



BENEFITS INSIDER
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WEB's **Benefits Insider** is a bi-monthly member exclusive publication providing the latest developments from Washington, DC, on matters of interest to employee benefits professionals. The content of this newsletter is being provided through 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 LEGISLATIVE ACTIVITY

Bipartisan Budget Agreement Includes PBGC Premium Hikes

As has been widely reported, a bipartisan, bicameral conference committee has reached agreement on [a joint budget resolution](#) for Fiscal Year 2014, replacing many of the spending cuts imposed by "sequestration" under prior law. A [short summary](#) and [section-by-section summary](#) are now available. The measure will now go to the House of Representatives and then the Senate for consideration. Approval is not assured since there are members of Congress at each end of the political spectrum who have expressed concern about the deal. However, it is expected to be passed and sent to the president for his signature.

Most notably, the budget agreement established \$8 billion in increases to single-employer Pension Benefit Guaranty Corporation (PBGC) premiums over a ten year period. Such premium increases were proposed in President Obama's FY 2014 budget proposal as well as the budget resolutions approved by both houses of Congress earlier this year. While the final increased level in the budget deal is far less than the \$25 billion over ten years called for in earlier proposals, it is still a disappointment and concern.

Under current law, the flat-rate premium is already set to increase from \$42 in 2013 to \$49 in 2014, with increases to be indexed to wage growth thereafter. If the budget agreement is approved by Congress, the flat-rate (per-participant) premium will be further increased to \$57 for plan year 2015 and to \$64 for plan year 2016, with increases to be indexed to wage growth thereafter.

The measure also increases the variable-rate premium (paid by underfunded plans on a per-\$1,000 of underfunding basis). Under current law, variable-rate premiums are already set to rise to \$14 per \$1,000 of underfunding in 2014 (which includes a statutory increase as well as an inflation adjustment), and are to increase to at least \$19 per \$1,000 of underfunding in 2015 and indexed to wage growth thereafter. If the budget agreement is approved, the variable rate will be increased to at least \$24 per \$1,000 of underfunding for plan year 2015 and at least \$29 per \$1,000 of underfunding for plan year 2016. The variable-rate premium cap will also be increased to \$500 beginning for plan years beginning after 2015, and indexed thereafter.

RECENT REGULATORY ACTIVITY

IRS Provides Temporary Relief on Frozen Plan Issue

Under guidance issued by the Internal Revenue Service (IRS) on December 13, defined benefit sponsors received helpful relief for 2014 and 2015 from the imposition of certain nondiscrimination rules on defined benefit pension plans that have been closed to new hires. This guidance, [Notice 2014-5](#), requests comments on a number of topics being considered for a more comprehensive future regulation.

The increasingly necessary practice of defined benefit plan sponsors "soft freezing" their plans (closing them to new entrants) has created new challenges for employers. These plan sponsors have used various approaches to assist older employees with the transition to the new system, such as grandfathering existing participants. However, over time, some of these transition

approaches can become technically inconsistent with current regulations prohibiting discrimination in favor of highly compensated employees.

Generally, to avoid claims of nondiscrimination, both the old and new plans must pass one of three tests -- requiring the plans to be primarily defined benefit in character, broadly available, or meet a minimum aggregate allocation gateway -- before they can combine the plans for another round of nondiscrimination testing. Because of the difficulty in meeting those tests, in some cases, employers have already been compelled to change important benefits on a prospective basis and participants could experience much broader adverse effects in the coming years if this problem is not corrected through permanent guidance.

Notice 2014-5 allows the plans to be tested together (or "aggregated") on a benefits basis for plan years beginning before January 1, 2016, but only if (1) the plans qualify for testing in 2013, based on meeting the "primarily defined benefit in character" rule or "broadly available" in the plan year beginning in 2013, or (2) the defined benefit plan passes nondiscrimination on its own in 2013. This allows plans that do not already have a problem to aggregate the defined benefit and defined contribution plans for testing purposes in their 2014 and 2015 plan years, even if they would not have met the test in those plan years. To qualify for the temporary relief, the "soft freeze" amendment had to be in place by December 13, 2013. This is a temporary solution to buy time so the IRS and Treasury can propose regulations with a more permanent fix.

The notice also proposes a number of alternatives for a permanent solution to the problem as well as other possible modifications to the nondiscrimination requirements.

IRS Clarifies Administration of In-Plan Roth Conversions

In [Notice 2013-74](#), released on December 11, the Internal Revenue Service (IRS) provided clarifying guidance that should ease adoption of in-plan Roth conversions (also known as in-plan Roth rollovers).

The American Taxpayer Relief Act of 2012 (ATRA) included a modification to the rules associated with Roth conversions within participating defined contribution plans such as 401(k), 403(b) and 457 plans. While prior law permitted certain participants (i.e., age 59½ or older or after separation from service) to convert distributable pre-tax plan assets to after-tax savings in a separate Roth account within the plan, the new measure effectively has eliminated the "distributable" requirement, allowing any pre-tax amount to be converted as long as the plan includes a Roth conversion program and taxes are paid on the converted amount.

In Notice 2013-74, the IRS addressed open issues related to:

- *Unvested Contributions*: The notice states that only vested contributions can be converted.
- *Plan Design*: The notice confirms that a plan may place restrictions on in-plan Roth conversions and has broad authority to discontinue offering them.
- *Application of Prior Guidance*: The notice confirms that prior guidance related to pre-2013 in-plan Roth conversions (in [Notice 2010-84](#)) continues to apply (although portions of it do not apply to the newly permitted in-plan conversions of nondistributable amounts)
- *Issues Applicable to all In-Plan Roth Conversions*: The IRS addressed the interplay between in-plan Roth conversions and the special tax rule on net unrealized appreciation ("NUA") of employer securities paid in a lump sum. The notice also

confirms that an in-plan Roth conversion begins the 5-year period for qualified distributions, if the conversion is the first contribution to the designated Roth account. Finally, the guidance confirms that an in-plan Roth conversion must be counted in determining the present value of accrued benefits for top-heavy status.

- *Distribution Restrictions*: the notice confirms that distribution restrictions that applied to the contribution before its conversion continue to apply to transferred amounts (and are not therefore eligible to be distributed like other rollover contributions) after the conversion.

Executive Branch Agencies Release Regulatory Agendas

Key regulatory agencies with jurisdiction over U.S. employee benefits policy recently updated their semiannual agendas with topics that are expected to be the subject of formal guidance during the next year. These include agencies with direct jurisdiction over employee benefit matters:

- [the U.S. Treasury Department \(Treasury\) and Internal Revenue Service \(IRS\)](#)
- [the U.S. Department of Labor \(DOL\) and Employee Benefit Security Administration \(EBSA\)](#)
- [the Health and Human Services Department \(HHS\) and Centers for Medicare and Medicaid Services \(CMS\)](#)
- [The Pension Benefit Guaranty Corporation \(PBGC\)](#)
- [The Securities and Exchange Commission \(SEC\)](#)

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.

The list categorizes regulatory projects according to whether they are in the proposed rule stage or the final rule stage. Generally, those items slated for "long-term action" do not have a specific timetable for proposal. While the description of each project includes a projected timetable for the issuance of rules or guidance, these timelines are estimates and frequently slip. For many projects, the projected date for "final action" is listed as December 2013. For all others, we have indicated the projected date.

Below, we highlight the significant items for employer plan sponsors and service providers.

[Treasury & IRS](#)

The following health care policy items are listed on the Treasury/IRS agenda:

- [Shared responsibility for employers regarding health coverage](#) under Internal Revenue Code Section 4980H, as enacted by the Patient Protection and Affordable Care Act (PPACA) [final rule stage]
- [Shared responsibility payment for not maintaining minimum essential coverage \(MEC\)](#) [final rule stage]
- [Reporting and notice requirements under Internal Revenue Code Section 6056](#), under which applicable large employers must file certain information with the IRS on coverage under an eligible employer-sponsored health plan and furnish statements to individuals, along with rules for [reporting of MEC under 6055](#) [both in proposed rule stage]
- [Minimum value of employer sponsored coverage](#) [final rule stage]

- [Requirements for group health plans and health insurance issuers relating to coverage of preventive services under PPACA](#) [final rule stage, final action planned for summer 2014]
- [Information reporting relating to affordable insurance exchanges](#) [final rule stage]
- [Health insurance premium tax credit rules](#) for determining whether health coverage under an employer-sponsored plan is affordable for individuals (spouses or dependents) who are eligible to enroll in the plan by reason of their relationship to an employee (related individuals) [final rule stage]
- [Fees on health insurance and self-insured plans](#) under sections 4375 to 4377 of the Internal Revenue Code, as added by Section 6301 of PPACA [proposed rule stage, proposed regulations expected soon]
- Guidance on [employer contributions to health savings accounts \(HSAs\)](#) and the interaction between the section 4980G comparability rules and section 125 nondiscrimination rules in instances where not all of the employer's employees contribute to an HSA through a cafeteria plan. [proposed rule stage, proposed regulations expected soon]
- [Permitted election changes for cafeteria plans](#) [proposed rule stage, proposed regulations expected soon]
- [Guidance under tax Section 125](#) regarding the use of contributions or benefits under a health flexible spending account in a subsequent plan year or period of coverage. [proposed rule stage, proposed regulations expected soon]
- [Medical and accident insurance benefits under qualified plans](#) [final rule stage]

The following retirement and compensation policy items are listed on the Treasury/IRS agenda:

- [Employee retirement benefit plan returns required on magnetic media](#) (i.e., electronic disclosure) [proposed rule stage]
- [Relief from the three percent mandatory non-elective contribution requirement in a safe harbor 401\(k\) plan](#) [final rule stage]
- [Removal of rollover allocation rule from designated Roth regulations](#), possibly addressing notice requirements under tax code Section 402(f) [proposed rule stage]
- [Additional rules regarding hybrid retirement plans](#) under the Pension Protection Act (PPA) of 2006 [final rule stage]
- [Reporting and notice requirements for deferred vested benefits under tax code Section 6057](#), formally designating the Form 8955-SSA as the form used to satisfy the relevant reporting requirements of the former "Schedule SSA" [final rule stage]

- [Modifications to minimum present value requirements for defined benefit plan distributions](#), allowing defined benefit plans to simplify the treatment of certain optional forms of benefit that are paid partly in the form of an annuity and partly in a more accelerated form [final rule stage]
- [Additional rules regarding the determination of plan assets and benefit liabilities for purposes of pension plan funding and benefit restrictions](#) for certain underfunded defined benefit pension plans [proposed rule stage, proposed regulations expected soon]
- [Accrual rules for defined benefit plans](#) in cases where plan benefits are determined on the basis of the greater of two or more separate formulas [final rule stage]
- [Update to minimum present value requirements for defined benefit plan distributions](#) [proposed rule stage, proposed regulations expected soon]
- [Guidance with respect to FATCA coordination](#) [proposed rule stage, proposed regulations expected soon]
- [Application of tax code Section 409A to nonqualified deferred compensation plans](#) [proposed rule stage, proposed regulations expected soon] and [further guidance on the application of tax code Section 409A to nonqualified deferred compensation plans](#) [final rule stage]
- [Notice to participants of consequences of failing to defer receipt of qualified retirement plan distributions and expansions of applicable election period and period for notices](#) [final rule stage, final action planned for July 2014]
- [Certain employee remuneration in excess of \\$1,000,000 under tax code Section 162\(m\)](#) [final rule stage]
- [compensation deferred under eligible deferred compensation plans](#), specifically relating to the definitions of a bona fide severance pay plan [proposed rule stage, proposed regulations expected soon]
- [contributions of an employer under a plan that does not meet the requirements of section 401\(a\) and application of tax code Section 404\(a\)\(5\)](#) [proposed rule stage, proposed regulations expected soon]

In addition to the Fall 2014 regulatory agenda, on November 20 the IRS updated its [2013-2014 Priority Guidance Plan](#). The above items are included among the 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.

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.

[DOL & EBSA](#)

The following health care policy items are listed on the DOL/EBSA agenda:

- [90-day waiting period limitation and technical amendments to certain health coverage requirements under PPACA](#) [final rule stage, final regulations planned for February 2014]
- [Mental Health Parity and Addiction Equity Act of 2008](#) [final rule stage (completed), [final regulations](#) issued November 8]
- [Amendments to excepted benefits](#) as amended by PPACA and the Health Insurance Portability and Accountability Act (HIPAA) [proposed rule stage, proposed regulations expected soon]

The following retirement and compensation policy items are listed on the Treasury/IRS agenda. Most notably, the agency intends to issue new proposed regulations in August 2014 "to more broadly define as employee benefit plan fiduciaries persons who render investment advice to plans for a fee."

- [Conflict of interest rule-investment advice](#) addressing "fiduciary" definition [proposed rule stage, new proposed regulations planned for August 2014]
- [Pension benefit statements](#), addressing 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 [proposed rule stage, proposed regulations planned for August 2014]
- [Guide or similar requirement for section 408\(b\)\(2\) disclosures](#) [proposed rule stage, proposed regulations planned for January 2014]
- [Annual funding notice](#), as required under ERISA, as amended by PPA and the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA) [final rule stage]
- [Selection of annuity providers--safe harbor for individual account plans](#) [proposed rule stage, proposed regulations planned for October 2014]
- [Target date disclosure](#) [final rule stage, final regulations planned for March 2014]
- [Amendment of abandoned plan program](#) [final rule stage, final regulations planned for April 2014]
- [Standards for brokerage windows](#) in participant-directed individual account retirement plans [pre-rule stage, RFI planned for April 2014]

[HHS & CMS](#)

The following health care policy items are listed on the HHS/CMS agenda:

- [Ninety-day waiting period limitation and technical amendments to certain health coverage requirements under PPACA](#) [final rule stage]
- [Calendar-year 2015 notice of benefit and payment parameters](#), addressing cost-sharing reductions, advance premium tax credit, reinsurance, and risk adjustment programs (including the transitional reinsurance program fee) under PPACA [proposed rule stage, [proposed regulations](#) issued November 25]
- [Establishment of quality standards for exchanges and qualified health plans \(QHPs\)](#) [proposed rule stage, proposed regulations planned for March 2014]
- [Nondiscrimination under PPACA](#) (listed under the Office for Civil Rights, rather than CMS) [proposed rule stage, proposed regulations planned for August 2014]

PBGC

The following retirement policy items are listed on the HHS/CMS agenda:

- [Reportable events and certain other notification requirements](#) [final rule stage, final regulations planned for June 2014]
- [Benefits payable in terminated single-employer plans; limitations on guaranteed benefits; shutdown and similar benefits](#), specifically related to “unpredictable contingent events” [final rule stage]
 - [Proposed regulations](#) were issued in March 2011.
- [Payment of premiums; large-plan flat-rate premium](#) [final rule stage]
 - [Proposed regulations](#) were issued in July.
- [Cash balance plans; benefit determinations and plan valuations for statutory hybrid plans under PPA](#) [final rule stage]
 - [Proposed regulations](#) were issued in October 2011.
- [Liability for termination of single-employer plans; treatment of substantial cessation of operations](#), including “partial” terminations [proposed rule stage, proposed regulations planned for March 2014]
- [Missing participants under PPA](#), allowing certain terminating plans not covered by the existing Missing Participants program to participate in that program [proposed rule stage, proposed regulations planned for July 2014]
- [Multiemployer plans; valuation and notice requirements](#) for certain terminated multiemployer plans or multiemployer plans involved in mergers [proposed rule stage, proposed regulations planned for March 2014]
- [Title IV treatment of rollovers from defined contribution plans to defined benefit plans](#), including asset allocation and guarantee limits [proposed rule stage]

- [benefit payments](#), clarifying and codifying payment and valuation policies [proposed rule stage, proposed regulations planned for March 2014]

SEC

The following retirement policy items are listed on the HHS/CMS agenda:

- [Pay ratio disclosure](#) under the Dodd-Frank Wall Street Reform and Consumer Protection (Dodd-Frank) Act [final rule stage, final regulations planned for October 2014]
- [Investment company advertising: target date retirement fund name and marketing](#) [final rule stage, final regulations planned for October 2014]
 - [Proposed regulations](#) were issued in June 2010 and the SEC approved [a set of additional recommendations](#) in April.
- [Money market fund reform; amendments to Form PF](#) [final rule stage, final regulations planned for October 2014]

Qualified Retirement Plan Distributions Excluded from NIIT

In [final regulations](#) issued December 2 on the net investment income tax (NIIT), the Internal Revenue Service (IRS) confirmed that qualified retirement plan distributions are exempt from the NIIT, as instituted by the Health Care and Education Reconciliation Act of 2010.

Beginning in 2013, Section 1411 of the Internal Revenue Code imposes a 3.8 percent tax on the "net investment income" of individuals, estates and trusts - generally, the net income accumulated from interest, dividends, royalties, rents and capital gains.

However, Section 1411(c)(5) specifically identifies specific amounts that are not considered "net investment income," including:

- Rollovers to an IRA or another qualified retirement plan;
- Corrective distributions (including distributions as part of a compliance correction program), such as to correct a failure of the actual deferral percentage test or the actual contribution percentage test affecting a 401(k) plan;
- Deemed distributions from defaulted plan loans or from an in-plan or Roth IRA conversion; and
- Dividends on employer stock that are distributed to participants and deductible by the employer.

Non-qualified distributions are generally not subject to NIIT because they are treated like wages. The regulations also clarify that the NIIT should not affect the administration of any qualified retirement plan, meaning that plan administrators do not need to take any actions based on the regulations.

RECENT JUDICIAL ACTIVITY

No activity to report this period.