

Tax Regulations provide rules for the taxation of participants in a split-dollar life insurance arrangement. Those regulations generally apply to any split-dollar life insurance arrangement entered into after September 17, 2003. For this purpose, if an arrangement entered into on or before September 17, 2003, is materially modified after September 17, 2003, the arrangement is treated as a new arrangement entered into on the date of the modification. Section 1.61-22(j)(2)(ii) sets forth a non-exclusive list of changes that are not treated as material modifications for this purpose.

#### *Section 101(j)*

Section 101(j) was added to the Code by § 863(a) of the Pension Protection Act of 2006, Public Law 109-280. Section 101(j)(1) generally provides that in the case of an employer-owned life insurance contract, the amount of death benefits excluded from gross income of an applicable policyholder under § 101(a)(1) shall not exceed an amount equal to the sum of the premiums and other amounts paid by the policyholder for the contract. For this purpose, an employer-owned life insurance contract is a life insurance contract that (i) is owned by a person engaged in a trade or business and under which such person is directly or indirectly a beneficiary under the contract, and (ii) covers the life of an insured who is an employee with respect to the trade or business on the date the contract is issued. An applicable policyholder is generally a person who owns an employer-owned life insurance contract, or a related person as described in § 101(j)(3).

Section 101(j)(2) provides exceptions to the general rule of § 101(j)(1) in the case of certain employer-owned life insurance contracts with respect to which certain notice and consent requirements are met. Those exceptions are based either on (i) the insured's status as an employee within 12 months of death or as a director, a highly compensated employee or a highly compensated individual; or (ii) the extent to which death benefits are paid to a family member, trust, or estate of the insured employee, or are used to purchase an equity interest in the applicable policyholder from a family member, trust or estate.

Section 101(j) applies to life insurance contracts issued after August 17, 2006, except for a contract issued after that date pursuant to a § 1035 exchange for a contract issued on or before that date. For this purpose, a material increase in the death benefit or other material change generally causes the contract to be treated as a new contract. Other than as described above, contracts issued on or before August 17, 2006, are grandfathered and not subject to the requirements of § 101(j). *See* Pub. L. No. 109-280, § 863(d).

#### *Section 264(f)*

Section 264(f) was added to the Code by § 1084(c) of the Taxpayer Relief Act of 1997, Pub. L. No. 105-34. Section 264(f)(1) provides that “[n]o deduction shall be allowed for that portion of the taxpayer’s interest expense which is allocable to unborrowed policy cash value” with respect to a life insurance policy or an annuity or endowment contract. Section 264(f)(4) identifies those policies and contracts that are excepted from the rule of § 264(f)(1).

Section 264(f) applies to contracts issued after June 8, 1997, in taxable years ending after such date; any material increase in the death benefit or other material change in the contract is treated as a new contract for this purpose. Other than as described above, contracts issued on or before June 8, 1997, are grandfathered and not subject to the requirements of § 264(f). *See* Pub. L. No. 105-34, § 1084(d) (as amended by Pub. L. No. 105-206, § 6010).

#### SECTION 3. APPLICATION OF SECTIONS 101(j) AND 264(f) TO CONTRACTS THAT ARE SUBJECT TO SPLIT-DOLLAR LIFE INSURANCE ARRANGEMENTS

Both §§ 101(j) and 264(f) apply to “life insurance contracts,” which are defined in § 7702 for all purposes of the Internal Revenue Code as any contract that is a life insurance contract under the applicable law, but only if such a contract either meets the cash value accumulation test of § 7702(b), or both meets the guideline premium requirements of § 7702(c) and falls within the cash value corridor of § 7702(d). Under § 7702, the term “life insurance contract” generally does not encompass the

terms of an arrangement, such as a split-dollar arrangement, of which the contract is a part. Accordingly, if the parties to a split-dollar life insurance arrangement modify the terms of the arrangement but do not modify the terms of the life insurance contract underlying the arrangement, the modification will not be treated as a material change in the life insurance contract for purposes of §§ 101(j) and 264(f), even if the modification is treated as a material modification of the split-dollar arrangement for purposes of § 1.61-22(j).

#### DRAFTING INFORMATION

The principal author of this notice is Linda K. Boyd of the Office of Associate Chief Counsel (Financial Institutions and Products). For further information regarding this notice, contact Ms. Boyd at (202) 622-3970 (not a toll-free call).

## Contingent Fees Under Circular 230

### Notice 2008-43

This notice provides guidance to practitioners concerning contingent fees under Treasury Department Circular No. 230, 31 C.F.R. part 10 (Circular 230). Specifically, this notice provides interim guidance clarifying when a practitioner may charge a contingent fee under section 10.27(b)(2) of Circular 230 for services rendered in connection with any matter before the Internal Revenue Service.

The Treasury Department and the IRS intend to revise section 10.27 to reflect the clarifications described in this notice. The IRS will follow the interim rules in this notice for purposes of enforcing section 10.27 until further guidance is provided.

#### BACKGROUND

In general, 31 U.S.C. section 330 authorizes the Secretary to regulate attorneys, certified public accountants, enrolled agents, enrolled actuaries, and others who practice before the Service. Regulations under section 330 are promulgated in 31 C.F.R. part 10 and are reprinted as Treasury Department Circular No. 230.

On September 26, 2007, the Treasury Department and the IRS published final regulations (T.D. 9359, 2007-45 I.R.B.

931) in the **Federal Register** (72 FR 54540) modifying rules governing the general standards of practice before the IRS. These final regulations generally preclude a practitioner from charging a contingent fee for services rendered in connection with any matter before the Internal Revenue Service, including the preparation or filing of a tax return, amended tax return or claim for refund or credit.

The final regulations, however, permit a practitioner to charge a contingent fee for services rendered in connection with the IRS examination of, or challenge to, (i) an original tax return, or (ii) an amended return or claim for refund or credit when the amended return or claim for refund or credit was filed within 120 days of the taxpayer receiving a written notice of the examination of, or a written challenge to, the original tax return. Contingent fees are also permitted for interest and penalty reviews and for services rendered in connection with a judicial proceeding arising under the Internal Revenue Code. The final amendments to section 10.27 made by the final regulations apply to fee arrangements entered into after March 26, 2008.

Section 406 of the Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432 (120 Stat. 2958) (the Act), which was enacted on December 20, 2006, amended section 7623 of the Internal Revenue Code concerning the payment of awards to certain persons who detect underpayments of tax. Prior statutory authority to pay awards at the discretion of the Secretary was re-designated as section 7623(a), and a new section 7623(b) was added to the Code. Additional off-Code provisions in section 406 of the Act established a Whistleblower Office within the IRS and addressed reward program administration issues. See Notice 2008-4, 2008-2 I.R.B. 253, for interim guidance

applicable to award claims submitted under the authority of section 7623(b).

### INTERIM GUIDANCE

Several practitioners have contacted the Treasury Department and the IRS to request a clarification of the exception in section 10.27(b)(2)(ii) of Circular 230 permitting a practitioner to charge a contingent fee for services rendered in connection with an IRS examination of, or challenge to, an amended return or claim for refund or credit when the amended return or claim for refund or credit was filed within 120 days of the taxpayer receiving a written notice of the examination of, or a written challenge to, the original tax return. Specifically, the practitioners are concerned that the “within 120 days of the taxpayer receiving a written notice of the examination of, or a written challenge to the original tax return” language in section 10.27(b)(2)(ii) requires the IRS to furnish the written notice of examination to a taxpayer as a prerequisite to a practitioner charging a contingent fee. Other practitioners contacted the Treasury Department and the IRS to discuss whether section 10.27 permits practitioners to charge a contingent fee with respect to whistleblower claims under section 7623.

In response to these requests, the Treasury Department and the IRS have determined that section 10.27(b)(2) should be clarified and amended. Accordingly, the IRS will apply the following interim rules as revised below under section 10.27(b)(2) until the Treasury Department and the IRS amend the regulations:

§ 10.27 Fees.

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(b) \* \* \*

(2) A practitioner may charge a contingent fee for services rendered in connec-

tion with the Service’s examination of, or challenge to—

(i) An original tax return; or

(ii) An amended return or claim for refund or credit filed before the taxpayer received a written notice of examination of, or a written challenge to, the original tax return; or filed no later than 120 days after the receipt of such written notice or written challenge. The 120 days is computed from the earlier of a written notice of the examination, if any, or a written challenge to the original return.

(3) A practitioner may charge a contingent fee for services rendered in connection with a claim for credit or refund filed solely in connection with the determination of statutory interest or penalties assessed by the Internal Revenue Service.

(4) A practitioner may charge a contingent fee for services rendered in connection with a claim under section 7623 of the Internal Revenue Code.

(5) A practitioner may charge a contingent fee for services rendered in connection with any judicial proceeding arising under the Internal Revenue Code.

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### EFFECTIVE DATE FOR INTERIM GUIDANCE

These interim rules regarding contingent fees are applicable to fee arrangements entered into after March 26, 2008.

### DRAFTING INFORMATION

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