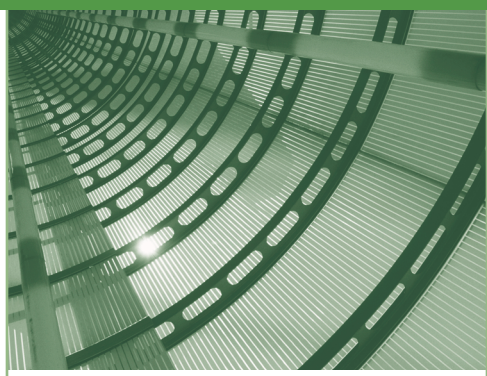
WHITE & CASE

Executive Compensation, Benefits and Employment Law Focus



In This Issue...

Roth 401(k) Plan Regulations Finalized

On January 3, 2006, the Internal Revenue Service ("IRS") published final Roth 401(k) regulations, effective for plan years beginning on or after January 1, 2006.

Background/Proposed Regulations

As discussed in our May 2005 newsletter (www.whitecase.com/ECBELFocusMay2005), as of January 1, 2006, employers may allow employees to elect to make designated, after-tax, Roth contributions to a 401(k) plan ("Roth contributions"). Such Roth contributions are treated as elective deferrals, are not excludable from income at the time the contribution is made and, if certain requirements are met, future distributions, including earnings, will not be included in income at the time of distribution.

Modifications from Proposed Regulations

Although the final regulations do not make significant changes to the proposed regulations the following should be noted:

Pre-tax and Roth Contributions. The final regulations retain the requirements that the Roth contribution must be: (i) designated as a Roth contribution, irrevocably, by the employee at the time of election; (ii) treated by the employer as includable in the employee's income; and (iii) maintained in a separate account. The regulations clarify that if the plan offers a Roth contribution option it must also offer the traditional pre-tax elective deferral option.

Separate Accounting. The final regulations did not modify the separate accounting requirement but clarified that no contributions other than Roth contributions and rollover contributions from other Roth plans or Roth IRAs may be allocated to a designated Roth account.

Required Distributions. In response to comments regarding the application of the required minimum distribution rules, the preamble to the final regulations specifies that, unlike Roth IRAs, Roth 401(k) accounts are subject to the required minimum distribution requirements in the same manner as pre-tax contributions. However, there is nothing that would prohibit a participant from transferring his or her Roth 401(k) account into a Roth IRA in order to avoid application of the required minimum distribution rules.

Deferral Elections. The final regulations continue to provide that the rules generally applicable to pre-tax elective deferrals (*e.g.*, the frequency of elections, non-forfeitability, distribution restrictions, etc.) also apply to Roth contributions. In addition, the final regulations specify that a plan may utilize automatic enrollment in conjunction with designated Roth contributions; however, the plan must indicate whether such automatic deferrals will be treated as pre-tax or Roth contributions.

EXECUTIVE COMPENSATION, BENEFITS AND EMPLOYMENT LAW FOCUS authors:

Kenneth A. Raskin, Esq.
New York
kraskin@whitecase.com

Stacy L. DeWalt, Esq.
New York
sdewalt@whitecase.com

Jihwan Kim, Esq.
New York
jhkim@whitecase.com

1155 Avenue of the Americas
New York, NY 10036
+ 1 212 819 8200

www.whitecase.com

Rollovers. The final regulations note that a direct rollover from a designated Roth contribution account under a qualified cash or deferred arrangement may only be made to another designated Roth contribution account under an applicable retirement plan or to a Roth IRA. In addition, the regulations address the application of the special direct rollover rule, which allows a plan administrator to prohibit a distributee to elect a direct rollover with respect to eligible rollover distributions which are reasonably expected to total less than $200, to Roth accounts. The final regulations provide that a plan may treat the balance of the Roth account and the other accounts under the plan as accounts held as two separate plans for purposes of using the special $200 rule. Therefore, if the balance in a Roth account is less than $200, the plan is not required to offer a direct rollover election or to apply the automatic rollover provisions with respect to the Roth account.

Nondiscrimination Testing. The final regulations retain the rule in the proposed regulations which allow, but do not require, a plan to provide that if a plan fails its nondiscrimination tests (*e.g.*, ADP and/or ACP) a highly-compensated employee ("HCE") with both pre-tax and Roth contributions may elect whether to have the excess contributions attributed to his pre-tax contributions or Roth contributions. If the HCE elects to treat his excess contributions as attributable to Roth contributions, the return of such excess contributions will not be included in the HCE's income; however, any earnings attributable to the excess contributions will be includable in income.

Although the final regulations do not provide guidance with respect to the taxation of distributions of Roth contributions, the preamble indicates that this issue will be addressed in proposed regulations "to be issued in the near future."

Conclusion

Because the Roth 401(k) provisions are set to expire on December 31, 2010, many employers may be waiting to see if Congress makes such accounts permanent. However, those employers who are willing to add a Roth 401(k) contribution option to their plans should:

- Amend existing plan documents before the end of the plan year in which the Roth contributions are first effective to address certain mandatory and discretionary issues including: (i) whether an employee may elect to choose the order in which distributions will be made from the participant's traditional, Roth and/or rollover accounts, and (ii) how the plan's automatic enrollment provisions, if any, will apply in light of the addition of the Roth 401(k) contribution.

- Update summary plan descriptions and communicate the addition of the Roth 401(k) option to participants.

- Ensure that the plan has appropriate procedures in place to comply with the separate accounting requirement.

- Update payroll systems to reflect participant's Roth contributions.

As always, White & Case would be pleased to assist you in revising your 401(k) plan and participant communication materials to incorporate a Roth contribution option.

On January 26, 2006, the IRS published proposed regulations regarding the taxation of distributions from designated Roth accounts under 401(k) and 403(b) plans. These proposed regulations will be discussed in a future Executive Compensation, Benefits and Employment Law Focus.

Penalty for Not Providing Plan Related Information

In a recent case, a judge in the United States federal district court ruled against a plan administrator for not providing certain requested information with respect to a pension plan. The plan administrator was ordered to pay a penalty to the plan participant for violating certain provisions of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). In addition, the plan administrator, the company sponsoring the plan, and a service provider for the plan were also ordered to pay certain attorney's fees incurred by the plan participant.

Background

Hewitt Associates, LLC ("Hewitt") provided administrative services to the Rohm and Haas Retirement Plan (the "Plan"). Mr. Kollman, a participant in the Plan, decided to retire, relying on the lump sum pension benefit calculation provided by Hewitt. The actual lump sum pension benefit that Mr. Kollman received, however, was less than the amount previously estimated by Hewitt that Mr. Kollman had noted. Mr. Kollman communicated with the human resources department of Rohm and Haas (the "Company") regarding this discrepancy and he subsequently appealed the reduction in the lump sum pension benefit amount to the Company. In connection with the appeal, Mr. Kollman's attorney, on February 18, 2003, requested certain related information from Hewitt, including documentation regarding the calculation of Mr. Kollman's benefit. Hewitt forwarded the request for information by Mr. Kollman's attorney to the Company's benefits administrative committee, the Plan's administrator (the "Administrator"). Mr. Kollman and his attorney did not receive any requested information from Hewitt. Hewitt and the Company communicated about the requested information, reviewed the documents requested, and Hewitt recommended that the Company and/or Hewitt pay the difference between the benefit that Mr. Kollman relied upon and the amount that was actually paid. Notwithstanding this recommendation, the Company denied Mr. Kollman's appeal, stating that the Plan rules did not permit the payment of additional funds. Mr. Kollman subsequently received communication from Hewitt that Mr. Kollman should request the documents from the Administrator rather than from Hewitt. In April 2003, Mr. Kollman's attorney requested the relevant information directly from the Company. Thereafter, Mr. Kollman commenced a lawsuit against Hewitt, the Company, and the Administrator (collectively, the "Defendants") for failing to provide requested information to the plaintiff, Mr. Kollman.

Law

Section 104(b)(4) of ERISA requires the administrator of a plan subject to Title I of ERISA, upon written request, to provide to any participant or beneficiary certain information related to such plan.

Section 502(c)(1)(B) of ERISA provides that if any administrator fails to comply with a request for information required by Title I of ERISA within 30 days after the request by a participant or a beneficiary, the court may provide a penalty of up to $100 a day from the date of such failure, and may also order other relief deemed proper.

Section 502(g)(1) of ERISA provides that the court may provide, to either party, reasonable attorney's fees and costs of the action.

Conclusion

The court found that the Defendants intentionally failed to provide the requested documents. The Administrator was found to be liable for $100 per day from March 20, 2003, 30 days after the date the request was sent to Hewitt, until the documents were delivered. The Defendants were also held liable for the reasonable attorney's fees of the participant, Mr. Kollman.

In light of this recent ruling, plan administrators should (1) review in a timely manner any written requests by plan participants or beneficiaries for documentation related to their plans, and (2) provide the appropriate documentation to such participants or beneficiaries within the 30-day period.

White & Case

White & Case is a leading global law firm with nearly 2,000 lawyers in 38 offices in 25 countries. Our clients value both the breadth of our network and depth of our US, English and local law capabilities in each of our offices and rely on us for their complex cross-border commercial and financial transactions and for international arbitration and litigation. Whether in established or emerging markets, the hallmark of White & Case is our complete dedication to the business priorities and legal needs of our clients.

Our approach is based on listening to the needs and desires of our clients, taking the time to understand their business and responding with effective strategies and solutions, no matter how enormous the opportunity or formidable the challenge. We work with the world's most established and respected companies, including 73 percent of the Global Fortune 100, as well as with start-up visionaries, governments and state-owned entities.

With new technologies, globalization, consolidation and other forces continuously changing how business gets done, we help our clients evaluate the risks and rewards of ventures designed to advance their interests whether located in one jurisdiction or many. Leading industry publications consistently recognize White & Case for exemplary work, including:

"One of the top ten global employment practices"
—PLC Cross-Border Quarterly

"US Law Firm of the Year 2005"
—The Lawyer

"Banking and Finance Team of the Year 2005"
—Legal Business

"Infrastructure Team of the Year 2005"
—The Lawyer

"Insolvency Law Firm of the Year 2004"
—Asian Legal Business

"Best Restructuring Lawyers 2004"
—The Asset

"Best Firm for Oil & Gas Financings and Petrochemicals Financings 2005"
—Project Finance

"Ranked in first tier for international arbitration"
"Ranked in second tier for international trade"
"Ranked in second tier for project finance"
—Chambers USA

"Ranked second worldwide in 2004 in number of completed M&A deals"
—Project Finance

"Ranked sixth worldwide in 2004 for antitrust"
—Global Competition Review

ALMATY ANKARA BANGKOK BEIJING BERLIN BRATISLAVA BRUSSELS BUDAPEST DRESDEN DÜSSELDORF FRANKFURT HAMBURG HELSINKI HO CHI MINH CITY HONG KONG ISTANBUL JOHANNESBURG LONDON LOS ANGELES MEXICO CITY MIAMI MILAN MOSCOW MUMBAI MUNICH NEW YORK PALO ALTO PARIS PRAGUE RIYADH SAN FRANCISCO SÃO PAULO SHANGHAI SINGAPORE STOCKHOLM TOKYO WARSAW WASHINGTON, DC

Please contact Kenneth A. Raskin or any member of White & Case's Executive Compensation, Benefits and Employment Law Practice Group if you have any questions or comments or you would like an additional copy of this or other issues. You may also call upon White & Case Legislative Services in Washington, DC for information on pending bills, hearing dates, etc. For address changes, or to receive this publication by email, please send your information to white_and_case_ecbel@whitecase.com.

Kenneth A. Raskin, Esq.
New York Office
Telephone: + 1 212 819 8508
Facsimile: + 1 212 354 8113
kraskin@whitecase.com

Current and back issues of this newsletter are available on our website at www.whitecase.com, along with extensive archives of other newsletters and client memoranda.

White & Case is a limited liability partnership registered as such in the State of New York. JAN 2006 | 01341