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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. To inquire about membership with the Council, contact Deanna Johnson at (202) 289-6700 or djohnson@abcstaff.org.

Articles in this Edition

RECENT LEGISLATIVE ACTIVITY

Bipartisan Budget Act Signed into Law

President Obama has signed into law the Bipartisan Budget Act of 2015 (H.R. 1314), a two-year deal to increase federal spending caps and raise the debt ceiling through March 2017. Included in the package are numerous revenue-raising provisions, several of which relate directly to employer-sponsored benefits.
The measure:

- Increases premiums paid by single-employer defined benefit plans to the Pension Benefit Guaranty Corporation (PBGC).
- Expands defined benefit plan funding stabilization by one year.
- Provides increased flexibility for defined benefit plan sponsors to use mortality tables that are different than those prescribed by the U.S. Treasury Department.
- Repeals the automatic health plan enrollment requirement under Section 18A of the Fair Labor Standards Act, as added by the Affordable Care Act (ACA)

See the previous *Benefits Insider* for more details on these provisions.

Now that a debt ceiling crisis has been averted and the spending caps have been lifted, Congress will now move to the appropriations process in which lawmakers will direct each regulatory agency's funding for the next year. The federal government's current stopgap funding measure expires on December 11.

House Lawmakers Propose 'Best Interest' Fiduciary Standard Addition to DOL Rule; Bipartisan Lawmakers Release Legislative Principles

Representatives Mike Kelly (R-PA) and Sam Johnson (R-TX) have introduced the Retirement Choice Protection Act of 2015 (H.R. 3922) to add a "workable 'best interest' standard to the U.S. Department of Labor's (DOL) proposed rule on fiduciary standards. Additionally, a bipartisan group of legislators have unveiled a set of principles for the regulation of investment advisors.

The DOL's proposed regulations broadly update the definition of "investment advice" by extending fiduciary status to a wider array of advice relationships than is done by the existing rules. Democrats continue to urge DOL to re-open its comment period for further deliberation.

At a September 30 hearing held by the U.S. House of Representatives Ways and Means Committee's Oversight Subcommittee, numerous witnesses called the proposed rule "flawed" and said that the rule's existing "best interest" exemption focuses too much on cost to the exclusion of other factors that may be equally or more important to the plan participant. On October 6, Kelly and Johnson, joined by 103 fellow House members, sent a letter to Labor Secretary Thomas Perez expressing concerns that the proposed fiduciary rule “will severely disrupt the availability of affordable financial education and investment advice while also restricting product choice and retirement security for many American families” and to urge the secretary to implement “substantial changes” to fix the rule’s shortcomings.

To address these concerns, H.R. 3922 establishes a new definition for a “best interest recommendation” as “a recommendation provided by a person acting with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the information obtained through the reasonable diligence of the person regarding factors such as the advice recipient’s age, and any other information that the advice recipient discloses to the person in connection with receiving such recommendation, where the person does not subordinate the interests of the plan or advice recipient, as applicable, to its own.” Under the bill, such recommendations may include those that are based on a limited range of products, providers or offerings and/or those that may result in variable compensation to the person providing the advice.

Kelly and Johnson are both members of the full Ways and Means Committee, which shares jurisdiction over retirement policy with the Education and the Workforce Committee. H.R. 3922 has been referred to both committees for further consideration.

Also in the House of Representatives, a team of bipartisan lawmakers unveiled a list of legislative principles to ensure retirement advisors protect clients’ best interests on November 5 in light of growing concerns about the proposal. The list was prepared by Ways and Means Oversight Subcommittee Chairman Peter Roskam (R-IL), Ways and Means Select Revenue Measures Subcommittee’s ranking Democrat Richard Neal (D-MA), Education and the Workforce Health, Employment, Labor and Pensions Subcommittee Chairman Phil Roe (R-TN) and Rep. Michelle Lujan Grisham (D-NM).

In a statement accompanying the principles, the lawmakers expressed concern that the DOL proposal “may have unintended negative consequences that could harm individuals and families saving for retirement” and announced their intention to introduce a bipartisan legislative solution embodying their principles.

RECENT REGULATORY ACTIVITY

ERISA Advisory Council Releases Recommendations, Borzi Discusses Regulatory Activity

The ERISA Advisory Council (EAC) released its **2015 recommendations** to the U.S. Department of Labor (DOL) on November 4, suggesting that DOL step up its efforts to promote lifetime plan participation and provide additional guidance to employers with regard to pension risk transfers.

The EAC is a group of benefits experts established by Congress and appointed by the U.S. Department of Labor (DOL) to identify emerging benefits issues and advise the Secretary of Labor. In 2015, the EAC examined two topics: (1) "lifetime plan participation" (relating to plan distributions and rollovers) and (2) pension plan "de-risking" (where plan sponsors partially or fully discharge their ERISA plan liabilities), which the EAC has dubbed "pension risk transfer," and the disclosures given to participants in these events. The EAC has previously addressed both of these topics, examining pension fund de-risking in 2013 and lifetime plan participation in 2014. The 2015 examination focused on notices and disclosure, providing administrative assistance to the DOL.

With regard to lifetime plan participation, the EAC recommended that DOL:

- Publish a range of sample communications that encourage lifetime participation, rather than a uniform model notice.
- Publish "tips and FAQs" to educate plan sponsors about plan design features that encourage lifetime plan participation. (The EAC provided a sample tip sheet for DOL's consideration.)
- Encourage the creation of "plain language communications" promoting lifetime plan participation that can be tailored and adapted to a plan's participant population.
- Explore a joint-agency effort with the U.S. Treasury Department to clarify the IRA Rollover Notice under Internal Revenue Code Section 402(f).
- Take further action on the EAC's 2014 recommendations, which included the provision of guidance on lifetime income options and calculators, technology standards and account consolidation.

With regard to model notices and disclosures for pension risk transfers, the EAC recommended that DOL:

- Issue model notices as soon as possible and encourage plan sponsors to issue the model notices to participants at the earliest possible stage in the implementation of a risk transfer transaction. (A sample insurance company risk transfer notice and a sample lump sum notice were provided by the EAC.)

- Encourage plan sponsors to refrain from suggesting to plan participants that the applicable mortality tables and discount rates currently permitted to calculate lump sums are "government-approved."

- Include a link in the lump sum transfer notice to a Web tool that would assist participants in researching the retail annuity that can be purchased with a lump sum.

In conjunction with the release of these recommendations, Assistant Secretary of Labor of the Employee Benefits Security Administration (EBSA) Phyllis Borzi addressed the EAC.

Borzi revealed that DOL guidance on state-level retirement plan initiatives will be published before the end of 2015, including (1) a proposed regulation that will give states a safe harbor for state-based automatic IRAs that will not trigger ERISA preemption (which, with some exceptions, basically preempts state laws that affect employee benefit plans), and (2) sub-regulatory guidance that will help states offer ERISA-covered state-based plans. Borzi described the safe harbor automatic IRA as a second safe harbor that will take into account automatic enrollment.

Longstanding DOL regulations say that voluntary IRA programs offered by employers, where participation is totally voluntary and employer involvement is minimal, are not ERISA plans, which allow employers to provide their employees with the opportunity to invest in an IRA through payroll deduction without creating an ERISA plan and without triggering ERISA preemption. Borzi said the sub-regulatory guidance on ERISA-covered plans will allow states to serve as service providers or plan sponsors to facilitate coverage. She expressed hope that states will add consumer protections to the state-based automatic IRAs and did not rule out federal legislation to authorize federal automatic IRAs.

Borzi also reported on the controversial proposed regulations that broadly update the definition of "investment advice" by extending fiduciary status to a wider array of advice relationships than is done by the existing rules. Borzi characterized the comment period for the proposal as "extraordinarily long" and said that EBSA has received many comments and suggestions. She added that the DOL plans to finalize the regulations in the first half of next year.

Borzi also talked about DOL Interpretive Bulletin 2015-01, which provided guidance on the selection of "economically targeted investments" (ETIs, also known as "socially responsible" investments) under ERISA's retirement plan fiduciary standard.

Tim Hauser, EBSA's deputy assistant secretary for program operations, also addressed the EAC on the topic of health care. He indicated that he is particularly worried about fee disclosure in health plans. While retirement benefit fee disclosure is well regulated, health benefits were not included as part of the 2012 final regulations under ERISA Section 408(b)(2).

In hearings to discuss the fiduciary rule earlier this year DOL representatives indicated they intend to clarify that the new rule will not apply to health, disability and life insurance contracts that do not include an investment component. However, they were clear that arrangements with an investment component and associated fees would not be excepted.

Obama Administration Releases Collective Final Regulations on Various ACA Matters

Late on November 13, the U.S. Departments of Treasury, Labor (DOL) and Health and Human Services (HHS) released a package of final regulations related to the Affordable Care Act (ACA), formally codifying rules that had been, until now, issued in “interim final” form.

These rules address:

- Grandfathered plans
- Preexisting condition exclusions
- Lifetime and annual limits
- Rescissions
- Dependent coverage
- Appeals
- Patient protections

IRS Provides Guidance for Transition to Final Hybrid Rules

The Internal Revenue Service (IRS) issued final transitional amendments governing the “market rate of return” rules for hybrid retirement plans on November 13, giving plan sponsors until 2017 to come into compliance with certain key elements of the previous regulations finalized in 2014.

Hybrid retirement plans, such as cash balance plans and pension equity plans, are defined benefit plans but also contain features that resemble defined contribution plans. In September 2014, the IRS published final regulations addressing market rate of return rules for hybrid plans (i.e., the amount of interest rate credit that can be provided by a plan) under the Pension Protection Act of 2006, along with proposed rules offering transitional guidance for hybrid plans that are not yet in compliance with the final rules.

The transitional amendments, as finalized, generally allow plan amendments to change the interest crediting rate under a hybrid plan from a rate that is not on the list to a rate that is on the approved list of interest crediting rates and combinations of rates. The rules apply to amendments made between September 18, 2014 and the first day of the plan year beginning on or after January 1, 2017.

Most notably, the final regulations released on November 13 delay the applicability date for certain provisions of the 2014 final rules from 2016 until 2017, including those provisions that provide a list of interest crediting rates and combinations of rates that satisfy ERISA's requirement that the plan not provide an effective rate of return in excess of a market rate of return.

The final rules also provide the following technical guidance, focusing largely on the use of investment-based rates versus non-investment-based rates. (An investment-based rate is a rate of return provided by actual investments, taking into account the return attributable to any change in the value of the underlying investments. A rate of return that is based on the rate of return for an index that measures the change in the value of investments can also be considered to be an investment-based rate. Non-investment-based rates are either fixed rates of interest or bond-based rates (such as yields to maturity of bonds).

- Final regulations in many cases permit a plan sponsor to choose between one of two or more alternative amendments in order to bring a plan into compliance on crediting rates.

- Any non-investment based variable rate that does not meet regulatory requirements (including the greater of two or more non-investment based variable rates) may be capped at the third segment interest rate. However, the third segment rate would also apply as a limitation on any annual fixed minimum rate that is part of the composite rate. The third segment rate is an interest rate, provided by the IRS, used in determining plan liabilities and is based on benefits payable after 20 years (a long-term rate).

- If a plan uses an investment-based rate and there is no permitted investment-based rate with similar risk and return characteristics, the plan can either switch to an approved investment-based rate that is less volatile or switch to the third segment rate with a fixed 4 percent minimum rate.

- Plans using an investment-based rate with an impermissible annual (or more frequent) fixed or variable rate minimum can either (1) eliminate the fixed minimum rate (or any variable non-investment based rate minimum) and eliminate any reduction to the investment-based rate, or (2) switch to the third segment rate (preserving any fixed minimum rate to the extent permitted).

- If a plan has a cumulative floor (possibly caused by a change in crediting rates under a prior amendment) or a "greater-of" formula, a special rule requires an amendment that each participant's benefit is based on the greatest benefit as of the amendment date (but the rates must satisfy other rules in the regulations).

- The regulation includes a new rounding rule (annual rate to the nearest 25 basis points) and provides anti-cutback relief for transitional amendments.

- Treasury and the IRS continue to study plans that permit participants to choose among a menu of hypothetical investment options and could make further change in the future (or even disallow these participant-directed arrangements). In the meantime, plan sponsors can use the regulatory guidance to individually fix any impermissible choice or totally eliminate the entire choice.

Treasury Expanding myRA Program to Include New Funding Options

In a November 4 announcement, the U.S. Treasury Department revealed that it will be expanding its *my*RA program to give participants more options for contributing the accounts.

The *my*RA program, launched in December 2014, is an executive branch initiative under which savings vehicles (similar to Individual Retirement Accounts (IRAs)) are provided through employers. The program is targeted at individuals who do not already have access to an employer plan, although they can be offered in conjunction with an existing employer plan.

The accounts are invested only in a new class of nonmarketable, electronic Treasury retirement savings bonds that replicate the variable rate of the Government Securities Investment Fund (G Fund) of the Thrift Savings Plan for federal employees.
Until now, *my*RA accounts were only able be funded by direct deposit through an employer. With the November 4 announcement, participants can now also fund an account by setting up recurring or one-time contributions from a checking or savings account or from a federal tax refund.

The U.S. Department of Labor (DOL) has concluded that an employer permitting its employees to contribute to a *my*RA through payroll deduction does not constitute sponsoring "an employee pension benefit plan" subject to ERISA.

Employers Can Continue to Call IRS After Recent Reorganization

Employer plan sponsors or service providers with technical questions and/or questions about IRS guidance can continue to call the IRS for informal discussions, even now that responsibility for employer plans has been transferred within the agency.

Previously, such questions were addressed to the IRS's Tax Exempt and Government Entities Division (TE/GE) but now the calls should be made to the IRS Office of Chief Counsel ((202) 317-6700 or (202) 317-4148). As was the case when the questions were addressed to TE/GE, the IRS answers are informal and do not enable the caller to "rely" on the discussion. However, the discussion may provide insights on the IRS's current thinking on a particular matter.

The change was caused by an IRS reorganization earlier this year (the reorganization was detailed in IRS Announcement 2014-34) when many of the attorney employees who previously worked in the Employee Plans area of TE/GE were transferred to the Office of Chief Counsel. The IRS subsequently announced that the Employee Plans division would no longer provide email responses to technical questions and the Chief Counsel's office has confirmed they too will not answer questions via email.

IRS guidance prepared prior to 2015 will generally have an Employee Plans (TE/GE) phone number along with a name to contact for questions. Many of those contacts are now at the Office of Chief Counsel. Members can call the number listed above and ask for the individual listed in the guidance. If the individual no longer works at the IRS, the caller can let the IRS know what they are calling about and should be directed to the correct person. Future guidance should have the appropriate phone number.

IRS Conducting Online Readiness Survey for ACA Information Reporting

The IRS is asking employers, insurance providers, software developers, and transmitters to complete a new online survey to assess readiness for transmitting information returns 1095-C and 1095-B to the IRS as required by the Affordable Care Act (ACA). The ACA Information Returns (AIRS) Readiness Survey is also available at the IRS website for the AIRS Program. The survey is voluntary and anonymous. The IRS receives only compiled data, which does not allow for the identification of any individual or company.

According to the IRS, information from this survey will assist the IRS with understanding the readiness of various reporting entities to submit the returns, learning what additional information will be helpful to ensure stakeholder readiness, and determining how best to communicate additional information to stakeholders. Survey respondents can complete the survey more than once if they make repeat visits to the site and different individuals within the same organization may complete the survey. The survey consists of about a dozen short questions that are specifically tailored to whether an employer, insurer, transmitter or software developer is completing the survey. The survey will be open through early 2016. The IRS intends to modify the questions as needed to more accurately collect data as the filing season progresses.

The ACA information reporting requirements are effective for tax year 2015. Forms 1095-C must be furnished to full-time employees by February 1, 2016. Forms 1095-C and 1095-B are required to be filed with the IRS by February 29, 2016. Instructions for Forms 1094-C and 1095-C provide information for obtaining 30 day extensions for filing the returns with the IRS and furnishing statements to employees. According to recent informal statements, the IRS anticipates a potential increase in requests for a 30-day extension for providing statements to employees and is considering guidance that would make the process for requesting an extension easier for 2015.

RECENT JUDICIAL ACTIVITY

Fiduciary Prevails in Sixth Circuit Stock Drop Case

A three-judge panel from the U.S. Court of Appeals for the Sixth Circuit ruled in **a November 10 split decision** that an investment decision can be considered “prudent” if the process used to make the decision was itself prudent. The decision represents a victory for plan sponsors threatened by “stock drop” lawsuits, in which plaintiffs allege that the failure to divest of an investment that subsequently drops in value constitutes a breach of fiduciary duty.

Raymond M. Pfeil and Michael Kammer v. State Street Bank and Trust Company, centers on the plan sponsor's offering of company stock as a voluntary 401(k) plan investment option. The case has been the subject of deliberation at the district and appellate court level for several years, with this latest ruling reflecting the U.S. Supreme Court's 2014 decision in *Fifth Third Bankcorp v. Dudenhoeffer*, in which the high court eliminated the longstanding "presumption of prudence" standard. However, the Supreme Court also indicated that the market price will generally reflect the value of a publicly traded security absent special circumstances, and the Sixth Circuit held "that a plaintiff claiming that an ESOP's investment in a publicly traded security was imprudent must show special circumstances to survive a motion to dismiss."

In response to an initial 2009 class-action filing, in which the plaintiffs 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 Sixth Circuit 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.

After the U.S. District Court for the Eastern District of Michigan issued a new ruling in favor of the independent fiduciary on a motion to dismiss in 2014, the Sixth Circuit took up the case once again.

In light of the Supreme Court's *Dudenhoeffer* decision, the three-judge panel of the Sixth Circuit rendered a 2-1 decision upholding the district court's judgment, finding that the plan's fiduciary "repeatedly discussed at length whether to continue the investments in GM that are at issue in this case. Given the prudent process in which State Street engaged, [the plaintiff] failed to demonstrate a genuine issue about whether State Street satisfied its statutory duty of prudence." If the plaintiffs wish to appeal, they may request a rehearing of the case by the full circuit court.