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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

House, Senate Approve Separate 2016 Budget Resolutions

The U.S. Senate and House of Representatives have each approved Fiscal Year 2016 budget resolutions after lengthy debate. Both resolutions were authored by Republican leaders and were approved on mostly party-line votes.

Budget resolutions are non-binding and do not become law, although they do establish a framework for a legislative policy agenda by setting specific spending levels for various executive branch agencies. Like President Obama's proposal released earlier this year, both the Senate and House resolutions express general views on the health care law and tax reform.

While the budget process serves primarily as a messaging exercise, one important component is that the budget resolutions agreed to by both houses include "reconciliation" instructions, which pave the way for a privileged legislative vehicle that cannot be filibustered in the Senate. Such a reconciliation bill would only require 51 votes for passage in the Senate (which would allow Senate Republicans to pass a measure without any Democratic votes), is limited to 20 hours of debate and is limited in the types of amendments that may be offered.

(The most recent budget resolution, passed by both the House and the Senate in 2009, included a reconciliation instruction. Democrats in the majority used the reconciliation process to achieve final passage of the Patient Protection and Affordable Care Act (PPACA) in 2010.)

The House measure is specific with regard to reconciliation instructions for the repeal of some or all of PPACA, while the Senate simply provides general reconciliation instructions for the two committees of jurisdiction over health care (and retirement plans as well), the Senate Finance Committee and the Senate Health, Education, Labor and Pensions (HELP) Committee.

(During debate in the Senate, lawmakers rejected an amendment (Amendment No. 791) offered by Senator Ron Wyden (D-OR), the ranking Democrat on the Senate Finance Committee, which would have deleted the reconciliation instructions.)

The Senate and the House are expected to go to conference to resolve differences between the different resolutions and send a combined document for both chambers' approval. The President need not sign a concurrent budget resolution, but if the concurrent resolution includes a reconciliation instruction, that triggers a separate legislative process and that bill must be presented and signed by the President to become law.

Senate Concurrent Budget Resolution

On March 27, the Senate approved S.Con.Res 11 by a vote of 52 to 48 after voting on numerous amendments throughout the week. Two Republicans voted against the measure with all of the Democrats.

The Senate Budget Committee had previously unveiled and approved their Fiscal Year 2016 budget resolution on March 18 and 19.

S.Con.Res 11 assumes the repeal and replacement of PPACA in favor of "legislation that strengthens the doctor-patient relationship, expands choice, and lowers health care costs." The resolution calls for reform of the tax code to lower the after-tax costs of investment, savings, and work and reduce costs to businesses and individuals.

The Senate budget resolution also allows for reform of the tax code, and under the heading "Supports Stronger Economic Growth," the plan would establish an economic growth reserve fund for policies that:

- Lower the after-tax costs of investment, savings, and work.
- Reduce the costs to business and individuals from the tax code.
- Reduce the costs borne by U.S. economic activity stemming from federal regulations.
- Reduce the costs of frivolous lawsuits.

The measure also includes a notable amendment added during committee consideration, sponsored by Senators Mark Warner (D-VA) and Kelly Ayotte (R-NH), which would seek to eliminate or modify a number of congressionally mandated reports that have been deemed duplicative or outdated.

During the course of floor debate during the week of March 23, the Senate ***approved*** the following notable amendments with implications for employee benefit plans. Like the budget resolution itself, these amendments are equally non-binding and are designed to express the general policy views:

- Amendment No. 425, sponsored by Senator Susan Collins (R-ME), to "improve retirement security."

- Amendment No. 498, sponsored by Senate Finance Committee Chairman Orrin Hatch (R-UT) would "establish a deficit-neutral reserve fund relating to legislation submitted to Congress by President Obama to protect and strengthen Social Security."

- Amendment No. 409, sponsored by Sen. Deb Fischer (R-NE), would "promote equal pay, which may include preventing discrimination on the basis of sex and preventing retaliation against employees for seeking or discussing wage information."

- Amendment No. 692, sponsored by Sen. Tim Scott (R-SC), would provide for "transparency in health premium billing." A similar amendment, No. 1026, offered by Sen. Patty Murray (D-WA), was also approved by the Senate.

- Amendment No. 798, Sponsored by Sen. Patty Murray (R-WA), would provide for "legislation to allow Americans to earn paid sick time."

- Amendment No. 968, sponsored by Wyden, would promote "middle-class tax relief, including extending and expanding refundable tax credits."

These amendments are largely aspirational in nature and no details for achieving their goals have been provided. Additionally, even if these amendments are retained in the budget resolution passed by both houses, the policies they outline will not become law merely because they are included in the budget resolution. Instead, they would necessitate enactment of specific legislation to achieve the stated aims.

The Senate ***rejected*** the following notable amendments:

- Amendment No. 357, sponsored by Sen. Tom Cornyn (R-TX) would have enacted President Obama's fiscal year 2016 budget. (For a description of the president's budget, see the February 2 *Benefits Byte*.)

- Amendment No. 362, sponsored by Sen. Barbara Mikulski (D-MD), sought to amend the Equal Pay Act of 1963 "to allow for punitive damages, limit the any factor 'other than sex' exception, and prohibit retaliation against employees who share salary information."

- Amendment No. 471, sponsored by Wyden, would have created "a point of order against legislation that would cut benefits, raise the retirement age, or privatize social security."

- Amendment No. 842, sponsored by Sen. Jeff Merkley (D-OR), was intended to improve "consumer financial protection."

- Amendment No. 919, sponsored by Sen. Jack Reed (D-RI), sought to "eliminate deductions for corporate compensation" in excess of $1 million.

- Amendment No. 1094, sponsored by Sen. Elizabeth Warren (D-MA), related to "expanding Social Security."

- Amendment No. 323, sponsored by the Senate Budget Committee's ranking Democrat Bernie Sanders (D-VT), which sought "to create millions of middle class jobs by investing in our nation's infrastructure paid for by raising revenue through closing loopholes in the corporate and international tax system." The Democratic staff of the Senate Finance Committee recently issued a report characterizing certain executive compensation practices as "loopholes," and 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."

A great many more amendments were introduced but did not receive floor consideration during debate, addressing such matters as the U.S. Department of Labor's fiduciary definition project (No. 610), employee wellness programs (Nos. 502 and 961), automatic payroll deduction IRAs (No. 634), multiemployer pension plans (No. 980), PPACA taxes (No. 826) and insurer fees (No. 355) and the 40-hour work week under PPACA (No. 442).

House Concurrent Budget Resolution

Meanwhile, the House of Representatives passed its budget resolution, H.Con.Res 27, by a mostly party-line vote of 228 to 199 on March 25. House Republicans first released their budget resolution, A Balanced Budget for A Stronger America, on March 17 and the House Budget Committee approved the legislative text of the resolution March 19, on a party-line vote of 22-13.

The Republicans described their budget proposal in a summary document, A Balanced Budget for A Stronger America. Unlike the Senate measure, the House resolution includes "policy statements" on a variety of topics.

Under the section "Strengthening Health and Retirement Security," the authors observe that a "breakdown can be seen in every corner of our health care system – from individuals struggling to purchase health insurance on their own, to employers finding it increasingly difficult to provide insurance for their workers."

The primary tenet of the Republicans' health care agenda is full repeal of the Patient Protection and Affordable Care Act (PPACA). "Instead of a complex structure of subsidies, mandates, and penalties, our budget proposes we increase access to quality, affordable health care by expanding choices and flexibility for individuals, families, businesses and states while promoting innovation and responsiveness," the plan said.

The "Strengthening Health and Retirement Security" section "calls for a bipartisan path forward in addressing the long-term structural problems within Social Security," but does not discuss employer-sponsored retirement savings – although the tax incentives for employer-sponsored retirement plans may still be at issue under the Republicans' tax reform agenda.

The House GOP budget resolution section "Securing Economic Opportunity" includes a subsection on tax reform, which calls for "comprehensive tax reform that would include lower rates for individuals and families as well as large corporations and small businesses" while "broadening the tax base by closing special interest loopholes that distort economic activity."

A concern about "loopholes" and lost tax expenditures 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 current method used for calculating "tax expenditures," the health and retirement benefit tax incentives represent the two largest sources of foregone federal tax revenue.

The primary difference between the version of the bill reported out of the House Budget Committee and the version approved by the full House is the addition of $96 billion set aside for defense spending.

During debate of the measure, the House rejected a series of substitute budget proposals offered by the Democratic Caucus, the Congressional Black Caucus, the Congressional Progressive Caucus and the conservative Republican Study Committee.

House Approves 'Doc Fix,' Partially Offset; Senate Expected to Follow Suit After Recess

The House of Representatives approved legislation on March 26 to permanently address the "sustainable growth rate" (or "SGR"), the payment formula used to determine Medicare reimbursements to physicians. The Medicare Access and CHIP Reauthorization Act (H.R. 2) passed by an overwhelming 392 to 37 bipartisan vote.

Before adjourning the Senate for two weeks, Senate Majority Leader Mitch McConnell (R-KY) told *Congressional Quarterly* that the Senate is likely to pass the measure quickly when it returns after April 13. President Obama has indicated that he will sign the measure into law. Such legislation, commonly referred to as the "doc fix," is necessary to stave off a 21 percent cut to Medicare provider payments when the 2014 one-year patch – the last in a series of temporary patches dating back more than a decade – expires after March 31. Without the fix, any federal spending in excess of the SGR would result in automatic reductions in Medicare's reimbursement rates for providers, although McConnell has said that "the Centers for Medicare and Medicaid Services will be able to handle the delay for up to two weeks."

Passage of a permanent fix would be a significant achievement, not only because it represents a rare moment of bipartisan agreement in both chambers, but also because it would remove from the legislative calendar one of the annual scrambles for federal revenue raisers – which has, at times, been a vehicle for employee benefits legislation.

The Congressional Budget Office (CBO) estimates that the measure will cost $175.4 billion over ten years, only partially offset by Medicare beneficiary reforms and other spending adjustments. Unlike most legislation approved by Congress in recent years, H.R. 2 was exempted from the prevailing "pay-as-you-go" rules. There had been concerns that the cost of a permanent fix would compel Congress to seek unrelated revenue-raising provisions, perhaps affecting employer-sponsored plans.

House Ways and Means Subcommittee Hears Testimony on Evidence-Based Policymaking

On March 17, the U.S. House of Representatives Ways and Means Subcommittee on Human Resources held a hearing to discuss how to use empirical data to evaluate government program effectiveness. The hearing, Expanding Opportunity by Funding What Works: Using Evidence to Help Low-Income Individuals and Families Get Ahead, is the second in a series on "Moving America's Families Forward;" the first hearing occurred in early February. While this hearing did not focus on benefit plans specifically, there was brief discussion about the "skewed" nature of current tax expenditures and whether they disproportionately benefit higher income workers.

In convening the hearing, Chairman Charles Boustany (R-LA) stated that "while we all want to know about whether [federal social] programs are working or not, what we actually know is quite limited," noting that there is little data available to evaluate the effectiveness of many government programs. He emphasized the need to ensure that resources are being invested in effective programs.

The subcommittee heard testimony from the following witnesses:

- Joan Entmacher, vice president for Family Economic Security at the National Women's Law Center, testified on the importance of safety net work and social programs, but stressed that budget cuts, sequestration and other program extensions make it difficult to properly evaluate programs' effectiveness, but cited examples of certain programs that have proved effective and should be expanded, such as the Earned Income Tax Credit.

  She suggested finding additional resources to invest in such programs by looking at the largest federal tax expenditures, stating that "the benefits of tax expenditures are distributed unevenly across the income scale." Tax expenditures constitute foregone revenue the government estimates it does not collect. The tax incentives for retirement savings – which provide a strong and effective incentive for individuals across all income levels to save for a secure retirement – have recently been cited by reports from the White House's Office of Management and Budget (OMB) and the Joint Committee on Taxation (JCT) as the second largest projected federal "tax expenditure" over the next five years, with the exclusion of employer contributions for employee health care as the largest.

- John Bridgeland, senior advisor to Results for America (a non-profit organization seeking to use evidence and data to create policy to improve quality and results), noted the lack of program evaluations and gave recommendations to build evidence for what works, use evidence to invest in what works, and redirect funding away from what does not. He also commended the Social Impact Partnership Act (H.R. 1336) introduced by representatives Todd Young (R-IN) and John Delaney (D-MD) to encourage and support partnerships between the public and private sectors "to improve our nation's social programs," as well as the proposed Evidence-Based Policy Commission Act, introduced by Rep. Paul Ryan (R-WI) and Senator Patty Murray (D-WA) in the last Congress.

- David Muhlhausen, research fellow at the Heritage Foundation, testified that "the effectiveness of federal programs is often unknown," and demonstrated how many programs operate without evaluations for decades. He reviewed recent program evaluations and concluded that with the exception of some "welfare-to-work" programs, many federal social programs are found to be consistently ineffective.

- Grover Whitehurst, director of the Brown Center on Education Policy at The Brookings Institution, also testified on the need for evidence and research in guiding policy. He suggested that Congress focus on creating incentives for incorporating findings from the best research into programs, allowing for more flexibility between states, rather than direct how states and local government should use findings from research.

Senate Committee Examines International Taxation

The Senate Finance Committee continued its series of hearings on tax reform with a March 17 session on Building a Competitive U.S. International Tax System.

In his opening statement, Committee Chairman Orrin Hatch (R-UT) said that reforming the international tax system is "a critical step" in comprehensive tax reform. He added that the U.S. needs to lower its corporate tax rate and "should also shift significantly in the direction of a territorial tax system."

The committee's ranking Democrat, Senator Ron Wyden (D-OR), said in his opening statement that "The dealmakers will always get around piecemeal policy changes. Nothing short of comprehensive tax reform will end the cycle." He joined Hatch in calling for a reduction in the U.S. corporate tax rate.

Witnesses at the hearing discussed international taxation trends in other countries, the advantages of a "territorial" system versus a "worldwide" system and the institution of a minimum tax on foreign income.

During the question-and-answer period, lawmakers also debated the merits of comprehensive tax reform as opposed to piecemeal reform, with Wyden urging a comprehensive approach and Senator Tom Carper (D-DE) suggesting that Congress should do what they can now, in case comprehensive reform becomes bogged down.

This latest hearing is the fifth in the Senate Finance Committee's series of hearings on tax reform. The committee's previous hearings have discussed:

- The process leading to the Tax Reform Act of 1986.
- Ways to promote growth in wages, jobs and the economy.
- Fairness in the tax code.
- Simplification in tax reform.

House Committee Discusses Upcoming Fiduciary Rule, DOL Budget Request

In a March 18 hearing, the U.S. House of Representatives Education and the Workforce Committee examined the Fiscal Year 2016 federal budget proposal for the U.S. Department of Labor (DOL). During the hearing, the committee heard testimony from DOL Secretary Thomas E. Perez and discussed the forthcoming proposed rule expanding the definition of the term "fiduciary."

The DOL recently 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." 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.

In his opening statement, Chairman John Kline (R-MN) said that even with the gains made in the economy since the recession, Americans still face high health care costs and stagnant wages, causing them to struggle to send kids to college and save for retirement. He expressed concern about the DOL "putting more rules on more Americans" including on the men and women who need help saving for retirement, in reference to the fiduciary definition proposal.

Ranking Democratic member Bobby Scott (D-VA) also referenced the fiduciary rule in his opening statement, noting that they need to protect retirees and ensure the regulations to do so are in place.

Perez's testimony covered a range of issues that fall under DOL jurisdiction, including "ensuring that workers receive the retirement, health and other workplace benefits that allow them to rely on their health care benefits and retire with dignity." With regard to the fiduciary proposal, he emphasized that, like doctors and lawyers, financial advisors should be providing advice that is in their clients' best interests. He said that while most financial advisors adhere to this, others "receive back-door payments for steering their clients to bad investments with high fees and low returns" that eat away at retirement savings.

During the question-and-answer session, many members of the committee asked Perez for more details about the fiduciary rule. Representative David Roe (R-TN) questioned whether Perez believed that financial advisors don't act within their clients' best interests and Perez responded that financial planners can and should do what lawyers and doctors do, which is to look out for clients' best interests, and agreed that many are already doing this, but that many have told him that the playing field isn't level for them. Roe also suggested that the Securities and Exchange Commission (SEC) ought to be writing this rule, to which Perez responded that the DOL is working very closely with the SEC. SEC Chair Mary Jo White recently announced that the agency is developing its own rules for financial advisors.

Rep. Luke Messer (R-IN) said that with the burden of retirement planning shifting increasingly onto employees, they will need more advice, not less, and noted concern that expanding the fiduciary definition could have the unintended consequence of making less advice available. Perez emphasized that they want more to have access to *good* advice, and right now there's a lack of certainty on whether clients are receiving good advice.

Rep. Frederica Wilson (D-FL) also voiced concerns that the fiduciary rule should not impact the availability of affordable financial advice, noting that Americans have a better chance at retirement security when good advice is available.

Rep. Brett Guthrie (R-KY) brought up the application of the proposed rule to valuations of non-publicly traded employer securities within employee stock ownership plans (ESOPs). Perez noted the benefits of ESOPs and stated that after the concerns expressed about ESOPs in the previous year's budget hearing, they would not be included in the upcoming fiduciary rule.

Other issues discussed included:

- ***Wellness programs:*** Rep. Tim Walberg voiced his concerns over the recent litigation brought by the Equal Employment Opportunity Commission (EEOC) against employer wellness programs despite the support for wellness programs in the Patient Protection and Affordable Care Act (PPACA). The DOL does not have direct oversight of EEOC, though they share jurisdiction over certain policy matters.

- ***Age discrimination:*** Rep. Suzanne Bonamici (D-OR) asked what the DOL is doing to ensure there isn't age discrimination against older workers. Perez said that this year the White House will be holding a summit on older Americans and a wide range of issues affecting them, including retirement security.

- ***Stop-loss insurance:*** Messer asked about stop-loss insurance and voiced concerns that the administration has been signaling attempts to regulate it. Stop-loss insurance is an insurance contract or provision in a contract between a self-funded benefit plan and an insurance carrier that provides financial protection and insures the employer against losses if claims to the plan exceed a specified dollar amount over a set period of time.

- ***Multiemployer pensions:*** In his opening statement, Kline thanked Perez for his support of the current multiemployer defined benefit plan provisions enacted as part of the Consolidated and Further Continuing Appropriations Act, but said there was still a lot of work to be done on the issue.

Other topics of discussion included raising the minimum wage, the effects of sequestration and overtime pay reforms.

RECENT REGULATORY ACTIVITY

DOL Issues New Regulations for Timing of Defined Contribution Plan Annual Disclosure

The U.S. Department of Labor (DOL) Employee Benefit Security Administration (EBSA) issued new regulations on March 18 setting forth the timing requirements for annual disclosures under participant-directed individual account plans. The new rule effectively gives plan sponsors and administrators additional flexibility by replacing the prior 12-month window for annual disclosure with a 14-month window.

The regulations take the form of a **proposed rule** and an identical **direct final rule**. The final rule, which contains the actual text of the regulation, will automatically take effect if no "significant adverse comment" is received with regard to the proposed regulations. The deadline for comments on the proposed rule is Monday, April 20.

Under October 2010 final regulations governing fee disclosure for participant-directed individual account plans (including defined contribution arrangements like 401(k) plans), plan administrators must annually disclose detailed investment-related information to plan participants and beneficiaries about the plans' designated investment alternatives in the form of a comparative chart. Those regulations required that the disclosure must be provided at least once in any 12-month period for both calendar- or fiscal-year plans.

After certain groups asserted that the 12-month period was both confusing and problematic, partially because the original disclosure was due August 30, 2012, EBSA provided temporary enforcement relief from defined contribution plan fee disclosure requirements by allowing plan sponsors a one-time "reset" of the timing of this annual disclosure to align the comparative chart with other participant disclosures. EBSA also asked if it should consider allowing a 30-day or 45-day window in connection with the due date for disclosing subsequent annual comparative charts.

In extending this disclosure period, EBSA acknowledged that "the overall objective of the "participant-level fee disclosure" regulation is to make sure participants and beneficiaries in participant-directed individual account plans are furnished the information they need, on a regular and periodic basis, to make informed decisions about the management of their individual accounts and the investment of their retirement savings. While deadlines are needed to avoid irregular and non-periodic disclosures, flexible deadlines alone do not undermine the overall objective of the regulation."

Although the direct final rule is not effective until June 17 (90 days after publication in the Federal Register), the Department is adopting an enforcement policy, effective immediately, under which plan administrators may rely on the new definition in paragraph (h)(1) prior to the effective date of the amendment.

The 14-month window applies only to the *annual* disclosure requirements and does not address the *quarterly* disclosure notice on benefit statements required elsewhere in the fee disclosure rules (for which a 45-day window is already provided). EBSA is soliciting comments on whether a similar adjustment is needed for the quarterly statements.

IRS Issues New Guidance on FATCA

The Internal Revenue Service (IRS) has updated its instructions for Form 8938, the official form used by individual U.S. taxpayers to report ownership of foreign deferred compensation over certain threshold amounts under the Foreign Account Tax Compliance Act (FATCA). These revised instructions clarify the reporting rules and provide relief for failure to report certain foreign retirement plans and accounts for 2014 and earlier years.

FATCA was enacted in 2010 as part of comprehensive efforts by the U.S. government to crack down on concealed financial accounts owned by individual U.S. taxpayers outside the United States. Under FATCA, Foreign Financial Institutions (FFIs) are subject to U.S. reporting requirements and are subject to the imposition of a 30 percent tax withholding on most types of investment income for failure to comply. In January 2013, the IRS published final regulations relating to information reporting by FFIs and withholding on certain payments to FFIs and other foreign entities under FATCA. The principal issue for non-U.S. retirement plans has been that the definition of FFI includes "any non-U.S. entity that holds financial assets for the account of others as a substantial portion of its business" – a definition the United States interprets to include retirement plans.

IRS Extends Nondiscrimination Relief for Frozen Defined Benefit Plans through 2016

In **Notice 2015-28**, released on March 19, the Internal Revenue Service (IRS) extended through 2016 relief from the imposition of certain nondiscrimination rules on defined benefit pension plans that have been closed to new hires.

The new notice effectively adds one additional year to the relief provided under IRS Notice 2014-5, issued in December 2013. Under the extended guidance, plans may be tested together (or "aggregated") on a benefits basis for plan years beginning before January 1, 2017, if (1) the plans qualify for testing in 2013, based on meeting the "primarily defined benefit in character" rule or "broadly available" in the plan year beginning in 2013, or (2) the defined benefit (DB) plan passes nondiscrimination on its own in 2013. This allows plans that did not already have a problem to aggregate the defined benefit and defined contribution plans for testing purposes in their 2014 and 2015 (and now 2016) plan years, even if they would not have met the test in those plan years. To qualify for the temporary relief, the "soft freeze" amendment had to be in place by December 13, 2013.

In the previous session of Congress, Senators Benjamin Cardin (D-MD) and Rob Portman (R-OH) of the U.S. Senate Finance Committee, and Representatives Pat Tiberi (R-OH) and Richard Neal (D-MA) of the U.S. House of Representatives Ways and Means Subcommittee on Select Revenue Measures, introduced legislation (the Retirement Security Preservation Act (S. 2855)/H.R. 5381) that would have affirmed that a defined benefit plan does not fail the nondiscrimination rules, or the minimum participation requirement, provided the composition of the closed class of participants in the plan meets certain requirements. Similar legislation has not yet been introduced in the current Congress.

Treasury/IRS Issues Guidance on Expatriate Plans under PPACA

The U.S. Treasury Department and Internal Revenue Service (IRS) have released **new guidance** addressing the application of the health insurance provider fee to expatriate plans. Section 9010 of the Patient Protection and Affordable Care Act (PPACA) imposes a fee, to be paid by September 30 of each year, on "covered entities engaged in the business of providing health insurance." The statute's definition of "covered" entities *excludes* self-insured employer plans, though the cost of the fee could be passed through to enrollees and plan sponsors of insured plans (including large group plans) in the form of increased premiums.

Expatriate health plans were included within the group of covered entities until Congress passed legislation at the end of 2014 (as part of the Consolidated and Further Continuing Appropriations Act) exempting expatriate plans from the health insurance fee. Generally, the legislation provided that, for calendar years after 2015, a qualified expatriate (and any spouse, dependent, or any other individual enrolled in the plan) enrolled in an expatriate health plan is not considered a United States health risk. These rules are generally effective for expatriate health plans issued or renewed on or after July 1, 2015.

According to IRS Notice 2015-29, issued on March 30, "Treasury and the IRS have determined that the MLR final rule definition of expatriate policies ... is broad enough to cover all potential expatriate health plans" described in the 2014 legislation. "Therefore, because guidance is urgently needed to implement this special rule, this notice uses the MLR final rule definition to define expatriate health plan solely for this limited purpose." This notice is effective March 30, 2015 and applies only to fee years 2014 and 2015.

ERISA Advisory Council Announces 2015 Discussion Topics

On March 20, the ERISA Advisory Council (EAC), a group of benefits experts established by Congress and appointed by the U.S. Department of Labor (DOL) to identify emerging benefits issues and advise the Secretary of Labor on health and retirement policy, has released its working group topics for 2015: pension fund de-risking and lifetime plan participation (relating to plan distributions and rollovers).

The chair and vice chair, respectively, of the EAC for the 2015 term will be Paul M. Secunda, professor of law and director, Labor and Employment Law Program at Marquette University Law School, and Mark E. Schmidtke, shareholder of Ogletree, Deakins, Nash, Smoak & Stewart.

During the first portion of the meeting, Assistant Secretary Phyllis Borzi of the DOL's Employee Benefits Security Administration (EBSA) spoke to the group about some of the DOL's current initiatives, including the upcoming fiduciary rule currently under review at the Office of Management and Budget (OMB).

The EAC also decided on the aforementioned two topics at the meeting, rather than their customary three, although they agreed to focus on privacy and security issues during the morning session of the third day of their subsequent meetings. They agreed not to appoint a subgroup for the third subject (so there will not be a separate report) but anticipate laying the groundwork for a future EAC to address the privacy/security issue. The EAC has previously addressed both of these selected topics, with pension fund de-risking in 2013 and lifetime plan participation in 2014, and stated that it plans to focus on notices and disclosure, providing administrative assistance to the DOL. Final reports from prior years are available on the EAC website.

The EAC announced that its next meeting will take place May 27-29.

DOL Updates Timeframe for Finalization of SBC Rules, Forms

In **a Frequently Asked Questions document** released on March 30, the U.S. Department of Labor (DOL) Employee Benefits Security Administration (EBSA) updated the public on its anticipated timeframe for finalization of proposed regulations on the summary of benefits and coverage (SBC) and the uniform glossary, required under the Patient Protection and Affordable Care Act (PPACA).

The SBC is a brief document, to be provided by group health plans and health insurance coverage in the group and individual markets, intended to provide standard and easy-to-understand information about health plan benefits and coverage options to help consumers compare and select health insurance. Proposed regulations on the SBC requirements were issued by the DOL (with the U.S. departments of Treasury and Health and Human Services) on December 22, 2014.

According to the proposed regulations, updates to the SBC rules, template and associated documents were proposed to apply beginning September 1, 2015. In response to questions from the public about the timing for finalization of the rules and associated forms, the new guidance states that "The Departments anticipate the new template and associated documents will be finalized by January 2016 and will apply to coverage that would renew or begin on the first day of the first plan year (or, in the individual market, policy year) that begins on or after January 1, 2017 (including open season periods that occur in the Fall of 2016 for coverage beginning on or after January 1, 2017)."

IRS Updates EPCRS Correction Program

On March 27, the Internal Revenue Service (IRS) issued Revenue Procedure 2015-27, modifying the Employee Plans Compliance Resolution System (EPCRS) – a voluntary correction program through which retirement plan sponsors can fix inadvertent errors without any loss of qualified plan status.

Rev. Proc. 2015-27 updates and clarifies certain changes made to the EPCRS issued through Revenue Procedure 2013-12 in December 2012. Notable changes to the program include clarification to the correction rules on overpayment failures and reduced Voluntary Correction Program fees for failing to meet the requirements for participant loans.

Rev. Proc. 2015-27 is generally effective July 1. Comments must be submitted by July 20.

RECENT JUDICIAL ACTIVITY

Third Circuit Affirms Lower Court Decision in Favor of Plan Participants, Disregarding 'Legal Deference' Principle

In a blow to benefit plan sponsors, the U.S. Court of Appeals for the Third Circuit has ruled for a class of plaintiffs in the case of *Cottillion v. United Refining Company*. The court's three-judge panel sidestepped the issue of whether the plan sponsor was entitled to "legal deference" as established under prior case law.

The U.S. Supreme Court previously asserted that such deference was warranted in an April 2010 ruling in the case of *Conkright v. Frommert*. In that decision, the Supreme Court held that the district court had an obligation to defer to an ERISA plan administrator's reasonable interpretation of the terms of the plan if the plan administrator arrived at the interpretation outside the context of an administrative claim for benefits. The Third Circuit, in *Cottillion,* also indicated that an exhaustion of administrative remedies argument (the named plaintiffs failed to file claims with the plan before filing the lawsuit) was left to the discretion of the district court which had not abused its discretion.

Cottillion v. United Refining Company, on appeal from the U.S. District Court for the Western District of Pennsylvania, involves the attempted recovery of pension plan distributions that had been erroneously paid through a misinterpretation of plan documents that was subsequently corrected. When the plan attempted to recover the overpayments to maintain qualified status after a Voluntary Correction Program (VCP) filing with the IRS, the plaintiffs sued, alleging that the defendant violated ERISA's anti-cutback provisions by attempting to retroactively reduce the amount of accrued early retirement benefits. The district court found in favor of the plaintiffs, including remedy awards.

Ultimately, the Third Circuit declined to weigh in on the matter of legal deference, concluding that "no amount of deference" could overcome the facts of the case and that the reinterpretation of the plan document was actually a plan amendment that violated the anti-cutback rules. United Refining is considering whether to file a petition either for a rehearing or a rehearing *en banc* (of the entire court).