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Publications

DOL (Somewhat) Unshackles Auditors from Stringent Independence Requirements

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On September 6, 2022, the Department of Labor (the "Department") published an Interpretive Bulletin entitled "Independence of Employee Benefit Plan Accountants" (the "Bulletin" or "IB 2022-01") superseding previous guidance governing when the Department considers a qualified public accountant to be "independent." The Department's preamble statements in IB 2022-01 explain that the new guidance "remove[s] certain outdated and unnecessarily restrictive provisions."

The Employee Retirement Income Security Act of 1974, as amended ("ERISA"), requires plan administrators to engage an independent qualified public accountant, in certain circumstances, to audit and render an opinion on the financial statements required to be included in a plan's annual report filed with the Department. IB 2022-01 relaxes the Department's guidance on independence for this purpose. The relief, while limited, is a step toward closing the gap between the American Institute of Certified Public Accountants ("AICPA") auditor independence standards and those standards imposed by the Department. Additionally, IB 2022-01 should reduce the number of auditors that are inadvertently disqualified from initial engagements, thereby allowing plan sponsors more latitude in their auditor selection process.

Background

Section 103 of ERISA requires an accountant to be "independent" for purposes of the audit requirement. However, the statute does not define the term "independence." The Department's longstanding guidance on auditor independence was Interpretive Bulletin 75-9 ("IB 75-9"). IB 2022-01 updates and supersedes IB 75-9. The Department's interpretation of auditor independence, as set forth in IB 75-9, was a longstanding source of technical tripwires for auditors subject to strict independence rules promulgated by AICPA, state licensing boards, and, in some cases, the Public Company Accounting Oversight Board ("PCAOB"). Stakeholders have complained that the Department's independence rules are outdated and unnecessarily restrictive.

IB 2022-01's preamble discusses the Department's request for information ("RFI") on "Independence of Employee Benefit Plan Accountants" issued in 2006. In response to that RFI, some commenters suggested that the Department adopt and conform to AICPA guidelines on independence. The Department expressly declined to do so in IB 2022-01 on the basis that such an approach would require "a significant departure from the Department's largely facts and circumstances approach, to a more detailed and prescriptive approach to independence determinations." The Department also specifically noted that it didn't believe that it was necessary to expressly adopt the AICPA independence guidelines because those standards would already apply as part of the preexisting audit requirement as part of General Accounting Audit Standards required under ERISA Section 103. Instead, IB 2022-01 makes the two changes discussed below.

IB 2022-01

IB 2022-01 provides two important changes to auditors of benefit plans:

1. A direct ownership interest in the publicly traded securities of the plan sponsor prior to the initial audit engagement for the plan no longer disqualifies the auditor from performing a plan audit.

Previously, Interpretive Bulletin 75-9 stated that an auditor was not independent if the accountant, or their firm, or a member of the firm, had any "direct financial interest or material indirect financial interest" in the plan or plan sponsor "during the period covered by the financial statements." This restriction operated to disqualify any accounting firm with even a single partner who held as little as one share of publicly traded stock for any amount of time during the plan year to be audited, which may have resulted in inadvertent disqualification of some accounting firms.

IB 2022-01 allows a qualified public accountant to accept a new audit engagement despite holding publicly-traded securities of a plan sponsor during the period covered by the financial statements if the "accountant, accounting firm, firm, partners, shareholder employees, and professional employees of the accountant's accounting firm, and their immediate family, **have disposed of any holdings of such publicly traded securities prior to the period of professional engagement**." (emphasis added).

IB 2022-01 provides that the "period of professional engagement " begins on the earlier of, the date the accountant signs the initial engagement letter or the date the accountant begins to perform any audit, review or attest procedures (including planning the audit of the plan's financial statements). Significantly, IB 2022-01 provides accountants with a "divestiture window". This window is between when an oral agreement or understanding is agreed upon and the commencement of the "period of professional engagement." The new divestiture window provides relief to accountants in the event their firm, partners, employees, and immediate families own publicly-traded securities of potential clients.

2. Definition of "Office" Updated for Purpose of Determining Who is a "Member" of the Firm.

Like the predecessor IB, IB 2022-01 ties disqualification to certain direct or indirect ownership interests held by members of the accountant's firm. However, under the prior IB 75-9, "members" were defined as "all partners or shareholder employees in the firm and all professional employees participating in the audit or located in an office of the firm participating in a significant portion of the audit." That is, the predecessor IB tied disqualification to professional employees' office location.

IB 2022-01 defines the term "office" to reflect more current practices modeled on the definition of the AICPA independence standard. Accordingly, IB 2022-01 defines the term "office" to mean a "reasonably distinct subgroup within a firm, whether constituted by formal organization or informal practice, in which personnel who make up the subgroup generally serve the same group of clients or work on the same categories of matters regardless of the physical location of the individual."

Outlook

IB 2022-01 is not expected to result in additional burdens for plan sponsors. Rather, plan sponsors may be able to choose from a wider pool of accountants due to the relaxed independence standards. Another impact of IB 2022-01 may be a greater concentration of plan audits being performed by a smaller number of auditors. In fact, within IB 2022-01, the Department suggested that it has found that auditors who perform more ERISA audits tend to make fewer errors. It remains to be seen, however, whether the changes make a difference in the plan audit market.

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