# LEGISLATION
# BEING CONSIDERED IN 110TH CONGRESS

## I. Pension Protection Act Delay

In the House of Representatives, H.R.3868 was introduced on October 17, 2007 to delay the effective date of the pension funding provisions contained in the Pension Protection Act of 2006 (PPA). Reps. Pomeroy and Cantor sponsored this bill. Generally, this bill delays the effective date of the PPA by one year. However for provisions, such as the interest and mortality tables used to determine pension liabilities, the application of credit balances, accelerated quarterly contributions and limits on benefits and benefit accruals for underfunded plans, the effective date will be delayed to the calendar year following the year in which the regulations are finalized (as long as the finalized regulations are issued by June 30 of that year). Sponsorship of similar legislation is being discussed in the Senate but it is unclear whether this legislation will be enacted before the end of the year.

## II. Alternative Minimum Tax

Both the House and the Senate will be considering legislation to either completely reform the alternative minimum tax (AMT) regime or to continue to provide a short-term exemption from AMT for certain taxpayers. The Chairman of the Ways and Means Committee in the House, Charles Rangel is looking toward providing a complete overhaul of the AMT as part of a major tax reform bill, but, recognizing the lack of time remaining in this legislative year, is willing to move forward with a short term patch to the AMT problem. The Senate is looking only at a short-term AMT patch but is divided on whether there should be offsetting tax increases to pay for it. Because the Senate Democrats on the Finance Committee do not have consensus on whether the AMT patch should be paid for, the Chairman Baucus may bypass the Committee and bring the short-term AMT patch directly to the whole Senate.

## III. Non-Qualified Deferred Compensation

As a part of offsetting the costs of any changes to the tax code, additional limitations on deferred compensation are contemplated. Earlier this year as part of the Senate minimum wage legislation, any deferred compensation accrual in a year which exceeded the lesser of $1 million or 100% of an employee's compensation would be a violation of Internal Revenue Code section 409A and subject to immediate taxation including a 20% additional tax. Earnings on deferred amounts would be included in the determination of the annual deferred compensation accrual. While the expansion of Code section 409A did not make it into the final signed version of the minimum wage bill, it will be used as an offset on any future tax bill. We understand that there will be revisions to this legislation when it is next introduced with the revisions being elimination of the cap based on 100% of an employee's contribution; exclusion of some amount earnings on

deferred amounts from the $1 million cap; and an exclusion from the cap of amounts accrued under certain excess benefit plans.

## IV. $1 Million Deduction Cap on Top Executive Compensation

The Senate minimum wage bill also amended Code section 162(m) – the $1 million deduction cap on executive compensation for the top executives. It provided that once an executive was in the top paid group, he or she would always be in that group, even after retirement and his or her family would be in that group for payments made after the executive's death. What this would mean is that payments or benefits provided to these executives after they retire or otherwise terminate employment would be subject to the $1 million deduction cap. It is anticipated that this provision will also be included in future tax bills along with the expansion of the application of Code section 409A.

## V. Carried Interest/Hedge Funds

Hedge funds and the carried interest that private equity firm managers have are being examined by the tax writing committees and pension funds and other tax exempt organizations that invest in these entities are being scrutinized as well. While the well publicized efforts to tax private equity firm managers carried interest in those entities seem to have been put on the backburner in the Senate, the large amounts of revenue that could be garnered by such taxation may prove irresistible to tax writers later in the session. In fact, Sen. Kerry and Rep. Emanuel have introduced legislation which would limit a common structure for hedge funds and private equity -- deferrals into investments held in foreign countries that are deemed to be tax havens. On the plus side, Sen. Levin has introduced legislation which would make it clear that a pension plan that invests in a private equity fund would not be subject to unrelated business taxable income.

## VI. Stock Options

Sen. Levin has reintroduced legislation that he introduced in the previous legislative session which requires the tax treatment of stock options to the company mirrors the accounting treatment, so that the company would get a tax deduction at the time the options are granted rather than when the options are exercised. We understand that the tax writing committees are not convinced of the merits of such a proposal on a tax policy basis, so that, even with a Congress controlled by Democrats, there is little chance of this legislative proposal receiving serious consideration during the remainder of the legislative session.

## VII. Retirement Savings Vehicles

There continues to be a desire to provide better access to retirement savings vehicles for those who do not have access to an employer-provided retirement savings plan. For example, Rep. Neal has introduced legislation which would allow employees who are not covered by a employer-sponsored retirement savings plan to save for retirement through automatic payroll deductions to an IRA. Some presidential candidates have become interested in this, with Sen. Clinton recently proposing a universal 401(k) plan with matching contributions from the government which would decrease as the individual's

income increased. Of course, the Bush Administration still has its lifetime savings account and retirement savings account (LSA/RSA) proposals outstanding. While there is always interest in this topic, the revenue cost of enacting these proposals limits the possibility of action in this area.

## VIII. 401(K) Fee Legislation

H.R. 3185 (Miller Bill) – Rep. Miller (D-CA) has introduced and held a hearing on his fee disclosure bill. The Miller Bill amends ERISA only and only applies to 401(k) plans. The bill would mandate new fee disclosures by service providers to plan administrators and plan administrators to participants. The requirements of the Miller Bill are extremely detailed and unclear. The Miller Bill also includes a mandatory investment option and the establishment of another DOL Advisory Council.

H.R. 3765 (Neal Bill) – Rep. Neal (D-MA) has introduced competing legislation that only amends the Internal Revenue Code. The Neal Bill applies to all participant directed plans (401(k), 403(b), 457). The bill's requirements are clearer and more general than the Miller Bill, but the bill still could require considerable disclosure, particularly by service providers (including some disclosure aimed at "unbundling" and some disclosure of payments to subcontractors).

Two hearings have been held by the House Education and Labor Committee. Both the House Ways and Means Committee and Senate Aging Committee have scheduled hearings. At this point, it is possible that some fee disclosure legislation could pass the House, although Senate action is uncertain.

## IX. Health Care Legislation

Mental Health Parity (H.R. 1424, S.558) – Legislation is pending in both the House and the Senate that would substantially expand the current mental health parity requirements in ERISA, the Code and PHSA. The bills require parity on all treatment (e.g., number of visits) and financial limits (co-pays, deductibles) – not just annual and lifetime limits. However, the Senate bill still would allow employers to define the scope of mental health benefits (e.g., what conditions are covered or not). The House bill mandates that all plans cover a very broad range of conditions. The bill has passed the Senate and Committees are marking up the bill in the House. If the Senate and House pass different versions and the bill goes to conference, prospects are uncertain. But, it seems unlikely that the President would veto this legislation.

Genetic Information Non discrimination Act (H.R. 493) – This 100 page legislation includes a new employment law title that bars discrimination based on genetic information in terms and conditions of employment (which could include health plans). The legislation also includes ERISA, PHSA, and Code amendments that have very detailed rules prohibiting genetic discrimination for group plans and individual policies. These titles are not coordinated well and there is a risk that employers will be exposed to liability under both titles for the same actions. The bill passed the House

overwhelmingly and Senate Floor action pending. If the Senate and House can reconcile relatively small differences, this legislation is likely to become law.

ERISA Preemption Legislation – Hearings were held in House Education and Labor Committee to review whether ERISA preemption is a roadblock to state-based comprehensive health care reforms. Rep. Andrews (D-NJ) used the House hearing to discuss whether legislation to restrict preemption is needed. Close Congressional scrutiny of ERISA preemption can be expected following the court decisions finding the Maryland and Suffolk County pay or play laws preempted.