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H.R. 1424 (INCLUDING THE EMERGENCY ECONOMIC STABILIZATION, ENERGY IMPROVEMENT AND EXTENSION, AND TAX EXTENDERS AND AMT RELIEF ACTS OF 2008)

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The Emergency Economic Stabilization, Energy Improvement and Extension, and Tax Extenders and AMT Relief Acts of 2008 (the "Act") signed into law on Friday by the President deal primarily with relief of the current national financial crisis by authorizing the Federal government's purchase or insuring of "troubled assets." Troubled assets include principally mortgages, collateralized mortgage obligations and other mortgage related securities. This legislation may provide some relief to a retirement plan which holds troubled assets. The legislation also includes a number of provisions beyond those dealing directly with troubled assets. Among these are new rules for coverage under the health plans available to public retirement system members and employees. This memo briefly addresses certain provisions of the Act of interest to public retirement systems.

Troubled Assets and Retirement Plans

Section 101 of the Act grants the Secretary of the Treasury ("Secretary"), subject to a number of conditions and limitations, authority to purchase troubled assets from any "financial institution." This authority is in effect until December 31, 2009, but may be extended for approximately 9 months upon certification by the Secretary that such extension is necessary to bring about financial stability. [Act, §120]

What is a Financial Institution?

For purposes of the Act, the term "financial institution means any institution, including, but not limited to, any bank, savings association, credit union, security broker or dealer, or insurance company, established and regulated under the laws of the United States or any State … and having significant operations in the United States, but excluding any central bank of, or institution owned by, a foreign government." [Act §3(5), emphasis added] If a plan is a financial institution under the terms of the Act, it might be eligible for relief as to troubled assets it holds.

Are Pension Plans Financial Institutions? Maybe Yes ……

The definition of "financial institution" raises the question of whether a qualified retirement plan is a financial institution within the meaning of the Act. Looking at only the definition of that term, it seems it could encompass a retirement plan – and indeed, almost any other organized entity operating in the United States. This interpretation finds support in Section 2 of the Act which directs that the Secretary exercise authority under the Act in a manner that "protects home values, college funds, retirement accounts, and life savings." In addition, Section 103 of the Act states that "[i]n exercising the authorities granted in this Act, the Secretary shall take into consideration" various factors, including "ensuring that all financial institutions are

eligible to participate in the program, without discrimination based on … form of organization" and "protecting the retirement security of Americans by purchasing troubled assets held by or on behalf of an eligible retirement plan."

……….But, Maybe No

The explicit mention of retirement plans in the above-cited provisions of the Act begs the question of why that term is conspicuously absent from the definition of "financial institution." Some provisions of the Act seem to indicate that Congress did not intend to include retirement plans within the scope of the term financial institution. For example, one might ask whether a pension plan meets the definitional requirement of having "significant operations" in the United States. Of greater concern perhaps is that Section 113(d) of the Act states the Secretary "may not purchase, or make any commitment to purchase, any troubled asset under the authority of this Act, unless the Secretary receives" warrants for common or preferred stock or senior debt instruments "from the financial institution from which such assets are to be purchased." There are modest exceptions to this rule, including "for any participating financial institution that is legally prohibited from issuing securities and debt instruments." However, in such a case, the Secretary must establish "appropriate alternative requirements … so as not to allow circumvention" of the purposes of the Act. It is difficult to identify what type of "alternative requirements" would be practical in the case of a qualified retirement plan that must operate for the exclusive benefit of its participants.

The circumstances giving impetus to enactment of the Act also indicate that it might not provide relief to pensions plans. The powers granted to the Secretary under the Act were intended in large part to increase liquidity in the credit markets. For this reason, it would not be surprising if the Secretary focuses on purchasing troubled assets primarily from financial institutions in a position to significantly influence the availability of short term commercial paper.

What's a Plan To Do?

So, where does this leave pension plans in assessing whether some relief under the Act might flow in their direction? The "purposes" provisions of the Act seem to contemplate the possibility of a purchase of troubled assets from retirement plans while the mandate that the Secretary may not purchase troubled assets without the acquisition of warrants or debt instruments of the seller, or making suitable alternative arrangements, seems to present a hurdle to pension plans participating in the troubled asset purchase program. Significant insight to this question will be available once the Secretary issues regulations or program guidelines as required by Sections 101(c) and (d) of the Act. The program guidelines, due no later than 45 days after enactment of the Act, are to include "criteria for identifying troubled assets for purchase." In the meantime, pension plans may be well served by a strategy of approaching the Secretary on a unified basis to educate the Secretary regarding the troubled assets issues facing retirement plans.

Health Plan Issues

The Act became a vehicle for a number of legislative proposals unrelated to the current financial crisis. Among those are new rules affecting group health plan coverage for mental health services and college age dependents. These changes could require adjustments to group health

plans offered to public retirement system members or employees.

Mental Health Parity

- Coverage Limits

Prior to enactment of the Act, a group health plan that provided coverage for both medical-surgical expenses and mental health care was not permitted to apply lifetime or annual limits to the mental health care coverage that differed from comparable limits on medical and surgical coverage. The Public Health Service Act makes these rules applicable to health plans such as those offered by public retirement systems. [See 42 USC §300gg-5] This parity rule for coverage limits was to sunset on December 31, 2008. The Act eliminates the sunset clause and makes permanent the parity requirements for annul and lifetime limits. [Act, §512(b)]

- Terms of Coverage

The Act also expands the scope of coverage for mental health benefits. If a plan covers both medical and mental health or substance abuse services, the financial terms and treatment limitations applicable to the mental health or substance abuse coverage must be equivalent to comparable features of the plan's medical coverage.

- ■ Financial Terms

The parity requirement for financial terms means a plan cannot include cost-sharing provisions applicable to mental health or substance abuse services that do not apply to medical-surgical services. For example, deductibles, co-payments, out-of-pocket expenses, coinsurance and any limits on covered in-patient or out-patient visits for mental health services must be no more restrictive than like requirements applicable to substantially all medical and surgical benefits covered by the plan.

- ■ Treatment Limitations

The new rules on treatment limitations require that the plan have no treatment limitations unique to mental health services. For example, a plan may not include limits on the frequency of treatment, number of visits, days of coverage, or similar limits on the scope or duration of mental health treatment that are more restrictive than the predominant treatment limitations applied to substantially all medical and surgical coverage under the plan.

- ■ Out-of-Network Services

The Act also mandates equal treatment for out-of-network services. If a plan covers medical services rendered by an out-of-network provider, it must also cover mental health or substance abuse services provided by out-of-network providers. This requirement is to be administered in a manner that is consistent with the parity requirements applicable to financial and treatment limitations.

As was the case prior to enactment of the above requirements, a sponsor of a non-Federal governmental plan that is self-insured may elect to exempt its plan from the mental health parity requirements. [45 CFR §146.180] Note also that the Act does not require a plan to offer mental health coverage, but only to have parity between any mental health and medical coverage it does provide.

College-Age Dependents on Medical Leave

The Act adopts new requirements for group health plan coverage of student dependents. Under these rules, a health plan may not discontinue coverage of a dependent who is eligible for plan coverage

on the basis of being a college student if he or she loses student dependent status because of taking a leave from school that is medically necessary due to a serious illness or injury. The student's coverage may not terminate before the date that is the earlier of the date that is one year after the first day of the medically necessary leave of absence or the date on which such coverage would otherwise terminate under the terms of the plan or health insurance coverage. In addition, the Act requires that a plan must now include, with any notice regarding a requirement for certification of student status for coverage under the plan, a description of the availability of continued coverage during medically necessary leaves of absence.

Conclusion

Significant guidance on the above provisions should be forthcoming, some of it in the very near future. This guidance will be especially important for plans hoping to find some relief under the troubled assets purchase provisions of the Act. Retirement plans should monitor carefully the development of relevant regulatory guidelines to determine exactly what relief, if any, might be available as to their investment portfolios. Group health plans should begin immediately to evaluate the impact of the new mental health parity requirements on the coverage they offer. In some cases, plans may wish to consider taking advantage of the opt out provisions available to them under the Public Health Service Act.

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