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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

Extenders Bill Approved with Defined Benefit, Defined Contribution Provisions; COBRA Provisions Deleted

On May 28, the U.S. House of Representatives approved, by a vote of 215-204, a newly-revised version of the American Jobs and Closing Tax Loopholes Act (H.R. 4213), so-called "tax extenders" legislation to extend a number of expiring tax and unemployment-related provisions. The most recent official detailed summary, a Joint Committee on Taxation analysis and Joint Committee on Taxation revenue estimate have also been issued.

The extenders measure includes defined benefit pension plan funding relief legislation — along with new defined contribution plan fee disclosure requirements. An extension of the COBRA premium assistance program has been deleted from the measure entirely (more details below).

Defined benefit pension funding relief

H.R. 4213 includes single-employer and multi-employer funding relief similar to the provisions included in the Senate tax extenders bill (the American Workers, State, and Business Relief Act, as amended by Senators Johnny Isakson (R-GA) and Benjamin Cardin (D-MD)). As we have previously reported, the most recent revisions make a change to the stock redemption portion of the cash flow rule that accompanies defined benefit plan funding relief.

Defined contribution plan fee disclosure

The section of the bill dubbed "The Defined Contribution Plan Fee Disclosure Act of 2010" contains provisions imposing new defined contribution plan fee disclosure requirements. It reflects a blend of 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)) fee disclosure bills and also reflects technical input from the U.S. Department of Labor (DOL).

The most recent revisions modify the fee disclosure provisions, including a change to the transactions costs language (further suggesting they are seeking disclosure of the internal transaction costs of plan investment options). The measure also revises the effective date to provide a reasonable "good faith" standard of compliance with the statutory requirements until 12 months after final implementing regulations are issued by DOL.

The legislation approved on May 28 did not include an extension of the COBRA continuation coverage premium assistance program, first enacted as part of the American Recovery and Reinvestment Act of 2009 (ARRA). The program is currently scheduled to expire after May 31, 2010. Earlier versions of the legislation had extended the program through at least November 2010.

Senate Financial Services Bill with Swaps Language

On May 20, the Senate passed the Restoring American Financial Stability Act (S. 3217), the financial services reform bill. The legislation includes provisions regulating so-called "swap trades," financial instruments that pension plans often use to manage and reduce investment risk.

S. 3217 will now be subject to a congressional conference to resolve its differences with the House of Representatives-passed The Wall Street Reform and Consumer Protection Act (H.R. 4173), which does not include the "swaps" language.

There are numerous other elements of the bill related to executive compensation, including provisions that would:

- give shareholders the right to a non-binding vote on executive pay;
- 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;
- 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.

Senate Committee Leaders Write PBGC on Premium Filing Issue

On May 20, the Democratic chairmen and ranking Republican members of the Senate committees with ERISA jurisdiction wrote a letter to Pension Benefit Guaranty Corporation (PBGC) Director Vincent K. Snowbarger regarding a controversial issue concerning certain premium filings.

The May 20 letter, signed by Senate Finance Committee Chairman Max Baucus (D-MT) and Ranking Republican Charles Grassley (R-IA) and Senate Health, Education, Labor and Pensions (HELP) Chairman Tom Harkin (D-IA) and Ranking Member Michael Enzi (R-WY), strongly urges PBGC to reconsider its decision on this issue. "There is no policy reason for PBGC to take such a position," the letter reads. "This is not an instance where plans are attempting to 'game the system' by making decisions with the benefit of hindsight. These plans made the decision to use the Alternative Method when they timely made their premium filings."

Senate Finance Committee Holds Hearing for PBGC Director Nominee

On May 26, the Senate Finance Committee held a hearing to consider the nomination of Joshua Gotbaum to the position of Director of the Pension Benefit Guaranty Corporation (PBGC). Committee Chairman Max Baucus (D-MT) and Ranking Republican Member Charles Grassley (R-IA) were the only two Senators attending the hearing.

During questioning, Baucus raised the recent issues with variable rate premium filings. Many companies seeking to use the so-called “alternative method” for determining liabilities for PBGC premium calculation purposes have reportedly been informed that their forms contained technical errors that would invalidate each plan’s clear intent to elect the alternative method for 2009, thus substantially increasing each plan’s 2009 premium requirements.

Baucus asked Gotbaum to commit to examining the increased premiums and penalties of employers that inadvertently failed to select the alternative method when submitting their variable rate premiums for 2009. Baucus specifically said that he thought PBGC was “overreaching” with its current stance on the issue. Gotbaum indicated that he would commit to examining this issue if it is not resolved prior to his confirmation.

Baucus also discussed during the hearing the burdens faced by employer sponsors in multiemployer plans when the plan covers retirees and soon-to-be retirees of employers that are no longer in business. Gotbaum indicated that he thought the current agreements between employers in multiemployer plans are insufficient, and that a fix will involve plan-by-plan examinations and, potentially, congressional involvement. When asked to explain his thoughts on savings and pensions in general, Gotbaum cited three goals: (1) to make sponsors comfortable offering pension plans, especially DB plans, (2) to make sure that people understand the benefits of retirement plans, and (3) to make it as easy as possible for people to save for retirement.

Since the Finance Committee hearing did not have a quorum, committee members will have to vote on the Gotbaum nomination at a later time. The Senate Committee on Health, Education, Labor and Pensions has already approved Gotbaum's nomination. The Finance Committee is expected to approve the nomination as well, at which point it will then go to the full Senate for consideration.

RECENT REGULATORY ACTIVITY

IRS Releases 2011 Indexed Amounts for HDHPs

On May 24, the U.S. Treasury Department and Internal Revenue Service (IRS) released Revenue Procedure 2010-22, which lists the new indexed amounts, adjusted for inflation, for high-deductible health plans (HDHPs). In this case, the amounts for 2011 are unchanged from the amounts for 2010 because, after the application of the cost-of-living adjustment rules, the changes in the Consumer Price Index for the relevant period do not result in changes to the amounts for 2011. The following table lists the 2010 amounts and the new 2011 amounts:

	Calendar Year 2011	
	Self-only	Family
Annual Contribution Limit	$3,050	$6,150
HDHP Minimum Deductible	$1,200	$2,400
HDHPOut-of-Pocket Limit (includes deductibles, co-payments and other amounts but not premiums)	$5,950	$11,900

Treasury/IRS Release Final Employer Stock Diversification Regulations

On May 11, the U.S. Treasury Department (Treasury) and the Internal Revenue Service (IRS) released final regulations concerning the employer stock diversification rules included in the

Pension Protection Act of 2006 (PPA). The PPA created a new section of the Internal Revenue Code (Section 401(a)(35)) that requires many defined contribution plans to allow plan participants and beneficiaries to diversify out of employer stock into other investment options.

The final rule is effective on the date of publication but applies to plan years beginning on or after January 1, 2011. For plan years beginning before that date and after the statutory effective date, plans are permitted to rely on IRS Notice 2006-107, the proposed regulations, or the final regulations.

IRS Notice 2009-97 extended the deadline for adopting interim or discretionary plan amendments under certain provisions of PPA, including Section 401(a)(35), to the last day of the first plan year that begins on or after January 1, 2010 (December 31, 2010 for calendar year plans).

The final regulations, like the proposed regulations and Notice 2006-107 which provided interim guidance, generally provide that prohibitions or restrictions or conditions can not be placed on the investment (or divestiture) or employer securities that are not imposed on other investments available under the plan.

Many of the changes/clarifications included in the final regulations relate to this requirement and permitted restrictions and conditions (exceptions). The final regulations expanded the list of permitted indirect restrictions to include this exception for QDIAs.

Another exception to the “least restrictive” rule allows plans to prohibit investment in a frozen employer stock fund. The final regulations allow, for reinvestment of dividends paid on employer securities in a frozen fund (but only if the plan does not have another employer securities fund).

The final rule also provides a transition rule for certain leveraged Employee Stock Ownership Plans (ESOPs). This transition relief allows the employer stock fund to still be treated as frozen even though employer securities are allocated due to the release of matching contributions from the plan’s suspense account that holds employer securities acquired in a plan year beginning before January 1, 2007, with an exempt loan which has not been refinanced after the end of the last plan year beginning before January 1, 2007.

The final regulations also make permanent the transition relief for stable value funds first allowed in Notice 2006-107 and extended and expanded in the proposed regulations. The final regulations allow restrictions to be imposed on the employer stock fund or a similar fund which are not imposed on the stable value or similar fund and clarifies that stable value or similar fund means “an investment product or fund designed to preserve or guarantee principal and provide a reasonable rate of return, while providing liquidity for benefit distributions or transfers from other investment alternatives…”

The final rule provides another exception in that it allows a plan to plan to restrict reinvestment of divested amounts in another employer securities account when there are more than one employer securities account (and reinvestment is permitted in the other account) where the only relevant difference between the separate accounts is the section 402(e)(4) cost (or other) basis of the trust in the shares held in each account.

The final regulations, like the proposed regulations but unlike Notice 2006-107, allows reasonable restrictions on the timing and number of investment elections that an individual can make to invest in employer securities if the restrictions are designed to limit short-term trading. The example provided allows a limit on the purchase of employer securities if there has been a sale within a short period of time, such as seven days, and the preamble clarifies that the 7-day rule is simply an example and other short-term trading restrictions "such as a restriction based on multiple trades within a specified period" would be allowed if reasonably designed.

The final rule also states that cutback relief will be provided for plans amended to eliminate ESOP diversification provisions required under Internal Revenue Code Section 401(a)(28) if the diversification provisions of Section 401(a)(35) apply and the amendment is made during the extended remedial amendment period permitted under Notice 2009-97 (through the last day of the first plan year beginning on or after January 1, 2010).

The regulations continue to provide an exception to the rules for stand-alone ESOPs and Treasury and the IRS declined to allow an "investment manager" expansion of the exception for broadly held funds (treated as not holding employer securities if held by a regulated investment company, etc.) except for a limited exception for multiemployer plans when the investment fund is managed by an investment manager. However, the regulations do change a definition that will allow the investment companies exception to include certain exchange traded funds (ETFs).

IRS Issues Guidance on Health Care Reform Small Employer Tax Credit

On May 18, the Internal Revenue Service (IRS) issued Notice 2010-44, providing guidance on a small-employer tax credit included as part of the Patient Protection and Affordable Care Act (PPACA). The notice clarifies that the federal credit will never be reduced because an employer is receiving a state health care subsidy. The tax credit, contained under Section 45R of the Internal Revenue Code, is designed to encourage small employers to offer health coverage for the first time or to maintain coverage they already provide. (The credit is effective for taxable years beginning in 2010 through 2013.)

Specifically, Notice 2010-44 addresses four primary issues taxpayers raised to IRS and the Treasury Department about the small business health care tax credit:

- the effect of state subsidies on the federal credit;
- how add-on insurance is treated;
- how to calculate the hours worked by employees; and
- transition issues.

According to an accompanying IRS news release, for tax years 2010 to 2013, the maximum credit is 35 percent of premiums paid by eligible small business employers and 25 percent of premiums paid by eligible employers that are tax-exempt organizations. The maximum credit goes to smaller employers — those with 10 or fewer full-time equivalent (FTE) employees — paying annual average wages of $25,000 or less. The credit is completely phased out for employers that have 25 FTEs or more or that pay average wages of $50,000 per year or more. Because the eligibility rules are based in part on the number of FTEs, not the number of employees, businesses that use part-time help may qualify even if they employ more than 25 individuals. Eligible small businesses can claim the credit as part of the general business credit starting with the 2010 income tax return they file in 2011. For tax-exempt organizations, the IRS will provide further information on how to claim the credit.

More information about the credit, including a step-by-step guide and answers to frequently asked questions, is available through the IRS.

PPACA Adult Child Coverage Regulations Released

On May 10, the U.S. Department of Labor (DOL) Employee Benefits Security Administration, the U.S. Treasury Department and Internal Revenue Service and the U.S. Department of Health and Human Services issued interim final regulations implementing the provisions of the Patient Protection and Affordable Care Act (PPACA) extending dependent coverage to children up to age 26. An official fact sheet and list of frequently asked questions has also been released.

Under the statute, health plans and issuers that offer dependent coverage must make the coverage available to enrollees' adult children until the age of 26, even if the young adult no longer lives with his or her parents, is not a dependent on a parents' tax return, is no longer a student or is married (though the child's own spouses and children do not qualify). There is a transition for certain existing group plans that generally do not have to provide dependent coverage until 2014 if the adult child has another offer of employer-based coverage aside from coverage through the parent.

The provision is applicable to plans or policy years beginning on or after September 23, 2010, although the Obama administration has publicly called upon employers and insurers to comply voluntarily with the provisions prior to the official effective date.

Also notable:

- All eligible young adults must be provided with a special enrollment opportunity no later than the first day of the first plan or policy year beginning on or after September 23, 2010.
- The dependent coverage must provide all of the benefit packages available to similarly situated individuals who did not lose coverage because of cessation of dependent status. The qualified individual cannot be required to pay more for coverage than those similarly situated individuals.
- Compliance with the extension of coverage to adult children will not adversely affect a plan's status as a grandfathered plan.
- IRS Notice 2010-38 states that the value of any employer-provided health coverage for an employee's child is excluded from the employee's income through the end of the taxable year in which the child turns 26.

IRS Sends Compliance Questionnaire to 401(k) Plan Sponsors

The Internal Revenue Service (IRS) Employee Plans Compliance Unit is conducting a random survey of 1,200 401(k) plan sponsors using a recently released 46-page 401(k) Compliance Check Questionnaire. The questionnaire and related documents can be found on a special IRS Web page devoted to the project. Plan sponsors who will be asked to fill out the questionnaire were randomly selected from the population of plan sponsors who completed a Form 5500 (Annual Report) for the 2007 plan year. The questionnaire is a compliance check, not an audit or investigation, but failure to fill out the questionnaire or to provide complete information will result in further enforcement action which could include a 401(k) plan audit. Selected employers will be assigned a personal identification number for completing the questionnaire online.

Although the questionnaire indicates the focus is on the 2008 plan year, many of the questions request information for 2006 and 2007 as well. Questions focus on demographics, plan participation, employer and employee contributions, compensation, top heavy and nondiscrimination rules, distributions and plan loans, plan operations, automatic contribution arrangements, Roth features, IRS voluntary compliance programs and plan administration. The questionnaire also asks whether there was a reduction, suspension or discontinuance of matching or nonelective employer contributions during the 2006-2009 plan years. The information gathered from the questionnaires will be used in a report to be published by the IRS describing the responses and identifying areas where more focused education, guidance and outreach is needed, as well as how the IRS can utilize their enforcement efforts to address and/or avoid areas of non-compliance.

DOL Releases EFAST Filing Guidance

The Department of Labor (DOL) Employee Benefits Security Administration has released new guidance and information regarding the EFAST2 online filing system, which 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. This guidance includes:

- Revised frequently asked questions (FAQs) on the EFAST program generally;
- Revised FAQs on electronic filing for small businesses, and
- A revised fact sheet reflecting the new "e-signature" option, which will allow plan sponsors to avoid obtaining signing credentials. Under this guidance, service providers that manage the filing process for plans can get their own signing credentials and submit the electronic Form 5500 or 5500-SF for the plan.

Additional information and instructions are available on the official EFAST Web site.

DOL, SEC Issue Guidance on Target Date Retirement Funds

The U.S. Department of Labor (DOL) and the Securities and Exchange Commission (SEC) recently released an Investor Bulletin on Target Date Retirement Funds (TDFs), a guide designed to educate individual investors on the operations and risks of these funds. DOL is expected to follow up shortly with a checklist for plan fiduciaries to use in selecting and monitoring TDFs.

The bulletin explains the basic purpose and construction of TDFs, highlighting the differing glide paths that TDFs with the same target date may use and noting that TDFs are often used as default investments in 401(k) plans. It notes that fees of the TDF are a relevant consideration for investors and that some TDFs may charge fees both for the underlying investments and for the TDF itself.

The bulletin concludes with a recap of the key items investors should consider when evaluating TDFs:

- Whether an investor wants the more hands off approach of a TDF as opposed to taking a more active role in managing investments, noting that TDFs nonetheless need monitoring;
- Understanding the strategy and risks of the TDF;
- Understanding how the TDF's investment mix will change over time and when it will reach its most conservative asset allocation; and
- Determining whether the TDF's investment mix at the target date and thereafter fits with an investor's plans for withdrawal versus continued investment in retirement.

HHS Formally Releases Early Retiree Reinsurance Program Regulations

The U.S. Department of Health and Human Services (HHS) has officially released interim final regulations implementing the Early Retiree Reinsurance Program (ERRP), as established under Section 1102 of the Patient Protection and Affordable Care Act (PPACA). The regulations have officially been posted to the "public inspection" section of the Federal Register and is scheduled for formal publication in the Federal Register on May 5. The interim final regulations become effective on June 1, 2010. HHS has issued a media statement and fact sheet summarizing the new program.

ERISA Advisory Council Announces 2010 Topics

The ERISA Advisory Council, a group of benefits experts established by the U.S. Department of Labor (DOL) to identify emerging benefits issues and advise the Secretary of Labor on health and retirement policy, has released its issue topics for the 2010 session:

- Disparities for Women and Minorities in Retirement and Health Care: The ERISA Advisory Council will attempt to establish a baseline for the state of retirement and health care for minorities and women and to understand the causation of the conditions discovered. The council will also solicit data to understand the differences between married women and unmarried women, as well as special issues facing divorced and widowed women.
- Employee Benefit Plan Auditing and Financial Reporting Models: The ERISA Advisory Council will study whether the audit requirement and financial reporting model contained in ERISA Sections 103 and 104 provide the protections to plan participants and beneficiaries that Congress originally intended when it enacted ERISA in 1974.
- Healthcare Literacy: The ERISA Advisory Council will examine this issue to (1) assist DOL in its development of standards for use by group health plans and issuers, (2) determine whether DOL should take proactive steps to assist employers in their innovative efforts to promote health care literacy and efficient employee use of available coverage outside of written disclosures or materials and/or (3) whether DOL should provide tools or other resources to employees and retirees that promote health care literacy, and if so, in what form.

PBGC Releases Multiemployer Pension Insurance Modeling System

The Pension Benefit Guaranty Corporation (PBGC) reported results from the first year of its new Multiemployer Pension Insurance Modeling System (ME-PIMS), which tracks risk to the PBGC's multiemployer pension insurance program. The system produces hundreds of economic simulations and generates a range of outcomes for multiemployer pension plans over the next 10 years, showing the scale of the multiemployer program's exposure to risk.

From the simulations, the program's median net financial position in 2019 is a deficit of $2.4 billion (in 2009 dollars). In the PBGC's fiscal year 2009 financial statements, released in November 2009, the multiemployer program posted a record $800 million deficit. The program's exposure to possible losses from future pension plan insolvencies soared to $326 million from $30 million in FY 2008. Unlike the PBGC's protection of plans sponsored by a single employer, the agency does not take over failed multiemployer plans, but instead sends financial assistance to insolvent plans.

Treasury, IRS Request Feedback on Priority Guidance Plan

The U.S. Treasury Department (Treasury) and Internal Revenue Service (IRS) are requesting public comments on recommendations for the agencies' 2010-2011 Guidance Priority List, a list of issues that will be the subject of formal guidance during the next year. Treasury and IRS are expected to act on a number of recently enacted statutes with benefits implications, including the Patient Protection and Affordable Care Act of 2010 (PPACA) and the American Recovery and Reinvestment Act of 2009 (ARRA, the stimulus package).

Notice 2010-43, issued on May 12, stipulates the criteria for evaluation of these comments:

- Whether the recommended guidance resolves significant issues relevant to many taxpayers;
- Whether the recommended guidance promotes sound tax administration;
- Whether the recommended guidance can be drafted in a manner that will enable taxpayers to easily understand and apply the guidance;
- Whether the IRS can administer the recommended guidance on a uniform basis; and
- Whether the recommended guidance reduces controversy and lessens the burden on taxpayers or the IRS.

Recommendations submitted by June 30, 2010, will be reviewed for possible inclusion on the original 2010-2011 Guidance Priority List. Recommendations received after June 30, 2010, will be reviewed for inclusion in the next periodic update.

OMB Proposes New Rules for Pension Plans and Federal Procurement Policy

On May 10, the Office of Federal Procurement Policy (OFPP) and the Cost Accounting Standards oard (Board) issued proposed regulations regarding cost accounting standards 412 and 413 and the defined benefit pension minimum funding requirements under the Pension Protection Act of 2006 (PPA).

The PPA amended the minimum funding requirements for defined benefit pension plans and required he Board to harmonize with PPA its accounting standards applicable to U.S. government reimbursement of the contractor’s pension costs. The proposed regulations suggest several changes to harmonize CAS with PPA, including the recognition of a "minimum actuarial liability" consistent with the PPA minimum required contribution. The proposed changes will effectively lessen the difference between the amount of pension cost reimbursable to the contractor in accordance with cost accounting standards and the amount of pension contribution required to be made by the contractor as the plan sponsor by PPA.

RECENT JUDICIAL ACTIVITY – Nothing To Report