

Final Regulations on Fee Disclosure

**QRP
401(k)**

On July 16, 2010, the Department of Labor's Employee Benefits Security Administration (EBSA) published interim final regulations on required service provider fee disclosures to retirement plan fiduciaries. These regulations replace proposed regulations issued in 2007. They are intended to "assist fiduciaries in determining both the reasonableness of compensation paid to service providers, and any conflicts of interest that may impact a service provider's performance under a service contract or arrangement" with a plan.

These regulations arrive at a time when increasing attention is being focused on preserving assets in retirement plans, particularly participant-directed individual account plans, such as 401(k)s. Information on fees charged for services and investments is viewed by many as helping plan fiduciaries make better-informed decisions when selecting those who will provide services to their plans.

Following is an overview of the provisions of these interim final regulations. They become effective July 16, 2011, a year from their publishing in the *Federal Register*. Public comments will be accepted by EBSA for a 45-day period that ends August 30, 2010.

General Application of These Regulations

- ◆ These interim final regulations apply to both defined contribution and defined benefit pensions plans, but do not apply to simplified employee pension (SEP) plans, SIMPLE IRA plans, or IRAs.
- ◆ Disclosures must be made to a "responsible plan fiduciary," which is a fiduciary with the authority to enter into contracts for services to the plan.
- ◆ The disclosure requirements apply to those providing fiduciary or investment advisory services, and to providers of recordkeeping or brokerage services that make investments available to participant-directed individual account plans.
- ◆ Providers of certain other services for which indirect compensation is received may also be subject to these regulations.
- ◆ If a service provider relationship is not expected to involve direct or indirect compensation of \$1,000 or more, it is not covered under these regulations. While the regulation is unclear as to the time period over which the \$1,000 amount is determined, it appears to be based on the overall term of the agreement.

AUGUST 2010

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*To make mistakes is human;
to stumble is commonplace; to be
able to laugh at yourself is maturity.*

— William A. Ward


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- ◆ If a service is necessary to a plan, and the contract or arrangement—and the compensation to be paid under the arrangement—are reasonable, such arrangement will not be considered in violation of ERISA as a prohibited transaction. To be considered reasonable, the disclosures discussed in this *Retirement Plans Bulletin* must be provided.
- ◆ These regulations include a prohibited transaction class exemption for a plan fiduciary that unknowingly enters into an agreement with a service provider who fails to meet the regulations' disclosure requirements, or continues a service arrangement while a disclosure failure is being corrected.
- ◆ A service contract or arrangement that fails to qualify for the prohibited transaction relief provided under ERISA will subject the service provider to the prohibited transaction excise tax as specified in the Internal Revenue Code, despite the lack of an amendment to the complementing Treasury regulations.
- ◆ A responsible plan fiduciary can avoid prohibited transaction consequences under certain covered service provider disclosure failure circumstances. The fiduciary must have reasonably believed the provider did, or would, properly disclose. Upon discovery of the failure the fiduciary must request proper disclosure in writing. If the provider does not comply within 90 days, the fiduciary must report the failure and provide details to the Department of Labor.
- ◆ These interim final regulations are not intended to preempt state laws governing disclosures by service providers working with retirement plans, except to the extent such laws prevent application of the regulations.

Covered Service Providers

A “covered service provider” is required to make the disclosures governed by these regulations to the responsible plan fiduciary. As noted above, the final regulations added the \$1,000 threshold for being required to make the disclosures. A covered service provider is any of the following.

- ◆ Any person or entity providing services as an ERISA fiduciary, either directly to the plan, or fiduciary services to an investment product or entity holding plan assets
- ◆ An investment advisor providing services directly to a plan, and registered under the Investment Advisers Act of 1940 or any state law
- ◆ Providers of recordkeeping or brokerage services to a participant-directed individual account plan, including recordkeepers or brokers that offer a platform of investment options as part of their contract or arrangement with the plan
- ◆ Affiliates or subcontractors providing (but not limited to) such services as accounting, auditing, actuarial, appraisal, banking or consulting services, related to the development of investment policies or objectives, or to selecting or monitoring service providers or plan investments, and reasonably expecting to receive indirect compensation from the plan through the covered service provider

Other Requirements

- ◆ Disclosure by covered service providers must describe the services to be provided to the plan pursuant to the contract or arrangement (not including nonfiduciary services) and the compensation to be received.
- ◆ While the required disclosure of fees must be in writing, it is not required that a formal contract be used to provide the disclosure, nor does EBSA specify a format for disclosing fees. (A model disclosure form was suggested by some who commented on the proposed regulations, and EBSA may consider this in the future.)
- ◆ A covered service provider must describe compensation to be received from the plan in the event of a termination of the contract or arrangement, and how prepaid amounts may be determined and refunded to the plan.
- ◆ A responsible fiduciary must request more information if the service provider fails to provide sufficient detail to determine if compensation to be received for specified services is reasonable.

- ◆ Service providers must disclose if they reasonably expect to be providing services as an ERISA fiduciary, or as a registered investment adviser (if registered under the Advisers Act or under state law).
- ◆ In general, services for which a covered service provider receives *direct* compensation may be disclosed either in aggregate, or itemized on a service-by-service basis.
- ◆ All *indirect* compensation (that not received directly from the plan, plan sponsor, or covered service provider) that is reasonably expected to be received must be disclosed, including each service, and all payers of the indirect compensation that will be received.
- ◆ Compensation set on a transaction basis, such as commissions, finder's fees, soft dollars, or charged directly against the plan's investments (such as 12b-1 fees) must similarly be disclosed, including the service, payers, and recipients of fees, and their status as an affiliate or subcontractor of the covered service provider.
- ◆ A recordkeeping service provider must furnish a description of all direct and indirect compensation that this entity, or an affiliate or subcontractor, reasonably expects to receive for recordkeeping services.
- ◆ If fees for recordkeeping services are offset or rebated against other compensation received, the covered service provider must provide a reasonable and good faith estimate of the recordkeeping costs using reasonable prevailing market rates, and explain the methodologies and assumptions used to prepare the estimate. (EBSA has included a standard for estimating recordkeeping costs in these regulations.)
- ◆ A description of how a service provider will be paid must be disclosed, such as whether costs will be billed, deducted from plan accounts or investments, etc.
- ◆ An investment provider must describe any compensation it will receive that is charged against investments, related to acquisition, sale, transfer, or withdrawal from the investment (e.g., sales loads or charges, redemption or surrender fees).
- ◆ A description of an investment's annual or ongoing operating expenses must be provided, such as expense ratio, wrap fees, etc. This is also required of recordkeepers and brokers that make available investments for participant-directed individual account plans, for all investment options offered in the plan.
- ◆ Recordkeepers and brokers will not be held liable for errors contained in the disclosure materials of an issuer of investments, if they are not affiliated with the issuer, and are unaware of the inaccuracies.

Timing of Disclosures

Service providers to a plan must provide a statement to the responsible plan fiduciary before entering into a contract or arrangement with the plan, stating that all required disclosures have been made. EBSA did not provide a time frame, but left it to service providers and plan fiduciaries to determine what is reasonable.

- ◆ If an entity whose relationship with a plan does not rise to the level of "covered service provider" *becomes* a "covered service provider"—due to an act of one of the parties—a disclosure to the plan fiduciary must be made as soon as practicable, " ... but not later than 30 days ... [after] ... the service provider knows ... " of the investment.
- ◆ If any change in the initial disclosure information given by a covered service provider occurs, it must be communicated to the plan as soon as practicable, but no later than 60 days following the change, except in extraordinary circumstances beyond the provider's control.
- ◆ A covered service provider must provide to a plan fiduciary or administrator any information on compensation paid that the plan would need to comply with any ERISA "reporting and disclosure requirements ... and the regulations, forms and schedules issued thereunder." This response must come within 30 days of the request, except under extraordinary circumstances.
- ◆ No contract or arrangement will fail to be reasonable under the regulations solely because a covered service provider makes an error or omission in its disclosures, assuming it has acted "in good faith" and exercised "reasonable diligence." Correction must be made no later than 30 days after discovery by the service provider. ❖

Plans Urged to Mind Their Forfeitures

Many retirement plans that provide employer contributions have a requirement that employees participate in the plan for several years before becoming fully entitled to—or “vested” in—the employer’s contributions. Vesting requirements can provide an incentive for employees to remain with an employer for an extended period of time, and can minimize providing sometimes-scarce benefits to short-term employees. Those who terminate service before becoming fully vested in their employer’s retirement plan contributions will generally forfeit some, or all, of these retirement benefits.

Where do these forfeitures go? In general, they’re used for one of several purposes. Forfeitures can be reallocated to other participants in the employer’s retirement plan. They can also be used to reduce future employer contributions, or to offset plan administrative expenses. How they will be used is generally specified by an election in a retirement plan’s adoption agreement, or—in the absence of an affirmative election—may be determined by a default (“hard-coded” language) in a plan’s governing document, often called the “basic plan document,” or BPD. Failure to follow prescribed procedures for use of forfeitures can risk the tax-advantaged status of a retirement plan.

On the IRS Radar

One of the many things an IRS auditor looks for when conducting an examination or audit of a retirement plan is whether it has followed the operational road map laid out in its written plan document. This includes any formulas for vesting, and the plan’s prescribed use(s) of forfeited unvested dollars. Neglecting to follow the plan document is an operational failure, potentially subjecting the plan to IRS sanctions if not properly corrected.

An indication that the IRS is paying close attention to the handling of forfeitures was demonstrated recently in the agency’s spring 2010 *Retirement News for Employers* newsletter. The IRS notes that some plan administrators “... place these forfeited amounts into a plan suspense account, allowing them to accumulate over several years.” The newsletter goes on to say that various IRS rulings “preclude a plan from carrying over plan forfeitures to subsequent plan years.”

IRS logic that “...failure to use forfeitures in a timely manner denies plan participants additional benefits or reduced plan expenses...” is not without merit. But the regulatory and other guidance citations presented by the IRS are less than conclusive in supporting the IRS position that forfeitures cannot be carried over beyond the year in which a forfeiture occurs.

The IRS is known to have approved prototype documents that provide for use of forfeitures in subsequent years, or “as soon as possible.” Furthermore the IRS’ own agency-issued “boilerplate” language—which the IRS provides to plan document drafters—states that for plans that use forfeitures to reduce future employer contributions, “Any forfeitures occurring will reduce employer contributions for the *next* plan year.”

Unfortunately, regardless of whether the IRS is on-point and on-target in its recent warnings on timely use of plan forfeitures, it is clear that the IRS intends to make this a compliance issue. How an IRS auditor would assess and grade a retirement plan’s use of forfeitures cannot be fully predicted. Appealing an IRS finding of noncompliance, or plan operational failure, is always uncertain territory. When in doubt, it’s always best to make every effort to meet IRS expectations.

Some Ground Rules

Here are several sensible ground rules for using plan forfeitures, whether they will be reallocated to other employees, used to reduce employer contributions, or used to reduce plan expenses.

- ◆ Be sure your plan specifies how forfeitures are to be used.
- ◆ Follow that plan-specified formula.

- ◆ Do not presume to have full discretion as to when forfeitures are used, despite what seem to be logical plan or business objectives or priorities.
- ◆ Use forfeitures *as soon as possible* within the terms provided by the plan.

In its newsletter, the IRS also describes the availability of the Employee Plans Compliance Resolution System (EPCRS) program to correct retirement plan operational failures, including failure to properly use or allocate forfeitures. The IRS notes that, if discovered within two years of the failure, a plan can generally self-correct, which—in the case of forfeitures—could potentially require revising prior-year allocations.

Unfortunately, while addressing a legitimate compliance concern, the IRS has also lent some uncertainty to an issue with many variables. It is an issue where plan documents, employer elections, and the IRS' own prior guidance interact to yield more than one black-and-white solution. ❖

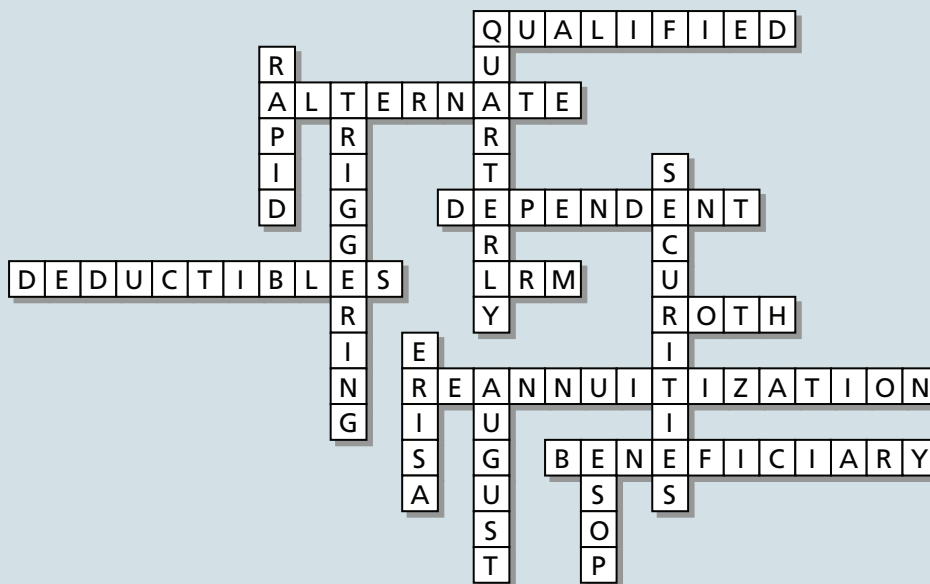
Test Your Knowledge – Answers to Last Month's Puzzle

Thank you to everyone who participated in last month's crossword puzzle. Out of all the eligible entries, five winners were randomly drawn to receive a free Ascensus *IRA Reporting* training video from Ascensus' new *Video Training Series*.

Congratulations to the winners!

Paula Jackson, Blackridge Financial
Halina Lotko, Webster Bank
Joan Mazzella, Los Angeles Federal Credit Union
Nancy Williams, ViewPoint Bank
Jerry Wondoloski, Virtus Investment Partners

Be sure to check the last page of each month's *Retirement Plans Bulletin* for new training puzzles.



Still No Qualified Charitable Distributions for 2010

IRA

Many IRA holders have delayed taking their required minimum distributions hoping that Congress would pass legislation restoring the ability to take qualified charitable distributions (QCDs) from Traditional and Roth IRAs. Remember that the Pension Protection Act of 2006 added a provision that allowed individuals age 70½ and older to exclude QCDs of up to \$100,000 from their gross income for 2006 and 2007. The Tax Extenders and Alternative Minimum Tax Relief Act of 2008 extended the QCD option only through December 31, 2009. A QCD was a distribution, subject to certain restrictions, of Roth or Traditional IRA taxable assets paid directly to a qualified charity. The QCD could satisfy an IRA holder's required minimum distribution for the applicable year. Unfortunately, Senate leadership has failed in its latest attempt to pass legislation that would have extended QCDs.

On May 20, Senate Finance Committee Chairman Max Baucus (D-MT) and House Ways and Means Committee Chairman Sander Levin (D-MI) jointly released a summary of their tax-extenders agreement. The bill, H.R. 4213, the American Jobs and Closing Tax Loopholes Act of 2010, would extend many popular tax breaks, provide tax relief to businesses and state and local governments, and extend eligibility for unemployment insurance benefits.

Provisions in H.R. 4213 that affect IRAs would

- ◆ extend qualified charitable distributions from Traditional and Roth IRAs for one year, through December 31, 2010, and
- ◆ permit qualified airline employees to roll over airline bankruptcy settlement payments to a Traditional IRA and recharacterize a prior contribution of a settlement payment to a Roth IRA as a contribution to a Traditional IRA. (At present, rollovers of airline bankruptcy settlement payment are allowed only to Roth IRAs.)

Despite days of negotiations, modifications to the bill were not sufficient to sway moderate Senators who were concerned with the cost of the bill and its impact on the deficit. On June 24, Senate leadership failed to get the 60 votes necessary to end debate and proceed to a final vote, and Senate Majority Leader Harry Reid (D-NV) pulled the bill from the floor. It is not clear whether the Senate will attempt to take up the bill again. ❖



Ascensus Observes Labor Day

The offices of Ascensus, including the *800 Consulting* service, will be closed Monday, September 6, 2010, to observe Labor Day. Regular business hours, 8:00 a.m. to 5:00 p.m. CDT, will resume Tuesday, September 7, 2010.

2010 Fall Seminar Tour Calendar

IRA

In the highly competitive world of financial services, IRA administrators need the knowledge and skills to service their clients with professional expertise. Continuing education is imperative. Now is the time to plan to take advantage of the Ascensus fall seminar tour. This year the IRA seminars include *IRA Fundamentals* and *Advanced IRAs – Operational Issues*. To register and for additional sites and dates co-sponsored by Ascensus and state banking associations or credit union leagues, please check out our website at www.ascensus.com. Be sure to check co-sponsored sites for registration details and pricing.

IRA Fundamentals

Our *IRA Fundamentals* seminar is one of our most popular seminars. Each year thousands of IRA professionals attend this seminar to enhance their knowledge of Traditional and Roth IRAs—including the latest information on IRA portability, beneficiary, and reporting rules. Our experienced instructors use classroom instruction, multimedia presentations, and real-life examples to create an ideal learning environment for attendees. We designed this seminar to teach IRA fundamentals to individuals who are new to the retirement industry or who need a general IRA refresher. Although the *IRA Fundamentals* seminar is an introductory course, our instructors will assist attendees with more advanced questions.

Advanced IRAs – Operational Issues

IRAs continue to play an important role in saving for retirement. During 2009, nearly 4 out of 10 U.S. households owned IRAs and more than 75 percent of IRA-owning households participated in employer-sponsored retirement plans.* These statistics illustrate the potential for interaction between IRAs and employer-sponsored retirement plans. With the current market focus on converting assets to Roth IRAs, financial organizations need to know how best to facilitate these transactions to stay competitive. Equally as competitive—and ripe for operational error—is the required minimum distribution (RMD) and beneficiary market. To have a successful, revenue-generating IRA department, IRA administrators must understand the rules surrounding these issues and know how to correctly perform complicated IRA transactions.

This informative seminar will focus on various IRA operational issues such as converting or rolling over assets to Roth IRAs, distributing RMDs, and handling IRA assets after an IRA holder dies. Attendees also will learn how recent legislative changes will affect their day-to-day operations. Through hands-on training and peer discussions, attendees will discover practical solutions to common IRA problems.

*Investment Company Institute, *The Role of IRAs in U.S. Households' Saving for Retirement*, 2009

Ascensus Seminar Dates and Locations

California

Ontario

IRA Fundamentals Oct. 12
Advanced IRAs Oct. 13
 Sheraton Ontario Airport Hotel
 429 N Vineyard Avenue
 Ontario, CA 91764
 909-937-8000

Torrance

IRA Fundamentals Dec. 7
Advanced IRAs Dec. 8
 Torrance Marriott South Bay
 3635 Fashion Way
 Torrance, CA 90503
 310-316-3636

San Francisco (San Bruno)

IRA Fundamentals Nov. 16
Advanced IRAs Nov. 17
 Courtyard San Francisco Airport
 1050 Bayhill Drive
 San Bruno, CA 94066
 650-952-3333

District of Columbia

Arlington, VA

IRA Fundamentals Oct. 21
Advanced IRAs Oct. 22
 Hilton Crystal City
 2399 Jefferson Davis Hwy
 Arlington, VA 22202
 703-418-6800

Georgia

Atlanta

IRA Fundamentals Oct. 7
Advanced IRAs Oct. 8
 Hilton Atlanta Airport
 1031 Virginia Ave
 Atlanta, GA 30354
 404-767-9000

Kansas

Overland Park

IRA Fundamentals Oct. 19
Advanced IRAs Oct. 20
 DoubleTree Corporate Woods
 10100 College Blvd
 Overland Park, KS 66210
 913-451-6100

Louisiana

New Orleans (Kenner)

IRA Fundamentals Oct. 7
Advanced IRAs Oct. 8
 Hilton New Orleans Airport
 901 Airline Drive
 Kenner, LA 70062
 504-469-5000

Massachusetts

Boston (Natick)

IRA Fundamentals Oct. 14
Advanced IRAs Oct. 15
 Crowne Plaza Natick
 1360 Worcester Street
 Natick, MA 01760
 508-653-8800

2010 Fall Tour Calendar*Continued on Page 8*

Minnesota**Brainerd/Baxter**

IRA Fundamentals Sept. 28
Advanced IRAs Sept. 29

The Lodge
6967 Lake Forest Dr
Baxter, MN 56425
218-822-5634

Minneapolis

IRA Fundamentals Sept. 21
Advanced IRAs Sept. 22

Sheraton Bloomington Hotel
7800 Normandale Blvd
Minneapolis, MN 55439
952-835-7800

Oklahoma**Oklahoma City**

IRA Fundamentals Dec. 9
Advanced IRAs Dec. 10

Oklahoma City Marriott
3233 Northwest Expwy
Oklahoma City, OK 73112
405-842-6633

Oregon**Portland**

IRA Fundamentals Nov. 18
Advanced IRAs Nov. 19

Hilton Garden Inn
12048 NE Airport Way
Portland, OR 97220
503-255-8600

Pennsylvania**Philadelphia**

IRA Fundamentals Oct. 19
Advanced IRAs Oct. 20

Marriott Philadelphia Airport
One Arrivals Road
Philadelphia, PA 19153
215-492-9000

Texas**Dallas (Irving)**

IRA Fundamentals Dec. 7
Advanced IRAs Dec. 8

Marriott Dallas Ft. Worth Airport
8440 Freeport Pkwy
Irving, TX 75063
972-929-8800

Wisconsin**Appleton**

IRA Fundamentals Oct. 26
Advanced IRAs Oct. 27

Holiday Inn Select
150 S Nicolet Rd
Appleton, WI 54914
877-786-9480

Eau Claire

IRA Fundamentals Sept. 29
Advanced IRAs Sept. 30

Holiday Inn
2703 Craig Road
Eau Claire, WI 54701
715-835-2211

LaCrosse

IRA Fundamentals Sept. 16
Advanced IRAs Sept. 17

Holiday Inn
200 Pearl St
LaCrosse, WI 54601
608-784-4444

Madison

IRA Fundamentals Sept. 14
Advanced IRAs Sept. 15

Madison Marriott West
1313 John Q Hammons Dr
Madison, WI 53562
608-831-2000

Milwaukee-Brookfield

IRA Fundamentals Oct. 28
Advanced IRAs Oct. 29

Courtyard Milwaukee
16865 West Bluemound Rd
Brookfield, WI 53005
262-821-1800

Continuing Education Credits

Ascensus is an approved provider of continuing education with the following programs and certification sponsors. Please contact Ascensus if you are interested in continuing education credits and to confirm the number of credits available per class per designation at 800-346-3860.

Institute of Certified Bankers (ICB)

- ◆ Certified IRA Services Professional (CISP)
- ◆ Certified Trust and Financial Advisor (CTFA)
- ◆ Certified Retirement Services Professional (CRSP)

Certified Financial Planner (CFP)

- ◆ IRA programs meet the continuing education requirements for CFP certification

National Association of Federal Credit Unions (NAFCU)

- ◆ NAFCU Certified Compliance Officer (NCCO)
- ◆ Certified IRA Professional (CIP)

The Office of Professional Responsibility, Internal Revenue Service

- ◆ Enrolled Retirement Plan Agent (ERPA)
- ◆ Enrolled Agent (EA)

We have entered into an agreement with the Office of Professional Responsibility, Internal Revenue Service, to meet the requirements of 31 Code of Federal Regulations, section 10.6(g), covering maintenance of attendance records, retention of attendance records, retention of program outlines, qualification of instructors, and length of class hours. This agreement does not constitute an endorsement by the Office of Professional Responsibility as to the quality of the program or its contribution to the professional competence of the Enrolled Retirement Plan Agent. ❖

Answer Key: D, J, G, I, F, K, A, H, C, B, E

IRA Compliance: IRS Authoritative Sources

IRA administrators frequently look for the authority governing a required IRA compliance issue (or IRA operation). If the administrator finds the source, she often has trouble determining the legal weight of the source. This is a particular concern when there are multiple IRS sources dealing with the same compliance issue. The IRA administrator has to determine which source takes precedence.

Unfortunately, financial organizations do not usually have a single place to go to for a complete listing of all IRA compliance rules and regulations. Actually, compliance is a complicated area of IRA administration based on requirements from several sources, including the Internal Revenue Code, Treasury regulations, Internal Revenue Service (IRS) pronouncements, and other government directives. Each of these sources has its own degree of authority.

Internal Revenue Code

The Internal Revenue Code (IRC) is created by Congress and is a collection of laws governing the generation of revenue. IRA holders are given the tax benefit of tax-deferred earnings, tax-free distributions in some cases, and, possibly, income tax deductions for IRA contributions. To receive these tax benefits, IRA holders must follow certain rules regarding their IRAs. The rules address all aspects of the IRA, including maintenance of the IRA, deductions taken for the contributions, when distributions must be taken, distribution options when the IRA holder dies, penalties for any IRA holder abuse in these areas, etc. The foundation for these rules is found in the Internal Revenue Code (IRC).

Some key sections in the Internal Revenue Code relating to IRAs are listed below.

- ◆ IRC Sec. 72(t) contains details on the 10 percent early distribution penalty and the various exceptions to this penalty.
- ◆ IRC Sec. 219 cites contribution limits and authorizes the deductions allowed for certain types of IRA contributions.
- ◆ IRC Sec. 401(a)(9) outlines the general rules for required minimum distributions (RMDs) and beneficiary options.
- ◆ IRC Sec. 402 explains the rules for making rollover contributions from employer-sponsored retirement plans into IRAs.
- ◆ IRC Sec. 408 outlines the general rules applying to IRAs.
- ◆ IRC Sec. 408A contains the general rules for Roth IRAs.

Treasury Regulations

The Internal Revenue Service (IRS) is the largest bureau of the Department of Treasury, and is responsible for determining, assessing, and collecting revenue in the U.S. The IRS is responsible for writing Treasury regulations that interpret and implement the Internal Revenue Code. There are three types of Treasury regulations, each with a different degree of authority. Treasury regulations may be released in the form of final, temporary, and proposed regulations, each of which is explained next.

Final Regulations (Treas. Regs.) – Final regulations remain in effect as long as the applicable IRC section remains unchanged or until the IRS rewrites the regulations. Final Treasury regulations are released in Treasury Decisions (TD).

Temporary Regulations (Temp. Treas. Regs.) – Temporary regulations provide temporary guidance when taxpayers need immediate guidance, but more time is needed to develop final regulations. Temporary regulations have the same authority as final regulations, and generally are effective until replaced by final regulations.

Proposed Regulations (Prop. Treas. Regs.) – Proposed regulations usually are issued during periods when final regulations are being developed in a certain area. After proposed regulations are released, the IRS considers comments from the public and may hold hearings to gather industry input before making the regulations final. The IRS indicates in the proposed regulations the extent to which they may be relied upon before final regulations are completed.

Each section of the Treasury regulations corresponds to a particular section of the Internal Revenue Code. For example, IRC Sec. 6081 is the basic authority for the Secretary to grant an extension of time for filing any tax-related information returns, such as Form 1099-R, *Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc.*, and Form 5498, *IRA Contribution Information*. Treas. Reg. 1.6081-1 provides more detail about the granting of filing extensions. Temporary Treasury regulations have similar numbering, except that the number sequence is followed by a “T.”

When the Treasury Department initially releases proposed regulations, the release is given a six-digit identification number preceded by “REG” and followed by two digits denoting the year of drafting. Final regulations typically are released as Treasury Decisions (TD). For example, in January 2001, the IRS released the proposed Treasury regulations governing required minimum distributions (RMDs) that were drafted in 2000. The initial release was identified as REG-130477-00 and REG 130481-00. Contained in this release, in addition to other sections, was Prop Treas. Reg. 1.408-8, explaining RMD regulations specific to IRAs. The IRS released the final version of these regulations in TD 8987 in April 2002; the actual regulation cite is Treas. Reg. 1.408-8.

Revenue Rulings (Rev. Rul.)

The IRS releases revenue rulings when a particular section of the Code or Treasury regulations requires a more in-depth interpretation for taxpayers. Revenue rulings may be relied on as the IRS’ official position on a specific set of facts. But the IRS does reserve the right to restate any position by modifying or replacing a previously published ruling.

Revenue Procedures (Rev. Proc.)

The IRS releases revenue procedures to outline specific procedures necessary to comply with IRS rules and regulations. Revenue procedures may be relied upon until changed, modified, or superceded.

IRS Announcements and Notices

The IRS publishes announcements and notices in the Internal Revenue Bulletin. These pronouncements are published when taxpayers need immediate information on specific issues. The language in announcements and notices may appear later in revenue rulings or in procedures generated to explain the area covered in the announcement or notice in more detail. Taxpayers can rely on the information supplied in announcements and notices.

IRS Publications

The IRS annually releases publications designed to explain a variety of tax topics using layman’s terms. For example, IRS Publication 590, *Individual Retirement Arrangements (IRAs)*, discusses many essential IRA issues and is a good resource for researching general IRA questions.

IRS Forms

The IRS publishes hundreds of forms and accompanying instructions every year. Often, the instructions to the forms contain information on certain rules or procedures that are not available from any other source. This is particularly true for procedures to satisfy reporting requirements.

Private Letter Rulings

Private letter rulings (PLRs) are opinions written by the IRS in response to a written request from a taxpayer regarding a specific set of facts. A PLR may only be relied upon only by the taxpayer who actually applied for the ruling. But a PLR gives some indication to all taxpayers about how the IRS views a particular issue.

Information Sources Must Be Current

The IRS uses the sources just discussed to inform IRA holders and financial organizations of how they must maintain IRAs. Compliance with these IRS rulings often depends on timely access to the information. Legislation and IRS pronouncements may come into play quickly.

In this fluid environment, financial organizations need information immediately to coordinate operations that will accommodate the changes. Therefore, financial organizations should ensure their access to necessary information by subscribing to information sources or consulting services, regularly attending continuing education courses, and working closely with the organization’s advisors. In audit situations, the IRS does not view insufficient resources as a valid excuse for noncompliance. ❖

QRP FOCUS

QRP FOCUS ON SAFE HARBOR 401(k) ESTABLISHMENT DEADLINE



Polly Heins

FEATURED CONSULTANT

Please send topics for Ascensus' QRP Focus column to the following address: Editor, *Retirement Plans Bulletin*, Ascensus, Inc., P.O. Box 979, Brainerd, MN 56401. The editor does not guarantee that questions will appear in the column and regrets that no personal responses can be sent.

Q What is the deadline for establishing a new safe harbor 401(k) plan?

A Many employers seek to avoid the actual deferral percentage (ADP) testing of plan deferrals by selecting certain safe harbor 401(k) provisions in their plan documents. If an employer is thinking of establishing a brand new plan with a safe harbor 401(k) provision for the 2010 calendar year, or amending an existing profit sharing plan (with no elective deferrals currently permitted), the employer must have the safe harbor 401(k) plan provisions in place (amended and signed plan documents) by October 1, 2010. Treasury regulations state that the first plan year—for a calendar or noncalendar year plan—must be at least three months long and that the eligible employees must be allowed to make 401(k) elective deferrals for at least three months.

The employer must also provide a special notice to employees, letting them know that the plan intends to follow the safe harbor 401(k) rules for 2010 and stating the amount and type of safe harbor contribution that the employer will make. The employer must distribute the notice to all eligible employees for a new or amended 2010 calendar year plan no later than September 30, 2010. Thereafter, it must be provided annually 30-90 days before the first day of the plan year.

Q When can an employer with an existing 401(k) plan add a safe harbor 401(k) provision?

A An employer with an existing 401(k) plan must generally implement a new safe harbor 401(k) provision on the first day of the plan year. The employer must meet certain requirements before the safe harbor provision is effective.

- ◆ The employer must distribute a notice to employees 30-90 days before the beginning of the plan year, stating the amount and type of safe harbor contribution.

- ◆ The employer must amend the existing plan document to add the safe harbor 401(k) provision before the beginning of the plan year.

Q What if an employer is thinking about implementing a 401(k) safe harbor provision, but is unsure?

A The IRS allows employers who want a safe harbor 401(k) plan, but who are unsure whether they can commit, to decide each year whether to activate safe harbor provisions for the current year. The employer must have selected the “current year” testing method in the plan document to take advantage of this option. In addition, the employer must provide a notice to all eligible employees at least 30 days, but not more than 90 days, before the beginning of the plan year, stating that the employer may amend the existing plan to a safe harbor 401(k) during the next plan year and, if so, will provide at least a three percent nonelective contribution. If, during that next plan year, the employer decides to adopt safe harbor 401(k) provisions, the employer must also

- ◆ execute a plan document with the safe harbor 401(k) provisions at least 30 days before the end of the plan year,
- ◆ provide a supplemental notice at least 30 days before the end of the plan year, stating that the employer intends to satisfy the safe harbor 401(k) rules and make a safe harbor 401(k) nonelective contribution, and
- ◆ make the nonelective contribution to each eligible employee in an amount that is at least three percent of the employee’s compensation.



IRA Advisor



Jennifer Bassett, CISP

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Please send questions for Ascensus' IRA Advisor column to the following address: Editor, *Retirement Plans Bulletin*, Ascensus, Inc., P.O. Box 979, Brainerd, MN 56401. The editor does not guarantee that questions will appear in the column and regrets that no personal responses can be sent.

Q One of our clients established her own business in 2005. She would like to establish a SIMPLE IRA plan for her 2009 tax year. Her business's 2009 tax return due date was April 15, 2010, but she filed for an automatic six-month extension. Can she still establish a SIMPLE IRA plan for 2009?

A No. According to IRS Notice 98-4, Q&A, K-1, an existing employer may establish a SIMPLE IRA plan for a tax year on any date between January 1 and October 1 of that year. (This requirement does not apply to a new employer that comes into existence after October 1 if the employer establishes the SIMPLE IRA plan as soon as administratively feasible.)

Q One of our clients currently maintains a SIMPLE IRA plan for his employees. He recently bought another small business that has a 401(k) plan. The purchase is effective August 1, 2010. None of his original employees are eligible to participate in the 401(k) plan until 2011. Can our client continue to maintain the SIMPLE IRA plan for his original employees until the end of his 2010 tax year?

A Yes. In fact, your client may maintain the SIMPLE IRA plan for 2010 and 2011. An employer generally may not make contributions to a SIMPLE IRA plan if he maintains another qualified retirement plan. But Notice 98-4 contains two exceptions to the general rule: an employer who maintains a separate union plan, and an employer who maintains another plan as a result of an acquisition or merger. In both situations, an employer may still contribute to a SIMPLE IRA plan provided the participants of these "other plans" are excluded under the SIMPLE IRA plan. Notice 98-4, Q&A, C-1, allows the employer to exclude any

employees who would not have been eligible to participate in the SIMPLE IRA plan if the acquisition had not occurred. In the case of a merger or acquisition, contributions to the SIMPLE IRA plan would be allowed for the year of merger or acquisition and the following year.

Q We have a client who currently maintains a SIMPLE IRA plan. She has decided to terminate the SIMPLE IRA plan effective September 1, 2010. Can she terminate her SIMPLE IRA plan mid-year?

A Conservatively, no. Little IRS guidance is available for SIMPLE IRA plans, and the topic of terminating SIMPLE IRA plans is not addressed in official IRS pronouncements. While general information at the IRS website generally is considered less official or binding than Treasury regulations or IRS pronouncements, the IRS website offers some information on terminating SIMPLE IRA plans. Ascensus opinion, based primarily on information at the IRS website, is that employers can only terminate SIMPLE IRA plans prospectively, beginning no earlier than the next calendar year. And contributions under the SIMPLE IRA plan must continue until the next calendar year. At its website, the IRS suggests that to terminate a SIMPLE IRA plan, an employer should notify the financial organizations that "handle" the SIMPLE IRA plan that contributions will cease for the next calendar year and the plan will terminate. The employer also must notify employees that the SIMPLE IRA plan will be discontinued. Notice to the IRS is not required when employers terminate SIMPLE IRA plans. Employers considering terminating their SIMPLE IRA plans should consult with their legal counsel and competent tax advisors to discuss the appropriate termination procedures. ♦

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Test Your Knowledge

Test your knowledge of this month's edition of the *Retirement Plans Bulletin*. Match the correct term in the left column with the description in the right column taken from the articles within this issue. The answer key is on page 8.

- A. Forfeitures
- B. Temporary Regulations
- C. Two Years
- D. Proposed Regulations
- E. Interim Final Regulations
- F. Final Regulations
- G. SIMPLE IRA Plan
- H. 60 Days
- I. Safe Harbor 401(k) Plan
- J. 30 Days
- K. 30-90 Days

- _____ These usually are issued during periods when final regulations are being developed in a certain area.
- _____ If an error or omission is discovered in its disclosures, correction must be made no later than this time frame after discovery by the service provider.
- _____ Existing employers may establish this type of IRA-based plan for a tax year on any date between January 1 and October 1 of that year.
- _____ Under this type of plan, the first plan year must be at least three months long and the eligible employees must be allowed to make elective deferrals for at least three months.
- _____ These remain in effect as long as the applicable IRC section remains unchanged or until the IRS rewrites the regulations.
- _____ In order for the safe harbor provision to be effective, the employer must distribute a notice to employees in this time period before the beginning of the plan year, stating the amount and type of safe harbor contribution.
- _____ While these types of assets can be reallocated to other participants in the employer's retirement plan, they can also be used to reduce future employer contributions, or to offset plan administrative expenses.
- _____ If any change in the initial disclosure information given by a covered service provider occurs, it generally must be communicated to the plan as soon as practicable, but no later than this time period after the change.
- _____ If discovered within this time period, a plan generally can self-correct a failure to properly use or allocate forfeitures using the Employee Plans Compliance Resolution System (EPCRS) program.
- _____ These provide temporary guidance when taxpayers need immediate guidance, but more time is needed to develop final regulations.
- _____ The Employee Benefits Security Administration (EBSA) published these on required service provider fee disclosures to retirement plan fiduciaries.