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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 Health Care Update is updated through November 7, 2009 but may have been subsequently changed 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 December Issue.

Health Care Update

On November 7, the U.S. House of Representatives passed the Affordable Health Care for America Act (H.R. 3962), by a vote of 220 to 215. One Republican, Representative Joseph Cao (R-LA), joined 219 Democrats in supporting the bill, while 39 Democrats joined the rest of the Republican caucus in voting against the measure. Adoption of an amendment restricting public funding of abortions secured the votes of a number of Democrats who had indicated that they would otherwise oppose the overall bill. This was the only amendment on which a vote was permitted on the legislation.

Ultimately, a proposed amendment by Rep. John Shadegg (R-AZ), which would have opened up ERISA and permitted state law causes of action, was not pursued nor made "in order" to be voted upon.

Prior to the final vote, the House considered and rejected a Republican substitute bill by a vote of 176 in-favor to 258 opposed. One Republican Member, Rep. Timothy Johnson (R-IL), joined all 257 Democrats in voting against the GOP substitute. In addition, immediately before proceeding to a vote on final approval of the bill, the Republicans offered a motion that would have added medical liability reform – a provision that they estimated would result in $54 billion in savings which would be used to restore some of the cuts in the Medicare program, including Medicare Advantage plans. That motion was defeated by a vote of 247 opposed (244 Democrats and 3 Republicans) to 187 in-favor (174 Republicans and 13 Democrats).

Meanwhile, on November 21, the U.S. Senate approved a procedural motion on a party-line vote of 60 to 39 that will allow the chamber to move forward with debate on the Patient Protection and Affordable Care Act, the comprehensive health care reform measure based on the America's Healthy Future Act, as approved by the Senate Finance Committee, and the Affordable Health Choices Act (S. 1679), as approved by the Senate Health, Education, Labor and Pensions (HELP) Committee.

Senate Majority Leader Harry Reid (D-NV) has released an official Democratic summary of the bill and the Congressional Budget Office (CBO) has issued a federal revenue score of the bill. A lengthy floor debate on the full measure, with numerous amendments, is expected to begin after the Thanksgiving holiday and could last through the calendar year.

Senate HELP Committee Discusses Pension Funding at Retirement Policy Hearing

the Senate Health, Education, Labor and Pensions Committee recently held a hearing, Pensions in Peril: Helping Workers Preserve Retirement Security Through a Recession, with a focus on defined benefit pension funding relief. In his opening statement, new Committee Chairman Tom Harkin (D-IA) said, "as we investigate the challenges that workers and employers face when pension plans get into financial trouble, I look forward to moving forward in the same spirit to develop both short- and long-term solutions. But we must remember that it is precisely in such economic times that the role of the federal government in safeguarding Americans' retirement is more important than ever, and we must strike a careful balance."

The first panel of witnesses spoke primarily on the impact of the economic downturn on individual participants' retirement security, with particular attention to the specific benefit cuts experienced by some employees at Delphi Corporation. Witnesses were:

- Bruce Gump, chairman of the Delphi Salaried Retirees Association, who discussed the fallout from the Delphi bankruptcy;
- Barbara Bovbjerg, director of education, workforce, and income security issues at the Government Accountability Office, who discussed the Pension Benefit Guaranty Corporation's final benefit determination processes;
- David Jury, associate general counsel of the United Steelworkers of America, who urged enactment of defined benefit pension funding relief, but only for plans that are not frozen; and
- Richard Jones, chief actuary, retirement consulting for Hewitt Associates, who suggested solutions for mitigating the effect of defined benefit pension requirements, such as extended amortization periods and widening the smoothing corridor.

The second panel of witnesses discussed the effect of the economic downturn on retirement plans, particularly defined benefit pension plans, and what kind of relief is necessary. Witnesses were:

- Ronald R. Peterson, president of the Johns Hopkins Hospital and Health System, who discussed the urgent need for funding relief in order to preserve jobs and allow for continued investment in medical care;
- Ron Gebhardtsbauer, faculty-in-charge of the Actuarial Science Program at Penn State University, who discussed the actuarial basis of the need for funding relief and focused on expanding the smoothing corridor;
- Randy DeFrehn, executive director, National Coordinating Committee for Multiemployer Plans; who strongly recommended relief for multiemployer pension plans in particular; and
- Karen Friedman, Executive Vice President and Policy Director, Pension Rights Center; who also expressed support for funding relief but suggested that relief not extend to companies with frozen plans and that any relief be conditioned on maintaining the defined benefit plan as well as restricting deferred compensation for executives.

The question-and-answer periods included discussion of specific relief proposals (such as expanded smoothing and amortization), the need for relief before the end of the year, the applicability of relief to frozen plans and possible limitations on executive compensation.

Senate Aging Committee Hears Testimony on Target Date Funds

The Senate Special Committee on Aging recently held the hearing, Default Nation: Are 401(k) Target Date Funds Missing The Mark? 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.

As Committee Chairman Herb Kohl (D-WI) said in his opening statement, the hearing was intended to examine three issues related to the use of target-date funds as default investments in defined contribution retirement plans: The lack of transparency and consistency in fund design, the fees charged to plan participants and the potential conflicts of for fund managers. In conjunction with the hearing, the committee's majority staff released the research report Target-Date Retirement Funds: Lack of Clarity Among Structures and Fees Raises Concerns.

The Aging Committee hearing follows a June 19 joint Department of Labor (DOL) and Securities and Exchange Commission (SEC) 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." Allison Klausner, Assistant General Counsel – Benefits for Honeywell International Inc., testified at the June 19 hearing.

Most notably, Assistant Secretary of Labor for the Employee Benefits Security Administration (EBSA) Phyllis Borzi testified before the committee, remarking that the Department of Labor (DOL**)** Department shares the Committee's interest in examining whether target date funds provide workers with a secure retirement. Borzi's testimony focused on:

- the steps that the Department has taken to review issues relating to the use of target date funds in retirement plans, including the Department's activities related to the designation of target date funds as qualified default investment alternatives
- information gleaned from the June joint hearing with the Securities and Exchange Commission (SEC) on target date funds; and
- an explanation of DOL's oversight role and outreach activities, as well as initiatives that the Department is considering to provide further guidance on target date funds.

Specifically, Borzi reiterated DOL's intention to re-propose regulations investment advice and re-examine regulations regarding fee disclosure between plan participants and fiduciaries and regulations regarding qualified default investment alternatives.

Other witnesses included:

- Barbara Bovbjerg, director of education, workforce and income security for the U.S. Government Accountability Office;
- Andrew Donohue, director of investment management for the SEC;
- John Rekenthaler, vice president of research for Morningstar, an investment research firm;
- Ralph Derbyshire, senior vice president and deputy general counsel for FMR LLC, the parent company of Fidelity Investments; and
- Michael Case Smith, senior vice president of institutional strategies for Avatar Associates, an investment management firm.

The key topic of discussion during the question-and-answer period was whether target-date fund managers should be bound by fiduciary standards to prevent excessive fees or conflicts of interest. The Aging Committee does not have jurisdiction over retirement policy issues, though Kohl and Senate Health, Education, Labor and Pensions Committee Chairman Tom Harkin (D-IA) have introduced the Defined Contribution Plan Fee Disclosure Act, legislation to expand disclosure of defined contribution plan fees.

Pension Funding Relief Bill Introduced

On October 27, Representatives Earl Pomeroy (D-ND) and Pat Tiberi (R-OH) formally introduced the Preserve Benefits and Jobs Act, legislation to provide defined benefit pension plans with temporary funding relief.

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 obligations in 2010 and beyond. Significant concern has also been reported by companies indirectly affected by the increased obligations, such as suppliers and buyers of products or services rendered by affected companies.

The measure's relief provisions relating to single-employer plans (Title I of the bill) include:

- An extended period for single-employer defined benefit plans to amortize certain funding shortfalls. Two alternatives would be allowed: one alternative would extend the period for nine years, delaying the seven amortization payments for two years with employers making interest payments in the first two years (the so-called "2+7 rule"). The second alternative would fund 2008 losses over a 15-year amortization period. Employers electing the funding relief would have to meet one of three self-selecting maintenance-of-effort options:
    - continuing to provide benefit accruals under the defined benefit plan;
    - making a 3 percent nonelective contribution to a defined contribution plan for employees frozen out of the defined benefit plan; or
    - freezing all nonqualified deferred compensation plans and subjecting them to the restrictions that apply to the defined benefit plans that cover rank and file employees.

  These requirements would apply for either two or eight years depending on the extended amortization schedule chosen by the employer.

- Expansion of the smoothing "corridor," within which single-employer defined benefit plans are allowed to average asset values, from the current 10 percent to 20 percent of fair market value for 2009 and 2010.

- Allowing plan sponsors to "look back" to the plan’s 2008 funded status to determine if the benefit restriction (freezing benefit accruals for plans that are less than 60 percent funded) will apply in 2009 and 2010.

- Allowing plan sponsors to "look back" to the plan’s 2008 funded status for the use of credit balances (with respect to a plan that was under 80 percent funded in the prior year) for both 2009 and 2010.

- Clarification that technical corrections to the PPA did not require plan investment expenses to become a current-year cost, which would be a major new burden on employers.

- Repeal of the PPA rule requiring reporting with respect to plans that are less than 80 percent funded, replacing this rule with a 90 percent trigger for reporting. The new trigger would take effect when a plan has aggregate unfunded vested benefits of more than $100 million and would disregard plans that are at least 90 percent funded. Additionally, rules regarding the confidentiality of the reported information would be tightened.

- Delay of the benefit restriction effective date for collectively bargained plans until plan years beginning after December 31, 2011.

- Exclusion of Social Security level-income options from the benefit restriction limiting lump sums and other prohibited payments.

- A change in the determination of the amount of the Pension Benefit Guaranty Corporation (PBGC) guarantee by using the date of plan termination, rather than the date that the plan sponsor enters bankruptcy. (The PBGC announced its maximum insurance benefit for 2010 on October 27.)

- Comparable amortization relief and maintenance-of-effort rules for plans not yet subject to the PPA rules, limited to the deficit reduction contribution (DRC) rules under the pre-PPA funding rules.

- Prohibition of ad hoc benefit enhancements or "early retirement window" arrangements, under which benefits are payable in a lump sum unless the plan is at least 120 funded (after taking into account the additional benefits). Alternatively, the company could fund the full cost of the additional benefits, in which case all benefits under the plan would be required to be 100 percent vested.

- Revision of the treatment of PBGC reportable events based on a specified reduction in the number of active participants in a plan.

Multiemployer pension provisions (Title II) include:

- Allowing certain multiemployer plans to elect one of two approaches to fund recent losses over a 30-year period (available for 2009 and 2010).

- Steamlining existing amortization extension provisions and allows 10-year smoothing and a 130 percent corridor for 2008 and 2009 asset losses.

- Extension of the rehabilitation period and the funding improvement period by 5 years.

- Facilitation of the merger of multiemployer pension funds through the creation of multiemployer pension “alliances”.

- Updating the level of PBGC guarantees for multiemployer plans that become insolvent, while modifying existing provisions for multiemployer plans so that eligible plans that have suffered substantial reductions in contributions due to employer bankruptcies and terminations may in some cases transfer liabilities attributable to those employers to the PBGC.

Pomeroy and Tiberi are members of the House of Representatives Ways and Means Committee, which shares jurisdiction over pension matters and held a hearing on defined benefit pension plan funding levels on October 1 (See story below). Committee leadership has expressed support for the legislation, though no action on this measure has yet been scheduled.

Defined benefit funding relief provisions have also been advanced within the 401(k) Fair Disclosure and Pension Security Act (H.R. 2989), as approved by the House of Representatives Education and Labor Committee (which also has jurisdiction over pension matters) and the Savings Recovery Act introduced by House Minority Leader John Boehner (R-OH).

Extension of COBRA Subsidy Under Consideration

Eligibility for the temporary government COBRA premium subsidy, established under the American Recovery and Reinvestment Act of 2009 (ARRA), ends on December 31, 2009. A possible extension or expansion of the government subsidy is being considered in Congress. In light of ongoing high unemployment rates, the Obama Administration has expressed Interest in extending the COBRA subsidy. Likely vehicles for a legislative extension or expansion include any stimulus or health care reform legislation enacted this year.

The Treasury Department is assessing the COBRA subsidy in terms of take up rates, administrative burden and other impacts in anticipation of a possible extension by Congress. Although specifics are not yet available, there are several approaches that appear to be under consideration to extend the subsidy including extending the duration of the current nine month subsidy period for an additional two to three months (or longer); extending the eligibility time period beyond the current December 31, 2009, expiration date; or expanding the eligibility criteria to include additional COBRA qualifying events beyond the current “involuntary termination" criteria, to include, for example, reduction in hours resulting in loss of health benefits coverage.

GAO Report Examines Fees in Non-401(k) Defined Contribution Plans

The Government Accountability Office (GAO) released a report, Retirement Savings: Better Information and Sponsor Compliance Could Improve Oversight and Reduce Fees for Participants. This report had been requested by House of Representatives Ways & Means Committee Chairman Charles Rangel (D-NY) to evaluate fee levels and fee disclosure practices in IRAs and in defined contribution arrangements other than 401(k) plans (Such as 401(a), 403(b), 457 and IRA arrangements). Specifically, Rangel asked GAO to determine: how the types of fees across these plans differ, how plan sponsors' actions affect participant fees, how fee disclosure requirements vary, and how effective is the oversight of these plans. The report was requested in part to help the Ways & Means Committee determine whether fee disclosure legislation should be applied only to ERISA-covered defined contribution plans (as under the 401(k) Fair Disclosure and Pension Security Act (H.R. 2989), approved by the House Education and Labor Committee) or to all tax-preferred defined contribution arrangements (as under the Defined Contribution Plan Fee Transparency Act (H.R. 2779), as introduced by Ways and Means Committee member Richard Neal (D-MA)).

GAO found that participants in 403(b) plans and IRAs often pay higher investment fees than participants in other defined contribution arrangements. They attributed this to the greater prevalence of retail versus institutional investment products offered in these arrangements as well as to the reduced employer involvement with these arrangements relative to other defined contribution plans. There was also specific discussion of the greater prevalence of variable annuities in the 403(b) market and the higher fee levels generally associated with these products. Overall, the report contained a fairly extensive discussion of the features of the 403(b) market that tend to result in higher fees for participants and compared 403(b) plans somewhat unfavorably in this regard relative to other defined contribution plans. GAO also found that fee disclosure practices vary widely depending on the specific type of defined contribution plan (or IRA) and depending on the specific type of investment product selected by the participant. GAO also described what they perceived as gaps in regulatory oversight by the U.S. Department of Labor (DOL) and the Internal Revenue Service (IRS) that made oversight of fee levels and fee disclosure practices more difficult.

In terms of specific recommendations, GAO urged Congress (consistent with its 2006 report on 401(k) plan fee disclosure) to consider amending ERISA to expand required disclosures to plan participants regarding fees in all ERISA-covered defined contribution plans, including to require an easy comparison of fees across plan investment options. GAO also recommended that Congress consider giving DOL specific authority to collect information that would facilitate better monitoring of 403(b) plans of tax-exempts that rely on the DOL's safe harbor regulations (regarding limited employer involvement) to operate outside of ERISA. In terms of regulatory action, GAO recommended that the IRS and DOL work collaboratively to provide guidance for all types of defined contribution plan sponsors about ways such sponsors can help to decrease participant fees. They also recommended that the IRS collect information to allow it to differentiate between 457(b) governmental and 457(b) tax-exempt plans in order to ensure proper compliance with catch-up contribution rules (which are available to participants in 457(b) governmental plans but not 457(b) tax-exempt plans. Finally, GAO recommended that IRS establish a formal memorandum of understanding with financial regulators to allow it to share information on service providers (where such information can be shared without revealing protected taxpayer information) in order to assist with fee level and fee disclosure oversight.

While it does not contain this specific recommendation, the GAO report will likely strengthen the hand of those in Congress who wish to extend fee disclosure requirements to all tax-preferred defined contribution arrangements. It could also lead to further discussion as to whether new legislation imposing specific fee disclosure requirements on IRAs should be contemplated.

Ways and Means Committee Holds Hearing on Defined Benefit Funding, Investment Advice

Two important topics were presented in a hearing before the House of Representatives Ways and Means Committee in an October 1 hearing on defined benefit pension plan funding levels and investment advice rules. According to the initial hearing announcement, the hearing sought to determine the impact of the financial crisis on the funding levels of such plans and whether additional funding relief is necessary. With respect to defined contribution plans, the hearing focused on plan participant access to investment advice and whether such advice is unbiased. Two separate witnesses came before the committee in a single hearing: William Nuti, chairman and chief executive officer of NCR Corporation, testified on the subject of defined benefit funding relief, while Robert G. Chambers, a partner in the international law firm of McGuireWoods LLP, testified on the subject of investment advice.

*Defined Benefit Pension Funding Reform W*illiam Nuti, chairman and chief executive officer of NCR Corporation, testified on the critical need for defined benefit funding relief. "This issue is critically important … to every company, every employee, and every community across the United States. This is far more than a pension issue. Fundamentally, it is a jobs issue and a critical economic recovery issue," he said.

Some of the testimony urged immediate legislative relief that would assist defined benefit plans in coping with the extreme and unanticipated jumps in upcoming pension obligations created by the Pension Protection Act of 2006 (PPA) and the market-driven declines in pension asset values. Under the PPA, the vast majority of plan sponsors will be locked into dramatically increased funding obligations on January 1, 2010.

Other witnesses testifying before the committee were:

- Craig P. Rosenthal, principal with Mercer, discussing the recently completed report on estimated 2009 required contributions and credit balances;
- Norman Stein, senior legislative counsel for the Pension Rights Center;
- Judith F. Mazo, senior vice president, director of research for the Segal Company, on behalf of the National Coordinating Committee for Multiemployer Plans and the Multiemployer Pension Plan Consortium;
- Damon Silvers, associate general counsel for AFL-CIO; and
- Mark Warshawsky, director of retirement research for Watson Wyatt Worldwide

During the question-and-answer period, Ranking Republican member Dave Camp (R-MI) asked Warshawsky how Congress could best strike the balance between providing relief to companies with preserving the health of the PBGC, concluding that temporary relief would be preferable to outright reform of PPA.

Camp also asked whether the recent regulatory relief provided by IRS had been helpful and — since employers now have flexibility in selecting the relevant discount rate for 2009, which would affect the present value of their liabilities — whether "the true financial picture of private pension plans could be worse" than the testimony had indicated. Rosenthal replied that the "lookback" had reduced liabilities by approximately 10 to 20 percent.

Representative Sander Levin (D-MI) asked the panel what conditions should be required of companies making use of funding relief. More specifically, Representative Wally Herger (R-CA) asked whether maintenance-of-effort requirements set a dangerous precedent for the voluntary employee benefits system.

Pomeroy commended Nuti's testimony before the committee and asked him to reiterate the critical nature of funding relief with respect to job creation and preservation, as well as the importance of predictability for the long-term health of defined benefit pension plans.

Likewise, Representative Bob Etheridge (D-NC) asked Nuti to confirm that the desired relief represents a temporary fix to a long-term problem. "That's correct," Nuti said, "Think of it as a 'time-out,' not a 'bail-out.'" Representative Ginny Brown-Waite (R-FL) had earlier complimented Nuti on the absence of a bailout request.

Pomeroy is now soliciting bipartisan support for his legislation, while Miller continues to express interest in tying relief to fee disclosure and investment advice legislation, which could slow the process.

On the subject of investment advice, Robert G. Chambers, a partner in the international law firm of McGuireWoods LLP testified on behalf of two leading employee benefit interest groups. “If legislation is enacted with respect to the PPA investment advice provision, it is critical that the legislation not adversely affect the investment advice rules in effect prior to the enactment of the PPA. Participants need investment advice now more than ever,” Chambers said.

Some of the testimony also expressed concern that proposed legislation would threaten existing programs that already avoid conflicts of interest and operate in the interest of the participants. H.R. 2989, as approved by the House Education and Labor Committee, replaces the ERISA investment advice provisions enacted through PPA. While the version of legislation originally approved by the subcommittee included language that validated investment advice arrangements under *Sun America* and other pre-PPA advisory opinions and exemptions issued by the DOL, this important language was not included in the bill approved by the full committee.

Other witnesses testifying before the committee were:

- LeRoy Gilbertson, a member of the AARP National Policy Council;
- Mark A. Davis, vice president of CAPTRUST Financial Advisors, on behalf of the National Association of Independent Retirement Plan Advisors;
- Christopher Jones, executive vice president of investment management and chief investment officer at Financial Engines;
- Edmund F. Murphy III, managing director for Putnam Investments, LLC; and
- Jim McCarthy, managing director for Morgan Stanley, on behalf of the Securities Industry and Financial Markets Association.

Questions and answers from the committee focused on the potential consequences of enactment of H.R. 2989. Pomeroy asked Chambers whether the kind of legislation proposed by the Education and Labor Committee dramatically impact the availability of advice that the marketplace presently offers. "There will be a significant adverse effect if this legislation goes through," Chambers said, describing the different options for participants under such a new regime. He also noted that the U.S. Department of Labor has a mechanism for enforcing existing rules regarding conflicted investment advice.

RECENT REGULATORY ACTIVITY

Treasury, IRS Extend NRA Regulations Compliance Deadline for Governmental Plans

On October 28, the U.S. Treasury Department and Internal Revenue Service (IRS) issued Notice 2009-86, announcing the agencies' intention to extend the time by which a governmental plan must comply with final regulations on distributions from a pension plan upon attainment of normal retirement age (NRA) beyond the date previously announced. Taking into account this extension, the NRA regulations will be effective for a governmental plan (as defined in Section 414(d) of the Internal Revenue Code) for plan years beginning on or after January 1, 2013. This notice does not change the effective date of the NRA regulations for a plan that is not a governmental plan or modify the relief previously provided in Notice 2007-69.

The Treasury and IRS released final phased retirement regulations that: (1) modify the proposed definition of normal retirement age, (2) clarify that a pension plan is permitted to commence payment of retirement benefits to a participant who has attained normal retirement age even if he or she has not left employment, and (3) specify that conforming amendments can be made during a transition period.

DOL Offers Additional Form 5500 Guidance, Filing Assistance

On October 23, the U.S. Department of Labor issued supplemental guidance on the 2009 Schedule C fee reporting guidelines in the form of Frequently Asked Questions. This information supplements prior guidance on this topic, which was developed in response to questions from the employee benefits community.

Some of the issues covered in the new FAQs include reporting of:

- Gifts, entertainment and other non-monetary compensation
- Compensation to hedge fund investment managers
- “Look-through” investment funds
- Mutual fund redemption fees
- ERISA fee recapture accounts

The guidance also provides clarification regarding the 2009 plan year transition relief for service providers by explaining that the transition relief also covers plan administrators and Form 5500 preparers who rely on those service providers for information needed to complete the Schedule C.

In a related story, DOL has developed a dedicated Web page to assist employers with Form 5500 filing under the new EFAST system. EFAST is designed to simplify and expedite the receipt and processing of the Form 5500 for satisfying the annual reporting requirements under ERISA and the Internal Revenue Code. The new Web site, at http://www.efast.dol.gov/, will provide filers with up-to-date information about filing requirements, electronic filing options, software availability, frequently asked questions, publications, and forms (most of which have been previously released).

IRS Issues Expatriate Guidance under HEART Act

On October 15, the Internal Revenue Service (IRS) issued Notice 2009-85, providing guidance on the tax treatment of expatriates under the Heroes Earnings Assistance and Relief Tax (HEART) Act of 2008, which provides tax and savings assistance for military veterans and their families. As one of the revenue raisers used to offset any federal revenue losses created by the bill, the measure included a so-called "expatriation" provision, which applies to U.S. citizens who expatriate and certain long-term permanent residents who give up their U.S. residence status.

The IRS guidance details Section 877A of the tax code, created under the HEART Act to address taxation of individuals who expatriate on or after June 17, 2008. Section 877A generally provides that all property of a “covered expatriate” – including tax-deferred amounts in IRAs, Coverdell education savings accounts, Section 529 accounts, health savings accounts and medical savings accounts – is treated as sold and taxable on the day before the individual’s expatriation date. Gain and loss from the deemed sale must be taken into account at that time (subject to a $600,000 exclusion amount, which will be indexed for inflation – Exclusion amount for 2009 is $626,000) unless the individual elects to defer payment of the tax by providing security and waiving treaty rights that would prevent assessment or collection of the deferred tax.

"Eligible deferred compensation items" that are payable by a U.S. employer to a covered expatriate generally would not be subject to immediate taxation, but would be subject to 30 percent federal income tax withholding at the time that payments are made. For these purposes, deferred compensation items include both qualified and other tax-favored retirement plans (401(a), 403(b), SEP, and SIMPLE IRA) and nonqualified deferred compensation plans of a U.S. employer.

The IRS intends to issue regulations incorporating this guidance that will apply to individuals whose expatriation date is on or after October 15, 2009. Until regulations are issued, such individuals may apply the rules described in the notice in their entirety. Individuals whose expatriation date is on or after June 17, 2008, and before October 15, 2009, may apply the rules described in this notice in their entirety.

IRS is soliciting comments on the guidance to inform the development of these regulations.

Funding Regulations Formally Published

The U.S. Treasury Department and Internal Revenue Service (IRS) formally published final regulations governing defined benefit plan funding and benefit restrictions on October 15. These new regulations allow plan sponsors to modify certain funding elections with respect to their 2008 plan year (the first plan year which began in 2008) but only if the election is made in writing by the due date (including extensions) of the Schedule SB "Single-Employer Defined Benefit Plan Actuarial Information" of Form 5500 (October 15 for calendar year plans).

Plan sponsors are permitted to rely on the final regulations prior to the 2010 plan year and can also rely on the relevant proposed regulations for certain statutory sections. The IRS acknowledged that the remedial amendment period for the PPA (the time period in which plans must be amended to comply with PPA) ends with the last day of the plan year beginning in 2009 (December 31 for calendar year plans).

Although Treasury and IRS have not yet released regulations for hybrid plans, the new funding regulations may provide a preview of the administration's views on some cash balance plan issues – particularly the so-called "whipsaw" issue (an anomaly under which the plan is required to pay out distributions that are greater than the account balance). The regulation states that the account balance in a cash balance plan must be brought forward to normal retirement age using the plan's interest crediting rate and discounted back (for present value) using the statutory rate. If these rates do not match, the calculation may become subject to "whipsaw" under which the participant is entitled to an amount in excess of the account balance. Under prior law, the 30-year Treasury rate was used for discounting back, but PPA requires using a changing yield curve and segmented rate. The IRS reportedly takes the position that either a fixed interest crediting rate or a variable rate, such as an equity rate, could result in "funding whipsaw."

GINA Title I Regulations Formally Published

On October 7, the U.S. Departments of Labor, Treasury and Health and Human Services (HHS) formally published interim final regulations implementing Title I of the Genetic Information Nondiscrimination Act (GINA) of 2008, including restrictions on the use of health risk assessments (HRAs) in employee group health plans. At the same time, HHS also formally published proposed regulations modifying the HIPAA Privacy Rule to implement GINA's requirements with regarding the privacy and confidentiality of genetic information.

Advanced copies of the interim final regulations were unveiled in a news release and summarized in an agency fact sheet. Title I of GINA and the interim regulations prohibit employer-sponsored group health plans and health insurers providing group and individual health insurance from restricting enrollment or adjusting premiums based on genetic information or requiring or requesting genetic testing. These interim final regulations for the group market apply to group health plans and group health insurance issuers for plan years beginning on or after December 7, 2009 (January 1, 2010 for calendar year plans). Comments on these regulations are due on or before January 5, 2010.

The HHS proposed regulations on PHI would modify the HIPAA privacy standard to clarify that genetic information is health information and to "prohibit the use and disclosure of genetic information by covered health plans for eligibility determinations, premium computations, applications of any pre-existing condition exclusions, and any other activities related to the creation, renewal, or replacement of a contract of health insurance or health benefits." Comments on the proposed privacy regulations are due on or before December 7, 2009.

Sebelius Updates Congress on Mental Health Parity Rules

In an October 2 letter to lawmakers, Health and Human Services Secretary Kathleen Sebelius indicated that it is the agency's goal is "to issue regulations by January 2010 that will … make it easier for health plans and issuers to take crucial steps toward full implementation of the protections of the [Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA)]." HHS shares regulatory jurisdiction over this law with the U.S. Treasury and Labor departments.

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 comment letter expresses the perspective of employer health plan sponsors and offers recommendations for proposed regulations, including a non-enforcement policy or good faith compliance period for the first plan year for which the act applies to any particular plan.

According to a news article published by the Bureau of National Affairs (BNA), a "good faith" standard will likely apply in the absence of implementing regulations. "A spokesman for HHS said that in the absence of regulations, plans should make reasonable efforts to adhere to the law's intent. Issuers and employment-based group health plans are responsible for following the law and we will take into account their good-faith efforts to comply with a reasonable interpretation of the law before regulations are issued,' Nicholas Papas told BNA in an e-mailed comment."

RECENT JUDICIAL ACTIVITY

Second Circuit Rules for Citigroup in ERISA Legislation

On October 19, the U.S. Second Circuit Court of Appeals ruled on behalf of a cash balance plan administrator in the class-action *Citigroup Pension Plan ERISA Litigation*, overturning the decision by the U.S. District Court for the Southern District of New York. At issue is whether the administrator of a cash balance plan failed to satisfy advance notice requirements under Section 204(h) of ERISA when making a purely technical amendment to the plan.

The U.S. District Court for the Southern District of New York ruled in favor of the plaintiffs in December 2006, finding that the defendant's retirement plan violated aspects of ERISA. The Court also ruled on remedies in November 2007.

Supreme Court Seeks Input from Solicitor General in San Francisco Health Care Case

The U.S. Supreme Court has temporarily delayed action in Golden Gate Restaurant Association (GGRA) v. City and County of San Francisco, a key ERISA preemption case, instead seeking input from the office of the U.S. Solicitor General. (The Office of the Solicitor General is tasked to conduct all litigation on behalf of the United States in the Supreme Court, and to supervise the handling of litigation in the federal appellate courts.) The GGRA has petitioned the Supreme Court for a review of the Ninth Circuit Court of Appeals decision this case.

This case centers on a local ordinance that requires employers to make minimum qualifying health care expenditures on behalf of workers, or pay the required amounts to the City of San Francisco. The minimum per hour expenditure was increased in 2009 to $1.23 for private employers with 20-99 employees and $1.85 for private employers with 100 or more employees.

Earlier this year the Ninth Circuit denied a petition by the GGRA requesting rehearing of a three-judge panel decision upholding the minimum employer spending requirements. The decision included a strongly worded and lengthy dissent which argued that the Ninth Circuit decision conflicts with ERISA preemption principles established under Supreme Court case law and with the Fourth Circuit ruling in RILA v. Fielder (a 2007 decision of the Fourth Circuit Court of Appeals that struck down a Maryland employer "pay-or-play" law), and "most importantly, flouts the mandate of national uniformity in the area of employer-provided health care that underlies the enactment of ERISA."

Under the prior administration, The U.S. Department of Labor submitted an amicus brief to the Ninth Circuit in support of GGRA, arguing that a rehearing is appropriate because the extent to which ERISA permits state or local governments to require employers to pay for or provide medical benefits to their employees is a "question of exceptional importance due to the significant, disruptive consequences of a ruling that undermines the federal ERISA scheme by exposing employers to the complexity of complying with a potential myriad of state and local laws similar but not identical" to the Ordinance. However, it remains unclear whether the new administration will take a different approach.

A subsequent ruling on GGRA's petition to hear the case could be issued later this year or sometime in 2010. Developments on comprehensive health care reform could play a significant role in the Supreme Court's decision whether to consider the case.