BENEFITS INSIDER

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The ***Benefits Insider*** is a bimonthly member exclusive publication prepared for WEB members by the American Benefits Council ("the Council"), a premiere benefits advocacy organization based in Washington, DC. This newsletter provides the latest news and analysis on the most important benefits-related policy matters in Congress, executive branch agencies and the federal judiciary.

Please note: any views or opinions expressed in these stories represent the advocacy positions of the American Benefits Council and its membership. They do not necessarily reflect the views of WEB or its membership. To inquire about membership with the American Benefits Council, contact Deanna Johnson at (202) 289-6700 or djohnson@abcstaff.org.

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RECENT LEGISLATIVE ACTIVITY

House Lawmakers Echo Council Concerns with SEC's Predictive Data Analytics Rule Proposal

Noting many of the concerns identified by the American Benefits Council, a bipartisan group of lawmakers sent the Securities and Exchange Commission (SEC) a letter signed by 20 U.S. House of Representative members asking the agency to withdraw its proposed rule, "Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker Dealers and Investment Advisers."

The Council has argued that the predictive data analytics (PDA) rule would impose broad and potentially burdensome conflict-of-interest requirements on broker-dealers and investment advisers that use even simple technologies to communicate with clients and fund investors or manage clients' assets. This would negatively affect plan sponsors and participants in company retirement plans.

While supportive of protecting investors form conflicts of interest, lawmakers write "the definition of 'covered technology' used is so vague and expansive that it would include tens of thousands of technologies that have been in common use for decades, including spreadsheets, basic investment analysis tools, and web-based retirement calculators," reflecting similar concerns held by the Council.

Examples of the beneficial technologies that would unfortunately be covered by this proposal include simple programs used by individuals to determine:

- How much money they need to retire.
- How much they need to save annually to achieve their retirement goals.
- How much money they can afford to spend annually during retirement.

The proposal would also cover programs used to demonstrate to individuals the advantages of saving for retirement.

The letter notes these, and other more innovative tools, have been critical to increasing participation in our markets among low-income investors, and this rule would harm historically retirement savers and investors who rely on low-cost brokerage services and self-directed investment tools.

Lawmakers Propose Bipartisan Bill to Account for Long-Term Preventive Health Savings; Council Offers Support

Part of the American Benefits Council's drive for health care cost control is the promotion of preventive care, which helps address health challenges before they become chronic and more expensive to treat. A new, bipartisan effort in Congress, supported by the Council, aims to improve the legislative environment for measures that would advance preventive care.

The Preventive Health Savings Act would direct the Congressional Budget Office (CBO) – Congress' official budget scorekeeper – to extend its analysis of preventive health measures beyond the existing 10-year budget window to two additional 10-year periods. Under the bill, preventive health is defined as "action that focuses on the health of the public, individuals, and defined populations in order to protect, promote, and maintain health and wellness and prevent disease, disability, and premature death that is demonstrated by credible and publicly available evidence from epidemiological projection models, clinical trials, observational studies in humans, longitudinal studies, and meta-analysis."

The measure is sponsored in the U.S. Senate (S. 114) by Benjamin Cardin (D-MD), Mke Crapo (R-ID), Angus King (I-ME) and Kevin Cramer (R-ND). The bill is sponsored in the U.S. House of Representatives (H.R. 766) by Representatives Michael Burgess (R-TX) and Diana DeGette (D-CO).

In **a February 14 letter endorsing the legislation**, the Council said "the only way to truly make health care more affordable is to understand and address the root causes of rising health care spending, including the prevalence of chronic conditions. … Preventive health care initiatives lower health care costs and allow employees to live longer, healthier and more productive lives."

In particular, the enactment of S. 114/H.R. 766 could make it easier to pass legislation supported by the Council such as the Chronic Disease Management Act (S. 655), which would allow health savings account-eligible high-deductible health plans to provide access to health care services and medications that manage chronic conditions on a pre-deductible basis.

RECENT REGULATORY ACTIVITY

Council Addresses Concern in SECURE 2.0 Guidance with IRS

The Internal Revenue Service (IRS) late last year issued Notice 2024-02, offering guidance in the form of questions and answers under numerous sections of the SECURE 2.0 Act. As part of its ongoing dialogue with Treasury Department and IRS officials, the American Benefits Council has raised targeted concerns about one aspect of the guidance.

While the notice overall positively clarifies a number of provisions of the SECURE Act of 2022, the Council raises concern with Q&A A-3, which addresses, in part, the SECURE 2.0 Act provision expanding employers' ability to use automatic enrollment in retirement plans. We believe Notice 2024-02 affects the grandfathered status of single-employer plans when merged into pooled employer plans (PEPs) or multiple employer plans (MEPs) established after December 29, 2022.

In a **February 7 letter to the IRS**, the Council argues Q&A A-3 is "technically incorrect" and has adverse effects for plan sponsors. The Council argues the notice contradicts the grandfather provision in the relevant statute and is inconsistent with existing code sections related to PEPs. The Council suggests the notice puts post-enactment PEPs and MEPs at a disadvantage, limiting employer options, stifling innovation and potentially leading to less competition and higher fees for participants.

Under Notice 2024-02, if a plan sponsor with a grandfathered plan wants to join a new PEP or MEP, it will have to give up its grandfather status, thereby increasing its matching costs "very materially" in some cases.

The letter also notes the guidance violates the Administrative Procedure Act (APA) by retroactively changing the industry without proper notice and comment, classifying Q&A A-3 as a legislative rule rather than an interpretive rule.

In a **follow-up February 20 letter**, the Council reiterated concerns with Q&A A-3 and our intentions to continue to gather additional information for further input.

GAO Report Discusses Challenges in Management, Consolidation of Retirement Savings Plans

The Government Accountability Office (GAO) recently released a report addressing issues related to tracking and consolidating retirement savings, particularly in 401(k) plans.

The February 20 report emphasizes the need for legislative and executive actions to address challenges in tracking and consolidating retirement savings, offering specific recommendations to improve the system for 401(k) plan participants.

An overall theme of the report is rolling over a balance from a plan to an IRA, from an IRA to another IRA or from a plan to a plan is too difficult. The report aims to enhance the effectiveness of retirement savings management and increase the ease with which participants can navigate and consolidate their accounts.

The report includes recommendations to Congress such as considering enacting legislation to grant authority to a federal agency to establish a "pension dashboard," allowing participants to view information about their workplace retirement plans in a centralized location. Additionally, the GAO recommends granting authority to the U.S. Department of Labor (DOL) and Internal Revenue Service (IRS) to establish an automatic plan-to-plan rollover system for participants changing jobs.

The report also includes recommendations to three agencies:

- Pension Benefit Guaranty Corporation (PBGC): Assess and report to Congress on transferring small inactive account balances to the Missing Participants Program.
- U.S. Treasury Department: Take action to clarify the 402(f) notice, such as by amending the notice.
- DOL: Issue a request for information to explore data standards for rollovers and provide participants with information about all distribution options.

While the report recognizes that the SECURE 2.0 Act makes progress on many of these issues, the GAO glosses over them and does not mention that regulators will likely spend years implementing what Congress has already mandated.

RECENT JUDICIAL ACTIVITY

Class-Action ESG Lawsuit Survives Motion to Dismiss in Federal Court

In a ruling with alarming implications for employer-sponsored retirement plans, the U.S. District Court for the Northern District of Texas has allowed a case to advance alleging fiduciary violations in connection with a company's stated commitment to environmental, social and governance goals (ESG).

In *Spence v. American Airlines*, the plaintiffs argue that the defendant company violated its fiduciary duties under ERISA to its 401(k) plan because it hired and failed to properly monitor investment managers that pursue ESG goals in their investment strategies at the expense of financial returns for plan participants.

In ruling against a motion to dismiss the suit, the court found that the plaintiff articulated a "plausible story" that the company's public commitment to ESG initiatives motivated a decision to invest the plan's assets with investment managers that pursued allegedly underperforming ESG investments; in fact, the court points out that the plaintiff has pled more than is required to survive a motion to dismiss.

This survival of a motion to dismiss appears to lower the threshold for a motion to dismiss and therefore could inspire a wave of lawsuits against 401(k) plan fiduciaries that hire investment managers with ESG investment policies, leading to costly discovery.

While litigation against the federal and state governments challenging such policies has become more common, *Spence* appears to be one of the first lawsuits targeting the private sector on the issue of ESG investing. And because the complaint targets several of the country's largest investment managers, any final decision in the case could have a major impact on the investment strategies of managers that are responsible for trillions of dollars in retirement savings.

In its communications with policymakers in Congress and the executive branch, the American Benefits Council has consistently emphasized the need for clear and workable rules regarding the investment of plan assets.