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By Electronic Delivery

May 16, 2016

J. Mark Iwry
Senior Advisor to the Secretary and Deputy Assistant Secretary
for Retirement and Health Policy
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Mark J. Mazur
Assistant Secretary for Tax Policy
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Hon. William J. Wilkins
Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

RE: Priority Guidance Plan Recommendations on Retirement Security Issues

Dear Mr. Iwry, Mr. Mazur, and Mr. Wilkins:

The Investment Company Institute[1] is pleased to submit recommendations regarding retirement security issues for projects to be included on the 2016-2017 Priority Guidance Plan. A separate ICI submission will describe our recommendations regarding regulated investment companies.

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[1] The Investment Company Institute (ICI) is a leading global association of regulated funds, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's U.S. fund members manage total assets of $17.6 trillion and serve more than 90 million U.S. shareholders.

I. Items from 2015-2016 Priority Guidance Plan

A. Regulations under Section 411(a)(11)

We request that the Service finalize the proposed regulations implementing section 1102 of the Pension Protection Act, which instructed the Secretary of the Treasury to modify the regulations under section 411(a)(11) to require disclosure of the consequences of failing to defer receipt of a distribution from a defined contribution plan.[2] We strongly recommend that the Service finalize the requirements as proposed. As we stated in our comment letter,[3] the proposal strikes the right balance by alerting the participant that the plan may have investments, or fee structures, different from those obtainable in an IRA, and alerting the participant that more information is available. This approach will not overwhelm the participant with information that obscures the key information while also assuring the participant has access to information consequential to the decision whether to take or defer a distribution from the plan.

B. Guidance Regarding Substantiation of Hardship Distributions

For the last couple of years, the Priority Guidance Plan has included an item on guidance regarding substantiation of hardship distributions. In 2015 editions of the IRS Employee Plans News and Retirement News for Employers newsletters,[4] the Service indicated that plan sponsors should, among other things, obtain and keep documentation that substantiates an employee's immediate and heavy financial need in the case of a hardship distribution. The newsletters also specified that electronic self-certification (by a participant) of the nature of a hardship is not sufficient. These newsletter statements are not supported by Treasury regulations and are inconsistent with prior indications from the Service, including statements on the Service's website and in public forums, that this type of documentation is not required to substantiate the *existence* of a hardship. This inconsistency, coupled with the existence of the current Priority Guidance Plan item relating to hardship substantiation, naturally leads to confusion in the plan sponsor and service provider communities.[5] We believe that formal guidance is now essential to clarify the Service's position on this issue and we request that the Service issue, as soon as possible, a clarification that the newsletters do not represent the guidance referred to on the Priority Guidance Plan.

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[2] 73 Fed. Reg. 59575 (Oct. 9, 2008).

[3] *See* ICI letter to Internal Revenue Service re: proposed regulation (REG-107318-08), dated January 7, 2009.

[4] The Employee Plans News is available here: http://www.irs.gov/pub/irs-tege/epn_2015_4.pdf and the Retirement News for Employers is available here: http://www.irs.gov/pub/irs-tege/rne_0415.pdf. We note that these newsletter articles also state that, for plan loans with a repayment period exceeding five years, plan sponsors should retain documentation verifying that loan proceeds were used to purchase or construct a primary residence, an obligation which also is not supported in other guidance issued by the Service.

[5] Given that the Service has not previously suggested such a requirement, plan sponsors may not have adopted the practice of maintaining such documentation and would not have a way of retrieving the necessary documentation to comply with the inconsistent position more recently set forth in the newsletters.

II. New 2016-2017 Priority Guidance Plan Items

The Institute requests that the Service add the following retirement security matters to the 2016-2017 Priority Guidance Plan. We have recommended these additions in previous letters to the Service on the Priority Guidance Plan.

A. 403(b) Plan Termination

Pursuant to an item on the 2010-2011 Priority Guidance Plan, the IRS issued Revenue Ruling 2011-7, providing guidance on 403(b) plan terminations. While this Ruling addressed many open issues, it does not address a significant question regarding plans funded through individually-owned section 403(b)(7) custodial accounts.[6] An effective plan termination depends on the ability to distribute all accumulated benefits within a reasonable period of time. Individual custodial accounts, however, typically do not provide for distribution without the consent of the participant. Therefore, any participant who fails to request a cash distribution or rollover of his or her 403(b) account could jeopardize the effectiveness of the termination for other participants or cause the employer to have to maintain a spun-off plan indefinitely. Guidance for this type of situation is essential.

Revenue Ruling 2011-7 and the regulations under section 403(b) permit the delivery of an individual annuity contract (or a certificate evidencing an interest in a group annuity) as a means of distributing accumulated benefits under a 403(b) plan termination. This ordinarily means that an annuity contract may continue as a tax-deferred vehicle after plan termination. The Ruling does not contemplate distribution of a 403(b)(7) custodial account, however. Given that section 403(b)(7)(A) provides that contributions to a custodial account shall be treated as contributions to an annuity contract, we request equal treatment for 403(b)(7) custodial accounts in connection with a plan termination. Distribution of a custodial account that retains its 403(b) character, like the distributed 403(b) annuity contract, may be the only option for some custodians attempting to carry out terminating distributions without the consent of the participant, particularly where the custodial agreement does not permit involuntary liquidation of the account or unilateral amendment of the agreement for this purpose. Without the ability to distribute the account itself, many custodians are left wondering how to carry out an employer's wishes to terminate a plan while at the same time satisfying legal obligations to the individual account owner.

We also believe that guidance addressing a plan termination involving custodial accounts that do contemplate involuntary liquidation would be appropriate. Some have read Revenue Ruling 2011-7 to require affirmative participant consent to a distribution, which would suggest that the presence of a single unresponsive or uncooperative participant could taint and significantly delay a plan termination. To address this misunderstanding, guidance describing an involuntary distribution with an automatic rollover to an IRA after a specified period would be appropriate. Guidance in this regard will facilitate

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[6] *See* ICI letter to W. Thomas Reeder, dated March 17, 2009; and ICI letter to W. Thomas Reeder, dated Nov. 12, 2008.

necessary amendments to custodial agreements to permit automatic rollovers to IRAs in connection with plan termination and would allow custodians to rely on an employer's direction that a plan is being terminated. The Institute has strongly urged that this guidance be published as soon as possible, given that some employers have begun the process of terminating their 403(b) plans pursuant to the 2007 final regulations issued under section 403(b).[7]

B. Tax Treatment of Escheated Amounts

We continue to request guidance on the proper tax treatment of escheated amounts from retirement plans and IRAs. In 2004, the Department of Labor ("DOL") issued guidance regarding missing participants in terminating defined contribution plans.[8] The DOL guidance requires that a plan administrator use certain search methods to locate a missing participant, and if all efforts to locate the missing participant fail, then the fiduciary should consider distributing the amounts to a federally insured bank account or escheating them to a state unclaimed property fund. The requested guidance should address certain federal tax implications of escheatment, including (1) whether Form 1099-R reporting is required, (2) whether payors should designate amounts as escheated and, if so, how payors should make such a designation, and (3) whether withholding is required. We have requested this guidance in prior years and we wish to reiterate its importance. We understand that several states have increased their efforts to collect unclaimed property in IRAs and other retirement plans.

C. Additional Guidance Clarifying the Application of the One-Per-Year Limit on IRA Rollovers

Pursuant to an item on the second quarter update to the 2014-2015 Priority Guidance Plan, the IRS issued Announcement 2014-32 which clarifies the impact a 2014 IRA rollover has on the one-rollover-per-year limitation contained in section 408(d)(3)(B) of the Internal Revenue Code. Announcement 2014-32 and previously issued Announcement 2014-15 were issued in response to *Bobrow v. Commissioner*,[9] a January 2014 Tax Court opinion which held that the one-rollover-per-year limitation applies on an aggregated basis to all of a taxpayer's IRAs and not to each IRA separately. While Announcement 2014-32 addressed certain issues relating to the section 408(d)(3)(B) one-per-year-limitation on IRA rollovers, as is further discussed below, we request additional guidance permitting waivers of inadvertent violations of the one-per-year-limit on IRA rollovers in circumstances where the inadvertent violations are beyond the control of the IRA holder. For example, as discussed below, such inadvertent violations may arise as a result of trailing dividends or in circumstances where the IRA holder has not taken an affirmative action to initiate a distribution.

[7] 72 Fed. Reg. 41128 (July 26, 2007). *See* ICI letter to W. Thomas Reeder, dated March 17, 2009; and ICI letter to W. Thomas Reeder, dated Nov. 12, 2008.

[8] U.S. Department of Labor, Employee Benefits Security Administration, Field Assistance Bulletin No. 2004-02, dated September 30, 2004.

[9] T.C. Memo. 2014-21 (January 28, 2014).

With respect to trailing dividends, in circumstances where an IRA holder initiates an indirect rollover after the dividend record date, but prior to the dividend payment date, the dividend payment will likely be issued directly to the IRA holder as a subsequent payment. In a circumstance where the IRA holder effectuates a rollover to another IRA within the 60-day period required by section 408(d)(3)(a)(i), an attempt to roll the trailing dividend payment into the new IRA may be seen as violating section 408(d)(3)(B)'s one-per-year-limitation on IRA rollovers.

Another example involves circumstances where the decision to initiate a distribution is due to circumstances beyond the control of the IRA holder. Such a situation may occur, for example, where an investment product undergoes a structural change (such as a reorganization, merger, or closure) and as a result of the structural change, the IRA holder's investment in the investment product is liquidated and payment issued directly to the IRA holder. In the event that payment is issued to the IRA holder during a 12-month period in which he or she has previously made an indirect rollover, he or she will be precluded from making another indirect rollover with the funds received as a result of the investment product structural change.

In light of these possible situations, it may be appropriate for the IRS to have a process for waiving inadvertent violations of the one-per-limit limit on IRA rollovers, similar to the waiver process contained in section 408(d)(3)(I) for violations of the 60-day rule for indirect rollovers.

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If we can provide you with any additional information regarding these issues, please do not hesitate to contact David Abbey at 202/326-5920 (david.abbey@ici.org) or Elena Chism at 202/326-5821 (elena.chism@ici.org).

Sincerely,

/s/ David Abbey

David Abbey
Deputy General Counsel – Retirement Policy

/s/ Elena Barone Chism

Elena Barone Chism
Associate General Counsel – Retirement Policy