

From: Ferrante, Frank

Sent: Friday, October 29, 2021 1:53 PM

To: kara.getz@mail.house.gov; Carol.weiser@treasury.gov

Cc: Holmes, Nathan <Nathan.Holmes@thompsonhine.com>

Subject: Suggested Text to Confirm that the Section 1411 Proposed Revision Does Not Subject the Payment of Deferred Compensation Earnings to the 3.8% Tax

Hi Carol and Kara,

The House Reconciliation bill (as released on October 28) contains the text shown below (page 1658) that is intended to clarify a settled point that “wages” are not subject to the Section 1411 3.8% tax. As written, a concern is whether it could be interpreted to subject the payment of deferred compensation earnings (which are not subject to the Section 3101(b) tax) to the Section 1411 3.8% tax. Any such interpretation would seem beyond the intended purpose, but the language could be tightened to avoid any such interpretation. The Joint Committee on Taxation Explanation (p. 81) of the revision states only that “investment income does not include wages subject to FICA taxes” and solely as a clarification.

(c) CLARIFICATIONS WITH RESPECT TO DETERMINATION OF NET INVESTMENT INCOME.— (1) WAGES SUBJECT TO FICA OR RRTA NOT TAKEN INTO ACCOUNT.—Section 1411(c)(6) is amended by inserting “or wages received with respect to employment on which a tax is imposed under section 3101(b) or 3201(a)” before the period at the end.

The reason for the concern is that the exclusion is only for “wages received ... on which a tax is imposed under Section 3101(b)...”

The first question is whether deferred compensation earnings are considered wages for purposes of such new language. In general, deferred compensation earnings are wages, except that the nonduplication rule of Section 3121(v)(2)(B) states that the deferred compensation taken into account as wages, including income attributable thereto, is not wages for purposes of chapter 21 (FICA). Absent clarification, one potential reading of the proposed amendment to Section 1411(c)(6) could be that the receipt of deferred compensation earnings that are not included in wages at the time of payment would be considered wages for purposes of Section 1411 (which is not in chapter 21), if applicable.

The second point is that deferred compensation earnings as wages for Section 1411 would not have been subject to the tax imposed on Section 3101(b). Accordingly, the proposed exception would not seem applicable to the deferred compensation earnings.

The third point is that there remains the question of whether the deferred compensation earnings constitute “net investment income.” The additional proposed revisions to Section 1411(c)(1)(A) raises this question again.

As background, the application of Section 1411 to deferred compensation earnings was a discussion point when Section 1411 was enacted in 2010. The email exchange below and the attachment discuss the point considered back then. As noted in the email exchange with George Bostick, the preamble to the Section 1411 proposed regulations settled the discussion:

vii. Income From Employment. For purposes of section 1411, an employee is treated as engaged in the trade or business of being an employee. Therefore, regardless of whether such amounts are calculated by reference to the items described in proposed § 1.1411-4(a), amounts paid by an employer to an employee that are treated as wages for purposes of section 3401 are not net investment income because such amounts are derived in the ordinary course of a trade or business to which section 1411 does not apply. For example, amounts paid to an employee under a nonqualified deferred compensation plan for such employee (or that otherwise become includible in income under section 409A, 457(f), 457A, or other Code section or tax doctrine) that include gross income from interest or other earnings are not treated as net investment income, regardless of whether such amounts are not subject to Federal Insurance Contributions Act tax due to the earlier application of section 3121(v)(2).

Would not want to reopen this issue by the proposed change. One approach for true clarity is to add “including the income attributable thereto that is referenced in section 3121(v)(2)(B)” to the new text.

The proposed text in the House bill was also in the September 13 version, but I picked up this point only when reviewing the October 28 version. There might be another remedy through the statutory language and someone else might have commented on the same point since the initial September 13 release, but with the fast and hectic pace of this process, I thought to reach out on the point.

Hope this detail sufficiently raises the issue for consideration and possible further clarity.

If the intended change is to subject deferred compensation earnings to the Section 1411 3.8% net investment income tax, there would be a lot more discussion and revenue estimate, along with consideration as to whether such change should be included in the “Social Security 2100: A Sacred Trust” introduced by Rep Larson on Tuesday, which raises the amounts subject to Social Security taxes.

Thank you for your attention to this point and best wishes as the legislative discussions continue.

Frank

Francesco A. Ferrante | Thompson Hine LLP

Austin Landing I, 10050 Innovation Drive, Suite 400 | Dayton, OH 45342-4934

Office: 937.443.6740 | **Cell:** 937.470.0598 | **Fax:** 937.443.6635

Email: Francesco.Ferrante@ThompsonHine.com

Web: <http://www.thompsonhine.com/professionals/ferrante-francesco>



A Smarter Way to Work – predictable, efficient and aligned with client goals.



ATLANTA

CINCINNATI

COLUMBUS

NEW YORK

CHICAGO

CLEVELAND

DAYTON

WASHINGTON, D.C.

Earned a perfect score of 100 and recognized as a Best Place to Work for LGBT Equality for 8 consecutive years on the Human Rights Campaign Foundation's Corporate Equality Index.

Read our Diversity & Inclusion Initiative report, [Be the Change](#).

Atlanta | Chicago | Cincinnati | Cleveland | Columbus | Dayton | New York | Washington, D.C.



From: Ferrante, Frank

Sent: Monday, December 03, 2012 5:46 PM

To: 'george.bostick@do.treas.gov' <george.bostick@do.treas.gov>

Subject: RE: Nonapplication of New Section 1411 to Deferred Compensation Earnings

George, thanks to the government for the language in the preamble to the Section 1411 proposed regulations confirming that earnings on employee nonqualified deferred compensation arrangements are not subject to the new 3.8% tax. Not sure if there was a heavy discussion on the point but it should have been an enjoyable debate.

Hope that you continue to enjoy the role and look forward to our next discussion regarding executive compensation.

Frank

Francesco A. Ferrante

Thompson Hine LLP

(937) 443-6740 Telephone

(937) 470-0598 - Cell

(937) 443-6635 – Fax

Francesco.Ferrante@ThompsonHine.com

Celebrating 100 years of client service excellence.

Atlanta | Cincinnati | Cleveland | Columbus | Dayton | New York | Washington, D.C.



From: Ferrante, Frank

Sent: Wednesday, August 18, 2010 5:24 PM

To: 'george.bostick@do.treas.gov'

Subject: Nonapplication of New Section 1411 to Deferred Compensation

In the event that the second letter regarding Section 1411 and deferred compensation has not reached your desk, it is attached.

I enjoyed our conversation last month and look forward to similar detailed discussions.

Francesco A. Ferrante

Thompson Hine LLP

(937)443-6740 - Telephone

(937)470-0598 - Cell

(937)443-6635 - Fax

Francesco.Ferrante@ThompsonHine.com