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RECENT LEGISLATIVE ACTIVITY

Health Care Reform Update: House, Senate Approve Reconciliation Measure Modifying Health Reform Law, President Signs Into Law

President Obama signed the Patient Protection and Affordable Care Act (PPACA) into law on March 23. On March 25, the U.S. Senate approved the Health Care and Education Affordability Reconciliation Act (H.R. 4872), a package of modifications to PPACA. President Obama signed H.R. 4872 into law on March 30. This action finalizes the new health care reform law, bringing to a close more than a year of legislative debate. During Senate debate of the measure, Republicans offered a number of substantive amendments to the bill, but all of them were defeated along party lines.

Pension Funding Update: House Adjourns Without Agreement, Multiemployer Bill Introduced in Senate

The U.S. Senate recently approved relief provisions for both single-employer and multi-employer defined benefit pension plans as part of the substitute amendment to H.R. 4213, the American Workers, State, and Business Relief Act. The legislation includes a number of provisions relating to employer-sponsored benefits.

Defined Benefit Pension Plan Funding Relief

This legislation includes relief for both single-employer and multi-employer defined benefit pension plan sponsors, as amended by Senators Johnny Isakson (R-GA) and Benjamin Cardin (D-MD) to mitigate the impact of the restrictions originally attached to the relief. The House of Representatives adjourned for a two-week recess on March 25 without reaching agreement on defined benefit pension funding relief legislation. Another alternative will be for Representatives to take no formal action on funding relief and negotiate when the House and Senate resolve differences in tax extenders legislation. (The House passed a tax extenders package, without funding relief provisions, in December 2009.)

A number of specific issues remain under consideration by the House committees, including the conditions for using the relief, such as the so-called "cash flow rule" and an "active plan" requirement for use of option related to extended amortization of losses (the 15-year amortization rule).

In addition, it is likely that the committees' final agreement will include a blend of contribution plan fee disclosure legislation, based on the 401(k) Fair Disclosure and Pension Security Act (H.R. 2989), approved by the Education and Labor Committee and sponsored by Chairman George Miller (D-CA), and the Defined Contribution Plan Fee Transparency Act (H.R. 2779), sponsored by House Ways and Means Select Revenue Measures Subcommittee Chairman Richard Neal (D-MA).

It is also likely that the committees will include in their final agreement, at a minimum, direction to the U.S. Treasury Department to review the nondiscrimination rules for certain abusive practices that have the effect of significantly discriminating in favor of highly compensated employees. There could also be an agreement on limiting the counting of part-time workers' benefits for purposes of the nondiscrimination rules. These provisions are based on proposals offered by Ways and Means Committee member Lloyd Doggett (D-TX), who recently circulated

a draft revision of the Retirement Fairness Act (H.R. 4126), the bill Doggett introduced in November 2009.

Senator Bob Casey (D-PA) recently introduced the Create Jobs & Save Benefits Act (S. 3157), legislation to address the current funding status of multiemployer plans. The bill would provide relief to multiemployer plans, participants and companies in recognition of the volatile economic environment of the past two years. “Pension plans across the country have taken major losses because of the near economic collapse and the decline in the stock market,” said Casey in a news release.

Specifically, S. 3157 would:

- enable multi-employer funds to combine resources for purposes of reducing administrative costs.
- permit a plan to "partition;" if a plan satisfies certain requirements, the plan will transfer to a separate account all benefit liabilities attributed to orphans (participants of employers who withdrew from the plan without paying withdrawal liability) and assets equal to a maximum of 5-years of projected benefit payments. The PBGC would handle the initial application, drafting of partition agreement and monitor financial assistance to the plans. PBGC would not provide notices, calculate benefits or in any other form administer the plan. The orphans benefit would be fully guaranteed as if the orphan was still receiving benefits from the multi-employer plan.
- order the U.S. Departments of Labor and Treasury to prepare a report on whether the qualified partition program has strengthened the financial condition of the original plans and improved the ability of the contributing employers to these plans to remain in business.

Conversions to Roth 401(k) Plans, 457 Plans

The Senate's jobs/tax legislation includes a provision addressing intra-plan Roth conversions and, for the first time, allowing 457 plans to include designated Roth contributions. Specifically, the provision enables workers who would be eligible for a plan distribution (generally aged 59½ and older) to convert pre-tax “distributions” from defined contribution retirement plans (such as a 401(k)), to Roth 401(k) contributions (which are made after-tax and can be withdrawn tax-free at retirement). Although generally treated as a “distribution” for tax purposes (employees would be taxed on the amounts converted but would not be subject to the 10 percent premature distribution tax if younger than 59½), the conversion would actually happen within the plan. According to a March 9 *Congress Daily* report, "the proposal is aimed at keeping retirement assets within the employer-sponsored system" and would raise $1 billion in federal revenue.

Another provision enables employees of state or local governments who participate in 457 plans (similar to 401(k) plans) to make designated Roth contributions (employees in 457 plans eligible for distributions would also have the ability to make the Roth conversion of pre-tax deferrals under the previously described provision). The Roth conversion provision applies only to governmental 457 plans. Nonprofit 457 plans are considered unfunded nonqualified deferred compensation plans. This provision would raise $506 million in federal revenue. These changes were accepted as part of a block amendment package offered by Senate Finance Committee Chairman Max Baucus (D-MT).

Senator Dodd Releases Financial Services Reform Bill with CFPB Application to Benefit Plans

On March 15, Senate Banking, Housing and Urban Affairs Committee Chairman Christopher Dodd (D-CT) released the Restoring American Financial Stability Act (RAFSA), a financial services reform bill that creates a new Consumer Financial Protection Bureau (CFPB) at the Federal Reserve. Under this legislation, the CFPB could have some jurisdiction over retirement and benefit plan service providers. An 11-page summary of the overall bill was also released by Dodd's office.

The RAFSA bill adopts a structure on the retirement and benefit plan issues that is somewhat similar to what was used in the House-passed Wall Street Reform and Consumer Protection Act (H.R. 4173) (Pages 920-922) and rather different from an initial discussion draft circulated by Dodd in November 2009. The House bill focused on exempting plans and plan sponsors (but not service providers) while the earlier Dodd draft exempted service providers but did not directly address the plan and plan sponsor issues.

Additional details include:

- RAFSA makes clear that nothing in it alters the authority of the U.S. Treasury Department, the Internal Revenue Service (IRS) and the Department of Labor (DOL) with respect to the specified list of retirement and benefit plans. (The specified list of plans can be found on page 1091 of the new bill, lines 15 to 23.) It is quite broad (including "any employee benefit or compensation plan or arrangement, including a plan that is subject to Title I of ERISA") and also makes reference to specific plans or arrangements under the tax code, covering most of the tax-preferred health, retirement plan, IRA and education savings vehicles.
- RAFSA makes clear that neither the specified retirement and benefit plans, nor the activity of establishing or maintaining such a plan for employees, will be treated as the provision of a consumer financial product (which could give rise to regulation by the CFPB). This portion roughly tracks the House-passed bill, which exempted the plans and plan sponsor from jurisdiction.
- RAFSA states that the CFPB cannot regulate services provided to the specified plans unless such regulation is as a result of a joint request from the Secretaries of Treasury and Labor to do so. Presumably, this would occur if and when the two departments identified a need for regulation of service providers that was beyond their jurisdiction. However, this joint request approach is somewhat more of a constraint on CFPB jurisdiction over service providers than we saw in the House bill where mere coordination between the consumer regulator and the other agencies was required.

The regulation of "swaps" and other specialized financial instruments, used by pension funds among others, is expected to be addressed by an amendment now being crafted by Senators Jack Reed (D-RI) and Judd Gregg (R-NH). We will report on the details of that amendment when it is released

There are also a number of provisions relating to executive compensation. The bill would:

- give shareholders the right to a non-binding vote on executive pay (the Obama Administration has already demonstrated strong support for Congressional "say on pay" legislation and in June 2009 released a fact sheet on "say-on-pay" measures);

- give the Securities and Exchange Commission (SEC) authority to grant shareholders proxy access to nominate directors;
- include standards for listing on an exchange requiring that compensation committees include only independent directors and have authority to hire compensation consultants (The Obama Administration has previously expressed support for such measures and in June 2009 issued a fact sheet on compensation committee independence);
- require that public companies set policies to take back executive compensation if it was based on inaccurate financial statements or does not comport with accounting standards; and
- direct the SEC to clarify disclosures relating to compensation, including requiring companies to provide charts that compare their executive compensation with stock performance over a five-year period.

RECENT REGULATORY ACTIVITY

Employers Write to OMB Regarding Proposed ERISA Regulations

The U.S. Department of Labor (DOL) is preparing to issue regulations with potentially significant implications for ERISA preemption of state or local health care reform initiatives. In an abstract of the forthcoming notice of proposed rulemaking, the agency indicates that it will seek to issue regulations clarifying the definition of “employee welfare benefit plan” for purposes of ERISA, specifically with respect to the application of that definition to state or local health care initiatives.

On March 29, 13 employer organizations sent a letter to White House Office of Management and Budget Director Peter Orszag requesting that the proposed ERISA regulation be withdrawn in order to assess its compatibility with the intent of recently enacted comprehensive health care reform. The letter expresses serious concern that the proposal "may be incompatible with provisions in the Patient Protection and Affordable Care Act (PPACA), and may make it difficult if not impossible for employers to comply with either PPACA or the regulation."

DOL Updated EFAST2 Frequently Asked Questions

On March 24, the Department of Labor (DOL) Employee Benefits Security Administration updated the Frequently Asked Questions relating to the EFAST2 online filing 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.

Most notably, DOL added question-and-answer No. 35: Can a third-party preparer submit an annual return/report for the sponsor electronically under EFAST2? "Yes. A third-party preparer can submit an annual return/report that a plan sponsor/administrator has already signed electronically. The plan sponsor/administrator, however, retains legal responsibility for the timeliness of the submission, as well as for its accuracy and completeness."

DOL Releases Final Rules Regarding Disclosure Requirements, Civil Penalties for Multiemployer Pension Plans

On March 2, the U.S. Department of Labor (DOL) Employee Benefits Security Administration (EBSA) officially published final regulations addressing disclosure of multiemployer defined benefit pension plan information to workers – including plan funding information. An official fact sheet is also available.

The Pension Protection Act of 2006 (PPA) amended ERISA Section 101(k) to require the administrator of a multiemployer plan to provide to participants, beneficiaries, employee representatives and contributing employers, upon request:

- a copy of any periodic actuarial report (including sensitivity testing) received by the plan for any plan year which has been in the plan's possession for at least 30 days;
- a copy of any quarterly, semi-annual, or annual financial report prepared for the plan by any plan investment manager or advisor or other fiduciary which has been in the plan's possession for at least 30 days; and
- a copy of any application filed with the Secretary of the Treasury requesting an extension under section 304 of the Act (or section 431(d) of the Internal Revenue Code of 1986) and the determination of such Secretary pursuant to such application.

The final rule, which becomes effective on April 1, applies to plan administrators, participants and beneficiaries and contributing employers of multiemployer plans.

Also on March 2, DOL/EBSA published final regulations regarding assessment of civil penalties under Section 502(c)(8) of ERISA, as modified by the PPA. Under the revised statute, the Secretary of Labor is granted authority to assess civil penalties of up to $1,100 per day against any plan sponsor of a multiemployer plan that is in "endangered" or "critical" status. These final regulations finalize proposed regulations issued on September 4, 2009.

Treasury's FinCEN Proposes New Rules Affecting ERISA Plans with Assets Invested Outside U.S.

The U.S. Treasury Department has proposed new regulations that would impact employee benefit plans with assets invested outside the United States. Under the proposed regulations, ERISA plans with non-U.S. assets need to file Foreign Bank and Financial Accounts (FBAR) disclosure forms annually (Form TD F 90-22.1). For this purpose, non-U.S. mutual funds, annuity contracts and insurance contracts with cash values would be considered foreign financial accounts and be subject to FBAR reporting. However, the proposed regulations do clarify that if the plan has more than 25 foreign bank and financial accounts, the plan need only provide minimal information on the form itself, but must maintain sufficient records to fully disclose account details to an IRS examiner in the event of an audit.

As mentioned, the proposed regulation clearly identifies employee benefit plan trusts as "United States persons" potentially subject to the disclosure rules. Although no specific exemption was granted for these corporate employees, it would appear that no filing would be required by individual employees unless they have a personal financial interest that represents a very significant portion of plan assets. Nevertheless, these employees may be required to make disclosures when filing their personal income tax returns. (How the guidance may affect this obligation is not entirely clear; see the new analysis of FBAR issues provided by Groom Law Group, Chartered.)

On February 26, the Internal Revenue Service also published Notice 2010-23, which provides an extension until June 30, 2011, for FBAR filings for 2009 and prior years for most employee benefit plan trusts who would be required to file FBAR notices for such years. Without this relief, affected plans could have been subject to penalties for failure to make timely disclosures for such years.

RECENT JUDICIAL ACTIVITY

Supreme Court Rules for Fiduciary in Mutual Fund Fee Case

On March 30, the U.S. Supreme Court decided a key case with implications for employee benefit plans. The court unanimously found, in Jones v. Harris Associates L.P., that under the Investment Company Act, fees do not run afoul of the law unless they are so "disproportionately large" that they could not have been the product of arm's-length bargaining (what two unrelated parties, not subject to some handicap or bias or other factor that would influence the negotiation, would likely reach in an agreement).

This ruling provides additional support for plan sponsors and fiduciaries engaged in litigation over "excessive" defined contribution plan fees. While *Jones v. Harris* was brought under the Investment Company Act, it is possible that courts will apply this standard in cases brought under ERISA where plaintiffs have attempted to hold plan fiduciaries liable if they could have found a cheaper comparable product. ERISA's legislative history specifically references the Investment Company Act.

Congress continues to examine defined contribution plan fee issues – with consideration of legislation possible later this year – and the U.S. Department of Labor is preparing final and proposed regulations on the issue.