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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

PRA Technical Corrections Legislation Introduced

On July 26, Representative Ron Kind (D-WI) introduced the Pension Technical Modifications Act (H.R. 2656), a bill to make technical corrections to the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA) and the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief (PRA) Act of 2010, which collectively provided defined benefit pension funding relief in light of the economic downturn of 2008.

The technical modifications included in H.R. 2656 would:

- Clarify when plan investment expenses may be excluded from determining "target normal cost";
- Revise the statutory definition of "eligible plan year";
- Modify the statutory definition of an "eligible charity plan"; and
- Suspend certain funding level limitations, including amendment of Social Security level-income options.

Representatives Tom Petri (R-WI) and Jim McDermott (D-WA) are listed as original cosponsors of the legislation. The measure has been referred to the U.S. House of Representatives Ways and Means Committee (of which Kind and McDermott are members) and Education and the Workforce Committee (of which Petri is a member). No such legislation has yet been introduced in the Senate.

House Subcommittee Examines DOL Fiduciary Definition Project

On July 26, the House of Representatives Education and the Workforce Committee's Health, Employment, Labor and Pensions Subcommittee held a hearing, Redefining 'Fiduciary': Assessing the Impact of the Labor Department's Proposal on Workers and Retirees, to examine the progress and rationale of the "fiduciary definition" revision initiative currently underway at the U.S. Department of Labor (DOL). Phyllis Borzi, Assistant Secretary of Labor for the Employee Benefits Security Administration (EBSA), appeared before the subcommittee to provide testimony.

DOL/EBSA has issued proposed regulations that would significantly expand the definition of the term "fiduciary" with respect to investment advice provided in conjunction with defined benefit pension plans or individual retirement accounts (including defined contribution plans). Borzi has indicated the agency's intention to finalize the rule before the end of the year or shortly thereafter.

In Congress, the fiduciary definition project has been met with bipartisan criticism, not only with regard to the substance of the proposed regulation but also with the agency's rulemaking process, in part due to the conflicts with the proposed business conduct standards rules being promulgated by the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC) pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the Dodd-Frank Act). In public comments filed with DOL/EBSA, numerous lawmakers have strongly urged the regulatory agencies to withdraw and re-propose the regulations after a comprehensive economic impact study can be performed.

Convening the July 26 hearing, Subcommittee Chairman Phil Roe (R-TN), said, "while we support looking at ways to enhance this important definition, the current proposal is an ill-conceived expansion of the fiduciary standard. It will undermine efforts by employers and service providers to educate workers on the importance of responsible retirement planning. Regrettably, the proposal may deny investment opportunities and drive up costs for the individuals it is intended to protect."

Borzi's testimony emphasized the importance of amending what she referred to as "a flawed 35-year-old rule" by clarifying what constitutes "paid investment advice." She outlined the problems with the current regulations and addressed various concerns raised about the proposed regulation and the department's preliminary responses. On the subject of process and harmonization of rules with the SEC and CFTC, Borzi asserted that "agencies will not put out regulations that contradict each other."

Lawmakers on the subcommittee panel questioned Borzi thoroughly on a range of issues, including the potential effect of federal credit default, the comprehensiveness of DOL/EBSA's information and comment gathering, the impact on Employee Stock Ownership Programs (ESOPs)(and appraisers, in particular) and the likelihood of increased legal liability for fiduciaries under the new rules. Most noteworthy, both Chairman Roe and Representative Rush Holt (D-NJ) voiced concerns that the project was moving forward without sufficient data to support such a drastic revision, while Rep. Carolyn McCarthy (D-NY) expressed her misgivings about the consistency of the expansive proposed definition with the recent Executive Order by President Obama seeking to ease regulatory burdens.

A second panel of expert witnesses also provided testimony before the subcommittee:

- Donald Myers, partner at Morgan, Lewis & Bockius LLP, criticized the DOL/EBSA proposal as a "broad interpretation of the rules," noting that the regulations as proposed would force fundamental changes for certain businesses.
- Kent Mason, partner at Davis & Harman LLP, described the common ground that exists among DOL/EBSA, plan sponsors and service providers, while discussing complications in the rulemaking process. He also addressed some of the proposed rule's unintended consequences, including implications for "swap" trades used by pension plans to mitigate volatility.
- Norman Stein, professor at the Earle Mack School of Law at Drexel University, testifying on behalf of the Pension Rights Center, explained why the current fiduciary definition is outdated and must be revised, as well as his own personal experience receiving conflicted investment advice.
- Jeffrey Tarbell, director at Houlihan Lokey (an investment bank that provides appraising services to ESOPs), noted that the risk of increased litigation would increase costs for plan sponsors, thereby limiting participant access to financial advice.
- Kenneth Bensten, Jr., executive vice president of the Securities Industry and Financial Markets Association, discussed the broad impact of the proposed regulations, including the potential impact on individual retirement accounts.

All of these witnesses, excluding Stein, urged DOL/EBSA to withdraw and re-propose the fiduciary definition regulations. Questions from the panel generally echoed the questions posed to Borzi earlier in the hearing, with an increased emphasis on the importance of a more comprehensive study before the rules are finalized.

House Committees Examine Effect of PPACA on Employers

On July 28, a number of committees in the House of Representatives held hearings to discuss the impact of the Patient Protection and Affordable Care Act (PPACA) on employers.

Small Business Subcommittee

On July 28, the House Small Business Committee's Subcommittee on Healthcare and Technology held the hearing, Small Businesses and PPACA: If They Like Their Coverage, Can They Keep It?, examining whether small businesses will be able to maintain their existing coverage under the new law.

The subcommittee heard testimony from Steven B. Larsen, deputy administrator and director of the Center for Consumer Information and Insurance Oversight at the Centers for Medicare and Medicaid Services. He told the subcommittee that PPACA "contains a number of provisions that will help close the gap between small and large businesses' ability to offer health insurance to their employees," including tax credits, initiatives to address price discrimination, and the establishment of state-based exchanges.

Also testifying before the subcommittee were:

- Dr. Douglas Holtz-Eakin, president of the American Action Forum, suggested that PPACA raises the overall cost of operating a small business and undermines job growth, while leading to a dramatic decline in employer sponsored insurance.
- William Dennis, Jr., senior research fellow at the National Federation of Independent Business, offered new survey data suggesting that employers offering health insurance have a far more pessimistic view of PPACA and its anticipated effects, as compared to employers that do not offer insurance.
- Brian Vaughn, president of Nearly Famous, Inc. (a Burger King franchisee), testifying on behalf of the United States Chamber of Commerce, told the subcommittee that anticipated PPACA burdens have hindered his ability to create jobs.
- Timothy Stoltzfus Jost, Robert Willett Family Professor of Law at Washington and Lee University College of Law, described the benefits of the law's "grandfather" provisions and refuted arguments that employers would be driven to drop health insurance coverage.

Oversight and Government Reform Subcommittee

Also on July 28, the House of Representatives Oversight and Government Reform Committee's Subcommittee on Health Care, District of Columbia, Census and the National Archives held the hearing, Impact of Obamacare on Job Creators and Their Decision to Offer Health Insurance, focusing on the effect of the PPACA on employer plan sponsors – primarily small businesses.

The subcommittee heard testimony from the following witnesses:

- Andrew Puzder, CEO of CKE Restaurants, talked about the burdensome regulations imposed by the PPACA;
- Grady Payne, president of Connor Industries (a lumber company), expressed frustration with the "no-man's land between assistance and exemptions for small business and preferential treatment and waivers for mega corporations and other powerful entities."

- Will Morey, president and CEO of Morey's Piers (an amusement park company), discussed the unique challenges the PPACA presents for employers of seasonal employees, who are classified as "full-time" under the law.
- Victoria J. Braden, president and CEO of Braden Benefit Strategies, Inc., described how the PPACA is forcing her clients and her, as a small employer, to limit expansion and growth.
- J. Michael Brewer, president of Lockton Benefit Group, expressed serious concern with the administrative complexity created by the PPACA.
- Terry Gardiner, vice president of Small Business Majority (a small business advocacy organization), defended PPACA, describing its enactment as "critical, because small businesses needed relief from the high costs of health insurance."

The Oversight Committee does not have jurisdiction over health care issues but does maintain oversight of the various regulatory agencies charged with implementing PPACA. The June 28 hearing is a part of continued efforts by the Republican leadership to highlight criticism of PPACA.

In both hearings, the question-and-answer period unfolded predictably, with Republicans framing PPACA as a "job-killing" bill and Democrats defending the law as essential for expanding coverage to 30 million new individuals.

House Republicans are expected to continue to scrutinize PPACA in committee hearings throughout the year.

RECENT REGULATORY ACTIVITY

DOL Finalizes Extension of Applicability Dates for Retirement Plan Fee Disclosure

On July 13, the U.S. Department of Labor (DOL) Employee Benefits Security Administration **issued final regulations** providing an extension of applicability dates for service provider-to-fiduciary fee disclosure regulations and the transition rule for participant-level fee disclosure regulations. As finalized, the regulations provide additional transition time as compared with the proposed extension issued on May 31. The amendments are effective as of July 15, 2011.

In summary, the final rule extends the effective date for disclosure of defined contribution plan fees by service providers to plan fiduciaries under ERISA Section 408(b)(2) to April 1, 2012, and the transition rule for the initial disclosure under the participant fee disclosure regulations to 60 days after that (or, if later, 60 days after the first day of the first plan years that begins on or after November 1, 2011). Quarterly disclosures will be due 45 days after the end of the quarter in which initial disclosures are required. Therefore, for calendar year plans, the initial disclosure to plan participants is due by May 31, 2012, and the first quarterly participant fee disclosure is due August 14, 2012.

Fiduciary-Level Fee Disclosure

Governing disclosure of defined contribution plan fees by service providers to plan fiduciaries under ERISA Section 408(b)(2) (the "fiduciary-level" rule) were issued on July 15, 2010. The regulations would require that service providers give plan fiduciaries written disclosures of certain fee and services information necessary to assist plan fiduciaries in assessing the reasonableness of compensation or fees paid by the plan, as well as the potential for conflicts of

interest. These rules are expected to be finalized before the end of 2011. As issued, the interim final regulations apply to plan contracts or arrangements for services in existence on or after July 16, 2011.

Under the final regulations, as amended, The effective date for the interim final fiduciary-level fee disclosure rule is extended from July 16, 2011 to April 1, 2012. (The May 31 proposal had suggested January 1, 2012.)

Participant-Level Fee Disclosure
Also, to align the service provider-to-fiduciary interim final regulations with final regulations on participant-level fee disclosure, the final regulations also extend the terms of the transition rule related to the applicability date of the participant-level regulations. Originally, under these rules as finalized in October 2010, a plan was given 60 days after the applicability date to furnish to participants the initial disclosures that are otherwise required to be furnished before the date on which a participant or beneficiary can first direct his or her investments.

Under the final regulations, initial disclosures must be furnished no later than the later of (1) 60 days after the first day of the first plan year beginning on or after November 1, 2011, or (2) 60 days after the effective date of the fiduciary-level fee disclosure rule. (The May 31 proposal would have extended this transition rule period to 120 days after the final regulations' November 1, 2011 applicability date) "The [DOL] agrees with commenters that the transition rule should be tied to the effective date for the final 408(b)(2) regulation," the final regulations state.

As indicated in the May 31 proposal and clarified in the final rule, the transitional rule also provides that certain quarterly disclosures regarding the quarterly statement of fees and expenses actually deducted must be furnished no later than 45 days after the end of the quarter in which the initial disclosures are required to be furnished to participants and beneficiaries pursuant to the transitional rule (August 14, 2012, for calendar year plans).

According to the final regulations, DOL "is carefully analyzing these comments as part of its broader review of public comments in response to its recent request for information concerning ERISA electronic delivery standards generally."

HHS Proposes Regulations for Health Exchanges, Risk and Reinsurance Standards

On July 11, the U.S. Department of Health and Human Services (HHS) issued two sets of proposed regulations implementing certain provisions of the Patient Protection and Affordable Care Act (PPACA).

Proposed Regulations on Exchanges and Qualified Health Plans

The first set of proposed regulations issued on July 11 addresses the rules for establishment of "Affordable Insurance Exchanges" (exchanges) prescribed by the PPACA. Under the statute, these state-based, competitive marketplace-style exchanges are scheduled to be operational beginning January 1, 2014.

The exchanges will be the sole source for subsidized health coverage for individuals with household incomes below 400 percent of the federal poverty level (FPL). Subsidized health coverage will also be available through the insurance exchanges for qualified individuals (also

on the basis of household income below 400 percent of FPL) who are full-time employees and do not have the opportunity to elect "affordable" health coverage from their employer.

The exchanges will initially be open only to those in the individual and small group insurance markets. Beginning in 2017, states are authorized (but not required) to make health coverage under the insurance exchanges available to large employer groups. (The definition of "large" employer groups for this purpose will be based on separate state standards.)

Generally, the proposed regulations are designed to offer states substantial discretion in the design and operation of an exchange. Specifically, these rules:

- set forth the federal requirements that states must meet if they elect to establish and operate an exchange;
- outline minimum requirements that health insurance issuers must meet to participate in an exchange and offer qualified health plans (QHPs); and
- provide basic standards that employers must meet to participate in the Small Business Health Options Program (SHOP).

The regulations make clear that these proposed regulations represent just the first part of this phase of rulemaking, with the following issues to be addressed – in conjunction with the U.S. departments of Labor and Treasury – in a separate issuance:

- standards for individual eligibility for participation in the exchange, advance payments of the premium tax credit, cost-sharing reductions and related health programs and appeals of eligibility determinations;
- standards outlining the exchange process for issuing certificates of exemption from the individual responsibility requirement and payment;
- defining essential health benefits, actuarial value and other benefit design standards; and
- standards for exchanges and qualified health plan issuers related to quality.

Proposed Regulations on Standards Related to Reinsurance, Risk Corridors and Risk Adjustment
Also issued by HHS on July 11 were proposed regulations to implement standards for states related to reinsurance and risk adjustment, and for health insurance issuers related to reinsurance, risk corridors, and risk adjustment consistent with Title I of PPACA. These standards, for both states and health insurance companies, are designed to keep premiums down once the exchanges and other insurance reforms go into effect.

The comment deadline is September 28, 2011.

PBGC Releases Updated Regulatory Agenda

The Pension Benefit Guaranty Corporation (PBGC) recently released its Semi-Annual Regulatory Agenda for spring 2010, listing a number of regulatory initiatives that are expected to be under review or development between June 2011 and June 2012, as well as those completed during the past 6 months. It is important to note that for some of these projects, the anticipated timeline has already been delayed (i.e., cases where proposed rules were expected to be issued in June 2011); we are anticipating that these issuances are imminent.

For employer retirement plan sponsors, the following matters are listed:

Forthcoming proposed rules

- Cash balance plans: PBGC will amend existing regulations to address the rules for valuing benefits in terminating "cash balance" and other hybrid pension plans. The proposed amendments also prescribe rules on how PBGC determines benefits payable in terminating cash balance and other hybrid plans that it trustees. The proposed regulations are expected to be issued imminently, with a comment period to follow.
- Reportable events: The PBGC has decided to re-propose its regulations addressing "reportable events" – events that may be indicative of a need to terminate a plan – under ERISA Section 4043. PBGC had published the proposed regulations in November 2009 to reflect changes resulting from the Pension Protection Act of 2006 (PPA) and eliminate most automatic waivers and filing extensions provided under the prior reportable events regulations. A new set of proposed regulations is expected imminently.
- Missing participants: PBGC will propose regulations implementing Section 410 of PPA, which governs whether certain terminating plans not covered by the existing Missing Participants program may participate in that program. Once final regulations are issued, the program must cover multiemployer plans and may cover small professional service employer plans (25 or fewer active participants) and individual account (such as defined contribution) plans. The proposed regulations are expected to be issued in August 2011.
- Commercial airlines plans: PBGC will propose regulations implementing Section 402(g)(2) of PPA, which applies to plans of commercial airlines that elect the 17-year funding relief under PPA and terminate within ten years of the election. For such plans, the amount of benefits guaranteed is fixed as of the first plan year to which the funding relief applies, with plan assets first allocated to the amount of guaranteed benefits lost due to the new rules. The proposed regulations are expected to be issued in August 2011.
- Treatment of rollovers from defined contribution plans to defined benefit plans: PBGC will propose regulations addressing the treatment of rollovers from defined contribution plans to defined benefit plans under Title IV of ERISA, including asset allocation and guarantee limits. The proposed regulations are expected to be issued imminently.

Forthcoming final rules

- Partial plan terminations: PBGC will finalize proposed regulations on ERISA Section 4062(e), which provides for reporting of, and liability for, "partial" terminations of single-employer defined benefit pension plans. The proposed regulations provide guidance on whether and when a "Section 4062(e) event" occurs, describe the liability that arises and how the liability is satisfied, prescribe recordkeeping requirements, and provide for waivers in appropriate circumstances. The final regulations are expected to be issued in November 2011.
- Termination rules for companies in bankruptcy: PBGC will finalize a rule implementing Section 404 of PPA. The proposed regulations provide that when an underfunded, PBGC-covered single-employer pension plan terminates while its contributing sponsor is in bankruptcy, the date the sponsor's bankruptcy petition was filed will be considered the termination date of the plan. The proposal is intended to address the additional PBGC liabilities that occur when a sponsoring employer's pension plan falls further into the red during bankruptcy proceedings. The final regulations are expected to be issued imminently, with an effective date shortly thereafter.

- Contingent events: PBGC will finalize proposed regulations interpreting the section of the Pension Protection Act of 2006 (PPA) that changed the phase-in period for the guarantee of benefits contingent upon the occurrence of an "unpredictable contingent event (UCE)," such as a plant shutdown. The previous five-year phase-in (20 percent per year) began when the amendment providing UCE benefits (UCEBs) was adopted or effective (whichever is later) but PPA added a third factor that the phase-in period starts no earlier than the date of the shutdown or other unpredictable event. The statutory change applies to benefits that become payable as a result of a UCE that occurs after July 26, 2005. The final regulations are expected to be issued in October 2011.

Forthcoming long-term projects

- Assessment of, and relief from, information penalties: PBGC will replace a collection of prior policy statements about penalties with an Interim Final Rule providing an updated and expanded set of information penalty policies. Prior guidance was issued in January 2001 and May 2004. The timeline for issuance of the interim final rule is not yet known.
- Interest on premium overpayments: PBGC will issue proposed regulations amending prior rules on payment of premiums under Section 406 of the Pension Protection Act, which authorizes PBGC to pay interest on premium overpayments refunded to designated payors. Under the statute, interest is to be calculated at the same rate and in the same manner as interest is calculated for premium underpayments. The timeline for issuance of the proposed regulations is not yet known.
- Allocation of assets in single-employer plans: PBGC will propose new regulations amending current benefit valuation and asset allocation regulations by improving valuation assumptions and methods. Chief among the modifications the PBGC is considering are modifications to the structure of its retirement assumptions. The most recent regulations on this matter were issued in December 2005. The timeline for issuance of the proposed regulations is not yet known.

DOL Releases Updated Regulatory Agenda

On July 7, the U.S. Department of Labor (DOL) Employee Benefits Security Administration (EBSA) released its Semi-Annual Regulatory Agenda, listing all regulations that are expected to be under review or development between June 2011 and June 2012, as well as those completed during the past 6 months.

Of note for health plan sponsors, the agenda notes that continuing regulatory action to implement the Patient Protection and Affordable Care Act of 2010 (PPACA) will be taken on a number of topics. The following issues are listed as "long-term actions," meaning that no new issuances are planned, though the relevant interim final regulations (IFR) remain open to amendment: The topic automatic enrollment in large employer health care plans is also listed, but no regulations have yet been issued on this topic and the timeline for future action is undetermined.

In addition, for health plan sponsors, the following matters are discussed:

- Fee disclosure for welfare plans: In December 2010, DOL held a hearing to consider issues relating to the disclosure of fee, conflict of interest and other information by service providers to group health, disability, severance and other employee welfare benefit plans under ERISA Section 408(b)(2). The purpose of the hearing was to collect

information, related data and views regarding the application of the standards in the interim final regulations to welfare benefit plans.

- A proposed regulation related to cost exemption under the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA) is anticipated. Interim final regulations on MHPAEA were released on February 2, but these rules did not address the statutory provisions regarding the increased cost exemption under Section 712(c)(2). Forthcoming proposed regulations will seek to address this issue, though no timetable has been established yet.
- Cease and desist orders for fraudulent multiple employer welfare arrangements (MEWAs): ERISA Section 521 authorizes DOL to issue a cease and desist order if it appears that a MEWA is fraudulent, creates an immediate danger to public safety or welfare, or can be reasonably expected to cause significant, imminent, and irreparable public injury. This section also authorizes the Secretary of Labor to issue a summary seizure order if it appears that a MEWA is in a financially hazardous condition. Proposed regulations, expected to be issued in September 2011, will provide standards for the issuance of such orders.

For employer retirement plan sponsors, the following matters are discussed:

- *Definition of fiduciary:* DOL has issued proposed regulations that would significantly expand the definition of the term "fiduciary" with respect to investment advice provided in conjunction with defined benefit pension plans or individual retirement accounts (including defined contribution plans).
- *Investment advice:* the Pension Protection Act of 2006 (PPA) amended ERISA to add a prohibited transaction exemption that permits the provision of investment advice to participants or beneficiaries of certain individual account plans if the investment advice is provided under an "eligible investment advice arrangement." To qualify as an "eligible investment advice arrangement," the arrangement must either provide that any fees received by the adviser do not vary depending on the basis of any investment options selected, or use a computer model under an investment advice program that meets certain criteria. With respect to both types of advice arrangements, the investment adviser must disclose to advice recipients all fees that the adviser or any affiliate is to receive in connection with the advice and the computer model that serves as the basis for an eligible investment advice arrangement must be certified by an "eligible investment expert." DOL issued proposed regulations in February 2010 and final regulations are expected to be issued in August 2011.
- *Service provider-fiduciary fee disclosure:* In July 2010, DOL issued interim final regulations governing disclosure of defined contribution retirement plan fees by service providers to plan fiduciaries under ERISA Section 408(b)(2), requiring service providers to give plan fiduciaries written disclosures of certain fee and services information necessary to assist plan fiduciaries in assessing the reasonableness of compensation or fees paid by the plan, as well as the potential for conflicts of interest. As issued, these regulations would have applied to plan contracts or arrangements for services in existence on or after July 16, 2011.
- *Lifetime income and benefit statements:* In February 2010, DOL issued a request for information regarding lifetime income options – such as annuities – for participants and beneficiaries in retirement plans. PPA requires ERISA plans to provide participants and certain beneficiaries with individual pension benefit statements. Generally, defined benefit plans must provide the statement every 3 years (with an annual notice alternative) while defined contribution plans that permit participant direction must provide the statement quarterly and individual account plans that do not permit participant

direction must provide the statement annually. DOL has combined these previously separate initiatives into a single project, indicating they will have some kind of lifetime income disclosure on the proposed benefit statement regulation that is expected to be published in December 2011.

- *Target date funds:* The U.S. Department of Labor (DOL) has released proposed regulations regarding target date funds, which would amend the DOL final regulations of October 2007 on qualified default investment alternatives (QDIAs) as well as the October 2010 participant-level fee disclosure regulations. DOL expects to issue final regulations on this matter in November 2011 and is continuing to work on a fiduciary checklist for target date funds.
- *Annual funding notice:* DOL has issued proposed regulations that would implement the annual funding notice requirement under ERISA, as amended by PPA and the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA). DOL expects to issue final regulations on this topic in January 2012.
- *Amendment of Abandoned Plan Program:* DOL published a package of final regulations, collectively entitled Termination of Abandoned Individual Account Plans, that facilitate the termination of, and distribution of benefits from, individual account pension plans that have been abandoned by their sponsoring employers. DOL intends to examine whether, and how, to amend those regulations by expanding the scope of individuals entitled to be a "qualified termination administrator," who is authorized to determine whether an individual account plan is abandoned and to carry out related activities necessary to the termination and winding up of the plan's affairs. Proposed regulations are expected to be issued in December 2011.
- *Prohibited transaction exemption procedures:* DOL will soon amend the current rule of procedure that governs the filing and processing of applications for administrative exemptions from the prohibited transaction provisions of Title I of ERISA, the Internal Revenue Code, and the Federal Employees' Retirement System Act. The amendment will seek to clarify the types of information and documentation generally required for a complete filing and provide expanded opportunities for the electronic submission of information and comments relating to an exemption application. This guidance is expected to be issued in final form in November 2011.

Regulatory activity impacting retirement and health and welfare plans include:

- *Electronic disclosure:*, DOL recently issued a formal request for information (RFI) on electronic disclosure by employee benefit plans, seeking comments on the use of electronic media by employee benefit plans to furnish information to participants and beneficiaries covered by ERISA plans. This topic is listed as being in the “pre-rule” stage, with no action scheduled while the agency reviews public comments through October 2011.

  There is a disconnect between the electronic disclosure project (discussed below) and the service provider-fiduciary fee disclosure regulations (which, as amended, would be effective January 1, 2012) as well as the participant-level fee disclosure final regulations (which are applicable for plan years beginning on or after November 1, 2011, with a transition rule that, as amended, allows the first disclosures 120 days after the applicability date). It seems unlikely that DOL will complete a significant rewrite of its electronic delivery guidance during this time period.

- *ERISA claims procedure*: ERISA provides that each employee benefit plan must provide "adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied." The notice must set forth the specific reasons for the denial and must be written in a manner calculated to be understood by the claimant. Each plan must also afford " a reasonable opportunity" for any participant or beneficiary whose claim has been denied to obtain "full and fair review" of the denial by the "appropriate named fiduciary of the plan." DOL intends to update the current rules governing the internal claims and appeals process with proposed regulations expected in December 2011.

RECENT JUDICIAL ACTIVITY – Nothing to Report This Month