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Executive Orders on Regulatory Guidance Could Affect IRS Published Guidance

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The Internal Revenue Service (IRS) and Treasury Department publish a Priority Guidance Plan (PGP) each year to identify and prioritize tax issues that should be addressed through regulations, revenue rulings, revenue procedures, notices, and other published guidance. The annual PGP focuses resources on issues that are most important to taxpayers and tax administration. Recent PGP's have prioritized guidance on a number of insurance issues including principle-based reserves, private annuities, the definition of cash value, annuity contracts with long-term care riders, and captive insurance.

This year, as in the past, the IRS published a notice inviting recommendations for items that should be included in the 2017-2018 PGP. Unlike prior years' notices, however, Notice 2017-28, 2017-19 I.R.B. 1235 (May 8, 2017), also references new executive orders that were issued in the early days of the Trump Administration and could affect the decision to include (or exclude) certain items from the 2017-2018 Priority Guidance Plan. Those executive orders are:

E.O. 13771 (Jan. 30, 2017)
Reducing Regulation and Controlling Regulatory Costs

E.O. 13777 (Feb. 24, 2017)
Enforcing the Regulatory Reform Agenda

The first—E.O. 13771—is by far the most important generally, though likely not for tax. It requires that the total incremental cost of all new regulations to be finalized in 2017 be no more than zero. It also requires that for every one new regulation that is issued, at least two prior regulations be identified for elimination. The exact application of this E.O. to tax guidance is not fully known. Tax guidance, in particular, poses unique issues compared to regulations of other agencies due to unique issues in measuring cost, the variety of guidance items that the IRS publishes, and the fact that in many cases tax guidance is welcomed by taxpayers because it reduces uncertainty and hence controversy upon examination. Even if it is determined that E.O. 13771 does not apply to most tax guidance, it nevertheless operates as a limitation where it does apply.

The second E.O. referenced in Notice 2017-28—E.O. 13777—directs agencies to undertake certain activities to reduce the burdens agencies place on the American people. Much of this order is administrative in nature. For example, it directs each agency to establish a Regulatory Reform Office and a Regulatory Reform Task Force, whose task it is to ensure agency compliance with a variety of executive orders and other guidance from the administration aimed at limiting regulatory burden. In particular, E.O. 13777 requires each Regulatory Reform Task Force to identify regulations that are outdated, unnecessary, or ineffective, or that impose costs that exceed benefits. At a minimum, these executive orders will require the IRS to give additional thought to each item that is selected for inclusion in the PGP.

In addition to the executive orders cited in Notice 2017-28, E.O. 13789 (April 21, 2017), “Identifying and Reducing Tax Regulatory Burdens,” directs the Treasury Secretary to identify in an interim report to the president all significant regulations issued by the Treasury Department since 2016 that either (i) impose an undue financial burden; (ii) add undue complexity to the tax laws; or (iii) exceed the statutory authority of the IRS. On July 7, the IRS released Notice 2017-38, 2017-30 I.R.B. 147 (July 24, 2017), describing the Treasury Department’s activities under the executive order and identifying eight regulations as significant and as meeting at least one of the three enumerated criteria. The notice requests public comment on whether the regulations should be rescinded or modified and, if modified, how. The eight identified regulations include regulations under section 385 of the Internal Revenue Code, addressing whether certain instruments should be treated as debt or equity. Those regulations drew significant criticism, including from the insurance industry, when they were originally proposed. Although many of the industry’s concerns were addressed, the regulations still pose a challenge for insurers in some situations.[1]

Like other industries, the insurance industry has grown accustomed to a PGP that contains a handful of familiar publication projects that the IRS will prioritize in the coming year. Regardless of whether the 2017-2018 PGP looks different from prior years’ PGPs, it is certain that whatever items end up in the PGP will have undergone closer scrutiny and overcome additional hurdles as a result of these executive orders and the regulatory agenda of the new administration. ■

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ENDNOTES

1 In addition to regulations under section 385, Notice 2017-38 identifies proposed regulations on the definition of a political subdivision, temporary regulations on the transfer of property to regulated investment companies and REITs, regulations on summons interview, proposed regulations on restrictions on liquidation of an interest for estate and gift taxes, temporary regulations on recourse partnership liabilities, regulations on certain income and currency gain or loss, and regulations on the treatment of transfers of property to foreign corporations.