



# AMERICAN BENEFITS COUNCIL

December 3, 2018

## HIGHLIGHTS FROM THE FALL 2018 REGULATORY AGENDAS

Key regulatory agencies with jurisdiction over U.S. employee benefits policy have updated their semiannual agendas with topics that are expected to be the subject of formal guidance during the next year. These agencies include:

- U.S. Treasury Department (Treasury) and Internal Revenue Service (IRS)
- U.S. Department of Labor (DOL) and Employee Benefit Security Administration (EBSA)
- Health and Human Services Department (HHS) and Centers for Medicare and Medicaid Services (CMS)
- Equal Employment Opportunity Commission (EEOC)
- Pension Benefit Guaranty Corporation (PBGC)
- Securities and Exchange Commission (SEC)

This update of the regulatory agenda continues to include “deregulatory actions” as part of its title and objective. In fact, it notes that the agendas are focused on “ongoing commitment to fundamental regulatory reform and a reorientation toward reducing unnecessary regulatory burdens.” It also outlines four broad regulatory reform priorities: (1) Advancing Regulatory Reform, (2) Public Notice of Regulatory Development, (3) Transparency and (4) Consistent Practice across the Federal Government to achieve “more effective and less burdensome regulation.” This is consistent with executive branch initiatives (such as White House [Executive Order 13771](#) and [Executive Order 13777](#)) to eliminate two regulations for each new regulation.

As indicated in the summary below, the Council has been actively engaged with almost all of the regulatory projects that have direct applicability to employer plan sponsors. This engagement involves formal written comments, testifying at regulatory agency hearings and informal communications.

The semiannual agendas categorize regulatory projects according to whether they are in the proposed rule stage or the final rule stage. Generally, those items slated for “long-term action” do not have a specific timetable for the proposal. The agendas also attempt to provide a time frame for completion of the given stage, although these dates are subject to change and are frequently missed.

The significant items for employer plan sponsors and service providers are highlighted below.

### Treasury & IRS

Treasury and IRS released in November 2018 its [2018-2019 Priority Guidance Plan](#), which describes the regulatory projects that the agencies “hope to complete” during the twelve-month period from July 2019 through June 2020. Notably, the plan highlights the agencies’ efforts to uphold “deregulatory policies and reforms” under current White House directives. The guidance plan does not place any deadline on completion of projects and is typically updated throughout the year (see the [November 15, 2018, Benefits Byte](#)).

The following **health care policy items** are listed on the Treasury/IRS agenda:

#### *Proposed Rule Stage*

- [Proposed regulations on the “Cadillac” excise tax on high cost employer-sponsored health coverage under Section 4980\(I\) for taxable years beginning after 2021, enacted by the Affordable Care Act \(ACA\)](#) [proposed regulations scheduled for September 2019]
- [Proposed regulations providing supplemental guidance on specific issues relating to shared responsibility for employers regarding health coverage](#) [proposed regulations scheduled for September 2019]
- [Proposed regulations applying various provisions of Section 2711 of the Public Health Service Act, the Affordable Care Act, and the Internal Revenue Code to Health Reimbursement Arrangements](#) [proposed regulations scheduled for November 2018 and final regulations scheduled for September 2019]
- [Proposed regulations updating existing final regulations on the definition of a church plan Section 414\(e\) of the Internal Revenue Code](#) [proposed regulations scheduled for April 2019]
- [Proposed regulations regarding welfare benefit fund under a collective bargaining agreement](#) [proposed regulations scheduled for March 2019]

#### *Final Rule Stage*

- Final regulations regarding the [religious exemptions](#) and [moral exemptions](#) from requirements to provide coverage for contraceptive items and service for entities that object to providing such coverage [final regulations scheduled for December 2018]

- In November 2018, HHS, DOL and Treasury issued final regulations which set forth the grounds for [religious](#) and [moral](#) exemptions from the ACA requirement that contraceptive coverage be provided without cost-sharing under their health plans. [An official fact sheet](#) is also available. As in [the set of interim final rules issued in October 2017](#), both the religious and moral final rules extend the exemption (and the accommodation) to certain non-governmental employers (including for-profit companies, whether they are closely-held or not) and institutions of higher education with “sincerely held religious beliefs” or “sincerely held moral convictions” opposed to offering coverage of some or all contraceptive or sterilization methods encompassed by the ACA’s guidelines (see the [November 9, 2018, Benefits Byte](#) for more detail).
- [Final regulations on the rules for expatriate health plans, expatriate health plan issuers, and qualified expatriates under the Expatriate Health Coverage Clarification Act of 2014 \(EHCCA\)](#) [final regulations scheduled for July 2019]

The following **retirement and compensation policy items** are listed on the Treasury/IRS agenda:

#### *Prerule Stage*

- [Regulations under Section 414\(m\) of the Internal Revenue Code to define the term affiliated service group](#) [advanced notice for proposed regulations scheduled for August 2019]
  - As noted in the agenda, Treasury describes that the advanced notice for proposed regulations will “describe guidance under consideration and solicit comments on rules for determining whether two or more separate service entities constitute an affiliated service group under section 414(m).”

#### *Proposed Rule Stage*

- [Proposed regulations to provide limited relief to a defined contribution multiple employer plan \(MEP\) in the event of a failure by one employer maintaining the plan to satisfy an applicable qualification requirement or to provide information needed to ensure compliance with a qualification requirement](#) [proposed regulations scheduled for April 2019]
- [Regulations on the use of lump sum payments to replace lifetime income being received by retirees under defined benefit pension plans and lump sum payments after a restriction period](#) [proposed regulations scheduled for March 2019]
  - According to the abstract, “These regulations [will] prohibit accelerations of annuity payments to those plan participants in defined benefit pension

plans who currently receive annuity payments” The project was not listed in the 2017-2018 Priority Guidance Plan but was included in the Fall 2018 Unified Regulatory Agenda.

In 2015, the IRS [issued guidance](#) stating its intention to amend the required minimum distribution regulations under Internal Revenue Code Section 401(a)(9) to prohibit lump sum payments or any other accelerated form of distribution of qualified benefit plans to replace any joint and survivor, single life or other annuity currently being paid.

In an October 23 letter (written prior to the issuance of the 2018-2019 Priority Guidance Plan), the Council [commended](#) the Treasury and IRS in response to the omission of the department’s regulatory project on lump sum windows in its then most recent Priority Guidance Plan. The Council also provided the agency with recommendations to withdraw its previous guidance that could be interpreted as a prohibition on certain pension plan lump sum payments, as well as to amend the Fall 2018 Unified Regulatory Agenda to remove its plans for proposed regulations on lump sum windows. See the [November 5, 2018, Benefits Byte](#) for more details but note that with the inclusion in the 2018-2019 Prior Guidance Plan, Treasury appears to be signaling it may intend to implement the 2015 guidance.

- [Regulatory action to modify the rules relating to hardship distributions from 401\(k\) plans](#) [proposed regulations issued in November 2018 with final action scheduled for February 2019]
  - As noted in the Agenda, the Bipartisan Budget Act of 2018 requires the Secretary of the Treasury to make the modification no later than one year after the date of enactment of the Act, which was signed into law February 9, 2018.

In November 2018, the IRS [issued](#) proposed regulations that would expand the safe harbor that applies to 401(k) hardship distributions and clarifies several points that the Council has been discussing with IRS and the Treasury Department. These proposed regulations would make changes to reflect a number of statutory changes, particularly the Bipartisan Budget Act of 2018, the Tax Cuts and Jobs Act of 2018, and the Pension Protection Act of 2006 (see the [November 15, 2018, Benefits Byte](#) for more information).

- [Proposed regulations regarding tax withholding on certain retirement plan distributions under Code sections 3405\(a\) and \(b\)](#), relating to periodic payments and nonperiodic distributions [proposed regulations scheduled for November 2018]

- In November 2018, the IRS issued [interim guidance and request for comments](#) on income tax withholding from wages and from retirement and annuity distributions.
- [Proposed regulations regarding the use of actuarial tables in valuing annuities, interests for life or terms of years, and remainder or reversionary interest](#) [proposed regulations scheduled for April 2019; proposed regulations comment period scheduled to end in June 2019; final regulations scheduled for June 2019]
- [Requirements for employee stock ownership plans](#) to prescribe rules under Code sections relating to employee stock ownership and also to update existing regulations relating to ESOPs [proposed regulations scheduled for November 2018]
- [Proposed regulations would provide an update to minimum vesting standards](#) that generally apply to tax qualified retirement plans under section 411(a) of the Internal Revenue Code and 29 U.S.C. 1053 and 1054 [proposed regulations scheduled for February 2019]
- [Regulations providing guidance on the application of the nondiscrimination requirements, the backloading limitations, certain plan termination rules, the benefit limitations, and the top heavy rules](#) to cash balance plans, pension equity plans and variable annuity plans that addresses particular characteristics of those types of plans [proposed regulations scheduled for February 2019]
- [Regulations regarding the application of the section 72\(t\) 10 percent additional tax to an early distribution \(prior to age 59-1/2\) from a qualified retirement plan](#) [proposed regulations scheduled for July 2019]
- [Proposed regulations regarding the determination of plan assets and benefit liabilities for purposes of the funding requirements that apply to single employer defined benefit plans](#), the use of certain funding balances maintained for those plans, and the benefit restrictions for certain underfunded defined benefit pension plans [proposed regulations scheduled for June 2019]

### *Final Rule Stage*

- [Nondiscrimination relief for closed or frozen defined benefit plans](#) [final regulations scheduled for November 2018]
  - The increasingly necessary practice of defined benefit plan sponsors “soft freezing” their plans (closing them to new entrants), and the use of various approaches to assist older employees with the transition to the new system, have created challenges for these employers. Over time, some of these transition approaches can become technically inconsistent with

current regulations prohibiting discrimination in favor of highly compensated employees.

As [requested by the American Benefits Council](#), the IRS [extended through 2019 relief](#) from the imposition of certain nondiscrimination rules on defined benefit pension plans that have been closed to new hires, providing the plans meet certain criteria also detailed in earlier notices. See the [August 27, 2018, Benefits Byte](#) for more information.

As reported in the [March 9, 2018, Benefits Byte](#), the U.S. Senate Finance Committee Chairman Orrin Hatch (R-UT) and the committee's Ranking Democrat Ron Wyden (D-OR) joined together to introduce the [Retirement Enhancement and Savings Act \(RESA\) of 2018 \(S. 2526\)](#), of which one of its provisions would revise the Code's nondiscrimination rules to provide relief from the imposition of certain nondiscrimination rules on defined benefit pension plans that have been closed to new hires. The modification, originally authored by Senators Ben Cardin (D-MD) and Rob Portman (R-OH) (see the [April 6, 2017, Benefits Byte](#)), would allow such a "frozen" defined benefit plan to be aggregated with one or more defined contribution plans and tested on a benefit accruals basis, under certain conditions.

This relief also appeared in the House Republicans draft tax legislation (see the [November 30, 2018, Benefits Byte](#)) and in Family Savings Act (H.R. 6757), a retirement savings bill that was approved by the House in September 2018 (see the [September 27, 2018, Benefits Byte](#)).

- [Reporting and notice requirements for deferred vested benefits under tax code Section 6057](#), formally designating the Form 8955-SSA as the form used to satisfy the relevant reporting requirements of the former "Schedule SSA" [final regulations scheduled for February 2019] and further [reporting and notice requirements for deferred vested benefits under Section 6057](#) provide guidance on the requirement for plan administrators or employers to furnish an individual statement to participants who separate from service with a deferred vested benefit [proposed regulations scheduled for February 2019]
- [Definitions of "Qualified Nonelective Contribution" \(QNEC\) and "Qualified Matching Contribution" \(QMAC\) to defined contribution plans](#) to provide that forfeitures may be used to fund such contributions [final regulations scheduled for November 2018]
  - In July 2018, the IRS and the Treasury issued [final regulations](#) on the definitions of qualified matching contributions (QMACs) and qualified nonelective contributions (QNECs).

- [Application of Code Section 409 to nonqualified deferred compensation plans](#) [proposed regulations scheduled for August 2019] and [further guidance on application of Section 409 to nonqualified deferred compensation plans](#) [final regulations scheduled for August 2019]
- [Update to minimum present value requirements for defined benefit plan distributions](#) [final regulations scheduled for November 2018]
- [Amending regulations implementing the Bank Secrecy Act \(BSA\) regarding reports of foreign financial accounts \(FBAR\)](#) to clarify which persons will be required to file reports of foreign financial accounts and what information is reportable [final regulations scheduled for November 2018]

The following **other benefits issues** are listed on the Treasury/IRS agenda:

### *Proposed Rule Stage*

- [Proposed regulations to provide guidance under 162\(m\)](#) [proposed regulations scheduled for July 2019]
  - As reported in an [August 24, 2018, Benefits Byte](#), to implement changes enacted as part of the Tax Cuts and Jobs Act of 2017 (TCJA), [the IRS issued guidance](#) on the tax deductibility of compensation exceeding \$1 million under Internal Revenue Code Section 162(m). This notice precedes the formal issuance of proposed rules implementing the provisions, since, as the IRS notes, “stakeholders have submitted comments indicating that they would benefit from initial guidance on certain aspects” of the law.

In February, the Council noted in a [letter to Congress' Joint Committee on Taxation](#) and in subsequent meetings with IRS staff that “the current explanation of the written binding contract provision does not adequately address how the rule applies to companies’ outstanding performance-based compensation. In addition, many compensation arrangements were put in place with no expectation that the individual would be covered by 162(m) when the compensation is paid.”

- [Proposed regulations to clarify the income tax treatment of certain employer-provider meals, including meals provided in employer-operated eating facilities](#) [proposed regulations scheduled for April 2019]

### DOL & EBSA

The following health policy item is listed on the DOL/EBSA agenda:



### *Proposed Rule Stage*

- [Proposed regulations that would increase the usability of health reimbursement arrangements \(HRAs\), expand employers' ability to offer HRAs to their employees, and allow HRAs to be used in conjunction with nongroup coverage](#) [proposed regulations were issued in October 2018]
  - As reported in the [October 24, 2018, Benefits Byte](#), DOL and HHS released proposed regulations that would permit employees to use HRAs to purchase health insurance on the individual market. The [proposed regulations](#) would also permit employers that offer traditional group health plans to provide “excepted benefit” HRAs of up to \$1,800 per year to reimburse employees for certain qualified medical expenses.

The proposed rule expanding the use of HRAs was issued pursuant to an October 2017 presidential executive order directing the departments to consider proposing regulations or guidance to increase the usability of HRAs. The proposal generally aligns with a key recommendation of the Council’s strategic plan, [Magnifying A 2020 Vision: A Closer Look at Selected Proposals to Strengthen Employer-Sponsored Health Benefits](#), that employers be permitted to establish stand-alone HRAs (or similar accounts) that can be used by employees to purchase individual coverage on a tax-favored basis. The Council has advocated with Congress and the regulatory agencies over the last several years for the expanded use of HRAs to provide employers with greater flexibility in the design of employee health benefits. While this particular approach may not fit the benefit strategies for all employers, it may be attractive to those companies and employees who are seeking a more defined contribution approach to health care coverage.

The following retirement and compensation policy items are listed on the DOL/EBSA agenda:

### *Proposed Rule Stage*

- [Regulations to establish criteria under Section 3\(5\) of ERISA for purposes of being an "employer" able to establish and maintain an employee pension benefit plan \(as defined in Section 3\(2\) of ERISA\) that is a multiple employer retirement savings plan](#) [proposed regulations issued October 2018]
  - As reported in the [October 22 Benefits Byte](#), the DOL issued [proposed regulations](#) designed to make multiple-employer retirement plans (MEPs) more accessible for small businesses. While the proposed rule stops short of permitting open MEPs – which will likely require legislative action – it reduces some obstacles to potential MEP sponsorship. The DOL proposed rule fulfills a provision of [an August 31 executive order](#), in which the



president set forth a series of measures to “strengthen retirement security in America.” At that time, the Council has issued [a public statement](#) calling the executive action “a promising step.”

### *Final Rule Stage*

- [Regulatory options in light of the recent Fifth Circuit opinion to vacate the fiduciary regulation finalized in 2016](#) [final regulations scheduled for September 2019]
- [Amendment of the abandoned plan program](#), designed to facilitate the termination of, and distribution of benefits from, individual account pension plans that have been abandoned by their sponsoring employers [interim final regulations scheduled for December 2018]
  - [Proposed regulations](#) were issued in December 2012. At least one focus of the amendments will be consideration of expanding the scope of individuals who can be “qualified termination administrators,” the only entities authorized to implement the activities necessary to terminate an abandoned plan.
- [Adoption of an amended and restated Voluntary Fiduciary Correction Program \(VFCP\)](#), intended to expand the scope of some transactions currently eligible for correction under VFCP and streamline correction procedures for certain other transactions [interim final regulations scheduled for October 2018]
- [Guidance permitting electronic filing of top hat plan statements](#) [final regulations scheduled for October 2018]

### EEOC

The following health policy item is listed on the EEOC agenda:

- [Proposed regulations to amend how equal employment provisions of the Americans with Disabilities Act \(ADA\) are implemented](#) to address the interaction between title I of the ADA and inducements and/or penalties as part of wellness programs offered by employers [proposed regulations are scheduled for June 2019 ]
  - The EEOC’s final wellness plan rules, which were finalized in 2016, generally allow for the use of incentives of up to 30 percent of the cost of certain self-only coverage in exchange for an employee’s participation (or spouse’s participation in the case of GINA) in a bona fide wellness program. The Council prepared [a detailed summary of the two final rules](#) upon their finalization in May 2016.

On August 22, 2017, the U.S. District Court for the District of Columbia ordered the EEOC to reconsider its regulations under the ADA related to incentives and employer-sponsored wellness plans. See *AARP v. EEOC*, Civ. Action No. 16-2113 (D.D.C. Aug. 22, 2017). In accordance with the court's ruling, the EEOC will consider and take actions to cure defects in the rule.

A December 20, 2017, the court vacated the Equal Employment Opportunity Commission's final rules governing incentives in workplace wellness plans effective January 1, 2019. The court left the wellness regulations in place for 2018 in order to avoid potential disruption to employer plans and strongly urged the EEOC to move up its deadline for issuance of new proposed rules (see the [December 22, 2017, Benefits Byte](#)).

- [Proposed regulations to amend how regulations on the Genetic Information Nondiscrimination Act of 2008 address inducements](#) to employees' spouses or other family members who respond to questions about their current or past medical conditions on health risk assessments (HRA) [proposed regulations are scheduled for June 2019]
  - In a [March 1, 2017, hearing](#) before the U.S. House of Representatives Committee on Education and the Workforce, [the Council testified](#) about the need for consistent federal policy to make wellness plans more available and effective (see the [March 2, 2017, Benefits Byte](#)).

## [HHS & CMS](#)

The following health care policy items are listed on the HHS/CMS agenda:

### *Pre-Rule Stage*

- [A request for information \(RFI\) to solicit the public's views on how provisions of the HIPAA rules affect coordinated care and case management among hospitals, physicians \(and other providers\), payors, and patients](#) [RFI scheduled for November 2018]

### *Proposed Rule Stage*

- [Proposed regulations to increase the usability of HRAs to expand employers' ability to offer HRAs to their employees, and to allow HRAs to be used in conjunction with nongroup coverage](#) [proposed regulations were issued October 2018]
  - HHS states in agenda that this regulatory action is being proposed in response to [Executive Order 13813](#), "Promoting Healthcare Choice and Competition Across the United States."

For more information on Council activity regarding HRAs, see HRA item under DOL/EBSA.

- [Proposed regulations prohibiting discrimination on the basis of race, color national origin, sex, age, and disability under any health program or activity, any part of which is receiving federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an federal agency or any entity established under the ACA](#) [proposed regulations scheduled for October 2018]
- [Proposed regulations to alter the standard unique identifier for health plans \(HPID\) and the implementation specifications and requirements for its use, as well as change the other entity identifier \(OIED\) and implementation specifications for its use](#) [proposed regulations scheduled for November 2018]
  - The Council previously filed [written comments](#) on this issue.
- [Proposed regulations to remove safe harbor protection for rebates to plans or pharmacy benefit managers involving pharmaceuticals and to establish a new safe harbor protection](#) [proposed regulations scheduled for October 2018]

## PBGC

The following retirement policy items are listed on the PBGC agenda:

### *Proposed Rule Stage*

- [Benefit payments](#), clarifying and codifying payment and valuation policies [proposed regulations scheduled for November 2018]
- [Proposed regulations to clarify and codify policies on the determination of guaranteed benefits for participants in multiemployer plans](#) [proposed regulations scheduled for September 2019]
- [Proposed regulations to update the methodology for setting interest assumptions under the benefit payments regulation for paying benefits in single-employer plans](#) [proposed regulations scheduled for September 2019]
- [Amendments to benefit valuation and asset allocation regulations to improve assumptions and methods](#), including possible modifications to mortality rates and interest factors [proposed regulations scheduled for September 2019]
  - The proposed rule will amend PBGC [final regulations](#) issued in December 2005.

- [Methods for computing withdrawal liability](#) under the Multiemployer Pension Reform Act of 2014 [proposed regulations scheduled for November 2018]
  - As reported in the [April 5, 2018, Benefits Byte](#), the PBGC published clarifying [guidance](#) on April 4 regarding a multiemployer pension plan's proposed adoption of alternative payment amounts and how to satisfy withdrawal liability – the statutory obligation imposed upon employers who withdraw from a multiemployer plan.
- [Miscellaneous Corrections, Clarifications, and Improvements](#) to PBGC's regulations, notably 29 CFR part 4043 (dealing with reportable events) [proposed regulations scheduled for December 2018]
- [Guidance to clarify rules on arbitration procedures regarding multiemployer plans](#) [proposed regulations schedule for July 2019]

#### *Final Rule Stage*

- [Regulations to make changes to the reporting, disclosure, and valuation for certain terminated or insolvent multiemployer plans and duties of plan sponsors](#) [final regulations scheduled for March 2019]

## [SEC](#)

The following retirement policy items are listed on the SEC agenda:

#### *Final Rule Stage*

- [Regulations to establish a standard of conduct for broker-dealers and natural persons who are associated persons of a broker-dealer](#) when making a recommendation of any securities transaction or investment strategy involving securities to a retail customer, as well as to implement related record-making and recordkeeping obligations [final regulations scheduled for September 2019]

It is also notable that SEC is pursuing several regulatory projects related to swaps. Defined benefit pension plans often use swaps to hedge or mitigate risks endemic to plan liabilities and investments. [The Council testified on the importance of swaps](#) for defined benefit plans in a [2011 hearing](#) of the U.S. House of Representatives Financial Services Committee's Subcommittee on Capital Markets and Government Sponsored Enterprises and has commented repeatedly on proposed margin rules for uncleared swaps, since such rules can impose unnecessary costs and restrictions on pension plans that are simply trying to manage risks.

For more information on regulatory activity as it applies to retirement matters, please contact [Jan Jacobson](#), senior counsel, retirement policy. For more information on regulatory activity as it applies to executive compensation matters, please contact [Lynn](#)

[Dudley](#), senior vice president, global retirement and compensation policy. For more information on regulatory activity as it applies to health care matters, please contact [Kathryn Wilber](#), senior counsel, health policy. All can be reached at (202) 289-6700.