

Employee Benefits Corner

A Look at What's Coming: The IRS Issues Its Guidance Priorities

By Elizabeth Thomas Dold and David N. Levine

For many years now, the IRS and Treasury have jointly developed a list of areas in which they intend to release guidance—such as regulations, revenue rulings, notices and other published official authority—during the coming year. The IRS and Treasury typically have succeeded in issuing guidance on most of the items on these “guidance priority” lists. Experience has shown that few things that are not on the list get done—although the list does not cover the IRS exam guidelines, field directives, *etc.*—and intervening legislation or court decisions often throw a monkey-wrench into the best-laid plans.

The July 2016–June 2017 “guidance priorities” plan (“Plan”) highlights areas of pending qualified plan guidance, with a vast majority of the 35 pension-related projects being carryovers from prior guidance plan lists. A summary of what is to come in the coming year from the project list includes the following.

All Plans

- *EPCRS.* A Revenue Procedure is pending to (1) update EPCRS for the changes in the determination letter program and (2) reflect additional guidance on certain corrections, including plan overpayments. These changes are important to the benefits community because without the protection of the determination letter program (and the extended remedial amendment period) for individually designed plans, risk shifts to the plan sponsor (and its recordkeeper) to update the plan document timely, and to be in operational compliance with the document, with sanctions on the line for any failures unless discovered and addressed through VCP or self-correction (if applicable).
- *Other items.* On the list is a number of other items of interest, including: (1) final regulations under Code Sec. 411(a)(11) regarding the right to defer receipt of a distribution that must include a description of the consequences of failing to defer; (2) regulations on the exceptions to additional tax under Code Sec. 72(t) on early distributions (10-percent additional tax); (3) additional guidance on issues relating to lifetime income from retirement plans (and IRAs); (4) update of Code Sec. 416 top heavy regulations for statutory changes; (5) guidance under Code Sec. 3405 regarding withholding on distributions made to payees with an address outside the United States; (6) final



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regulations on normal retirement age regulations for governmental plans (proposed issued in Jan. 2016); (7) guidance under Code Sec. 404 regarding deductions for employer contributions to qualified plans; (8) service credit and vesting under Code Sec. 411; (9)

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aggregation rules under Code Sec. 414(m); (10) regulations on the definition of a governmental plan (and the status of Indian tribe plans as governmental plans); (11) proposed regulations on eligible combined plans under Code Sec. 414(x); (12) guidance concerning the tax on prohibited transactions under Code Sec. 4975; and (13) final 5500 reporting regulations under Code Sec. 6057 (proposed regulations issued in June 2012).

Defined Benefit Plans

- *Mortality Table.* Notice and regulations under Code Sec. 430(h)(3)(B) updating the mortality tables used for pension funding purposes (which also impact lump sum calculations). In anticipation of the new tables, a number of plan sponsors were taking advantage of lump sum windows by year-end in order to help avoid some of the impact of the new tables. The IRS recently issued Notice 2016-50¹ that provides for updated static mortality tables for 2017 (including a modified unisex version of the mortality tables for determining minimum present value under Code Sec. 417(e)(3)), but notably the Notice indicates that the anticipated broader changes to be issued in proposed regulation format that will revise the base mortality rates and projection factors in Reg. §1.430(h)(3)-1 are still pending and are not expected to apply until 2018, which this one-year delay is welcomed relief for plan sponsors.
- *Interest Credits.* Guidance on the treatment of future interest credits under hybrid plans for various purposes, which we anticipate will include guidance on how the interest credits will impact the rate of accrual used to determine if the anti-backloading requirements are met by a cash balance benefit formula.
- *Lump Sum Window.* Regulations under Code Sec. 401(a)(9) (minimum required distributions) on the use of lump sum payments to replace lifetime income being received by retirees in pay status under defined benefit pension plans. As indicated in Notice 2015-49,² the IRS intends to reflect the inability to offer a lump sum window to retirees in pay status.
- *Part Lump Sum and Part Annuity.* Final regulations under Code Sec. 417(e) to simplify the treatment of optional forms of benefit that are paid partly in the form of an annuity and partly in a more accelerated form have been recently issued. The guidance was recently issued. The intent was to facilitate split distributions because the annuity portion will provide lifetime income and help protect against unexpected post-retirement longevity. The proposed regulations issued in 2012 required anti-cutback protection, which made making the change to apply the 417(e)(3) factors only to the lump sum portion of the benefit, and the plan's non-417(e) factors for the annuity portion a challenge, but this protection was eliminated in the final rules. The final rules are generally prospective, but plan sponsors can elect to apply them retroactively. Therefore, for plan sponsors looking to offer a combination of lump sum and annuity, a closer look at these final regulations with the plan's actuary should be undertaken.
- *Other Items.* On the list is a number of items related to issuing proposed or final regulations related to: (1) closed defined benefit plans and related matters, following the proposed regulations that we published early 2016 (recently issued Notice 2016-57 provides one-year transition relief for 2017); (2) pension equity plans; (3) regulations under Code Sec. 417(e) that update the minimum present value requirements for defined benefit plans; (4) revenue procedure relating to approval for funding method changes; and (5) regulations on additional issues relating to funding and related rules for single employer plans under Code Secs. 430 and 436.

Defined Contribution Plans

- *Qualifying Longevity Annuity Contracts.* Additional guidance regarding qualifying longevity annuity contracts (QLACs), which provide minimum required distribution relief for IRAs and defined contribution plans that provide lifetime income benefits for participants starting at a late age. As these provisions are rather stringent, and new to the retirement scene, additional guidance on these annuities is welcomed to encourage their use in the qualified plan market.
- *Hardship Distributions.* Guidance regarding

substantiation of hardship distributions made the list, which the IRS has posted some information regarding the need for the plan sponsor to review and maintain records, and not have the participant merely electronically certify to the hardship and retain his documentation with his tax records.

- *Use of Forfeitures.* Guidance on the timing of the use or allocation of forfeitures in defined contribution plans is on the list, likely to explain the use of forfeiture for safe harbor contributions, etc. Pre-approved plan sponsors were required to make adjustments to their PPA restatements to reflect the limited use of forfeitures in safe harbor plans, which the industry is hopeful that the pending guidance will provide some relief and clarification in this area.
- *Pre-Approved Plans.* Additional guidance on the determination letter program, including changes to the pre-approved plan program made the list, which we anticipate addressing additional changes to the pre-approved plan program (and related Form 5307 filings).
- *Other Items.* On the list is a number of additional items related to (1) regulations updating the rules applicable to ESOPs; (2) guidance regarding QNECs and QMACs; (3) 403(b) remedial amendment period; and (4) excess benefit arrangements under Code Sec. 415(m).

And not on the list, which was issued just prior to the publication of the guidance plan was Rev. Proc. 2016-47,³ which provides another, less expensive avenue for participants to roll over late indirect rollovers due to hardship following a self-certification approach. Historically, the 60-day period to complete an indirect rollover has been rather inflexible, requiring a participant to file for a private letter ruling (with a current cost of \$10,000) for relief from the 60-day period. But the IRS has provided welcome relief for plan participants who meet the following three conditions in order to help facilitate tax-free rollovers:

- (1) no prior denial by the IRS of a hardship waiver request for the amount in question;
- (2) the participant missed the 60-day deadline because of the participant's inability to complete a rollover due to at least one of the following reasons: an error by the receiving or distributing financial institution; the check (if applicable) was misplaced and never cashed; the distribution was deposited into and remained in what the participant mistakenly thought was an eligible

retirement plan; severe damage to the participant's principal residence; the death of a member of the participant's family; a serious illness of the participant or a member of the participant's family; incarceration of the participant; restrictions imposed by a foreign country;

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a postal error; the distribution was originally made on account of a tax levy and the levy proceeds have been returned to the participant; or the party making the distribution delayed in providing the necessary information to complete the rollover, despite the participant's reasonable efforts to obtain the information; and

- (3) the contribution must be made to the receiving plan or IRA as soon as practicable after the barrier to the rollover has been removed (with a 30-day safe harbor period).

If these conditions are satisfied, the participant may use the model self-certification provided with the Revenue Procedure, or may use a letter that is substantially similar in all material respects. Notably, the plan sponsor (or IRA provider), absent knowledge to the contrary, can rely on the certification to satisfy the 60-day rollover period. However, if on audit the IRS determines that the 60-day period should not be waived, then taxation and related penalties may result to the participant, along with necessary corrective action to remove the invalid rollover from the plan/IRA.

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ENDNOTES

¹ Notice 2016-50, IRB 2016-38, Sept. 2, 2016.

² Notice 2015-49, IRB 2015-30, 79.

³ Rev. Proc. 2016-47, IRB 2016-37, 346.

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