**_BENEFITS INSIDER_**
**_A Member Exclusive Publication_**

**Volume 134, March 17, 2015** (covering news from March 3-16, 2015)

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 ........ 2**
**Senate, House Leaders Introduce Employer Wellness Programs Bill ........ 2**
**Senate Finance Committee Examines Tax Reform in Multiple Hearings ........ 3**
**Senate Aging Committee Kicks Off Series of Retirement Security Hearings ........ 8**
**Congress Announces New Retirement Security Caucuses ........ 10**

**RECENT REGULATORY ACTIVITY ........ 10**
**Final HHS 2016 Benefit and Payment Parameters Notice Addresses Maximum Out-of-Pocket, Minimum Value Requirements ........ 10**
**Agencies Issue Final Regulations for Limited Wraparound Coverage as "Excepted Benefits" ........ 11**

**RECENT JUDICIAL ACTIVITY ........ 12**
**Supreme Court Hears Oral Arguments in King v. Burwell ........ 12**
**Sixth Circuit Court of Appeals Overturns Disgorgement of Profits Award Under ERISA in Rochow v. LINA ........ 13**
**Supreme Court Signals Interest in a Reverse Stock Drop Case ........ 13**

## RECENT LEGISLATIVE ACTIVITY

### Senate, House Leaders Introduce Employer Wellness Programs Bill

On March 2, Republican committee chairmen from the U.S. Senate and the U.S. House of Representatives introduced legislation designed to provide legal certainty to employers offering wellness programs.

The Preserving Employee Wellness Programs Act was introduced in the Senate as S. 620 by Senator Lamar Alexander (R-TN) and in the House as H.R. 1189 by Representative John Kline (R-MN). The legislation was introduced largely in response to recent litigation by the U.S. Equal Employment Opportunity Commission (EEOC) challenging employer-sponsored wellness programs.

According to an accompanying press release, "A bipartisan provision in PPACA allowed employers to discount health insurance premiums by up to 30 percent -- or 50 percent if approved by the Departments of Treasury, Labor, and Health and Human Services -- for healthy lifestyle choices like quitting smoking or maintaining a healthy cholesterol level."

The EEOC has pursued litigation against wellness plans without issuing guidance, which has created uncertainty for employers who offer these programs. The EEOC filed a request in the U.S. District Court for the District of Minnesota for a temporary restraining order and preliminary injunction against Honeywell International Inc.'s wellness program, alleging that it violated the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA) by imposing penalties on employees who decline participation in the company's biometric screening program. The district court denied the EEOC's request, based on a finding that the program does not meet the legal standard that its continuation poses "irreparable harm" to participants. The court did not decide the issue of whether Honeywell's wellness plan design violated the ADA.

The EEOC continues to pursue a lawsuit challenging a wellness plan sponsored by Flambeau, Inc. (a Wisconsin-based manufacturer with 1,600 employees) as well as a similar suit against Orion Energy Systems.

The EEOC announced in its most recent semi-annual regulatory agenda that it intends to issue regulations this year addressing wellness programs under the ADA and GINA. However, the actual timetable for the issuance of such guidance is uncertain.

Under The Preserving Employee Wellness Programs Act:

- Plans that comply with the wellness provisions of the Health Insurance Portability and Accountability Act (HIPAA) that were amended by the Patient Protection and Affordable Care Act (PPACA) (included in section 2705(j) of the Public Health Service Act) shall not violate the ADA or GINA by offering rewards in compliance with PHSA 2705(j). In general, this protection extends to health contingent wellness programs, including activity-only and outcome-based programs.
- Participatory programs shall receive the same protection if the reward is less than or equal to the maximum reward amounts applicable to health contingent wellness programs.
- The collection of information about the "manifested disease or disorder of a family member shall not be considered an unlawful acquisition of genetic information with respect to

another family member participating in workplace wellness programs" and shall not violate GINA.

- The legislation also includes two provisions to clarify the bill's applicability. The first states that nothing should be construed to limit the continued application of the *bona fide* benefit plan exception to wellness programs. The second states that nothing "shall be construed to prevent an employer that is offering a wellness program from establishing a deadline of up to 180 days for employees to request and complete a reasonable alternative standard."
- The legislation shall take effect as if enacted on March 23, 2010 (the date the Patient Protection and Affordable Care Act was signed into law), and shall apply to the ADA and GINA, including amendments made under those laws.

During a Senate Health, Education, Labor and Pensions (HELP) hearing last autumn on EEOC nominations, members of the committee discussed the recent lawsuits relating to employer wellness programs, with some senators criticizing the agency for pursuing litigation before publishing guidance. Senator Alexander, who now serves as chairman of the committee, stated that the EEOC places too much emphasis on high-profile lawsuits and too little on resolving claims, and that there is a lack of transparency on how the EEOC issues guidance to the public and on its activities, generally. He voiced his concerns about lawsuits filed against employer wellness programs despite the lack of guidance from the EEOC.

## Senate Finance Committee Examines Tax Reform in Multiple Hearings

*Fairness in the Tax Code*

On March 3, the U.S. Senate Finance Committee heard testimony on how to incorporate "fairness" into the tax code in conjunction with possible tax reform. The hearing, Fairness in Taxation, highlighted the differences in the way "fairness" is defined and looked to resolve the tension between "growth" and "fairness."

A concern for a fair tax code has often been the basis for criticism of certain tax incentives that are viewed as being "regressive," i.e., giving highly-paid individuals a greater tax benefit than lower-paid individuals. This argument has been applied in raising objections to the income tax exclusion for employer-sponsored health plans as well as the income tax deferral on employer-sponsored retirement plan contributions. Based upon the method used for calculating "tax expenditures" the health and retirement benefit tax incentives represent the two largest sources of foregone federal tax revenue.

In his opening statement, Chairman Orrin Hatch (R-UT) quoted President Kennedy as saying that "a rising tide lifts all boats," but noted that – due to the marginal tax rates, even for low- and modest-income people – "not all boats are currently being lifted." He said fairness means that similarly situated taxpayers should be treated similarly and acknowledged that while some may disagree on what constitutes fairness, he hoped the hearing would help in reaching conclusions. Ranking Democratic member Ron Wyden (D-OR) emphasized that the tax code needed to be restructured in a bipartisan way to help the middle class. He also announced the release of a report prepared by the committee's Democratic staff on "tax loopholes" (see related story) and emphasized that tax reform needs to emulate the Tax Reform Act of 1986 by cracking down on loopholes, as well as treating equally income from earned wages and from investments.
The committee heard testimony from the following witnesses:

- Lawrence B. Lindsey, president and chief executive officer of The Lindsey Group, (and a former member of the Federal Reserve Board, as well as an economic policy official in the George W. Bush administration) emphasized that growth is key to improving the economy. He recommended focusing on simplification and growth more than fairness, as over the long-term, both will do more to solve income inequality than additional complexity in the tax system.

- Deroy Murdock, Fox News contributor and senior fellow with the Atlas Network, made several suggestions for tax reform, including: gearing the tax code toward "dynamic, robust economic growth," replacing the current system with a flat tax and significantly lowering the U.S. corporate tax rate, or cutting it altogether. He also suggested helping disadvantaged Americans not through the tax system but through higher education standards, charter schools and additional education initiatives such as the Harlem Educational Activities Fund.

- Heather Boushey, executive director and chief economist at the Washington Center for Equitable Growth, noted that as income inequality has increased, the tax code has not kept pace toreduce inequality. She also said that despite the common perception that efforts to reduce inequality are in tension with economic growth, new research shows that "steps taken to reduce inequality do not significantly hinder economic growth." Her testimony included some policy proposals, including reducing retirement tax incentives, which she asserted would make the tax code more progressive.

- Steven Rattner, chairman of Willett Advisors LLC, (and a former economic policy official in the Obama administration) recommended that income earned by investments should be treated the same as other forms of income and also noted the importance of maintaining adequate revenue, especially with the growing retirement and health care costs for the aging baby boomer population. Rattner cited the inherent inequities of capital gains taxation in particular. He also alluded to isolated cases where individuals have amassed tens of millions of dollars in retirement accounts.

During the question-and-answer session, the witnesses offered different opinions of what defines a "fair" tax code. Lindsey said that due to the issues involved in defining "income," it would be prudent to move away from an income-based tax code and toward a "cash-flow"-based tax system (similar to a consumption tax), which he said would be fairer and encourage growth. Murdock stated that a 10 percent flat tax would create the same amount of revenue as the current complex system. Boushey noted the importance of maintaining the revenue needed to properly invest in the economy and said that the current system is not promoting investments that benefit the economy. Rattner said that the basic structure of the current system has served the country well for decades, but loopholes and exemptions should be reduced or eliminated to make the tax code fair.

Senator Ben Cardin (D-MD) asked about the viability of a progressive consumption tax, noting that it would simplify the tax system as well as create fairness. The witnesses responded with varying degrees of optimism but expressed concerns about the additional administrative burden imposed on sellers of goods and services.

The committee also recently announced the launch of five bipartisan tax working groups in an effort to facilitate congressional consideration of comprehensive tax reform, including a "Savings and Investment" working group. It is important to note that the tax incentives for retirement savings

will be evaluated in this working group alongside other investment issues such as capital gains taxation.

*Simplification and the Tax Code*

The Finance Committee continued its examination of possible tax reform in a March 10 hearing on ways to reduce complexity in the tax system. During the hearing, Tax Complexity, Compliance, and Administration: The Merits of Simplification in Tax Reform, witnesses offered suggestions on ways in which the tax code could be simplified without reducing tax revenue, including measures affecting retirement savings, such as creating uniformity of regulations on required minimum distributions and early withdrawal penalties across different types of retirement plans.

In his opening statement, Hatch noted that there are many causes of complexity in the tax code, including the use of tax incentives to advance social and economic policies, the interaction of federal tax laws with state laws, the complexities in the international tax system and the various "credits, deductions, exclusions, exemptions, fees, and excise taxes, all of which were presumably intended by their proponents for good," but contribute to the overall complexity of the tax system. He said that despite the tension between simplicity and fairness, reducing complexity in the tax system should be a priority.

Ranking member Wyden, in his opening statement, noted that due to the complexity of the tax code, taxpayers increasingly have to rely on possibly risky software and preparers to help them file, which is why he introduced the Taxpayer Protection and Preparer Proficiency Act of 2015 (S. 137), which would give the Secretary of the U.S. Department of the Treasury the authority to regulate tax return preparers. He also stressed that simplicity and fairness do not have to be at odds and encouraged the committee's bipartisan approach to tax reform.

The committee heard testimony from the following witnesses:

- Carol Markman, certified public accountant and tax director at EP Caine & Associates CPA, LLC, outlined several areas that could be changed to both simplify and increase fairness in the tax code, including retirement plans.

  She noted that there are several different types of retirement plans and that many Americans have several types of plans when they begin to be required to take an annual required minimum distribution (RMD) at age 70½. She suggested that instead of requiring RMDs from different types of plans to be taken separately from each type of plan, taxpayers should be permitted to take their entire RMD from a single retirement account. Markman also suggested that the exemptions to the 10 percent penalty on early retirement account withdrawals be made uniform across all plan types.

- Mihir Desai, professor of finance and law at Harvard University, commented on the excessive complexity of certain areas in the code, including Individual Retirement Accounts (IRAs). He suggested combining the multitude of available tax preferred savings accounts into two accounts, "one for retirement savings and one for everything else." He also advocated for a territorial tax system, where domestic income is taxed but not foreign income, over the U.S. current worldwide system, where corporations headquartered in the U.S. must pay corporate income tax on all income, regardless of whether it is earned in the U.S. or overseas.

- Bruce Bartlett, former deputy assistant secretary for economic policy for the U.S. Department of the Treasury, testified that much of the tax system's growing complexity comes from the changing economy, which in turn is changing the nature of income. He

cited contract workers as an example, as they have to file with the same complex returns as small businesses. He noted that a consumption-based tax, where money spent on goods and services is taxed, has potential to simplify the tax system. He also suggested consolidating "the many tax subsidies for education, retirement saving and other worthwhile purposes."

- Keith Fogg, professor of law and director of the Villanova University School of Law Federal Tax Clinic, commented on the difficulties low-income taxpayers face with simply trying to file their taxes correctly. He emphasized that the focus should be on getting the return filing process right and that return preparers should be regulated to protect low income taxpayers.

During the question-and-answer session, Senator Maria Cantwell (D-WA) asked whether they needed to be focusing more on retirement savings and investing in research and development. Bartlett agreed that any policy that helps increase savings is good and encouraged that the research and development credit be made permanent.

Wyden asked whether taxing income from wages and investments at the same rate would diminish complexity. Bartlett responded that an issue with that is that individuals can choose when, or if, to realize capital gains, which can create a "lock-in" effect, and he suggested the way Europe deals with this issues, where a rate of return on investments is estimated and taxed without those capital gains needing to be withdrawn.

Sen. Cardin asked about the simplification that would be created by moving from an income based tax system to a consumption-based system, to which the witnesses responded with optimism, although Markman expressed concern about its effect on low-income taxpayers.

Sen. Sherrod Brown (D-OH) expressed skepticism that comprehensive tax reform could be achieved and instead suggested a set of discreet reform packages, based on the committee's working groups on tax reform.

In response to a question from Sen. Thomas Carper (D-DE) on where the committee can find common ground on an issue, Bartlett noted that some complexity is derived from having so many incentives that attempt to achieve the same purposes, especially in the areas of retirement savings and education. Fogg responded to another question from Carper that one way to both simplify the tax code and increase compliance would be to fix the filing system by having the IRS wait to send refunds until after they received third party data verifying returns and if the IRS sent taxpayers the data they already have.

As the Senate committee with jurisdiction over the tax code, the Finance Committee has signaled a strong interest in tax reform, which could have meaningful implications for the tax incentives related to employer-sponsored benefit plans. The committee has held a series of hearings on tax reform, with the most recent hearing focusing on ways to reform the tax code to promote growth in wages, jobs and the economy.

The committee's previous hearings have discussed the process leading to the Tax Reform Act of 1986 and ways to promote growth in wages, jobs and the economy.

**Tax 'Loopholes' Report Takes Aim at Executive Compensation**

In a report prepared by the Democratic staff of the Senate Finance Committee and unveiled at the Fairness in Taxation hearing on March 3, certain nonqualified deferred compensation (NQDC) practices are characterized as "tax loopholes" that should be revisited in the context of comprehensive tax reform.

The report, *How Tax Pros Make the Code Less Fair and Efficient: Several New Strategies and Solutions*, identifies "tax avoidance strategies" as described by the Joint Committee on Taxation (JCT) and outside independent experts. The Finance Committee's Democratic staff analysis states that "reforms to rein-in some of these strategies could reduce the amount of taxes avoided by tens of billions of dollars over the next decade while making the tax code fairer and simpler overall."

A persistent theme throughout the report is the criticism of NQDC arrangements that are commonly used by employers to reward executives. Because the tax code limits the deferral of income through qualified plans, the report suggests that *nonqualified* deferred compensation also be capped.

The report notes that NQDC arrangements can be used to circumvent the Internal Revenue Code Section 162(m) deduction limit in the tax code, under which annual compensation paid to certain senior executives in excess of $1 million is typically nondeductible by the employer, unless it meets certain conditions. However, if an employee's compensation is deferred until retirement when the employee is no longer a senior executive, the compensation will not be subject to the $1 million cap. This is because 162(m) only applies to compensation paid during a year if the employee is a senior executive on the last day of the year. "Policymakers also should explore closing this abusive loophole," the report says. The Patient Protection and Affordable Care Act and the federal government's Troubled Asset Relief Program have already imposed targeted limits on Section 162(m).

Other tax avoidance strategies identified by the report include:

- Using "collars" to avoid paying capital gains taxes.
- Using "wash sales" to time the recognition of capital income.
- Using derivatives to convert ordinary income to capital gains or convert capital losses to ordinary losses.
- Using derivatives to avoid constructive ownership rules for partnership interests.
- Using "basket options" to convert short-term gains into long-term gains.

(These terms and financial instruments are fully described in the report.)

In the prior Congress, then-House of Representatives Ways and Means Committee Chairman Dave Camp introduced the Tax Reform Act of 2014, which would have imposed a number of new limits on NQDC arrangements, including:

- Taxation of NQDC when there is no substantial risk of forfeiture.
- Repeal of the commission and performance-based compensation exception to the $1 million deduction limit, applicable to the CEO, CFO and three other highest paid employees.
- Expansion of the coverage of code Section 162(m) by providing that if an individual was considered a covered employee after 2013, the deduction limits will continue to apply to

all of their compensation in the future, providing that the deduction limit applies even if the income is paid to someone else (including a beneficiary upon the covered employee's death).

- Imposing a 25 percent excise tax for payments in excess of the $1 million deduction limit.

Notably, although the Democratic staff report takes aim at NQDC, it does not identify qualified retirement plans as "loopholes" requiring legislative reform. A recent White House fact sheet on the president's tax proposals said that "tax loopholes have allowed some high-income Americans to accumulate tens of millions of dollars in tax-preferred accounts that were intended to help workers save for a secure retirement, not to provide tax shelters for the wealthiest few."

### Senate Aging Committee Kicks Off Series of Retirement Security Hearings

On March 12, the U.S. Senate Special Committee on Aging held the first hearing in a new series on retirement security. The hearing, Bridging the Gap: How Prepared are Americans for Retirement?, discussed the various causes of financial insecurity during retirement, including increased longevity, lack of access to employer-sponsored retirement plans and increased health care costs.

In her opening statement, Chairwoman Susan Collins (R-ME) said that the purpose of the series on retirement was to better understand the scope of the retirement security problem, to identify the contributing factors to its rise and to develop "practical ideas we should consider to address the growing gap" between the amount Americans are saving and what will actually be needed during retirement. She emphasized the need for both public and congressional attention to retirement savings and noted that the measure she recently introduced along with Senator Bill Nelson (D-FL), the Retirement Savings Act of 2015 (S. 266), would help encourage more Americans to save for retirement.

Ranking Democratic member Claire McCaskill (D-MO) said in her opening statement that retirement security would be the top priority of the committee and emphasized the need for automatic enrollment to encourage low-to-moderate income workers to save. She also voiced her support for S. 266 as a bipartisan measure that would help workers without access to employer-sponsored retirement plans.

The committee heard testimony from the following witnesses:

- Jean Chatzky, financial journalist and editor for NBC's Today Show, discussed various sources of financial insecurity in retirement, including increased longevity, the cost of health care, the "delayed adult lifecycle" causing children's college costs and retirement to become "uncomfortably close," supporting adult children and elderly parents simultaneously and debt. Her testimony offered some solutions, such as increasing auto-enrollment and auto-escalation, implementing S. 266 to expand access, emphasizing separate emergency savings to prevent retirement savings leakage and providing education on the importance of delaying Social Security benefits as long as possible.

- Alicia Munnell, director of the Center for Retirement Research at Boston College, offered research suggesting that while Americans have maintained the same proportion of savings to income for decades, they needed to be saving much more. She argued that these habits have contributed to a rising number of Americans who won't be able to maintain the same standard of living after retirement. She stressed that having automatic systems in place is the best way to help Americans be prepared for retirement.

- Michal Grinstein-Weiss, associate professor and associate director at the Washington University Center for Social Development's Brown School of Social Work, focused on the savings barriers for low-to-moderate income workers, such as less access to employer-sponsored retirement plans. She also voiced support for S. 266, as well as for the recently enacted Illinois Secure Choice Savings Program Act, the first state-mandated retirement plan initiative signed into law. She also encouraged the use of automated savings programs as a way to encourage savings.
- Rob Carmichael, senior vice president of human resources, training, IT and facilities at the Maine Savings Federal Credit Union, described the steps his organization has taken to support their employees and credit union members with financial management and education, including offering a free financial advisor and encouraging participation in their 401(k) plan.

In the question-and-answer session, Collins noted that many Americans sacrifice Social Security benefits by starting to take benefits at age 62 instead of waiting to age 70 and asked what can be done to make sure those nearing retirement age stay in the workforce as long as possible. Chatzky responded that greater education on Social Security benefits is needed and that informing participants of the actual dollar amounts they would sacrifice would help. Munnell also commented on the confusion caused by the Social Security Administration's emphasis that full retirement age is 66, which leads people to believe that is the age where benefits have peaked, but in fact they peak at age 70.

Many senators, including McCaskill, Tim Scott (R-SC) and Thom Tillis (R-NC), discussed the need for further financial literacy, especially starting at a young age. The witnesses responded with a range of suggestions. Chatzky and Grinstein-Weiss both agreed that financial literacy needed to be included as early as possible. Munnell, however, stated that education has a limited ability to affect savings and stressed that people save when it is automatic with a system already in place.

Sen. Elizabeth Warren (D-MA) discussed how Americans' retirement savings are being "eaten away" by high fees and broker "kick-backs" and asked how they can work to fix this issue. Munnell discussed how the fiduciary standard currently does not apply to Individual Retirement Accounts (IRAs) under ERISA and voiced support for the U.S. Department of Labor's effort to change this with an updated "conflict of interest" rule, but she asserted that even with 401(k) plans that are covered under the fiduciary standard, there are many products with high fees that hurt future retirement savings.

In response to a question from Sen. Tim Kaine (D-VA) on whether there were resources comparing retirement systems across countries, Munnell recommended that the Organisation for Economic Co-operation and Development (OECD) provided a lot of resources on the different retirement systems among developed countries.

Sen. Sheldon Whitehouse (D-RI) discussed how peoples' decisions are highly influenced by the "default" option and noted that his legislation, the Automatic IRA Act of 2015 (S. 245), would help expand automatic enrollment in IRAs for employees who currently do not have access to an employer-sponsored retirement plan and asked whether the witnesses believed the idea had merit. The witnesses responded positively and Munnell noted the various state initiatives that have recently been introduced that aim to achieve similar results.

## Congress Announces New Retirement Security Caucuses

On March 2, the U.S. House of Representatives and the U.S. Senate announced the creation of new bipartisan Retirement Security Caucuses in each house of Congress. A congressional caucus is a group of Congressional members that join together to pursue common legislative objectives.

The House Retirement Security Caucus is being co-chaired by Representatives Mike Kelly (R-PA) and Richard Neal (D-MA) and the Senate caucus is being co-chaired by Senators Rob Portman (R-OH) and Ben Cardin (D-MD).

A press release from Kelly stated that the "primary mission of the House Retirement Security Caucus is to educate policy makers and the public about how national retirement policies can encourage Americans to save more money and plan more responsibly for their retirement," as financial security in retirement persists as a top concern among American workers.
Portman and Cardin, co-chairs of the Senate Retirement Security Caucus, have a long history of leadership in retirement legislation. As House members in 2001, they were the authors of legislation to expand and improve retirement plans (ultimately included in the Economic Growth and Tax Relief Reconciliation Act (EGTRRA)) as well as numerous other retirement-related measures. The legislation in EGTRRA raised plan savings limits, allowed so-called "catch-up contributions" for workers age 50 and over, added the "Saver's Credit," facilitated plan-to-plan portability and made many other changes to ERISA and the Internal Revenue Code to support employer-sponsored retirement plans.

Likewise, Neal has a history of leadership on retirement policy. He is a supporter of the Automatic Individual Retirement Account proposal, has sought to expand access to retirement plans through easing participation rules, enhancing automatic enrollment and automatic escalation, and has proposed many other changes to the Internal Revenue Code and ERISA that would improve and simplify plan administration. Kelly is in his third term in Congress and has shown interest and leadership in retirement plan policy matters.

# RECENT REGULATORY ACTIVITY

## Final HHS 2016 Benefit and Payment Parameters Notice Addresses Maximum Out-of-Pocket, Minimum Value Requirements

The U.S. Department of Health and Human Services (HHS) Centers for Medicare & Medicaid Services (CMS) published its final 2016 Notice of Benefit and Payment Parameters on February 27. Although the bulk of these requirements apply to the individual insurance market and health exchange operations, the regulations also include certain clarifications that apply to employer-sponsored group health plans. These include the application of the Patient Protection and Affordable Care Act's (PPACA) cost-sharing limits to individuals with coverage other than self-only and a requirement that a plan cover in-patient hospitalization in order to satisfy the 60 percent minimum value (MV) standard.

The 2016 annual limitation on cost-sharing under PPACA for self-only coverage is $6,850. For non-self-only coverage, the out-of-pocket limit will be $13,700. The preamble to the new notice states that HHS is finalizing the language in its prior proposal, which states that "the annual limitation on cost sharing for self-only coverage applies to all individuals regardless of whether the individual is covered by a self-only plan or is covered by a plan that is other than self-only."

HHS notes that "[w]e believe that this clarification is an important consumer protection, as we are aware that some consumers have been confused by the applicability of the annual limitation on cost sharing in other than self-only plans." The preamble further states that "[w]hile cost sharing incurred towards the deductible must count towards the annual limitation on cost sharing for EHB, the deductible limit is not regulated in the same manner as the annual limitation on cost sharing. Therefore, family high-deductible health plans that count the family's cost sharing to the deductible limit can continue to be offered under this policy." This clarification effectively requires that "embedded" annual limitations on cost-sharing (maximum out-of-pocket limits) apply to all plans.

The February 27 notice also finalized regulations clarifying that, to provide MV, employer-sponsored plans must satisfy the existing quantitative 60 percent MV standard and must also provide "substantial coverage of inpatient hospital services and physician services." HHS had proposed regulations to formalize guidance provided in IRS Notice 2014-69 (released on November 4) addressing the HHS MV calculator. The calculator is intended to be used to determine whether an employer-sponsored plan provides 60 percent MV. According to HHS and Treasury, the online MV calculator was improperly qualifying certain group health plan benefit designs that do not provide coverage for in-patient hospitalization services.

According to the February 27 notice, HHS intends to provide further clarity on the requirement to provide "substantial coverage."

## Agencies Issue Final Regulations for Limited Wraparound Coverage as "Excepted Benefits"

On March 16, the U.S. departments of Treasury, Labor and Health and Human Services issued final regulations to amend regulations regarding "excepted benefits" coverage under ERISA, the Internal Revenue Code and the Public Health Service Act with respect to "limited wraparound coverage."

Wraparound coverage supplements core coverage and might provide such things as extra benefits or broader networks. Excepted benefits are those benefits that are excluded from the portability provisions established under HIPAA as well as certain health plan requirements of the Patient Protection and Affordable Care Act (PPACA). Excepted benefits generally do not constitute "minimum essential coverage" under PPACA, and thus would not disqualify an individual for premium tax credits for the purchase of individual insurance through a health exchange.

Under a pilot program established by the final regulations, limited wraparound coverage may be offered as "excepted benefits" if the coverage is offered no earlier than January 1, 2016, and no later than December 31, 2018, and ends on the later of (1) the date that is three years after the date wraparound coverage is offered or (2) the date on which the last collective bargaining agreement relating to the plan terminates after the date wraparound coverage is offered.
As explained in the preamble to the final regulations, "The intent of limited wraparound coverage is to permit employers to provide certain employees, dependents, and retirees who are enrolled in some type of individual market coverage with overall coverage that is generally comparable to the coverage provided under the employers' group health plan, without eroding employer-sponsored coverage." On December 23, 2014, DOL (along with the departments of the Treasury and Health and Human Services) published proposed amendments to current regulations regarding excepted benefits coverage under ERISA, the Internal Revenue Code and the Public Health Service Act with respect to limited wraparound coverage. The proposed regulations set

out requirements under which limited benefits provided through a group health plan that wrap either eligible individual insurance or coverage under a Multi-State plan (limited wraparound coverage) constitute “excepted benefits.”

The new final regulations set out five requirements for such wraparound coverage, addressing the scope of coverage, cost limits, nondiscrimination rules, plan eligibility requirements and reporting requirements. The preamble to the final regulations describes the type of benefits that could be offered as meaningful benefits in limited wraparound coverage (including, for example, reimbursement for the full cost of primary care, or the cost of prescription drugs no on the formulary of the primary plan) and reiterate that limited wraparound coverage that is an excepted benefit cannot be an account-based mechanism.

In the preamble to the final regulations, the departments stated that issues relating to Section 4980I will be addressed as part of the Treasury and IRS rulemaking implementing the excise tax.

## RECENT JUDICIAL ACTIVITY

### Supreme Court Hears Oral Arguments in King v. Burwell

On March 4, the U.S. Supreme Court heard oral arguments in *King v. Burwell*, the controversial case that challenges the legality of federal subsidies for individuals obtaining health coverage in federally facilitated insurance exchanges.

The Court will be deciding whether the Patient Protection and Affordable Care Act (PPACA) allows individuals to receive federal subsidies to buy health coverage in states that have not established their own exchanges. To date, 13 states and the District of Columbia operate exchanges. In the remaining states, the federal government runs the exchanges, some of them in partnership with the states.

A ruling for the plaintiff-petitioners who are challenging the legality of the subsides would have far-reaching implications for individuals who are currently receiving subsidies for plans purchased in federal exchanges; disruption of insurance markets and risk pools; and application of the Code Section 4980H employer penalties (triggered by receipt of subsidies by eligible full-time employees). Such a decision would also create pressure on the Obama Administration, Congress and states to address the decision in the form of regulatory or legislative “fixes,” particularly for individuals who rely on subsidies to purchase health coverage. The court’s decision is expected by June 2015.

It is anticipated that the high court’s most conservative justices (Alito, Thomas and Scalia) would be more likely to endorse the petitioners’ strict literal reading of the statute, while the more liberal justices (Ginsburg, Breyer, Sotomayor and Kagan) would more likely endorse the administration’s contextual, interpretive reading, That would leave Chief Justice John Roberts, Justice Anthony Kennedy as “swing votes.” Today’s oral arguments appeared to confirm that likelihood.

During discussion, the liberal justices pressed the point that the statute must be read a whole and “in context” implying that the federal government should prevail. Justice Kennedy was pointed in his questioning of the plantiff-petitioners. As noted by SCOTUSblog, “Justice Kennedy expressed deep concern with a system where the statute would potentially destroy the insurance system in states that chose not to establish their own exchanges – likening this to an unconstitutional form of federal coercion.” Kennedy would also point out later that state insurance systems would likely

fail if the subsidy/mandate system created by PPACA does not operate in that particular state. Chief Justice Roberts asked very few questions.

In the event that the Supreme Court should rule that subsidies are not permitted for policies purchased on federally facilitated exchanges, the House Republican Working Group (including House committee chairmen John Kline (R-MN), Paul Ryan (R-WI) and Fred Upton (R-MI)) has offered an "off-ramp" plan that would, among other things, provide individuals an advanceable, refundable tax credit with which people can buy insurance approved by a state insurance commissioner.

Republican leaders in the U.S. Senate and House of Representatives recently released The Patient Choice, Affordability, Responsibility, and Empowerment (Patient CARE) Act to replace PPACA. The Patient CARE Act was unveiled on February 5 by its chief authors, Senate Finance Committee Chairman Orrin Hatch (R-UT); Senator Richard Burr (R-NC), a member of both the Finance Committee and the Health, Education, Labor and Pensions (HELP) Committee; and House Energy and Commerce Committee Chairman Fred Upton (R-MI). The Patient CARE Act would eliminate the individual and employer mandates, provide medical liability reforms, revise the age rating rules and transition Medicaid to a "capped allotment" system. (A two-page summary and comparison chart are also available.)

HHS Secretary Burwell has stated that the administration has no contingency plans as it believes there are no administrative actions that it could take after such a ruling to address the "massive damage" that it would create.

### Sixth Circuit Court of Appeals Overturns Disgorgement of Profits Award Under ERISA in Rochow v. LINA

On March 5, a majority of the U.S. Sixth Circuit Court of Appeals, sitting *en banc* (all of the judges from the court), vacated a "disgorgement of profits" ERISA award and remanded the case back to the District Court for the Eastern District of Michigan to determine whether and how much prejudgment interest should be awarded. In this case, *Rochow v. Life Insurance Company of North America (LINA)*, a majority of a three-judge panel of the Sixth Circuit previously upheld the district court award but the earlier dissenting judge wrote the overriding March 5 decision for the entire court.

Both the District Court for the Eastern District of Michigan and the Sixth Circuit Court of Appeals have consistently held that LINA wrongfully denied the plaintiff disability benefits owed to him, awarding the plaintiff $900,000 in benefits plus attorneys' fees and costs. However, in a subsequent ruling, the same district court ruled that LINA also breached its fiduciary duty by denying benefits and thus additional "equitable" remedies were appropriate, awarding the plaintiff nearly $3.8 million in "disgorgement" of adjudged LINA "profits" under ERISA Section 502(a)(3), which allows a plan beneficiary "to obtain other appropriate equitable relief." Two of the three judges in the three-judge panel of the Sixth Circuit upheld the "disgorgement" award in a December 6, 2013, decision.

### Supreme Court Signals Interest in a Reverse Stock Drop Case

The U.S. Supreme Court has asked the U.S. Solicitor General – the U.S. Department of Justice official responsible for arguing cases before the high court – to submit a brief in a case addressing potential fiduciary liability for selling "company stock" held in a qualified retirement plan under

ERISA. Such a request is typically considered a prelude to possible consideration of a case by the U.S. Supreme Court. In this case, the “company stock” was stock in the company no longer affiliated with the plan sponsor due to a spinoff.

A three-judge panel of the U.S. Court of Appeals for the Fourth Circuit was the last court to rule on the case, *Tatum v. R.J. Reynolds*, finding in favor of the plaintiffs, a group of plan participants who claim that they were harmed when the plan sponsor eliminated the company stock investment option from the company’s 401(k) plans shortly after a spinoff. The stock price had been dropping but after the fund’s removal, the company’s stock rose significantly higher. This is commonly referred to as a “reverse stock drop” case.

The Fourth Circuit panel’s majority opinion accepted the arguments of the plaintiffs (and the U.S. Department of Labor, as outlined in its own *amicus* brief) that the district court applied an erroneous legal standard to determine whether the breach resulted in losses to the plan. The panel therefore remanded the case back to the district court level “to review the evidence to determine whether RJR has met its burden of proving … that a prudent fiduciary would have made the same decision.”

Responding to a petition from R.J. Reynolds, the solicitor general has been “invited to file a brief” with the U.S. Supreme Court in this case. The high court will review the brief as part of its consideration of whether it will take up the case. It is expected that the Solicitor General will likely take the same position as the U.S. Department of Labor.

This is the second time in the past year that the U.S. Supreme Court has expressed an interest in benefit plan fiduciary issues. In this way, the *Tatum* case is reminiscent of 2014’s *Fifth Third Bancorp v. Dudenhoeffer*, in which the court rejected the prior law presumption that buying or holding employer stock in an Employee Stock Ownership Plan (ESOP) is prudent. Most importantly in that case, however, the Court also provided new rules that could significantly reduce *successful* claims simply based on the price of an employer stock dropping (often referred to as “stock drop” cases) or that the fiduciary should have taken an action based on “inside information.”