Research Bill Introduced

Senators Max Baucus (D-MT), Chairman of the Senate Finance Committee, and Kent Conrad (D-ND), who also serves on the Finance Committee, introduced the Patient-Centered Outcomes Research Act (S. 1213). This measure would establish the Patient-Centered Outcomes Research Institute to undertake comparative effectiveness research with the mission of generating evidence for physicians and patients on effective treatments of diseases, disorders and other health conditions. It is likely that this measure will be included with the committee's eventual comprehensive health care reform proposal.

The institute would:

- establish a national agenda of research priorities based on current conditions and expenditures;
- contract with the Agency for Healthcare Research and Quality (AHRQ) and other appropriate federal and private entities to conduct research, including systematic reviews, observational studies, clinical trials, and randomized controlled trials; and

- establish an expert methodology committee that is charged with developing methodological standards and examining whether scientifically valid methods exist for including cost and health plan design factors in comparative effectiveness studies.

The institute would be governed by a multi-stakeholder Board of Governors including the Secretary of Health and Human Services (HHS), the Directors of AHRQ and the National Institutes of Health (NIH), and 18 additional members – appointed by the U.S. Comptroller General – representing diverse public and private sector expertise and interests, with at least one member representing employers who self-insure employee benefits.

The institute would be funded through a Patient-Centered Outcomes Research Trust Fund, which would in turn be funded through the appropriations process. The legislation sets out a funding schedule of $10 million in fiscal year 2010, $50 million in fiscal year 2011 and $150 million in fiscal year 2012. For fiscal years 2013 through 2019, the appropriations schedule calls for $150 million as well as revenues received through fees on health insurance and self-insured plans.

Healthcare Reform Update: The Joint Committee on Taxation

In a related matter, the Joint Committee on Taxation sent a June 2 letter to Senate Finance Committee leaders explaining the estimated revenue effects of various tax-related health care reform financing proposals including a possible cap on the income tax exclusion for employer-provided health care coverage.

The estimate concludes that capping the income exclusion for employer-provided benefits on individuals with an adjusted gross income of more than $100,000 (or $200,000 for married couples) would raise $161 billion over 10 years. Expanding the cap to include all workers regardless of income, the tax would raise $418.5 billion over 10 years. Both estimates assume a cap equal to the value of the Federal Employees Health Benefit Plan (FEHBP) standard option and assume that the cap will be indexed to the per-capita medical cost growth index after 2010.

The committee also estimated the revenue effect of a tax on 50 percent of the premium amount, without an income cap. This would raise nearly $1.2 trillion over ten years.

The committee also estimated the revenue effect of other tax changes:

- Repealing the itemized deduction for medical expenditures above 7.5 percent of adjusted gross income would raise approximately $180 billion over 10 years;
- Repealing the exclusion for health expenditures made through Flexible Savings Accounts and Health Reimbursement Accounts would raise nearly $69 billion over ten years;
- A new federal excise tax of three cents per 12 ounces of sugar-sweetened beverage would raise more than $51 billion over ten years; and
- An increase in the excise tax to $16 per proof gallon on all alcoholic beverages would raise more than $61 billion over ten years.

The estimate acknowledges that "each of these proposals would result in a reduction in the number of people receiving employer sponsored insurance, ranging from 10-12 million people losing employer coverage due to a full repeal of the exclusion to fewer than one million people losing employer coverage if the exclusion is capped only for higher income people."

Congressional Budget Office (CBO) Releases Tentative Cost Estimate

On June 15, the nonpartisan Congressional Budget Office (CBO) released a tentative cost estimate of the "coverage" portions of the Senate HELP Committee's American Health Choices

Act (Title I, Subtitle A through D). According to the CBO, the bill would cost in excess of $1 trillion over ten years and "at the same time, the number of people who had coverage through an employer would decline by about 15 million (or roughly 10 percent), and coverage from other sources would fall by about 8 million, so the net decrease in the number of people uninsured would be about 16 million."

However, it is important to note that the calculations do not take into account certain provisions not yet included in the bill text as introduced, such as Medicaid expansion up to 150 percent of the federal poverty limit, a public health insurance option, employer mandates, the federal government's administrative costs of implementing the proposal, the costs of establishing and implementing the "gateways" and the effects on spending for other federal programs. Once these provisions are added to the legislation, it is likely to increase the expected number of insured individuals and will almost certainly add significantly to the bill's revenue cost.

On June 16, CBO also released a letter to Senate Budget Committee Chairman Kent Conrad (D-ND) and Ranking Member Judd Gregg (R-NH) responding to their request for information about the features of health care reform proposals that would affect federal spending on health care over the long term. The letter indicates that the federal government's current budgetary commitments to health care total more than $1 trillion in 2009 and proposals to significantly expand health insurance coverage would add to federal costs could permanently boost the government's budgetary commitments to health care by nearly 10 percent. The CBO also speculates on possible initiatives to lower the budgetary impact of health care. "Large reductions in spending will not actually be achieved without fundamental changes in the financing and delivery of health care. The government could spur those changes by transforming payment policies in federal health care programs and by significantly limiting the current tax subsidy for health insurance."

Council of Economic Advisers (CEA) Issues Health Care Reform Analysis

On June 2, the Obama Administration's Council of Economic Advisers (CEA) issued an analysis entitled "The Economic Case for Health Care Reform", projecting that health reform would have a positive impact on economic growth, family income, the federal deficit and the unemployment rate. The CEA concluded that the current path of health expenditures is not sustainable and, left unchecked, "threatens to have a devastating impact on the growth of workers' take-home pay and the government budget deficit." Also, the report concludes that successful health reform would result in "a dramatic impact on the trajectory of health care expenditures as a share of GDP over time" if the projected rate of growth in the nation's cumulative health care spending can be reduced by 1.5 percentage points per year. According to the report, other benefits of well-structured health reform include: a reduction in job-lock, an increase in the labor supply, and promotion of the creation and competitiveness of small businesses.

The report includes a chapter on "Key Elements of Successful Health Reform", which broadly discusses initiatives needed to slow the growth in health care spending and expand coverage. These proposals are largely through initiatives that have previously been embraced by the Obama Administration and are widely expected to be included in the eventual health reform legislation considered by Congress. For example, in order to slow the growth in health spending, the report embraces concepts such as: reorienting payments to health care providers to reward value rather than volume in health care services; reducing fraud and abuse; giving patients incentives to lead healthier lifestyles and seek lower cost, higher quality treatment options; and expanding performance measurement and reporting to allow consumers to make better decisions about quality health care. Coverage expansion concepts include: establishing health insurance exchanges to facilitate the purchase of coverage in the individual and small group markets; providing subsidies to make health coverage more affordable for lower-income individuals and families; and reforming health insurance rules to require guaranteed issue insurance products, eliminate pre-existing condition exclusions and impose limits on rating.

House Committee Approves 401(k) Fee, Investment Advice Legislation with Pension Funding Relief

On June 24, the House of Representatives Education and Labor Committee approved the 401(k) Fair Disclosure and Pension Security Act of 2009 (H.R. 2989) by a vote of 29 to 17. H.R. 2989 is a combination of the 401(k) Fair Disclosure for Retirement Security Act (H.R. 1984) and the Conflicted Investment Advice Prohibition Act (H.R. 1988), each approved by the Health, Employment, Labor and Pensions Subcommittee on June 17, and includes important defined benefit pension funding relief measures.

The defined benefit pension funding relief provisions include:

- A provision that would require employers to pay interest on their plans' 2008 losses for two years, to prevent the plans' shortfall from growing, but seven-year amortization of those losses would not commence until the expiration of those two years (the so-called "two plus seven" rule);

- A change in interest rate elections for plan years beginning in 2010 without approval (so that plans are not locked into any spot yield curve election made for 2009);

- Assurance that final regulations under Internal Revenue Code Sections 430 and 436 (funding requirements and benefit restrictions) will be effective no earlier than plan years beginning after December 31, 2009, and a reasonable interpretation standard will apply before the effective date;

- Clarification that technical corrections to the PPA did not require plan investment expenses to become a current-year cost (by changing "plan-related expenses" to "plan-related administrative expenses");

- A requirement that plans report to the Pension Benefit Guaranty Corporation if a plan has underfunding of at least $50 million or is less than 80 percent funded (adding back in the pre-PPA provision effective for years beginning after 2009); and

- For multiemployer plans, extend the rehabilitation period and the funding improvement period by 5 years.

The two-plus-seven rule was added to the bill during debate as an amendment offered by Representative Brett Guthrie (R-KY). The amendment as originally introduced included a temporary expansion of the "smoothing" corridor from 10 to 20 percent of fair market value. This corridor provision was eliminated from the amendment in an agreement between Guthrie and committee leadership.

As previously reported, the measure provides 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.

The bill would also replace the ERISA investment advice provisions originally enacted as part of the Pension Protection Act of 2006 (PPA). While the version of legislation approved by the HELP subcommittee included language that validated investment advice arrangements under Sun America and other pre-PPA advisory opinions, this important language was not included in the bill approved by the full committee.

The House Ways and Means Committee shares jurisdiction over retirement plan issues in the House of Representatives, though that committee has not scheduled consideration of H.R. 2989 or the Defined Contribution Plan Fee Transparency Act (H.R. 2779), sponsored by Ways and Means Committee member Richard Neal (D-MA) (see story, below).

Neal Introduces 401(k) Fee Disclosure Legislation

Representative Richard Neal (D-MA) has formally reintroduced the Defined Contribution Plan Fee Transparency Act (H.R. 2779), legislation to increase disclosure of defined contribution plan information between service providers, plan sponsors and plan participants. An official summary of the legislation is available. Neal, who sits on the U.S. House of Representatives Ways and Means Committee, had introduced a similar bill (H.R. 3765) in 2007. Neal's office has also prepared a document explaining the revisions made to H.R. 2779.

H.R. 2779 would amend the Internal Revenue Code to require certain disclosures by plans to participants and by service providers to plan administrators and impose taxes for failure to comply. The bill would apply to all tax-preferred, participant-directed defined contribution plans, including 401(k) plans, 403(b) plans and governmental 457(b) plans. Since H.R. 2779 would address defined contribution plan fee disclosure entirely through the tax code, it is entirely within the purview of the Ways and Means Committee. In contrast, the 401(k) Fair Disclosure for Retirement Security Act (H.R. 1984), introduced by House Education and Labor Committee Chairman George Miller (D-CA), addresses defined contribution plan fee disclosure through ERISA and is therefore under the jurisdiction of the House Education and Labor Committee.

With regard to disclosure by plan sponsors to participants, the bill requires employers to provide employees with disclosure notices regarding plan investments and fees at enrollment and annually with account specific information required quarterly – Neal's previous bill had only required enrollment and annual notices. The enrollment and annual notice would disclose the key characteristics of each investment option – including risk and return characteristics and any applicable fees – among other features. Accompanying the disclosure would be a statement that participants should not select investments based solely on fees but based on careful consideration of a range of factors. The quarterly notices would provide participants with information about the investments selected and the fees applicable to their accounts. This quarterly notice would describe and detail the participant's investment choices, as well as any asset-based or other fee charges to the account, but would not require actual dollar figures for fees charged as a percentage of assets (basis points). Failure to comply would result in a tax of $100 per day per failure with annual exposure capped at $500,000 or 10 percent of plan assets, whichever is lower. Unlike H.R. 1984, H.R. 2779 does not mandate the inclusion of an index fund, does not require monetization of participant investment expenses and requires somewhat less voluminous information to be provided to participants.

With regard to disclosures by plan service providers, the legislation would require them to provide certain fee information to plan administrators in advance of a contract for plan services. Providers would be required to give the employer an estimate of total fees and a detailed and itemized list of all the services to be provided under the contract. Charges for multiple bundled services would need to be separated into charges for: (1) investment management, and (2) administration and recordkeeping. Estimates can be used to make a reasonable allocation between categories. Providers would be required to disclose any payments made to, or received from, third parties as well as information on any benefits derived from offering proprietary or third-party investment products and whether investment products offered to the plan are available at other price levels. The detailed disclosure statement would need to be provided to employers every year and prior to any material modification to the contract. Employers would be required to make the notice available to participants upon written request. Failure to provide the proper notice to plan administrators would result in a tax of $1,000 a day per failure with annual exposure capped at $1,000,000 or 10 percent of plan assets, whichever is lower. Notably, H.R. 2779 includes permitted reliance on third-party information by both plan administrators and service providers and directs Treasury to develop safe harbor methods for bundled service providers to provide disaggregated service pricing.

Fees that are charged and disclosed on a percentage-of-assets basis must be accompanied by an example that translates the asset charge into a dollar amount. Both the $100 per day and $1,000 per day penalties can be avoided for inadvertent failures that occur despite reasonable diligence, if the failures are corrected within 90 days of knowledge of the failure. Treasury can also waive part or all of the tax. The bill also promotes electronic delivery of notices by directing Treasury to adopt a "post and push" regime under which all Internal Revenue Code retirement plan notices (not just the fee notices under the bill) can be posted electronically and then a communication provided to participants that the notice is available.

Annuity Incentive Legislation Introduced

Representatives Earl Pomeroy (D-ND) and Ginny Brown-Waite (R-FL) introduced the Retirement Security Needs Lifetime Pay Act (H.R. 2748), legislation to encourage retirees to receive some of their retirement savings in the form of guaranteed lifetime income payments. Pomeroy introduced similar legislation in the previous Congress. An official summary of the bill is also available.

To encourage use of annuities, the bill would:

- Exclude from income taxation, in the case of non-qualified annuities, 50 percent of the otherwise taxable portion of lifetime income payments, subject to a maximum annual exclusion of $10,000 per tax return;
- Exclude from income taxation, in the case of annuities paid out from qualified plans and IRAs, 25 percent of the otherwise taxable portion of lifetime income payments, subject to a maximum annual exclusion of $5,000 for an individual return and $10,000 for a joint return;
- Exclude the value of longevity insurance from amounts subject to required minimum distributions; and
- Clarify the income tax treatment of partial annuitizations so that the annuity payments resulting from a partial annuitization would be eligible for exclusion ratio treatment.

Because the bill's tax provisions would entail a significant federal revenue loss, it is unlikely that H.R. 2748 will receive consideration during this session of Congress.

Senate Aging Committee Discusses Long-Term Care, Legislation Introduced

The U.S. Senate Special Committee on Aging held the hearing Boon or Bane? Examining the Value of Long-Term Care (LTC) Insurance. In an opening statement, Committee Chairman Herb Kohl (D-WI) said, "We have a duty to make sure these policies, which may span many decades, are financially viable. This afternoon we will discuss how we can best protect these policyholders." He specifically cited a June 30, 2008, Government Accountability Office report, Long-Term Care Insurance: Oversight of Rate Setting and Claims Settlement Practices, which reported inconsistencies in nationwide rate-setting standards.

In conjunction with the hearing, Kohl (D-WI) and fellow committee member Ron Wyden (D-OR) introduced the Confidence in Long-Term Care Insurance Act (S. 1177). According to a news release, the bill would:

- Strengthen consumer protections with respect to premium rate stability, market disclosures, and training and certification of agents;
- Enable consumers to easily and accurately compare policies from different insurance carriers, particularly with regard to what benefits are covered and whether the plan offers inflation protection; and

- Require reciprocity across state partnership plans.

The bill would also require a biennial survey (conducted by the NAIC) and report on national and state LTC insurance markets, as well as reports to Congress on Medicaid LTC insurance partnership programs and minimum annual inflation protection.

The issue of financing long-term care has also been raised in other pending legislation. The Healthy Americans Act (S. 391 in the Senate, also sponsored by Wyden/H.R. 1321 in the House of Representatives) would amend the Internal Revenue Code to allow long-term care to be offered under a cafeteria plan, while the Long-Term Care Affordability and Security Act (S. 702/H.R. 2096) would permit an employer-sponsored cafeteria plan to offer qualified long-term care insurance with premiums paid on a pretax basis and reimburse qualified long-term care services under a health FSA. Also, LTC provisions are likely to be included in the version of health care reform legislation being developed by the Senate Committee Health, Education, Labor and Pensions, although the nature of these provisions is not yet known.

RECENT REGULATORY ACTIVITY

DOL/SEC Joint Hearing on Target Date Funds

On June 19, the U.S. Department of Labor (DOL) and Securities and Exchange Commission (SEC) held a joint hearing on target date funds and similar investment options. The stated purpose of the hearing was "to examine the need for additional guidance given the importance of these investments to the retirement savings of investors." Target-date funds typically allocate assets between equities, bonds and cash or cash equivalents (with some adding other asset classes) with the asset allocation becoming more conservative over time.

The hearing included nine separate panels, and each panel included three or four witnesses. Regulators asked questions of each panel following the presentation of prepared testimony. Many witnesses testified about the target date funds' glide paths (or how quickly the funds adjust their asset allocation to reduce exposure to equities as participants approach or go through retirement), communications and understanding of the funds.

Executive Compensation Update: Treasury Issues TARP Guidance

On June 15, the U.S. Treasury Department issued interim final regulations reflecting changes made by American Recovery and Reinvestment Act of 2009 (ARRA, the "stimulus" bill) to the executive compensation rules for entities that receive financial assistance under the Troubled Asset Relief Program (TARP) under the Emergency Economic Stabilization Act of 2008 (EESA). The interim final regulations provide standards and guidance for TARP recipients companies under Section 111 of EESA as well as certain additional standards under the authority of Treasury. Specifically, these regulations address the more restrictive bonus and golden parachute prohibitions, generally effective beginning June 15, 2009. Groom Law Group has prepared a summary of the regulations.

This release follows the recent statement by Treasury Secretary Timothy Geithner in which he announced the Obama Administration's intention to address executive compensation through legislative initiatives including "say-on-pay" measures and legislation to ensure the independence of compensation committees.

Two related legislative measures have already been approved by the House but are still awaiting consideration by the Senate: H.R. 1586, which would tax bonuses awarded to executives of TARP recipient companies, and H.R. 1664, which would prohibit certain compensation (such as bonuses) that are not based on performance standards for TARP recipient companies.

Comments to Treasury on the interim final rule are due by August 14.

IRS Advisory Committee Reports on International Pensions

The Internal Revenue Service (IRS) Advisory Committee on Tax Exempt and Government Entities (ACT) issued recommendations to IRS leaders, including International Pension Issues in a Global Economy: A Survey and Assessment of IRS' Role in Breaking Down the Barriers. The advisory committee had been tasked with identifying roadblocks to establishment and administration of cross-border pension issues and developing recommendations to overcome those obstacles.

The report includes 20 such recommendations, addressing pension contributions and benefits, pension distributions and nonqualified deferred compensation. ACT asserted that these recommendations are merely the first installment in a continuing series of recommendations. Generally, the report suggests renewed guidance efforts directed at administration of international pension matters rather than the current emphasis on enforcement at the individual participant level.

In a statement preceding the unveiling of the report, IRS Commissioner Douglas H. Shulman affirmed that he is particularly focused on international policy, which could foster additional attention to cross-border pension issues.

DOL, IRS Issue Semi-Annual Regulatory Agendas

The U.S. Department of Labor (DOL) and the Treasury Department/Internal Revenue Service (IRS) recently released their semiannual regulatory agendas, providing information on regulatory projects anticipated within the next 12 months.

Most notably, DOL expects to issue guidance on the following topics:

- proposed regulations on periodic pension benefit statements under the Pension Protection Act (PPA) of 2006
- proposed regulations for electronic communication by pension and welfare benefit plans
- Interim final regulations on the Genetic Information Nondiscrimination Act (GINA) of 2008 (Both the Department of Labor and the Internal Revenue Service have regulatory authority under GINA, and both have scheduled the release of regulations)
- Interim final regulations under PPA to require the administrator of a defined benefit plan to provide an annual funding notice to participants, beneficiaries and others.
- final regulations under PPA regarding the furnishing of multiemployer plan information upon request
- final regulations to provide additional guidance under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) to address the amendments made by the Children's Health Insurance program Reauthorization Act of 2009
- final regulations on the definition of plan assets for purposes of ERISA
- final regulations on the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008

The following items are listed by DOL as "long-term actions," for which regulatory action is expected to take more than 12 months:

- finalization of fiduciary disclosure obligations in defined contribution plans (proposed regulations were issued on July 23, 2007)
- finalization of the general statutory exemption for services under ERISA Section 408(b)(2) to determine whether an arrangement is "reasonable" within the meaning of the exemption (proposed regulations were issued on December 13, 2007)

The IRS expects to issue guidance on the following topics:

- advance notice of proposed regulations on determination of governmental plan status
- advance notice of proposed regulations on calculation of the applicable premium for COBRA coverage
- proposed regulations on definition of "highly compensated employee" under Internal Revenue Code Section 414(g)
- proposed regulations to set forth the professional standards for the performance of actuarial services under ERISA.
- proposed regulations on multiple annuity starting date limitations under defined benefit plans
- proposed regulations to provide guidance on the definition of a "bona fide severance pay plan" and "substantial risk of forfeiture"
- proposed regulations on the definition of "dependent" under the Working Families Tax Relief Act of 2004 and the Fostering Connections to Success and Increasing Adoptions Act of 2008
- action on prior proposed regulations on the calculation of the portion of an employee's accrued benefit derived from the employee's contributions to a defined benefit plan
- proposed and final regulations on multiemployer defined benefit plan funding
- proposed and final regulations regarding hybrid retirement plans, including vesting, payment of benefits and age discrimination
- final regulations on employer comparable contributions to Health Savings Accounts
- final regulations to "enhance" existing HIPAA portability regulations
- final regulations on cafeteria plans under Internal Revenue Code Section 125
- final regulations on the measurement of income inclusion and calculation of applicable taxes under Internal Revenue Code Section 409A
- final regulations regarding the tax treatment of payments by qualified plans for medical or accident insurance
- final regulations on required notice for amendments significantly reducing the rate of future benefit accrual
- final regulations on benefit restrictions for underfunded pension plans
- final regulations on diversification requirements for certain defined contribution plans
- final regulations on the determination of benefit liabilities and assets for purposes of the funding requirements that apply to single employer defined benefit plans

- final regulations on the application of the accrual rules to defined benefit plans whose benefits are determined on the basis of the greater of two or more separate formulas.
- final regulations on employee stock purchase plans
- final regulations on minimum required contributions for single employer defined benefit plans
- final regulations for failure to defer under Internal Revenue Code Section 411(a)
- final regulations under GINA (both the Department of Labor and the Internal Revenue Service have regulatory authority under GINA, and both have scheduled the release of regulations)

While agencies are not bound by their agendas, their publication does provide insight regarding the administration's priorities and the amount of activity expected within the next year.

IRS Updates COBRA Subsidy Guidance

The Internal Revenue Service (IRS) recently updated its "question and answer" guidance on the COBRA premium subsidy, which was enacted under the American Recovery and Reinvestment Act of 2009 (ARRA). The update provides 19 new questions and answers on a variety of issues related to Administration and Eligibility, Form Preparation, and Reporting and Documentation. The new questions and answers are dated and appear at the end of the list of Q&As for those subject headings.

Included in the updated Q&As is a "reasonable interpretation" rule to apply to employer determinations of "involuntary termination." Under ARRA, termination of employment must be "involuntary" for purposes of claiming a payroll tax credit for the COBRA premium subsidy. According to AE-25, if an employer's determination that an employee's termination of employment was involuntary for purposes of the COBRA subsidy provision is consistent with a reasonable interpretation of the applicable statutory provisions and IRS guidance, the IRS will not challenge that determination for purposes of whether the employer is entitled to claim a payroll tax credit for the COBRA premium subsidy provided to the employee. The employer must maintain supporting documentation of its determination that the employee's termination of employment was involuntary for this purpose, including an attestation by the employer of involuntary termination for each covered employee whose involuntary termination is the basis for eligibility for the subsidy.

RECENT JUDICIAL ACTIVITY

Seventh Circuit Appeals Court Denies Rehearing of 401(k) Suit

On June 24, the U.S. Court of Appeals for the Seventh Circuit denied an appeal for rehearing in the case of Hecker et al v. Deere & Company/Fidelity. This judgment affirms the same court's prior ruling for the defendant in the case, affirming the earlier district court decision that the plaintiffs (participants in the Deere & Company 401(k) plans) failed to state a claim against the defendants. The plaintiffs claimed they paid excessive and undisclosed fees, primarily because they paid "retail" rather than "wholesale" fees.

The U.S. Department of Labor (DOL) had filed an *amicus* (friend of the court) brief requesting the rehearing, and the denial of a rehearing included a short opinion addressing some of the enforcement concerns raised by DOL. In particular, the court stated that:

- DOL was not entitled to deference in its interpretation of ERISA Section 404(c) that is merely asserted in a footnote to the preamble of existing 404(c) regulations;

- The Seventh Circuit decision was "tethered closely to the facts before the court" and should not be read to insulate a fiduciary from liability if the fiduciary includes a very large number of investment options for participants to choose among; and

- The complaint was silent about the services received by plan participants from the company-sponsored plan (implying additional services could justify payment of retail fees).

The original class-action suit sought to address fee arrangements in 401(k) plans, generally targeting revenue sharing arrangements. The plaintiffs alleged fiduciary duty violations stemming from the defendants' selection of investment options with "excessive and unreasonable fees and costs," and failure to disclose to plan participants appropriate information regarding such fees and costs, including failure to disclose revenue sharing payments between the service providers. In June 2007, the U.S. District Court for the Western District of Wisconsin granted the defendants' motion to dismiss the case, ruling that the company would be protected by the ERISA Section 404(c) safe harbor because the plan permitted the participants to choose among a broad array of investment options. The court went on to state that even if 404(c) did not apply, the breadth of the investment options available to participants, which was over 2500 funds, when taking into account the directed brokerage window, made "untenable" the plaintiffs' claims that every investment option was "burdened with excessive expenses."