Officials Question How to Expand Multiple Employer Plan Relief

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By Stephanie Cumings

The IRS and Treasury aren't sure how they would go about expanding relief in the multiple employer plan (MEP) regulations to retirement plans for nonprofits and public schools.

That move might require a separate set of proposed regulations, said Stephen Tackney, deputy associate chief counsel (employee benefits), IRS Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes). But he and other officials at the December 11 IRS hearing on the proposed MEP regulations (REG-121508-18) identified issues that may arise from offering additional relief.

The proposed regs, issued in July, aim to help employers joining an MEP by offering an exception to the unified plan rule. Under that rule — also known as the "one-bad-apple rule" — a qualification failure by one employer could endanger the MEP for all the employers. But it's unclear how this exception would apply to section 403(b) plans set up for the employees of public schools and tax-exempt entities.

Kent A. Mason of Davis & Harman LLP, speaking on behalf of the American Benefits Council, said the regs should clarify that the one-bad-apple rule doesn't apply to section 403(b) plans, or the regs should extend the proposed relief to cover section 403(b) MEPs.

"Do you think we can do that given what we have proposed and that it is a [section] 413(c) regulation?" Tackney asked. He questioned whether extending relief to section 403(b) plans necessitated a separate proposal or whether it was a "logical outgrowth" of the existing proposed regs.

"I think it is not an unreasonable position to say it's a natural outgrowth," Mason replied. "When a number of people comment, you can sort of argue it's a natural outgrowth if it sparked that issue." He added that there would, however, need to be modifications to the section 403(b) regulations.

Deb Rubin of Transamerica, a retirement services company, agreed that the IRS should either clarify that the one-bad-apple rule is inapplicable to section 403(b) plans or expand the relief. But William Evans, attorney-adviser, Treasury Office of Benefits Tax Counsel, cautioned that more relief could create problems for some plans, like those involving custodial accounts.

Mason said the custodial account issue would be rendered moot by the passage of the Setting Every Community Up for Retirement Enhancement Act of 2019 (H.R. 1994). "If that doesn't happen, it is trickier," he added.

Simplifying the Notice Requirements

Another point of contention at the hearing concerned the notice requirements, which practitioners said are overly burdensome and time consuming. They suggested shortening the time frames and reducing the maximum number of notices that must be provided to a noncompliant employer.

Louis Mazawey of Groom Law Group suggested that the IRS simply require a plan to have "reasonable procedures" in place. Pamela Kinard, special counsel to the IRS associate chief counsel (employee benefits, exempt organizations, and employment taxes), questioned whether that approach would be too risky for MEP sponsors.

Mazawey agreed it might be too risky for some but said the IRS could retain the proposed notice procedures as a safe harbor.

Kinard also expressed concern that reducing the number of notices could make the process too aggressive in some situations.

Martin L. Pippins of the American Retirement Association said the IRS could carve out exceptions for issuing notices in cases in which it's "clearly futile," like when a business owner has been incarcerated or the business has been shut down.

A futility standard might be too subjective, offered Tackney, who said that a list of specific circumstances might be easier to administer.