

LEGISLATIVE UPDATE

ASSOCIATION OF EMPLOYEE BENEFIT PLANNERS OF NEW ORLEANS

QUALIFIED PLANS & 403(b) PLANS

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I. Internal Revenue Service Guidance

- A. 403(b) Plan Termination. In Revenue Ruling 2011-7 and through four factual scenarios, the IRS provided guidance concerning the termination of 403(b) plans. The IRS will recognize a plan as being terminated and as a distributable event upon a binding resolution, full vesting of all benefits under the plan, notification of participants and beneficiaries of the termination, 402(f) notice of rollover rights, if appropriate, cessation of all 403(b) contributions to other 403(b) plans within the controlled group, and if distributions are made within 12 months. Permissible forms of distribution are delivery of fully-paid individual annuity contracts, individual certificates based on a group annuity contract, single sum payments if permitted by an annuity contract, and in cash or in kind distributions of custodial accounts. As long as a distributed annuity contract continues to comply with the requirements for a 403(b) plan in effect when the contract is distributed, the value of the contract is not included in gross income until the amounts are actually paid. Any other plan termination distributions, such as amounts from a custodial account or a lump sum payment from an annuity contract, are included in gross income when distributed unless rolled over to an IRA or other eligible plan.
- B. Wrap Fees Paid Outside IRA or Roth IRA. In Private Letter Ruling 201104061, the IRS has said that the payment of “wrap fees,” charged by a financial institution for investment advice and other securities trading services, does not constitute a contribution to an IRA or Roth IRA when paid for with assets outside the IRA or Roth IRA and based on the percentage of IRA or Roth IRA assets under management.
- C. VCP Fee Discount for Pre-Approved Defined Contribution Plans that Missed the EGTRRA Deadline. Plan sponsors of pre-approved defined contribution plans using the Voluntary Correction Program (VCP) to correct a failure to adopt an EGTRRA plan by the April 30, 2010 deadline will be permitted to pay a discounted fee of \$375 (half the usual fee) if their VCP submissions are postmarked by May 2, 2011. IRS Employee Plans News, 2/2011.

- D. 401(k) Questionnaire. IRS has announced that the 401(k) plans of plan sponsors who failed to return its 401(k) Compliance Check Questionnaire will be subject to a “full-scope examination.” The IRS also announced that an interim report of general findings from the questionnaire will be posted in September and the final report sometime in 2012. Retirement News for Employers – Winter 2011 Edition.
- E. Meaning of “Readily Tradable” Securities for Purposes of ESOP Rules. In Notice 2011-19, the IRS has provided guidance on when employer securities are “readily tradable” on an established market or established securities markets for purposes of the rules governing ESOPs.
- F. Stand-alone Form Replaces Schedule SSA. In Announcement 2011-21, the IRS stated that beginning with returns for the 2009 plan year, Schedule SSA of Form 5500 has been replaced with stand-alone Form 8955-SSA. The 2009 Form 8955-SSA is expected to be issued shortly and the 2010 form later this year. Administrators will be permitted to file for 2010, using the 2009 form. Also, the IRS has developed a voluntary electronic filing system for filing Form 8955-SSA, which will be ready to accept filings when the form becomes available. In order to provide administrators with additional time to complete and file the new form, the due date for filing the Form 8955-SSA for the 2009 and 2010 plan years is the later of (1) the due date that generally applies for filing the form for the 2010 plan year, and (2) August 1, 2011.
- G. IRS 2010 Data Book: IRS issued its annual data book, providing statistical data on its 2010 fiscal year ending September 2010. In calendar year 2009, the IRS processed 820,407 employee plans returns and examined 1.4% of the returns processed. There are still about 100,000 2009 employee plan returns to be processed; processing was delayed because of a funding reduction for EFAST and a programming error. Of the 37,414 determination letters issued in the 2010 fiscal year, only about 1% were issued to defined benefit plans. Among the defined contribution plans, 93% of the determination letters were issued to profit sharing plans.
- H. Eligibility Requirements of Actuaries. The Joint Board for the Enrollment of Actuaries has released final regulations that modify the eligibility requirements for performing actuarial services for ERISA-covered employee pension benefit plans, change the continuing education requirements, address the standards for performing actuarial services, and eliminate the proposed “snitch rule.” The regulations are generally effective on April 30, 2011. 20 CFR 901.0 et seq.
- I. Reduced User Fees for Enrolled Agents and Enrolled Retirement Plan Agents. IRS has issued final regulations that separate and reduce the enrolled retirement plan agent user fees from the enrolled agent user fees. Initial enrollment and renewal of enrollment user fees are reduced to \$30 from \$125. TD 9523.

II. Department of Labor Guidance

- A. Fee Disclosure Rules: DOL has stated that it intends to delay the applicability date of the new fee disclosure rules under ERISA 408(b)(2) from July 16, 2011 to January 1, 2012. EBSA News Release 2/2011.
- B. Definition of “Fiduciary”. EBSA has posted a fact sheet on its website discussing its proposed rule that would more broadly define a “fiduciary” by reason of giving investment advice to an employee benefit plan or a plan’s participants.
- C. Proposed Regulations on Shutdown Benefits. The PPA amended ERISA to provide that unpredictable contingent event benefits (“UCEB”) would be guaranteed by the PBGC on a phase-in basis, as though the UCEB was a benefit adopted on the date the UCE occurred, rather than as of its actual adoption date. The PBGC has now issued proposed regulations that would, among other things, provide the definition of a UCEB and guidance as to the date a UCE occurs and the phase-in period.
- D. Prohibited Transaction Exemption for In-House Asset Managers. EBSA adopted final amendments to the prohibited transaction exemption applying to in-house asset managers conducting transactions involving plan assets. 76 FR 18255.
- E. Adoption of Technical Revisions to Form 5500 Actuarial Information. EBSA has announced that the IRS’ technical revisions to the actuarial information that is required to be reported on Form 5500 for pension plans electing funding alternatives under the PPA, which are published in IRS Notices 2010-83 and 2011-3, are effective April 5, 2011. Form changes will be required for 2011 and later forms.
- F. Final Amendment to In-House Asset Managers Prohibited Transaction Exemption. EBSA adopted final amendments to the rules allowing in-house asset managers to conduct transactions involving plan assets. Prohibited Transaction Exemption 96-23, as amended by PTE Application No. D-11221, 76 FR 18255.

III. Court Cases

- A. 404(c) Defense: In *Howell v. Motorola, Inc.*, 2011 WL 18966 (7th Cir. 2011), the Seventh Circuit held that ERISA 404(c) was not available to protect a fiduciary from charges of imprudent selection of investment options or the decision to continue offering a particular investment. But, the safe harbor is available as a defense to charges of insufficient disclosure and failure to properly monitor fiduciaries.
- B. IRA Excess Contribution Excise Tax. In *Hellweg*, TC Memo 2011-58, the IRS believed businesses were used to shift money into corporations owned by taxpayers’ Roth IRAs in order to avoid the statutory limits on contributions to

Roth IRAs. Dividends distributed from the businesses to the Roth IRAs that owned them were recharacterized by the IRS as distribution from the corporations to the individuals whose Roth IRAs owned the corporations and subsequent contributions by the individuals to their Roth IRAs. The IRS determined that while the transaction was valid for income tax purposes, amounts deemed to be contributed to the Roth IRAs were excess contributions subject to a 6% excise tax. The Tax Court disagreed with the IRS, holding that the excise tax was intertwined with and inseparable from the income tax regime and that because the IRS respected the transaction for income tax purposes, it must also be valid for excise tax purposes.

Unless expressly stated otherwise above, nothing contained in this memo was intended or written to be used, or can be used by or relied upon by any taxpayer for the purpose of avoiding penalties that may be imposed on such taxpayer under the Internal Revenue Code of 1986, as amended. No one, without our express prior written permission, may use any part of this memo relating to any Federal tax matter to support the promotion or marketing of any Federal tax transaction(s) or matters or in promoting, marketing or recommending a partnership or other entity, investment plan or arrangement to one or more taxpayers. Any taxpayer should seek advice based upon the taxpayer's particular circumstances from an independent tax advisor with respect to any Federal tax transaction or matter contained in this memo.