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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 President of Flexible Benefits Systems, Inc., csmith@fbsi.com.

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RECENT LEGISLATIVE ACTIVITY

Senate Finance Committee Tax Reform Working Groups Release Reports

The U.S. Senate Finance Committee's five bipartisan working groups on tax reform released their reports. The reports, released on July 8, offer policy options and recommendations for consideration as part of a larger effort to facilitate comprehensive tax reform.

As the Senate committee with jurisdiction over the tax code, the Finance Committee has been active in examining comprehensive tax reform and announced the working groups in January. Each bipartisan working group focused on a particular aspect of the Internal Revenue Code. The five areas included savings and investment, individual income tax, business income tax, international tax and community development and infrastructure. The five reports are available here.

The Savings & Investment Working Group was co-chaired by Senator Mike Crapo (R-ID) and Sen. Sherrod Brown (D-OH) and examined retirement tax policy as part of its topic area. While the group had been assigned consideration of the tax treatment of capital gains and dividends, financial products, defined benefit pension plans and private retirement savings accounts, the report states that in order to "develop consensus, bipartisan policy solutions strictly within the confines of the tax code elements assigned...our initial review led us to focus on the area of private retirement savings."

The report outlines three key goals for Congress to focus on to promote private retirement savings accounts and includes several policy recommendations for each goal, as well as background on current and previous legislation that could help achieve the goals, although the report specifically states the working group is not endorsing any particular legislation. The goals are to increase access to tax-deferred retirement savings, to increase participation and level of savings and to discourage leakage while promoting lifetime income.

Increase Access to Tax-Deferred Retirement Savings
Proposals to increase access to tax-deferred retirement savings vehicles include:

- **Open multiple employer plans (MEPs) to unrelated employers.** The report notes that current law requires a "nexus" between employers who wish to join a MEP, thereby hindering unrelated employers to form a MEP. The report favorably describes legislation that would waive this requirement for small businesses with fewer than 500 employees to allow them to form MEPs. The report also notes that small employers would benefit from forming MEPs by having reduced retirement administrative burdens, achieving the economies of scale that larger employers are able to achieve, promoting competition among providers of small business retirement plans and increasing the quality of the investment products available to employees while potentially reducing fees.

- **Increase start-up and matching credits and safe harbors for small businesses offering a plan.** The report proposes increasing the start-up credits for small employers that offer retirement plans and provide additional credits for small employers who offer automatic enrollment plans. The report also points out that Sen. Orrin Hatch (R-UT), chairman of the Senate Finance Committee, has proposed increasing the size of the current maximum credit for small employers who adopt a new qualified plan from $500 to $5,000, and President Obama has proposed offering small employers an auto-Individual Retirement Account (IRA) tax credit, tripling the existing "start-up" credit to

$4,500 and providing an additional $1,500 tax credit to small employers who already offer a plan and add auto-enrollment.

- **Create an additional safe harbor for automatic enrollment plans.** The report encourages expanding the current safe harbor for automatic enrollment plans and favorably reports on proposals which would add an additional safe harbor where an employer may "match" employee contributions of up 10 percent of pay. The proposals would also allow offset of the cost of this additional match for employers with fewer than 100 employees through a new tax credit equal to the increased match.

Increase Participation and Level of Savings
Proposals to increase employee participation and level of savings include:

- **Allow part-time employees to enroll in plans.** The report states that only 37 percent of part-time workers have access to a workplace retirement plan, as employers who offer retirement plans are allowed to exclude employees who work less than 1,000 hours per year. The report encourages consideration of proposals that allow long-term, part-time employees to contribute to employer-sponsored retirement plans and favorably describes the administration's proposal to expand access for part-time workers by requiring employers who offer plans to permit employees who have worked for the employer for at least 500 hours per year for 3 years or more to make voluntary contributions to the plan.

- **Expand the Saver's Credit.** The report advocates for proposals along the lines of H.R. 2117 and S. 1970, as introduced in the 113th Congress, to expand and increase the Saver's Credit as well as make it refundable.

- **Improve S Corporation Employee Stock Ownership Plans (S-ESOP Plans).** The report proposes to further encourage employee-ownership in S corporations, by considering bipartisan proposals that would extend the gain-deferral provisions of Code Section 1042 to sales of employer stock to S-ESOPs, to provide resources to small businesses contemplating making the transition to an ESOP and ensure that SBA-certified small businesses do not lose their status by becoming employee owned.

- **Make clarifications to church plans.** The report proposes technical changes to alleviate uncertainty and compliance issues for church retirement plans.

Discourage Leakage while Promoting Lifetime Income
Proposals to discourage leakage and promote lifetime income include:

- **Make a percentage of annuity payments excludable.** The report supports an approach that would allow a percentage of usually taxable lifetime annuity payments received by an individual from an IRA or any type of defined contribution plan to be excluded from gross income. The exclusion would be phased out at higher levels of income.

- **Increase portability of lifetime income.** The working group heard strong arguments that defined contribution plans should be encouraged to offer annuities or other installment products as investment options to encourage long-term, lifetime savings. Participants would be able to buy these products gradually over their careers, eliminating

the risk of making one large annuity or installment product purchase when interest rates are low.

- **Promote lifetime income.** The report encourages consideration of policies that encourage retirees to be knowledgeable about and select distributions that provide a stream of income payments over the course of their retirement.

- **Prevent leakage from retirement funds for purposes other than retirement income.** The report notes that a critical issue for the preservation of savings is leakage and proposes extending the rollover period for plan loan amounts until the end of the tax year to pay back a loan and allowing 401(k) participants to continue making elective contributions during the six months following a hardship withdrawal (elective contributions are currently prohibited for at least six months following a hardship withdrawal).

Other tax reform working groups with proposals that could affect employee benefits include:

- The Business Income working group report discussed giving corporations a deduction for dividends paid and imposing a withholding tax on the recipient of dividends, including tax-exempt retirement plans. The report also supports the president's proposal to make permanent Section 179 small business expensing at $1 million, allow cash accounting for businesses with up to $10 million in gross receipts, permanently double the deduction for start-up business costs from $5,000 to $10,000 and expand the health insurance tax credit for small businesses created in the Patient Protection and Affordable Care Act (PPACA).

- The Individual Tax working group report suggested that Congress consider proposals to rules for qualified charitable distributions from an IRA to expand the exclusion from gross income for qualified charitable distributions.

RECENT REGULATORY ACTIVITY

Final PPACA Preventive Care Regulations Provide Accommodations for Religious Objections to Contraceptive Coverage

The U.S. departments of Treasury, Labor (DOL) and Health and Human Services (HHS) issued final regulations regarding coverage of certain preventive services, including contraceptive services, under the Patient Protection and Affordable Care Act (PPACA) on July 10. The final regulations maintain an existing accommodation for eligible religious nonprofit organizations and provide certain closely held for-profit entities the same accommodation. The regulations also finalize interim final regulations on preventive services generally. HHS released a news release and fact sheet on the new final regulations.

The regulations finalize provisions from prior three rulemaking actions: interim final regulations issued in July 2010 related to coverage of preventive services, interim final regulations issued in August 2014 related to the process an eligible organization uses to provide notice of religious objection to the coverage of contraceptive services and proposed regulations issued in August 2014 related to the definition of "eligible organization," which would expand the set of entities that may avail themselves of an accommodation with respect to the coverage of contraceptive services. The 2014 proposed regulations were issued in response to the U.S. Supreme

Court decision in *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.

Drawing on a tax-law definition, the regulations establish that to be eligible for the accommodation, a closely held for-profit entity must, among other criteria, be an entity that is not a nonprofit entity and have more than 50 percent of the value of its ownership interests owned directly or indirectly by five or fewer individuals, or must have an ownership structure that is substantially similar. According to the preamble to the final regulation, "Those entities appear to be the types of closely held for-profit entities contemplated by Hobby Lobby, which involved two family-owned corporations that were operated in accordance with their owners' shared religious beliefs." The preamble further states that the departments also believe that the definition adopted in these regulations includes the for-profit entities that are likely to have religious objections to providing contraceptive coverage.

The final regulations are applicable beginning on the first day of the first plan year (or, in the individual market, the first policy year) that begins on or after September 14, 2015.

DOL Clarifies Fiduciary Liability 'Time of Selection' Standard for Annuities in Defined Contribution Plans

The U.S. Department of Labor (DOL) released Field Assistance Bulletin (FAB) 2015-02 on July 13, clarifying the "time of selection" standard in its safe harbor rule covering the applicable fiduciary responsibilities when selecting and monitoring annuity providers for a defined contribution plan. The FAB confirms that a plan sponsor's fiduciary responsibilities regarding a specific annuity provider end when it is no longer offered by the plan. This applies for both immediate and deferred annuities offered.

The FAB also confirms the following two points:

- "The prudence of a fiduciary decision is evaluated with respect to the information available at the time the decision was made – and not based on facts that come to light only with the benefit of hindsight." Thus, under DOL's safe harbor rule, "a fiduciary's selection and monitoring of an annuity provider is judged based on the information available at the time of the selection, and at each periodic review, and not in light of subsequent events."
- "The periodic review requirement in the safe harbor rule does not mean that a fiduciary must review the prudence of retaining an annuity provider each time a participant or beneficiary elects an annuity from the provider as a distribution option."

However, the DOL provided some examples of how the ERISA Section 413 statute of limitations would apply to the distribution of an annuity and stated "[absent fraud or concealment, these provisions mean that a plaintiff must base his or her claims on actions or omissions that occurred within the six years preceding the lawsuit. Thus, for example, if the plaintiff bases his or her claim on the imprudent selection of an annuity contract to distribute benefits to a specific participant, the claim would have to be brought within six years of the date on which plan assets were expended to purchase the contract."

The DOL commented it was releasing the FAB to assist plan sponsors who may be "overestimating" the amount of time or extent under which they would be held liable as a fiduciary for the financial wellbeing of a selected annuity provider. "This, in turn, could create or reinforce disincentives for plan sponsors to offer their employees an annuity as a lifetime income distribution" the FAB noted.

Finally, the DOL noted that it is considering issuing additional guidance on the annuity selection and monitoring issue.

IRS Issues Interim Guidance on Expatriate Plans under PPACA

The Internal Revenue Service (IRS) released interim guidance on the application of certain provisions of the Patient Protection and Affordable Care Act (PPACA) to expatriate health insurers, expatriate health plans and plan sponsors of expatriate health plans under the Expatriate Health Coverage Clarification Act (EHCCA) in IRS Notice 2015-43, published on June 30.

Under an expatriate health plan, substantially all of the primary enrollees must be "qualified expatriates," which means (1) certain foreign employees transferred or assigned to the U.S. for a specific and temporary employment purpose or assignment, (2) individuals working outside the U.S. for at least 180 days in a 12-month period, and (3) individuals who are members of certain groups, such as students or religious missionaries.

In Frequently Asked Questions (FAQs) guidance, the U.S. departments of Treasury, Labor (DOL) and Health and Human Services (HHS) previously provided a temporary delay for insured expatriate health plans to comply with the requirements of PPACA in FAQ (Part XIII), published in March 2013. Later FAQ guidance (Part XVIII), issued in January 2014, extended the temporary transition relief for plan years ending on or before December 31, 2016.

EHCCA was enacted in December 2014 as part of the Consolidated and Further Continuing Appropriations Act. The statute provides relief from specific PPACA requirements, fees and taxes for multi-national employers, globally mobile individuals and U.S. providers of expatriate insurance coverage, with the aim of ensuring that U.S. providers of this type of coverage are not at a competitive disadvantage against non-U.S. carriers who are not subject to PPACA. The provisions of the law that apply to expatriate health insurance issuers of fully insured expatriate health plans only apply to health insurers that are licensed in the U.S. and generally apply to plans issued or renewed on or after July 1, 2015.

Notice 2015-43 states that the departments have determined that issuers, employers and plan sponsors need additional time and guidance to modify their current arrangements to comply with EHCCA's requirements. It provides that until the issuance of further guidance, taxpayers are generally permitted to apply the requirements of EHCCA "using a reasonable good faith interpretation of the EHCCA."

Notice 2015-43 notes that the good faith rules do not apply to the Patient Centered Outcomes Research Institute funding fee (PCORI fee) under Internal Revenue Code Sections 4375 and 4376, as well as the health insurance provider fee under Section 9010 of PPACA. Treasury and IRS recently released Notice 2015-29 providing guidance addressing the application of the health insurance provider fee to expatriate plans. Notice 2015-43 includes a special rule for the

PCORI fee which states that issuers and plan sponsors can determine the PCORI fee by excluding lives covered under a specified plan "if the facts and circumstances demonstrate that the policy or plan (1) was designed and issued specifically to cover primarily employees (a) who are working and residing outside the United States, or (b) who are not citizens or residents of the United States but who are assigned to work in the United States for a specific and temporary purpose or who work in the United States for no more than six months of the policy year or plan year" or if it was designed to cover individuals who are members of a group of "similarly situated individuals" (see the Notice for more information).

The Notice indicates that the departments anticipate issuing proposed regulations in the future to implement EHCCA. The Notice also requests comments on needed clarifications for the statutory definitions of the terms "expatriate health plan" and "qualified expatriate," as well as the interaction of EHCCA with the previous transition relief for expatriate health plans. Comments are due by September 28.

The Notice is applicable to plans that are issued or renewed on or after July 1, 2015, and plan years that start on or after July 1, 2015.

SEC Issues Proposed Executive Compensation "Clawback" Rules

The U.S. Securities and Exchange Commission (SEC) issued proposed rules to require companies to establish policies to recover erroneously-awarded compensation to executives, also called a "clawback." The rules, released on July 1, would implement Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted in 2010, and would apply to the three fiscal years prior to when the company is required to file a restatement.

The proposed rules apply to "executive officers," defined as the president, chief financial officer, chief accounting officer and vice presidents in charge of business units, as well as those who craft company policy. That proposed definition is broader than the Sarbanes-Oxley Act's (SOX) clawback provision, which would only reach back one year.

The rules would direct the national securities exchanges and national securities associations to establish "listing standards that would require each issuer to develop and implement a policy providing for the recovery, under certain circumstances, of incentive-based compensation based on financial information required to be reported under the securities laws that is received by current or former executive officers, and require the disclosure of the policy." The rules are aimed at recovering awarded compensation that exceeds what should have been paid according to an accounting restatement, if the restatement is required because of "material noncompliance" with securities laws.

Non-compliance with the rules could result in a company being delisted from national securities exchanges. Erroneous compensation would have to be recovered, regardless of the executive officer's accountability for any misconduct or responsibility for the incorrect financial statements. Companies would also be forbidden from exempting officers from recovery.

The proposed rules follow April 29 proposed rules that would require public companies to disclose the relationship between "executive compensation actually paid" and the financial performance of the company for select employees, implementing relevant provisions of the Dodd-Frank Act. These actions reflect continued efforts by the SEC to tie executive compensation more closely to actual financial performance of the company.

IRS Issues Notice Prohibiting Certain Pension Plan Lump Sum Payments

The Internal Revenue Service (IRS) issued notice of its intent to amend the required minimum distribution regulations under Internal Revenue Code Section 401(a)(9) to prohibit lump sum payments or any other accelerated form of distribution of qualified benefit plans to replace any joint and survivor, single life or other annuity currently being paid.

Notice 2015-49, released on July 9, states that the amendments will be effective immediately, with some exceptions regarding "Pre-Notice Accelerations" of annuity payments.

The notice indicates the minimum distribution regulations will be amended, effective July 9, to prohibit a method of pension fund de-risking, where plan sponsors partially or fully discharge their ERISA plan liabilities through a lump sum payment to a participant or beneficiary currently receiving an annuity. Pension de-risking and participant disclosures for such activities are also currently being examined by the ERISA Advisory Council (EAC). The EAC, which has dubbed such activities "pension risk transfers," heard testimony on the subject in a recent series of hearings.

Under the exception, Notice 2015-49 states that the IRS anticipates that the amendments will not apply to an acceleration of ongoing annuity payments in association with a plan amendment specifically providing for implementation of a lump sum "risk-transferring" program if:

- the plan amendment was adopted or specifically authorized by a board, committee or similar body with authority to amend the plan prior to July 9, 2015;
- a private letter ruling or determination letter was issued by the IRS prior to July 9, 2015;
- a written communication to affected plan participants stating an explicit and definite intent to implement the lump sum "risk-transferring" program was received by those participants prior to July 9, 2015; or
- the plan amendment was adopted as part of an agreement between the plan sponsor and an employee representative (with which the plan sponsor has entered into a collective bargaining agreement) specifically authorizing implementation of such a program that was entered into and was binding prior to July 9, 2015.
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The notice refers to such types of acceleration of ongoing annuity payments as a "Pre-Notice Acceleration" and states that the IRS will not challenge a Pre-Notice Acceleration as an increase in benefits.

RECENT JUDICIAL ACTIVITY

Nothing to report this issue.