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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.

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RECENT JUDICIAL ACTIVITY – Nothing to Report

RECENT LEGISLATIVE ACTIVITY – Nothing to Report This Month

RECENT REGULATORY ACTIVITY

Treasury, IRS Guidance: All Legal Same-Sex Marriages Will Be Recognized for Federal Tax Purposes

The U.S. Treasury Department and Internal Revenue Service issued [Revenue Ruling 2013-17](#), along with Frequently Asked Questions documents on [same-sex spouses](#) and [domestic partnerships/civil unions](#). This ruling provided long-awaited guidance on the federal tax treatment of same-sex marriages in light of the U.S. Supreme Court's June 26 decision in *United States v. Windsor*. As we previously reported, the Court struck down Section 3 of the Defense of Marriage Act of 1996 defining spouse as only a person of the opposite sex.

In a [news release](#) announcing the guidance, Treasury and IRS declared that "same-sex couples, legally married in jurisdictions that recognize their marriages, will be treated as married for federal tax purposes. The ruling applies regardless of whether the couple lives in a jurisdiction that recognizes same-sex marriage or a jurisdiction that does not recognize same-sex marriage." As a result, the guidance allows for the uniform administration of plans and benefits across state lines.

Rev. Rul. 2013-17 applies to same-sex marriages legally entered into in one of the 50 states, a U.S. Territory or a foreign country, and to all federal tax provisions where marriage is a factor, including filing status, claiming personal and dependency exemptions, taking the standard deduction, employee benefits, contributing to an IRA and claiming the earned income tax credit or child tax credit. The ruling does not apply to registered domestic partnerships, civil unions, or similar formal relationships recognized under state law.

As explained in Rev. Rul. 2013-17 and the FAQ guidance, individuals who are or were in same-sex marriages may file original or amended returns choosing to be treated as married for federal tax purposes for one or more prior tax years still open under the statute of limitations (three years from the date the return was filed or two years from the date the tax was paid, whichever is later, meaning tax years 2010, 2011, and 2012).

The FAQ guidance includes several questions discussing how employees may claim refunds for federal income tax paid on the value of health coverage for a same sex spouse, as well as income taxes paid on premiums paid on an after tax basis. The FAQ guidance also confirms that employers may claim refunds for payroll taxes paid on such benefits and indicates that a special administrative procedure for employers to file claims for refunds or make adjustments for excess payroll taxes paid on same-sex spouse benefits "will be provided in forthcoming guidance to be issued by the IRS in the near future."

The FAQ guidance also addresses the rules that apply to qualified retirement plans pursuant to Rev. Rul. 2013-17 with examples of the consequences of these rules. Qualified retirement plans must comply with the rules as of September 16, 2013. The guidance explains that, although Rev. Rul. 2013-17 allows a taxpayer to file amended returns that relate to prior periods with respect to other matters, this does not apply with respect to matters relating to qualified retirement plans, expressly stating that "The IRS has not yet provided guidance regarding the

application of Windsor and these rules to qualified retirement plans with respect to periods before September 16, 2013."

IRS Finalizes Rules For Individual Mandate, Minimum Essential Coverage Requirements

The Internal Revenue Service (IRS) has released [final regulations](#) related to the "individual shared responsibility" requirement to obtain "minimum essential coverage" (MEC) under the Patient Protection and Affordable Care Act (PPACA). The final regulations include several clarifications related to employer-sponsored coverage.

Section 1501(b) of PPACA added Section 5000A to a new Chapter 48 of Subtitle D of the Internal Revenue Code, requiring nonexempt individuals to maintain "minimum essential coverage" for themselves and any dependents or make a "shared responsibility payment" using their federal income tax return.

The final regulations (which largely finalize the rules in the proposed regulations issued last May) provide implementation guidance regarding the maintenance of MEC and liability for the shared responsibility payment; coverage that qualifies as MEC; exempt individuals; and computation of shared responsibility payments. The final regulations also note that "Forms, instructions, publications, or other guidance to be published by the IRS are anticipated to assist taxpayers in determining the amount of an applicable shared responsibility payment."

Section 5000A provides that "minimum essential coverage" includes coverage under an "eligible employer-sponsored plan." The final regulations confirm that a self-insured group health plan is an "eligible employer sponsored plan" and also include:

- An acknowledgement that the proposed regulations did not specifically address arrangements in which an employer provides subsidies or funds a pre-tax arrangement for employees to use to obtain coverage under plans offered in the individual market. According to the preamble to the final regulations, "future guidance will address the application of section 5000A and the ACA's insurance market reforms to these types of arrangements."
- A discussion of whether medical coverage offered to employees by an organization "acting on behalf of an employer qualifies as an eligible employer-sponsored plan." According to the regulation's preamble, "a plan offered by an employer to an employee includes a plan offered to an employee on behalf of an employer."

This latter clarification addresses comments on the proposed rules as to whether a multiemployer or single employer collectively-bargained plan is an "eligible employer-sponsored plan" for employees covered by the CBA and whether a "plan offered to an employer's employees by a third party, such as a professional employer organization or leasing company, is an eligible employer-sponsored plan for the employees eligible to participate in the plan." The preamble states, however, that, "No inference is intended from this treatment that the third party is the employer for this or any other provision of the Code or related laws."

Other issues addressed in the final regulations include whether or when coverage provided by foreign insurance issuers or qualified health plans offered through a health exchange established by and within territories of the United States qualify as MEC. The final regulations

also include clarifications related to when individuals are exempt from the individual mandate for "lack of affordable coverage" including where the individuals are either eligible or ineligible for coverage under eligible employer-sponsored plans.

The final regulations were published in the Federal Register on August 30, 2013 and apply to taxable years ending after December 31, 2013.

HHS Issues Additional Guidance on PPACA Exchange Income Verification

In [guidance released on August 5](#), the U.S. Department of Health and Human Services (HHS) Centers for Medicare and Medicaid Services (CMS) provided additional information regarding the process for insurance marketplaces (or "exchanges") verifying the income of individuals who are seeking a premium tax credit for the purchase of insurance within an exchange.

The recent delay of reporting requirements under sections 6055 and 6056 of PPACA and the penalties under Section 4980H employer shared responsibility requirements – along with the subsequent issuance of [final regulations](#) governing exchange applications — raised uncertainties regarding the verification process for individuals seeking subsidies for coverage purchased in the exchanges.

According to the guidance, the "Marketplaces will always use data from tax filings and Social Security data to verify household income information provided on an application, and in many cases, will also use current wage information that is available electronically."

HHS Launches Employer-Focused Website on PPACA Implementation, Compliance

The U.S. Department of Health and Human Services has launched a new website specifically designed to educate employers on how the Patient Protection and Affordable Care Act (PPACA) will affect businesses.

BusinessUSA.gov/healthcare includes a "wizard" tool that tailors educational information based on a company's size and location. The website provides content on coverage options, tax credits and other provisions of the law from HHS, the Small Business Administration and the Treasury Department.

According to [a news release](#) announcing the new website, "The Administration will work with the employer community to ensure the site continues to be a helpful resource for businesses and their employees, including updating the site with additional, timely information."

State and federal Health Insurance Marketplaces (or "exchanges"), where individuals and small businesses can find health coverage, are scheduled to be operational beginning October 1.

EBSA Seeking Approval for Survey, Focus Groups on Retirement Benefit Statements

As part of the ongoing project to standardize "lifetime income illustrations" as part of retirement plan participant benefit statements, U.S. Department of Labor (DOL) Employee Benefits

Security Administration (EBSA) has requested approval from the Office of Management and Budget (OMB) to initiate surveys and focus groups of plan participants.

As stated in an [August 9 information collection request \(ICR\)](#), EBSA is seeking "to conduct a survey and an experiment on participants ... and to conduct four focus groups of non-panel members. The survey and focus groups would explore whether information contained in sample benefit statements can be presented in a way that improves recipients' understanding of the statements and helps them better plan for retirement." The proposed [survey instrument](#) and [focus group documents](#) can be accessed through the [OMB website](#). EBSA had issued a [preliminary ICR](#) to solicit comments earlier this year.

The Pension Protection Act of 2006 (PPA) requires ERISA plans to provide participants and certain beneficiaries with individual pension benefit statements. Generally, defined benefit plans must provide the statement every three years (with an annual notice alternative) while defined contribution plans that permit participant direction must provide the statement quarterly. Individual account plans that do not permit participant direction must provide the statement annually.

EBSA issued an [Advance Notice of Proposed Rulemaking \(ANPRM\)](#) on May 7 requesting comments on whether and how the individual benefit statement should present a participant's accrued benefits in a defined contribution plan as a lifetime income stream of payments as well as in the form of an individual account balance.

Based on the survey and focus group results, along with the feedback received in response to the ANPRM, EBSA will likely issue proposed regulations setting forth specific rules. However, as the ANPRM indicates, the DOL "intends to consider all reasonable alternatives to direct regulation, including whether there is a way short of a regulatory mandate that will ensure that participants and beneficiaries get constructive and helpful lifetime income illustrations."

Treasury, IRS Update Priority Guidance Plan; DOL Sets Regulatory Agenda

The U.S. Treasury Department (Treasury) and Internal Revenue Service (IRS) released [an update to its Priority Guidance Plan](#) for 2013-2014 on August 9, listing those issues that will be the subject of formal guidance during the next year. This document updates the previous [Priority Guidance Plan](#) document issued in February.

The plan contains 324 regulatory projects to be completed through June 2014, including 40 items addressing retirement benefits (Pages 5-7 of the document) and 26 items addressing executive compensation, health care and other benefits, including items related to implementation of the Patient Protection and Affordable Care Act (PPACA) (Pages 7-9). A number of these items have already been completed, as indicated in the priority plan.

The plan includes a number of long-awaited regulatory projects from prior guidance plans:

- Final hybrid plan regulations [Item A17 under the Retirement Benefits Section]
- Guidance under Internal Revenue Code (Code) Section 402(c) on retirement plan distributions that are disbursed to multiple destination and regulations under Code Section 402A on distributions from designated Roth accounts that are disbursed to multiple destinations [A10 and A11] (both related to the controversial language in the

model notice under Code Section 402(f) for split distributions involving after-tax contributions)

- Guidance on issues relating to pension equity plans [A19]
- Elements of the "lifetime income" guidance package [A38], along with (1) final regulations under Code Section 401(a)(9) on deferred annuities and minimum distributions (proposed regulations were published on February 3, 2012) [A7] and (2) final regulations under Code Section 417(e) to simplify the treatment of optional forms of benefit that are paid partly in the form of an annuity and partly in a more accelerated form (proposed regulations were published on February 3, 2012) [A25]
- Final regulations on suspension or reduction of safe harbor contributions (proposed regulations were published on May 18, 2009) [A8]
- Multiple projects on Code Section 430 funding rules, including (1) final regulations on determination of minimum required contributions [A26], (2) a revenue procedure relating to approval for funding method changes to reflect changes to the minimum funding requirements [A27] and (3) regulations on additional issues relating to funding rules for single-employer plans under the Pension Protection Act of 2006 [A29]
- Formal notice on additional issues relating to funding relief (and benefit limitations) for single-employer plans under the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010 [A30]

The latest edition of the guidance plan also makes a number of significant revisions and additions under the Employee Benefits/Retirement Benefits section:

- Guidance on frozen defined benefit plans [Item No. A1 under the Retirement Benefits Section]
- Regulations updating the rules applicable to Employee Stock Ownership Plans (ESOPs) [A2]
- Guidance on in-plan rollovers from qualified plans to designated Roth accounts, as provided under the American Taxpayer Relief Act of 2012 (ATRA) [A12]
- Guidance under §404 on deductions for employer contributions to qualified plans [A13]

Similarly, the plan includes key pending items listed under the Employee Benefits/Executive Compensation, Health Care and Other Benefits, including guidance related to the PPACA:

- Final regulations on the employer "shared responsibility" provisions of the PPACA (proposed regulations were issued in January) [B23] and regulations on certain reporting requirements to the IRS and employees under Code Section 6056 (as added by PPACA), regarding employer-providing health care coverage after January 1, 2014 [B24]; the Obama Administration has announced that it will delay the implementation of those requirements until October 2014) and issued transition relief in July [B25]
- Final regulations on cafeteria plans under Code Section 125 [Item No. B4]

- Final regulations under Code Section 162(m)(6), as added by the PPACA, affecting deferred compensation on the part of health insurance company executives [B6 and B7]
- Guidance under Code Section 223(c)(2)(C) on health savings accounts (HSAs), regarding certain services required to be provided without cost sharing [B8]
- Regulations under Code Sections 4980G and 125 addressing comparable employer contributions to employees' HSAs [B22]
- Final regulations on income inclusion under Code Section 409A (Proposed regulations were published on December 8, 2008) [B11]
- Final regulations on the PPACA Additional Medicare Tax [B17]

Other issues addressed elsewhere in the priority guidance plan include consolidated returns; corporations and their shareholders; excise taxes; exempt organizations; financial institutions and products; gifts, estates and trusts; insurance companies and products; international issues; partnerships; subchapter S corporations; tax accounting; tax administration; tax-exempt bonds and other general tax issues. An appendix also lists additional routine guidance that is published each year.

The U.S. Department of Labor (DOL) Employee Benefits Security Administration (EBSA) also recently revealed its near-term regulatory projects as part of its [semiannual regulatory agenda](#), providing information on regulatory projects anticipated within the next 12 months.

Most notably, the agency intends to issue new proposed regulations "to more broadly define as employee benefit plan fiduciaries persons who render investment advice to plans for a fee." A notice of proposed rulemaking is planned for October.

Other noteworthy anticipated regulatory projects include:

- Final regulations governing 90-day waiting periods under PPACA (planned for December 2013);
- Final regulations for defined benefit pension plans' annual funding notice (planned for October 2013);
- Final regulations governing target date fund disclosure (planned for November 2013);
- Final regulations amending the DOL Abandoned Plan Program (planned for January 2014);
- Final mental health parity regulations (along with Treasury and the Department of Health and Human Services, planned for October 2013);
- A proposed "guide" for service provider defined contribution plan fee disclosures under Section 408(b)(2) (planned for October 2013), along with additional fee disclosure initiatives;

- Ongoing initiatives for providing lifetime income illustrations as part of retirement plan pension benefit statements (see previous story, above);
- Initiatives for automatic enrollment in health plans for employees of large employers under PPACA and the Fair Labor Standards Act; and
- Amendment of the claims procedure regulations.

While agencies are not bound by their agendas, their publication does provide insight regarding the administration's priorities and the amount of activity expected within the next year.

ERISA Advisory Council Hears Testimony on Benefits Issues

On August 27, 28 and 29, the [ERISA Advisory Council \(EAC\)](#) heard testimony on a number of vital benefits matters.

The EAC is 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. The chair of the EAC for the 2013 term is Karen Kay Barnes, managing counsel for McDonald's Corporation, representing employers. Neal S. Schelberg, senior partner at Proskauer Rose LLP, also representing employers, serves as vice chair. *Locating Missing and Lost Participants*

On August 28, the EAC heard testimony on the challenges of finding lost and missing retirement plan participants in workplace retirement plans.

At the beginning of the hearing on lost and missing participants, Joe Canary, director of the Office of Regulations and Interpretations at DOL's Employee Benefit Security Administration (EBSA) and Daniel Maguire, director of DOL's Office of Health Plan Standards and Compliance Assistance, provided an update on current regulatory projects. In discussion with the panel, Canary noted that EBSA's imminent re-proposal of regulations defining "fiduciary" with regard to individual account plans will not be released until after October (the deadline listed in the DOL's agenda). Maguire said that the agency was still working on guidance spelling out the formal treatment of same-sex spouses and beneficiaries of employee benefit plans. (The U.S. Treasury Department and Internal Revenue Service issued [Revenue Ruling 2013-17](#), along with Frequently Asked Questions documents on [same-sex spouses](#) and [domestic partnerships/civil unions](#), on August 29, providing guidance on the federal tax treatment of same-sex marriages.)

Private-Sector De-Risking and Participant Protections

On August 29, the EAC heard testimony on the growing trend of defined benefit pension plan "de-risking," which can take many forms. The hearing focused on three methods of de-risking: (1) spinoff of a portion of a plan which is then terminated and annuities are purchased for plan participants and beneficiaries; (2) the purchase of annuities for a portion of the participants and beneficiaries in an ongoing plan which are then distributed to the applicable participants; or (3) the offering of a lump-sum payment in lieu of future annuity payments either to terminated vested former employees or retirees in pay status (or both).

Witnesses on this topic included Josh Gotbaum, director of the Pension Benefit Guaranty Corporation (PBGC), who surprised the group by saying that payment of lump sums is a greater

threat to retirement security than purchasing annuities from a sound insurance company, even for an ongoing plan. Gotbaum pointed out that insurance companies are highly regulated by states and if an insurance company does go bankrupt (which is extremely rare) there are state insurance funds. Gotbaum compared its own deficit, \$35 billion, to the positive net worth of Prudential which he said was close to \$35 billion, although he said the PBGC is "clearly not in any immediate risk of running out of money." According to Gotbaum, the Pension Protection Act of 2006 (which changed the interest rates applicable to lump-sum calculations) created an arbitrage situation for employers where it is cheaper to provide lump-sum distributions than annuities. Gotbaum does not think any amount or type of disclosure "will get people to make the right decision" and stated "I think lump sums are like cigarettes. They are legal and they are bad for you."

Philip Barlow of the DC Department of Insurance, Securities and Banking and Peter Gallanis of the National Organization of Life & Health Insurance Guaranty Association (NOLHGA) also testified. Barlow described the very vigorous reserve, licensing and monitoring process that the insurance companies are subject to, as well as the detailed reporting required in all states in which they are licensed to do business. Gallanis spoke about the state guaranty funds that back the annuities and called the "limits" (\$250,000 in many states) a "floor" because the monitoring and reporting allows regulators to enter the process while the insurance company still has plenty of assets. He added that in the period of 2008 to 2011 when more than 400 banks failed, only about six insurance companies went into liquidation triggering the guaranty funds and almost all were paid in full (because premium payers have priority over unsecured creditors).

Successful Retirement Plan Communications for Various Population Segments

On August 27, the EAC heard testimony on how retirement plans can target specific participant populations with specific educational and administrative communications.

Witnesses generally called for simplicity and situation-specific communications, but expressed some concern that approaches based on behavioral economics - such as automatic enrollment and escalation - have proven more effective at boosting participation than improving decision-making within the plan.

A list of written testimony is available on the [EAC website](#) and is expected to be updated soon. Final reports are typically issued early in the following year.

RECENT JUDICIAL ACTIVITY – Nothing to Report This Month