Multiple Employer Plan Regs May Create Undue Complexity

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By Stephanie Cumings

New proposed regulations for multiple employer retirement plans create unnecessary hurdles to solve a problem that may not exist, according to a practitioner.

The process outlined in the proposed regs mimics the one plan administrators already use to handle noncompliant employers, but with additional, burdensome notice requirements, Louis Mazawey of Groom Law Group told *Tax Notes* July 5.

Issued July 2, the multiple employer plan (MEP) regs (REG-121508-18) create an exception to the so-called unified plan rule, also known as the "one-bad-apple" rule, to protect MEPs from disqualification when one of the participating employers fails to comply with the rules. The regs were prompted by President Trump's August 2018 executive order on "strengthening retirement security."

According to the regs, some employers have been hesitant to enter into a MEP because of potential plan disqualifications caused by the actions of one employer. But Mazawey said that in his experience, MEP disqualifications are rare, as are plan disqualifications in general.

"I'm not really convinced that the one-bad-apple rule was really much of a deterrent to employers joining [MEPs] to begin with," he said.

Stringent Notice Rules

Under the regs, plan administrators would need to spin off and terminate plans of noncompliant employers, which Mazawey said is similar to what administrators are already doing in practice.

But the regs also require the administrator to provide up to three notices to noncompliant employers, describing their failures and remedial actions they should take. The third notice would also be sent to the employees and their beneficiaries, as well as to the Department of Labor, and would need to include "an explanation of any adverse consequences to participants in the event that a spinoff-termination occurs."

According to Mazawey, the proposed rules are too stringent and need to be streamlined. For example, the regs could simply require the plan to have reasonable procedures to identify errors and notify employers with plan failures, which he said is already the case for many plans. He also argued that the notice process in the regs is lengthy, which limits its practicality and efficiency.

The proposed regs also fail to address the fact that it's not always clear that there's a compliance problem to begin with, Mazawey said. "People can differ about how you interpret the rules," he added. "The way the regs are set up, they're very rigid and they don't really leave room for that."

Changes to MEPs in the Setting Every Community Up for Retirement Enhancement (SECURE) Act (H.R. 1994), which passed the House May 23, are more straightforward, Mazawey said. "The SECURE Act basically just provides for terminating the bad apple," he said.

One thing that's helpful in the proposed regs, Mazawey said, is that they spell out the consequences of a spinoff-termination, including that rank-and-file participants remain eligible for tax-favored treatment. He noted that the regs don't define who counts as a rank-and-file participant.

The regs apply to defined contribution MEPs, but not to defined benefit MEPs, and Mazawey said he's not sure why the latter are excluded. The regs say it's because defined benefit plans "raise additional issues, including issues arising from the minimum funding requirements and spinoff rules, such as the treatment in such a spinoff of any plan underfunding or overfunding." But the regs also ask for comments on when an exception to the one-bad-apple rule should be available for defined benefit plans.