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INSURANCE COMPANY INFORMATION REPORTING AND WITHHOLDING UPDATE

January 30, 2009

Employer Issues

1. Treasury Considering Guidance on New Bicycle Commuting Fringe Benefit

On January 9, 2009, at the recent American Bar Association Section of Taxation meeting in New Orleans, Catherine Livingston, Division of Chief Counsel (Tax Exempt and Governmental Entities), indicated that Treasury is considering the issuance of guidance on the new bicycle fringe benefit provision. Under section 132(f)(1)(D) of the Code, added by the *Emergency Economic Stabilization Act of 2008* (Pub. L. No. 110-343, 10/3/2008), a qualified bicycle commuting reimbursement fringe benefit is a qualified transportation fringe benefit. The provision allows employers to reimburse employees up to \$20 per month for certain expenses provided that the bicycle is regularly used for travel between the employee's residence and place of employment.

2. IRS Extends Transitional Relief for FSA/HRA Debit Cards

The IRS has issued Notice 2008-104 (2008-51 I.R.B. 1298, modifying Notice 2007-2, 2007-1 C.B. 254) concerning debit cards used in connection with health flexible spending arrangements ("FSAs") and health savings accounts ("HRAs"). Notice 2008-104 extends relief provided in Notice 2007-2 for six months so that, after June 30, 2009, health FSA and HRA debit cards may not be used at stores with the "Drug Stores" and "Pharmacies" merchant category code unless certain requirements are satisfied.

Notice 2007-2 provided that after December 31, 2008, health FSA and HRA debit cards could not be used at stores with the Drug Stores and Pharmacies merchant category code unless: (1) the store participated in the inventory information approval system as described in Notice 2006-69, 2006-2 C.B. 107, or (2) on a store location by store location basis, 90 percent of the store's gross receipts during the prior taxable year consisted of items which qualify as expenses for medical care under section 213(d) (including nonprescription medications as described in Rev. Rul. 2003-102, 2003-2 C.B. 559).

For transactions using debit cards at stores that meet the 90 percent rule, employers must treat all charges to the debit card as conditional (other than copayment matches, recurring expenses, and real-time substantiation as described in Rev. Rul. 2003-43, 2003-1 C.B. 935) pending substantiation of the charges through additional independent third-party information describing the goods or services, the date of the service or sale, and the amount of the charge.

3. New Proposed Regulations Clarify That Employee Compensation Is Not Subject to Governmental Entity Withholding under Section 3402(t)

Treasury and the IRS have issued proposed regulations (REG-158747-06) under section 3402(t) that clarify the application of the government entity withholding rules to government employees. Section 3402(t), added by the *Tax Increase Prevention and Reconciliation Act of 2005* (Pub. L. No. 109-222), requires all government entities, with certain exceptions, to withhold 3 percent of all payments for property or services made after December 31, 2010. The proposed regulations state that “Section 3402(t) withholding shall not apply to payments made to any government employee with respect to his or her services as an employee of the government.” This exception “applies to contributions to deferred compensation plans on behalf of an employee, contributions to employee benefit plans on behalf of an employee, fringe benefits provided to employees, and payments to employees under accountable plans for the individual travel expenses of the employee.” Prop. Regs. § 31.3402(t)-4(i).

In addition, the preamble explains that the section 3402(t)(2)(I) exception from section 3402(t) withholding for any payment to any government employee not otherwise excludable with respect to the employee’s services as an employee, excludes from withholding *any form of compensation that is paid to the employee or on the employee’s behalf*. Thus, for example, the preamble explains that proposed regulations exclude employer contributions to employee benefit and deferred compensation plans as well as employee contributions to such plans.

We have heard some rumors that a repeal, at least temporarily, of section 3402(t) is being considered as part of a congressional stimulus package.

4. IRS Issues Additional Guidance concerning Recent Regulations on Employment Tax Return and Deposit Rules

Rev. Proc. 2009-13, 2009-3 I.R.B. ___, provides filing procedures concerning recently issued temporary (T.D. 9440) and proposed regulations (REG-148568-04) relating to requirements for filing Federal employment tax returns and for depositing employment taxes. Generally, the regulations allow certain employers to file an annual employment tax return, Form 944, to report their social security, Medicare, and withheld Federal income taxes rather than the quarterly Form 941. For these employers, Form 944 will replace Form 941 and reduce their burden by reducing the number of returns they are required to file each year. The procedures apply to employers who are notified by the IRS that they should file Form 944 rather than Forms 941, and to qualified employers who choose to file Forms 944 beginning in the 2009 tax year.

Reporting Guidelines and Forms

1. February 17, 2009 Due Date for Certain Broker Statements to Customers on Form 1099-B

In Notice 2009-11, 2009-5 I.R.B. ___, the IRS noted the extended deadline of February 17, 2009 under section 6045(b) with respect to reportable items from calendar year 2008. The extension applies because February 15, 2009 is a Sunday and February 16, 2009 is a legal holiday. Notice 2009-11 applies to reporting entities that furnish Form 1099-B and that customarily report the items furnished on Form 1099-B to customers on an *annual composite form recipient statement*. Thus, the notice also modifies the 2008 General Instructions for Forms 1099, 1098, 5498, and W-2G. In addition, the notice also provides that certain related penalties will not be assessed under section 6722.

The *Emergency Economic Stabilization Act of 2008* (Pub. L. No. 110-343, 10/3/2008), recently changed the deadline under section 6045(b) for furnishing the statements to customers from “January 31” to “on or before Feb. 15” of the year following the calendar year for which the return under section 6045(a), effective for statements required to be furnished after December 31, 2008. Section 6045(a) requires brokers to file with the IRS annual information returns showing the gross proceeds realized by customers from various sale transactions. Section 6045(b) provides that brokers are required to furnish to every customer information statements with the same gross proceeds information that is included in the returns filed with the IRS for that customer.

2. IRS Releases 2009 Form W-4, *Employer’s Withholding Allowance Certificate*

The IRS has released the 2009 Form W-4, *Employee’s Withholding Allowance Certificate*. The new form is available on the IRS web site <http://www.irs.gov/pub/irs-pdf/fw4.pdf>.

3. IRS Releases 2009 Publication 15 (Circular E), *Employer’s Tax Guide*

The IRS has released the 2009 edition of Publication 15 (Circular E), *Employer’s Tax Guide*, which explains employer tax responsibilities, including requirements for withholding, depositing, reporting, paying and correcting employment taxes. The new publication is available on the IRS web site at <http://www.irs.gov/pub/irs-pdf/p15.pdf>.

Other Matters

1. Obama Administration Issues Memo Freezing All Pending Proposed and Final Regulations - Including Tax Regulations

On January 20, 2009, the Obama administration issued a memorandum to the heads of executive departments and agencies stating that no proposed or final regulation should be sent to the Office of the Federal Register (the “OFR”) for publication until approved by a department or agency head appointed or designated by the President after noon on January 20, 2009. In addition, the memorandum required withdrawal from the OFR all proposed or final regulations that have not been published in the Federal Register so that they could be approved. Further, in the case of regulations already published but not yet

effective, the memorandum requires that consideration be given to extension of the effective date for 60 days for the purpose of reviewing questions of law and policy raised by those regulations.

It has been reported that the memorandum applies to all regulations from all executive agencies and departments, including Treasury. However, at this point, we are not aware of administration objections to any particular Treasury action previously reported and in fact they all may ultimately go into effect without change

2. IRS Issues New Partial Assessment Procedure in Connection with Section 3402(d) Withholding Tax Relief

In Interim Guidance Memorandum SBSE-04-1108-064 (November 25, 2008), the IRS issued revised procedures for granting section 3402(d) relief when Forms 4669, *Statement of Payments Received*, and Form 4670, *Request for Relief from Payment of Income Tax Withholding*, are secured during an examination. Section 3402(d) provides relief for the withholding agent from liability where it failed to withhold, if the recipient paid the appropriate income tax attributable to the withholding. The guidance provides a modified partial assessment procedure to properly assess both income taxes under section 3402 and backup withholding under section 3406.

The IRS will incorporate the new procedures in IRM 4.23.8.4.2, *Procedures for Granting Relief Under IRC 3402(d) by Examiners*; IRM 4.23.10.16.2, *Examination Procedures for IRC 3402(d) Relief*; and IRM 4.23.10.16.3, *Examination Report Forms 4666, 4668, and 2504 for IRC 3402(d) Examinations*. The full text of the memorandum is available on the IRS web site at <http://www.irs.gov/pub/foia/ig/sbse/sbse-04-1108-064.pdf>.

Ask the Expert

Do changes need to be made for 2008 IRA reporting as a result of the 2009 waiver of Required Minimum Distribution requirements?

Yes. The IRS has just issued Notice 2009-9, 2009-5 I.R.B. ___ (modifying Notice 2002-27, 2002-1 C.B. 814), to provide guidance on waiver of the required minimum distribution (“RMD”) rules for 2009 under the *Worker, Retiree, and Employer Recovery Act of 2008*, Pub. L. No. 110-458 (“2008 Recovery Act”) enacted on December 23, 2008. Section 201 of the 2008 Recovery Act waives any RMDs for 2009 from retirement plans that hold each participant’s benefit in an individual account, such as individual retirement accounts (“IRAs”), section 401(k) plans, section 403(b) plans, and certain section 457(b) plans. The Notice provides that financial institutions required to file the 2008 Form 5498, *IRA Contribution Information*, should not put a check in Box 11, which relates to whether an RMD is required for 2009. The Form 5498, instructions for the participant explain:

If the box [11] is checked, you must take a required minimum distribution (RMD) for 2009. An RMD may be required even if the box is not checked. The amount, or offer to compute the amount, and date of the RMD will be furnished to you by January 31 either on Form 5498 (in the blank box to the left of box 10) or in a separate statement. If you do not take the RMD for 2009, you are subject to a 50% excise tax on the amount not distributed.

However, given that Notice 2009-9 was issued so shortly before the filing deadline, the IRS will not consider a Form 5498 to be issued incorrectly solely because Box 11 is checked, *provided the financial institution corrects the error and notifies the IRA owner no later than March 31, 2009, that no RMD is required for 2009.*

The Notice also provides that the RMD information required under Notice 2002-27 need not be sent to IRA owners for 2009. However, if a financial institution sends a separate RMD statement to an IRA owner, either initially or in response to the owner's request that the financial institution calculate the RMD for 2009, the financial institution *must* show the RMD for 2009 as zero. Alternatively, the financial institution may send the IRA owner a statement showing the RMD that would have been required but for the waiver of RMDs for 2009, along with an explanation of the waiver for 2009.

The IRS encourages all financial institutions to inform IRA owners who delay taking their 2008 RMD until April 1, 2009, that they are still required to take the 2008 distribution.

IRS Circular 230 Disclosure:

This newsletter is provided solely for informational purposes and is not intended to furnish legal advice with respect to the reader's particular factual circumstances. In accordance with § 10.35 of IRS Circular 230 requirements, you are advised that any discussion of tax issues in this newsletter is not intended or written to be used, and cannot be used, to avoid penalties imposed under the Internal Revenue Code or to promote, market or recommend to another party any transaction or matter addressed herein. The persuasiveness of this newsletter's discussion with regard to the tax issues in question and a taxpayer's good faith reliance on the newsletter will be determined under applicable provisions of the law and regulations (§ 10.35(f)).

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