to defer the payment of additional tax attributable to the property. The election is made on an asset-by-asset basis. To make the election, the covered expatriate must provide adequate security and must irrevocably waive on Form 8854 any right under any U.S. treaty that would preclude assessment or collection of tax imposed by section 877A.

The ability of a covered expatriate to make a deferral election is subject to the Service's acceptance of a tax deferral agreement, including evaluation of the adequacy of the security to be provided. The notice provides that the deferred tax and interest will be due immediately if the Service determines that the security provided no longer qualifies as adequate security unless the covered expatriate corrects the failure within 30 days after the Service mails the notification of the failure. Because the Service's approval of a tax deferral agreement is discretionary and would not be made until after the expatriation, this procedure is unlikely to prove helpful to covered expatriates who are less affluent or have liquidity constraints.

Filing and Reporting Requirements. Notice 2009-85 imposes rules that covered expatriates must follow to report information until regulations are issued under section 877A. Most notably, the rules require covered expatriates to file Form 1040NR with Form 1040 attached for the year of expatriation and, in certain cases, Form 1040NR for subsequent years. Importantly, the notice clarifies that all U.S. citizens who relinquish their U.S. citizenship and all long-term residents who cease to be lawful permanent residents of the U.S. are required to file Form 8854 in order to certify that they have been in compliance with all federal tax laws during the five years preceding the year of expatriation. Individuals who fail to make such certification will be treated as covered expatriates within the meaning of section 877A(g), whether or not they also meet the tax liability test or the net worth test.

Conclusion

In comparison to the ten-year alternative tax regime under prior law, the section 877A exit tax regime has a far greater potential for adverse consequences. These consequences include higher net tax cost due to the imposition of the mark-to-market tax, the potential for U.S. taxation in perpetuity on distributions from nongrantor trusts and certain deferred compensation items, ongoing and onerous U.S. tax reporting requirements, and risks of double taxation. Thus, it should not be surprising that the new exit tax regime has caused many global executives, entrepreneurs, and other individuals with ties to other countries to rethink the benefits of acquiring or retaining U.S. citizenship or green cards. In addition, the prospect of increased tax rates, the increased emphasis on individual compliance and transparency and its implications for individuals with non-U.S. assets, and the current environment of depressed asset values across all markets are stimulating further interest in expatriation. ■

Employee Benefit Plans: Recent Developments

By David Pratt*

Retirement Plans

Temporary Waiver of Required Minimum Distribution Rules. Under the Worker, Retiree, and Employer Recovery Act of 2008 no required minimum distribution (RMD) was required *for calendar year 2009* from IRAs and employer-sponsored defined contribution plans, including governmental 457(b) plans. Act § 201(a); I.R.C. § 401(a)(9)(H). The next RMD would be for calendar year 2010.

In Notice 2009-82, 2009-41 I.R.B. 491, the Service issued guidance regarding the waiver. Individuals who receive a 2009 RMD have until the later of November 30, 2009, or 60 days after the date the distribution was received, to roll it over. The Notice provides sample plan amendments that plan sponsors may adopt or use in drafting individualized amendments. A plan amendment is generally required by the last day of the 2011 plan year (2012 for a governmental plan). The Notice also includes additional guidance for plan sponsors.

Amendments to Comply with the Pension Protection Act of 2006. In general, section 1107 of the PPA requires plans to be amended by the last day of the first plan year beginning on or after January 1, 2009, to effectuate the changes made by the Act. Governmental plans have until 2011. In some cases there is a delayed compliance date for collectively bargained plans. Defined benefit plans must be amended to provide for limitations on benefit payments and benefit accruals under section 436.

Announcement 2009-82, 2009-48 I.R.B. 720, gives sponsors of cash balance and other hybrid plans until the end of the 2010 plan year to comply with the PPA requirement that the plan's interest-crediting rate not exceed a "market rate of interest." The Service has also extended by one year the deadline for amending plans to comply with other requirements of PPA. The new deadline is the last day

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of the first plan year beginning on or after January 1, 2010. Notice 2009-97, 2009-52 I.R.B. (advance release on Service website Dec. 11, 2009).

Other Qualified Plan Amendments. Generally, a plan amendment that is not required by a change in the law or regulations (*e.g.*, adding a Roth contribution feature to a 401(k) plan) must be adopted by the last day of the plan year in which the amendment is effective. Neither a Qualified Automatic Contribution Arrangement nor an Eligible Automatic Contribution Arrangement may be adopted mid-year. Accordingly, to add a QACA or an EACA for a plan year, the sponsor must adopt an amendment before the beginning of the plan year.

All qualified plans must adopt 2009 interim amendments by the due date of the plan sponsor's 2009 tax return, including extensions.

Under the Heroes Earnings Assistance and Relief Tax Act of 2008 ("HEART Act"), plans must provide additional death benefits when a participant dies during active military duty, and differential wage payments must be treated as compensation. 401(k) plans must allow distributions of elective deferrals to certain participants who are on active military duty for a period of more than 30 days. Other changes are optional. Plan sponsors must adopt a conforming amendment by the end of the 2010 plan year.

Pension Funding. On October 15, 2009, the Service released final regulations under sections 430 and 436, providing guidance on measuring the value of plan assets and benefit liabilities used for determining the funding requirements in single-employer plans; using credit balances; and applying benefit restrictions to certain underfunded defined benefit pension plans. T.D. 9467, 74 Fed. Reg. 53004 (2009). The regulations are effective for plan years beginning on or after January 1, 2010; plan sponsors may rely on them earlier. It is possible that Congress will grant relief from the enhanced minimum funding rules enacted by PPA.

Qualified Plan Limits for 2010. The Service interpreted the Code to prohibit a decrease in the limits, so almost all of the 2010 limits are the same as the 2009 limits. For instance, the general limit on elective deferrals is still $16,500. IR-2009-94, 2009 WL 3303735 (Oct. 15, 2009); Notice 2009-94, 2009-50 I.R.B. 848. The following limits *did* increase:

- Some of the adjusted gross income limitations under section 25B(b)(1)(A) for determining the amount of the retirement savings contribution credit;
- The applicable dollar amount under section 219(g)(3)(B)(ii) for determining the deductible amount of an IRA contribution for certain taxpayers increased from $55,000 to $56,000.
- The applicable dollar amount under section 219(g)(7)(A), for a taxpayer who is not an active participant, but whose spouse is an active participant, increased from $166,000 to $167,000.
- The adjusted gross income limitation under section 408A(c)(3)(C)(ii)(I) for determining the maximum Roth IRA contribution for certain taxpayers increased from $166,000 to $167,000.

Posting of Actuarial Information. Section 104(b)(5) of ERISA, enacted by PPA, requires the sponsor of a defined benefit plan (including a multiemployer plan) to post actuarial information on any intranet website maintained by the sponsor, or by the plan administrator on behalf of the sponsor. This requirement is effective for the 2008 plan year. The Department of Labor has not yet issued regulations, so sponsors should make a good faith effort to comply with respect to information included in the 2008 Form 5500. According to Watson Wyatt, "Posting a scanned version of Schedule SB on an intranet Web site apparently satisfies the PPA requirement for the 2008 reporting year. The DOL has not issued regulations providing additional guidance with respect to the intranet display." *Intranet Posting of Schedule SB*, Watson Wyatt Insider, Nov. 2009, www.watsonwyatt.com/us/pubs/insider/showarticle.asp?ArticleID=22730.

ERISA 204(h) Notices. The Service has issued a final rule on the ERISA section 204(h) notice requirements for a pension plan amendment that is permitted to reduce benefits accrued before the amendment date. T.D. 9472, 74 Fed. Reg. 61270 (2009). The regulations also reflect certain amendments made to the requirements by PPA. Generally, a section 204(h) notice must be provided at least 45 days before the effective date of any section 204(h) amendment (15 days for small plans and multiemployer plans).

Section 1107 of PPA grants employers limited permission to reduce accrued benefits, which would otherwise violate Code section 411(d)(6). PPA contains specific notice requirements that conflict with the ERISA language. "'In general, the [final regs] confirm that if you comply with the specific notice rules, you are deemed to comply with section 204(h),' said Louis Mazawey of Groom Law Group. 'Unfortunately, they leave open the possibility that the 204(h) penalties could apply if you fail to meet the more specific PPA notice rule – which Congress may or may not have intended. '" Sam Young, *Opacity of Final Pension Plan Notice Regs Troubles Practitioners*, Tax Notes Today, 2009 TNT 224-2 (Nov. 24, 2009).

Other Notices. PPA requires single-employer defined benefit plan sponsors to provide participants with an annual notice of the plan's funding status within 120 days of the end of the plan year to which the notice relates. Plans with fewer than 100 participants need not provide the notice until the Form 5500 is due.

ERISA section 101(j) requires a plan administrator to provide a notice to participants if the plan is subject to a restriction on payment of benefits, *i.e.*, the plan's adjusted funding target attainment percentage is less than 80%.

PPA requires plan sponsors of defined benefit plans to notify the PBGC if the plan has a funding target attainment percentage of less than 80%.

PPA requires defined benefit plans to automatically provide benefit statements to

participants, generally at least once every three years, and expands the information that statements must include. The first benefit statement is generally due for the 2009 plan year, within 45 days after the end of that year.

PBGC Proposed Rule. PBGC has issued a proposed rule [74 Fed. Reg. 61248 (2009)] to conform its reportable events regulation (under ERISA section 4043) and other PBGC regulations to statutory changes made by PPA and to revisions of other PBGC regulations that implement the statutory changes. The rule would eliminate most of the automatic waivers and filing extensions currently provided. The rule would create two new reportable events, dealing with funding-based benefit limits and asset transfers to retiree health benefits accounts.

403(b) Plans. An employer that sponsors a 403(b) plan must adopt a plan document by December 31, 2009, if it has not already done so. Notice 2009-3, 2009-1 C.B. 250. Existing plans may need to be amended to reflect changes in the laws and regulations, including changes under PPA. Transition rules apply to collectively bargained plans and church plans. Plan sponsors must also enter into service agreements and information sharing agreements with vendors.

Effective for plan years beginning on or after January 1, 2009, section 403(b) plans covered by ERISA are subject to the normal Form 5500 filing requirements, including an audit for large plans. DOL granted some relief in Field Assistance Bulletin 2009-02, http://www.dol.gov/ebsa/regs/fab2009-2.html.

Section 402(f) Notices. Section 402(f) requires plan administrators to give recipients of "eligible rollover distributions" notice of their rollover rights. The Service has now issued two new model rollover notices that should be used as soon as possible. Notice 2009-68, 2009-39 I.R.B. 423. Use of the model notices is optional, and a plan sponsor may modify the notices and omit items that are not relevant to the plan.

Investment Advice. In November 2009, DOL withdrew its controversial final rules relating to the provision of investment advice to participants and beneficiaries in individual account plans, and beneficiaries of individual retirement accounts (and certain similar plans). 74 Fed. Reg. 60156, withdrawing the rules published at 74 Fed. Reg. 3822 (2009). DOL stated that it intends to propose a revised rule limited to the application of the statutory exemption relating to investment advice.

Deferred Compensation: Sections 409A and 162(m). Generally, all plans and arrangements were required to be amended to comply with section 409A by December 31, 2008. It may still be possible to bring an arrangement into compliance if the employee's rights have not yet vested.

The Service allows employers to correct "operational errors" in the administration of a deferred compensation arrangement. Normally, the error must be corrected by the end of the year after the year in which the error occurs. However, under a transition rule, errors that occurred in 2005 through 2009 may be corrected by December 31, 2009. Notice 2008-113, 2008-2 C.B. 1305.

Rev. Rul. 2008-13, 2008-1 C.B. 518, held that amounts could not be treated as performance-based compensation for purposes of the $1 million deduction limitation under section 162(m) if the agreement permits payment to an executive who terminates employment before attaining the specified goal. The Service provided transition relief for any performance period that began on or before January 1, 2009, and for compensation paid pursuant to an employment contract in effect on February 1, 2008. For most public companies operating on a calendar year basis, Rev. Rul. 2008-13 will apply to periods beginning on or after January 1, 2010.

Stock Plans. In November 2009, the Service issued final regulations relating to employee stock purchase plans under section 423 [T.D. 9471, 74 Fed. Reg. 59074] and final regulations on the section 6039 reporting requirements for corporations issuing statutory stock options. [T.D. 9470, 74 Fed. Reg. 59087]

Roth IRA Conversions. Beginning January 1, 2010, an individual will be able to roll over (convert) to a Roth IRA, regardless of income or filing status, an IRA or an eligible rollover distribution from an employer plan. Also, a non-spouse beneficiary of an employer plan can make a trust to trust transfer to a Roth IRA. For conversions and rollovers in 2010 only, the taxpayer can include 50% of the taxable portion of the rollover in gross income for 2011 and the other half for 2012. This provision is elective.

Health and Welfare Plans

Mental Health Parity. Congress enacted the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act (MHPAEA), Pub. L. No. 110-343, in 2008. The act does not apply to (1) small employers, generally those with 50 or fewer employees in the prior calendar year or (2) group health plans with fewer than two participants who are current employees on the first day of the plan year. The provisions take effect for plan years beginning after October 3, 2009. Collectively bargained plans have a delayed effective date.

Michelle's Law. H.R. 2851, enacted by Pub. L. No. 110-381, requires group health plans to continue coverage for dependent students with a "serious illness or injury" who take "medically necessary" leaves of absence for up to one year or, if earlier, until coverage would otherwise end under the plan (*e.g.*, attainment of age 24 or 25). It is not clear how these rules will interact with COBRA or how "medically necessary" and "serious illness or injury" will be defined. The law is effective for plan years beginning on or after October 10, 2009, and to leaves beginning during such years.

The Genetic Information Nondiscrimination Act of 2008. Title I of GINA prohibits group health plans and health insurance issuers from discriminating on the basis of genetic

information with respect to eligibility, premiums, and contributions and is effective for plan years beginning on or after May 21, 2009. Title II prohibits employers from discriminating on the basis of genetic information in employment decisions and acquiring genetic information except in limited circumstances (*e.g.*, wellness programs that meet certain requirements) and is effective on November 21, 2009. Genetic information is broadly defined to include information about the genetic tests of an employee and the employee's family members, as well as the employee's family medical history. "Family members" is also broadly defined. On October 7, 2009, the Departments of Labor, Treasury, and Health and Human Services jointly published interim final regulations [74 Fed. Reg. 51664] under Title I, effective for plan years beginning on or after December 7, 2009. These rules will have a significant impact on health risk assessments and other wellness programs.

Health Savings Accounts. In a November 5, 2009, report, the Congressional Research Service summarized the HSA rules for 2009, discussing eligibility, qualifying health insurance, contributions, and withdrawals. The report is reprinted in *Tax Notes Today*, 2009 TNT 218-88 (Nov. 26, 2009).

The Service has released final regulations on employer comparable contributions to HSAs, which apply to contributions made on or after January 1, 2010. T.D. 9457, 74 Fed. Reg. 45994 (2009).

Excise Taxes. Excise taxes are imposed for noncompliance with COBRA, HIPAA and the rules for Archer MSAs and HSAs. The HSA regulations require employers to report these excise taxes on Form 8928. For COBRA and HIPAA excise taxes, the return is generally due by the tax return due date (with no extension). For excise taxes related to Archer MSAs or HSAs, the return is due by April 15 of the year following the year the non-comparable contribution was made. The rules take effect for excise tax forms due on or after January 1, 2010.

HIPAA. The HIPAA privacy regulations took effect in 2003. The Health Information Technology for Economic and Clinical Health Act (HITECH), enacted as part of the American Recovery and Reinvestment Act of 2009, significantly increased penalties for noncompliance. DHHS has issued interim final regulations that implement the increased penalties. 74 Fed. Reg. 56123 (2009). The regulations apply to some violations occurring as early as February 18, 2009, and require a plan amendment by February 17, 2010.

FMLA. The National Defense Authorization Act for Fiscal Year 2010 permits family members to take 26 weeks of FMLA leave in a single 12-month period to care for a "covered service member" undergoing medical treatment, recuperation or therapy within five years after the individual separates from military service with respect to a serious service-related injury or illness incurred or aggravated while on active duty. The law also extends the availability of FMLA leave to employees with family members on active duty in a regular component of the Armed Forces during deployment to a foreign country.

On December 19, 2009, the President signed the Department of Defense Appropriations Act for Fiscal Year 2010, Pub. Law No. 111-118. The Act extends eligibility for the COBRA premium subsidy through February 28, 2010; extends the maximum period for receiving the subsidy from 9 months to 15 months; requires notification of these changes by February 17, 2010; and provides special transition rules.

Miscellaneous Issues

The Service issued proposed section 125 regulations in 2007. It has informally indicated that final regulations will not apply to plan years beginning before January 1, 2011.

The FTC has delayed enforcement of its identity theft red flags rule until June 2010. The FTC has clarified that a 401(k) plan loan program need not be included in a written identity theft prevention program, but clarification is still needed as to the rule's potential application to other benefits.

In November 2009, the 6th Circuit held that a plaintiff's attorney was liable to an ERISA plan for disbursed settlement funds. *Longaberger Co. v. Kolt*, 2009 FED App. 0399P, 2009 WL 3806079 (6th Cir. 2009). "Here, the Longaberger Plan required full reimbursement of benefits paid when a Plan participant received a judgment or settlement. The district court was correct to not deduct attorney fees from the amount of reimbursement due to Longaberger. Thus, we conclude that Kolt is obligated to reimburse the Plan from the funds he received from liable third parties. Kolt's decision to commingle these funds and not maintain them intact does not prevent enforcement of Longaberger's equitable lien by agreement under the terms of its ERISA plan." 2009 WL 3806079 at *11. ■