King & Spalding

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Multiple Employer Plans: Proposed IRS Regulations Eliminate the "One Bad Apple" Rule

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A multiple employer plan (MEP) is a tax qualified retirement plan that is maintained by two or more employers who are not part of the same group of controlled corporations. The IRS rules governing MEPs provide that "the failure by one employer maintaining the plan (or by the plan itself) to satisfy an applicable qualification requirement will result in the disqualification of the MEP for all employers maintaining the plan." This "one bad apple" rule creates a disincentive for small employers who may otherwise consider offering retirement benefits under a MEP.

On August 31, 2018, President Trump issued an Executive Order directing the Secretary of the Treasury to consider amendments to regulations or other guidance "regarding the circumstances under which a MEP may satisfy the tax qualification requirements . . . , including the consequences if one or more employers that sponsored or adopted the plan fails to take one or more actions necessary to meet those requirements." In response to the Executive Order and the policy of expanding workplace retirement plan coverage, the IRS developed proposed regulations which would provide an exception to the "one bad apple" rule for certain defined contribution MEPs; the proposed regulation does not address defined benefit MEPs.

The proposed regulations provide a pathway for a MEP to avoid disqualification when a participating employer fails to correct a plan qualification issue, or fails to provide the MEP's administrator information about a qualification failure that the plan administrator reasonably believes might exist. To qualify for the exception, a MEP must meet the following requirements:

1. The MEP cannot be under examination by the IRS.

Our Practice

We advise public, private, taxable and tax-exempt clients on a wide variety of issues related to the design, preparation, communication, administration, operation, merger, split-up, amendment and termination of all forms of employee benefit plans and executive compensation programs and related funding vehicles. The firm has defended clients in significant high-profile ERISA litigation matters, including 401(k) plan "stock drop" cases and other breach-of-fiduciary-duty class actions.

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2. The MEP must be amended to include plan language that describes the procedures that would be followed to address plan qualification issues related to a participating employer, as well as how to handle an unresponsive participating employer that does not respond to requests by the MEP plan administrator to remedy such failures. After final regulations are issued, the IRS intends to publish a model plan amendment.

3. The MEP plan administrator must send up to three successive notices to the participating employer. Each notice must describe the failure, the remedial actions required to correct the failure, the employer's option to initiate a spin-off of its portion of the MEP, and the consequences if an unresponsive participating employer fails to act. After each notice is provided, the employer has 90 days to take appropriate remedial action or initiate a spinoff from the defined contribution MEP. If a participating employer takes the required actions after either the first or second notice, subsequent notices are not required. However, if a participating employer is not responsive after the second notice, the third notice must also be provided to the Department of Labor and to the plan participants who are employees of the unresponsive participating employer (the "Participating Employees").

4. If the unresponsive participating employer does not take appropriate remedial action or initiate a spinoff within 90 days after the third notice, then the plan assets and account balances held on behalf of Participating Employees of the unresponsive participating employer must be spun off to a separate, single employer defined contribution plan, followed by a termination of that plan. To satisfy these conditions, the MEP plan administrator must:

    - provide notice of the spinoff/termination to the Participating Employees;
    - stop accepting contributions from the unresponsive participating employer;
    - implement a spinoff of the plan assets and account balances held on behalf of Participating Employees to a separate single-employer defined contribution plan that has the same plan administrator, trustee, and substantive plan terms as the MEP;
    - terminate the spun-off plan and distribute its assets to the Participating Employees and their beneficiaries as soon as reasonably practicable after the plan termination date; and
    - report the spinoff/termination to the IRS.

To avoid punishing participants for mistakes of the participating employer, the proposed regulations provide that distributions from the terminated spun-off plan will not fail to constitute eligible rollover distributions solely because of the participating employer's failure. However, the IRS reserves the right to pursue appropriate remedies against any party (such as the owner of the participating employer) who is responsible for the failures resulting in the spinoff/termination—including denying such responsible party eligible rollover distribution treatment.

These proposed regulations generally will apply on or after the date these rules are published as final regulations in the Federal Register. Taxpayers may not rely on the rules set forth in the proposed regulations until the final regulations are issued.

King & Spalding is available if you need additional information regarding the new MEP guidance or other assistance with your MEP plan participation.

DOL Issues Final Prohibited Transaction Exemption for the Consolidation of Small Retirement Accounts When Workers Change Jobs

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On July 31, 2019, the U.S. Department of Labor ("DOL") released Prohibited Transaction Exemption 2019-02 ("PTE") to Retirement Clearinghouse, LLC ("RCH") for RCH's Auto-Portability Program (the "Program"). The PTE was granted following issuance of the DOL's Advisory Opinion 2018-01A (the "Opinion") addressing the status of certain parties as fiduciaries under the Program, and allows RCH to receive certain fees relating to the transfer of an individual's retirement account, valued at $5,000 or less, without the individual's affirmative consent. The Program uses complex financial technology to connect employers and record-keepers. When an employee terminates employment from one employer and begins to work for a new employer, RCH works with its participating record-keepers to locate and match the employee in his or her new employer's plan and automatically transfer the employee's retirement account balances from his or her previous employer's plan to his or her new employer's plan, for certain fees (as described below).

Background

The Employee Retirement Income Security Act of 1974 ("ERISA") and the Internal Revenue Code of 1986 (the "Code") prohibit a plan fiduciary from using its discretion to cause the plan to pay such fiduciary a fee (such a payment would be a prohibited transaction). The DOL has the authority to grant exemptions from the prohibited transaction rules that are protective, and in the interests, of plan participants. Under that principle, the DOL granted RCH the PTE. The PTE is not a class exemption that would be generally applicable to other vendors and its application is limited to RCH. The PTE is granted for five years. The DOL indicated that the objective of the Program is to "improve overall asset allocation, eliminate duplicative fees for small retirement saving accounts, and reduce leakage of retirement savings." Industry stakeholders will be assessing the success of the Program over the next five years.

The RCH Program

The Program consists of the following parts:

- ***Automatic Rollovers***. One part of the Program consists of automatic rollovers of mandatory distributions and account balances from terminated defined contribution plans into default individual retirement accounts (each an "IRA"). A distribution is mandatory if the amount does not exceed $5,000 and the plan's terms require an immediate distribution following a distribution event. To facilitate the

roll-overs into default IRAs, RCH will receive from the participating employer, plan or record-keeper information identifying separated participant accounts that are subject to mandatory distributions under the Code. Under the Program, RCH will be the default IRA provider or the plan may choose another IRA provider.

- If RCH is the default IRA provider, RCH will send out a mandatory distribution letter to the separated participants that explains the plan's distribution options, discloses all fees and features of the Program, including a Code-required notice explaining various tax rules for eligible rollover distributions, and advises participants that their plan account will be automatically rolled over into a default IRA unless they provide affirmative direction regarding the disposition of their account. In the case of a terminating plan, RCH sends a similar letter to all participants tailored to the circumstance of a terminating plan. The fees received by RCH from the IRA assets for this service include certain communication fees, monthly administrative fees, and distribution fees. RCH also receives sub-transfer agency fees from the IRA investment provider.
- If RCH is not the default IRA provider, the account balances of the IRAs will be transferred from the default IRA to an RCH default IRA and then potentially to the new employer's plan, if it is determined that the individual has a new plan account at the individual's current employer. RCH will collect a one-time communication fee and a one-time transfer fee.

- ***Automatic Roll-Ins***. Additionally, the Program consists of the automatic roll-in of funds in default IRAs to an individual account plan maintained by a new employer when the IRA owner changes jobs. If an employee's account is rolled over to the RCH default IRA, the employee will receive a welcome letter which describes the IRA's investment options and all of the Program's associated fees and features. The welcome letter also specifically informs the IRA owner that unless the IRA owner directs otherwise, the IRA may be transferred to a new employer's plan after 60 days. Participating record-keepers search their records for matches of employer plans and IRA accounts. When RCH matches an employee in a new employer plan, RCH validates the account and sends a consent letter requesting that the IRA owner consent to the transfer of the IRA assets to the new employer's plan. The new employer must also agree to accept the roll-in. The employee may also approve the roll-in transaction through affirmative consent when enrolling in the new employer plan. If the employee does not affirmatively consent, RCH will begin a default roll-in transaction. In addition to the fees noted above, RCH also receives a roll-in fee if the IRA is terminated and the IRA account balance is transferred to the new employer with RCH's assistance.

Fiduciary Duties Under the Program

Under the Opinion, the DOL indicated that authorizing a plan's participation in the Program is a fiduciary decision that must be made by the fiduciaries of the distributing and receiving plans. Before authorizing a plan's participation in the Program, a plan fiduciary who is independent of RCH must review the terms of the Program, and determine that the plan's participation in the Program is prudent. All fees that RCH receives in connection with the Program must be approved by the plan fiduciary of the prior employer plan. RCH has no authority to unilaterally change the types and amounts of the fees. In addition, RCH must not receive more

than reasonable compensation within the meaning of ERISA. The DOL further concluded that neither the plan sponsor of the former employer nor the new employer would be acting as a fiduciary in connection with a decision to transfer the individual's default IRA into the new employer's plan. Finally, for default IRAs, in the absence of affirmative consent, RCH will be acting as a fiduciary in directing the transfer of funds.

Conclusion

According to RCH, the PTE received support from industry stakeholders. It is anticipated that RCH will begin signing up employers and record-keepers to the Program. The commenters expressing support for the Program believe that it will reduce retirement asset leakage. Others opposed the PTE on the basis that control of an employee's assets should be solely in the control of the employee. Again, it is important that any plan contemplating participating in the Program assess participation in the Program in light of its fiduciary duties, as well as the impact to employees. King and Spalding is available to assist with any inquiry relating to the Program and we have extensive experience in assisting plan fiduciaries in the exercise of their fiduciary duties.

September and October 2019 Filing and Notice Deadlines for Qualified Retirement and Health and Welfare Plans

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Employers and plan sponsors must comply with numerous filing and notice deadlines for their retirement and health and welfare plans. Failure to comply with these deadlines can result in costly penalties. To avoid such penalties, employers should remain informed with respect to the filing and notice deadlines associated with their plans.

The filing and notice deadline table below provides key filing and notice deadlines common to calendar year plans for September through October. If the due date falls on a Saturday, Sunday, or legal holiday, the due date is usually delayed until the next business day. Please note that the deadlines will generally be different if your plan year is not the calendar year. Please also note that the table is not a complete list of all applicable filing and notice deadlines (including any available exceptions and/or extensions), just the most common ones. King & Spalding is happy to assist you with any questions you may have regarding compliance with the filing and notice requirements for your employee benefit plans.

Deadline	Item	Action	Affected Plans
September 15 (8 ½ months after the end of the plan year)	Minimum Contribution Deadline	Deadline for plan administrator to contribute balance of minimum contributions necessary to avoid a funding deficiency.	Defined Benefit Plans

Deadline	Item	Action	Affected Plans
September 30 (within 9 months of the end of the plan year)	Summary Annual Report (SAR)	Deadline for plan administrator to distribute Summary Annual Report for prior year to participants and beneficiaries. This deadline may be extended until 2 months following the close of the extension period for filing a Form 5500, if applicable.	Defined Contribution Plans Health and Welfare Plans (unfunded welfare plans are exempt)
September 30 (last day of the 9th month following the end of the prior plan year)	Certification of Adjusted Funding Target Attainment Percentage (AFTAP)	Deadline for actuary to certify AFTAP to avoid presumption that AFTAP is less than 60%.	Defined Benefit Plans
October 15	Medicare Part D Creditable Coverage Notice to Individuals	Deadline for employers that provide prescription drug coverage to Medicare Part D eligible individuals to provide a written disclosure notice to Medicare eligible individuals and their dependents covered under the plan indicating whether their prescription drug coverage is creditable coverage.	Health and Welfare Plans that provide prescription drug coverage to Medicare Part D eligible individuals
October 15 (2 ½ months after extension granted)	Form 5500	Deadline for plan administrator to file Form 5500 for prior year if deadline was extended by filing a Form 5558.	Retirement Plans Health and Welfare Plans
	IRS Form 8955-SSA	Deadline for plan administrator to file Form 8955-SSA if deadline was extended by filing a Form 5558.	Retirement Plans

Deadline	Item	Action	Affected Plans
October 15 (9 ½ months after the previous plan year)	PBGC Premium Filing	Deadline for plan administrator to pay flat-rate or variable PBGC premium for current plan year.	Defined Benefit Plans