



BENEFITS INSIDER
A Member Exclusive Publication

Volume 105, January 6, 2014 (covering news from December 16, 2013 - January 1, 2014)

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.

Articles in this Edition

RECENT LEGISLATIVE ACTIVITY 2

- Senate Declines Action on Tax “Extenders” Bill; Congress Expected to Address Expiring Tax Provisions in Early 20142**
- Senate Subcommittee Examines Retirement Policy, Focusing on Social Security2**
- Senate Special Committee on Aging Examines the Future of Long-Term Care Policy4**

RECENT REGULATORY ACTIVITY 6

- IRS Issues Guidance for FSAs, HSAs In Light of *Windsor* Decision6**

RECENT JUDICIAL ACTIVITY 7

- U.S. Supreme Court To Hear Stock Drop Case7**

RECENT LEGISLATIVE ACTIVITY

Senate Declines Action on Tax “Extenders” Bill; Congress Expected to Address Expiring Tax Provisions in Early 2014

Shortly before the U.S. Senate adjourned for 2013, the chamber considered – but did not pass – a pared-down “tax extenders” package extending certain expiring tax provisions for individuals, families and employers. The House of Representatives, prior to its own adjournment the previous week, chose to put off tax extenders until early in 2014.

A number of these expiring tax provisions affect employee benefits and are included in the Senate’s bill ([S. 1859](#)) and may be of interest to sponsors of employee benefits:

- *Mass transit benefit parity:* the [American Taxpayer Relief Act of 2012 \(H.R. 8\)](#) provided for an increase in the pre-tax allowance for mass transit expenses, making it equal to the benefit provided for parking (\$245 per month) through the end of 2013.
- *Tuition assistance:* tuition assistance under Internal Revenue Code Section 222 provides for tax deductibility of qualified employer-provided tuition and related expenses. The expiring provision allows an above-the-line deduction for qualified college tuition payments.
- *Distributions from Individual Retirement Plans for Charitable Purposes:* The expiring provision allows taxpayers age 70.5 and older to make a tax-free distribution from an IRA of up to \$100,000 to a 501(c)(3) organization and simultaneously satisfy the minimum required distribution rules.
- *Health care tax credit extension for certain trade adjustment assistance (TAA) and Pension Benefit Guaranty Corporation (PBGC) benefit eligible individuals:* this expiring provision provides a health insurance tax credit to individuals who are dislocated from their work due to trade competition.
- *COBRA benefits extension for individuals who receive TAA and are eligible to receive PBGC benefits.* This provision provides for a one-year extension of COBRA continuation of coverage benefits to individuals who are eligible for a benefit from the PBGC or who are eligible for trade adjustment assistance.

S. 1859 would have extended all of these programs for one additional year.

Tax extenders could be addressed in the new year as part of longer-term tax legislation, such as a possible permanent “doc fix” to stabilize payments made to Medicare providers. In the past, when Congress failed to reenact a package of temporary tax provisions before they expired, they have later passed an extenders package and applied it retroactively.

Senate Subcommittee Examines Retirement Policy, Focusing on Social Security

Witnesses at a December 18 hearing of the U.S. Senate Finance Committee’s Social Security, Pensions, and Family Policy Subcommittee expressed serious concerns about the future of the

Social Security program and discussed ways in which the current employer-sponsored retirement system can be improved to increase individuals' financial security.

The hearing, titled [The Role of Social Security, Defined Benefits, and Private Retirement Accounts in the Face of the Retirement Crisis](#), was described by Subcommittee Chairman Sherrod Brown (D-OH) as "the first of a series of hearings on retirement security and Social Security."

Brown's opening statement asserted that Social Security is the only leg of the "three-legged stool" still standing, with the employer-sponsored system struggling to provide adequate coverage for American workers while individuals are struggling to save outside of workplace plans. "These facts illustrate how great the need is for maintaining and expanding Social Security – the only source of guaranteed lifetime benefits on which most retirees can rely," Brown said.

Senator Pat Toomey (R-PA), the subcommittee's ranking Republican member, said in his opening statement that retirement policy should "recognize the strengths of the current retirement system and preserve what works ... it's generally good to adopt the approach of 'first, do no harm.'" Notably, he voiced support for the tax incentives that encourage people to save in workplace plans and opposed suggestions to cap the amount that individuals can save.

Senator Johnny Isakson (R-GA), in an opening statement, said the "retirement security bubble" is "the next big bubble." He echoed Toomey's call to preserve the tax incentives for defined contribution savings.

The panel heard testimony from the following witnesses:

- [John F. Sweeney](#), executive vice president at Fidelity Investments, provided survey research indicating that savers – particularly younger workers – need additional help and resources to improve retirement security outcomes. He advocated for expansion of automatic enrollment and escalation features and efforts to educate retirement plan participants and other investors.
- [Robert G. Romasco](#), president of AARP, talked extensively about the value of the Social Security program as a financial safety net for retirees as well as survivors and other beneficiaries. He criticized the current state of employer-sponsored retirement plans, arguing that "retiree savings have shrunk".
- [Andrew G. Biggs](#), resident scholar at the American Enterprise Institute, argued that improving the solvency of the Social Security system was more urgent than expansion of benefits. He also argued there are relative advantages of defined contribution plans over defined benefit plans, describing how certain innovations (lifecycle investing and/or partial annuitization) could help recreate many positive aspects of defined benefit plans.
- [Dean Baker](#), co-director of the Center for Economic and Policy Research, emphasized the importance of Social Security and noted that its projected to become even more important given what he described as the "collapse" of the defined benefit system.

During the question-and-answer portion of the hearing, Brown asked whether Social Security benefits were "adequate." Biggs indicated that the answer depends on how adequacy is measured. Baker argued that the benefits were not adequate and suggested expanding personal

savings through the introduction of a government-sponsored defined contribution plan (like the Thrift Savings Plan for federal employees) available to everyone.

Responding to a question by Toomey, Biggs acknowledged that defined contribution plans have their drawbacks, but noted that those drawbacks are generally fixable, while the problems faced by defined benefit plans – particularly at the state and local level – are much more difficult to solve.

In response to a question by Isakson, the panelists disagreed on the appropriateness of raising the retirement age, with Biggs expressing openness to the idea and Romasco and Baker arguing against it. Sweeney described data suggesting that delaying retirement even slightly has the potential to improve overall financial security. Isakson noted that the success of the private retirement system greatly reduces pressure on Social Security and other public programs.

Senator Ron Wyden (D-WA) described concerns from workers that pensions are “melting away” and that companies are “wheeling and dealing” with pension funds, using them to finance downsizing and special benefits for executives. He cited the work of Ellen Schultz of the *Wall Street Journal*, who has tried to document malfeasance on the part of companies and retirement plans. (Schultz has not published in the *Journal* since April.) Baker replied that it is “a serious problem” warranting greater scrutiny and more severe penalties but pointed out that it’s not a key cause of retirement insecurity. Biggs suggested that defined benefit plans “make it very easy for people to avoid doing the right thing.”

Senator Bill Nelson (D-FL) touted [the Lifetime Income Disclosure Act \(S. 1145\)](#) – cosponsored by Nelson and Isakson, among others – which would require 401(k) plan sponsors to inform participating workers of the projected monthly income they could expect at retirement based on their current account balance. He asked Sweeney to talk in detail about the strategies Fidelity is using to improve investor awareness of their retirement needs.

Senator Ben Cardin (D-MD) spoke briefly at the hearing, also touting the successes of the employer-sponsored system and invoking the call to “first do no harm.” He echoed the calls for automated features and lifetime income options.

Asked by Senator Bob Casey (D-PA) what the panelists would recommend for the next two years, Biggs recommended improving the solvency of the Social Security system independent of tax increases or benefit cuts. Baker suggested increasing benefits for individuals at the lower end of the income scale. Sweeney recommended further improvements of automatic features in retirement plans.

Similarly, Brown closed the meeting by asking what the future retirement system would look like. The panelists generally repeated their answers to Casey’s question, though Baker reiterated his suggestion of a supplemental government-sponsored defined contribution plan. Biggs advocated strongly for encouraging saving in workplace retirement plans. Romasco recommended looking at the retirement system holistically, with attention to public and private plans.

Senate Special Committee on Aging Examines the Future of Long-Term Care Policy

At [a December 18 hearing](#) of the U.S. Senate Special Committee on Aging, witnesses and committee members discussed the U.S. Senate Commission on Long-Term Care (CLTC)

September 30 [report to Congress](#) and the need to continue the discussion on the future of long term care policy and the need for reform.

The CLTC was established by the American Taxpayer Relief Act of 2012 to “develop a plan for the establishment, implementation, and financing of a comprehensive, coordinated, and high-quality system that ensures the availability of long-term services and supports for individuals in need of such services and supports” and provide a report to Congress with recommendations for government action. The CLTC’s members were appointed by the Democratic and Republican leaders of both houses of Congress, along with the President.

Committee Chairman Bill Nelson (D-FL) [opened the hearing](#) by citing the approximately 12 million Americans who currently have long-term care needs, with that number rising rapidly. “[The Congressional Budget Office] estimates that the value of such care is roughly \$234 billion annually. Despite these enormous costs, most Americans have done little or nothing to prepare for their future long-term-care needs ... Clearly, our current system of providing long-term care is unsustainable for both the government and for families.”

Ranking Republican committee member Susan Collins (R-ME) also cited the growing number of Americans who rely on long-term care services. Collins acknowledged that the oldest members of the population is the fastest growing segment of the population – along with declining birthrates, resulting in fewer family caregivers – means that the issue needs to be addressed soon. Collins went on to say “Americans should consider their future long-term care needs just as they plan for their retirement or purchase life insurance to protect their families.”

Senators Joe Manchin (D-WV) and Tim Scott (R-SC) also made brief opening statements citing personal experience as care-givers and the need to better educate the public about the importance of having long-term care and related policies.

The panel heard testimony from the from the following witnesses:

- [Anne Tumlinson](#), senior vice president for post-acute and long-term care at Avalere Health, suggested that the problems with the overall system are a result of under-financing of the system the and challenge of persuading individuals, especially younger individuals, to enroll in long-term care insurance. She voiced support for a government mandate in some form, saying “As challenging as it may seem in the current policy and political environment, some type of mandatory approach to insurance appears to be the only way to protect most Americans from the financial devastation of long-term care need.”
- [Bruce Chernof](#), president and CEO of the SCAN Foundation and chair of the CLTC, made his remarks in accompaniment with [Mark Warshawsky](#), visiting adjunct scholar at the American Enterprise Institute and vice-chair of the CLTC.

Chernof focused on the highlights of the September 30 report and said that, despite the large task presented to the CLTC, they were still able to produce and vote out a strong, action-oriented report including 28 recommendations in the areas of service delivery, workforce and financing.

Warshawski discussed the financing issues specifically. In the report, the CLTC called for a vision to accomplish “a sustainable balance of public and private financing for ... long term care services and supports,” but was not able to fully complete this section (though it did recommend significant follow-up efforts in this area).

- [Judy Feder](#), professor at Georgetown University and one of the six dissenting members of the CLTC, said that there is still a lot of work to be done in this area. She noted that there is much less acceptance of the need for long-term care services and supports, as opposed to the need for basic health care. Along with the other five commissioners who voted against the report, she offered an alternative report suggesting “why and how Congress should accomplish this goal.” She argued that building an effective long-term care insurance system with “public protection” is essential.

During the question-and-answer session, Collins talked about the federal long-term care insurance program and the low take-up rate, and asked the panel about the experience on the private employer side. Warshawsky responded that the situation is fairly similar with large employers and that while approximately 50 percent of companies make access to these policies available, only about five to six percent of employees currently participate. He went on to say that long-term care insurance policies are not tax-advantaged, unlike those for health and retirement, and this is likely a factor in the low take-up rates. Collins acknowledged that adding another tax incentive for employee benefits would be difficult in the current federal budget environment.

Inquiries from other committee members, including Senators Tammy Baldwin (D-WI), Sheldon Whitehouse (D-RI), Kelly Ayotte (R-NH) and Elizabeth Warren (D-MA), focused mainly on the need to better educate the public about long-term insurance policies and related products. The dialogue seemed to suggest that there are differing opinions at the member level as to the best and most effective structure of a long-term insurance program.

RECENT REGULATORY ACTIVITY

IRS Issues Guidance for FSAs, HSAs In Light of *Windsor* Decision

[Notice 2014-01](#), issued by the Internal Revenue Service (IRS) on December 16, provides guidance on the rules governing cafeteria plans, Flexible Spending Accounts (FSAs) and Health Savings Accounts (HSAs) in light of the U.S. Supreme Court’s decision in *U.S. vs. Windsor*, which struck down key sections of the Defense of Marriage Act.

Notice 2014-01 amplifies previous guidance provided in [Revenue Ruling 2013-17](#), issued in August (along with a set of [Frequently Asked Questions](#)), which interpreted the *Windsor* decision to define “spouse” for federal law purposes to include an individual married to a person of the same sex if the individuals are lawfully married under state law. The prior guidance adopted a “state of celebration rule” whereby same-sex couples, legally married in jurisdictions that recognize their marriages, will be treated as married for federal tax purposes, regardless of whether the couple lives in a jurisdiction that recognizes same-sex marriage or a jurisdiction that does not recognize same-sex marriage.

Notice 2014-01 provides further guidance (in question-and-answer format, with examples) regarding the application of *Windsor* to cafeteria plans, FSAs and HSAs. The guidance provides clarification with respect to:

- When plans may permit participants who are lawfully married to a same-sex spouse to make mid-year election changes;

- The effective dates of an election made under a cafeteria plan with respect to a same-sex spouse;
- When and under what circumstances must an employer begin to treat the amount that the employee pays for spousal coverage as a pre-tax salary reduction;
- The tax treatment of health coverage in the case of a plan participant who had been paying the cost of same-sex coverage on an after-tax basis;
- When a cafeteria plan may permit a participant's FSA, including a health, dependent care or adoption assistance FSA, to reimburse covered expenses of the participant's same-sex spouse or the same-sex spouse's dependent; and
- The application of joint deduction limits for contributions to HSAs and dependent care FSAs.

[A blog post on the Treasury Department website](#) provides additional details on the notice.

In September, the IRS issued [Notice 2013-61](#), guidance for employers and employees to make claims for refund or adjustments of overpayments of payroll taxes with respect to certain benefits and remuneration provided to same-sex spouses.

RECENT JUDICIAL ACTIVITY

U.S. Supreme Court To Hear Stock Drop Case

The U.S. Supreme Court has agreed to hear a case calling into question an employer's fiduciary duty when the employer's stock price declines or performs below expectations, affecting investment returns in retirement plans (commonly known as a "stock drop" case).

In the case of [Fifth Third Bancorp v. Dudenhoeffer](#), the plan participants are alleging that the defendants, as defined contribution plan sponsors, violated their fiduciary duty under ERISA by providing an investment option composed primarily of company stock when it was "imprudent" to do so, supported by misleading SEC filings.

The district court granted the defendant's motion to dismiss the case, invoking the "Moench presumption" of prudence to which fiduciaries are entitled. The Sixth Circuit Court of Appeals reversed the district court's ruling, arguing that the Moench presumption did not apply under these circumstances and creating a split among the appellate courts.

The U.S. Supreme Court will examine whether the allegations against the plan sponsor were sufficient enough to overcome the presumption of prudence. The U.S. Department of Labor [filed an amicus \("friend of the court"\) brief with the Supreme Court](#) in November, recommending that the question be re-phrased to consider whether a presumption of prudence should ever apply in employer stock cases, but it does not appear that the Supreme Court will take such a broad view.