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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

Top Senate Finance Democrat Releases Retirement Legislation Discussion Draft

Senator Ron Wyden (D-OR), the ranking Democratic member of the Senate Finance Committee, has released an early draft of retirement policy reform legislation. The measure specifically targets perceived abuses of Roth IRAs by wealthy individuals and also includes a number of other provisions intended to eliminate other loopholes while expanding savings for lower-income individuals.

In explaining his motivation for drafting the legislation, Wyden cites data from the Center for Retirement Research at Boston College National Retirement Risk Index, which found that the median IRA account contained only slightly more than $25,000 as of 2013 and an estimated 60 percent of all households had nothing saved in an IRA or 401(k). In contrast, he noted, a 2014 Government Accountability Office report showed that in 2011, 2,000 to 5,000 taxpayers had aggregated IRA balances over $5 million, including Roth IRAs.

Wyden's **Retirement Improvements and Savings Enhancements (RISE) Act** would impose a $5 million limit on Roth IRA savings and prohibit conversions from pre-tax amounts to Roth amounts in employer plans or IRAs.

The draft legislation also addresses required minimum distributions, eliminates "stretch IRAs," makes the Saver's Credit refundable and permits matching contributions to a 401(k) plan while employees make student loan repayments, among other provisions. An official summary and short summary are also available.

The RISE Act is intended to set the stage for legislation to be considered in the next Congress, starting in 2017. Wyden's office is soliciting comments "on all aspects of the discussion draft, as well as other topics related to retirement savings" through December 7. All comments should be submitted electronically (preferred) to Retirement_Savings@finance.senate.gov.

The Senate Finance Committee has tentatively scheduled a session for the week of September 19 to discuss and vote on retirement legislation that could be considered by the full chamber before the end of the year, but the RISE Act and its components are unlikely to be raised in this mark-up session.

Senate Special Committee on Aging Examines Retirement Security Policy

The U.S. Senate Special Aging Committee held a hearing on September 7 to discuss recommendations from the Bipartisan Policy Center (BPC)'s Commission on Retirement Security and Personal Savings.

The BPC, a widely respected bipartisan think tank established in 2007 by former Senate Majority Leaders Howard Baker (R-TN), Tom Daschle (D-SD), Bob Dole (R-KS) and

George Mitchell (D-ME), issued **a set of recommendations for addressing obstacles to retirement security** on June 9.

To open the hearing, Committee Chair Susan M. Collins (R-ME) characterized the current $7.7 trillion retirement security gap – the divide between what Americans have saved for retirement versus what they actually need – as a "crisis." She noted rising health care costs, the shift away from defined benefit plans and the continued repercussions of the financial crisis as several factors that inform the current state of retirement security for Americans and expressed that "ensuring that those who work for decades do not end up spending their retirement years in poverty" as a top priority.

Ranking Democratic committee member Claire McCaskill (D - MO) applauded the "bipartisan spirit in which [the Special Aging Committee] is forged," and hoped that the bipartisan effort of the commission could be "rewarded by the work of Congress to come together and find common ground as [America] moves into an era where no senior will have enough in social security to ensure that they will be comfortable in retirement."

The committee heard testimony from the co-chairs of the commission: former Senator Kent Conrad (D-ND) and James B. Lockhart III, who served as Executive Director of the Pension Benefit Guaranty Corporation in the George H.W. Bush administration, and as Principal Deputy Commissioner of the Social Security Administration in the George W. Bush administration.

Conrad and Lockhart discussed the witness testimonies discussed the recommendations laid out in the commission's final report, Securing Our Financial Future. Lockhart mentioned that the Urban Institute's findings that middle class retirement savings will be increased by 50% if all of the proposals suggested by BPC were implemented. The report contains 51 specific recommendations, sorted by six "key challenges" for American savers:

- A lack of workplace retirement coverage
- Leakage from retirement accounts
- The risk of outliving one's savings
- Underutilization of home equity
- Limited knowledge of personal finance
- Social Security at a crossroads

During the question-and-answer session, Collins asked which items of the proposal should be prioritized and Conrad clarified that the recommendations must be adopted as a complete package in order to achieve the desired effect and affirm the bipartisan efforts of the collaborators.

Senators Tim Scott (R-SC) and Tim Kaine (D-VA) discussed respective financial wellness campaigns to engage students to start saving young and inquired about other features, such as harmonizing the 401(k) and the IRA systems and matching incentives that could enable more Americans to develop a culture of savings.

Inquiries from other committee members, including Elizabeth Warren (D-MA), Sheldon Whitehouse (D-RI), Kirsten Gillibrand (D-NY), and Richard Blumenthal (D-CT), addressed a myriad of issues, such as paid leave, social security reform, the "lifetime earnings gap," surviving spousal provisions, and automatic IRAs, underscoring the breadth of the recommendations.

Whitehouse is the sponsor of the Automatic IRA Act of 2015 (S. 245), which would mandate automatic enrollment in IRAs for employees who currently do not have access to an employer-sponsored retirement plan.

In the previous session of Congress, Collins introduced (with Bill Nelson (D-FL)) the Retirement Security Act of 2014. The Collins-Nelson bill has not been introduced in this session of Congress.

Throughout the hearing, many committee members addressed the desire for bipartisan effort facing the urgency issue of securing retirement security.

House Committee Approves Sweeping Financial Reform Bill with Fiduciary Rule Repeal

As part of broad legislation aimed at rolling back many elements of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, the U.S. House of Representatives Financial Services Committee approved the repeal of the fiduciary definition rule finalized in April by the U.S. Department of Labor (DOL).

The new rule broadly expanded the definition of "investment advice" by extending fiduciary status to a wide array of advice relationships. The new rule is scheduled to go into effect in April 2017. While the Financial Services Committee does not have direct jurisdiction over the DOL, it has in its purview the Securities and Exchange Commission (SEC), which is still developing its own investment advice standards of conduct.

The **Financial CHOICE [Creating Hope and Opportunity for Investors, Consumers and Entrepreneurs] Act (H.R. 5983)**, approved by the committee in a party-line 30-to-26 vote, would invalidate and suspend the DOL's rule and any additional guidance, while requiring the SEC to prepare a thorough report and economic analysis before it issues its own rule. An official detailed summary and executive summary are available.

H.R. 5983 is an expansive measure that also incorporates a number of objectives relevant to employer plan sponsors, including:

- Reversing much of the Dodd-Frank regulatory regime and the Basel III capital and liquidity standards, although the Dodd-Frank provisions on executive compensation are not specifically cited.

- Retroactive repeal of the authority of the Financial Stability Oversight Council (FSOC) to designate firms as systematically important financial institutions (SIFIs).

- Fundamental reform of the Consumer Financial Protection Bureau (CFPB), tasking it with the dual mission of "competitive markets" in addition to "consumer protection." In 2014, the then-chairmen of the two Senate committees sharing jurisdiction over pension policy sent a letter to several Obama Administration officials – including the chairman of the CFPB – expressing concerns about "the lack of clear and specific rules to protect participants and retirees" in [pension plan] de-risking transactions and proposes that the regulatory departments and agencies consider procedural and clarifying guidance.

- Requires that all financial regulators (including the Consumer Financial Opportunity Commission, the Commodity Futures Trading Commission, the and the SEC) must produce, for each proposed rule, "a list of information on which the rule is based, including data, scientific and economic studies, and cost-benefit analyses."

- Repeal of the so-called *Chevron* legal doctrine, under which federal agency interpretations of statutes are given deference unless the interpretation is unreasonable. The U.S. Supreme Court declined to invoke Chevron in its decision in the 2015 *King v. Burwell* case, validating the availability of health insurance premium subsidies in federally-facilitated exchanges.

While the timing for floor consideration of H.R. 5983 is unclear, the measure is unlikely to receive consideration in the Senate this year.

Earlier in the year, the House approved House Joint Resolution 88 that also would have formally blocked the fiduciary rule from going into effect, but the resolution was vetoed by President Obama. The fiduciary rule has also been the subject of numerous lawsuits in federal court, in which plaintiffs argue that the rule exceeds the DOL's authority.

House Subcommittee Examines Mental Health Parity Laws

The Health Subcommittee of the U.S. House of Representatives Committee on Energy and Commerce held **a hearing on September 9** in which witnesses urged greater attention to the enforcement of parity in coverage between mental health and substance abuse disorders and physical illnesses.

Current mental health parity law is comprised of the Mental Health Parity Act of 1996 (MHPA) and the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA) and amended by the Affordable Care Act (which expanded the parity requirements from group health plans to the individual market).

The U.S. Department of Labor Employee Benefits Security Administration (EBSA) Mental Health and Substance Use Disorder Parity Task Force, which was established by a presidential memorandum earlier this year, hosted a "listening session" on June 29. A synopsis of the listening session has been provided by EBSA.

Earlier this year, the House approved by a vote of 422 to 2 the bipartisan Helping Families in Mental Health Crisis Act (H.R. 2646), which includes a number of provisions to strengthen mental health parity enforcement by:

- Directing the Administrator of the Centers for Medicare & Medicaid Services (CMS) – in collaboration with the Assistant Secretary of Labor of the Employee Benefits Security Administration (EBSA) and the Secretary of the Treasury – to report on MHPAEA violations and investigations.

- Directing the Government Accountability Office to prepare a separate report "detailing the extent to which covered group health plans (or health insurance coverage offered in connection with such plans), including Medicaid managed care plans … comply with the [MHPAEA]."

- Creating the position of Assistant Secretary for Mental Health and Substance Use Disorders within the U.S. Department of Health and Human Services.

Subcommittee Chairman Joe Pitts (R-PA) said, in opening the hearing, "since there seems to be ongoing discussions over protections as envisioned in the mental health parity laws previously enacted, it is timely for this committee to consider ways to streamline the mental health parity system.

Rep. Joseph P. Kennedy III (D-MA), took the opportunity at the start of the hearing to promote his Behavioral Health Coverage Transparency Act (H.R. 4276), which has yet to receive committee consideration. H.R. 4276 would require group health plans and health insurers to disclose specific analyses, findings and conclusions regarding their compliance with current law and regulations. It also calls on HHS, Labor, and Treasury to issue guidance on the process for current and potential participants and beneficiaries to file formal complaints of plans, conduct regular audits and publish information on denials of claims.

- Pamela Greenberg, president and CEO of the Association for Behavioral Health and Wellness (representing providers of mental health services), described the significant complexity of compliance requirements. "It is critical to recognize that differences do exist between behavioral health and physical health in order to ensure that the best quality, evidence-based care is being provided to consumers," she said. She also encouraged Congress to provide more streamlined disclosure guidelines and promote plan participant education.

- Matt Selig, executive director of Health Law Advocates, Inc. (providers of legal assistance to low-income clients), suggested that some insurance practices create barriers to access to mental health and substance use care. He asserted that greater disclosure of information by insurers is essential and expressed strong support for H.R. 4276.

- Dr. Michael A. Trangle, senior medical director of the Behavioral Health Division with the HealthPartners Medical Group, outlined the challenges associated with the treatment of patients who have mental health and substance use disorders. He called for better integration of behavioral health care with primary care and advancement of new payment models and standards that reimburse providers based on attaining best outcomes.

One of the problems identified by the panel is the "patchwork" of agencies tasked with enforcing the law, including the federal government, state insurance agencies and Medicaid offices and TRICARE for military veterans. Greenberg suggested that the establishment of "best practices" and the sharing of de-identified information would help facilitate interagency enforcement.

Chris Collins (D-NY) asked whether additional federal rules, audits and disclosure requirements would help or hurt the situation. Greenberg replied that consistency in enforcement was most important.

Asked by Kennedy what was the biggest barrier to mental care, Selig said that insurance practices were most significant but also identified workforce shortages as a notable problem.

The U.S. Senate is unlikely to bring the House-passed H.R. 2646 to the floor, but the Senate Health, Education, Labor and Pensions (HELP) Committee has approved the Mental Health Reform Act (S. 2680), which would also bolster enforcement of the MHPAEA. Senator John Cornyn (R-TX) told *The Hill* on Tuesday that a Senate vote on mental health legislation will likely have to wait until after the election.

While H.R. 4276 is also unlikely to receive broader consideration, Rep. Gene Green (D-TX) indicated during the question-and-answer period that he would seek to add elements of the bill in future mental health legislation.

In related news, Democratic presidential candidate Hillary Clinton recently articulated a sweeping mental health policy agenda, including greater enforcement of mental health parity. She also voiced her intention to convene a White House conference on the issue during her first year in office.

As a reminder, The U.S. Department of Labor's (DOL) Employee Benefits Security Administration (EBSA) hosted a webcast on September 14 to assist employer health plan sponsors in complying with existing parity requirements. Go to the DOL/EBSA registration page for more information.

House Passes Sense of House Resolution on Financial Technology

A resolution highlighting the importance of financial technology "to empower consumers, foster future economic growth, create new commerce and new markets" was approved by a 385-to-4 vote in the House of Representatives on September 12.

The bipartisan resolution, **H. Res. 835,** sponsored by Representatives Adam Kinzinger (R-IL) and Tony Cárdenas (D-CA), expresses the "sense of the House" that there is a need for a national policy fostering consumer access to financial tools.

During floor consideration, Representative Michael C. Burgess (R-TX) stated during consideration of the measure that "'blockchain,' a ledger-based technology fundamentally based on transparency, has the potential to disrupt healthcare records management, manufacturing supply chain management, real estate records, international clearinghouse and settlement functions, and even regulatory oversight by government agencies." Other speakers echoed that new innovations, like "blockchain," will have many applications in the financial services and healthcare fields, especially as online consumer experiences continue to expand.

The debate around H. Res. 835 identified some of the technology that affects or will potentially affect how plan sponsors administer their programs and engage their participants, and stressed the importance of anticipating continued innovation and developing regulatory groundwork to fully leverage and secure its potential. Given Congress's overwhelmingly affirmative vote for the resolution, further legislation to support it could follow.

RECENT REGULATORY ACTIVITY

Treasury, IRS Update Mortality Tables

The U.S. Treasury Department and Internal Revenue Service (IRS) have updated the static mortality tables to be used for defined benefit pension plans for 2017. Also importantly, the agencies announced that the next update will not be applicable until 2018.

Issued as **Notice 2016-50** on September 2, the mortality tables apply for purposes of calculating pension funding requirements, benefit restrictions, lump-sum calculations, Pension Benefit Guaranty Corporation (PBGC) premium payments, and other related purposes during calendar year 2017. The notice also includes a modified unisex version of the mortality tables for use in determining minimum present value for distributions with annuity starting dates that occur during stability periods beginning in the 2017 calendar year.

These mortality tables have been the subject of some controversy, as the federal government typically considers the projections of the Society of Actuaries (SOA, a professional organization serving 24,000 actuarial members) in formulating its mortality assumptions. However, the most recent SOA reports overstate mortality improvement, and would thus inflate funding liabilities, lump sums, and PBGC premiums.

While the 2017 tables are not based on the SOA projections, Notice 2016-50 reiterates prior indications that Treasury and the IRS will soon issue proposed regulations revising the base mortality rates and projection factors. To give sufficient time for notice and comment on the proposed regulations Treasury and the IRS expect that the final regulations will apply beginning in 2018.

Treasury, IRS Finalize Regulations Regarding Defined Benefit Plan Distribution Options

After more than four years, the U.S. Treasury Department and Internal Revenue Service (IRS) have **finalized regulations** modifying the "partial annuity" distribution options under defined benefit pension plans.

These rules, initially proposed by the Obama Administration in 2012 as part of a regulatory package designed to improve retirement security through access to lifetime income, simplifies 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.

The final regulations confirm that the new rules apply only to distributions with annuity starting dates in plan years beginning on or after January 1, 2017, though a taxpayer can elect to apply these regulations with respect to any earlier period. The release is largely silent on the how partial annuities should have been calculated under prior law. Treasury and IRS also simplified the rules of application for different plan designs.

While the proposed regulations would have provided for three different approaches to bifurcating the accrued benefit so that the minimum present value requirements apply to only a portion of the accrued benefit, the final rules combine the first two bifurcation approaches from the proposed regulations into a single, more broadly applicable rule.

The other element of the president's lifetime income regulatory project, final rules on longevity annuity contracts in tax-qualified plans, were finalized by the IRS in July 2014. (A longevity annuity contract is an annuity that allows beneficiaries to defer the distribution of income until a later age such as 80 or 85.)

RECENT JUDICIAL ACTIVITY

Nothing to report this issue