Key Labor, Employment, Immigration, Pension, and Health Care Regulatory Initiatives in the Obama Administration

The following is a summary of key regulatory actions, completed, underway, or anticipated, in which the Chamber has been, or plans on being, actively engaged.

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Representation-Case Procedures (Ambush Elections)

On June 22, 2011, the National Labor Relations Board published a notice of proposed rulemaking that will amend procedural elements governing the filing and processing of petitions relating to the representation of employees for purposes of collective bargaining with an employer.

The proposal would significantly limit the time period between when a petition is filed, and an election for a union is scheduled to be held. In addition, the regulations impose new requirements on employers by requiring that the voter eligibility list to be provided to the union include “each employee’s work location, shift, and classification” and additional contact information, such as telephone numbers, and e-mail addresses (where available). In addition, for any pre-election hearing, an employer could potentially be barred from raising any new issues during the hearing if the relevant issue in dispute is not raised first in a new Statement of Position Form. The proposed rule also would create a bright-line test with respect to proposed unit eligibility by declaring that if “the hearing officer determines that the only genuine issues remaining in dispute concerning the eligibility or inclusion of individuals who would constitute less than 20 percent of the unit if they were found to be eligible to vote, the hearing officer will close the hearing.” The cumulative impact of these proposed changes will in all likelihood lead to a muzzling of employer free speech rights.

The Chamber participated in the Board’s July 18th public meeting on the rulemaking, and filed comments on the proposal on August 22, 2011. On September 6, 2011, the Chamber filed “reply comments” with the NLRB, with a focus on responding to arguments raised by the AFL-CIO and SEIU.

The Chamber’s comments may be accessed here:

The Chamber’s reply comments may be accessed here:

On November 29, 2011, the Board unveiled a revised proposal to be voted upon in a meeting held on November 30, 2011. The revised proposal defers decisions on many of the proposed provisions such as the new Statement of Position form, and the inclusion of e-mail addresses and phone numbers in the voter eligibility list until a later date. However, the Board’s proposal still included several important provisions, such as the effective elimination of pre-election appeals that will dramatically shorten election times.
On December 22, 2011, the National Labor Relations Board published a final rule to alter the regulations governing representation case procedures, consistent with its November 30th resolution.

The rule went into effect on April 30, 2012. Prior to publication in the *Federal Register*, on December 20, 2011, the U.S. Chamber of Commerce and the Coalition for a Democratic Workforce filed a lawsuit against the National Labor Relations Board in the District of Columbia, challenging this regulation. On May 14, 2012, the judge in the District of Columbia case invalidated the rule, due to a lack of a quorum. The judge rejected the NLRB’s request for reconsideration on July 27, 2012. On August 7, 2012, the NLRB appealed the decision to the D.C. Circuit. On February 19, 2013, the Court issued an Order holding in abeyance an appeal of the case.

*Notice of Employee Rights under Labor Laws*

On August 30, 2011, the National Labor Relations Board finalized regulations mandating that all employers covered by the NLRA post a notice of employee rights under the NLRA. The regulation had been proposed on December 22, 2010. On September 19, 2011, the Chamber filed a lawsuit against the National Labor Relations Board in South Carolina, challenging this regulation. A similar lawsuit was also filed in federal court in the District of Columbia. The federal court in D.C. upheld the authority of the Board to require employers to post notices. However, the D.C. court invalidated most of the enforcement provisions, including the creation of a new unfair labor practice and the tolling of the statute of limitations. Meanwhile, on April 13, 2012, the federal court in South Carolina ruled that the Board does not have the authority to issue the rule at all. On April 17, 2012, the federal appellate court in D.C. enjoined enforcement of the rule, pending appeal. On May 2, 2012, the Board published a notice in the *Federal Register*, indicating that the NLRB will not enforce the rule until the lawsuits have been decided. Further, the Chamber has obtained a letter from the Board indicating that it will not seek enforcement of the law unless the Fourth Circuit or U.S. Supreme Court overturns the decision of the federal judge in the Chamber’s lawsuit.

On May 7, 2013, the Ct. of Appeals for the District of Columbia issued a unanimous decision invalidating the NLRB’s regulation requiring employers to display a poster describing employees’ rights to unionize. Employer groups, including the Chamber, had strongly criticized this requirement as being completely one sided since there was no mention of employees’ rights to decertify a union or withhold contributions to the union that would be used for political purposes. Also criticized was the fact that the rule created a brand new unfair labor practice and tolled the statute of limitations for failure to post the notice. In its decision, the court focused on the poster as impinging on an employer’s free speech rights, ruling that the Board violated the National Labor Relations Act in making a failure to post the Board’s notice an unfair labor practice and evidence of an anti-union animus. On June 14, 2013, in the lawsuit brought by the Chamber, the 4th Circuit Court of Appeals struck down the regulation, stating that the NLRB did not possess the statutory authority to promulgate the notice-posting requirement. On August 12, 2013, the 4th Circuit Court of Appeals denied NLRB’s petition for rehearing en banc. On
September 4, 2013, the Court of Appeals for the D.C. Circuit denied a similar request by the Board.

The Chamber filed comments on the proposal on February 22, 2011.

The Chamber’s comments to the proposed regulation may be accessed here: [http://www.uschamber.com/sites/default/files/comments/NLRB%20posting%20comments%2022-11_0.pdf](http://www.uschamber.com/sites/default/files/comments/NLRB%20posting%20comments%2022-11_0.pdf)

**OSHA GHS/HCS Regulation**

On March 26, 2012, the Occupational Safety and Health Administration (OSHA) published the final rule which made only minor changes to the proposed rule. The final rule revises the “unclassified hazards” provision by renaming it “Hazards Not Otherwise Classified (HNOCs)” and makes other cosmetic changes such as removing requirements for HNOCs to be listed on labels that producers must develop. While OSHA removed combustible dust from the “hazards not otherwise classified” category, combustible dust is now included under its definition for hazardous chemicals, requiring that employers account for them on safety data sheets and in worker training. Under the new rule, employers will be required to add the signal word “warning” and the hazard statement, “may form combustible dust concentration in air” on labels for substances that could produce a combustible dust hazard, despite the absence of a proper definition of combustible dust hazards and the fact that combustible dust is associated with many more substances than the chemicals covered by the GHS/HCS rule. Furthermore, the illogical implementation deadlines were not fixed—employers must still train their workers on all of the rule’s new labeling and safety data sheet requirements by December 1, 2013, but the labels and safety data sheets themselves do not have to be available until June 1, 2015. Portions of the regulation are being challenged in court.

**Proposed Interpretation of “Feasible” Under OSHA’s Noise Exposure Standard**

On October 19, 2010, OSHA published in the Federal Register a proposed new interpretation of the term “feasible” as it applies to administrative and engineering controls under the General Industry and Construction Noise Exposure standards. OSHA’s enforcement policy gives employers considerable latitude to rely on personal protective equipment (PPE--such as ear plugs or ear muffs) when noise protection is required rather than forcing employers to exhaust the opportunities for administrative (such as schedule rotations), or engineering (such as sound dampening or other technology) controls. Under the new interpretation, administrative and engineering controls would have been considered economically feasible if “implementing such controls will not threaten the employer’s ability to remain in business, or if such a threat to viability results from the employer’s failure to meet industry” standards.

On January 19, 2011, OSHA announced the withdrawal of this proposal. The Chamber submitted preliminary comments objecting to this action as imposing unnecessary costs on employers who are already protecting their employees appropriately from noise hazards just before the announcement of withdrawal. An independent economic analysis concluded that the potential impact of this proposal on employers would be more than $1 billion.
The Chamber’s comments can be accessed here:

ADA Title III Accommodations for Public Pools Facilities

On September 25, 2010, the Department of Justice issued a final rule implementing revised specific criteria defining what constitutes accessibility in public accommodations. Among other things, the regulation requires owners of public pools to provide means of entering and exiting for people with disabilities such as a pool lift or a sloped ramp into the pool.

In advance of the March 15, 2012 compliance deadline, the DOJ attempted to clarify these requirements with guidance issued on January 31, 2012. However, this guidance expressed a clear preference for fixed lifts over portable lifts. This preference is not found in the regulations or specific criteria.

On May 21, 2012, the Department of Justice extended the compliance date until January 31, 2013.

Revising FMLA Regulations to Implement Legislative Changes and Modify Recently Issued Regulations

Regulations implementing amendments to the Family and Medical Leave Act (FMLA) to make specific types of leave available to military personnel, as well as other changes intended to give employees and employers greater clarity and help restore balance to the implementation of the FMLA took effect on January 16, 2009. In the interim, Congress passed amendments expanding the availability of leave for military personnel and changing the calculation for how airline flight crews qualify for leave under the Act. On February 15, 2012, the Department of Labor proposed regulations implementing these changes. In addition, the proposed regulations would also amend the existing FMLA regulations to change how employers are allowed to track the use of intermittent leave. The current standard permits an employer to track intermittent leave in intervals of up to an hour. The proposed regulation would revert to the previous standard, which required employers to track intermittent leave by the shortest increment time used for any other time keeping purpose. This would be a reversal of a change made by the Bush administration that was considered beneficial for employers in helping them control unnecessary or improper use of intermittent leave. On April 30, 2012, the Chamber, in conjunction with the National Coalition to Protect Family Leave, filed comments objecting to the proposed changes in intermittent leave and urging the Department to maintain the current regulatory language.

The comments may be accessed here:
http://www.protectfamilyleave.org/pdf/NCPFL_NPRM_comments_043012.pdf

On February 6, 2013, the Department of Labor published final regulations with no changes from the proposal.
Systemic Compensation Discrimination Under Executive Order 11246 and Voluntary Guidelines for Self-Evaluation

On January 3, 2011, the Office of Federal Contract Compliance Programs (OFCCP) published a notice proposing to rescind guidance issued during the last administration related to systemic compensation discrimination. The existing guidance makes it clear that the OFCCP will not use the debunked pay-banding (or the so-called DuBray method) of determining whether discrimination may have occurred, but will instead use more robust and accurate methodologies such as multivariable regression. It also issued voluntary guidelines for self-evaluation. On February 28, 2013, the OFCCP published a final notice rescinding both the guidance and the voluntary guidelines. In their place, OFCCP issued directive 307, described in the significant non-regulatory activities section.

The Chamber filed comments on this proposal on March 4, 2011.

The comments may be accessed here: http://www.uschamber.com/issues/comments/2011/comments-ofccp-rescission-compensation-guidance

OSHA On-Site Consultation Program Clarification

OSHA operates several programs to assist employers in identifying and correcting workplace safety issues. To entice employers into these programs, there has been a firewall between the consultation services and OSHA’s enforcement activities, or employers were granted exemptions from inspections (except in the cases of accidents, injuries, or fatalities) if they met certain standards. On September 3, 2010, to follow up on their strong enforcement-focused rhetoric, OSHA proposed revisions to the regulations covering their On-site Consultation Program to allow sites under going consultation to be referred to inspection officers for enforcement. OSHA also proposed revisions to the regulations governing the Safety and Health Achievement Recognition Program (SHARP)—a program that provides “incentives and support to small employers to develop, implement, and continuously improve effective safety and health programs at their workplaces”—so that companies participating in it will be subject to inspections regardless of whether they meet SHARP criteria. Such changes will likely result in these programs losing participants and therefore justifying less resources in the future. On October 29, 2010, the Chamber joined comments submitted by the Coalition for Workplace Safety criticizing this proposal as discouraging employers from participating in the On-site Consultation and SHARP programs and possibly leading to resources being diverted away from these valuable programs. The comments also criticized OSHA for not conducting a small business review panel before issuing the proposal since it directly affects small businesses. OSHA has indicated in its 2013 Spring Regulatory Agenda, that this rule has been withdrawn.

On August 8, 2013, OSHA published a formal notice in the Federal Register, announcing the withdrawal of the rule.

Federal Contractor Affirmative Action Obligations under the Rehabilitation Act

On July 23, 2010, the Labor Department published an advanced notice of proposed rulemaking (ANPRM) that seeks information on how the Office of Federal Contract Compliance Programs can strengthen the affirmative action requirements of the regulations implementing section 503 of the Rehabilitation Act. The ANPRM solicited comments from the public on 18 separate questions.

On September 21, 2010, the Chamber filed comments on this proposal questioning the ability for the Department to develop measures to set goals and numerical targets, among other things.

The comments may be accessed here: http://www.uschamber.com/issues/comments/2010/chamber-comments-ofccp

On December 9, 2011, OFCCP published a notice of proposed rulemaking, significantly altering the regulations implementing Section 503 of the Rehabilitation Act. On January 17, 2012, the Chamber requested an extension of time to respond to the proposal. Although the original deadline was set for February 7, 2012, OFCCP later extended the due date until February 21, 2012. The Chamber submitted comments on February 21, 2012.

The comments may be accessed here: http://www.uschamber.com/sites/default/files/comments/120221_503Comments.pdf

On May 24, 2012, the U.S. Chamber joined with nine other groups to write a letter to Labor Secretary Hilda Solis expressing concern with achieving the numerical target.

On July 31, 2013, the Chamber signed on to a multi-industry letter to Secretary Perez, respectfully requesting to set up a meeting to discuss implementation issues with the upcoming OFCCP 503 regulation.

On September 24, 2013, the final regulations were published in the Federal Register.

As initially proposed, the two rulemakings would have been incredibly burdensome and expensive while likely doing little to increase the hiring of individuals with disabilities. However, through various comments, letters, and meetings, the Chamber convinced OFCCP to eliminate or dramatically reduce many of the more onerous provisions in the final regulations. Of the five costliest elements as identified by the Chamber, three have been eliminated from the final regulations. Across all items, it appears that OFCCP’s final rule eliminates about $250 million or nearly half of the first year costs that the Chamber estimated for the rule as proposed. On-going annual compliance costs after the initial year are likely at least $100 million less per year under the final rule than they would have been under the proposed rule.
**Federal Contractor Affirmative Action Obligations under the Vietnam Era Veterans Readjustment and Assistance Act**

On April 26, 2011, OFCCP issued a proposed rule that seeks to strengthen affirmative action requirements by requiring federal contractors to conduct more substantive analyses of recruitment and placement actions under the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA, as amended) and the use of numerical targets to measure effectiveness. The proposal also imposes vast new recordkeeping and other burdens on contractors and subcontractors. On June 15, 2011, the Chamber requested a 90-day extension to the filing deadline. On June 22, 2011, the Labor Department announced a 14-day extension to the comment period. The Chamber filed comments, in conjunction with other employer associations, on July 11, 2011, emphasizing the significant new burdens that would be imposed on contractors should the rule be implemented, and offered alternative and less burdensome mechanisms to achieve the shared goal of increasing employment opportunities for our nation’s veterans.


On September 24, 2013, the final rule was published in the *Federal Register*. Due to the fact that the Veterans and 503 regulations have many overlapping provisions, the cost reduction from final versus proposed elements of the Veterans regulation seem to be similar.

**Revising “Companionship” Exemption to the Fair Labor Standards Act**

On December 27, 2011, the Wage and Hour Division published a proposed rule to effectively eliminate the exemption afforded to companionship services providers and live-in domestic services providers under the Fair Labor Standards Act. Specifically, the Department’s proposal explicitly states that third party providers of these services will no longer be covered by the exemption from the FLSA, meaning that they will now be subject to minimum wage and overtime requirements. For those workers hired directly by the family or recipient of the services, the new proposal would impose a 20 percent threshold for the amount of time incidental services may be performed. Many of these functions are ordinary household activities that are some of the main reasons clients hire people to provide companionship services. These restrictions are so severe as to eliminate, for any practical purpose, the availability of the exemption which Congress provided in the statute. This will have a dramatic effect on how providers of these services operate and their competitiveness. In addition, the proposed regulation also states that an employer of live-in domestic service employees would be required to keep a record of hours worked.

On March 21, 2012, the Chamber submitted comments.
On September 17, 2013, the Department of Labor released the final rule, without any meaningful changes from the proposal. The final regulation is scheduled to go into effect on January 1, 2015.

**Rulemakings Underway**

*Adding New Column to Track Ergonomic Injuries Under OSHA Injury Logs*

After the Clinton ergonomics regulation was struck down by Congress, the Bush OSHA withdrew a revision to the recordkeeping standard that would have added a column on the OSHA injury log to track work-related musculoskeletal disorders (WMSDs)—the kind of injuries associated with ergonomic risks. On January 29, 2010, OSHA proposed a new regulation reinstating such a column based on the definition for these injuries which was included in the 2001 recordkeeping standard. The Chamber leads the employer coalition responding to this issue and filed comments opposing the proposal on March 30, 2010.

The coalition comments may be accessed here: [http://www.uschamber.com/issues/comments/2010/100330osha.htm](http://www.uschamber.com/issues/comments/2010/100330osha.htm)

A final regulation went to the Office of Management and Budget’s Office of Information and Regulatory Analysis, on July 14, 2010. On July 21, 2010, the Chamber, with other groups, met with OIRA to reiterate our belief that OSHA’s economic analysis was woefully inadequate. On January 25, 2011, OSHA announced that they were “temporarily” withdrawing the proposal from OMB review to solicit more input from small businesses. This is a tacit admission that they should have conducted a small business review panel before issuing the proposed regulation—a point we made in our comments.

The Department of Labor, in conjunction with the Small Business Administration’s Office of Advocacy, held a series of three teleconferences in April, 2011 to reach out to the small business community for input.

The Consolidated Appropriations Act, 2012 (P.L. 112-74) included a defunding rider blocking the Department of Labor from using any funds to proceed forward with this regulation during FY 2012 (Oct. 2011-Oct. 2012). That rider has been extended under the Continuing Resolution, which runs until September 30, 2013. The Spring 2013 Regulatory Agenda lists this regulation under the long term actions category meaning that it will not move forward in the next 12 months.

*Employer and Consultant Reporting Under the LMRDA’s Persuader Regulations*

On June 21, 2011, the Labor Department published a proposed rule, which will greatly narrow the interpretation of the “advice” exemption. The proposed rule will significantly increase regulation of law firms, trade associations, and others who communicate with employers.
regarding union issues. Narrowing of the employer exception of its own employees’ activities could also prove extremely problematic for employers and chill exercise of free speech rights.

On September 21, 2011, the Chamber filed comments, opposing the proposal.

The Chamber’s comments are available here: http://www.uschamber.com/issues/comments/2011/comments-labor-department-new-proposed-persuader-regulations

The Labor Department held a public meeting on May 24, 2010, to solicit opinions regarding changes to employer reporting obligations under the LMRDA. The Department invited comments on three separate but related issues: narrowing the “advice” exception, narrowing the exception for activities of the employer’s own employees, and requiring electronic submission of certain disclosure forms.

*Genetic Information Nondiscrimination – Title I Regulation of Health Risk Assessments*

On October 7, 2009, the Departments of Treasury, Labor, and Health and Human Services issued interim final regulations implementing certain provisions of Title I of the Genetic Information Nondiscrimination Act (GINA). Included in these regulations is a very broad interpretation of “underwriting” that effectively prohibits employers from offering incentives to employees who participate in health risk assessments (HRAs) if the HRA asks about family medical history. The interim final rules went into effect on December 7, 2009. The Chamber has joined with other business organizations in exploring strategies to address this important matter.

We also filed comments critical of the treatment of health risk assessments and related points on January 5, 2010, that may be accessed here: http://www.uschamber.com/issues/comments/2010/100105gina.htm

*Scheduling Letter and Itemized Listing*

On May 12, 2011, the OFCCP published a notice, which seeks to make significant changes to the “scheduling letter” and “itemized listing” that it uses at an initial stages of a compliance evaluation. On July 11, 2011, the Chamber submitted comments sharply critical of some of the proposed changes, in particular, the creation of a new government database of private compensation information, the burdens that would be imposed by the new recordkeeping and reporting obligations, and the invasion of privacy and threat to proprietary and confidential information. On September 28, 2011, the OFCCP sent a final version of the letter and itemized listing to OMB. The Chamber submitted comments on October 28, 2011.

The July 12, 2011, comments may be accessed here: http://www.uschamber.com/issues/comments/2011/comments-proposed-extension-approval-information-collection-requirements
The October 28, 2011, comments may be accessed here:
http://www.uschamber.com/issues/comments/2011/comments-proposed-extension-approval-information-collection-requirements%E2%80%94non-co

Compensation Data Collection Tool

On August 10, 2011, the OFCCP published an advanced notice of proposed rulemaking to develop a replacement for the EO survey to implement Executive Order 11246. The ANPRM solicits comments from the public on 15 separate questions. Perhaps most alarming, the agency in one of their questions has raised the possibility that businesses bidding on future Federal contracts will need to submit compensation data as part of the Request for Proposal process. OFCCP has also stated their intentions to use this type of compensation data for research, such as analyzing industry trends. On October 11, 2011, the Chamber submitted comments seeking withdrawal of the regulation.

The comments may be accessed here:
http://www.uschamber.com/sites/default/files/comments/111110OFCCPCompDataToolComments.pdf

OSHA Recordkeeping Update from SIC codes to NAICS codes; reporting of hospitalizations and amputations

OSHA published a proposed regulation on June 22, 2011, that would do several things: update the industry codes on which OSHA relies from the old Standard Industrial Classification (SIC) system to the newer and more widely used North American Industry Classification System (NAICS); change the reporting requirement for hospitalizations to within 8 hours for any work related hospitalization—instead of just when three or more employees were hospitalized; and require reporting any work related amputation within 24 hours.

Because the conversion to the new system is not seamless, some industries and employers who currently are exempt from the recordkeeping requirement because of low injury numbers will now be covered by the recordkeeping requirement and conversely some who were previously covered will no longer be covered. Also, by requiring reporting for hospitalizations for every employee, instead of just when three or more are involved, the issue of work relatedness is far less clear. There are also concerns about how an employer would have to respond if an employee who suffered an amputation is taken to the hospital which is very likely—under which time requirement would the employer have to report? Finally, the only method of reporting provided is by telephone, which ignores the various other technology options that are available and provide a record of the employer having reported.

The Chamber filed comments on October 28, 2011.

The comments may be accessed here:
http://www.uschamber.com/sites/default/files/comments/111028USCCcommentsOSHANPRM.PDF
Treasury Department Acquisition Regulations Proposed Contracting Language for Minority and Women Inclusion under Dodd-Frank Act

On August 21, 2012, the Department of the Treasury proposed contracting language to implement the requirement in Section 342 of the Dodd-Frank Act that all contractors to agencies covered by the act commit to “ensure, to the maximum extent possible, consistent with applicable law, the fair inclusion of minorities and women in the workforce.” This language will be inserted into all service contracts and subcontracts worth more than $150,000. If requested by the contracting officer, contractors would have to provide, within 10 days, extensive demographic and supporting information detailing their, and their subcontractors’ good faith efforts to meet the requirements of the contract language. The Chamber submitted comments on October 22, 2012 which expressed concerns about some of the vague terms in the proposed language; the impact this language would have on subcontractors, many of whom will not have had to deal with similar requirements associated with other affirmative action requirements; the possibility of more involvement from DOL’s Office of Federal Contract Compliance Programs than the Act permits; and the inadequacy of the Regulatory Flexibility Act analysis.

The comments may be accessed here: http://www.uschamber.com/sites/default/files/comments/USCC%20comments%20on%20Treasury%20contracting%20language%20for%20Dodd-Frank%20OMWI.pdf

Worker Classification Survey

On January 11, 2013, the Wage and Hour Division (WHD) requested comments under the Paperwork Reduction Act review of the agency’s proposal to collect information “about employment experiences and workers’ knowledge of basic employment laws and rules so as to better understand employees’ experience with worker misclassification.” The survey is expected to support the Department’s announced Right to Know under the Fair Labor Standards Act rulemaking as well as the ongoing Employee Misclassification Initiative. On March 1, 2013, the Chamber, submitted a request for extension for the comment period as the survey documents and instrument were not made available on the Internet. Due to the significant impact this survey will have on key WHD activities, the Chamber and other employer associations took the unusual step on March 12, 2013, of submitting comments to the Paperwork Reduction Act review of the instrument and the process for conducting it.

The comments may be accessed here: https://www.uschamber.com/sites/default/files/comments/USCC%20comments%20on%20WHD%20ICR%20for%20worker%20classification%20survey.pdf

OSHA Revised Silica Standard

In February 2011, OSHA submitted to OIRA for review a proposed revision to the respirable silica standard. On September 12, 2013, the proposed revised silica dust standard was published in the Federal Register. The proposed rule has two texts- one for the general industry and maritime sectors and one for construction. The proposed revised silica standard reduces the Permissible Exposure Level by half (to 50 µg/m³ from 100 µg/m³) as well as adding an Action
Level of 25 µg/m$^3$ that will trigger various other programmatic requirements such as exposure monitoring, providing medical exams to workers with high exposure, and training workers about silica hazards.

This rulemaking has attracted considerable attention from unions and other advocates who believe that the current PEL is too high and pushed OSHA and the administration to release this proposal. In reality, the level of silica related lung disease has decreased significantly over recent years and questions remain about whatever exposure problems are a function of a lack of compliance with the current PEL, not the PEL itself. Further questions remain about whether the anticipated PEL and Action Level are below the level of detection, raising issues about whether this is a technologically feasible rule.

If this revised standard is issued, it will immediately mean that virtually all construction sites and other locations where silica exposure occurs will be out of compliance. A key industry impacted by this rulemaking will be the hydraulic fracturing gas and oil industry (fracking). In its initial submission to OIRA, OSHA did not include fracking in its economic analysis. This was added during the time the proposal was under review at OIRA.

Comments are due December 11, 2013 and hearings are scheduled to begin March 14, 2014.

**Anticipated Rulemakings**

**OSHA Injury and Illness Prevention Program (I2P2) Regulation**

Though no proposed regulation has been issued yet, OSHA’s highest priority rulemaking would require all employers to implement injury and illness prevention programs (I2P2) that meet requirements to be specified by OSHA. Employers will be required to identify all hazards, including those that do not have specific standards, in their workplace and take corrective or protective measures; what OSHA is calling “find and fix.” OSHA has held public meetings around the country to take input on this concept, but many questions remain. Under this rulemaking, OSHA will have to decide how to treat employers who already have effective programs in place, and whether employers will be vulnerable to double citations—once for a hazard discovered during an inspection, and once for having a faulty program that failed to identify and correct the hazard. OSHA is also expected to use this rulemaking to create a requirement for employers to assess their workplaces for ergonomic hazards which would effectively impose an ergonomics standard. OSHA must also figure out how to define a significant risk that this regulation will address to satisfy rulemaking requirements. The next step will be a small business review panel. When OSHA convenes the panel, it will make public their draft regulation along with the draft economic analysis which will provide interested parties an opportunity to see what OSHA is planning. The Spring 2013 Regulatory Agenda, published on July 3, 2013, indicates that a Notice of Proposed Rulemaking is to be published in January 2014.
OSHA Clarification of Employer’s Obligation to Make and Maintain Accurate Records of Work-Related Injuries and Illnesses

The Spring 2013 Regulatory Agenda, published on July 3, 2013, indicates that OSHA is planning to promulgate a proposed rule in November, 2013, to “amend its recordkeeping regulations to clarify that the duty to make and maintain accurate records of work-related injuries and illnesses in an ongoing obligation.” This would be an attempt to undo through regulation the recent Court of Appeals decision in Volks that made clear OSHA has a six month window from the time of the violation to bring a citation against an employer for a recordkeeping violation.

Construction Contractor Affirmative Action Requirements

The Labor Department announced that it intends to issue an NPRM in October, 2013 to update affirmative action requirements applicable to federal construction contractors. As with the Rehabilitation Act and VEVRAA regulations, the details of this proposal will be very important in determining the extent to which the proposal will improve compliance or impose undue burdens.

Sex Discrimination Guidelines for Federal Contractors

In its most recent Regulatory Agenda, the Labor Department announced that it had planned to issue a Notice of Proposed Rulemaking in November 2013, to update its guidelines to reflect the current state of law regarding sex discrimination. The agency observed that current regulations are “more than 30 years old and warrant a lookback.”

“Right to Know” under the Fair Labor Standards Act

The Department of Labor’s Wage and Hour Division wants to greatly expand recordkeeping requirements for employers under the FLSA. The proposal will not only require greater disclosure on how an employee’s pay is computed, thus inviting increased scrutiny of an employer’s payroll, but will also force employers to produce a “classification analysis” for each worker that they exclude from FLSA coverage or deem ineligible for overtime. These would include administrative or professional employees and independent contractors. OSHA and OFCCP initiatives will also review employer records on employee FLSA status. Employers would be forced to provide this “classification” analysis to employees and WHD investigators. In addition, this regulation is expected to exacerbate the current litigation trends against employers alleging FLSA overtime violations. To support this rulemaking the DOL is preparing to go out with a survey to gauge employee awareness of classification issues. Because of the impact this survey will have, the Chamber and other concerned employer associations submitted comments to the DOL in conjunction with the review of the survey instrument under the Paperwork Reduction Act process, raising concerns about survey design and implementation.
Significant Non-Regulatory Activities

**Department of Labor**

*OSHA Whistleblower Memo and Employer Safety Incentive Programs*

On March 12, 2012, OSHA issued a memorandum to regional administrators that outlines four scenarios that OSHA believes would constitute violations of the whistleblower protections under Section 11(c). Among the scenarios is one where employers implement an incentive program that rewards employees for low injury rates or remaining injury free for a period of time. Incentive programs are not mentioned anywhere else in the statute or regulations. OSHA has created a consequence for employers who have them without any authority or providing any supporting data or evidence.

*OSHA Letter of Interpretation Permitting Union Representatives to Accompany an OSHA Inspector at Non-Union Workplaces*

On February 21, 2013, OSHA issued a letter of interpretation responding to a request from the United Steel Workers that said a union representative is permitted to accompany an OSHA inspector during a walk-around inspection at a non-union workplace. Current regulations make clear that any employee representative shall be an employee of the company. Therefore a non-union workplace would not have a union representative. This is a dramatic reversal of policy and clearly aligns OSHA with union attempts to use OSHA inspections as organizing tools against non-union employers. Furthermore, it was done as a letter of interpretation, not a rulemaking so there was no opportunity for those who will be impacted to provide input, or requirement for OSHA to justify its action. More importantly, there is no clear way to challenge this or overturn it. On June 12, 2013, the Coalition for Workplace Safety sent a letter to the Department of Labor, requesting withdrawal of the interpretation letter.

*informACTION App Challenge (WHD and OSHA)*

On July 12, 2011, the Department of Labor announced a contest, the “informACTION app” challenge, which requires developers to use compliance data from the Occupational Safety and Health Administration and the Wage and Hour Division to provide information to workers and the general public targeting the hotel, motel, restaurant, and retail industries. In designing the app, the Department is “encouraging developers to combine DOL data with other publicly accessible data feeds from around the web.” If a developer uses an outside data set, the accuracy or veracity of the data being provided is not clear. The informACTION challenge is meant to target “bad actors” in the employer community, but may actually damage an employer’s reputation and good standing in the community if the information conveyed is incomplete, or inaccurate.

*Persuader Reporting Orientation Program (OLMS)*

The Department of Labor initiated the Persuader Reporting Orientation Program (PROP) in January 2011 to “provide compliance assistance to employers and labor relations consultants who are likely to enter reportable agreements or arrangements pursuant to Section 203 of the Labor-Management Reporting and Disclosure Act.” PROP should be viewed in conjunction with the proposed “persuader” regulation, narrowing the “advice” exception which was promulgated on June 21, 2011.
Under PROP, DOL will examine union election petitions filed with the NLRB and send information via a letter to employers and their representatives informing them of their persuader reporting obligations under Section 203 of the Labor-Management Reporting and Disclosure Act. This letter makes scant reference to the “advice” exception, and includes references to LM-10 reporting obligations that cover certain payments to and arrangements with unions or union officials.

**U-VISA Determinations (WHD)**

On March 15, 2010, the Secretary of Labor announced that DOL would begin to certify U-Visas for victims of employment based crimes. Traditionally, U-Visas are granted to undocumented individuals who are victims of violent crimes such as assault, rape, kidnapping, trafficking, etc. Under a U-Visa, an individual may remain in the U.S. for up to four years. The WHD will be tasked with certifying U-Visa requests during the course of their wage and hour investigations.

**“Bridge to Justice” ABA Referral Program (WHD)**

On November 19, 2010, Vice President Joe Biden announced an initiative between the Department of Labor and the American Bar Association during a meeting of the Middle Class Task Force. The purpose of the initiative, entitled “Bridge to Justice” is to provide complainants–employees who allege violations of their rights under the Fair Labor Standards Act, or the Family and Medical Leave Act--the opportunity to be referred to the American Bar Association’s Standing Committee on Lawyer Referral and Information Service, when the Department of Labor has declined to pursue their claim. The program went into effect on December 13, 2010.

At any one of four stages, a complainant will be provided the toll-free number for the ABA-Approved Attorney Referral System. If the Wage and Hour Division has completed an investigation, it will send the complainant a letter with the Wage and Hour Division case number, the violations found, and the amount of calculated back wages owed. This initiative is expected to result in increased private litigation under the FLSA and the FMLA or as a method to drive private businesses to settle allegations even when they may be unsubstantiated.

**Memorandum of Understanding for Employee Misclassification Initiative (WHD)**

On September 19, 2011, the Wage and Hour Division, the Internal Revenue Service, and the labor commissioners and other agency leaders of the states of Connecticut, Maryland, Massachusetts, Minnesota, Missouri, Utah, and Washington announced that they have entered into a memorandum of understanding to curb the practice of employee misclassification. The Department of Labor has also entered into similar agreements with the states of California, Colorado, Hawaii, Illinois, Iowa, Louisiana, and Montana.

The Wage and Hour Division has revamped the agency’s complaint process to focus on industries that “employ particularly vulnerable workers who don’t complain.” The agency has announced initiatives focusing on Tennessee hotels and motels, North Carolina residential care facilities, Florida and Mississippi agriculture, New Jersey gas stations, Tampa, Fl. restaurants, Connecticut and Rhode Island construction sites, grocery stores in Alabama and Mississippi, and child labor violations in the movie theater industry.
In addition, the Wage and Hour Division has announced an enforcement initiative to combat misclassification of independent contractors at nail salons in the Seattle metropolitan area.

**Aggressive Strategic Plans (OFCCP)**

The Director of the Office of Federal Contract Compliance Programs (OFCCP) laid out an aggressive “strategic plan.” For example, one of the targeted goals is to “increase workers’ incomes and narrow wage and income inequality,” while another is to “ensure fair and high quality work life environments.” OFFCP will not only enforce systemic discrimination claims, but also claims of individual discrimination. OFCCP will further broaden enforcement efforts through more use of corporate-wide multi-establishment reviews and industry-specific reviews.

**Guidance on the Applicability of the Worker Adjustment and Retraining Notification Act to layoffs that may occur among Federal Contractors, including in the Defense Industry as a Result of Sequestration (ETA)**

On July 30, 2012, the Assistant Secretary of the Employment and Training Administration sent guidance to state workforce agencies and administrators, indicating that due to the “unforeseeable circumstance” test, it would be inappropriate for federal contractors, including those in the defense industry to notify their employees about layoffs that could result from federal budget cuts due to sequestration that may occur in January 2013.

On September 28, 2012, the Office of Management and Budget issued a memorandum stating that if an agency terminates or modifies a contract, and the contractor must close a plant or lay off workers en masse, the company could treat employee compensation costs for WARN Act liability, attorney’s fees and other litigation costs as allowable costs to be covered as the contracting agency so long as the contractor has followed a course of action consistent with the Labor Department’s guidance.

**Complying with Nondiscrimination Provisions: Criminal Record Restrictions (OFCCP)**

On January 29, 2013, OFCCP issued Directive No. 306, advising federal contractors and subcontractors about potential discriminatory liability that could result from using criminal records as a screening device.

**OFCCP Procedures for Reviewing Contractor Compensation Systems and Practices (OFCCP)**

On February 26, 2013, OFCCP issued Directive 307 on "Procedures for Reviewing Contractor Compensation Systems and Practices." This was issued in conjunction with OFCCP’s rescission of its compensation standards and voluntary guidelines. Now, instead of using standard analytical procedures in pursuing compensation discrimination claims, Directive 307 states that the OFCCP will pursue these claims on a case-by-case basis. Directive 307 will give OFCCP more flexibility, which it will likely use to its advantage as part of its aggressive enforcement agenda.

**Calculating Back Pay as Part of Make-Whole Relief for Victims of Employment Discrimination (OFCCP)**

On July 17, 2013, OFCCP issued Directive 310 on "Calculating Back Pay as a Part of Make-Whole Relief for Victims of Employment Discrimination." Directive 310, effective immediately, provides guidance to its compliance officers regarding the methodology for the calculation of
back pay awards to federal contractor applicants and employees allegedly subject to discrimination.

**Agricultural Workers (WHD)**

On May 9, 2013, the Wage and Hour Division launched an initiative in Illinois and Missouri that places an emphasis on enforcement and education for growers, farm labor contractors, agricultural brokers, and processors which help these parties comply with the Fair Labor Standards Act, the H-2A program, the Migrant and Seasonal Agricultural Worker Protection Act, and the Occupational Safety and Health Act’s field sanitation standards.

**Fair Labor Data Challenge**

On July 9, 2013, the Department of Labor announced a contest, the “Fair Labor Data Challenge,” which requires developers to create a smartphone app that integrates DOL’s enforcement data with consumer rating websites, geopositioning sites, and other relevant data sets, such as those available from state health boards. The “Fair Labor Data Challenge” is meant to target “bad actors” in the employer community, but may actually damage an employer’s reputation and good standing in the community if the information conveyed is incomplete, or inaccurate.

**Equal Employment Opportunity Commission**

**Credit and Criminal History Background Checks**

The Equal Employment Opportunity Commission (EEOC) issued a complaint against an employer stemming from the alleged disparate impact of using credit and criminal history background checks as part of their hiring process. EEOC’s target of background checks by employers has become a prominent focus of the new chair of the EEOC, with the EEOC holding a hearing to examine the issue of using credit history on October 20, 2010 and a hearing examining criminal history background checks on July 26, 2011. If successful in its complaint, the EEOC could use the same approach to target nation-wide employers who use background checks in their hiring process.

On April 25, 2012, the EEOC voted 4-1 to approve new enforcement guidance related to consideration of arrest and conviction records in employment decisions.

In June 2013, the EEOC issued two additional complaints against employer regarding their use of criminal background checks.

**Workplace Wellness Programs and Employment Discrimination**

On May 8, 2013, the EEOC held a hearing to discuss the intersection between wellness programs and anti-discrimination laws. Following the hearing, the EEOC held the record open for submitted comments. On May 23, 2013, the Chamber submitted comments, urging the EEOC to refrain from issuing additional guidance.

National Labor Relations Board

Protected Concerted Activity Website
The National Labor Relations Board has launched a webpage that provides case examples of protected concerted activity, the right of employees to act together for their mutual aid and protection, even if they are not in a union.

Memorandum of Understanding with Justice Department
On July 9, 2013, the National Labor Relations Board entered into a memorandum of understanding with the Justice Department’s Civil Rights Division’s Office of Special Counsel for Immigration-Related Unfair Employment Practices to share information, refer matters to each other and coordinate investigations when deemed appropriate.

Letter of Agreement Between The Office of General Counsel and the Ministry of Foreign Affairs of Mexico
On August 1, 2013, the Office of General Counsel announced that on behalf of the Board, he has signed a letter of agreement with the Mexican Foreign Ministry to provide for cooperative efforts to provide Mexican workers in the United States, and their employers information, guidance, and access to education regarding their rights and responsibilities under the National Labor Relations Act.
Immigration Regulatory Activity

Completed Rulemakings

H-2B Program Rule and Wage Methodology

The Employment and Training Administration (ETA) decided to reengineer the H-2B program, which is used to hire temporary nonagricultural workers, by finalizing a new regulatory system to address what the agency believes is insufficient worker protections in the current H-2B operational and enforcement guidelines and by finalizing a new wage methodology regulation. The two regulations, one being a general program rule (final rule published February 21, 2012) and the other a wage rule (final rule published January 19, 2011), are intertwined both in policy substance and procedural challenges, and both have been the subject of ongoing litigation as well as action by Congress in the appropriations process.

- Wage Rule Summary:

On January 19, 2011, ETA published a final rule regarding a new wage methodology for all temporary nonagricultural H-2B workers. The new rule would have established that employers were obligated to pay the greater of the Service Contract Act, the Davis-Bacon Act, or mean occupational wages, regardless of whether the employer was working on a federal contract. The effective date was changed various times and was ultimately blocked from being implemented by Congress when it passed the Consolidation Appropriations Act of 2012 (P.L. 112-74), which barred DOL from implementing the new wage methodology for fiscal year 2012. Since then, Congress has continued the same rider in Continuing Resolutions for fiscal year 2013 (P.L. 113-6), the last of which is in place through September 30, 2013. In addition, two lawsuits remain pending about the wage rule, one now in the 3rd Circuit and one in federal district court in Florida (the Chamber is an amicus in the Florida litigation).


- Program Rule Summary:

On February 21, 2012, ETA published a final rule regarding large-scale revisions for the temporary nonagricultural employment of H-2B workers in the United States, which is virtually unchanged from the proposed rule. The new rule created a new concept of “corresponding employment,” establishing that instead of similarly situated employees being similarly compensated, individuals working in “corresponding” jobs must be compensated the same even when the jobs do not have the same duties and minimum requirements. In addition, the new rule imposed a variety of cumbersome rules borrowed from the seasonal agricultural worker program, awarded the Wage and Hour Division new authority to investigate corresponding employment,
and established that DOL has unlimited authority to require more advertising or recruitment beyond the parameters identified in the regulations.

On April 16, 2012, the Chamber filed a lawsuit in U.S. District Court for the Northern District of Florida with employers in the landscape and seafood processing industries against DOL, claiming that the agency does not have the authority to promulgate the rule and is in violation of the Regulatory Flexibility Act. On April 26, 2012, the U.S. District Court for the Northern District of Florida granted a nationwide preliminary injunction. DOL appealed to the 11th Circuit and oral arguments were held in December 2012, and on April 1, 2013, the 11th Circuit ruled against DOL finding that only the Department of Homeland Security (DHS) has the authority to regulate the H-2B visa category. The nationwide preliminary injunction remains in place regarding the program rule and thus no part of this rule has been implemented.

The Chamber’s comments on the H-2B program rule proposal may be accessed here:

The preliminary injunction issued in the Chamber H-2B program rule lawsuit may be accessed here:

- Current Status of H-2B Wage and Program Rules:

On April 24, 2013, DHS and DOL jointly issued an interim final H-2B wage rule, which, in effect, had DHS, after consultation with DOL, reissue the initially finalized wage methodology without change, in attempt to address the challenge to DOL’s authority to do so. It appears the new interim final rule may be in either direct conflict with the current Continuing Resolution rider, or inconsistent with the intent of that rider. On July 23, 2013, DOL published a Federal Register notice confirming its intention to delay indefinitely the effective date of the H-2B wage rule initially published in 2011 and instead to implement the new joint rule with DHS as announced by the revised interim final rule.

In the appropriations cycle for fiscal year 2014, the House and Senate may have new riders related to both the H-2B wage and program rules. On the Senate side, an explicit delegation of authority to DOL was attached to the Labor appropriations bill reported out of committee, negating our efforts to challenge DOL’s authority to regulate in this area. In the House, it’s not clear as of yet what riders will be added to appropriations, but there is significant Republican interest in the business perspective in this area. House legislation was introduced (H.R. 2765) that, mirroring the bipartisan language regarding H-2B wages in the Senate immigration reform bill (S. 744), would establish a fair and reasonable compromise approach to H-2B wages.

Meanwhile, the federal district judge who issued the preliminary injunction regarding the H-2B program rule is expected to issue a nationwide permanent injunction by September, barring DOL
from implementing the program rule. On August 30, 2013, DOL published a final rule, delaying indefinitely the H-2B wage rule.

_I-9 Employment Eligibility Verification_

DHS’ U.S. Citizenship and Immigration Services (USCIS) published a finalized new Form I-9 on March 8, 2013, changing the one pager to a two page data collection form, which is now in effect as of May 8, 2013.

The Chamber’s comments on the development of the new Form I-9, which went through a one year, regulatory process, may be accessed here: https://www.uschamber.com/sites/default/files/comments/I-9%20comment%20to%20USCIS%205-29-2012%20with%20attachments.pdf and here: http://www.uschamber.com/issues/comments/2012/comments-uscis-form-i-9-employment-eligibility-verification

_Automation of Form I-94 Arrival/Departure Record_

On March 27, 2013, the Department of Homeland Security’s Custom and Border Protection (CBP) promulgated an interim final rule establishing automation of the Form I-94 Arrival/Departure Record to streamline the admissions process for individuals lawfully visiting the United States. Form I-94 provides international visitors evidence they have been lawfully admitted to the U.S. which is necessary to verify alien registration, immigration status, and employment authorization.

The automation means that affected visitors will no longer need to fill out a paper form when arriving to the U.S. by air or sea, improving procedures and reducing costs. Travelers wanting a hard copy or other evidence of admission will be directed to www.cbp.gov/I94 to print a copy of an I-94 based on the electronically submitted data, including the I-94 number from the form, to provide as necessary to employers, benefits providers or as evidence of lawful admission.

CBP is in the process of rolling out the automation at all ports of entry. After a period of several years, it is expected that CBP will eliminate the arrival/departure record altogether, and use passport numbers to track foreign nationals entering the country.

_Rulemakings Underway_

_Labor Condition Application (ETA 9035) for H-1B Petitions_

On July 9, 2012, the Department of Labor’s Employment and Training Administration (ETA) published proposed significant revisions to ETA Form 9035, otherwise known as the Labor Condition Application (LCA) Form, and its instructions.

The proposed form revision, among other things, would limit the maximum number of workers who could be covered on a single LCA to no more than 10 and require that the intended
worker(s) be identified by name on the LCA form prior to filing. Significant private information would be collected on the proposed new LCA, including data about the named employee, end clients of consulting firms, and information about the sponsoring employer (e.g., revenue).

The Chamber strongly opposes the collection of this private information and mounted a detailed challenge to several aspects of the revised form that appear to conflict with existing DOL regulations. The Chamber’s position is that the proposed LCA revision is inconsistent with the Administrative Procedure Act, the Privacy Act, state privacy laws, EEOC rules, current regulations governing the LCA, and, in some circumstances, the federal statute governing the creation of the LCA obligation. On September 7, 2012, the Chamber submitted comments.

The entire LCA form, without exception and without redaction, is required by statute to be publicly available for review. Currently, any member of the public, including a representative of a competitor business, any employee of the petitioning employer, or a reporter, can request to see an employer’s public access file. In addition, DOL makes certain information on the LCA form available on its website.

On January 24, 2013, DOL announced in a Federal Register notice that the agency would launch a searchable online registry of LCAs that would make employer sponsorship information more quickly and easily accessible to the public. While DOL already discloses some data on employers’ LCAs, the agency plans to release this information in a variety of formats, including PDF copies of certified cases and a searchable database. The new registry is expected to be launched in the near future, and will include LCAs certified since April 15, 2009.

DOL’s January 24th announcement highlights the importance of the Chamber’s efforts to bar DOL from requiring an employer to include additional private personally identifiable information on the LCA form. For now, DOL has been silent on if or when it will proceed with LCA reform.

The Chamber’s comments on the proposal may be accessed here: https://www.uschamber.com/sites/default/files/comments/USCC%20comment%20on%20LCA%20final%20to%20DOL%209-7-2012.pdf

**Anticipated Rulemakings**

**H-4 Dependent Spouses**

The Department of Homeland Security’s U.S. Citizenship and Immigration Services (USCIS) has long been expected to propose amendments to its regulations by extending the availability of employment authorization to H-4 dependent spouses of principal H-1B nonimmigrants who have begun the process of seeking lawful permanent resident (LPR) status through employment and have extended their authorized period of admission or “stay” in the U.S. under section 104(c) or 106(a) of Public Law 106-313, also known as the American Competitiveness in the Twenty-First Century Act of 2000. USCIS believes that allowing the eligible class of H-4 dependent spouses to work encourages professionals with high demand skills to remain in the country and help spur the innovation and growth of U.S. companies, and thus allow the U.S. to remain a world leader in high technology. In the past, the Chamber has advocated for the extension of employment...
authorization for H-4 dependent spouses of principal H-1B nonimmigrants and will continue to support these efforts throughout the rulemaking process. As of December 10, 2012, the notice of proposed rulemaking is at OMB for review. This will impact the Senate’s immigration reform bill, S. 744, which would create work authorization for H-4 spouses in certain circumstances. The bill would establish H-4 work authorization for a spouse if the spouse’s country of citizenship provides reciprocal work authorization for U.S. citizen dependent spouses in similar situations.

*Asia-Pacific Economic Cooperation (APEC) Business Travel Card*

The Department of Homeland Security’s U.S. Customs and Border Protection is expected to promulgate an interim final rule in fall 2013, setting forth the eligibility requirements and the application procedures and fee for the APEC Business Travel Card. Pursuant to the APEC Business Travel Cards Act of 2011 and the APEC Business Travel Card Operating Framework, U.S. Customs and Border Protection is establishing the U.S. Asia-Pacific Economic Cooperation Business Travel Card Program. APEC is an economic forum whose primary goal is to support sustainable economic growth and prosperity in the Asia-Pacific region. APEC is comprised of 21 members, including the United States. One of APEC’s initiatives is the APEC Business Travel Card Program. The U.S. APEC Business Travel Card Program will enable eligible persons access to fast-track immigration lanes at foreign APEC economies.

*Premium Processing Expansion*

The Department of Homeland Security’s U.S. Citizenship and Immigration Services (USCIS) has announced that in fall 2013, it expects to issue a NPRM regarding expansion of premium processing to E-3 (specialty occupation petitions for workers from Australian), H-1B1 (specialty occupation petitions for workers from Singapore and Chile), and other employment-based petitions.

*Expand STEM Practical Training for Students with Prior STEM Degrees*

The Department of Homeland Security’s U.S. Citizenship and Immigration Services (USCIS) has announced that in fall 2013, it expects to issue a NPRM recognizing that the additional 17 month period of Optional Practical Training for F-1 STEM students should include F-1 students earning business or other degrees when their prior degree was in a STEM field.

*Procedural and Technical Employment Verification (I-9) Violations*

The Department of Homeland Security’s Immigration and Customs Enforcement (ICE) has been indicating since early 2011 that it was prepared to issue a NPRM finally implementing the mandate of the 1996 immigration reform legislation (IIRIRA – the Illegal Immigration Reform and Immigrant Responsibility Act) to distinguish between substantive failures to comply with the employment verification obligations (I-9) and technical or procedural failures. ICE has announced that in fall 2013 it expects to move forward with proposed rulemaking.
Pension Regulatory Activity

Completed Rulemakings

PBGC Rule on Cessation of Operations (ERISA section 4062(e))

If an employer ceases operations at a facility in any location that causes job losses affecting more than 20% of participants in the employer's qualified retirement plan, the Pension Benefit Guaranty Corporation (PBGC) can require an employer to put a certain amount in escrow or secure a bond to ensure against financial failure of the plan. In 2010, the PBGC issued a proposed rule detailing specific incidents that would be considered a “section 4062(e)” event. The Chamber submitted comments arguing that the PBGC overstepped the intent of the statute and would impose these liabilities in many more situations than warranted by the statute. Moreover, the Chamber expressed concern that the proposed rules did not take into account the entirety of all circumstances but, rather, focused on particular incidents in isolation.

The Chamber’s comments can be accessed here:
http://www.uschamber.com/sites/default/files/comments/PBGC_Comments_4062e.pdf

In 2011, the PBGC stated that it would reconsider the proposed rule. However, the Chamber learned that the PBGC’s enforcement policy continued to follow the proposed rule. As a result, the Chamber sent comments to the PBGC in response to President Obama's Executive Order No. 13563 which included a statement for the need to reconsider ERISA section 4062(e). Moreover, the Chamber had several subsequent conversations with Director Josh Gotbaum on this issue.

On November 2, 2012, the Pension Benefit Guaranty Corporation (PBGC) announced that it will be changing its enforcement efforts with respect to ERISA section 4062(e). According to the announcement, instead of using a one-size-fits-all approach, the PBGC will use facts and circumstances to focus on companies that pose real risk. As a result of its new approach, the PBGC estimates that 92 percent of companies sponsoring defined benefit pension plans will not face PBGC enforcement efforts. While this is an obscure provision, it can have substantial financial impact on a plan sponsor with a defined benefit plan. Therefore, this is a major victory for the pension plan community.

Plan Fee Disclosure

In July 2010, the DOL issued an interim final regulation covering the disclosures required from service providers to plan sponsors. The interim final rule follows the proposed rule that was issued by the DOL issued in 2009, but contains a number of provisions that differ significantly from the proposed regulation. Therefore, the regulations were issued as interim final to allow for additional comment.

On August 30, 2010, the Chamber submitted comments in response to the interim final rule. The Chamber’s comments recommended that the final rule require a single disclosure document from the service provider to the plan sponsor and reiterated our concerns about the application of the fee disclosure rules to welfare plans.
The Chamber’s comments can be accessed here:
http://www.uschamber.com/sites/default/files/comments/Plan_Fees_Comments_Interim_Final_Rule.pdf

On February 3, 2012, DOL released the final regulation for plan fee disclosure. The Department reserves the right in the final regulation to later issue regulations concerning a tool, such as a sample guide to assist plan fiduciaries. The Appendix includes a “sample guide,” which DOL is strongly encouraging plan sponsors to use. The rule took effect on July 1, 2012.

On May 7, 2012, EBSA issued Field Bulletin No. 2012-02, providing guidance in the form of Frequently Asked Questions (FAQs) with respect to the issue of fee disclosure information to participants. On July 30, 2012, the EBSA issued a revised FAQ, Field Bulletin No. 2012-02R, clarifying its position on the treatment of open broker windows in 401(k) plans. The revised FAQ clarifies that plan sponsors must provide fee information concerning the brokerage window itself but limits the plan sponsors obligations with respect to investments inside the window. This position is much more in line with the previous regulatory guidance from the DOL.

On July 22, 2013, the Department of Labor issued Field Assistance Bulletin No. 2013-02. The participant fee disclosure regulation requires certain disclosures to be made for individual account plans on an annual basis. The FAB, as a matter of temporary enforcement policy, allows plans to “re-set” the notice deadline for either the 2013 or the 2014 plan year. In addition, EBSA stated that it is considering whether to allow a 30-day or 45-day window during which a subsequent annual comparative chart would have to be furnished, rather than fixing the 12-month "at least annually" period to end on one specific day. The Chamber plans to submit favorable comments on this FAB.

Financial Capability at Work

On September 4, 2012, the President’s Advisory Council on Financial Capability (PACFC) issued a draft framework on steps employers can take to increase the financial capability of their workers entitled “Financial Capability at Work: A Strategic Framework for Employers.” The Chamber submitted comments focusing on two issues; 1) That the private retirement system must remain voluntary; and 2) Employers should not incur additional fiduciary liability for providing financial education.

These comments can be found here:

Many of the Chamber's suggestions – particularly those asking to clarify the voluntary nature of employer-sponsored benefits and seeking clarification around electronic delivery – were adopted as part of the formal recommendation to the President and the Treasury Secretary. On November 28, 2012, the PACFC unanimously approved the formal recommendation.
**Rulemakings Underway**

**Missing Participant Program – Request for Information**

On June 21, 2013, the PBGC issued on a request for information on implementing a program to deal with the benefits of missing participants in terminating individual account plans. In general, the Chamber supports the implementation of a missing participants program by the PBGC as long as participation in the program is voluntary and is comparable to services provided by private parties.


**Electronic Disclosures – Request for Information**

On April 7, 2011, the Department of Labor issued a request for information on electronic disclosure by employee benefit plans. The request applies to disclosures for both retirement and health care plans. The Chamber submitted comments to the request for information on June 6, 2011. In general, our comments urge the DOL to update its safe harbor for electronic disclosures to make the use of electronic delivery of notices easier for both retirement and health care plans. In addition, we recommend that electronic delivery be allowed as the default delivery option for all benefit plans.


**Hybrid Plan Regulations**

On October 18, 2010, the Treasury Department and Internal Revenue Service issued long-awaited regulations affecting hybrid defined benefit plans. The agencies released both a set of final regulations and a set of proposed regulations. The Chamber submitted comments on January 12, 2011, which highlight the need for the Treasury and the IRS to set forth a clear and rational approach to PPA compliance for Pension Equity Plans. Moreover, because of the complexity of hybrid plans and their regulation, we requested additional guidance to ensure that plan sponsors have sufficient clarity and flexibility to adopt and maintain hybrid pension plans with legal certainty.

A copy of the Chamber’s letter can be found here: [http://www.uschamber.com/sites/default/files/comments/Cash_Balance_JanComments.pdf](http://www.uschamber.com/sites/default/files/comments/Cash_Balance_JanComments.pdf)
Definition of a Fiduciary

On October 21, 2010, EBSA issued a proposed regulation regarding the definition of a fiduciary under ERISA. This regulation is the first time the definition of a fiduciary has been changed since the implementation of ERISA. According to EBSA, the intent of the proposed rule is to more broadly define the circumstances under which a person or entity is considered to be a fiduciary when giving investment advice to an employee benefit plan or a plan's participants. The Chamber submitted comments to the DOL on February 3, 2011. We support the efforts of the DOL in updating the definition of a fiduciary, but have concerns about the breadth of some of the changes. There have been significant changes in both the design of private retirement plans and the investment options and services provided for these plans. Although these changes have created increasingly complex investment schemes and financial arrangements, the determination of fiduciary status has not changed. Therefore, amending the definition at this time is appropriate. At the same time, we believe that the expansion of the fiduciary definition should not be freely interpreted to include every act related to a retirement plan. Rather, a balance needs to be struck that protects participants and allows for the free flow of information and services in the market.

A copy of the Chamber’s comments can be found here: http://www.dol.gov/ebsa/pdf/1210-AB32-111.pdf

Following up on our initial comments, the Chamber submitted an additional letter to Secretary of Labor Hilda Solis on August 4, 2011, requesting a re-proposal of the proposed rule and a re-evaluation of the economic analysis included in the proposal.

A copy of the Chamber’s letter to Secretary Solis can be found here: http://www.uschamber.com/sites/default/files/hill-letters/Fiduciary_Letter_Solis.pdf

On September 19, 2011, the Department of Labor announced that it intends to re-propose this regulation in 2013. The 2013 Spring semi-annual regulatory agenda, released on July 3, 2013, states that a rule will be re-proposed in October, 2013. However, we believe that the issuance of a re-proposed rule will be pushed beyond this date.

Target Date Fund Disclosure

On November 30, 2010, the DOL issued proposed regulations on target date fund disclosures. The proposal amends the qualified default investment alternative regulation to provide more specificity as to the information that must be disclosed in the required notice to participants and beneficiaries concerning investments in qualified default investment alternatives, including target date or similar investments. A significant concern is the increasing number of required notices and whether participants are becoming overwhelmed with the volume of information being provided. On January 11, 2011, the Chamber submitted comments.
A copy of the Chamber’s comments can be found here: http://www.uschamber.com/sites/default/files/comments/TargetDateFunds_Comments_Jan2011.pdf

On May 24, 2012, the Labor Department announced that it is reopening the comment period to allow for feedback on research the SEC commissioned as part of its work on its proposed rule on comprehension and communication issues regarding target date funds. Comments were due by July 9, 2012.

**Annual Funding Notice for Defined Benefit Plans**

On November 18, 2010, the DOL issued proposed regulations on the annual funding notice for defined benefit plans. The proposal would implement the annual funding notice requirement in ERISA, as amended by the PPA and WRERA. As amended, section 101(f) of ERISA generally requires the administrators of all defined benefit plans to furnish an annual funding notice to the PBGC, participants, beneficiaries, and certain other persons that must include, among other information, the plan’s funding target attainment percentage or funded percentage, as applicable, over a period of time, as well as other information relevant to the plan’s funded status. A significant concern is the increasing number of required notices and whether participants are becoming overwhelmed with the volume of information being provided.

On January 18, 2011, the Chamber submitted comments.

A copy of the Chamber’s comment letter can be found here: http://www.uschamber.com/sites/default/files/comments/Defined_Benefit_Plan_Comments_Jan2011.pdf

**Lifetime Income Options and Illustrations on Benefit Statements**

On February 2, 2010, the Department of Labor and the Treasury Department issued a request for information on lifetime income distribution options in defined contribution plans. The Chamber submitted comments in response to this request on May 3, 2010. The comments detail the Chamber’s top priorities surrounding lifetime income products. First, the letter explains the importance of defined contribution plans in the current retirement landscape and urges the agencies not to underestimate the security that they provide in their current form to millions of participants.

The comments then detail a number of issues including low take-up rates among participants, concerns about increased liabilities on employers, incentives for employers to provide information on lifetime income products, and suggested changes to the minimum required distribution rules. Moreover, the comments urge the agencies against requiring lifetime income products as a mandated distribution option in defined contribution plans.

The Chamber’s comments may be accessed here: http://www.uschamber.com/sites/default/files/comments/Lifetime_Income_Options_Response_RFIL.pdf
On February 2, 2012, the Treasury Department issued two proposed rules: one on longevity annuity contracts purchased under a defined contribution plan and the other on allowing distributions of partial annuities in defined benefit plans. The Treasury Department also issued two revenue rulings that provide guidance on the distribution of annuities.

On May 8, 2013, the Department published an advance notice of proposed rulemaking (ANPRM) that indicated that DOL is considering a proposal that would require that pension benefit statements for defined contribution plans include lifetime income illustrations. DOL also posted an online calculator on its website that “illustrates an annuitization approach to estimate the monthly lifetime income streams based on both the participant’s current account balance and on the projected value of the account balance at retirement.” Comments were originally due by July 8, 2013, but were extended until August 7, 2013.

On August 7, 2013, the Chamber submitted comments, which may be accessed here:
http://www.uschamber.com/sites/default/files/comments/Lifetime%20Income%20Disclosures%20-%20Comments%20to%20DOL.pdf

Reportable Events

In January 2010, the Chamber submitted comments to the Pension Benefit Guaranty Corporation on a proposed rule aimed at increasing opportunities for the PBGC to become aware of potential funding issues. The Chamber’s comments focused on the need for balance between enhanced oversight by the PBGC and the potential burdens on employers. In several instances, we believe that the benefits imposed upon plan sponsors will not provide an equivalent benefit to the PBGC. For example, the proposal eliminates most of the automatic waivers and extensions that currently exist. Therefore, the Chamber urges the PBGC to enter in a negotiated rulemaking process and should allow waivers and extensions to be retained in specific occasions.

These comments can be found here:
http://www.uschamber.com/sites/default/files/comments/Reportable_Events_Comments_Jan2010.pdf

In August of 2011, the PBGC issued its Plan for Regulatory Review stating that it will re-propose this rule with an emphasis toward reducing the unnecessary burdens on employers and plans. On April 3, 2013, the PBGC re-proposed these rules in substantially revised form. The new proposed rule is intended to reform and reduce reporting requirements for more than 90 percent of companies and pension plans.

On June 3, 2013, the Chamber submitted comments. The comments may be accessed here:

On June 18, 2013, the Chamber testified during the public hearing on these rules.
**Purchase of Irrevocable Commitments**

In a standard termination, an employer must purchase irrevocable commitments (i.e., annuity contracts) to provide for all benefit liabilities. In January 2010, the Chamber submitted comments to the Pension Benefit Guaranty Corporation on proposed regulations concerning the purchase of irrevocable commitments. The comments stressed that the purchase of irrevocable commitments should depend on the facts and circumstances surrounding the purchase, but that there should be a safe harbor for certain purchases. The comments recommended several requirements for the safe harbor, including that the irrevocable commitments be purchased for a specific purpose, that plan assets are at least equal to plan benefits at the time of the purchase; and that the standard termination notice be given to beneficiaries covered by the irrevocable commitment. With these requirements, the safe harbor will address the concerns of the PBGC during a standard termination. Nonetheless, a safe harbor should be only that – a way to ease oversight burdens for the agency and to provide certainty for plan sponsors. A purchase of irrevocable commitments that does not meet the safe harbor should be subject to a facts and circumstances review by the PBGC.

These comments can be found here:  

**Premium Rates; Payment of Premiums**

On July 23, 2013, the Pension Benefit Guaranty Corporation promulgated a proposed rule to amend regulations on premium rates and the payment of premiums to simplify due dates and coordinate the due date for plan termination with the termination process. On September 23, 2013, the Chamber submitted comments, which may be accessed here:  
Healthcare Regulatory Activity

Completed Rulemakings

Medical Loss Ratio

On April 14, 2010, the Departments of Health and Human Services, Treasury, and Labor published a request for information (RFI) to aid in the development of regulations to implement new Public Health Act Section 2718, as added by Sections 1001 and 10101 of the Patient Protection and Affordable Care Act. Section 2718 of the Public Health Service Act requires health insurance issuers offering individual or group coverage to submit annual reports to the Secretary on the percentages of premiums that the coverage spends on reimbursement for clinical services and activities that improve health care quality, and to provide rebates to enrollees if this spending does not meet minimum standards for a plan year. The Departments are specifically requesting examples of initiatives to classify as “activities that improve health care quality.” On May 14, 2010, the Chamber submitted comments to the Departments, emphasizing that the definition of “activities which improve health care quality” should encompass disease management programs; efforts to facilitate care coordination; the development of quality reporting metrics; initiatives to combat waste, fraud and abuse; and methods to control health care costs. The Chamber also requested that the agencies exempt the medical loss ratio requirement from applying to self-insured plans, in accordance with the statute.

The Chamber’s comments submitted in response to this RFI may be accessed here: http://www.uschamber.com/sites/default/files/comments/100512comments_MLR_RFI.pdf

On December 1, 2010, the Department of Health and Human Services published an interim final rule which implements the definition and methodology associated with the calculation of the Medical Loss Ratio (MLR) provisions of the Patient Protection and Affordable Care Act and the calculation of the rebate to consumers for plans that do not satisfy the MLR. A correction was published on December 30, 2010.

The Chamber filed comments in response to this interim final rule on January 31, 2011, which may be accessed here: http://www.uschamber.com/sites/default/files/comments/Medical_Loss_Ratio_IFR_Comments.pdf

On December 7, 2011, the Department of Health and Human Services published a final rule to implement the MLR requirements. The final rule includes a new notice requirement, which states that insurers must provide information on the amount of the rebate or MLR, regardless of whether or not there is a rebate. EBSA has spelled out in guidance (Technical Release No. 2011-04) how ERISA plans should handle the distribution of rebates as a plan fiduciary.

On December 7, 2011, the Department also published an interim final rule implementing the Medical Loss Ratio requirements regarding the distribution of rebates by issuers in group markets for non-Federal governmental plans. The final rules took effect on January 1, 2012.
The Chamber filed comments in response to this final rule on January 6, 2012, which may be accessed here:

On February 21, 2012, the Department of Health and Human Services published a re-opening of comment period with respect to the information collection activities associated with the MLR requirements, including the notice rebate form. The Chamber filed comments in response to this request.

The Chamber’s comments may be accessed here:

On May 19, 2012, the Department of Health and Human Services published a final rule amending the regulations implementing the medical loss ratio provision. The final rule will require insurers to provide a one-time notice to beneficiaries even if the insurer has met the applicable MLR requirement.

On December 7, 2012, HHS published a proposed rule, which amends the regulations to specify how issuers are to account for payments or receipts for risk adjustment, reinsurance, and risk corridors, and to change the timing of the annual MLR report and distribution of rebates required of issuers to allow for accounting of the premium stabilization programs. The proposed rule also proposes to amend the regulations to revise the treatment of community benefit expenditures in the MLR calculation for issuers exempt from Federal income tax.

On December 24, 2012, the Chamber filed comments.

The Chamber’s comments may be accessed here:

On March 11, 2013, HHS published a final rule, which finalizes the amendments to specify how issuers are to account for payments or receipts for risk adjustment, reinsurance, and risk corridors, and to change the timing of the annual MLR report and distribution of rebates required of issuers to allow for accounting of the premium stabilization programs. The final rule also formally amends the regulations to revise the treatment of community benefit expenditures in the MLR calculation for issuers exempt from Federal income tax.

**Preventive Services Coverage**

On July 19, 2010, the Departments of Treasury, Labor, and Health and Human Services published an interim final rule to implement requirements regarding first dollar coverage of preventive services for non-grandfathered group health plans and health insurance issuers offering group and/or individual insurance coverage.
The Chamber’s comments in response to the interim final rule may be accessed here: http://www.uschamber.com/sites/default/files/comments/100916preventionregulation.pdf

Subsequent sub-regulatory guidance has been issued by HHS to clarify and revise the IFR in the form of “Frequently Asked Questions” on December 22, 2010 (Question 1).

On August 3, 2011, the Departments of Treasury, Labor, and Health and Human Services published an amendment to the interim final rule, regarding first dollar coverage of preventive services for women with respect to non-grandfathered group health plans and health insurance issuers offering group and/or individual insurance coverage. Comments in response to the amendment to the interim final rule were due on September 30, 2011.

On February 10, 2012, the Center for Consumer Information and Insurance Oversight (CCIIIO) within the Centers for Medicare and Medicaid Services issued guidance on a temporary safe harbor for certain employers, group health plans and group health insurance issuers with respect to the requirement to cover contraceptive services without cost sharing under section 2713 of the Public Health Service Act, section 715(a)(1) of the Employee Retirement Income Security Act and Section 9815(a)(1) of the Internal Revenue Code.

On February 15, 2012, the Departments of Treasury, Labor, and Health and Human Services published a final rule which finalized without change the interim final rule authorizing the exemption of group health plans and group health insurance issuers sponsored by certain religious employers from having to cover certain preventive health services under the Patient Protection and Affordable Care Act. These final rules apply generally to group health plans and group health insurance issuers on April 16, 2012.

On March 21, 2012, the Departments of Treasury, Labor and Health and Human Services published an Advance notice of proposed rulemaking (ANPRM) regarding certain preventive services under the Patient Protection and Affordable Care Act. This ANPRM announced the intention of the Departments to proposed amendments to regulations regarding certain preventive health services under PPACA. The proposed amendments would establish alternative ways to fulfill the requirements of the law when health coverage is sponsored or arranged by a religious organization that objects to the coverage of contraceptive services for religious reasons.

On February 1, 2013, the Departments of Treasury, Labor, and Health and Human Services published proposed rules, which establish alternative ways to fulfill the requirements of the law when health coverage is sponsored or arranged by a religious organization that objects to the coverage of contraceptive services for religious reasons. The proposed rules closely mirror the ANRPM’s earlier guidance. Comments were due on April 8, 2013. On July 2, 2013, the Departments of Treasury, Labor, and Health and Human Services published final rules, virtually unchanged from the proposal.

Subsequent sub-regulatory guidance has been issued by HHS to clarify the preventive services requirement in the form of “Frequently Asked Questions” on February 20, 2013 (Questions 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20).
Uniform Explanation of Benefits, Coverage Facts and Standardized Definitions

On August 22, 2011, HHS published a Notice of Proposed Rulemaking (NPRM) implementing the requirement that all insurers use a 4 page uniform format for accurate summaries of benefits and coverage explanations. The Patient Protection and Affordable Care Act requires the Secretary to develop standards for use by group health plans and health insurance issuers in compiling and providing a summary of benefits and coverage explanation that accurately describes benefits and coverage. The Secretary must also set standards for the definitions of terms used in health insurance coverage, including specific terms set out in the statute. Plans and issuers must provide information according to these standards no later than 24 months after enactment. The NPRM proposes how to implement the information disclosure provisions in Section 2715 of PHSA, as added by the Patient Protection and Affordable Care Act.

On October 21, 2011, the Chamber submitted comments which may be accessed here: http://www.uschamber.com/sites/default/files/comments/111021_NPRMcomments.pdf

On November 17, 2011, the Department of Labor issued an FAQ stating that a final rule will be issued with a new applicability date, meaning that until a final rule is issued, the March 23, 2012 implementation date no longer stands. The Chamber pushed for a delay in the implementation deadline in comments filed with CMS in response to the NPRM on October 21, 2011.

On February 14, 2012, the Departments (Labor, Treasury, and HHS) promulgated a final rule, implementing the provisions regarding the uniform explanation of benefits, coverage facts, and standardized definitions. The final rule delays the implementation date for group health plans until the first day of the first plan year that begins on or after September 23, 2012.

On March 19, 2012, and on May 11, 2012, the Department of Labor, Department of Treasury, and Department of Health and Human Services issued guidance under “Frequently Asked Questions,” which stated that group health plan and sponsors working in good faith to provide the standardized summary of benefits and coverage required will not face penalties during the first year of applicability.

On June 5, 2012, the Department of Labor released Coverage Examples, a Calculator, and related information.

On April 23, 2013, the Department of Labor released an updated FAQ, announcing updated materials. Specifically, the Departments have released an updated template and sample summary of benefits and coverage. These documents are authorized for use with respect to group health plans and group and individual health insurance coverage with respect to coverage beginning on or after January 1, 2014, and before January 1, 2015. The only change to the template and sample completed summary of benefits and coverage is the addition of statements of whether the plan or coverage provides minimum essential coverage (as defined under section 5000A (f) of the Internal Revenue Code of 1986) and whether the plan or coverage meets the minimum value requirements (that is, the plan’s or coverage’s share of the total allowed costs of benefits provided under the plan or coverage is not less than 60 percent of such costs).
Health Insurance Premium Tax Credit

On August 17, 2011, the Treasury Department published a notice of proposed rulemaking and notice of public hearing to describe providing guidance to individuals who enroll in qualified health plans through Exchanges and claim the tax credit and to Exchanges that make qualified health plans available to individuals and employers.

On October 31, 2011, the Chamber submitted comments which may be accessed here: http://www.uschamber.com/sites/default/files/comments/111031NPRMPremiumTaxCreditUSC.pdf

On May 23, 2012, the Treasury Department issued final regulations regarding the health insurance premium tax credit. On August 21, 2012, the Chamber submitted comments in response to the final rule.

The comments may be accessed here: https://www.uschamber.com/sites/default/files/comments/Premium%20Tax%20Credit%20final%20regulations.pdf

On December 7, 2012, HHS published a proposed rule providing additional details for Exchanges and issuers on the administration of advance payments of premium tax credits and cost-sharing reductions for individuals and families.

On December 24, 2012, the Chamber filed comments.


On February 1, 2013, the IRS published an amendment to the final rule, which declares that the threshold for affordability for employment-based plans is based on the cost of individual coverage in relation to an individual’s household income.

On March 11, 2013, HHS published a final rule which provides additional details for Exchanges and issuers on the administration of advance payments of premium tax credits and cost-sharing reductions for individuals and families.

Essential Health Benefits

On November 8, 2010, the Institute of Medicine requested comments to an on-line survey exploring the proper definition of “essential health benefits” which all qualified plans offered in an exchange would be required to cover.

A copy of the comments the Chamber submitted through the on-line survey may be accessed here: http://www.uschamber.com/sites/default/files/comments/Essential_Health_Benefits_IOM_Final_0.pdf
Three days after the Chamber submitted responses, the Institute of Medicine requested that a representative from the U.S. Chamber of Commerce participate in a public panel to explore purchaser decision making in benefit design from the perspective of small employers. A member of the Employee Benefits Committee who also serves on the Health Care Regulatory Task Force participated in the panel discussion on January 13, 2011.

On December 16, 2011, the Department of Health and Human Services (HHS) issued a bulletin and request for comment, entitled the “Essential Health Benefits Bulletin.” The bulletin indicates that the Department is contemplating permitting States to define a benchmark plan that is equivalent in benefit offerings to the largest plan by enrollment in any of the three largest small group insurance products in the State’s small group market; any of the three largest three State employee health benefits plans by enrollment; any of the largest three national FEHBP plans options by enrollment; or the largest insured commercial non-Medicaid Health Maintenance Organization (HMO) operating in the State. States can also offer additional benefits in the package, but would be responsible for defraying these costs. On February 3, 2012, the Chamber submitted comments.

A copy of the Chamber’s comments may be accessed here: https://www.uschamber.com/sites/default/files/comments/EHB_Bulletin_USCC_Comments.pdf

On February 17, 2012, CMS issued a bulletin, entitled “Frequently Asked Questions on Essential Health Benefits” to provide guidance to states and employers on how to comply with this provision in the statute.

On February 24, 2012, CMS issued a bulletin on the calculation of actuarial value and cost-sharing for qualified health plans and other non-grandfathered coverage in the individual and small group market.

On June 5, 2012, CMS published a proposed rule to establish data collection standards to support the definition of “essential health benefits.” Comments were due by July 4, 2012. On July 20, 2012, CMS published a final rule to establish the data collection standards required to support the definition of “essential health benefits.”

On November 26, 2012, HHS published a proposed rule detailing the “essential health benefits,” actuarial value and cost-sharing for qualified health plans and other non-grandfathered coverage in the individual and small group market, and the accreditation process for health plans. The proposed rule largely mirrors the earlier bulletins, but also imposes a new requirement that health insurance plans will also be required to cover the same number of prescription drugs as the benchmark plan in their states, and includes a transitional policy for the coverage of habilitative services. The proposed rule also would set up a waiver process for insurers to impose a higher threshold than the maximum deductible permitted under the statute if a plan can’t design a “bronze” plan without a higher deductible.

On December 26, 2012, the Chamber submitted comments in response to the proposed rule.
A copy of the Chamber’s comments may be accessed here: https://www.uschamber.com/sites/default/files/EHB%20AV%20Accreditation%20Proposed%20Rule%20-%20USCC.pdf

Subsequent sub-regulatory guidance has been issued by HHS to clarify how the essential health benefits interface with the limitations of cost-sharing in the form of “Frequently Asked Questions” issued on February 20, 2013 (Questions 1 and 2).

On February 26, 2013, HHS published a final rule regarding the “essential health benefits.” The final rule indicates that annual limitations on out-of-pocket maximums will apply to both the large group market and self-insured plans and that the Department will engage in separate rulemaking to clarify those standards; finalizes a minimum value calculator for the large group and self-insured plans, which relies on using a standard population that is based on self-insured group health plans; and states that guidance on the treatment of Health Reimbursement Arrangements for the actuarial value calculator is forthcoming. The final rule also states that sub-regulatory guidance is forthcoming for a health plan “to have procedures in place that allow an enrollee to request clinically appropriate drugs not covered by the health plan.”

“Minimum” Value of Employer Sponsored Coverage

On April 26, 2012, the Internal Revenue Service (IRS) published Notice 2012-31, requesting public comment on issues relating to the minimum value and shared responsibility provisions included in the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010. Specifically, the IRS requested comments on how the agency should consider the interaction between the actuarial value (A/V) of the Essential Health Benefits and determining the A/V value of employer-sponsored plans. The notice also describes the different approaches to the methodology regarding how an employer-sponsored plan may calculate the A/V value to meet the threshold requirements. On June 11, 2012, the Chamber submitted comments.


On November 26, 2012, HHS published a proposed rule detailing the “essential health benefits,” actuarial value and cost-sharing for qualified health plans and other non-grandfathered coverage in the individual and small group market, and accreditation process for health plans. The proposed rule mirrors the guidance provided in IRS Notice 2012-31.

On December 26, 2012, the Chamber submitted comments.

A copy of the Chamber’s comments may be accessed here: https://www.uschamber.com/sites/default/files/EHB%20AV%20Accreditation%20Proposed%20Rule%20-%20USCC.pdf
On February 26, 2013, HHS published a final rule with respect to how employer-sponsored plans may calculate A/V to satisfy the minimum value requirement.

On May 3, 2013, the IRS published a proposed rule that outlines how health risk assessments, HSA contributions, and wellness program incentives should be treated when calculating minimum-value standards. In addition, the proposed rule also requests input on “safe harbor” designs large employers may use for purposes of calculating minimum value requirements.

On July 2, 2013, the Chamber submitted comments, which may be accessed here: http://www.uschamber.com/sites/default/files/comments/USCC%20Comment%20on%20Minimum%20Value%20NPRM.pdf

Incentives for Nondiscriminatory Wellness Programs in Group Health Plans

On November 26, 2012, the Departments of Labor, Treasury, and HHS published a proposed rule amending the regulations for nondiscriminatory wellness programs in group health coverage. The NPRM would increase the maximum permissible reward under a health-contingent wellness program offered in connection with a group health plan (and any related health insurance coverage) from 20 to 30 percent of the cost of coverage, and further increase the maximum permissible reward to 50 percent for wellness programs designed to prevent or reduce tobacco use. The proposed regulation would also impose new considerations with respect to the “reasonable alternative” standard, and includes new sample language for employers to inform their employees about achieving the reward via alternative means.

On January 25, 2013, the Chamber filed comments.

The Chamber’s comments may be accessed here: https://www.uschamber.com/sites/default/files/comments/Workplace%20Wellness%20Programs%20Proposed%20Rule%20-%20US%20Chamber%20of%20Commerce%20Comments.pdf

On June 3, 2013, the Departments of Labor, Treasury, and HHS published the final rule.

On May 3, 2013, the IRS published a proposed rule that outlines how health risk assessments, HSA contributions, and wellness program incentives should be treated when calculating minimum-value standards. The proposed rule also provides a safe harbor for employers who use incentives in their wellness programs and have an employee who qualifies for a premium assistance tax credit due to the fact that the coverage is unaffordable or lacks minimum value due to the use of these incentives.

On July 2, 2013, the Chamber submitted comments, which may be accessed here: http://www.uschamber.com/sites/default/files/comments/USCC%20Comment%20on%20Minimum%20Value%20NPRM.pdf
**Individual “Shared Responsibility” Requirement**

On February 1, 2013, the Internal Revenue Service published a proposed rule and announced a public hearing regarding implementation of the individual mandate penalty for individuals, methods for calculating the fee, and exemptions. Comments were due by May 2, 2013. On August 30, 2013, the Internal Revenue Service published final regulations.

On February 1, 2013, the Department of Health and Human Services published proposed regulations to implement the individual mandate, including describing how exchanges can grant certificates of exemptions to individuals, and sets forth the processes that individuals may be credited for “minimum essential coverage” if they have other health insurance coverage than is defined in the statute. Comments were due by March 18, 2013.

**Rulemakings Underway**

**Mental Health Parity Interim Final Rule**

On February 2, 2010, the Departments of Treasury, Labor, and Health and Human Services (HHS) published an interim final rule implementing the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (“Act”), which prohibits group health plans from applying financial requirements or treatment limitations that are more restrictive than those applied to the group health plan’s medical and surgical benefits. This regulation is effective for the first plan year beginning on or after July 1, 2010. The rules are much more expansive than anticipated.

On May 3, 2010, the Chamber, American Benefits Council, and National Retail Federation submitted joint comments on the interim final rules. The Chamber, along with the American Benefits Council, and National Retail Federation respectfully requested that the agencies delay the applicability date until the first plan year beginning on or after January 1, 2012, and also provide for a good faith compliance period to give plan sponsors additional time to come into compliance. The comments also emphasized that the departments overreached in defining the list of “non-quantitative” limits to also encompass medical management techniques.

The Chamber’s jointly filed comments may be accessed here: [http://www.uschamber.com/sites/default/files/comments/100503mhp_comments.pdf](http://www.uschamber.com/sites/default/files/comments/100503mhp_comments.pdf)

Scheduled for October, 2013, the Department of HHS (with the Department of Treasury and Department of Labor) is expected to publish a final rule to further clarify statutory changes to the Public Health Service Act (PHSA) affecting the group health insurance markets and non-federal governmental plans, made by the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA).
Preexisting Condition Exclusions, Lifetime and Annual Limits, Rescissions and Patient Protections

On June 28, 2010, the Departments of Treasury, Labor, and Health and Human Services published an interim final rule (with comment period) to implement Public Health Service Act Sections 2704 (prohibiting preexisting condition exclusions), 2711 (banning lifetime limits and imposing restricted annual limits, until 2014), and 2719A (patient protections with respect to designation of a primary care provider, pediatrician and/or obstetrician/gynecologist; and cost-sharing limitations with respect to emergency services).

The Chamber’s comments in response to the interim final rule may be accessed here: http://www.uschamber.com/sites/default/files/comments/100826preexistingconditionexclusion.pdf

Subsequent sub-regulatory guidance has been issued to clarify and revise the IFR, including several sub-regulatory guidance issued by HHS in the form of “Questions and Answers on Enrollment of Children under 19 Under the New Policy That Prohibits Pre-Existing Condition Exclusions.” Additionally, an Insurance Standards Bulletin was issued by the HHS’s Office of Consumer Information and Insurance Oversight on September 3, 2010, detailing the process for obtaining waivers of the annual limits requirements in the group and individual markets. Further sub-regulatory guidance was issued by HHS in the form of “Frequently Asked Questions” on September 20, 2010 (Question 15), on October 8, 2010 (Questions 7 and 8), on December 22, 2010 (Question 6), and on April 29, 2013 (Question 1).

Non-Discrimination in Favor of Highly Compensated Individuals

On October 12, 2010, the Department of Treasury and the Internal Revenue Service published Notice 2010-63 and a request for comments in the Internal Revenue Bulletin and invited public comment on what additional guidance would be helpful with respect to the extension of rules prohibiting discrimination in favor of highly compensated individuals to fully insured group health plans, as required under the provisions of the Patient Protection and Affordable Care Act. (These rules currently apply to self-insured plans.) Effective for plan years beginning on or after September 23, 2010, non-grandfathered fully insured group health plans that fail to comply with the Internal Revenue Code Section 105(h)’s nondiscrimination requirements will be subject to taxes, remedies, and potentially significant penalties.

The Chamber’s comments in response to the notice may be accessed here: http://www.uschamber.com/sites/default/files/comments/101104nondiscrim_comments.pdf

On December 22, 2010, the IRS issued Notice 2011-1 and request for comments regarding the timing of the application of this statutory prohibition. The notice stated that Treasury, IRS, Labor, and HHS have determined that compliance should not be required until after regulations and other administrative guidance of general applicability have been issued. No concrete new effective date has been set. Instead, the notice merely states that after additional guidance is issued, the Departments anticipate that guidance will not apply immediately. The notice also

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requested additional public comments on particular issues, to which the Chamber responded by the March 11, 2011 deadline.

The Chamber’s comments in response to this notice may be accessed here: http://www.uschamber.com/sites/default/files/comments/Non-discrimination_favor_highly_paid_individual_USCC_comments.pdf

On April 2, 2013, the IRS published a notice of proposed rulemaking to implement this provision.

On July 1, 2013, the Chamber submitted comments, which may be accessed here: http://www.uschamber.com/issues/comments/2013/proposed-rule-section-9014-executive-compensation

Medicare Shared Savings Program: Accountable Care Organizations

On April 7, 2011, HHS published a proposed rule implementing the provisions relating to Medicare payments to providers of services and suppliers participating in Accountable Care Organizations (ACOs). ACOs create incentives for health care providers to work together to treat an individual patient across care settings – including doctor’s offices, hospitals and long-term care facilities. The Medicare Shared Savings Program will reward ACOs (accepting responsibility for at least 5,000 Medicare beneficiaries for three years) that lower growth in health care costs while meeting performance standards on quality of care and putting patients first. Under these provisions, providers and suppliers can continue to receive traditional Medicare Fee-for-service payments under Part A and B, and be eligible for additional payments based on meeting specified quality and savings requirements. Patient and provider participation is purely voluntary. The Patient Protection and Affordable Care Act requires the Secretary of the United States Department of Health and Human Services (HHS) to establish the Medicare Shared Savings Program no later than January 1, 2012.

Under the proposed rule, Medicare beneficiaries would not enroll in a specific ACO. Instead, Medicare would take a retrospective look at the beneficiary’s use of services to determine whether a particular ACO should be credited with improving care and reducing expenditures, thereby incenting the ACO to improve the quality of care for all patients seen by its member providers and suppliers. An ACO that meets the program’s quality performance standards would be eligible to receive a share of the savings it generates below a specific expenditure benchmark set up by the Centers for Medicare and Medicaid Services (CMS) for each ACO. The proposed rule would also hold ACOs accountable for downside risk by requiring ACOs to repay Medicare for a portion of losses (expenditures above its benchmark.)

The Chamber submitted comments on June 6, 2011 in response to the proposed rule which may be accessed here: http://www.uschamber.com/sites/default/files/comments/ACO_Proposed_Rule_USCC_Comments.pdf
On November 2, 2011, the Department published final regulations regarding the Medicare Shared Savings Program. The final rule differs from the proposed rule by among other things, removing the requirement that each ACO participant must have a seat on the ACO’s governing body; cutting in half the number of quality measures from 65 to 33; and by making it more difficult for ACOs to be held accountable for downside risk, meaning that ACOs are more likely to achieve savings.

On November 2, 2011, the Centers for Medicare & Medicaid Services and the Office of the Inspector General, HHS, promulgated an interim final rule establishing waivers of the application of certain health care fraud and abuse laws to specified arrangements involving ACOs under the Medicare Shared Savings Program. The interim final rule establishes five separate waivers that may be utilized by health care providers. Comments were due by January 3, 2012.

**Stop-Loss Insurance**

On May 1, 2012, the Departments of Treasury, Labor, and Health and Human Services published a request for information regarding the use of stop loss insurance by group health plans and their plan sponsors with a focus on the relevance and consequences of stop loss insurance at low attachment points.

On July 2, 2012, the Chamber submitted comments which may be accessed here: https://www.uschamber.com/sites/default/files/comments/Stop-loss%20RFI.pdf

**Employer “Shared Responsibility” Requirement**

On May 23, 2011, the Internal Revenue Service (IRS) published in the *Bulletin*, Notice 2011-36, requesting public comment on issues relating to the shared responsibility provisions included in the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010. Specifically, the IRS requested comments on how the agency should consider full-time employment and the different approaches to calculating employment status with respect to the classification of who should be considered a “full-time” employee. In addition, the notice also requested comments regarding how the 90-day waiting period, beginning in 2014, would interplay with the “shared responsibility” requirement. On June 17, 2011, the Chamber submitted comments, emphasizing that the IRS should maintain flexibility in its approach towards calculation of “full-time employment,” and commended the agency for its initial outreach effort.

The Chamber submitted comments on June 17, 2011, in response to the notice and request for comments which may be accessed here: http://www.uschamber.com/sites/default/files/comments/USCCcomments_2011-36_IRS.pdf

On October 3, 2011, the IRS published in the *Bulletin*, Notice 2011-73, requesting public comment on issues relating to the shared responsibility provisions included in the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010. Specifically, the IRS has requested comments on a proposed “safe harbor” which would
permit an employer that offers coverage to its employees to measure the 9.5 “affordability test” by using wages that the employer paid to the employee, rather than the employee’s household income.

The Chamber submitted comments on December 13, 2011, which may be accessed here: http://www.uschamber.com/sites/default/files/comments/111113AffordabilitySafeHarborUSCC Comments.pdf

On February 9, 2012, the Department of Labor and the Internal Revenue Service issued guidance, entitled “Frequently-Asked Questions From Employers Regarding Automatic Enrollment, Employer Shared Responsibility, and Waiting Periods.” The guidance requested comments on potential interpretations that the Departments are planning to take with respect to auto-enrollment, the “free rider” penalty, and the 90-day waiting period. On April 5, 2012, the Chamber filed joint comments through the Employers for Flexibility in Health Care Coalition.

The comments may be accessed here: https://www.uschamber.com/sites/default/files/comments/EFHC_ReNotice2012-17_Final.pdf

On August 31, 2012, the Internal Revenue Service published Notice 2012-58, requesting public comment on issues related to “safe harbor” methods that employers may use to determine which employees are treated as “full-time” employees. Specifically, the IRS has requested comments on a proposed “safe harbor” which would permit an employer that offers coverage to its employees to measure hours worked based on a look-back measurement of up to 12 months for variable hour employees or seasonal employees; provides an option to use specified administrative periods for ongoing employees as well as certainly newly hired employees; and endorses the “safe harbor” approaches contained in Notice 2011-36 and Notice 2011-73. On September 30, 2012, the Chamber submitted comments.

The comments may be accessed here: https://www.uschamber.com/sites/default/files/comments/Notice%202012-58.pdf

On January 2, 2013, the Internal Revenue Service published a proposed rule regarding implementation of the “free rider” penalty for “applicable large employers.” On March 18, 2013, the Chamber submitted comments which may be accessed here: https://www.uschamber.com/sites/default/files/comments/4980H%20NPRM%20-%20US%20Chamber%20of%20Commerce%20Comments.pdf

On August 31, 2012, the Department of Health and Human Services, the Department of Labor and the Internal Revenue Service issued guidance, entitled “Guidance on 90-Day Waiting Period Limitation Under Public Health Service Act §2708.” This guidance will remain in effect at least through the end of 2014. It explains what constitutes a “waiting period” and which ones do not violate the 90-day limit. Additionally, it outlines generally permissible eligibility conditions, as well as the proper application of certain eligibility conditions and when waiting periods may be imposed on variable hour employees. The guidance coordinates with concurrently issued Treasury Department Notice 2012-58. On September 30, 2012, the Chamber submitted comments.
The comments may be accessed here:

On March 21, 2013, the Department of Health and Human Services, the Department of Labor, and the Internal Revenue Service issued proposed rules for implementing the 90-day waiting period. The proposed rules mirror the earlier guidance. Comments were due by May 20, 2013.

On May 3, 2013, the IRS published a proposed rule that outlines how health risk assessments, HSA contributions, and wellness program incentives should be treated when calculating minimum-value standards. On July 2, 2013, the Chamber submitted comments, which may be accessed here:

On July 9, 2013, IRS published Notice 2013-45, “Transition Relief for 2014 Under §§ 6055 (§ 6055 Information Reporting), 6056 (§ 6056 Information Reporting) and 4980H (Employer Shared Responsibility Provisions).” The Notice states that the Internal Revenue Service will issue proposed rules for the information reporting requirements this summer, and due to this decision, the “free rider” penalty will not take effect until 2015.

On September 9, 2013, the IRS published proposed rules for the information reporting requirements. Comments are due by November 8, 2013.

Reporting Requirements

On April 26, 2012, the IRS published Notice 2012-32 and Notice 2012-33, requesting public comment on: the reporting requirements for large employers and the interaction of the reporting requirements for health insurance issuers, government agencies, employers that sponsor self-insured plans and others that provide minimum essential coverage to an individual. On June 11, 2012, the Chamber submitted comments.

The comments may be accessed here:

On September 9, 2013, the IRS published proposed rules for the information reporting requirements. Comments are due by November 8, 2013.

Verification of Access to Employer-Sponsored Coverage Bulletin

On August 26, 2012, the Center for Consumer Information and Insurance Oversight issued a bulletin regarding the verification of access to employer sponsored coverage. The bulletin outlines a proposed interim strategy for verification related to coverage during the 2014 and 2015 plan years, and requests comments on long-term strategies for verification related to coverage during plan years 2016 and beyond.
FAQs

On February 9, 2012, the Department of Labor issued Notice 2012-17, and requested comment regarding automatic enrollment, employer shared responsibility, and waiting periods.

The Chamber in conjunction with a variety of other employer trade associations filed comments through the Employers for Flexibility in Health Care Coalition. These comments were filed on April 5, 2012 and can be accessed here: https://www.uschamber.com/sites/default/files/comments/EFHC_ReNotice2012-17_Final.pdf

Flexible Spending Arrangements

On May 30, 2012, the Internal Review Service issued Notice 2012-40 regarding guidance on the effective date of the $2,500 limit on salary reduction contributions to health flexible spending arrangements (FSAs) and on the deadline for amending plans to comply with that limit. The Notice provides relief for certain contributions that mistakenly exceed the $2,500 limit and that are coordinated in a timely manner. On August 17, 2012, the Chamber submitted comments with respect to whether to modify the use-or-lose rule that is currently set forth in the proposed regulations with respect to health FSAs.

These comments can be accessed here: http://www.uschamber.com/sites/default/files/comments/Notice%202012-40.pdf

Exchanges and Qualified Health Plans

Planning and Establishment of State-Level Exchanges

On August 3, 2010, the Department of Health and Human Services published a request for comments (RFC) in advance of future rulemaking and grant solicitations. The RFC invited comments to aid in the development of standards for establishment and operation of new state-based insurance marketplaces that must be in operation by 2014 for individuals and small groups to purchase a qualified health plan. In addition to the RFC, the National Association of Insurance Commissioners released a draft of the American Health Benefit Exchange Model Act on September 27, 2010 and the Department of Health and Human Services also issued an initial guidance to states on exchanges on November 22, 2010.

The Chamber’s comments in response to the request for comments may be accessed here: http://www.uschamber.com/sites/default/files/comments/101004stateLevelExchanges.pdf

On July 15, 2011, HHS published a proposed rule which (1) Sets forth the Federal requirements that States must meet if they elect to establish and operate an Exchange; (2) outlines minimum requirements that health insurance issuers must meet to participate in an Exchange and offer qualified health plans (QHPs); and (3) provides basic standards that employers must meet to participate in the Small Business Health Options Program (SHOP).

On October 31, 2011, the Chamber submitted comments which may be accessed here:
On March 27, 2012, HHS published both a final and interim final rule to implement the requirements regarding the establishment of exchanges and qualified health plans.

On May 16, 2012, the Centers for Medicare and Medicaid Services released guidance entitled, “General Guidance on Federally-facilitated Exchanges.” The guidance provides guidelines for establishing a federally run health exchange and for states looking to partner with the federal government to operate an exchange.

On November 26, 2012, HHS published a proposed rule detailing the “essential health benefits,” actuarial value and cost-sharing for qualified health plans and other non-grandfathered coverage in the individual and small group market, and accreditation process for health plans. The proposed rule largely mirrors the earlier bulletins, but also imposes a new requirement that health insurance plans will also be required to cover the same number of prescription drugs as the benchmark plan in their states. The proposed rule also sets up a waiver process for insurers to impose a higher threshold than the maximum deductible permitted under the statute if a plan can’t design a “bronze” plan without a higher deductible.


On November 26, 2012, HHS published a proposed rule which implements the statute’s policies regarding determining how insurers may adjust premiums, and guaranteed availability and renewal requirements, and how risk pools may be underwritten. The proposed rule closely mirrors the requirements of the law by imposing a 3:1 age range banding, permitting insurers to charge smokers more, as well as adjust premiums based on family size and geography, and also prohibits insurers from using claims history, health status, gender, and occupation to increase premiums.


Subsequent sub-regulatory guidance has been issued by HHS to clarify how the essential health benefits interface with the limitations of cost-sharing in the form of “Frequently Asked Questions” issued on February 20, 2013 (Questions 1 and 2).

On February 25, 2013, HHS published a final rule detailing the “essential health benefits,” actuarial value and cost-sharing for qualified health plans and other non-grandfathered coverage in the individual and small group market, and accreditation process for health plans. The final rule also states that sub-regulatory guidance is forthcoming outlining options related to plan design where exceeding the deductible limits is permissible while keeping the de-minimum variation intact. On February 27, 2013, HHS issued a final rule which implements the statute’s
policies regarding determining how insurers may adjust premiums, and guaranteed availability and renewal requirements, and how risk pools may be underwritten.

On June 19, 2013, CMS published a proposed rule regarding exchange oversight and technical ground rules for the Exchanges. Comments were due by July 19, 2013. On August 30, 2013, CMS published final regulations.

_Exchange Functions in the Individual Market: Eligibility Determinations; Exchange Standards for Employers_

On August 17, 2011, HHS issued a proposed rule which recommends that the Exchange perform eligibility determinations. The proposed rule also suggests specific standards for the Exchange eligibility process, and contains standards for employers with respect to participation in the Small Business Health Options Program (SHOP), paralleling the Exchange standards for SHOP set forth in the previous Exchange rule.


On March 27, 2012, HHS published both a final and interim final rule to implement the establishment of exchanges and qualified health plans. Among other things, the final/interim final rule combined two of the topics covered in the above referenced Proposed Rule and NPRM, regarding respectively, the Establishment of Exchanges and QHPs and exchange standards for employers.

On May 11, 2012, the Chamber filed comments regarding the SHOP Exchanges which may be accessed here: [http://www.uschamber.com/sites/default/files/comments/Final_Rule_Interim_Final_Rule.pdf](http://www.uschamber.com/sites/default/files/comments/Final_Rule_Interim_Final_Rule.pdf)

On December 7, 2012, HHS issued a proposed rule which sets several standards and processes for implementing SHOP Exchanges, including standards governing the definitions and counting methods used to determine whether an employer is a small or large employer; a safe harbor method of employer contribution in a Federally-facilitated SHOP; the default minimum participation rate; QHP standards linking Exchange and Federally-facilitated SHOP participating and ensuring that broker commissions in the Federally-facilitated SHOP are the same as those in the outside market; and allowing Exchanges and the SHOP exchange to selectively list only brokers registered with the Exchange or SHOP. The proposed rule also indicates that HHS will require a user fee of 3.5 percent of the monthly premium charged by an issuer for a particular policy under a Qualified Health Plan in order to support the operations of the Federally-facilitated Exchange. On March 11, 2013, HHS published the final rule, implementing these respective changes.

On January 22, 2013, HHS promulgated a proposed rule that would among other things, (1) set forth standards for adjudicating appeals of individual eligibility determinations and exemptions from the individual responsibility requirements, as well as determinations of employer-sponsored coverage, and determinations of SHOP employer and employee eligibility for purposes of implementing section 1411(f) of the Affordable Care Act, and (2) set forth standards for adjudicating appeals of employer and employee eligibility to participate in the SHOP. Comments were due by February 13, 2013.

On March 11, 2013, HHS issued a proposed rule which sets additional standards for implementing SHOP Exchanges. Specifically, the proposed rule: 1) amends the special enrollment period to 30 days for most applicable triggering events; 2) proposes that if an employee or dependent becomes eligible for premium assistance under Medicaid or CHIP or loses eligibility for Medicaid or CHIP, this would be treated as a triggering event, and the employee or dependent would have a 60-day special enrollment period to select a qualified health plan; 3) sets a transitional policy for plan years beginning on or after January 1, 2014 and ending on January 1, 2015, the federally-facilitated SHOP exchange will permit an employer to select a qualified health plan at a coverage tier, otherwise known as “employer choice,” prior to implementing an “employee choice” framework in 2015, and 4) permits the premium aggregation function to be optional for plan years beginning before January 1, 2015.

On April 1, 2013, the Chamber submitted comments which may be accessed here: https://www.uschamber.com/sites/default/files/comments/SHOP%20Proposed%20Rule%20-%20USCC%20Comments.pdf

On June 4, 2013, HHS issued the final rule for the SHOP Exchanges, virtually unchanged from the proposed rule.

On June 19, 2013, CMS published a proposed rule that among other things, includes standards for SHOP to coordinate with the functions of the individual market exchange for determining eligibility for premium assistance tax credits or Medicaid eligibility, and clarifies that a state is permitted to elect to establish only a SHOP, while the federal government would operate the Exchange for the individual market. Comments were due by July 19, 2013. On August 30, 2013, CMS published the final regulations.

**Medicaid Program: Eligibility Changes Under the Affordable Care Act of 2010**

On August 17, 2011, HHS published a proposed rule implementing provisions of the law related to Medicaid and CHIP eligibility, enrollment simplification and coordination. Comments were due by October 31, 2011.


On January 22, 2013, HHS published a final rule implementing the Medicaid/CHIP eligibility, enrollment simplification and coordination provisions.

**Risk Adjustment, Reinsurance and Risk Corridors Program**

On December 7, 2012, HHS published a proposed rule describing how the risk adjustment, reinsurance, and risk corridors program is intended to operate.

On December 24, 2012, the Chamber submitted comments.


On March 11, 2013, HHS published the final rule on risk adjustment, reinsurance, and risk corridor programs.

On March 11, 2013, HHS published an interim final rule which proposes to adjust risk corridor calculations that would align the calculations with the single risk pool provision, and set standards permitting issuers of qualified health plans the option of using an alternative methodology for calculating the value of cost-sharing reductions provided for the purpose of reconciliation of advance payments of cost-sharing reductions. Comments were due by May 1, 2013.

On June 19, 2013, CMS published a proposed rule that details additional requirements related to program integrity for State-operated risk adjustment and reinsurance programs, and revised standards. Comments were due by July 19, 2013.

**Tax Credit for Employee Health Insurance Expenses of Small Employers**

On August 26, 2013, the Internal Revenue Service published proposed regulations which detail how an eligible small employer may be eligible to obtain a tax credit if such an employer decides to purchase health insurance coverage on the Exchange. Comments are due by November 25, 2013.

**Modifications to HIPAA Privacy, Security, and Enforcement Rules Under ‘Health Information Technology For Economic and Clinical Health’ (HITECH) Act**

On May 31, 2011, the Department of Health and Human Services’ Office for Civil Rights published a proposed rule to modify the HIPAA Privacy rule as necessary to implement the accounting of disclosures provisions of section 13405(c) of the Health Information Technology for Economic and Clinical Health Act (Title XIII of the American Recovery and Reinvestment Act of 2009). These modifications are intended to benefit health care consumers by strengthening the privacy and security protections afforded their health information by HIPAA covered entities and their business associates.
On August 1, 2011, the Chamber, in conjunction with the American Benefits Council, filed comments on the proposal which may be accessed here:  

On January 25, 2013, the Department of Health and Human Services’ Office for Civil Rights published an omnibus final rule to modify the HIPAA Privacy, Security, and Enforcement Rules and implement statutory amendments under the Health Information Technology for Economic and Clinical Health Act. Specifically, among other things, the final rule eliminates the “risk of harm” standard for breach notification and institutes a risk assessment methodology for making such a determination; redefines business associates and expands their liability; and strengthens penalties for HIPAA violations. The rule took effect on March 26, 2013. Covered entities and business associates are permitted until September 23, 2013 to come into compliance with applicable requirements. The rule also provides a transition period for revised business associate agreements that incorporate these new standards. If an appropriate business associate agreement is in place as of January 25, 2013, there is an additional one-year period beyond the compliance date to revise business associate agreements to remain in compliance.

Meaningful Use: Stage 2

On March 7, 2012, the Department of Health and Human Services promulgated two proposed rules, one from the Center for Medicare and Medicaid Services (CMS) and one from the Office of the National Coordinator for Health Information Technology (ONC), which outline the standards for health care providers attesting to stage 2 of the meaningful use program. The proposed rules would officially extend Stage 1 until fiscal year 2014, retain the 90-day reporting requirement for the first year of Stage 1, and allow health care providers to remain in Stage 1 for two years.

Stage 2 of the meaningful use program would take effect in 2014. Under the stage 2 proposed rules, hospitals would need to meet 16 core meaningful use objectives, and two objectives from a list of four criteria. Physicians and other eligible health care professionals would need to meet 17 core objectives and three of five menu objectives.

The proposed rule also allows for:

- Aligning clinical quality measures under the meaningful use program with other programs that involve quality reporting, such as the Medicare Physician Quality Reporting System and the shared savings program for accountable care organizations;
- Allowing eligible professionals to report data in batches;
- Allowing physician groups to report quality data for their entire group;
- Including the viewing of medical images as an optional menu objective;
- Including the submission of data to disease registries as an optional menu objective;
- Enabling at least 50% of patients to view, download, and share their EHR data online;
- Requiring health care providers to report on eight safety criteria related to medications; and
- Requiring health care providers to submit data to public health agencies when possible.
On May 7, 2012, the Chamber signed on to a letter through the Confidentiality Coalition commenting on a narrow privacy issue in the proposed rule from ONC. The letter encourages the ONC to not implement the proposed changes to the HIPAA “accounting of disclosures” rule and let it remain as it is, unchanged so that it is optional.

On August 23, 2012, CMS and ONC released the final rules on Stage 2 of the Meaningful Use program delineating the criteria hospitals and other providers must meet to receive funding under the second phase of the federal electronic health record incentive program.

**Meaningful Use: Stage 3**

On November 26, 2012, the Department of Health and Human Services promulgated a proposed rule which outlines the draft recommendations regarding standards for health care providers attesting to Stage 3 of the meaningful use program.

The Chamber submitted comments on January 14, 2013.

The Chamber’s comments may be accessed here:
[https://www.uschamber.com/sites/default/files/comments/MU3%20Comments%20USCC.pdf](https://www.uschamber.com/sites/default/files/comments/MU3%20Comments%20USCC.pdf)

**Whistleblower Protections**

On February 27, 2013, the Occupational Safety and Health Administration (OSHA) promulgated an interim final rule, governing the whistleblower provisions of Section 1558 of the Affordable Care Act, to provide protections to employees of health insurance issuers or other employers who may have been subject to retaliation for reporting potential violation of the law’s consumer protections (e.g., denial of pre-existing conditions) or affordability assistance provisions (e.g., receive a premium assistance tax credit or cost-sharing reduction credit). On April 29, 2013, the Chamber submitted comments.

The comments may be accessed here:

**Health Insurance Tax**

On March 4, 2013, the Internal Revenue Service issued a proposed rule and notice of public hearing regarding the health insurance tax. The NPRM provides guidance to implement the health insurance tax, based on a firm’s net premiums allocated by market share.

On June 3, 2013, the Chamber submitted comments. The comments may be accessed here:
Federal Employees Health Benefits Program: Members of Congress and Congressional Staff

On August 8, 2013, the Office of Personnel Management issued a proposed rule, which would permit members of Congress and staff members who are “employed by the official office” to continue to receive an employer contribution toward their health insurance premium while purchasing coverage on the exchange.

On September 9, 2013, the Chamber submitted comments, which may be accessed here: http://www.uschamber.com/sites/default/files/comments/USCC%20Comment%20on%20FEHB%20Program.pdf

Notice of Computer Matching Program


Nondiscrimination under the Patient Protection and Affordable Care Act

On August 1, 2013, the Department of Health and Human Services’ Office of the Secretary published a request for information regarding covered entities with respect to prohibitions against discrimination on the basis of race, color, national origin, sex, age, and disability, as provided in Section 1557 of the Patient Protection and Affordable Care Act (Pub. L. 111-148). Comments are due by September 30, 2013.
Anticipated Rulemakings

Administrative Simplification: Compliance; Health Plan Certification

In September, 2013, HHS is expected to issue a proposed rule under Administrative Simplification to certify that data and information systems are in compliance with any applicable standards and associated operating rules for electronic funds transfers, eligibility for a health plan, health claim status, and health care payment and remittance advice.

Definition of Dependent under Section 152

In July, 2013, the Treasury Department was expected to publish a notice of proposed rulemaking (NPRM) on the definition of dependent under Section 152 of the Internal Revenue Code. This definition may have an effect on which adult children an employer must offer to cover until the age of 26.

Revisions to Regulations Addressing the OIG’s Safe Harbors Under the Anti-Kickback Statute, Exclusion Authorities, and Civil Monetary Penalty

In April, 2014, the Secretary of HHS is expected to issue a proposed rule that would, among other things, revise Part 1003, addressing the Office of Inspector General's authority to propose the imposition of civil money penalties and assessments by reorganizing and simplifying existing regulatory text and eliminating obsolete references contained in the current regulations. Among the proposed revisions, this rule would establish separate subparts within Part 1003 for various categories of violations; clarify the availability of exclusion for certain violations in addition to civil money penalties and assessments; date various references to managed care organization authorities; and clarify the application of Section 1140 of the Social Security Act with respect to the misuse of certain Departmental symbols, emblems, or names through Internet and e-mail communications.

Amendment to Claims Procedure Regulation

Expected at a date to be determined, the Department of Labor is expected to issue a proposed rule implementing the requirement that each employee benefit plan must provide “adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied.” The notice must set forth the specific reasons for the denial and must be written in a manner calculated to be understood by the claimant. Each plan must also afford “a reasonable opportunity” for any participant or beneficiary whose claim has been denied to obtain “full and fair review” of the denial by the “appropriate named fiduciary of the plan.” The Department has issued a regulation pursuant to the above authority that establishes the minimum requirements for benefit claims procedures of employee benefit plans covered by Title I of ERISA. This rulemaking is intended to strengthen, improve, and update the current rules governing the internal claims and appeals process.
Automatic Enrollment in Health Plans of Employees of Large Employers

Expected at a date to be determined, this Labor Department rulemaking will implement Section 1511 of the Patient Protection and Affordable Care Act, which added Section 18A to the Fair Labor Standards Act to require employers who have more than 200 full-time employees and who offer enrollment in one or more health benefits plans to automatically enroll new full-time employees in one of the plans offered and to continue enrollment of current employees.

Coverage of Children to Age 26 – Final Rule

At a time yet to be determined, the agencies that issued the interim final rule (HHS, Treasury and Labor) are expected to conclude their review of comments submitted by the public in response to the interim final rule. The Patient Protection and Affordable Care Act (PPACA) amended Title I of ERISA, adding Section 715 which encompasses various health reform provisions of the Public Health Service Act (PHS Act). These regulations provide guidance on the extension of dependent coverage for children to age 26 under PHS Act’s Section 2714.

Grandfathered Plan – Long Term Actions

At a time yet to be determined, the agencies that issued the interim final rule (HHS, Treasury and Labor) are expected to publish a final rule. The Patient Protection and Affordable Care Act amended Title I of ERISA, adding Section 715 which encompasses various health reform provisions of the Public Health Service Act. These regulations provide guidance on the rules for maintaining grandfathered health plan status under Section 1251 of the Patient Protection and Affordable Care Act.

Pre-existing Condition Exclusions, Lifetime and Annual Limits, Rescissions and Patient Protections – Long Term Actions

At a time yet to be determined, the agencies that issued the interim final rule (HHS, Treasury and Labor) are expected to publish a final rule. The Patient Protection and Affordable Care Act amended Title I of ERISA, adding Section 715 which encompasses various health reform provisions of the Public Health Service Act (PHS Act). These regulations provide guidance on the rules prohibiting preexisting condition exclusions and other discrimination based on health status (PHS Act’s Section 2704); prohibition of lifetime and annual income limits (PHS Act’s Section 2711); the prohibition of rescissions of health coverage after coverage begins (PHS Act’s Section 2712); prohibition on discrimination in favor of highly compensated individuals (PHS Act’s Section 2716); and patient protections (PHS Act’s Section 2719A).

Internal Claims and Appeals – Long Term Actions

At a time yet to be determined, the agencies that issued the interim final rule (HHS, Treasury and Labor) are expected to publish a final rule. The Patient Protection and Affordable Care Act amended Title I of ERISA, adding Section 715 which encompasses various health reform
provisions of the Public Health Service Act. These regulations provide guidance on the rules relating to internal and external appeals processes under the Patient Protection and Affordable Care Act.

**Significant Non-Regulatory Activities**

*Health Reimbursement Arrangements*

On January 24, 2013, the Department of Labor posted on their website, “FAQs About Affordable Care Act Implementation Part XI” Specifically, two questions, Questions 2 and 4 address certain issues relating to Health Reimbursement Arrangements (HRAs).

On May 20, 2013, the Chamber sent a letter to the Department of Health and Human Services, Treasury, and Labor, urging the Departments to reverse their interpretation of how HRAs should be treated, and requesting a one-year grace period if the current interpretation stands.

The comments may be accessed here:  

*FAQs on Notice of Coverage Options*

In September 2013, the Department of Labor posted on their website, “FAQs on Notice of Coverage Options.” The FAQ states that employers will not be fined or penalized for failing to provide employees with a notice informing them about existence of the Exchanges.