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IRS TAKES STEP TOWARDS DE-RISKING RETIREE LUMP SUM WINDOWS

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On March 6, 2019, the IRS announced that it will not amend the minimum required distribution regulations under Code section 401(a)(9) to expressly prohibit lump-sum window elections for retirees who are already receiving annuity payments under a defined benefit pension plan. This practice has never been clearly permissible under existing RMD regulations. Nevertheless, some plan sponsors seeking to “de-risk” their pension liability received private letter rulings in the past permitting such action. Then the IRS issued [Notice 2015-49](#) announcing that it would propose amendments to the RMD regulations clarifying that lump sum windows for retirees are not be permitted. Now the IRS has altered course on this issue again with [Notice 2019-18](#).

Thoroughly confused? Not surprising given the shifting positions of the IRS on this issue.

Existing Regulations

Existing regulations state that once annuity payments have commenced over a period of time, the period may only be changed in accordance with certain exceptions enumerated in Treas. Reg. 1.401(a)(9)-6, Q&A-13. One enumerated exception is for annuity payment increases described in Q&A-14. The regulations under Q&A-14 provide that annuity payments may increase to allow a beneficiary to convert the survivor portion of a joint and survivor annuity into a single-sum distribution upon the employee’s death. They do not expressly recognize a similar right to convert an annuity into to a lump sum during the employee’s lifetime. They do, however, permit the payment of “increased benefits that result from a plan amendment.” Plan sponsors interested in de-risking their pension liability have sought to rely on this language in the existing regulations, taking the position that it can be read broadly enough to permit retirees who are currently receiving lifetime annuity payments to elect to convert the annuities to an immediate lump sum payment.

Private Letter Rulings

In the past, the IRS issued private letter rulings to some plan sponsors, such as [PLR 201228045](#), treating plan amendments providing for retiree lump sum windows as permitted benefit increases under Treas. Reg. 1.401(a)(9)-6, Q&A-14(a)(4). The rulings concluded that the offerings would not violate 401(a)(9) but did not express an opinion as to the federal tax consequences of the

transaction under any other provision of the Code. A private letter ruling is directed only to the taxpayer who requested it and cannot be used or cited as precedent. Nevertheless, plan sponsors developed a certain comfort level with the permissibility of such offerings under Code section 401(a)(9).

Notice 2015-49

In Notice 2015-49, the Treasury Department and the IRS announced an intent to amend the RMD regulations to specify that “benefit increases” resulting from plan amendments permitted under the regulations will include only those that increase ongoing annuity payments and not include amendments that accelerate (or provide an option to accelerate) ongoing annuity payments. The anticipated amendment to the 401(a)(9) regulations would generally prohibit the use of retiree lump-sum windows effective January 9, 2015 with grandfathering where certain specified action had already been taken with respect to a plan amendment or where a private letter ruling or determination letter were issued by the IRS prior to July 9, 2015. In light of the anticipated guidance, the notice indicated that any private letter ruling or determination letter issued involving a plan that provides for a lump-sum risk-transferring program will generally include a caveat expressing no opinion as to the federal tax consequences of the lump-sum risk-transferring program.

Notice 2019-18

The Treasury Department and the IRS have now issued Notice 2019-18 informing taxpayers that they no longer intend to amend the RMD regulations under Code section 401(a)(9) to address the practice of offering retirees and beneficiaries in pay status a temporary option to elect a lump-sum payment in lieu of future annuity payments. Until further guidance is issued, the IRS will not assert that a plan amendment providing for a retiree lump-sum window program causes the plan to violate Code section 401(a)(9) but it will continue to evaluate whether the plan, as amended, satisfies the requirements of Code sections 401(a)(4), 411, 415, 417, 436 or other sections of the Code. During this period, the IRS will not issue private letter rulings with regard to retiree lump-sum windows, but if the taxpayer is eligible for and receives a determination letter, the IRS will not include a caveat expressing no opinion regarding the tax consequences of such a window. This guidance expressly supersedes Notice 2015-49.

Green Light?

For now, the IRS will not oppose retiree lump-sum windows under Code section 401(a)(9) although the program must, of course, pass muster with respect to other qualified plan rules. Plan Sponsors should tread carefully, being sure to consider whether the particular facts connected with a proposed window would create concerns under other qualified plan rules such as nondiscrimination requirements under the Code. In addition, plan sponsors should be aware that this guidance from the IRS will not prevent the DOL from pursuing any perceived violations of fiduciary duty with

respect to the implementation of such an offering. For example, the adequacy of communications to retirees and beneficiaries regarding the program and possible risks associated with converting a lifetime annuity to a lump-sum payment may be scrutinized.

Has the IRS had its final say on this issue? Stay tuned.

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