



Pension & Benefits Quarterly

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March 2021

Qualified Retirement Plans Updates

By Ami Givon | GCA Law Partners LLP

Consolidated Appropriations Act, 2021 (CAA) Provisions:

The CAA, the expansive appropriations package signed into law on December 27, 2020, contained provisions affecting qualified plans and individual retirement accounts (“IRAs”), including relief for plan sponsors and participants affected by the COVID-19 pandemic and other disasters. Applicable CAA provisions are:

Partial Plan Termination Relief: A plan will not be treated as experiencing a partial plan termination (that would trigger the full vesting provisions of Internal Revenue Code (Code) section 411(d)(3)) for any plan year that includes the period beginning March 13, 2020, and ending March 31, 2021, if the number of

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“ As we head into 2021, I am reminded how personally grateful I am for our WP&BC family and the community we share professionally... Thanks to all of you for being part of my professional community. ”

Karen Mack,
Gallagher

President’s Letter - Pg 2



President's Letter

Happy Winter 2021!

Welcome back to our newsletter. I hope that everyone had a safe and healthy holiday season and that you are all continuing to cope through the realities of the pandemic. For the first time in many years, and in order to ensure safety for my aging parents, we chose not to travel for the holidays. My family here and across the country therefore shared our family holiday experience via Webex. <<Sigh...>> Such is the reality of this time and we all have our own stories. As we head into 2021, I am reminded how personally grateful I am for our WP&BC family and the community we share professionally. The shared experiences we have through programs and brown bags (and board meetings!) has helped me feel connected, and it has been an important part of my well-being strategy over the past year. Thanks to all of you for being part of my professional community.

Last summer, our Board sent an important and heartfelt announcement to our membership stating unequivocally that ... *"we stand against racial inequality, ongoing injustice, and embrace diversity and inclusion for everyone. Education and equality are core principles of our profession. It is our responsibility to uphold these principles as leaders in our profession and make room for necessary and important discussions around racism, inequality and injustice in our society, in business and our personal lives."* Since that announcement, we have spent a great deal of time at the board level discussing the role diversity and inclusion has in our programming and community. Our February 26th Chapter Meeting was an outstanding program featuring a panel of three plan sponsors, who discussed how they address Diversity, Equity and Inclusion in their benefits offering. We are also working on a more formal D&I mission statement and measurements to ensure that we are supporting diversity and inclusion so that all feel welcome in our community. Stay tuned for more information and please reach out to any one of us with your ideas to help us move the needle in this important area.

As per usual, our board and committee chairs (and committee members!) have been hard at work to make sure that we are delivering a fulfilling calendar of educational events for the 2020-2021 program year. Since our last newsletter, we hosted four events!

On December 10th, we held a program session featuring **Bernie Knobbe**, the Head of Global Benefits & Wellbeing with **AECOM**. Bernie shared details of AECOM's highly acclaimed, award-winning wellness program. He is an enthusiastic speaker and we all came away with great ideas for benefits communication.

We recently kicked off the second half of the program year on January 14th with a Washington update on the political landscape with added insight on retirement, healthcare and social security with the new Administration. **Michael Townsend**, V.P. Legislative and Regulatory Affairs with **Charles Schwab** was the speaker. It was very well-attended and received high marks from all.

On January 26th, **Ami Givon** of **GCA Law Partners LLP** led a brown bag lunchtime webinar on the DOL's new fiduciary rule. Those of us on the call appreciated Ami's attention to detail in explaining the new rules and walking us through how the change in the Presidential Administration could affect its implementation.

And on February 26th our panel discussion on how human resource professionals are promoting diversity, equality and inclusion through training and benefits. The speakers were **Sharawn Connors** of **Micron Technology**, **Carmen Lewis** of **Amy's Kitchen** and **Lisa Phelps** of **American Homes 4 Rent**.

Please block off time in your calendars for upcoming activities:

March 25, 2021 will be a program featuring how to help essential workers during COVID. Stay tuned for more details!

April 21, 2021 will be an economic update from JP Morgan. Stayed tuned for more details!



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May 16-19th will be the jointly sponsored (with NIPA) **NAFE Annual Expo – either in New Orleans, LA or Virtual (stay tuned for the final decision)**. More advertising will be coming soon.

This organization exists to benefit its members and so we need your continued support. If you haven't yet renewed your membership or are considering becoming a member, please do so at your earliest convenience. If your organization is looking to be a sponsor and you missed out on the 2020/2021 year, please keep us in mind for 2021/2022 as you are setting budgets. It is the generosity of our sponsors that enable us to continue delivering valuable programming and networking opportunities for our benefits community.

**Karen Mack, FSA, EA, MAAA
Gallagher**

PRESIDENT'S LETTER

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Gallagher - Thought Leadership

Optimizing Compliance and Organizational Wellbeing in 2021

From fostering a workplace culture centered on supporting the physical, emotional, career and financial wellbeing of employees to ensuring that benefit programs are compliant with local, state and federal requirements, effectively protecting your employees' wellbeing connects directly to protecting the wellbeing of your organization overall. Here are some topics to help kick off 2021 with action items to tackle during the year ahead.

Strategize over how to address COVID-19 vaccination questions for the workplace.

Perhaps the biggest COVID-19 related question for early 2021 is: What do we need to know about coronavirus vaccinations in the workplace?

Take a proactive approach to address the need for leave due to COVID-19. Even though the Families First Coronavirus Response Act's (FFCRA's) mandatory leave provisions expired on December 31, 2020, COVID-19 continues to cause illnesses and school closures. How will your organization address additional time off needs due to COVID-19?

Revisit mental health parity compliance. Both the federal and state governments are increasing their enforcement of mental health parity requirements. How prepared is your employer-sponsored group health plan to meet the CAA's comparative analysis documentation requirements?

Check on the health of your wellbeing program. The physical and psychological toll of 2020 will likely have lingering effects on your employees and their families. Employers may wish to assess their wellbeing programs not only in light of regulatory requirements, but also with an eye toward mental, physical, and financial wellbeing needs arising from COVID-19.

Perform an assessment of your employee benefits data cybersecurity. In addition to a health pandemic, a pandemic of cyberattacks arose during 2020. What steps has your organization taken to ensure that its employee benefit data is protected not only internally but also in the hands of third-party service providers?

Following is a link to an information article exploring additional details of these issues:

<https://ajg.adobeconnect.com/ccyearahead/>



Register now for the March Chapter Meeting!
March 25, 2021 - 12:00 p.m. - 1:30 p.m.

Learn how Voya's DEI resources help encourage
financial wellness for underserved employees.

Visit: www.wpbcsanfrancisco.org to register!



Membership Means Community

Our chapter programs and activities allow members to network, exchange ideas and expand your knowledge with peers who share professional interests. Membership allows you to become both a member of the employee benefits community and a more valuable resource to your employer.

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Current Membership Special for NEW Members – Tell your colleagues and friends!

Join in March and receive four months free - March, 2021 through June, 2022!

Our program year runs from July 1 to June 30 each year.

Join the Western Pension & Benefits Council San Francisco Chapter during this month for the 2021-2022 program year and get four extra months!

If you are a lapsed member and did not renew in 2020, this special also applies to you!

Membership fee reduction for 2021-2022 Program Year

In recognition of the fact that our meetings will be virtual for as long as needed, we will continue to offer a reduction for membership: \$95.00 for individual members, as well as reductions to other levels. Trust us, we can't wait to get back to normal and meet in person!

One-Time Membership fee waiver for 2021-2022 Program Year

We understand that these are challenging times. If you are not able to pay the discounted fee, you can select the one-time fee waiver and remain part of our community. We are committed to members during this time and want to help our community through this so we all come through it stronger together.

We are committed to offering our community a full and interactive experience as a member, which will include virtual events until it is safe and acceptable to meet in person.



MEMBERSHIP MEANS COMMUNITY

Member Profile: Frank Y. Suzuki

Company: Relation Insurance Services

Title: Vice President, Retirement Administration

Education: University of California, Davis

Years in the industry: 40 years

Please tell us about your first “real” job: In the summer of 1981, I joined Shadur LaVine & Associates in Encino, CA as a Pension Administrator in the land of movie stars and swimming pools. This was great introduction to the retirement administration business. I am grateful for the opportunities and acquaintances I made during my 10 years in Southern California before moving back to Northern California. I remember thinking that I would give this a try for three years before considering a career change. It’s amazing to recall those early days and how time has passed so quickly.



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BUSINESS BACKGROUND

Nature of your work: Third Party Administration

How you got into the field: My UC Davis roommate, Gene Farber, made a comment during our last summer that I should talk to his brother David when we were discussing our next steps in life. David Farber is an Actuary I worked with at Shadur LaVine & Associates. This led to an interview to which they accepted my application for employment. I can’t say enough of my appreciation towards David and his parents Marvin and Ruthie Farber for welcoming me and letting me stay at their Santa Monica home while I got settled and found a place of my own.

What you like about the field: Like others, I find it gratifying to help individuals provide for their retirement, which is commonly overlooked. I enjoy helping clients navigate the intricacies of Qualified Retirement Plans while building their trust and confidence.

From an industry perspective, I like the sense of commonality, sharing of knowledge and helpfulness that I find refreshing and energizing. More recently, I enjoy the interaction with the new talent, including the children of my earlier work associates.

PERSONAL

Ways you spend free time: I enjoy spending time with my wife, Jan, our twin girls and dog. We routinely have family adventures, whether it be a game, weekend getaway or a day trip to the beach. I also enjoy fly fishing, hiking and spending time outdoors.

Guiding philosophy: Treat others the way you want them to treat you.

Favorite charities: As a Rotarian, I’ve seen many good charities. It’s hard to choose just one. Let’s help them all to the extent we can.

Last books read: “The Culture Code: The Secrets of Highly Successful Groups” by Daniel Coyle.

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Member Profile continued: Frank Y. Suzuki

Restaurant recommendations: Gianni's Italian Bistro in San Ramon and Horn BBQ in Oakland.

What will you do when you retire: Stroll on the beach with my family and dog, teach my girls to fly fish on a peaceful lake, try winter camping in a hammock.

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MEMBER PROFILE



Create Opportunities

CLA is the leading provider of employee benefit plan audits in the country. Our industry professionals have worked with employee benefit plans for more than 60 years, and our dedicated team of 350 professionals audit more than 3,000 plans nationally.

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Member Pet Profile:

Name: Violet

Breed: Muted Tortie.

My human is: Sarah Kanter

How did I find my human: My human adopted me and my brother from Hopalong when I was a kitten.

How I help my human do their job: Verify their camera works on conference calls by walking in front of it. I'm very helpful.

Favorite part of my human working from home: Food dish gets filled quicker, more lap time.

Least favorite part of my human working from home: Zoom calls interfere with my naps, lots of disruptive package deliveries.

Favorite place to visit outside of the house: Don't know, human won't let me out.

What I learned about my human working from home: How many pairs of sweatpants they own.

Favorite human food: Anything with cream in it.

What will you do when you retire? Travel the world. Just kidding, no major plans.



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Qualified Retirement Updates, continued

active participants covered by the plan on March 31, 2021, is at least 80 percent of the number of active participants on March 13, 2020.

Disaster Relief: Plan and IRA-related relief is available for individuals whose principal residence was in a federally-declared (other than solely by virtue of COVID-19) disaster area. The disaster area must have been declared as such between January 1, 2020, and February 25, 2021. The relief is akin to that provided under the Coronavirus Aid, Relief, and Security Act (CARES Act) (penalty-free distributions of up to \$100,000; plan loan limits increased to \$100,000 and postponement of plan repayments; three-year period income inclusion and option to recontribute distributions). Plans are not required to provide for any disaster relief, but those that do must be amended retroactively to conform to applicable provisions by the last day of the plan year that begins on or after January 1, 2022 (2024 for governmental plans).

The CAA does not include a required minimum distribution waiver, as the CARES Act did for 2020, and does not extend the COVID-19 relief provided under the CARES Act beyond 2020.

Extension of In-service Coronavirus-related Distributions (CRDs) to Money Purchase Pension Plans: Money purchase pension plans are permitted to provide in-service CRDs under the CARES Act, but only for the period January 1, 2020 to December 30, 2020.

In-service Distributions from Certain Participants in Multiemployer Plans: The age at which in-service distributions may be taken from multiemployer plans by certain employees in the building and construction industry is retroactively lowered from 59½ to 55.

Election to Terminate Transfer Period for Qualified Transfers from Pension Plans for Covering Future Retiree Costs: Code section 420(f) is amended to allow an employer that had made a “qualified future transfer” of assets from an overfunded defined benefit plan to cover future retiree health or life insurance costs to elect, by no later than December 31, 2021, to terminate the transfer period with respect to the transfer.

Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act) Guidance: On December 9, 2020, the IRS issued Notice 2020-86, providing guidance on the SECURE Act provisions that increased the maximum qualified percentage of compensation under a qualified automatic contribution arrangement (QACA) safe harbor 401(k) plan from 10% to 15% and that eliminated the safe harbor notice requirements for safe harbor 401(k) plans that provide for safe harbor nonelective contributions. The notice’s statements include:

- A QACA plan is not required to increase the maximum qualified percentage to 15%.
- A plan that incorporates the maximum qualified percentage by reference to the applicable Code section may continue to apply the pre-SECURE Act maximum of 10% in operation as long as it amends the plan by the SECURE Act plan amendment deadline to provide explicitly that the plan’s maximum qualified percentage is 10%, retroactive to the first day of the first plan year beginning after December 31, 2019. Failure to timely amend will result in the plan having failed to have operated in accordance with its terms as of the first day of the first plan year beginning after December 31, 2019.
- A plan may be amended after the SECURE Act amendment deadlines to provide for a maximum qualified percentage of up to 15%, in accordance with the general discretionary amendment deadline rules.
- Although the SECURE Act eliminated the safe harbor notice requirement for traditional (non-QACA) 401(k) plans that seek to satisfy the actual deferral percentage test (for elective deferrals) by making safe harbor nonelective contributions, it did not eliminate the safe harbor notice requirement for traditional 401(k) plans with respect to satisfying the actual contribution percentage test (for matching contributions) through the

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Qualified Retirement Updates, continued

making of safe harbor nonelective contributions. However, for QACA plans providing for safe harbor nonelective contributions, the notice requirement was eliminated for both purposes.

- In the case of a plan for which the safe harbor notice is not required, the providing of a notice that includes a statement that the plan may be amended mid-year to reduce or suspend safe harbor nonelective contributions will not cause non-compliance with the Code's safe harbor provisions.

Notice 2020-86 also addresses two safe harbor plan amendment fact patterns, as well as applicable retroactive amendment requirements. It states that its guidance applies on similar terms to 403(b) plans that apply the Code section 401(m) safe harbor rules.

Rollover Rules for Qualified Plan Loan Offset Amounts: On January 6, 2021, the IRS issued its final regulations relating to amendments made to Code section 402(c) by section 13613 of the Tax Cuts and Jobs Act (TCJA) which provides an extended rollover period for a qualified plan loan offset (QPLO) amount. A QPLO amount is defined in Code section 402(c)(3)(C)(ii) as a plan loan offset amount that is treated as distributed from a qualified employer plan to an employee or beneficiary solely by reason of (1) the termination of the plan, or (2) the failure to meet the plan's loan repayment terms because of the employee's severance from employment. The final regulations:

- Add new Treasury regulations section 1.402(c)-3 to take into account changes to the rollover rules made by section 13613 of the TCJA with respect to QPLO amounts;
- Provide that a distribution of a plan loan offset amount that is an eligible rollover distribution and not a QPLO amount may be rolled over by the employee (or spousal distributee) to an eligible retirement plan within the 60-day period set forth in Code section 402(c)(3)(A) (subject to the special rules for the waiver of the 60-day rollover deadline); and
- Provide that a distribution of a plan loan offset amount that is an eligible rollover distribution and a QPLO amount may be rolled over by the employee (or spousal distributee) to an eligible retirement plan through the period ending on the individual's tax filing due date (including extensions) for the taxable year in which the offset is treated as distributed from the plan.

The final regulations are applicable to plan loan offset amounts, including qualified plan loan offset amounts, treated as distributed on or after January 1, 2021. However, taxpayers (including a filer of a Form 1099-R) may choose to apply the regulations with respect to plan loan offset amounts, including QPLO amounts, treated as distributed on or after August 20, 2020.

Extension of Temporary Relief from the Physical Presence Requirement for Consents Under Qualified Plans:

In Notice 2021-03, the IRS extended through June 30, 2021, the temporary relief provided in Notice 2020-42 from the requirement that certain participant elections and spousal consents be witnessed in the physical presence of a notary public or plan representative. Witnessing will be deemed satisfied if made remotely via live audio-video technology that otherwise satisfies specified requirements.

Required Amendments List for 2020: In Notice 2020-83, the IRS issued its Required Amendments List for 2020 (2020 RA List) for individually designed Code section 401(a) plans and individually designed Code section 403(b) plans.

The 2020 RA List requires that plans that are maintained by employers that have provided difficulty of care payments during plan years beginning after December 31, 2015, and before January 1, 2021, be amended by December 31, 2022 or, if later, the SECURE Act section 601 date applicable to the plan, as set forth in Notice 2020-68. If an employer



Qualified Retirement Updates, continued

changes its practice and begins to make difficulty of care payments to its employees in future years, the plan must be amended to include difficulty of care payments in the definition of Code section 415(c)(1) compensation by the end of the second calendar year following the calendar year in which the employer begins to make those payments.

The 2020 RA List also states that new Code section 414(y)(1)(D) provides that a cooperative and small employer charity pension plan is defined to include a defined benefit plan that, as of January 1, 2000, was maintained by a tax-exempt employer that met specific characteristics.

Covered Compensation Tables for 2021 Plan Year: The IRS in Revenue Ruling 2021-3 has issued tables of covered compensation under Code section 401(l)(5)(E) for the 2021 plan year.

Updates to Determination Letter Program: The IRS has released Revenue Procedure 2021-4, which updates the IRS's determination letter program and sets out the user fees that will apply to various IRS submissions, including determination letter and Voluntary Correction Program applications.

Department of Labor (DOL) Developments:

Final Amendment to Regulation Addressing Fiduciary Duties Regarding Proxy Voting and Shareholder Rights:

On December 16, 2020, the DOL published its final regulation to its "investment duties" regulation to address the application of ERISA's prudence and exclusive purpose requirements to the exercise of shareholder rights, including proxy voting. The final regulation became effective on January 15, 2021. The DOL also removed Interpretive Bulletin 2016-01 from the Code of Federal Regulations because it no longer represents the DOL's view regarding these duties.

However, the DOL on March 10, 2021, announced a nonenforcement policy regarding this regulation while it considers additional guidance on the issues involved. The nonenforcement policy applies also to the DOL's final regulation on "Financial Factors in Selecting Plan Investments," published on November 13, 2020, addressing the extent to which fiduciaries may take into account nonpecuniary factors in making investment decisions.

The final regulation restates that fiduciaries must act prudently and solely in the interests of plan participants and beneficiaries in deciding whether and how to exercise shareholder rights, including the voting of proxies. It details how only the economic interests of the plan and its participants and beneficiaries are to be considered, the duties fiduciaries have regarding investigation, the rules applicable to the use of proxy advisory firms or other service providers, and the requirements for recordkeeping the exercise of shareholder rights. It clarifies that fiduciaries are not required to vote all proxies, and provides for two safe harbor policies that fiduciaries may adopt to satisfy their fiduciary responsibilities with respect to decisions on whether to vote proxies.

The final regulation provides guidance to investment managers of pooled investment vehicles that hold assets of more than one plan who may be subject to conflicting investment policy statements.

Investment Advice Prohibited Transaction Exemption: On December 18, 2020, the DOL published the final version of "Prohibited Transaction Exemption 2020-02, Improving Investment Advice for Workers & Retirees," which permits investment advice fiduciaries to ERISA plans and IRAs to receive compensation and engage in certain transactions that would otherwise constitute ERISA or Code prohibited transactions, provided certain conditions are met. No new regulatory definition of "investment advice" has been created, but the DOL in preambles to the proposed and final versions of the exemption included interpretations of the existing definition. The exemption became effective on February 16, 2021 (with the DOL/IRS enforcement policy announced in Field Assistance Bulletin (FAB) 2018-02 to continue until December 20, 2021).

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Qualified Retirement Updates, continued

Guidance on Locating Missing Participants: In FAB 2021-01, issued on January 12, 2021, the DOL announced a temporary enforcement policy under which it will not pursue violations of ERISA section 404(a) against either responsible plan fiduciaries of terminating defined contribution plans or qualified termination administrators (QTAs) of abandoned plans in connection with the transfer of a missing or non-responsive participant's or beneficiary's account balance to the Pension Benefit Guaranty Corporation (PBGC) in accordance with the PBGC's missing participant regulations rather than to an IRA, certain bank accounts, or to a state unclaimed property fund, if the plan fiduciary or QTA complies with the guidance in the FAB and has acted in accordance with a good faith, reasonable interpretation of ERISA section 404(a) with respect to matters not specifically addressed in the FAB. The DOL also has issued a document that lists both "red flags" that indicate a possible missing participants problem for a plan and examples of best practices that in the DOL's experience have proven effective at minimizing and mitigating the problem of missing or nonresponsive participants.

Increase in Statutory Penalties: On January 14, 2021, the DOL issued its final rule providing for inflation-adjusted increases for statutory penalties for ERISA violations, as required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. Among the increases was the maximum penalty for failure to file a Form 5500 to \$2,259 per day. The increases apply to penalties assessed after January 15, 2021 (with respect to violations occurring after November 2, 2015).

PBGC Developments:

Increase in Penalties: The PBGC has increased to \$2,259 per day (up from \$2,233 per day) the maximum amount it may assess as ERISA section 4071 penalties for the failure to provide certain notices or other material information, and to \$301 per day (up from \$297 per day) the maximum amount it may assess as ERISA section 4302 penalties for failure to provide certain multiemployer plan notices. The increases took effect January 13, 2021.

Increase of Maximum Monthly Benefit Guarantee Limits for 2021: The PBGC has issued its table showing the 2021 monthly maximum benefit guarantees for single-employer plans. The 2021 guarantee limits for single-employer plans are 3.81% higher than the 2020 limits due to indexing as required by ERISA.

Amendment of Regulation on Allocating Assets in Terminating Single-Employer Plans: On December 7, 2020, the PBGC issued an amendment to its regulation on the allocation of assets in single-employer plans by substituting a new table for determining expected retirement ages for participants in pension plans undergoing a distress or involuntary termination with valuation dates falling in 2021.

Amendment of Methods for Computing Withdrawal Liability: The PBGC has issued amendments to its regulations on allocating unfunded vested benefits to withdrawing employers and notice, collection and redetermination of withdrawal liability. The amendments implement statutory provisions affecting the determination of a withdrawing employer's liability under a multiemployer plan and the annual withdrawal liability payment amount when the plan has had benefit reductions or suspensions, surcharges or contribution increases that must be disregarded. The amendments, which also provide simplified withdrawal liability calculation methods, are applicable to employer withdrawals from multiemployer plans that occur in plan years beginning on or after February 8, 2021.

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Health and Welfare Regulatory Update

Elizabeth Harris

Orrick, Herrington & Sutcliffe LLP

I. COVID-19 Vaccines and Testing for Group Health Plans

In November 2020, the Trump Administration's Department of Labor ("DOL"), Health and Human Services ("HHS"), and the Treasury (collectively, the "Departments") issued interim final regulations ("IFR") that address a number of issues regarding the U.S. outbreak of COVID-19. The HHS's Centers for Medicare and Medicaid Services ("CMS") also issued a fact sheet and news release relating to the interim final regulations. It is not clear yet whether the Biden Administration may reverse some of the Trump Administration's policies or issue another rulemaking or sub-regulatory guidance affecting the scope of the rules.

The IFR implement certain requirements under the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") legislation, enacted in March 2020 in response to COVID-19, for group health plans and health insurers. Notably, the IFR:

1. Address how and when group health plans and health insurers will be required to provide coverage for COVID-19 vaccines (when available).
2. Update Affordable Care Act ("ACA") requirements regarding preventive health services to reflect a CARES Act provision that reduced the timeframes under which group health plans and insurers must cover "qualifying coronavirus preventive services" (including recommended COVID-19 immunizations) without cost-sharing.
3. Implement a CARES Act requirement under which health providers of COVID-19 diagnostic tests must make their cash prices for the test public.
4. Establish procedures for enforcing the cash price disclosure requirements.

The IFR applies from November 2, 2020, for the duration of the COVID-19 public health emergency, as determined by HHS.

II. 2020 ACA Information Reporting Instructions

The Internal Revenue Service ("IRS") has finalized the forms and related instructions for 2020 information reporting under the ACA for Forms 1094-C and 1095-C. In addition to certain generally applicable changes, the 2020 final instructions include updates to reflect individual coverage health reimbursement arrangements ("ICHRAs"). ICHRAs are permitted under the Trump Administration's final regulations, that were finalized in June 2019, and generally apply for plan years beginning on or after January 1, 2020, and impose conditions that must be satisfied for HRAs to be integrated with individual health insurance coverage.

Section 6055 of the Internal Revenue Code (the "Code") requires employers with self-insured health plans, health insurers, and other providers of minimum essential coverage ("MEC") to file information returns and provide employee statements regarding health coverage (if any) that the employer provides. Information provided under Code Section 6055 was used, among other purposes, to enforce the ACA's individual mandate. However, tax reform legislation enacted in December 2017 reduced the penalty to zero for violating the ACA's individual mandate, effective beginning in 2019.

Code Section 6056 requires large employers (in general, those with 50 or more full-time employees in the previous year) to file annual information returns with the IRS and provide statements to employees regarding the health insurance, if any, offered by the employer. The Code includes general penalty provisions that apply to ACA information returns and statements required under Code Sections 6055 and 6056. Specifically, Code Section 6721 imposes a penalty for either: (1) failing to timely file an information return; or (2) filing an incorrect or incomplete

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information return.

The new instructions now include updated penalty amounts for failure to file returns and furnish statements. The adjusted penalty amount is \$280 per violation, with an annual maximum of \$3,392,000 (up from a maximum of \$3,339,000, for 2019).

Reporting entities must furnish individual statements (Form 1095-B or 1095-C, or a substitute form) to all full-time employees as well as any individuals covered under self-insured health plans on or before March 2, 2021, (extended from January 31, 2021).

The instructions note that the IRS will grant no additional extensions to furnish individual statements.

Reporting entities must file Form 1094 and Forms 1095 with the IRS by February 28 if filed by paper, and by March 31 if filed electronically. For 2020, paper filings are due by March 1, 2021, since February 28 is a Sunday.

III. Consolidated Appropriations Act: Health and Welfare Benefits Provisions

The Consolidated Appropriations Act (the "Act") was signed into law by President Trump on

December 27, 2020, and includes significant health and welfare benefits provisions that affect group health plans and health insurance issuers. The Act is the most comprehensive piece of legislation to impact group health plans since the ACA.

Below is a summary of the key provisions of the Act that apply to group health and welfare plan sponsors. The Act includes provisions regarding: (1) flexible spending arrangements; (2) surprise medical billing; (3) mental health and substance use disorder benefits; (4) pharmacy benefits reporting; and (5) disclosure of service provider compensation.

1. FLEXIBLE SPENDING ARRANGEMENTS ("FSAs")

Due to changes in circumstances resulting from COVID-19, the Act temporarily relaxes some of the FSA rules. FSA plan sponsors are permitted (but not required) to amend their cafeteria plans to take advantage of the new relief provisions (outlined below) by the end of the first calendar year beginning after the end of the plan year in which the change takes effect. In addition, the plan must be operated in accordance with the amendment terms as of the effective date of the amendment.

- A plan may allow participants to carry over any unspent health or dependent care FSA funds remaining at the end of plan years ending in 2020 and 2021 (generally, only health FSA funds up to \$550 may be carried over).
- If an FSA instead uses a grace period, it may be extended for plan years ending in 2020 and 2021 from the ordinary 2.5 months after year's end to a full 12 months.
- For plan years ending in 2021, a plan may allow participants to prospectively change their FSA contribution election. However, refunds are not permitted.
- For dependent care FSAs, plans may temporarily increase the upper age limit for reimbursable expenses from 12 to 13 for dependents who aged out during the last plan year in which regular enrollment ended on or before January 31, 2020. If the participant has any unspent amounts remaining at the end of that year, this rule also extends to the following year but only for those carried-over amounts.
- A plan may allow employees who cease to participate in a health FSA during calendar year 2020 or 2021 to nonetheless continue to receive reimbursements of unused contributions, through the end of the year (plus any grace period) in which they stopped participating.

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2. SURPRISE MEDICAL BILLING PROVISIONS

Effective for plan years beginning in 2022, employer-sponsored medical plans that cover emergency services must offer services without requiring preauthorization determinations, regardless of whether a health provider that delivers the services is a participating provider in the plan's network or the emergency facility. Such non-ancillary services now must be furnished without coverage limits or requirements that are more stringent than those for emergency services delivered by participating providers. In addition, any cost-sharing requirements for out-of-network services may not be greater than those for services provided by in-network providers. The Act also prohibits air ambulance services from balance billing individuals covered by a group health plan or individual or group health insurance.

(a) Out-of-Network Rate Determinations: Independent Dispute Resolution Process

Similar to many state surprise billing laws, the Act includes open negotiation and independent dispute resolution ("IDR") procedures for use by plans or insurers and non-participating providers to determine the amount that will be paid for a provided service. The parties can participate in a 30-day open negotiation process that begins on the day the provider receives the plan's initial payment (or denial notice) regarding the service.

If the plan or insurer and provider cannot agree to a payment amount during the 30-day open negotiation period, either party may then invoke the IDR process by providing notice to the other party and HHS. If this occurs, a "certified IDR entity" will determine the payment amount for the service. Under implementing guidance concerning the IDR process, there will be criteria for jointly determining the payment amounts as to multiple disputed items (for example, if services are related to treatment for a similar condition). More detail is anticipated in the form of agency guidance.

(b) Health Plan Advance Estimates

Starting in 2022, if a participant schedules a healthcare service to be performed by a provider with sufficient advance notice, the provider must provide advance notice to the health plan. Group health plans and insurers that receive the provider's notice regarding a participant's scheduled service must supply the participant with a notice, generally within one business day of receiving the provider's notice, that contains specified coverage information.

The plan's notice to a participant must state whether the provider is a participating provider as to the scheduled service and, if so, the contracted rate for the service based on relevant billing and diagnostic codes. The notice must also include a good faith estimate of how much the health plan will expect to pay for the scheduled services.

(c) External Review and Surprise Medical Billing

On or before January 1, 2022, health plans must apply the external review procedures of the ACA to benefit denials relating to the Act's surprise medical billing provisions.

3. MENTAL HEALTH AND SUBSTANCE USE DISORDER BENEFITS

Plan sponsors that provide both medical/surgical benefits and mental health or substance use disorder benefits, and that impose non-quantitative treatment limitations ("NQTs") on mental health or substance use disorder benefits, are required to perform and document comparative analyses of the design and application of NQTs. Beginning February 10, 2021, these analyses must be made available to the Departments upon request. Employers whose plans impose separate limitations on mental health benefits will need to test the program and keep a copy of the current test in the event one of the agencies requests it.

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4. PHARMACY BENEFITS REPORTING

By December 27, 2021, and annually thereafter, group health plans will be required to submit to the DOL, HHS and IRS a report detailing plan spending, drug costs, participant premiums and manufacturer rebates, and the effect of manufacturer rebates on premiums. The Departments must then publish a biannual report on prescription drug reimbursements, pricing trends, and the role of prescription drug costs on premiums.

4. DISCLOSURE OF SERVICE PROVIDER COMPENSATION

Service providers for welfare plans were temporarily exempt from the Employee Retirement Income Security Act ("ERISA") requirement to provide fee disclosures to plan fiduciaries. However, the Act ends that reprieve and extends the fee disclosure rules to group health plans. Service providers for group health plans must comply with fee disclosure rules effective December 27, 2021. Such fee disclosure rules potentially apply to any group health plan vendors (including brokers and consultants) that provide services to a group health plan funded with plan assets.

HEALTH AND WELFARE



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The Newsletter welcomes contributions from its members. If you would like to submit a topical benefits-related article for an upcoming issue, please contact the chapter at info@wpbcfsf.org.

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