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RECENT LEGISLATIVE ACTIVITY

House Oversight Subcommittee Examines PPACA, Health Premium Subsidies

On October 27, the U.S. House of Representatives Committee on Oversight's Health Subcommittee held the hearing Examining Obamacare's Hidden Marriage Penalty and Its Impact on the Deficit. Specifically, the hearing discussed whether the insurance premium subsidies available to lower-income individuals under the Patient Protection and Affordable Care Act (PPACA) will inadvertently penalize married couples, but the hearing also served as a forum for discussion of the benefits and drawbacks of the health care law in general.

As part of the hearing, the full committee unveiled a staff report, Uncovering the True Impact of the Obamacare Tax Credits: Increases the Deficit, Expands Welfare through the Tax Code, and Implements a New Marriage Tax Penalty. This report contains:

- a projection from the Congressional Budget Office (CBO) indicating that the refundable health insurance tax credits and Medicaid expansion under PPACA will increase the national debt burden, largely because many of the filers who claim the health insurance tax credit will lack positive income tax to offset;
- a Joint Committee on Taxation estimate suggesting that the statutory linkage of the tax credit to the federal poverty level (FPL) will create an incentive for low-income individuals not to marry (or to divorce), since two single individuals will be able to obtain a greater tax benefit than a married couple; and
- arguments that employers will have a significant incentive to drop employer-sponsored health insurance because of the sizeable health insurance tax credits available to individuals under PPACA, which would lead to increased federal budget deficits.

During the question-and-answer period, Republican subcommittee members generally denounced PPACA and its long-term economic effects, while Democratic members focused on its success in increasing access to health care coverage. Congress is expected to continue its close oversight of PPACA implementation in the coming months, particularly as the 2012 campaign season progresses.

House Panel Holds Hearing on PPACA Grandfather Plan Rules

On October 13, the U.S. House of Representatives Education and Labor Committee's Health, Employment, Labor and Pensions Subcommittee held a hearing on Regulations, Costs, and Uncertainty in Employer Provided Health Care, examining the Patient Protection and Affordable Care Act's (PPACA) changes and regulations impacting employer-provided insurance, particularly rules addressing grandfathered health plans.

"Grandfathered" health plans that meet the requirements of the interim final regulations remain exempt from some, but not all, of the market reform provisions in PPACA.

Subcommittee Chairman Phil Roe (R-TX) opened the hearing by describing the challenges small and large employers are encountering as they attempt to secure "grandfather" status. "The ability to adjust and manage the benefit plans of their workers has offered employers an opportunity to minimize disruption and modify care to best meet the needs of the workplace. That flexibility is severely undermined by the new law and its flawed grandfather regulation," Roe said.

Ranking Democratic Subcommittee Member Rob Andrews (D-NJ), in his opening statement, suggested that the hearing was simply an attempt to "re-litigate" the health care reform bill and suggested that the subcommittee should be focusing instead on job creation.

The subcommittee heard testimony from the following witnesses:

- Grace-Marie Turner, president of the Galen Institute, criticized the grandfather plan regulations, arguing that they prevent employers from making changes to their health plans to keep costs down while increasing regulatory burdens. She noted that these cost increases are ultimately passed along to employees in the form of cost-sharing.
- Dennis M. Donahue, managing director of Wells Fargo Insurance Services USA, Inc. (on behalf of the Council of Insurance Agents and Brokers), detailed the costs and burdens of compliance with the grandfather rule, as well as the medical loss ratio (MLR) requirements, which mandate health insurers spend a minimum of 80 percent of premium revenue on clinical services and activities to improve health care quality for plans in the individual and small group markets, and 85 percent for plans in the large group market. He expressed support for the Access to Professional Health Insurance Advisors Act (H.R. 1206), which would prevent the MLR regulation from reducing the commissions of agents and brokers.
- Ron Pollack, executive director of Families USA, spoke in favor of PPACA and touted its success in expanding health care coverage to lower-income individuals, reducing the acceleration of health care cost increases and increasing employment opportunities in the health care sector.
- Robyn Piper, president of Piper Jordan, described the costs, obstacles and limitations imposed on employers seeking to maintain their health plans under the grandfather rules. "As many employers have been challenged with maintaining status, plan enhancements and cost-containing measures have been delayed. For those workers employed by organizations that have chosen to lose grandfathered status, many have witnessed increased premiums and cost-shifting," she said in her testimony. Piper also criticized the Obama Administration for failing to provide employers with thorough guidance, increasing uncertainty and legal expense.

The question-and-answer period covered a wider variety of subjects, including PPACA's overall impact on job creation, the MLR requirements (particularly as they affect insurance agents and brokers) and wellness programs.

Worker Misclassification Legislation Introduced in House, Senate

Lawmakers in the U.S. Senate and House of Representatives have introduced legislation to address instances of "worker misclassification" – the improper classification of employees as independent contractors.

On April 8, Senator Sherrod Brown (D-OH) introduced the Payroll Fraud Prevention Act (S. 770), a bill that he said would "protect workers from being misclassified as independent contractors, thereby ensuring access to safeguards like minimum wage and overtime, health and safety protections, and unemployment and workers' compensation benefits." Senator Tom Harkin, Chairman of the Senate Health, Education, Labor and Pensions (HELP) Committee, to which the bill has been referred, has signed on as an original cosponsor of S. 770.

On October 13, Representative Lynn Woolsey (D-CA) introduced a nearly identical measure, the Employee Misclassification Prevention Act (H.R. 3178). Representatives George Miller (D-CA) and Rob Andrews (D-NJ), ranking Democratic members of the House Education and the Workforce Committee and the Subcommittee on Health, Employment, Labor and Pensions Subcommittee, have signed on as original cosponsors to H.R. 3178. The bill has been referred to the Education and Workforce Committee as well as the House Ways and Means Committee.

Both measures seek to reduce the number of misclassification violations by:

- Ensuring that employers keep records that reflect the accurate status of each worker as an employee or non-employee and clarifying that employers violate the Fair Labor Standards Act when they misclassify workers;
- Increasing penalties on employers who misclassify their employees and are found to have violated employees' overtime or minimum wage rights;
- Requiring employers to notify workers of their classification as an employee or non-employee;
- Creating an "employee rights Web site" to inform workers about their federal and state wage and hour rights; and
- Providing protections to workers who are discriminated against because they have sought to be accurately classified.

At the same time, EMPA would improve federal and state efforts to detect and stop misclassification by:

- Mandating that states conduct audits to identify employers who misclassify workers and by requiring that the U.S. Department of Labor (DOL) monitor states' efforts to identify misclassification;
- Directing states to strengthen their own penalties for worker misclassification;
- Permitting DOL and the Internal Revenue Service (IRS) to refer incidents of misclassification to one another; and
- Directing DOL to perform targeted audits focusing on employers in industries that frequently misclassify employees.

Woolsey, Miller and Andrews were among 11 Democratic leaders who sent a letter to the Joint Select Committee on Deficit Reduction (known as the "Supercommittee") encouraging them to include worker misclassification legislation as part of their recommendations to Congress. Initiatives to address worker misclassification are considered "revenue-raisers" because they typically yield increased tax collections. The Obama Administration included a similar recommendation in its detailed proposal to the Supercommittee (on Page 279) that would explicitly permit the Internal Revenue Service (IRS) to issue guidance about the proper classification of workers and allows the IRS to require prospective (but not retroactive) reclassification of workers who are currently misclassified. Penalties would be waived or substantially reduced for employers under certain conditions.

The Obama Administration already appears to be ramping up efforts to address worker misclassification with the previous signing of a memorandum of understanding (MOU) permitting the DOL and IRS to share information and with the IRS issuance of Announcement 2011-64, unveiling a new Voluntary Classification Settlement Program (VCSP) "to permit taxpayers to voluntarily reclassify workers as employees for federal employment tax purposes."

Bill Introduced to Allow Use of Retirement Funds for Mortgage Payments

On October 5, U.S. Senator Johnny Isakson (R-GA) and Representative Tom Graves (R-GA) introduced identical versions of the Hardship Outlays to protect Mortgagee Equity (HOME) Act (S. 1656/H.R. 3104).

This bill would permit taxpayers to withdraw money from a qualified retirement plan, penalty-free, to make mortgage payments toward a primary residence. Withdrawals would be capped, over the lifetime of the individual, at $50,000 or one-half of the present value of the plan account. The funds must be used for this purpose, so long as those funds are used within 120 days of withdrawal. Deferred income tax otherwise due on those withdrawals would still be due to the Internal Revenue Service.

The Senate bill has been referred to the Senate Finance Committee and the House bill has been referred to the House of Representatives Ways and Means Committee.

Senators Introduce Automatic IRA Legislation

U.S. Senators Jeff Bingaman (D-NM) and John Kerry (D-MA) recently introduced the Automatic IRA Act (S. 1557), legislation to provide for automatic enrollment of employees in payroll-deduction savings plans. An official summary is also available. Bingaman previously introduced similar legislation in the previous Congress (S. 3760).

Under the bill, employees who work for a private business with more than a certain number of workers and whose employer does not already offer a retirement plan would be defaulted into a program in which they contribute payroll earnings to an individual retirement account (IRA). The bill has a phase-in which applies the requirements to employers with more than 100 employees the first year, 50 the second, 25 the third and 10 the fourth year after enactment. The bill could have implications because categories of employees who are otherwise not eligible for coverage under the company's plan might be required to be automatically enrolled in an IRA under the terms of this legislation.

The measure is similar to a proposal included in President Obama's Fiscal Year 2011 budget. A companion bill has not yet been introduced in the House of Representatives, although Representative Richard Neal (D-MA) sponsored such a bill in 2010.

Senators Bingaman and Kerry are both members of the Senate Finance Committee, to which this bill has been referred.

CBO Issues Report on Retirement Savings Tax Incentives

On October 18, the Congressional Budget Office (CBO) released a report, Use of Tax Incentives for Retirement Saving in 2006. The report examines participation rates in, and contributions to, pre-tax (i.e., 401(k)) and post-tax (i.e. Roth-style) retirement plans in 2006, as compared to earlier data. The paper also analyzes two provisions enacted as part of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) – increases in contribution limits and the "saver's credit" for low-income individuals.

The report revealed the following notable findings:

- The highest rates of participation in tax-favored retirement plans (pre-tax and post-tax) were seen among workers between the ages of 45 and 59; those whose income was $40,000 or more; and those who were the primary earner in a two-earner household. The lowest participation rates were among workers under the age of 30 and those whose income was under $20,000.
- Twenty-nine percent of workers who filed tax returns were wage earners who contributed to 401(k)-type plans. Another 18 percent were wage earners who participated in noncontributory (encompassing noncontributory defined contribution and defined-benefit) plans only. Participation rates by age, income, and marital status for 401(k)-type plans were similar to those for all tax-favored retirement plans.
- Participants in 401(k)-type plans contributed an average of $4,350 in 2006. Average contributions were higher among older workers, those whose earnings fell into higher income ranges and married workers who were either a sole or a primary earner.
- Overall participation in some form of tax-favored retirement plan was nearly the same in 1997, 2000, 2003, and 2006 –within 1 percentage point of 51 percent. Between 2003 and 2006, participation solely in noncontributory plans increased by 1 percentage point.
- Five percent of participants in 401(k)-type plans in 2006 contributed up to the limits established by EGTRRA. Twelve percent contributed amounts equal to or greater than the pre-EGTRRA limits and presumably would have made the maximum allowable contributions in the absence of EGTRRA. Therefore, EGTRRA reduced the proportion of participants who were constrained by the contribution limits for 401(k)-type plans by 7 percentage points.
- In 2006, 25 percent of all workers who filed tax returns were eligible to take the saver's credit (down from 30 percent in 2003) on the basis of their income and tax liability. Only 20 percent of those eligible actually contributed to a retirement account (down slightly from 21 percent in 2003), and 65 percent of those who contributed claimed the credit (up from 59 percent in 2003).

While the report finds that average contributions to all types of plans increased in real (inflation-adjusted) terms between 2003 and 2006, largely because of the increases in the maximum contribution under EGTRRA, the report suggests that these changes may reflect "the shifting of assets between taxable and tax-favored accounts." The report also argues that additional increases to the limits would not materially increase participation rates, since "the percentage of participants who already contribute the maximum amounts allowed (that is, the percentage who are constrained by the current contribution limits) represents an upper bound on the percentage of participants who might be induced to save more if the limits were raised.

RECENT REGULATORY ACTIVITY

DOL Issues Final Investment Advice Regulations

On October 24, the Employee Benefits Security Administration (EBSA) of the U.S. Department of Labor (DOL) issued final regulations interpreting the investment advice provisions of the Pension Protection Act of 2006. These final regulations effectively establish a prohibited transaction exemption permitting the provision of investment advice to participants and beneficiaries in defined contribution plans or individual retirement accounts. DOL had released proposed regulations in February 2010.

(The new final regulations replace the final regulations published in January 2009 by the Bush Administration. The Obama Administration delayed the effective date of the Bush regulations

multiple times and requested additional comments before withdrawing them completely in November 2009.)

Like the most recent proposed regulations, the final regulations allow investment advice to be provided in two ways: (1) through the use of a computer model certified as unbiased, and (2) through an adviser compensated on a level-fee basis. Also, like the Bush Administration version, the final regulations clarify that it does not invalidate or otherwise affect prior regulations, exemptions, interpretive or other guidance previously issued by the DOL (such as the "SunAmerica" guidance) concerning the circumstances under which the provision of investment advice would not constitute a prohibited transaction.

The final regulations do, however, make a number of notable changes to the most recent proposed regulations. Most notably:

- The final regulations attempt to clarify the use of "generally accepted investment principles" and "historical returns" as criteria for asset allocation under the computer model. The proposed regulations contained a requirement that a computer model not "inappropriately distinguish among investment options within a single asset class on the basis of a factor that cannot confidently be expected to persist in the future," which would appear to include historical returns. DOL revised the provision to read that a computer model must "appropriately weigh the factors used in estimating future returns of investment options." The final regulations' preamble concedes that DOL should not define generally accepted investment theories, but states that historical performance of investment options should not be given "inappropriate weight."
- The final regulations assert that the computer model is required to take into account all designated investment options, which does not include brokerage windows, self-directed brokerage accounts or other plan arrangements that enable participants or beneficiaries to select investments beyond those designated by the plan. This provision continues the proposed regulations' exception from this requirement for annuities, but discontinues the exception for employer securities and target date funds, which must now be taken into account by the computer model. DOL did not remove in-plan annuity options from the list, meaning a computer model need not, but may, take into account an annuity offered as an investment by the plan. DOL notes in the preamble that if a participant already has part of his or her account allocated to an annuity, those amounts must be taken into account in developing the recommendations for the remaining assets. DOL included a new rule that allows a participant to request that a particular investment be excluded from consideration.
- The final regulations clarify that the fee-leveling condition only requires that compensation not vary based on the advice rendered; the language in the proposal suggested any compensation "based on" the advice would be prohibited.
- The final regulation includes some clarifications to the requirement that the eligible investment expert and auditor not have a material relationship with the fiduciary adviser.
- DOL retained the proposed regulations' requirement in the context of IRAs that a fiduciary adviser must send a copy of an auditor's report to DOL if the report identifies instances of noncompliance.
- The proposal clarifies that the term IRA includes a SEP and SIMPLE IRA.

Among possible changes to the proposed regulations that were not adopted:

- The final regulations continue to require that both the fee-leveling and computer models take into account or utilize "information relating to age, time horizons, risk tolerance, current investments in designated investment options, other assets or sources of income, and investment preferences," to the extent it is provided. The final regulations reaffirm DOL's position that such information is sufficiently important to the provision of useful investment advice that fiduciary advisers should be required to make a request for the information.
- DOL did not modify its position, first reflected in Field Assistance Bulletin 2007-1, that the fee leveling condition is applied at the fiduciary adviser level only and not also at the level of affiliates.

EBSA has withdrawn and will re-propose regulations revising 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). EBSA Assistant Secretary Phyllis C. Borzi asserted that the final investment advice regulations are separate from, and do not affect, the proposed fiduciary definition rule.

The regulations are effective December 27, 2011.

HHS Releases Final Regulations for ACOs, FTC/DOJ Issue Antitrust Enforcement Statement

On October 20, the Centers for Medicare and Medicaid Services(CMS) of the U.S. Department of Health and Human Services (HHS) issued final regulations on Accountable Care Organizations (ACOs) under the Medicare Shared Savings Program (MSSP) established by Section 3022 of the Patient Protection and Affordable Care Act (PPACA). In addition to the final rule, CMS also issued interim final regulations regarding waivers of certain federal laws, including the physician self-referral law, the anti-kickback statute and certain provisions of the civil monetary penalty law in connection with the MSSP.

An ACO is an organization of health care providers that agrees to be accountable for the quality, cost, and overall care of Medicare beneficiaries who are enrolled in the traditional fee-for-service program. They are used to facilitate coordination and cooperation among providers to improve the quality of care for Medicare beneficiaries and reduce unnecessary costs. Under the MSSP, providers of services and suppliers can continue to receive traditional fee-for-service payments under Medicare Parts A and B, and be eligible for additional payments based on meeting specified quality and savings requirements. The statutory language requires the Secretary to establish this program no later than January 1, 2012. The final regulations set forth the requirements for eligibility for, and participation in, ACOs.

In conjunction with the issuance of the final regulations, the Federal Trade Commission (FTC) and Department of Justice (DOJ) issued a statement of antitrust enforcement policy, similar to the proposed statement issued on March 31, that addresses the application of the antitrust laws to health care collaborations among otherwise independent providers and provider groups that seek to participate, or have otherwise been approved to participate, as ACOs. Te final policy statement differs from the proposed policy statement in that:

- The entire final policy statement (with the exception of the voluntary expedited antitrust review) applies to all collaborations among otherwise independent providers and provider groups that are eligible and intend, or have been approved, to participate in the

MSSP. Its applicability is no longer limited to those collaborations formed after March 23, 2010, the date on which PPACA was enacted; and

- Because the ACO/MSSP final regulations no longer require a mandatory antitrust review, the final policy statement no longer contains provisions relating to that review. However, as discussed in the final rule, the agencies stated that they will continue to oversee competition in markets served by ACOs that participate in the MSSP, aided by data and information from CMS that will assist FTC and DOJ in monitoring the competitive effects of ACOs.

SEC Confirms "No Action" on DOL Fee Disclosure Requirements

The Securities and Exchange Commission (SEC) has provided to the U.S. Department of Labor (DOL) a "No Action" Letter, confirming that providing the information required under the DOL final regulations on defined contribution plan fee disclosure to participants will not violate Rule 482 of the Securities Act of 1933.

The fee disclosure regulations require plan administrators to furnish each participant or beneficiary with certain plan-related information and certain investment-related information in specific categories. This required disclosure, if considered an advertisement governed by the securities laws, is inconsistent in a few ways with SEC Rule 482. In particular, Rule 482 has different rules concerning the timing requirements for updating information, the disclosure of money market fund performance and certain narrative and legend disclosures. Finally, it was not clear how the Financial Industry Regulatory Authority (FINRA, the largest independent regulator for all securities firms doing business in the U.S.) would treat such disclosures created by a broker-dealer subject to its jurisdiction.

PBGC Proposes Regulations for Terminated Hybrid Plan Valuations

On October 28, the Pension Benefit Guaranty Corporation (PBGC) proposed regulations implementing provisions of the Pension Protection Act of 2006 (PPA) that change the rules for determining the present value of the accrued benefit and the benefits payable to participants and beneficiaries upon the termination of a statutory hybrid plan, such as a cash balance plan.

PPA provides that, when such a plan terminates, the variable rate used under the plan to determine accrued benefits will be equal to the average of the rates of interest used under the plan during the five-year period ending on the termination date. Further, the amount of the benefit, payable in the form of an annuity payable at normal retirement age, will be determined using the interest rate and mortality table specified under the plan for that purpose as of the termination date (or an average interest rate, if the plan rate is a variable rate). For a plan terminated and trusteed by PBGC, the proposed regulations would conform PBGC's rules for determining the allocation of assets and the amount of benefits payable under Title IV of ERISA to the PPA changes in the benefit determination rules for statutory hybrid plans.

The proposed regulations were formally published in the Federal Register on October 31. Comments are due by December 30.

IRS Issues Guidance on Hybrid Plan Regulations

On October 12, the Internal Revenue Service (IRS) issued Notice 2011-85, announcing the postponement of effective dates for certain hybrid defined benefit plan interest crediting rules (addressing market rate of return). The guidance modifies the proposed hybrid plan regulations issued in October 2010.

Specifically, the notice:

- Postpones until no earlier than January 1, 2013, the effective date of proposed hybrid plan regulations and certain provisions of the final regulations (in particular, certain sections related to the interest crediting rates).
- Extends the deadline for adopting an interim or discretionary amendment to comply with Internal Revenue Code Section 411(a)(13) (other than Section 411(a)(13)(A)) and Section 411(b)(5) until the last day of the first plan year before the plan year for which the proposed hybrid plan regulations, once finalized, apply to the plan.
- States that the IRS expects to provide relief from the anti-cutback rules in Code Section 411(d)(6) when the proposed regulations are final. The relief will apply if (a) the amendment is adopted by the last day of the first plan year before the plan year for which the proposed plan regulations, once finalized, apply to the plan; and (b) the amendment eliminates or reduces the protected benefit only to the extent necessary to enable the plan to meet the requirements of Code Section 411(b)(5).
- Formalizes relief originally described in IRS Announcement 2009-82 regarding Code Section 204(h) notices. This special timing rule only applies to amendments adopted after November 10, 2009, and on or before the last day of the first plan year that begins on or after January 1, 2009.

IRS Provides Guidance on Pre-Approved Plans

On October 5, the Internal Revenue Service (IRS) issued Revenue Procedure 2011–49, guidance on opinion and advisory letters for pre-approved retirement plan documents. The guidance effectively modifies and supersedes Rev. Proc. 2005-16, which set forth the requirements for requesting opinion and advisory letters for preapproved plans.

The Revenue Procedure clarifies the effect of employer amendments on pre-approved plan status and allows opinion letters to be issued for the first time for preapproved multiple employer plans, among other items.

Pre-approved plans include master and prototype (M&P) plans as well as volume submitter (VS) plans. M&P plans generally consist of a basic plan document and adoption agreement that may not be amended by adopting employers, except by choosing among permitted options under the adoption agreement. VS plans are generally sample or specimen plans which are submitted for approval and then adopted by individual employers. The IRS will announce the deadline for employers to timely adopt the plans after the pre-approved documents have been reviewed.

The guidance specifically revises procedures for VS plans to clarify when separate specimen plans and applications are required for different categories of plans and to specify that a governmental plan is one of the categories of plans that require a separate specimen plan. Most notably, for both M&P and VS plans the list of areas not covered by letters is expanded to include hybrid plans, as well as plans with section 401(h) accounts, and plans under section

414(x). In addition, the guidance extends the application deadline for mass submitter defined contribution plan sponsors from October 31, 2011, to January 31, 2012.

Changes Announced in IRS Retirement Limits, MSAs, Long-Term Care Premiums, Fringe Benefits for 2012 Plan Year

Each year, dollar limits applicable to various plan contributions and benefits are adjusted for inflation and the cost-of-living (COLA).

As announced in Internal Revenue Service (IRS) Press Release 2011-103 and the IRS COLA Table, many of the relevant retirement plan indexes have increased for the first time in three years.

New limits for Medical Savings Accounts (MSAs), eligible long-term care premiums and transportation fringe benefits were also announced under IRS Revenue Procedure 2011-52.

Key limits are listed in this table. Click here.

IOM Issues Report on Essential Health Benefits Under PPACA

On October 7, the Institute of Medicine of the National Academies (IOM) issued its report providing the U.S. Department of Health and Human Services (HHS) with a set of criteria and approaches for developing a package of "essential health benefits," as applicable to individual and small group coverage under the Patient Protection and Affordable Care Act (PPACA). HHS is expected to identify the actual standard in the next several months.

The essential benefits package will establish the minimum benefits – including preventive, diagnostic, and therapeutic services and products – that must be covered by certain health plans, including those participating in state-based health insurance exchanges. The IOM panel was not permitted to recommend specific services or products.

Most notably, the IOM report directs HHS to consider cost and effectiveness when determining the package itself, including the expected average cost of health insurance for small employers when the law is fully implemented in 2014. The report also strongly suggests transparency in the process of determining the specific elements of the package, informed by input from the public.

While the essential health benefits package will directly apply to plans in the individual and small group markets, there are implications for plans in the large group market, including self-insured plans. PPACA's prohibition on lifetime and annual dollar limits applies to group health plan coverage for any "essential health benefits," as determined in HHS guidance. As we have previously reported, interim final regulations (IFR) issued in June 2010 implementing these limits stated that the regulatory agencies will take into account good faith efforts to comply with a reasonable interpretation of the term "essential health benefits" for plan years that begin before final regulations are issued defining the term.

DOL Issues Prohibited Transaction Exemption Procedural Regulations

On October 26, the U.S. Department of Labor (DOL) Employee Benefits Security Administration (EBSA) released final regulations governing the filing and processing of applications for administrative exemptions from the prohibited transaction provisions of ERISA. Most notably, these regulations modify the definitions of "qualified independent appraiser" and "qualified independent fiduciary" retained in connection with such transactions. The rule becomes effective on December 27.

RECENT JUDICIAL ACTIVITY

Second Circuit Appeals Court Affirms Dismissal in Citigroup "Stock Drop" Case

In a split decision handed down on October 19, the U.S. Court of Appeals for the Second Circuit upheld a district court's dismissal in the case of In Re: Citigroup ERISA Litigation. At issue in the case was whether the defendant, as fiduciary of a defined contribution plan, acted imprudently by continuing to offer the corporation's common stock as an investment option for plan participants prior to a decline in the company stock price which caused losses to employee investors. Such cases are commonly referred to as "stock drop" cases. In recent years, ERISA "stock drop" lawsuits have become commonplace and now often occur in tandem with securities fraud lawsuits and can follow even a modest decline in an employer's stock price.

The majority opinion, led by Judge John M. Walker Jr., upheld the district court's decision on the basis of the "Moench Presumption." Under this presumption, which has been adopted by a number of courts, fiduciaries of plans that invest in employer stock are entitled to a presumption that their decision to invest, or continue to invest, in employer stock is prudent unless plaintiffs can show the fiduciaries abused their discretion. The majority opinion stated that the Moench Presumption can be overcome only where there is a "dire situation" that was objectively foreseeable. "The test of prudence is … one of conduct rather than results, and the abuse of discretion standard ensures that a fiduciary's conduct cannot be second-guessed so long as it is reasonable," Walker wrote.

The majority opinion also determined, in dismissing the plaintiff's claims of fiduciary breach of loyalty that "fiduciaries have no duty to provide plan participants with non-public information that could pertain to the expected performance of plan investment options."

The U.S. Department of Labor (DOL) had issued an amicus brief in favor of the plaintiff, requesting reversal of the district court decision. It is unclear now whether the plaintiffs will seek additional appeal.