Recent Regulatory Developments

By Tony Roda

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There are two developments on the tax policy regulatory front that deserve the attention of the public pension community. First, the Office of Management and Budget will now be reviewing certain tax regulations following the formulation and review of those regulations at the Department of the Treasury. Second, the Treasury Department is requesting public comments on the expansion of the determination letter program.

OMB-OIRA Review of Tax Regulations

For 35 years an arrangement has been in place between the U.S. Department of the Treasury and the Office of Management and Budget with regard to the regulatory review process for tax regulations. Under the arrangement, very few tax regulations were ever reviewed by OMB's Office of Information and Regulatory Affairs (OIRA).

On April 11, 2018, the Trump Administration changed the ground rules for review of tax regulations. A Memorandum of Agreement (MOA) between the Treasury Department and OIRA outlines the new process. Notably, the MOA provides for OIRA review where the tax regulatory action is likely to result in a rule that may:

- Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- Raise novel legal or policy issues, such as prescribing a rule of conduct backed by an assessable payment; or
- Have an annual non-revenue effect on the economy of $100 million or more, measured against a no-action baseline.

The general review period at OIRA is 45 days, although certain regulations related to the recently-enacted Tax Cuts and Jobs Act of 2017 may receive review within 10 days, provided there is agreement for the expedited treatment between Treasury and OIRA.

The tax community in Washington, D.C. has been abuzz about this change. Certainly, there is deep technical tax policy expertise at the Treasury Department, which often draws upon additional and often more practical knowledge at the Internal Revenue Service (IRS). While OIRA is said to be beefing up its tax policy team, it is unlikely to ever match Treasury-IRS. So what is the practical point of this additional layer of review?

Be that as it may, OMB-OIRA is now on the field on tax regulations and likely to stay on the field for the duration of the Trump Administration. For those of us in an advocacy role this new layer

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of review provides a second bite at the apple for those regulations subject to OIRA's new role. Some commentators believe this review will not be substantively impactful. However, there a few items to keep in mind: (1) the first two criteria that would trigger OIRA review are quite broad; (2) OMB-OIRA is within the Office of the President and OMB Director Mick Mulvaney is extremely close to President Trump; and (3) it should come without saying, but presidential politics can come into play in narrow as well as broad public policy decisions.

Determination Letter Program

Revenue Procedure 2016-37 limited the determination letter program effective January 1, 2017 for individually designed plans to initial plan qualification, plan termination and certain other limited circumstances identified in subsequent guidance. Rev. Proc. 2016-37 also stated that the Treasury Department and IRS will consider each year whether to enlarge the program to these as-yet-unspecified, "other limited circumstances."

In this vein, Treasury Notice 2018-34 was recently released. It requests public comments on the enlargement of the program. Using language from Rev. Proc. 2016-37, the Treasury Notice recites certain circumstances for consideration, including "…significant law changes, new approaches to plan design, and the inability of certain types of plans to convert to pre-approved plan documents." The Notice further states that, "Comments…should not merely state the type of plan, but should also specify the issues applicable to that type of plan that would justify review of that particular plan type under the…program. Such issues may include specific plan features and special plan designs applicable to that type of plan, or unresolved questions of qualification in form with respect to that type of plan." Written comments are due on or prior to June 4, 2018.

It is unclear at this stage whether Treasury Notice 2018-34 is simply the rote exercise outlined by Rev. Proc. 2016-37 of periodically requesting comments or whether it envisions a new openness on the part of the Trump Administration to substantially enlarge the program.

Please be advised that NCPERS will closely monitor these two regulatory developments as well as anything further the Trump Administration initiates that may impact state and local governmental pension plans. ◆

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SOUTH: Louisiana

Louisiana's Senate on April 24 shelved legislation to create a hybrid pension plan for future employees that would have incorporated defined-contribution features. The bill, SB 14, also would have raised the retirement age to 65. The legislation was put aside after reaching the full Senate for action on April 17, following approval by the State Senate Finance Committee.

Public pension advocates organized 53,000 phone calls to Louisiana lawmakers asking them to oppose the legislation. Opposition from Governor John Bel Edwards stalled the initiative. An analysis performed by the Louisiana Legislative Auditor indicated that the legislation would have increased costs to the retirement system by $9.9 million.

The legislation, sponsored by state Senator Barrow Peacock, was supported by the Louisiana State Employees Retirement System, or LASERS.

LASERS said its research had shown that the current plan would not provide retirement security for the vast majority of new hires, and that only 5 percent would be in the plan long enough to receive an unreduced retirement benefit. It said it aimed to create a secure base benefit for employees in the defined benefit plan by reducing the risk of creating future unfunded liabilities.

The law would have affected rank-and-file state workers hired starting in 2020. Eligibility to receive a monthly pension check would have been pushed back from the current ages of 60 or 62. The introduction of a hybrid pension would have reduced their monthly checks, offering instead the uncertain ability to supplement income with an account similar to a 401(k) plan.

While advocates touted the portability of a hybrid plan, NPPC and its constituent organizations, argued that shrinking the financial value of retirement benefits to state workers would be costly in the long run. Louisiana public employees are not in the federal Social Security system. ◆