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CORRECTING PLAN DOCUMENT FAILURES TO AVOID IRS PENALTIES

The old saying that “it’s not worth the paper it’s printed on” is especially applicable in the area of qualified plan documents.

Failure to Properly Sign and Date Plan Documents

All too often, we receive plan documents from clients which are missing signatures or dates. Failure to properly sign and date an original plan document, a plan amendment or a plan restatement is deemed a document failure by IRS. Any such documents will be rejected by IRS in the event of an audit or if the plan is re-submitted for an updated IRS approval. In short, such documents are not worth the paper they are printed on.

These problems can easily be avoided by always making sure that plan documents are prop-

erly prepared and executed. Conscientious follow-up is the secret to success. Unfortunately, we have come across numerous plan documents from retirement plan practitioners who have not learned this secret.

Document failures will become a major issue in the coming months. All defined contribution plans based on pre-approved documents, including Volume Submitter and Prototype plans, had to be completely restated for the EGTRRA legislation by April 30, 2010. IRS has announced that there will be no extensions for the April 30th deadline. If the restatement was not timely executed the plan is considered by IRS to be a non-amender plan which now suffers from a document failure.

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CORRECTLY TITLE YOUR ASSETS

One of the most important parts of an estate plan review is ensuring that your assets are correctly titled. Let us assume that Congress reinstates the estate tax with a \$3,500,000 exemption before the end of 2010 (which is as good an estimate as any). If your assets

exceed \$3,500,000 (including life insurance policies), you should call us to establish a “credit shelter trust” (if you have not already done so) in order to take advantage of the estate tax exemption. This will save the children ap-

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CORRECTING PLAN DOCUMENT FAILURES

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Similarly, over the past number of years, there were a number of IRS-required amendments (“Interim Amendments”) which had to be signed and dated at various dates prior to April 30, 2010. Here again, the absence of the required amendment -- or an absence of a proper signature or date -- results in a document failure.

IRS Penalties

The penalties for a document failure can be severe. The IRS compliance (penalty) fee for an EGTRRA failure discovered during a determination letter application is \$2,500 for plans with up to 20 participants, and \$5,000 for plans with 21-50 participants. The fees are higher for multiple plans or for plans with a greater number of participants. More importantly, the fees are even higher if IRS discovers the failure during an audit.

IRS Correction Program

Document failures can be corrected under IRS’s Employee Plans Compliance Resolution System (“EPCRS”). However, EPCRS can only be used if the existence of the document failure is *voluntarily disclosed to IRS* and a compliance fee (contingent upon the number of participants in the plan) is paid to IRS.

IRS Audit CAP

If IRS discovers a missing document and/or unsigned or undated document through an audit or other means (*i.e.*, without voluntary disclosure), the document failure cannot be cured under EPCRS and is not eligible for the reduced fees discussed above. Instead, the IRS Audit Closing Agreement Program (“Audit CAP”) must be used under which IRS will demand a “maximum sanction penalty”.

Voluntary Compliance versus Audit

The differences in exposure between voluntary correction and Audit CAP correction can be very substantial. By way of example, assume that a plan with 10 participants and \$500,000 of assets has a document failure involving the EGTRRA Amendment. If the plan sponsor makes a voluntary disclosure under EPCRS, the compliance fee would be \$375. On the other hand, if an IRS agent discovered the document failure during a determination letter application, the fee would be \$2,500. Further, if the failure is discovered during an audit, IRS will propose a sanction penalty under Audit CAP (which serves as the opening amount for negotiations with IRS) which could be in excess of \$10,000. Different fact patterns of document failures will involve different penalty

ranges, but the voluntary EPCRS route is always *substantially* less expensive than having the failure “picked up” during audit.

These types of problems often come to our attention in the case of “takeover plans” (*i.e.*, when a new client brings existing plan documents to us for review). Our firm has substantial experience helping such clients make use of the EPCRS program to bring their plan documents into compliance.

Curing the Defect

In cases involving plans that have these problems, we can assist the client in gathering the needed documentation or, where specific documents simply cannot be located, in preparing currently-dated replacement documents for submission under the IRS correction program. Similarly, in cases involving a plan document failure discovered by IRS during audit, we can assist the plan sponsor in negotiating with IRS during the Audit CAP proceedings. ■

Please call Ira Langer, Esq., Andrew E. Roth, Esq. or Jay Fenster, Esq. if you have any questions.

CORRECTLY TITLE YOUR ASSETS

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proximately \$1,750,000 of federal estate tax when the surviving spouse dies. In order to understand this technique, assume that there is a married couple and the husband predeceased the wife. His Will or Revocable Trust will provide that the first \$3,500,000 of his assets will be held in trust for the wife. The wife will live off of the income and principal of the trust and when she subsequently dies, the trust will pass to the children free from estate tax.

A large flaw in this planning is that in order to take advantage of the \$3,500,000 estate tax exemption, the husband

in this example must have up to \$3,500,000 of assets in his sole name. Any assets owned as joint tenants with rights of survivorship (noted as JTWROS on accounts) with the wife will pass to her outside of the Will and cannot be used to fill up the credit shelter trust.

In order to move assets into each spouse's sole name, there are two options. First, retitle accounts in each spouse's sole name. This requires a bit more monitoring to ensure that the accounts remain equal as time passes. Secondly, you can retitle the assets to tenants in common. The difference is that with tenants in common, upon the death of the first spouse, in-

stead of the whole asset passing to the surviving spouse, 50% will pass under the Will and be used to fill the credit shelter trust. The advantage of this approach is that regardless of the increase or decrease in value of the asset, half of the account will always be available to fund the trust.

You can have a beautiful set of documents drafted with the intent of saving estate tax, but if your assets are incorrectly titled, then the plan was all for naught. ■

Please contact Michael Markhoff, Esq. with any questions about the titling of assets.

MANDATORY COMPLIANCE PLANS FOR MEDICAID PROVIDERS

The New York State Office of the Medicaid Inspector General ("OMIG") now requires certain Medicaid providers to certify annually (by December 31) that they have satisfied the requirements of the Medicaid Provider Compliance Law ("Law"), which includes the adoption of an effective compliance plan. The OMIG anticipates that Medicaid providers may be able to detect and correct payment and bill-

ing mistakes and fraud if they are required to implement an effective compliance program.

The Law principally affects Article 28 facilities and providers submitting claims or receiving reimbursement from Medicaid of at least \$500,000 annually. The OMIG is authorized to impose sanctions or penalties, including the revocation of a provider's ability to participate

in the Medicaid Program, on those who fail to develop, adopt and implement an effective compliance plan. ■

If you would like assistance in developing an appropriate compliance plan for your practice, please contact Robert B. Danziger, Esq. or Gregory R. Tapfar, Esq.

HOUSE ACTS TO POSTPONE PROPOSED 21.2% DECREASE IN 2010 MEDICARE PHYSICIAN FEE SCHEDULE; BILL GOES TO SENATE

On May 28, 2010, the House of Representatives approved a bill to postpone the proposed 21.2% decrease in the 2010 Medicare physician fee schedule until 2012. The legislation has now been taken up by the Senate.

Absent such action, the 21.2% decrease, the effective date of which had been deferred numerous times, was scheduled to go into effect on June 1, 2010. Under the proposed bill, physicians will receive a 2.2% increase in Medicare reimbursement through the end of 2010, and an additional 1% increase in 2011. In anticipation of the Senate taking prompt action on the bill, the Centers for Medicare and

Medicaid Services is delaying the processing of Medicare claims with dates of service of June 1, 2010 or later for the first ten business days of June.

Although most of Medicare's payment rates are simply adjusted each year for inflation, a complex formula, the Sustainable Growth Rate ("SGR"), is the mechanism used with respect to the physician fee schedule. Since 2002, the SGR has consistently resulted in proposed reductions in the Medicare physician fee schedule, all of which have been avoided either through administrative rulemaking or Congressional action.

The fix described above does not otherwise modify the SGR methodology, which would then be reinstated in 2012. Numerous medical trade associations continue to lobby for the abandonment of the SGR formula, but Congress has to date resisted doing so because the projected effect on the deficit would be in the tens, if not hundreds, of billions of dollars. ■

The above information was current as of the date of publication. However, the situation with the Medicare physician fee schedule is fluid. Please contact Joshua S. Levine, Esq. to discuss the most recent developments.

IN OUR FIRM

Expanding our Actuarial Services

Our actuarial department has recently expanded its services to assist public sector employers in valuing post-retirement health benefits. Currently, the firm's actuaries are providing these GASB #45 services to more than 40 cities, towns, villages and school districts throughout the tri-state region.

The firm's actuaries have performed countless comparable calculations (FASB services) for those private sector employers who offer these benefits to their employees.

Expanding our Actuarial Department

We are pleased to announce that Andrea L. Abolafia, FSA, EA, MAAA, has joined our firm's actuarial department. Andrea has many years of experience consulting clients on qualified and non-qualified defined benefit pension plans, 401(k) and other defined contribution plans and post-retirement benefit plans. Prior to joining us, Andrea was a principal at Mercer and a director at PricewaterhouseCoopers LLP.

This publication is intended for general information purposes only. It is not intended to constitute individual legal advice to any specific client.