Worldwide Employee Benefits Network

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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

Senate Finance Committee Hearing Emphasizes Need for Tax Reform, Lower Corporate Tax Rates

The U.S. Senate Finance Committee continued its examination of possible tax reform in a February 24 hearing focusing on ways to reform the tax code to promote growth in wages, jobs and the economy. The discussion centered on the need to lower the U.S. corporate tax rate, not only to keep U.S. corporations competitive globally but also to benefit American workers.

As the Senate committee with jurisdiction over the tax code, the Finance Committee has signaled a strong interest in tax reform which, of course, could have meaningful implications for the tax incentives related to employer-sponsored benefit plans. Chairman Orrin Hatch (R-UT) recently released an analysis, Comprehensive Tax Reform for 2015 and Beyond, outlining various issues likely to come up in the effort to reform the tax code, including employer-sponsored benefits. The committee has also announced the launch of five bipartisan tax working groups within the committee in an effort to facilitate congressional consideration of comprehensive tax reform in the 114th Congress, including a "Savings and Investment" working group, which will cover retirement savings policy.

In his opening statement, Chairman Hatch suggested that there is bipartisan interest in tax reform and stressed the need to continue working towards action. While he expressed disagreement with the provisions in the President's recent budget "aimed at significantly hiking taxes on capital as well as on savings and investment," he welcomed the willingness of the Obama Administration to engage in ways to improve the tax system for businesses and workers.

Ranking Democratic member Senator Ron Wyden (D-OR) referenced the committee's last hearing on tax reform in his opening statement, noting that the approach to tax reform used in the Tax Reform Act of 1986 emphasized equal tax treatment of income derived from wages and investments, as well as the importance of bipartisanship to achieve tax reform.

The committee heard testimony from the following witnesses:

- Jane G. Gravelle, senior specialist in economic policy at the Congressional Research Service (CRS), examined major tax expenditures and potential avenues for reform. She suggested reducing the differential tax treatments on returns on investments based on the source of the return, including "the favorable treatment of pension and retirement earnings." She also expressed support for the 40 percent excise tax on high-cost health coverage under the Patient Protection and Affordable Care Act (PPACA) to mitigate the tax expenditure caused by the exclusion of employer-provided health benefits from employee's income. Her testimony also suggests "lowering the level at which the tax applies."

- Michael Boskin, professor of economics at Stanford University's Hoover Institution, said that the current tax system is biased against savings and investments and has kept the U.S. national savings and investment rates low. He emphasized that addressing this imbalance should be a major component of tax reform, especially "given the closely related negative side effects on saving and investment from the growth of the national debt and unfunded social insurance transfers to the elderly." He advocated for a transition to a consumption tax, or taxing only the income spent on goods and services.

- John Diamond, fellow in public finance at Rice University's Baker Institute for Public Policy and chief executive officer of Tax Policy Advisers, LLC, stressed that serious consideration should be given to taxing consumption, rather than income based tax reform. He also provided macroeconomic analyses of various recent proposals for tax reform, including the Tax Reform Act of 2014, as introduced by previous U.S. House of Representatives Ways and Means Committee Chairman Dave Camp (R-MI).

- Laura D'Andrea Tyson, professor of business and administration and economics at the University of California-Berkeley's Haas School of Business, testified on the importance of significantly reducing the corporate tax rate and stated that "of all taxes, corporate income taxes are the most harmful to economic growth because they reduce the returns to savings and investment." Her testimony also advocated moving the U.S. international tax system from a worldwide approach (in which the foreign earnings of U.S. companies are subject to U.S. corporate tax with the amount owed offset by a credit for taxes paid in foreign jurisdictions) to the territorial tax system used by most U.S. global competitors (in which international companies are allowed to repatriate their active foreign earnings at home without paying a significant additional domestic tax).

During the question-and-answer portion of the hearing, the witnesses discussed how the corporate tax rate is hindering economic growth and making the U.S. less competitive internationally. In response to a question on how to garner public attention to the need for tax reform, Tyson suggested increasing the gasoline tax or expanding it to a consumption-based carbon tax.

Bostick suggested that Americans would be willing to sacrifice certain specialized individual tax credits for lower tax rates and increased simplicity. In response to a question on the importance of revenue neutrality, Diamond said that revenue neutral tax reform is important to get reform passed. Bostick also commented that the current slowdown in the rise of health care costs began before the implementation of PPACA and that, despite some debate, most health economists believe spending will soon begin to rise again.

Tyson responded to a question from Sen. Dan Coats (R-IN) that while the U.S. has done a lot to encourage retirement savings, the incentives need to be targeted because they are currently benefiting primarily high-income savers. While Sen. Wyden has also expressed concerns about the current retirement tax incentives in the past, evidence demonstrates that they provide a strong and effective incentive for individuals across all income levels to save for a secure retirement. Senator Hatch has also repeatedly refuted assertions that retirement savings tax incentives are "upside down" and continues to stress the importance of a bipartisan approach to retirement policy.

RECENT REGULATORY ACTIVITY

IRS Requests Comment on Possible Approaches to Rules for 40 Percent Excise Tax

On February 23, the Internal Revenue Service (IRS) published Notice 2015-16, requesting comment on possible approaches for regulations implementing the 40 percent excise tax to be imposed on high-cost health coverage under the Patient Protection and Affordable Care Act (PPACA). Comments are being accepted through May 15.

The excise tax, scheduled to be implemented in 2018, is a nondeductible 40 percent excise tax created under Internal Revenue Code (IRC) Section 4980I, as added by PPACA. The tax applies to "applicable employer-sponsored coverage" in excess of statutory thresholds (in 2018, $10,200 for self-only, $27,500 for family). The tax was implemented as a "revenue raiser" to pay for other aspects of the PPACA, including federal subsidies for coverage for low-income individuals, and also to address perceived over-consumption of health care coverage.

Notice 2015-16 asks the public to comment on:

- The definition of applicable coverage.
- The determination of the cost of applicable coverage.
- The application of the annual statutory dollar limit to the cost of applicable coverage.
- Any other issues under Internal Revenue Code Section 4980I.

Notice 2015-16 also states the Treasury and IRS' intention to issue another notice inviting comments on additional issues not addressed in Notice 2015-16 and that they expect to use those comments "to inform proposed regulations that will be issued in the future for further public notice and comment."

President Obama Announces DOL Re-Proposal of Rule Updating Definition of "Fiduciary"

On February 23, the U.S. Department of Labor (DOL) submitted to the Office of Management and Budget (OMB), a revised version of the "conflict of interest" rule expanding the definition of the term "fiduciary". OMB will have up to 90 days to review the rule, after which it will be published in proposed form, with a formal comment period, before it is finalized. The text of the proposal will not be made public until it is published.

In describing the rule at an AARP event today, President Obama emphasized the need for "uniform rules of the road that require advisers to act in the best interests of their clients." It is fairly unusual for the President to specifically give a speech regarding a proposed regulation. That suggests the importance the Administration is placing on this initiative. The fact that the President is publicly speaking about the need for the rule on the very date it has been submitted to OMB underscores the extent to which the issue has largely been vetted within the White House and also suggests that OMB will not likely use the full 90 days to approve the proposed regulation for publication.

ERISA currently imposes stringent requirements on individuals who act as plan fiduciaries, supplemented by certain "prohibited" transactions. Fiduciaries are personally liable for losses sustained by a plan that result from a violation of these rules. Section 3(21)(A)(ii) of ERISA sets out a simple two-part test for determining fiduciary status: a person renders investment advice with respect to any money or other property of a plan, or has any authority or responsibility to do so; and the person receives a fee or other compensation, direct or indirect, for doing so.

The re-proposed rule is expected to expand significantly the definition of the term "fiduciary" with respect to investment advice provided in conjunction with defined benefit pension plans, defined contribution retirement savings plans and individual retirement accounts (IRAs). Generally, the proposal is intended to protect participants from conflicts of interest and self-dealing. For example, the proposed rule would define certain advisers as fiduciaries even if they do not provide advice on a "regular basis."

The rule was first proposed by the Department of Labor's Employee Benefits Security Administration (EBSA) in October 2010 but was later withdrawn due to concerns raised by the business and financial communities, as well as lawmakers from both parties.

At the February 23 announcement, President Obama emphasized the need to "modernize" an almost 40-year-old fiduciary regulation to build on consumer protections and ensure that Americans who are responsibly saving for their future retirement security are receiving a fair share of their return on investments. The White House also released a fact sheet as well as a new report from the Council of Economic Advisors, outlining the effects of conflicted investment advice on retirement savings. The fact sheet stated that the new proposal would:

- Require retirement advisers to "put their client's best interest first" by expanding the types of retirement investment advice subject to ERISA.
- Continue to allow access to investment advice by providing an exemption from the limits on payments that create conflicts of interest under the new definition.
- Allow advisers to continue to provide general education on retirement saving across employer-sponsored plans and IRAs without triggering fiduciary duties.

In a February 22 conference call with reporters, DOL Secretary Tom Perez said that the new proposal will include economic analysis as well as a list of proposed exemptions, neither of which were included in the first rule.

IRS Guidance Provides Limited Relief for 'Employer Payment Plans' Under PPACA

In Notice 2015-17, issued on February 18, the Internal Revenue Service (IRS) clarified and supplemented prior guidance on the tax treatment of "employer payment plans," under which an employer reimburses an employee (or directly pays) all or some of the premium for an individual health insurance policy. Notice 2015-17 provides limited transition relief to employer payment plans offered by small employers, while also addressing S-corporation health care arrangements, Medicare premium health reimbursement arrangements (HRAs) and TRICARE-related HRAs.

As previously reported, Notice 2013-54, issued by the IRS in September 2013 concluded that arrangements constituting employer payment plans fail to comply with the PPACA market reforms (including the annual dollar limit and preventive services requirements) and may be subject to the excise tax under Internal Revenue Code Section 4980D ($100 per day per individual per violation). The newly released Notice 2015-17 reiterates this conclusion, but states that, "at the same time, the departments understand that some employers that had been offering health coverage through an employer payment plan may need additional time to obtain group health coverage or adopt a suitable alternative."

Notice 2013-54 provides "limited transition relief" through June 30, 2015, for coverage sponsored by small employers (i.e., those that averaged fewer than 50 full-time employees (including full-time equivalent employees) on business days during the preceding calendar year). The notice clarifies that the relief does not extend to stand-alone HRAs or other arrangements to reimburse employees for medical expenses other than insurance premiums.
In addition, Notice 2015-17 addresses:

- Whether a 2-percent shareholder-employee healthcare arrangement is subject to the market reforms.
- Whether an employer that offers to reimburse Medicare premiums for its active employees creates an employer payment plan under Notice 2013-54;
- Whether an arrangement under which an employer reimburses (or pays directly) some or all of medical expenses for employees covered by TRICARE constitutes an HRA subject to the PPACA market reform requirements;
- Whether an arrangement under which an employer increases an employee's compensation (but does not condition the payment of additional compensation on purchase of health coverage) is an employer payment plan; and
- Whether reimbursements or payments under an employer payment plan that are provided on an after-tax basis would cause the arrangement not to be a group health plan (and therefore not subject to the market reforms).

In the previous session of Congress, Representative Charles Boustany (R-LA) introduced the Small Business Healthcare Relief Act, which would prevent small businesses from being penalized for providing monetary assistance to their employees to purchase insurance on the individual market on a pre-tax basis (such as in an HRA). Senator Charles Grassley (R-IA) recently offered (and then withdrew) similar language as an amendment in the recent Senate Finance Committee markup of the Hire More Heroes Act.

GAO Reports on Defined Benefit Plans Offering Lump Sum Payments

On February 26, the Government Accountability Office (GAO) released a report on the practice of giving pension plan participants a limited-time option of receiving their retirement benefits in the form of a lump sum to replace their lifetime annuities.

The report, Private Pensions: Participants Need Better Information When Offered Lump Sums That Replace Their Lifetime Benefits, focuses on:

- The prevalence of lump sum offers (or "windows") and sponsors' incentives to use them.
- The implications for participants.
- The extent to which selected lump sum materials provided to participants include key information.

A number of defined benefit plan sponsors have offered participants immediate lump sums to replace their lifetime annuities, sometimes as part of a pension plan "de-risking" strategy. The GAO report notes that although the U.S. Department of Labor (DOL) has primary responsibility for overseeing pension sponsors' de-risking reporting requirements, it does not require sponsors to report such offers, making it difficult to know the number of plan sponsors making these offers.

The report was requested by Representative Sander Levin (D-MI), ranking Democratic member of the House of Representatives Ways and Means Committee, (along with former House Education and the Workforce Ranking Democrat George Miller (D-CA)), who asked GAO to examine "what is spurring sponsors to make such offers and the potential effect these offers have on participants' retirement security." The report adds that "questions have been raised about participants' understanding of the financial tradeoffs associated with their choice."

The GAO report's conclusion that DOL should "improve oversight" and reassess or clarify existing regulations may encourage policymakers to further scrutinize pension plan administration, including de-risking activity.

PBGC Requests Input on Implementation of Multiemployer Pension Plan Provisions

On February 17, the Pension Benefit Guaranty Corporation (PBGC) issued a request for information (RFI) on future guidance to implement the multiemployer pension plan provisions included in the Consolidated and Further Continuing Appropriations Act, enacted in December 2014.

The RFI solicits public input on the application process to implement two new statutory provisions regarding multiemployer partitions (the segregation of a portion of multiemployer plan assets and liabilities ordered by the PBGC to reduce the chance of plan insolvency) and mergers enacted under the new law. Under the measure, a plan sponsor may apply to the PBGC to order a partition. The agency is required to make a determination no later than 270 days after the application was filed.

The measure also gives new authority to the PBGC to facilitate multiemployer plan mergers under certain requirements. Although not required by the law, the PBGC is considering guidance to provide advance notice that plan sponsors must demonstrate that they meet the criteria.

The notice follows another RFI issued by the Internal Revenue Service (IRS) on February 13 to implement the multiemployer pension plan benefit suspension provisions also included under the new law. The IRS notice invites public comments for information on future guidance that would address implementation of the benefit suspensions, including: (1) how future guidance should address actuarial and other issues, (2) how a plan sponsor could identify which benefits are based on a disability, since reductions based on disabilities are prohibited, (3) practical issues to be considered for participants who have and have not retired, and (4)satisfying the requirement that notices of the proposed suspension are distributed to plan participants and beneficiaries concurrently with the submission of the application for approval.

The PBGC RFI specifically asks for input relating to plan sponsors applying both to PBGC for a partition (or facilitated merger) concurrently with an application for a benefit suspension and the IRS RFI notes that both agencies will coordinate on developing processes that will apply to applications falling within their respective jurisdictions.

Comments are due on both RFI issuances by April 6.

RECENT JUDICIAL ACTIVITY

Nothing to report this issue.