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Treasury's Guidance Job Made Harder By Tax Official's Exit

By **Vidya Kauri**

Law360 (March 2, 2018, 1:27 PM EST) -- The recent sudden resignation of Dana Trier, a high-ranking official in the U.S. Department of the Treasury, has left the department shorthanded as it is tasked with interpreting a massive new tax law amid budget and staffing shortfalls, orders to cut regulations and a power struggle over which agency will oversee the regulatory process.

Trier, 69, stepped down as deputy assistant secretary for tax policy on Feb. 23 after losing points with Secretary Steven Mnuchin and other administration officials over public remarks that were perceived as unduly critical of the Tax Cuts and Jobs Act, P.L. 115-97, which Congress passed in December.

Trier was heavily involved in regulatory projects to provide taxpayers with highly anticipated guidance under the complex legislation, particularly in controversial areas such as the limit on business interest deductions and the taxation of pass-through businesses and multinational corporations.

Trier Reflects On His Abrupt Resignation From Treasury

In an exit interview with Law360, the former deputy assistant secretary for tax policy rues the circumstances that led to his departure, shares his concerns about the new tax law and the regulatory process, and speaks about his future plans.

It is difficult to quantify just how big a hole his departure has left at Treasury, but practitioners are concerned that his exit will exacerbate an already tight spot the department is in with its growing responsibilities and a shrinking budget for the Internal Revenue Service.

Any potential delays to issuing regulations are most likely to affect international businesses and partnerships that are faced with drastically new and complex changes in the tax code. Taxpayers may then be forced to take positions on their tax returns without the guidance they need, and this could ultimately lead to litigation against the government, according to David Blair, chair of Crowell & Moring LLP's tax practice.

“No matter how you slice it, they will be issuing these regulations for the next several years at least, but to the extent that it's slower, taxpayers don't have as much insight into how the government is thinking about implementation of the new law than they otherwise would,” Blair said.

Setbacks could cause Treasury to rely more on what is called “subregulatory guidance,” such as notices, announcements and press releases, as a substitute for fully vetted regulations, Blair said. Such alternative guidance may not be binding on either Treasury or taxpayers, but taxpayers can wind up in a sticky situation nonetheless, since the government can either change its position or defend it during audits despite lacking a fully considered analysis of specific taxpayer issues.

“Since there’s less review, there’s less opportunity for taxpayer input, and you don't always get as thorough a product as you would if you went through the actual regulation writing process,” Blair said. “The regulation writing process takes time, but it's time well spent.”

In an interview with Law360, Trier said Treasury is bound to experience some loss from his departure, but he attempted to downplay his own importance by saying there are other highly experienced people at Treasury who are capable of completing the necessary guidance projects without him.

“The one thing that I see as being lost is, I don’t think Treasury, in the short run, has anybody quite able to span all [my] different areas and see how they fit together quite as well as I did,” he said. “From the practitioner community's perspective, I was such a well-known person in practice that they probably think of it as a very considerable loss, but in fact there's a lot of depth at Treasury. … You would be kidding yourself if you thought that my departure was fatal.”

Steven Miller, national tax director at AlliantGroup LP, concurred, saying that while Trier’s departure compounds Treasury’s already existing challenges, it is difficult to see “how much one person can turn this around.”

“He is a very bright guy, a hard worker and the hole that the Department of Treasury and IRS are in is considerable with respect to what they need to get done here, and obviously this isn’t going to be a help,” Miller said.

The IRS has been hit with an onslaught of consecutive budget cuts since 2010 and has had to cut back on staffing levels and the number of audits it can perform. Its interim leader, David Kautter, has a second full-time job in his other role as assistant secretary for tax policy, and there are other vacancies at the top at both Treasury and the IRS, such as in the position of assistant secretary for economic policy and within the IRS Office of Chief Counsel.

While leadership roles have to be filled in, T. Keith Fogg, a professor and director of the federal tax clinic at Harvard Law School, said it was also concerning that the number of attorneys and staff members who are tasked with the actual drafting of regulations in the Chief Counsel's Office has declined over the years.

“It's not just the people that are missing at the top,” said Fogg, who worked in the Chief Counsel’s Office for 30 years until 2007. “The actual people who write the regulations — there's a lot less of them today than there was even in 2010. So, that's going to make a big difference.”

IRS data shows that the approximately 2,000-strong Chief Counsel’s Office lost about 100 employees between the 2015 and 2016 fiscal years. The total number of employees at the IRS dropped to 82,834 in 2016, down by 23 percent from 2010.

In addition to issuing major new guidance, the Treasury Department is also under pressure to repeal previously issued regulations that the Trump administration views as onerous and costly. Its regulatory process may also begin being subjected to oversight from the Office of Management and Budgetto determine the financial cost of new regulations being issued. Treasury has typically taken a position that several of its regulations don’t have a cost attached to them on the grounds that they merely interpret legislation passed by Congress and that it is the statutes themselves that carry associated costs.

Any potential struggle for oversight power between Treasury and the OMB and the possibility of an additional layer of review could further hamper the regulatory process, according to Miller.

“I think what people need to think a little bit about as they as they push for more review of regulations is the difficulty of two things: one, with any sort of precision, estimating the economic impact of any given tax regulations, and secondly, the delay that might be inherent in increased review and oversight,” Miller said. “Bureaucratic battles over who controls what is not going to help get that stuff out to the tax community and taxpayers where it needs to get.”

Treasury’s challenges may not be insurmountable, but partnerships and international businesses, in particular, ought to keep a close eye on how their business operations may be affected, since they are subject to some of the new tax law’s most complex provisions, experts said.

“It's all kind of reaching a critical point now because [Treasury staff] have more work and they have fewer people,” Blair said.

--Editing by Robert Rudinger and Vincent Sherry.