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Treasury Releases 2010-2011 Priority Guidance Plan

The Treasury and the IRS have issued their 2010-2011 priority guidance plan. The plan is released annually and reflects the guidance that IRS and Treasury have issued or intend to issue between July 1, 2010 and June 30, 2011. Treasury has already released some of the employee benefit-related items

Background

Each year, the Department of the Treasury (Treasury) and the Internal Revenue Service (IRS) (jointly referred to in this document as Treasury) issue a priority guidance plan that lists projects that they anticipate publishing between July 1 and June 30. The plans are based, at least in part, on suggestions made by interested parties in response to Treasury's request for needed guidance.

2010-2011 Priority Guidance Plan: Employee Benefit Items

The 2010-2011 priority guidance plan contains 310 items, 55 of which deal with employee benefits, including retirement benefits, executive compensation, health care and other benefits, and employment taxes. Because the plan covers the period July 2010 through July 2011, 18 of the items have already been issued – leaving 37 still to be completed. During the year, Treasury will update the list to reflect guidance that is published and additional items that become priorities during the year. Listed below are only the items Treasury has not yet issued.

BUCK COMMENT. *Although the list of likely guidance is extensive, the Treasury has a good record of publishing by June 30 most of the items in the year's plan. Where items have slipped, it is generally because of legislative activity, such as healthcare reform and pension technical corrections, that require priority attention.*

Retirement Benefits

Defined Benefit Plans

- Guidance under the Employee Retirement Income Security Act (ERISA) Section 101(j) on the notice a plan must provide to participants if the plan becomes subject to the funding-related benefit restrictions under Internal Revenue Code of 1986 (Code) Section 436.
- Final regulations under Code Section 430 on determination of minimum required contributions.

- Guidance under Code Section 4980F and ERISA Section 204(h) regarding notice requirements for certain plan amendments to hybrid plans.
- Guidance on eligible combined defined benefit-defined contributions plans under Code Section 414(x).

BUCK COMMENT. *While Treasury has issued much of the guidance on the single-employer funding rules and benefit restrictions changes made by the Pension Protection Act of 2006 (PPA), it still has several other pieces of guidance to issue. Also, any further guidance on PPA's multiemployer funding and "zone" rules are absent from the priority plan. Treasury recently published final hybrid regulations; it also proposed new regulations on additional hybrid issues. Treasury does not list a final regulation on the additional hybrid issues as guidance it anticipates issuing before July 2011. Treasury asked for comments some time ago on issues that needed to be addressed under Section 414(x), which allows smaller employers to have combined defined benefit-defined contribution plans.*

401(k) Plans

- Final regulations on suspension or reduction of safe harbor contributions under Code Section 401(k) and (m).

BUCK COMMENT. *Treasury issued proposed regulations, which could be relied on, in May 2009 allowing suspension or reduction of employer contributions in limited circumstances where making the contribution would cause financial difficulty. The proposed regulations provided the temporary relief employers needed for 2009. Most employers were able to address the problem by redesigning their plans starting in 2010.*

403(b) Plans

- Guidance on Code Section 403(b) plan terminations.
- Guidance on a prototype plan program for Code Section 403(b) plans.

BUCK COMMENT. *The Code Section 403(b) regulations that Treasury issued in 2007 significantly changed the IRS's approach to 403(b) plans. Among other changes, the regulations require all sponsors of 403(b) plans to have written plan documents – a requirement that previously applied only to those 403(b) plans subject to the ERISA rules. Since then, IRS has been promising to establish a prototype plan program for IRS approval of 403(b) plan documents (similar to the program for qualified plans) and eventually an individual plan program. The regulations also focused attention on how a sponsor "terminates" a 403(b) plan when it is the participants who hold the individual annuity contracts.*

ESOPs

- Guidance on rules applicable to employee stock ownership plans (ESOPs) under Code Sections 409 and 4975.
- Guidance on definition of readily tradable securities under Code Section 409(l) for ESOPs.

BUCK COMMENT. *Treasury has been promising new guidance on ESOPs for a number of years; however, other matters have always taken priority. It appears that such guidance has moved up on the priority list.*

Government and Church Plans

- Guidance on government pick-up arrangements under Code Section 414(h)(2).
- Guidance on government plan status under Code Section 414(d).
- Guidance on church plans under Code Section 414(e).
- Guidance on application of normal retirement age rules for governmental plans.

BUCK COMMENT. *Treasury has been working with the Department of Labor (Labor) and the Pension Benefit Guaranty Corporation (PBGC) to develop a common position on both church plans and government plans. In the meantime, the three agencies have not been issuing rulings on church plans and government plans. Both the church plan and the government plan guidance were expected last year but they did not get issued.*

Miscellaneous

- Guidance related to compliance with certain reporting requirements (Form 5500 and related schedules) under Code Sections 6057, 6058 and 6059 for retirement plans.
- Guidance on international tax issues related to retirement plans.
- Guidance on issues related to lifetime income from retirement plans.
- Guidance updating the Employee Plans Compliance Resolution System (EPCRS) for voluntary corrections.

BUCK COMMENT. *IRS's Advisory Committee on Tax Exempt and Government Entities (ACT) issued a report several years ago on the most significant issues in the international area for benefits practitioners, and IRS made addressing these issues a priority. With respect to lifetime income from retirement plans, Treasury and Labor issued a joint request for information, and held joint hearings on the topic. Commenters in the request for information process identified a number of technical barriers in the Code to*

encouraging participants and beneficiaries to elect a lifetime income option such as an annuity. The expected Treasury guidance is likely to eliminate those barriers that can be eliminated without legislation. The updating to ECPRS will provide an increased corrections program for 403(b) plans and, no doubt, some other expansions and simplifications.

Health Care

- Final regulations on cafeteria plans under Code Section 125.
- Guidance under Code Section 4980B (dealing with COBRA continuation coverage) regarding calculation of the applicable COBRA premium.
- Regulations under Code Section 4980G, dealing with health savings accounts (HSAs) on the interaction of Code Section 4980G with Code Section 125 (cafeteria plans) with respect to comparable employer contributions to employees' HSAs.
- Guidance on reporting the aggregate cost of employer-sponsored health care coverage under Code Section 6051(a)(14) (i.e., W-2 reporting).

BUCK COMMENT. *Treasury proposed new regulations on cafeteria plans under Code Section 125 in 2007, the first comprehensive revisions in over 20 years. The final regulations, however, were delayed by the health care debate. Now that the Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act (PPACA) has been enacted, Treasury can turn back to the Section 125 regulations. With respect to calculating applicable COBRA premiums, Treasury has published only limited guidance up until now even though COBRA continuation coverage was enacted in 1986. However, PPACA has added new importance to the actual calculation both for W-2 reporting in the next few years and taxation of excess health benefits starting in 2018. One issue that the guidance will have to resolve is the appropriate charge for retiree health coverage since COBRA coverage only dealt with terminated, active employees. Notably absent from this list are any of PPACA regulations that were issued in temporary form by Treasury and interim form by HHS and Labor; nor are there any other joint PPACA projects listed. It is not clear whether this is because those projects are not on the agenda or because they are projects that are jointly issued.*

Executive Compensation

- Regulations under Code Section 83 to incorporate the holding in Rev. Rul. 2005-48 (the impact of transfer restrictions on whether property is substantially vested).
- Guidance providing model language for Code Section 83(b) elections.

- Regulations under Code Section 162(m) (employer deductibility of compensation in excess of \$1 million) on the transition relief available under Treasury regulations (Section 1.162-27(f)(1)) for companies that become publicly held.
- Guidance on the application of Code Section 162(m)(6) (deductibility of payments by health insurers of compensation in excess of \$500,000).
- Final regulations on income inclusion under Code Section 409A (deferred compensation under nonqualified deferred compensation plans).
- Guidance on the application of Code Section 409A(b) (rules relating to funding of deferred compensation under nonqualified deferred compensation plans).
- Guidance under Code Section 457A (nonqualified deferred compensation from certain tax indifferent parties).
- Guidance under Code Section 457(f) (tax treatment of participants where plan or arrangement of employer is not an eligible deferred compensation plan).
- Guidance under Code Sections 280G and 4999(a) (golden parachute payments) on changes in ownership.

BUCK COMMENT. *Section 162(m) limits a public employer's ability to deduct compensation payments to certain officers if the compensation is in excess of \$1 million and not performance based. PPACA added a new paragraph (6), which limits a health insurer's deduction of compensation in excess of \$500,000. The deduction limit is not restricted to officers and there are significant pending questions, especially with respect to deferred income earned during a transition period. With the passage of Code Section 409A in 2004, there has been a new emphasis on deferred compensation. Treasury has published much of the basic guidance but some guidance remains open including how to calculate deferred income. Code Section 457A was added in 2008 to deal with foreign deferred compensation; the interaction of the Code deferred income rules with partnership rules and international tax rules has left open numerous questions that regulations must address.*

Other Benefit Guidance

- Regulations under Code Section 512 explaining how to compute unrelated business tax income (UBIT) of VEBAs.
- Guidance on the employee retention credit under Code Section 1400R.
- Guidance on employer-provided cell phones under Code Section 2043.
- Guidance updating Rev. Rul. 95-7 on FICA treatment of tips put in "tip jars."

- Regulations implementing Code Section 3121(z) (dealing with the treatment of certain foreign employers as American employers for purposes of FICA).
- Regulations under Code Sections 3127, 3121(b)(3)(A) and 3306(c)(5) making certain FICA exemptions available for disregarded entities.
- Regulations under Code Section 3504 dealing with fiduciaries, agents, or other persons who file employment tax returns under their EINs for their clients' workers.

Conclusion

Treasury generally only includes in its business plan the items it feels reasonably confident it can publish during the business plan period. With the plan, which covers July 1, 2010 to June 30, 2011, not being published this year until December, it is even more likely this year that the items on the list will be published by the end of June. This, of course, assumes no major pieces of new legislation that take up the time of Treasury's limited resources. Buck's consultants are available to assist you in determining how the expected guidance will impact your benefits plans.

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.