

IRS Continues Hot Streak: Issues Additional Favorable Fee-Based Annuity Rulings

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In June, the IRS issued two private letter rulings (PLRs) dealing with fee-based annuities. The facts of these two PLRs are generally identical to the facts of 17 PLRs issued by the IRS last November, with one important difference.

Although the 17 prior PLRs included a representation that the fees covered by the PLRs would not exceed an annual rate of 1.5% of the annuity's cash value, the two June PLRs had no such limitation. Interestingly, the IRS may have foreshadowed this development in that an additional PLR issued last November also had no limitation on the amount of fees.

The tax treatment of advisory fees paid directly from an annuity contract has a 30-year history. Originally, the IRS took the position that the tax treatment depended on the context. In the tax-qualified context, such as IRA annuities, 403(b) annuities, or annuities issued in connection with a 401(k) plan, the IRS took the position that the payment of an adviser's fee was not a taxable distribution from the annuity or plan. With regard to nonqualified annuities, the IRS took the exact opposite position, treating the payment of the adviser's fee as a taxable distribution from the annuity, subject to current income tax and possibly the 10% premature distribution tax penalty.

The recently issued PLRs, like the PLRs last November, contained several representations, including:

- The annuity owner will authorize payment of the investment advisory fees from the annuity's cash value.
- The fees will compensate the adviser only for investment advice with respect to the annuity and not for any other services.
- The annuity will be solely liable for paying the entire fee, which will be paid directly to the adviser and not to the annuity owner.
- The adviser will not receive a commission for the sale of the annuity.

Despite this favorable development, the PLRs can be relied on only by the taxpayers who received them. Therefore, taxpayers should assess the risks before treating advisory fees paid from annuities as nontaxable distributions without obtaining their own PLR.