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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 Smith, employee benefits attorney and Principal of Flexible Benefits Systems, Inc., csmith@fbsi.com.

Articles in this Edition

RECENT LEGISLATIVE ACTIVITY

Nothing to report this issue.

Congress was on recess during the period covered.

RECENT REGULATORY ACTIVITY

IRS Releases Instructions for PPACA Information Reporting Forms

The Internal Revenue Service (IRS) released long-awaited instructions for the forms to be used by applicable large employers and insurers for reporting information regarding health care coverage and "minimum essential coverage" as required under the Patient Protection and Affordable Care Act (PPACA). The IRS also issued Questions-and-Answers documents regarding information reporting by health coverage providers and reporting of offers of health insurance coverage by employers. The FAQs provide a summary of who is required to report, what information must be reported and how and when to report.

The forms are to be used to fulfill the requirements specified in final regulations implementing the reporting of minimum essential coverage (MEC) under Section 6055 of the Internal Revenue Code) and the reporting of health insurance coverage under Section 6056 of the Internal Revenue Code. These reporting requirements were delayed for 2014 under previously issued Notice 2013-45 transition relief and will not be effective until 2015, making the first required reporting due in early 2016 (though the IRS is encouraging voluntary reporting for coverage in 2014).

Code Section 6055 requires every health insurance issuer, sponsor of a self-insured health plan, government agency that administers government-sponsored health insurance programs and other entities that provide minimum essential coverage to file annual returns reporting certain information for each individual for whom minimum essential coverage is provided and to provide a copy of the return to the individual. Form 1095-B is to be used to comply with Code Section 6055. Form 1094-B is to be used to transmit these returns to the IRS. An employer that sponsors a insured health plan will not report as a provider of health coverage under section 6055. The health insurance carrier is responsible for reporting that coverage.

The **instructions for Forms 1094-B and 1095-B** are to be used for:

- Form 1094-B: Transmittal of Health Coverage Information Returns
- Form 1095-B: Health Coverage

Code Section 6056 requires every applicable large employer (generally, an employer that employed on average at least 50 full-time employees or equivalents) to file a return with the IRS that reports the terms and conditions of the health care coverage provided to the employer's full-time employees during the year. Form 1095-C is to be used to satisfy this requirement. Form 1094-C is to be used to transmit these returns. An applicable large employer that provides self-insured coverage is subject to the reporting requirements of both sections 6055 and sections 6056. As discussed in the IRS FAQs on Information Reporting by Health Care Providers (Section 6055), FAQ 27, such employers will combine section 6055 and 6056 reporting on Form 1095-C.

The newly released **instructions for Forms 1094-C and 1095-C** are to be used for:

- Form 1094-C: Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Return
- Form 1095-C: Employer Provided Health Insurance Offer and Coverage

Also on August 28, the IRS issued a draft Form 1095-A, Health Insurance Marketplace Statement, and instructions. Health Insurance Marketplaces (also known as health exchanges) must file Form 1095-A to report information on all enrollments in qualified health plans through the Marketplaces. The purpose of the Form 1095-A is to report information to the IRS about family members who enroll in a qualified health plan through the Marketplace. Form 1095-A is also furnished to individuals to allow them to claim the premium tax credit, to reconcile the credit on their returns with advance payment of the premium tax credit and to file an accurate tax return.

The IRS also updated its Form 1040, the U.S. Individual Income Tax Return, to add a new Line 61 in which taxpayers would indicate whether they have full-year health coverage or if they will be liable for the "individual responsibility" mandate penalty.

The IRS is accepting comments on the draft forms. Comments may be submitted on the Comment on Tax Forms and Publications page on IRS.gov. Although no comment deadline is identified, comments should be submitted as soon as possible as final forms are expected to be posted by the end of the year.

DOL Requests Information on Use of Brokerage Windows in 401(k) Plans

On August 20, the Department of Labor (DOL) released a request for information (RFI) on the use of brokerage windows, self-directed brokerage accounts and similar features in 401(k)-type plans. The DOL indicated that the purpose of the RFI is to increase its understanding of brokerage windows and that the information received "will assist the Department in determining whether, and to what extent, regulatory standards or safeguards, or other guidance, are necessary to protect participants' retirement savings."

This RFI follows guidance issued by the DOL on participant disclosure regulations and Field Assistance Bulletin 2012-02 (FAB 2012-02).The regulations require that certain information, such as fee and historical investment performance, is provided to participants regarding a plan's designated investment alternatives, or the investment options specifically offered by the plan. The regulation makes clear that brokerage windows and other similar plan features are not designated investment alternatives; however, the regulation does require some disclosure when a plan offers a brokerage window.

FAB 2012-02 specifically addressed brokerage windows in Q&A-13 and Q&A-30. Q&A-30 raised the possibility that in some cases, plan fiduciaries would be required to provide disclosure information with respect to certain investments available through the brokerage window. Because of widespread concerns about Q&A-30, FAB 2012-02 was amended, and Q&A-39 replaced Q&A-30, which was withdrawn. Q&A-39 indicated that the DOL may be returning to issues regarding brokerage windows; this RFI is the first step in that process.

The RFI notes several concerns raised about brokerage windows, including that plan participants may not be sufficiently protected against potentially costly or unsuitable investments because plan fiduciaries do not review the investment options available through a brokerage window. The RFI also asks thirty-nine questions, which are divided into the following categories:

- Defining Brokerage Windows
- Plan Investment Offerings – Brokerage Windows and Designated Investment Alternatives
- Participation in Brokerage Windows
- Selecting and Monitoring Brokerage Windows and Service Providers
- Fiduciary Access to Information about Brokerage Window Investments
- Brokerage Window Costs
- Disclosure Concerning Brokerage Windows and Underlying Investments
- The Role of Advisers
- Fiduciary Duties
- Annual Reporting and Periodic Pension Benefit Statements

The comment period closes on November 19.

Obama Administration Issues New Rules to Accommodate Religious Objections to Contraceptive Coverage under PPACA

The U.S. departments of Health and Human Services (HHS), Labor (DOL) and Treasury released proposed and interim final rules on August 22 providing new alternatives for certain employers who object on religious grounds to providing coverage of contraceptive services as required under the Patient Protection and Affordable Care Act (PPACA).

Under the health care law, certain women's preventive health services must be covered at no additional cost, including FDA-approved contraception methods and contraceptive counseling. Final rules issued in July 2013 provided an exclusion for "religious employers" and other non-profit, religiously affiliated organizations. Prior regulations provided accommodations whereby insured plans would provide notice to their insurer and self-insured plans would provide notice to a third-party administrator of their religious objection to contraceptive coverage. Under the regulations, insurers and third-party administrators provided with such notice would be required to provide contraceptive coverage consistent with the PPACA.

The interim final regulations (IFR), to be published in the Federal Register on August 27, provide an additional notification option for eligible non-profit religious organizations that permits them to notify HHS directly in writing of their religious objection to contraception coverage. HHS will then notify the insurer for an insured health plan, or DOL will notify the TPA for a self-insured plan, that the organization objects to providing contraception coverage and that the insurer or TPA is responsible for providing enrollees in the health plan separate no-cost coverage for contraceptive services for as long as they remain enrolled in the health plan.

Regardless of whether the eligible organization self-certifies in accordance with the July 2013 final rules or provides notice to HHS in accordance with the new IFR, the obligations of insurers and/or TPAs regarding providing or arranging separate payments for contraceptive services are the same, as discussed in the HHS fact sheet. The interim final rules are effective upon date of publication in the Federal Register. The comment deadline is 60 days after publication.

HHS contemporaneously issued **proposed regulations** in response to the recent U.S. Supreme Court decision *Hobby Lobby v. Burwell* holding that, under the Religious Freedom Restoration Act of 1993 (RFRA), the requirement to provide contraceptive coverage could not be applied to certain closely held for-profit corporations whose owners hold religious objections to such coverage. The proposed regulations set out two possible approaches for defining a

qualifying closely held for-profit entity. Under one approach, the entity could not be publicly traded and ownership of the entity would be limited to a certain number of owners. Under an alternative approach, the entity could not be publicly traded and a minimum percentage of ownership would be concentrated among a certain number of owners.

The number and concentration are not specified in the proposed rules. HHS is soliciting comments on these and other possible approaches for defining a closely held for-profit entity.
The proposed rules further provide that valid corporate action taken in accordance with the entity's governing structure (in accordance with state law) stating its owners' religious objection can serve to establish that the entity objects to providing contraceptive coverage on religious grounds. Comments on the proposed rules will be accepted through October 21, 2014.

IRS Updates Priority Guidance Plan

The U.S. Treasury Department (Treasury) and Internal Revenue Service (IRS) released its initial **2014-2015 Priority Guidance Plan** on August 26, listing those topics that will be the subject of formal guidance during the next year.

The 2014–2015 Priority Guidance Plan contains 317 projects to be considered priorities for the twelve-month period from July 2014 through June 2015 (the plan year), including 42 items addressing retirement benefits (Pages 5-7 of the document) and 23 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 A18] (proposed regulations were issued in October 2010)
- Regulations on "closed defined benefit plans and related matters" [A5]
- Guidance relating to defined benefit plan funding, including (1) regulations updating the minimum present value requirements for pension plans [A28], (2) a revenue procedure relating to approval for funding method changes [A30]
- Additional projects on Code Section 430 defined benefit plan funding rules, including (1) final regulations on determination of minimum required contributions [A29], (2) updated mortality tables used for pension funding purposes [A32] and (3) regulations on additional issues relating to funding rules for single-employer plans under the Pension Protection Act of 2006 [A31]
- Guidance on multiple employer plans [A40]
- Guidance under Internal Revenue Code (Code) Section 402(c) on retirement plan distributions that are disbursed to multiple destinations and regulations under Code Section 402A on distributions from designated Roth accounts that are disbursed to multiple destinations [A11 and A12] (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 [A20]
- Elements of the "lifetime income" guidance package [A39], along with 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) [A27]

- Regulations updating the rules applicable to Employee Stock Ownership Plans (ESOPs) [A1]
- Guidance on safe harbor 401(k) plans regarding certain mid-year changes and certain business transactions [A10]
- Guidance under §404 on deductions for employer contributions to qualified plans [A13]
- Regulations on eligible combined plans under Code Section 414(x), relating to the "DB(k)" form of hybrid plan provided for under the Pension Protection Act of 2006 [A25]
- A revenue procedure providing guidance on the Employee Plans Compliance Resolution System (EPCRS) [A41]

Similarly, the Employee Benefits/Executive Compensation, Health Care and Other Benefits section of the priority guidance plan includes key guidance related to the PPACA:

- A formal notice under Code Section 4980I related to the 40 percent excise tax on high-cost employer-provided coverage [B21]
- Guidance regarding the annual adjustment in the fee imposed to fund the Patient-Centered Outcomes Research Trust Fund [B19]
- Final regulations under Section 162(m)(6), relating to the $500,000 deduction limit on the compensation of some individuals by certain covered health insurance providers (proposed regulations were published in April 2013) [B7]

This section also includes the following miscellaneous benefits guidance items:

- Regulations under Code Section 86 regarding rules for lump-sum elections [B2]
- Regulations on the interaction of Code sections 4980G and 125 with respect to comparable employer contributions to employees' HSAs [B21]
- Final regulations under Code Section 162(m) on the stock-based compensation aggregate limit rule and associated transition relief (proposed regulations were published in June 2011) [B6]
- Guidance under Code Section 409A relating to executive compensation, including (1) final regulations on the income inclusion (proposed regulations were published in December 8, 2008) [B10] and (2) guidance to update prior correction program guidance [B11]
- A revenue ruling on the definition of "post-retirement medical benefits" [B12]
- Guidance updating the reporting requirements for sick pay benefits [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.

While the IRS is not bound by its priority guidance plan, their publication does provide insight regarding the administration's goals and the amount of activity expected within the next year.

ERISA Advisory Council Holds Second Session on Benefits Issues, Hears Regulatory Update from DOL

On August 19, 20 and 21, the ERISA Advisory Council (EAC) heard testimony on a number of vital benefits matters, including outsourcing employee plan services, pharmacy benefit manager

(PBM) compensation and fee disclosure, and issues and considerations around facilitating lifetime plan participation. This session follows the previous set of 2014 EAC hearings in June (as we have previously reported).

The EAC also received a regulatory update from U.S. Department of Labor (DOL) staff. In addition, there was a brief discussion by the EAC of its possible recommendations to the DOL on the issue of lifetime participation.

Outsourcing Employee Plan Services

On August 19, the EAC heard testimony regarding the outsourcing of employee benefit plan services. Among the witnesses was Lou Campagna, from the Division of Fiduciary Interpretations at the DOL Employee Benefits Security Administration (EBSA), who reviewed and summarized current law with respect to the outsourcing of fiduciary responsibilities. Campagna's testimony prompted a discussion of whether the naming of a fiduciary in the plan document itself constitutes a settlor or fiduciary function. Campagna did not cite specific regulatory authority supporting his view that such activity is a fiduciary function.

Regulatory Update

During the August 20 session, the EAC received a regulatory update from Judy Mares, Deputy Assistant Secretary for EBSA, Joe Canary, Director of the Office of Regulations and Interpretations and Dan Maguire, Director of the Office of Health Plan Standards and Compliance Assistance.

Most notably, Mares noted that the DOL's most recent regulatory agenda set a target release date of January 2015 for a re-proposed fiduciary definition and conflict-of-interest rule, and only added that the DOL is still working on the new rule. (Also see Canary's testimony during the lifetime facilitation discussion)

The discussion also covered the following issues:

- *Brokerage Windows:* Mares previewed the request for information (RFI) regarding brokerage windows subsequently published on August 20.
- *Missing Participants:* Mares described the Field Assistance Bulletin 2014-01 (FAB 2014-01) released on August 14.
- *The Patient Protection and Affordable Care Act (PPACA):* Maguire reported that many of the projects that the Departments of Labor, Health and Human Services, and Treasury have been working on for several years are now being implemented. The departments are examining how well the rules are working and where there may be gaps or the need for additional work.
- *Longevity Annuities:* In response to a question from the EAC, Canary commented that EBSA is not currently planning to give further input on the use of longevity annuities other than the input it provided to the IRS during its development of the recently released final rules on qualified longevity annuity contracts (QLACs).

PBM Compensation and Fee Disclosure

Also during the August 20 session, the EAC heard testimony on "PBM Compensation and Fee Disclosure." The EAC, among other things, is considering whether pharmacy benefit managers (PBMs) should be covered by the regulation of the DOL under section 408(b)(2) of ERISA

pertaining to compensation of service providers. The DOL chose not to address the disclosure requirements applicable to providers of services to health and welfare plans when it issued its regulation in 2012. The EAC heard testimony from a variety of witnesses, including plan sponsors, who had very different views on how PBMs operate and whether the DOL should extend its disclosure regulations to PBMs or whether education or outreach efforts by the DOL were necessary.

Issues and Considerations Around Facilitating Lifetime Participation

On August 21, the EAC heard testimony on facilitating lifetime plan participation and briefly discussed possible recommendations to the DOL on this subject.

EBSA's Canary testified separately on this subject, answering questions from the EAC on Form 5500, plan sponsor communications at employee termination, rollovers and loan regulations. He asserted that there are no explicit limitations on what plan sponsors can communicate to terminating plan participants, but "issues can arise" when those communications give rise to investment advice. While he added that employers have raised fiduciary concerns with EBSA, he could not provide additional details because such discussions are part of its ongoing fiduciary definition project.

The EAC briefly discussed recommendations for the DOL concerning facilitating lifetime participation, including educating plan sponsors and individuals on the benefits of retaining assets in the employer system, providing best practice guidance for plan features that encourage participants to remain in plans, simplifying forms for plan to plan transfers and development of an updated defined contribution plan annuity safe harbor.

IRS Issues Revenue Ruling on Puerto Rican Retirement Plans in 81-100 Group Trusts

On August 21, the Internal Revenue Service (IRS) issued Revenue Ruling 2014-24 which clarifies that plans covering only Puerto Rico residents and only qualified under Puerto Rico law (Puerto Rico only Plans) can invest in group trusts or collective investment trusts under Rev. Rul. 81-100 (81-100 Trusts). This is a favorable resolution to the federal income tax issues which affected the ability of Puerto Rico only plans to invest in the 81-100 Trusts. Plans dual qualified under both U.S. and Puerto Rican laws were already eligible to invest in these trusts.

81-100 group trusts are those that meet the requirements of Rev. Rul. 81-100, which was later modified by Revenue Ruling 2011-1 and Notice 2012-6. Rev. Rul. 2011-01 (as we have previously reported) indicated that Puerto Rico only Plans could continue to participate in 81-100 group trusts until the IRS issued further guidance on the topic.

Revenue Ruling 2014-24 states that any pension, profit-sharing or stock bonus plan whose participants are all residents of Puerto Rico is eligible to participate in 81-100 group trusts, since these plans fall under Section 1022(i)(1) of ERISA, which provides that any trust forming part of such a plan is generally tax-exempt under the U.S. tax code if the trust is exempt from Puerto Rico income tax.

The new ruling was issued due to inquiries from plan sponsors who wanted to "transfer assets and liabilities to Section 1022(i)(1) plans, while continuing to invest the transferred assets in the group trust in order to take advantage of the group trust's broader diversification opportunities

and lower investment costs." The IRS stated that although Puerto Rico plans are not qualified plans under the U.S. tax code and are not listed as group trust retiree benefit plans under Rev. Rul. 2011-1, they are still eligible as they fulfill the other applicable requirements of Rev. Rul. 2011-1, such as being tax-exempt under Section 501(a).

The ruling also lays out conditions in which a group trust retiree benefit plan may invest in an 81-100 group trust through a separate account maintained by an insurance company without affecting the tax status of the trust or the plans participating in it. These conditions include:

- all of the assets in the separate account must consist only of assets of group trust retiree benefit plans as defined in Rev. Rul. 2011-1 and as modified by this revenue ruling.
- the insurance company managing the separate account must enter into a written arrangement with the trustee of the group trust in accordance with the requirements of Rev. Rul. 2011-1.
- the assets of the separate account must be insulated from the claims of the insurance company's general creditors.

Rev. Rul. 2014-24 also extends transition relief on transfers from qualified retirement plans to Puerto Rico plans that meet the requirements of ERISA Section 1022(i)(1) that occur before January 1, 2016, as provided in Rev. Rul. 2008-40. Rev. Rul. 2008-40 temporarily provided that transfers from a qualified retirement plan to a Section 1022(i)(1) plan can be made without being treated as a distribution, as well as temporary relief from the tax code Section 410(b) minimum coverage rules for qualified retirement plans that make transfers to Puerto Rico plans.

RECENT JUDICIAL ACTIVITY

Nothing to report this issue.