

Employee Benefits Corner

The IRS 2014–2015 Priority Guidance Plan— Still a Long List for Employee Benefits

By Elizabeth Thomas Dold and David N. Levine

Each year, the Department of the Treasury, the IRS and the Chief Counsel at the IRS jointly issue a list of their guidance priorities for the year. Although the federal government generally operates on an October 1 fiscal year, the priority guidance plan is based on a July–June period. On August 26, 2014, the July 2014–June 2015 priority guidance plan was released (“the 2014–2015 Plan”).¹

The 2014–2015 Plan contains 65 projects in the context of “Employee Benefits” with 42 projects specifically focused on “Retirement Benefits.” As in prior years, many of the projects listed are carryover projects from the 2013–2014 priority guidance plan that are still in the middle of the regulatory process. The inclusion of a number of carryover projects is not surprising in light of both the budgetary restrictions on the IRS as well as the significant resources that have been necessary to implement the various provisions of the Patient Protection and Affordable Care Act of 2010 (PPACA) (P.L. 111-148). Although the health care reform under the PPACA was enacted over four years ago in 2010, it included a large number of requirements necessitating significant guidance over the past few years. Hopefully with much of that guidance now issued, the IRS can get back to issuing needed guidance in the retirement area.

Below we review a number of significant Retirement Benefits items from the 2014–2015 Plan, and despite the quite general descriptions of the issues that make it difficult to predict exactly what guidance will be forthcoming, we review the key areas and give a preview of where these pieces of guidance may be heading. Of course, any projects related to new legislation or court decisions often throw a monkey-wrench into the best-laid plans!

General Guidance

The following are examples of guidance listed on the 2014–2015 Plan that are likely to affect broad groups of plans:

- **Employee Plans Compliance Resolution System.** In the early 1990s, the IRS began establishing programs that allowed the correction of errors—both in plan form and operation—through voluntary correction methods that provided streamlined and less expensive remedies than what would be



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available via the examination process. In the 2000s, these programs were consolidated into the Employee Plans Compliance Resolution System (EPCRS). Since this consolidation occurred, EPCRS has been updated from time-to-time every few years to expand, enhance and improve its overall effectiveness and efficiency. The most recent update of EPCRS was in 2013,

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Rev. Proc. 2013-12,² which focused on provisions allowing the correction of Code Sec. 403(b) “plan document” errors within the EPCRS framework. On the 2014-2015 Plan is a reference to a revised Revenue Procedure to provide guidance with regard to certain corrections. Long on employers’ wish list is self-correction for inadvertent loan violations and less costly solutions for technical auto-enrollment and related safe harbor plan violations.

- **Voluntary Closing Program.** The list also includes guidance providing clarification regarding the Voluntary Closing Program for failures not covered by EPCRS, as described above. The IRS website³ provides the key details of this process where the plan sponsor can seek to continue to maintain the tax qualified status of the plan by entering into a closing agreement with the IRS and making corrections to the plan to make the participants whole, along with paying a nondeductible sanction to the IRS. The plan sponsor goes to the IRS and discloses the issue prior to an IRS audit.
- **Individually Designed Plans Determination Letter Process and Interim Amendment Procedures.** For years, plan sponsors and pre-approved plan providers have struggled with the IRS’s amendment procedures, which often require costly and time-consuming plan amendments to be adopted yearly in order to retain the tax-qualified status of the plans. We are hopeful that the IRS will issue some much-needed relief in this area to give employers a multi-year period to adopt any needed IRS amendments in order to reflect the ever-increasing complex terms of the Internal Revenue Code (“the Code”) and related IRS guidance.

- **Cycle E Cumulative List.** Although not expressly listed, each year the IRS issues an undated “Cumulative List of Changes in Qualified Plan Requirements” (Cumulative List) to be used for the applicable determination letter filings for the coming year. Therefore, plan sponsors should be keeping an eye out for the Cycle E Cumulative List that will list all the IRS provisions that need to be reflected, and subject to review, in the upcoming filing cycle (generally for plans with EINs ending in 0 or 5) that will run from February 1, 2015 to January 31, 2016. This list is also helpful for all plan sponsors to ensure that their plan documents properly reflect all IRS requirements in order to maintain the tax qualified status of the plan.
- **Plan Distributions.** The list includes a number of items related to plan distributions, including: (1) regulations on exceptions to the additional 10-percent tax under Code Sec. 72(t) on early distributions (generally prior to age 59 1/2) from a retirement plan or IRA (which guidance may impact recordkeeping processes and 1099-R reporting); (2) guidance under Code Sec. 402(c) on eligible rollover distributions that are distributed to multiple destinations (and similarly regulations under Code Sec. 402A on distributions from designated Roth accounts that are distributed to multiple destinations)—this guidance was just issued, which provides welcomed relief from concerns raised about the language in the IRS’s sample Code Sec. 402(f) notice that indicates a *pro rata* basis allocation must be made for partial/split rollovers; and (3) guidance under Code Sec. 3405 regarding the applicable federal income tax withholding for distributions made to payees with an address outside the United States.
- **Other Guidance.** A few additional items on the list to note include: (1) final regulations under Code Sec. 411(a)(11) regarding notice to defer distributions, (2) guidance updating regulations regarding service credit and vesting under Code Sec. 411, (3) guidance under Code Sec. 404 on deductions for employer contributions to qualified plans, (4) final regulations regarding Form 5500 IRS reporting authority, and (5) guidance regarding the aggregation rules under Code Sec. 414(m).

Qualified Defined Contribution Plans

The following are examples of guidance listed on the 2014–2015 Plan that are likely to affect defined contribution plans:

- **Hardship Distributions.** The list includes guidance regarding substantiation of hardship distributions.

Hopefully, the IRS guidance will provide some welcomed flexibility for plan sponsors and recordkeepers to document a proper hardship distribution (including the use of electronic processes).

- **QNECs and QMACs.** The list also includes guidance regarding qualified nonelective contributions (QNECs) and Qualified Matching Contributions (QMACs)—likely arising from the limitations placed on pre-approved plans that now restrict the use of forfeitures to fund such contributions. Ideally, any narrow interpretation of these contributions will be made on a prospective basis.
- **Mid-Year Changes to Safe Harbor Plans.** Long-awaited guidance regarding appropriate situations for permissible mid-year changes to a safe harbor 401(k) plan has made it to the list. This will include the impact of certain business transactions and hopefully other changes that should not be deemed to impact the deferral election decision and therefore permissible to modify during the year.
- **Other Guidance.** A few notable carryover items on the list include: (1) employee stock ownership plan (ESOP) guidance under Code Sec. 4975 and regulations updating the rules applicable to ESOPs, (2) additional guidance on issues related to lifetime income from retirement plans, and (3) guidance on certain multiple employer plans (which has been a hot topic, particularly on the Department of Labor (DOL) side for some time now).

Defined Benefit Plans

The following are examples of guidance listed on the 2014–2015 Plan that are likely to affect defined benefit plans:

- **Hybrid Plan Guidance.** After nearly a decade, we just received final rules for cash balance plans, pension equity plans, and other types of hybrid plans, including final rules on what is a permissible “market rate of return” under Code Sec. 411(b)(5) and related conforming amendments. Rules for a Code Sec. 414(x) plan are also on the list, which is a combined DB/k plan created by the Pension Protection Act of 2006 (PPA).
- **Funding Rules.** The IRS has previously issued numerous pieces of guidance implementing the revisions to the Code’s defined benefit funding rules made by the PPA and subsequent law. The 2014–2015 Plan includes a number of additional pieces of guidance in this area, including: (1) final regulations on determining the minimum required contributions under Code Sec. 430, (2) revenue procedures relating to

approval for funding method changes, (3) regulations on additional issues relating to funding and related rules for single employer plans under Code Secs. 430 and 436, (4) guidance under Code Sec. 430(h)(3)(B) updating the mortality tables under for pension funding purposes, and (5) guidance on the new funding rules in the Cooperative and Small Employer Charity Pension Flexibility Act.

- **Other Guidance.** Other notable items on the list include: (1) regulations under Code Sec. 417(e) to update the minimum present value requirements (which may include a new mortality table likely to increase minimum cashouts due to longer life expectancies); (2) final regulations under Code Sec. 417(e) to finalize the 2012 proposed regulations that provided for the treatment of partial annuity or lump sum option; (3) guidance on closed defined benefit plans—presumably to follow up on the limited relief in Notice 2014-5⁴ to alleviate some of the nondiscrimination problems that arise in years after a “soft freeze” occurs; and (4) a ruling on the recovery of basis under “phased retirement programs”—an area where IRS has not provided any guidance in many years.

Governmental Plans

The following are examples of guidance listed on the 2014–2015 Plan that are likely to affect governmental plan sponsors:

- **Governmental Plan Definition.** For many years, there have been inconsistencies in how the IRS, DOL and Pension Benefit Guaranty Corporation determine whether an entity is a “governmental plan,” and thus exempt from ERISA as well as many Code provisions. Over the past several years, the three agencies have been consulting with each other to develop new guidance on the definition of a “governmental plan” under Code Sec. 414(d). This item continues to be of importance as the number of “privatized” governmental employees continues to rise.
- **Guidance on Pick-up Arrangements.** Many governmental plans are funded by mandatory employee contributions that are “picked up” and treated as employer contributions under Code Sec. 414(h)(2). Due to significant financial difficulties, concern has been expressed about whether an employee may be allowed to elect between tiers of benefits that provide for different member contributions and benefit levels, which we anticipate the guidance to address.
- **Normal Retirement Age.** In May 2007, the IRS issued final regulations governing a plan’s definition

of “normal retirement age.” In Notice 2012-29,⁵ the IRS stated its intent to delay the effective date of these regulations for governmental plans to plan years beginning on or after January 1, 2015 (depending on the legislative session of a legislative body with the authority to amend a plan), and detailed the expected focus of its further guidance on the “normal retirement age” requirements applicable to a governmental plan.

Lastly, as the guidance plan runs from July 2014, the IRS has already completed two of the items on its list for the year. Specifically, it already issued the final regulations for qualifying longevity annuity contracts to provide relief from minimum required distribution requirements, and

it provided much-needed relief under Rev. Rul. 2014-24⁶ that allows plans covering only Puerto Rico residents and qualified only under Puerto Rico law as well as certain life insurance company separate accounts to invest in group trusts under Rev. Rul. 81-100.⁷

ENDNOTES

¹ The 2014–2015 Priority Guidance Plan can be obtained from the IRS website at www.irs.gov/uac/Priority-Guidance-Plan.

² Rev. Proc. 2013-12, IRB 2013-4, 313.

³ See www.irs.gov/Retirement-Plans/Employee-Plans-Voluntary-Closing-Agreements.

⁴ Notice 2014-5, IRB 2014-2.

⁵ Notice 2012-29, IRB 2012-18.

⁶ Rev. Rul. 2014-24, IRB 2014-37.

⁷ Rev. Rul. 81-100, 1981-1 CB 326.

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