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WEB's ***Benefits Insider*** is a member exclusive publication providing the latest developments from the Nation's Capital on matters of interest to benefits professionals. The content of this newsletter is being provided as a result of a partnership with the American Benefits Council, a premier benefits advocacy organization, which provides much of its core content.

Articles in this Edition

RECENT JUDICIAL ACTIVITY

Court Accepts Council's Amicus Brief in IBM Cash Balance Case

On November 10, the Seventh Circuit Court of Appeals accepted an *amicus* (friend of the court) brief filed by the American Benefits Council (along with the ERISA Industry Committee and a number of companies) in the class-action case of *Cooper et al v. IBM*. The case directly concerns the applicability of the age discrimination provisions of ERISA to hybrid pension plans. In July 2003, the U.S. District Court for the Southern District of Illinois ruled in favor of the plaintiffs, contrary to the legislative history of ERISA and several other federal court cases.

The *amicus* brief opposes the district court's decision, arguing that:

- Cash balance plans are not inherently age discriminatory;
- The decision is contrary to overwhelming legal authority including statutory language and legislative history;
- Upholding the district court's decision would cast doubt on many existing common plan designs that were in place when the age discrimination rules were developed; and
- Adoption of the district court's theory could lead to staggering financial consequences for plan sponsors and may force benefit freezes, terminations or even bankruptcy.

The court's acceptance of this brief is a particularly important development, because the court rejected two other *amicus* briefs that had been submitted.

RECENT REGULATORY ACTIVITY

IRS Issues Guidance on KETRA Loans and Distributions

On November 30, the U.S. Treasury Department (Treasury) and Internal Revenue Service (IRS) issued Notice 2005-92, which provides guidance on the special distribution and loan provisions applicable to the victims of Hurricane Katrina under the Katrina Emergency Tax Relief Act of 2005 (KETRA). KETRA allows individuals whose principal place of abode was in one of the four states affected by Hurricane Katrina (Louisiana, Mississippi, Alabama and Florida) on August 28, 2005 – and who suffered economic loss because of the hurricane – to receive special benefit plan distribution and loan privileges.

For distributions of up to $100,000 from qualified plans and IRAs that meet the requirements of KETRA and the guidance, the 10 percent premature distribution tax normally applicable to distributions prior to age 59-1/2 does not apply. In addition, KETRA allows the distribution to be included in income ratably over 3 years, and provides that the distribution will be treated as though it were paid in a direct rollover to an eligible retirement plan if the distribution is eligible for tax-free rollover treatment and is re-contributed to an eligible retirement plan within 3 years of the date of the distribution.

KETRA also increases the allowable loan amount from a plan from $50,000 to $100,000 and 50 percent to 100 percent of the employee's vested accrued benefit (the lesser of the dollar or percentage limitation). In addition, KETRA allows plans to delay payments due from Hurricane Katrina victims during the period beginning on August 25, 2005, and ending on December 31, 2006. A footnote in the guidance indicates the Department of Labor has advised IRS and Treasury that it will not treat plan sponsors or fiduciaries as violating the "adequate security" and "reasonably equivalent" requirements of Title I of the Employee Retirement Income Security Act (ERISA) because a loan was made under the provisions of KETRA and the Notice. The guidance makes clear that employers are permitted but not required to delay loan repayments under KETRA. The term of the loan may be extended by the duration of the suspension period, which may exceed one year.

The guidance clearly states that plan sponsors and administrators can rely on reasonable representations from the employee (or beneficiary) as to the location of the principal place of abode on August 28, 2005, and whether an economic loss was suffered, unless the plan sponsor or plan administrator has actual knowledge to the contrary. This reliance applies to KETRA distributions, re-contributions and loans.

The guidance clarified a number of other outstanding issues related to KETRA distributions including the following:

- KETRA distributions that are not eligible for tax-free rollover treatment (such as periodic payments over a period of at least 10 years, required minimum distributions and distributions to beneficiaries other than spousal beneficiaries) can still be treated as Katrina distributions for purposes other than the 3 year repayment period (can include income ratably over 3 years). KETRA distributions will not be treated as a change in substantially equal periodic payments which would trigger the premature distribution penalty for prior years.
- A reduction or offset of a participant's account balance in order to repay a plan loan can be treated as a KETRA distribution but a loan treated as a deemed distribution cannot.
- Corrective distributions such as excess contributions under Code Section 415, excess elective deferrals under Code Section 402(g), excess contributions under Code Section 401(k), and excess aggregate contributions under Code Section 401(m) cannot be treated as KETRA distributions.
- Although hardship distributions are generally not eligible for rollover, a hardship distribution that satisfies the KETRA distribution requirements will not be treated as made on account of hardship and will be eligible for re-contribution.
- Pension plans that are not permitted to make in-service distributions (such as money purchase pension plans) cannot make KETRA distributions.
- KETRA distributions are not subject to 20 percent mandatory withholding under the eligible rollover rules (and the plan is not required to offer a direct rollover of the distribution or provide a Code Section 402(f) notice) but are subject to voluntary withholding requirements.
- Employers can choose whether to treat distributions as KETRA distributions using any reasonable procedures as long as treatment is consistent.
- If KETRA distributions are made, the plan must be amended no later than the last day of the first plan year beginning on or after January 1, 2007 (2009 for governmental plans).

- Plans can use either distribution code 1 (early distribution, no known exception) or code 2 (early distribution, exception applies) in box 7 of Form 1099-R for reporting the distribution.
- Individuals receiving KETRA distributions will report the distributions and any re-contributions on IRS Form 8915, which is expected to be available soon.
- Individuals can elect out of the 3-year ratable income inclusion so that the distribution is entirely taxed in the year of distribution. If the individual elects to include all KETRA distributions in that year's taxable income and re-contributes any portion during the 3-year re-contribution period, the re-contributed amount will reduce the taxable income for the year of the distribution (an amended return will need to be filed if the individual has already filed a return).
- If the individual includes the income ratably over 3 years and re-contributes any portion of the KETRA distribution during the 3-year period, the re-contributed amount will first reduce the income for the taxable year for which the individual has not yet filed a timely return (timely means by the due date, including extensions). If the re-contributed amount exceeds the income for that year, the individual can choose whether to carry back or forward the remaining amounts (if carried back, an amended return must be filed) to offset any income attributable to the KETRA distribution.
- Re-contributions will not count against the one-rollover per year limitation.

IRS Extends Heinz Amendment Deadline
On November 23, the Internal Revenue Service (IRS) issued Rev. Proc. 2005-76, which extends by one year the date by which pension plan sponsors must amend their plans and be in operational compliance with earlier "suspension of benefits" guidance (Rev. Proc. 2005-23, Page 25 of linked document) issued to reflect the holding in the Supreme Court's decision in *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004).

The *Heinz* decision indicated that plan sponsors are prohibited from amending their plans to impose additional conditions on the right to receive retirement benefits accrued before the amendment (the plan in the *Heinz* case had been amended to increase the categories of employment which would result in a suspension of benefits after the plaintiffs had already retired and become reemployed in employment newly covered by the suspension of benefits provision). Rev. Proc. 2005-23 provided relief from the risk of plan disqualification for a previous suspension of benefits amendment that was not permissible under the *Heinz* decision, but only if the plan was amended to eliminate the problem by January 1, 2006, and the plan was retroactively made operationally compliant (and participants notified they could opt to retroactively commence payment of benefits) back to June 7, 2004 (the date of the Supreme Court decision). The new revenue procedure allows plan sponsors to implement the required plan amendment by January 1, 2007, and also requires retroactive operational compliance (to June 7, 2004) by that date.

Code Section 415 Grandfather Rule to Be Expanded
On November 22, the Internal Revenue Service (IRS) announced in Notice 2005-87 that the grandfather rule contained in the proposed regulations will be extended when the final regulations are published under Internal Revenue Code (Code) Section 415. Code Section 415 provides various limitations on benefits under qualified defined benefit plans and contributions to qualified defined contribution plans.

The proposed regulations, issued May 31, 2005, and proposed to be effective for limitation years beginning on or after January 1, 2007, contains comprehensive guidance regarding the limitations of Code Section 415, including updates for various statutory changes. The proposed regulations contain a grandfather rule under which benefits accrued on or before May 31, 2005, will be considered to meet the requirements of the regulations if they meet the requirements of statutory provisions, regulations and other guidance in effect on May 31, 2005.

The Notice indicates that the IRS and Treasury intend that, when the regulations are finalized, the May 31 grandfather date will be replaced with a date that is not earlier than the date of publication of the final regulations. In addition, the Notice states that during the interim period before final regulations are published, plans will not be treated as failing to meet the requirements of Code Section 415 if the plan's definition of compensation for a limitation year that is used to apply the limitations of Code Section 415 reflect compensation in excess of the limitation under Code Section 401(a)(17) that applies to that plan year.

IRS Issues Additional Guidance on FSA 2½ Month Spending Extension

The Internal Revenue Service has issued Notice 2005-86 providing additional guidance on the optional 2½-month Flexible Spending Arrangement (FSA) grace period and interaction between the grace period and Health Savings Accounts (HSAs.) Under Notice 2005-42 issued earlier this year, an employer may choose to amend its health or dependent care FSA to provide an additional 2½ months to spend contributions beyond the end of the plan year before the use-it-or-lose-it rule will apply. The Notice provides the following clarifications about the grace period:

- The grace period must be made available to all participants who are covered on the last day of the plan year.
- The grace period must remain in effect for the entire period even if the participant terminates employment prior to the end of the grace period.
- An employer may limit the grace period to certain benefits (e.g., the health FSA).
- An employer may adopt a grace period shorter than 2½ months.

The Notice also clarifies the interaction between FSAs with a grace period and HSA eligibility. Generally an individual participating in a health FSA who is covered by the grace period is not eligible to contribute to an HSA until the first day of the first month following the end of the grace period (typically April 1), even if the participant's health FSA has no unused benefits at the end of the prior cafeteria plan year. However, Notice 2005-86 provides that an employer may amend its cafeteria plan document to provide a grace period if the FSA is converted to a limited purpose or post-deductible FSA (which are allowed to be offered in conjunction with an HSA) for all FSA participants, regardless of whether they have enrolled in a high deductible health plan or HSA. The guidance also provides transition relief for cafeteria plan years ending before June 5, 2006, that an individual otherwise eligible to contribute to an HSA will remain an eligible individual even if the employer's FSA allows for the 2½ month grace period if either the individual has no contributions left at the end of the plan year (before the grace period begins) or the employer amends the cafeteria plan to provide that the grace period will not apply to individuals who elect the high deductible health plan.

IRS Issues HSA Clarification Regarding State Mandates
The Internal Revenue Service has issued Notice 2004-43 regarding the application of transition relief from state mandates to high deductible health plans (HDHPs) that operate on a non-calendar year plan year. Some states require that insured health plans provide certain benefits below the minimum deductible required for Health Savings Account (HSA) qualified HDHPs. Examples of such mandates include requiring coverage for screening of lead poisoning and any necessary medical follow-up and treatment without application of a deductible (New Jersey) or requiring coverage of home health care with a deductible of no more than $50 (New York.) Notice 2004-43 provided transition relief so that for months before January 1, 2006, employers could sponsor insured HDHPs that would qualify to be offered with an HSA even if a state mandate applied that would otherwise interfere with the high deductible plan requirement. The purpose of the transition relief was to allow time for states to change their mandates without delaying the ability of insurance carriers to offer HSA-qualified HDHPs.

Generally, a health plan may not reduce existing benefits before the plan's renewal date. Thus even if a state amended its laws before January 1, 2006, to remove any benefits mandates that would interfere with offering an HSA-qualified HDHP, a non-calendar year plan may still fail to qualify under the HSA rules after January 1 because existing benefits cannot be changed until the renewal date. The new Notice 2004-43 provides additional transition relief for such non-calendar year HDHPs. The Notice provides that for any coverage period of twelve months or less beginning before January 1, 2006, an HDHP that is otherwise HSA-qualified except that it complied on its most recent renewal date before January 1 with state-mandated benefit requirements, will be considered an HSA-qualified HDHP through the end of the current plan year.

FASB Votes to Review and Change Pension Accounting Standards
On November 10, the Financial Accounting Standards Board (FASB) voted to examine pension fund and post-retirement benefits accounting in a two-phase project that could ultimately lead to significant financial accounting changes for sponsors of defined benefit plans. FASB indicated the first phase will seek to improve transparency by requiring that the funded or unfunded status of defined benefit and other post-retirement benefits plans – measured as the difference between the fair value of plan assets and the current measure of the benefit obligation incurred for past employee service – be recognized in the company's balance sheet (and not just in footnotes). In a press conference following the meeting, FASB Chairman Robert Herz indicated FASB hoped to complete this phase by the end of 2006.

FASB indicated the second phase will be more comprehensive, and analysts indicate that project will likely attempt to introduce a more of a "mark-to-market" approach to pension accounting, causing more volatility in the financial reporting of companies that sponsor defined benefit plans. Some of the issues that FASB has indicated it intends to address in the second phase include:

- How to best recognize and display in earnings and other comprehensive income the various elements that affect the cost of providing postretirement benefits,
- How to best measure the obligation, in particular the obligations under plans with lump-sum settlement options,

- Whether more or different guidance should be provided regarding measurement assumptions, and
- Whether postretirement benefit trusts should be consolidated by the plan sponsor.

HHS Announces Medicare Part D Electronic Prescription Foundation Standards
On November 1, the Department of Health and Human Services announced final regulations describing the basic mechanism by which electronic prescriptions will be filed under Medicare Part D. With an effective date of January 1, 2006, the regulations allow for the immediate use of electronic prescribing (e-prescribing) of covered drugs when the program begins in the new year. All drug plans receiving Medicare Part D reimbursement must support e-prescribing options, while physicians and pharmacies may participate on an optional basis.

When e-prescribing, a doctor transmits a patient's prescription electronically to that person's pharmacy of choice. This speeds dispensing times and decreases the likelihood of filling errors via a system of automated checks for drug usage and interactions, and patient allergies and benefits coverage. The program also offers providers access to updated information on current treatments and costs based on the most recent medical evidence.

Also included in the November 1 statement was an announcement that the Centers for Medicare and Medicaid Services (CMS), the HHS department responsible for the program, will launch in conjunction with Part D's introduction, a test of "initial" e-prescribing standards for information on formulary and benefits, prior authorization messages, patient instructions, and clinical drug terminology. These initial standards are also designed to enhance drug selection, refill and dispensing procedures. Final regulations based upon these tests' results are expected by April 2008.

The final rule on foundation standards is expected to be published in the Federal Register on Monday, November 7.

Advisory Panel on Federal Tax Reform Issues Final Report
The President's Advisory Panel on Federal Tax Reform, chaired by former Senators Connie Mack (R-FL) and John Breaux (D-LA), have issued their final report with recommendations for reform of the nation's tax code. The panel was formed by President Bush with the stated purpose of simplifying Federal tax laws, sharing the burdens and benefits of the Federal tax structure in an appropriately progressive manner, and promoting long-run economic growth and job creation. The report will now be reviewed by the U.S. Treasury Department, which will use the report to develop a legislative package for consideration by Congress.

The final report, at nearly 280 pages, is available on the American Benefits Council web site:

- Part One (Chapters 1-4)
- Part Two (Chapters 5-6)
- Part Three (Chapters 7-9)
- Appendix

(Please note: these files are large and may take additional time to download and print.)

The Treasury Department will soon be soliciting written comments on the final report. Until then, interested parties may submit comments to the Treasury Department at (202) 622-2512.

IRS and DOL Provide Relief for Hurricane Wilma Victims
On October 27, the Internal Revenue Service (IRS) announced that Hurricane Wilma victims will have until February 28, 2006, to file returns, pay taxes and perform other time-sensitive acts that would otherwise be due between October 23, 2005, and February 28, 2006. In IRS Announcement IR-2005-128, the IRS granted relief to the same delayed due date which was granted to victims of Hurricane Katrina and Hurricane Rita in previous announcements. This relief applies to the time-sensitive actions described in Treas. Reg. Section 301.7508A-1(c)(1) and Rev. Proc. 2005-27 (see Section 8 for benefits-related provisions).

On October 31, the Department of Labor's (DOL) Employee Benefits Security Administration announced an extension of the deadline for filing Form 5500 for Hurricane Wilma victims to February 28, 2006. Plan filers entitled to the extension relief should check Part I, Box D on the Form 5500 and attach a statement to the form in accordance with the instructions.

Hurricane Wilma victims are individuals who live, and businesses whose principal place of business is located, in the covered disaster area. Those not in the covered disaster area, but whose books, records or tax professionals' offices are in the covered disaster areas are also entitled to relief. The disaster area includes the 20 Florida counties that have been included in the Federal Emergency Management Agency (FEMA) disaster area.

It should be noted that the IRS relief is not as comprehensive as the relief provided to Hurricane Katrina victims. For example, while it includes an extension of the deadlines for filing Form 5500 (because this is listed in Section 8 of Rev. Proc. 2005-27), it does not include extension of time to make minimum contributions or relaxation of documentation or other standards relating to loans and hardship distributions. However, the IRS has indicated it will continue to monitor the aftermath of Hurricane Wilma and will resolve other potential tax administration issues as they arise.

RECENT LEGISLATIVE ACTIVITY

Senate Passes Tax Reconciliation Bill with Pension Provisions
In the wee hours of the morning on November 18, the Senate passed a nearly $60 billion tax reconciliation bill (S. 2020) on a 64-33 vote. The tax bill, which addresses many areas, contains two provisions that may be of interest to retirement plan sponsors and one of interest to health plan sponsors. Another provision, added in the manager's amendment, may affect employers with foreign stock plans that resemble Incentive Stock Options (ISOs) or Employee Stock Ownership Plans (ESOPs).

The first retirement provision would extend the Savers Credit, scheduled to expire at the end of 2006, through 2009. The Savers Credit, which was created in the Economic

Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), allows taxpayers with incomes below certain amounts a nonrefundable credit for contributions to certain qualified retirement plans including 401(k) plans, 403(b) plans and IRAs. The credit depends on the adjusted gross income of the taxpayer and is a maximum of 50 percent of the first $2,000 in contributions.

The second retirement provision would extend certain withdrawal relief previously provided to victims of Hurricane Katrina to those affected by Hurricanes Rita and Wilma. The relief, first provided in the Katrina Emergency Tax Relief Act (KETRA), would waive the 10 percent premature distribution penalty for early distributions of up to $100,000 to persons who suffered an economic loss and whose principal residence was located in the Hurricane Rita and Wilma disaster areas. In addition, individuals taking these distributions would be permitted to pay the resulting income tax ratably over a three-year period or, alternatively, to re-contribute the withdrawn amounts over a three-year period and receive rollover treatment. The bill also applies the KETRA increased loan limits ($50,000 to $100,000 and 50 percent to 100 percent) and deferral of loan payments to victims of Hurricanes Rita and Wilma.

The legislation also added a section that applies the exceptions for ISOs and ESOPs under Internal Revenue Code (Code) Section 409A to foreign stock plans that must meet similar requirements (requirements are contained in Sections 422 and 423 of the Code).

A Democratic amendment offered by Sen. Bill Nelson (D-FL) would have provided additional time for Medicare beneficiaries to decide on enrolling in the new Medicare Part D prescription drug benefit. However, the amendment failed to gain sufficient votes to overcome a budget point of order.

The House has its own version of tax reconciliation (H.R. 4297) that is expected to come up after the Thanksgiving recess. On the health side, the bill includes a one-year extension of the current law tax provision for compliance with the so-called "mental health parity" provisions — the requirement that any annual or lifetime dollar limits on mental health coverage must be no lower than comparable limits on other medical and surgical benefits covered by the plan.

Senate Passes Reconciliation Bill with Pension, Health Care Provisions
The Senate passed the Deficit Reduction Omnibus Reconciliation Act (S. 1932) by a vote of 52-47 on November 3. S. 1932, which aims to reduce federal spending by $35 billion over the next five years, contains provisions addressing both defined benefit pension reform and health care reform.

PENSION REFORM: Budget Bill Includes Premium Hikes
S. 1932 would raise plan sponsor flat-rate premiums to the Pension Benefit Guaranty Corporation (PBGC) from $19 to $46.75 per participant per year, automatically index premium increases in the future and impose a special premium of $1,250 per plan participant (for the first three years) for companies emerging from bankruptcy that had terminated their pension plans.

S. 1932 must now be combined with the House of Representatives budget bill – intended to achieve $54 billion in federal savings over the next five years – which was expected to be considered by the full House during the week of November 7. On October 26, the House Education and the Workforce Committee approved provisions to the House bill that would raise premiums to $30 per plan participant per year for plan years beginning after 2005, also indexing future increases and imposing the special $1,250 premium in post-bankruptcy instances. The House bill also contains a more troubling provision allowing the PBGC itself to increase premiums by up to 20 percent from the prior year's level "if the corporation determines that such an increase is necessary for the operation of the plan termination insurance program." The PBGC-proposed increase would take effect unless Congress adopts a joint resolution expressly opposing it. The bill requires that the PBGC provide Congress with a description of the methodology and assumptions it uses for any proposed increase.

Both bills contained provisions indicating that any premium increases established in the final budget bill would be superceded by comprehensive pension reform legislation such as S. 1783 or the Pension Protection Act (H.R. 2830).

HEALTH CARE REFORM: Bill Includes Savings from Medicare, Medicaid Programs
S. 1932 also includes $10 billion in savings from the Medicare and Medicaid programs, as had previously been approved by the Senate Finance Committee. The legislation contains provisions supported by the Council that would establish a new pay-for-performance program under Medicare to begin rewarding health care providers that meet new measures of their quality and efficiency in delivering health services. However, the same legislation would also reduce funding for Medicare Advantage plans – the private health plans that contract with the federal government to provide health benefits including the new prescription drug benefit to Medicare beneficiaries. In addition, the Senate bill would greatly expand the authority of individual states to demand eligibility and claims data from employers and insurers to determine whether they cover individuals who are also covered by Medicaid so that the states could enhance their third-party payment recovery programs. The Council opposed the reductions in funding for Medicare Advantage plans and has urged that the expanded third-party liability recovery authority for the states be revised to provide an efficient, less burdensome way for employers and insurers to comply with state requests for eligibility and claims data.

The House budget bill is expected to contain $9.5 billion in reductions in Medicaid spending and no provisions affecting Medicare. The House bill also contains the broad language to expand states' third-party liability recovery programs and the Council has expressed similar concerns with House leaders that the legislation needs to be more narrowly drawn to avoid burdensome and conflicting demands from different states for employer and insurer eligibility and claims data.

Senate Approves Pension Funding Legislation
On November 16, the Senate approved the manager's amendment (final version) of the Pension Security and Transparency Act (S. 1783) by a vote of 97-2. S. 1783 is the Senate's pension reform bill containing single- and multi-employer funding reforms provisions, defined contribution provisions including those addressing automatic enrollment, and language intending to clarify the legal status of hybrid pension plans on a prospective-only basis. An official chart comparing S. 1783 to current law is now available on the American Benefits Council Web site.

The Senate approved two amendments — both addressing the airline industry — during consideration of the bill:

- An amendment by Sen. Johnny Isakson (R-GA) extending by 14-20 years the period for airlines to make up the underfunding in their pension plans was approved by voice vote.
- An amendment by Sen. Daniel Akaka (D-HI) limiting actuarial reductions for airline pilots close to retirement was approved by a roll call vote of 58-41.

Funding Reform and Hybrid Plan Legislation – Need for Hybrid Plan Clarification
Both the Bush Administration and the business community have expressed various concerns about the Senate-passed bill, S. 1783, the Defined Benefit Security and Transparency Act. The Administration in its Statement of Administration Policy noted that it supported passage but urged the elimination of delays in implementing the new 100 percent funding target, smoothing for calculating liabilities and asset valuation, the special airline provisions and use of credit balances resulting from pre-funding. In addition, the Administration expressed continued support for the use of credit rating for the determination of at-risk liability and use of a standard mortality table and indexed Pension Benefit Guaranty Corporation premiums.

The Senate debate on the legislation reflected a number of the business community's concerns, particularly the inclusion of credit rating as a measure for at-risk liability and the volatility that will result from the use of a 12-month period for calculating liabilities and valuing plan assets. The Senate debate also reflected concern over the hybrid plan provisions. Several senators spoke specifically regarding the need for comprehensive recognition of the validity of the hybrid plan design, including existing plans, while the measure was under consideration on the Senate floor, including Senators Richard Burr (R-NC), Wayne Allard (R-CO), Judd Gregg (R-NH), and Joseph Lieberman (D-CT). These statements for the record may be helpful in encouraging support for a comprehensive solution on hybrid plans as the legislation continues to work through the legislative process.

Ways and Means Committee Approves Pension Funding Legislation with Few Amendments
On November 9, the House of Representatives Ways and Means Committee approved the Chairman's mark of the Pension Protection Act (H.R. 2830) by a vote of 23 to 17. (The vote generally followed party lines, with Representative Paul Ryan (R-WI) the only Republican voting against the bill.) H.R. 2830 is the comprehensive pension funding reform legislation introduced by Representative John Boehner (R-OH) and previously approved by the House Education and the Workforce Committee, which he chairs, on June 30.

The chairman's mark, a substitute prepared by Committee Chairman Bill Thomas (R-CA), made a number of modifications to the bill as previously approved. An official summary and a Joint Tax Committee summary of the bill are also available on the American Benefits Council Web site.

A number of amendments were considered during the session:

- The committee approved an amendment offered by Rep. Ben Cardin (D-MD) that would permit rollovers to non-spouse beneficiaries.
- Cardin withdrew a separate amendment regarding automatic enrollment since it addressed ERISA issues; Rep. Sam Johnson (R-TX), also a member of the House Education and the Workforce Committee – which has jurisdiction over ERISA issues – pledged to work with Cardin on his amendment.
- A third amendment by Cardin regarding the Saver's Credit (from the 2001 tax bill) was partially accepted; the committee approved a provision allowing the Saver's Credit to be directly deposited into a savings account. The committee rejected a provision to make the Saver's Credit refundable.
- Rep. Phil English (R-PA) offered and then withdrew an amendment providing a one-time increase in monthly payments for beneficiaries whose plans have been assumed by the Pension Benefit Guaranty Corporation for longer than ten years.
- Rep. Stephanie Tubbs Jones (D-OH) offered and then withdrew an amendment that would have clarified the legitimacy of cash balance plans with respect to existing plans as well as those created in the future. Her amendment would also have prohibited "wearaway" of normal and early-retirement benefits and would have given participants with at least ten years of service or within five years of retirement the option of having their benefits calculated under the terms of the prior plan in cases of cash balance conversions.
- A Democratic substitute of the bill, details of which were not immediately available, was defeated by a vote of 24-16.

Defined Benefit Plan Reforms
H.R. 2830 still provides defined benefit pension plan reforms such as:

- extensive reforms of the funding rules for multiemployer and single-employer defined benefit pension plans
- a five-year phase-in of the new 100 percent funding target;
- linkage of the interest rate to 3-year smoothing;
- use of funded status, rather than credit rating, for determining at-risk liability;
- use of credit balances under limited circumstances;
- additional rules for multiemployer plans with special rules for endangered plans;
- prospective clarification with respect to the application of the age discrimination rules to hybrid plans;
- expanded disclosure requirements; and
- relief under certain circumstances from the new mandated RP-2000 combined mortality tables.

Defined Contribution Plan Reforms
The chairman's mark includes additional provisions for defined contribution plans, most significantly a permanent extension of the increased contribution limits as enacted by EGTRRA in 2001, including the saver's credit, and a safe harbor allowing for automatic enrollment. The chairman's mark did not address default investments or the ERISA preemption from state withholding rules. (These provisions were not within the jurisdiction of the Ways and Means Committee and could be added prior to consideration by the full House.) As originally contained in H.R. 2830, the chairman's mark also includes an exception to the prohibited transaction rules for investment advice.

FSA Rollover Provision
The chairman's version also includes a provision that would allow up to $500 of unused Flexible Spending Arrangement (FSA) dollars to be carried forward into the following year's FSA or rolled over into an individual's Health Savings Account (HSA). Normally, unused FSA funds must be forfeited at the end of the year (or after an optional 2½ month spending extension employers are allowed to provide). Contributions to the HSA from the FSA would be subject to the usual contribution limits for HSAs.

The House of Representatives approved a similar provision as part of the Medicare Modernization Act of 2003 allowing flexibility in the FSA "use-it-or-lose-it" rule for up to $500 in unused FSA funds after the Bush Administration had twice proposed the FSA change as part of its fiscal year 2003 and 2004 legislative programs. The FSA provision was later dropped by the House and Senate conferees from the final agreement on the Medicare Modernization Act, but has continued to be championed by Ways and Means Committee members Jim McCrery (R-LA), Eric Cantor (R-VA), Jim Ramstad (R-MN) and Nancy Johnson (R-CT).

Capitol Police to Investigate Compromise of Confidential Pension Documents
House of Representatives Education and the Workforce Committee Chairman John Boehner (R-OH) and Ranking Minority Member George Miller (D-CA) have asked the U.S. Capitol Police to investigate an incident in which confidential pension plan information may have been compromised. According to a committee press release, an employee of Bloomberg News is suspected of improperly taking sensitive material from the committee's Democratic office.

On October 26, a member of the Committee's Democratic staff called the Capitol Police and reported that a confidential Committee document had been taken by an employee of Bloomberg News. Bloomberg News has since returned the documents to the committee and promised not to release the information contained in the documents.

The Committee formally requested Form 4010 information from the Pension Benefit Guaranty Corporation (PBGC) for companies funded at a level of 75 percent or less and more than $50 million underfunded using PBGC assumptions. At the time, the American Benefits Council expressed concern to the Education and Workforce Committee and the PBGC about the value of the information being requested and the possible inappropriate release of confidential company information. The Committee used these documents to develop the Pension Protection Act (H.R. 2830), the comprehensive pension funding reform legislation now awaiting consideration by the full House.

In a separate but related matter, the Senate Finance Committee earlier this year also requested extensive information directly from a number of companies about their pension funding calculations, as well as details about some executive compensation programs. In that instance, the Council raised concerns about the possibility of that information being misused or misconstrued.

GAO Issues Cash Balance Report
The Government Accounting Office (GAO) issued a report on November 4 suggesting that cash balance pension plans "may provide more understandable benefits and larger accruals to workers earlier in their careers, advantages that may be appealing to a mobile workforce. However, conversions … to [cash balance] plans redistribute benefits

among groups of workers and can result in benefits for workers, particularly those who are longer tenured, that fall short of those anticipated in a [final average pay] plan."

Representative George Miller (D-CA), ranking minority member of the House Education and the Workforce Committee, released a press statement touting the GAO findings as support for the Pension Benefits Protection Act (H.R. 4052/S. 1302). This legislation would prevent any plan conversion that reduces the rate of future benefit accrual, unless plan participants with a certain level of tenure – age 40 or above or with at least ten years of service – are given a choice of enrolling in the old plan or the new plan.