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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.

Articles in this Edition

RECENT LEGISLATIVE ACTIVITY

Though Tax Reform Unlikely in 2014, Lawmakers Continue to Float Proposals

Despite the low likelihood that Congress will consider comprehensive tax reform in 2014, lawmakers continue to float policy proposals that would alter the long-standing tax incentives supporting employer sponsorship of health and retirement benefit plans. These proposals include:

- The comprehensive tax reform discussion draft developed by House of Representatives Ways and Means Chairman Dave Camp (R-MI);
- The 21st Century Worker Tax Cut Act (S. 2162), sponsored by Senate Budget Committee Chair Patty Murray, a measure intended primarily to expand the Earned Income Tax Credit for low-income workers and partially offset by changes to executive compensation provisions of the Internal Revenue Code; and
- The Expiring Provisions Improvement Reform and Efficiency (EXPIRE) Act (commonly known as the tax "extenders" bill), recently approved by the Senate Finance Committee.

In addition, President Obama's Fiscal Year 2015 budget proposal includes a number of provisions that would substantially affect employer-sponsored benefit plans, including a reduction in the value of itemized deductions and other tax preferences (including employer-sponsored health insurance and employee retirement contributions).

New statistics have been released to accompany the President's budget proposal in the form the White House Office of Management and Budget's (OMB) annual Analytical Perspectives document, which provides a detailed discussion of certain budget concepts and Administration policies including a list of the largest projected federal "tax expenditures" over the next five years. As in recent years, the tax incentives for employer-sponsored benefits dominate the list although, notably, the five-year projected tax revenue loss for Fiscal Years 2015-2019 are somewhat lower than last year's projection for Fiscal Years 2014-2018. The chart below shows the estimates for some of the leading "tax expenditures":

Selected Tax Expenditures	Billions of dollars, 2015-2019	Billions of dollars, (2014-2018)
Exclusion of employer contributions for medical insurance premiums and medical care	$1,151	$1,206
Exclusion of employer-sponsored pension plan contributions and earnings (combined defined benefit and defined contribution plans)	$649	$786
Deductibility of mortgage interest on owner-occupied homes	$456	$640
Deductibility of charitable contributions (including health and education)	$339	$319
Deductibility of nonbusiness state and local taxes	$291	$292
Individual Retirement Accounts	$98	$105

These tax expenditures constitute foregone revenue the government estimates it does not collect. The prominence of employer-sponsored benefits on this list suggests that such tax incentives may be targets for adjustment or elimination in the next round of comprehensive tax reform discussions.

House Ways and Means Committee Takes Up Certain Tax 'Extenders'

In a "mark-up" session on April 29, the U.S. House of Representatives Ways and Means Committee approved a select number of tax 'extender' bills, renewing expired or expiring tax provisions.

Unlike the Expiring Provisions Improvement Reform and Efficiency (EXPIRE) Act, approved by the Senate Finance Committee on April 2, none of the measures approved by the committee directly affect employer-sponsored benefit programs. The committee approved the following tax extension bills:

- H.R. 4429, to permanently extend the subpart F exemption for active financing income;
- H.R. 4438, to simplify and make permanent the research credit;
- H.R. 4453, to make permanent the reduced recognition period for built-in gains of S corporations;
- H.R. 4454, to make permanent certain rules regarding basis adjustments to stock of S corporations making charitable contributions of property;
- H.R. 4457, to permanently extend increased expensing limitations; and
- H.R. 4464, to make permanent the look-through treatment of payments between related controlled foreign corporations.

Following the hearing, Committee Chairman Dave Camp (R-MI) – who introduced a prominent, comprehensive tax reform proposal earlier in the year – issued a statement, saying "The United States is the only country in the world that allows such important pieces of its tax code to expire on a regular basis. By making these six bipartisan policies permanent, businesses small and large will have the ability to plan for the future, invest in the economy, hire new workers, and invent new technologies and products."

Prior to the session, the committee's majority staff also posted on the official Ways and Means website an op-ed by the conservative Heritage Foundation, in which Curtis S. Dubay, Research Fellow in Tax and Economic Policy in the Thomas A. Roe Institute for Economic Policy Studies, argued against efforts to offset the costs of extending expiring provisions. "If handled properly, the tax extenders would be an opportunity for Congress to improve tax policy," Dubay wrote. He also suggested that Congress should avoid extending these provisions in a single bill, saying that "Congress should go through each individual policy in the extenders package and evaluate them on their necessity for neutrality."

Dubay cited a number of extenders considered "vital," including tax-free distributions from an individual retirement account for charitable purposes. Among the extenders he recommended eliminating was the enhancement of and parity for mass-transit subsidies.

Full consideration and enactment of these individual measures (or a more comprehensive tax extenders package) is uncertain in the near term, but consideration of such a measure could be possible later in 2014.

RECENT REGULATORY ACTIVITY

GAO Issues Report on Retirement Plan Tax Incentives

A new report issued on April 20 by the Government Accountability Office (GAO) suggests that the current defined contribution plan contribution limits affect relatively few low- and middle-income individuals, making the reduction of these limits a potential target as part of comprehensive tax reform or to raise revenue outside that context.

The report, Private Pensions: Pension Tax Incentives Update, was requested by Senator Ron Wyden (D-OR), Chairman of the Senate Finance Committee and a key figure in the development of tax reform legislation. The report updates previous GAO studies on the number of new plans that have been formed since 2009 and the income characteristics of plan participants affected by the contribution limits.

GAO found that, from 2009 through 2011, the number of newly formed plans each year remained relatively flat but below the levels reported previously for 2003 through 2007. Overall, there were about 52,000 fewer private single-employer pension plans in 2011 than there were in 2000, although the total number of participants actually *rose* throughout the decade.

Most notably, GAO found that approximately six percent of all defined contribution plan participants who made contributions in 2010 were affected by the applicable limits (up from five percent in 2007 and a negligible number of participants were at the overall contribution limit on the sum of employer and employee contributions. The report concludes that participants contributing at the limits were found to have "disproportionately higher earnings" (90th percentile and higher) and were "overwhelmingly" more likely to be male.

Among the previous reports issued by GAO and its lead retirement policy analyst Charles A. Jeszeck was the March 2011 report Private Pensions: Some Key Features Lead to an Uneven Distribution of Benefits. The 2011 report suggested that while "the existing system of tax preferences for pensions has played at least a supporting role in fostering current levels of pension plan coverage" and "recent initiatives, such as automatic enrollment, may increase participation," it appears that "For [defined contribution] plans, a disproportionate share of these tax incentives accrues to higher income earners."

While the new GAO report stops short of this assertion, it leaves the impression that the current tax incentives have been ineffective, which could subject 401(k) plans to renewed Congressional scrutiny.

Social Security Administration Follows IRS' Lead, Discontinues Letter Forwarding Program

In a move with implications for retirement plan administrators, the U.S. Social Security Administration (SSA) has announced that it will formally discontinue its letter forwarding program, effective May 19. The SSA announcement follows Revenue Procedure 2012-35, issued in 2012, in which the Internal Revenue Service (IRS) ended its own letter forwarding program. *The SSA and IRS programs had been the only two listed* in the current safe harbor for locating missing participants. Plan administrators may now need to rely on commercial locator services instead.

Such programs are commonly used by retirement plans to locate "lost" participants or beneficiaries, thereby resolving situations in which the payment of additional benefits is required under the Employee Plans Compliance Resolution System (EPCRS). Just as IRS Revenue Procedure 94-22 expressly permitted plan administrators to make a written request of IRS to use its letter forwarding program, several pieces of regulatory guidance (such as U.S. Department of Labor Field Assistance Bulletin 2004-02) specifically reference the SSA program as a method to be considered for this purpose.

PBGC Premium Filing Instructions Finalized

On April 15, the Pension Benefit Guaranty Corporation (PBGC) announced that the U.S. Office of Management and Budget has approved the instructions for filing 2014 premiums for defined benefit plans.

To comport with the new instructions, PBGC has also updated its web pages showing premium due dates and the interest rates used to determine the variable-rate premium. The "My PAA" online filing system will also be updated soon to reflect the changes.

IRS Releases 2015 Indexed Amounts for HSAs, HDHPs

On April 23, the U.S. Treasury Department and Internal Revenue Service (IRS) released Revenue Procedure 2014-30, which lists the 2015 indexed amounts, adjusted for inflation, for health savings accounts and high-deductible health plans (HDHPs). (In some cases, this resulted in no change from the prior year.) The following table lists the current 2014 amounts and the new 2015 amounts:

	Calendar Year 2014		Calendar Year 2015	
	Self-only	Family	Self-only	Family
Annual Contribution Limit	$3,300	$6,550	$3,350	$6,650
HDHP Minimum Deductible	$1,250	$2,500	$1,300	$2,600
HDHP Out-of-Pocket Limit (includes deductibles, co-payments and other amounts but not premiums)	$6,350	$12,700	$6,450	$12,900

The Revenue Procedure is effective for calendar year 2015.

IRS Corrects Final PPACA Reporting Rules Under Code Section 6055

The Internal Revenue Service (IRS) has issued corrections to its final regulations on the reporting of minimum essential coverage (MEC) under Internal Revenue Code Section 6055, as amended by the Patient Protection and Affordable Care Act (PPACA).

Under Section 6055, as amended, every entity that provides MEC (including health insurance issuers and sponsors of a self-insured health plan) is required to file an annual return reporting specific information for each individual for whom MEC is provided. The information reported under Section 6055 can be used by individuals and the IRS to verify the months (if any) in which they were covered by MEC. This reporting facilitates compliance with, and administration of, PPACA provisions related to individual responsibility requirements and premium tax credits. Reporting becomes effective in 2015, with first reports due in early 2016.

Most notably, the IRS is officially revising Page 13223, second column, second full paragraph. The text that previously read:

> "For example, a reporting entity that makes an unsuccessful initial solicitation for a [Taxpayer Identification Number (TIN)] in December 2014 must make a second solicitation by December 31, 2015. Assuming that request is also unsuccessful, the reporting entity would not be penalized if its section 6055 reporting submitted in early 2016 reported a date of birth in place of TIN for the individual in question. One additional solicitation must be made by December 31, 2016, to have acted in a responsible manner."

… has now been corrected to read (emphasis added):

> "For example, a reporting entity that makes an unsuccessful initial solicitation for a TIN in ***December 2015*** must make ***the first annual solicitation by January 31, 2016. The second*** annual solicitation must be made by December 31, 2016, to have acted in a responsible manner. Assuming that request is also unsuccessful, the reporting entity would not be penalized if its section 6055 reporting submitted ***in early 2017*** reported a date of birth in place of TIN for the individual in question."

RECENT JUDICIAL ACTIVITY

District Court Rules for Fiduciary in Stock Drop Case

The U.S. District Court for the Eastern District of Michigan **ruled in favor of the independent fiduciary** in a retirement plan "stock drop" case on April 11, generally reaching the same conclusion as an earlier decision that had previously been rejected by the U.S. Court of Appeals for the Sixth Circuit

In the case of *Raymond M. Pfeil and Michael Kammer v. State Street Bank and Trust Company*, General Motors' (GM) hourly and salaried 401(k) plans offered GM stock as an investment alternative. No amounts were invested in the GM stock fund absent an affirmative election by a participant and participants had the discretion to change their allocation in any investment on any business day.

The plaintiff-participants filed a class action in 2009, suing State Street (the only defendant, since State Street, as an independent fiduciary, continued to hold GM stock in the GM retirement plans during the period before the GM bankruptcy) for retaining the GM stock fund as an investment option after public information raised questions about GM's short-term viability outside of bankruptcy. At that time, the U.S. District Court for the Eastern District of Michigan held that the plaintiffs had sufficiently pleaded a breach of fiduciary duty, but dismissed the case on the grounds that any alleged breach did not cause plan losses; any plan losses were caused by participants' own decisions with regard to investment in company stock.

The appeals court subsequently overturned the decision, ruling that plan fiduciaries have a duty to offer only prudent investments and cannot escape liability for imprudent investment options on the grounds that the participants have the choice as to whether to invest in such options. The case was then remanded back to the district court.

Upon a re-hearing of the case, the district court said it was "unable to conclude that State Street's decision not to divest the stock until March 31, 2009, was an imprudent decision in light of the presumption of reasonableness standard," and dismissed the case. The court's decision was based on a general "presumption of reasonableness" rather than the "presumption of prudence" that was the basis of the earlier district court decision and the appeals court decision. In making its latest ruling, the district court focused on State Street's prudent process used to make decisions about prohibiting new investments, retaining and ultimately liquidating GM's stock held in the plan.