January 28, 2013

The Honorable Phyllis C. Borzi
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Mr. Mark Iwry
Senior Advisor to the Secretary and
Deputy Assistant Secretary (Retirement and Health Policy)
U.S. Department of Treasury
Room 3064MT
1500 Pennsylvania Ave NW
Washington, DC 20220-0001

Re: Form 5500 and 8955-SSA Filing Requirements for Multiple Employer Plans

Dear Ms. Borzi and Mr. Iwry,

The American Society of Pension Professionals & Actuaries ("ASPPA") is writing to request that the Department of Labor ("Department" or "DOL") and the Internal Revenue Service (the "IRS") provide clarification and transitional relief with respect to the filing requirements for Form 5500, *Annual Return/Report of Employee Benefit Plan*, and Form 8955-SSA, *Annual Registration Statement Identifying Separated Participants With Deferred Vested Benefits*, for plans that were reasonably believed to be multiple employer plans obligated to file as a single plan under Title I of the Employee Retirement Income Security Act of 1974 ("ERISA") and the Internal Revenue Code ("IRC").

ASPPA is a national organization of more than 11,000 retirement plan professionals who provide consulting and administrative services for qualified retirement plans covering millions of American workers. ASPPA members are retirement professionals of all disciplines including consultants, administrators, actuaries, accountants, and attorneys. ASPPA is particularly focused on the issues faced by small- to medium-sized employers. ASPPA's membership is diverse, but united by a common dedication to the employer-based retirement plan system.

Background

Employee benefit plans adopted by unrelated employers have been part of the law since the enactment of ERISA. The IRC contains specific rules that apply to these plans for purposes of

the tax qualification requirements.[1] No similar rules apply under Title I of ERISA. To be an employee benefit plan, however, the plan must be established or maintained by an employer, an employee organization, or both.[2]

Our members tell us that over the last 10 years, the popularity of multiple employer plans ("MEPs") has increased markedly. This is in part a result of IRS Revenue Procedure 2001-21 that indicated that professional employer organizations, which typically provide employee leasing services, could adopt a MEP structure to avoid potential compliance problems with the "exclusive benefit rule." In reliance on that ruling, many professional employer organizations and similar entities established MEPs and made them available for adoption by unrelated employers. Plan sponsors have been attracted to these arrangements for many reasons, not the least of which is the goal of lowering administrative costs that would otherwise be passed on to participants.

On May 25, 2012, the Department issued two advisory opinions that have been read to mean that many of today's MEPs may not qualify as a single plan under Title I of ERISA.[3] Instead, the employers jointly sponsoring the MEP would be treated as each sponsoring a separate plan and as a result, each would be obligated to file its own individual Form 5500. Unfortunately, nothing in the Form 5500 instructions has ever indicated that a MEP, for purposes of filing a single Form 5500, must meet additional requirements beyond the fact that the sponsoring organizations were not part of the same controlled group. Additionally, it would appear that, for purposes of the reporting provisions of the IRC, MEPs should continue to file a single Form 5500 covering all the employers jointly sponsoring the plan. To date, no guidance has been issued by either the Department or the IRS advising plan sponsors on how to resolve the inconsistent rules that apply to the singular reporting form (i.e., Form 5500) mandated by both agencies as the vehicle for satisfying a plan sponsor's statutory reporting obligation.

Discussion

I. Form 5500

In the recent advisory opinions, the Department indicated that under Title I of ERISA, certain MEPs may not qualify to be treated as a single plan because the sponsoring employers may not share an employment-based common nexus or other organizational relationship other than the plan itself. In the absence of this "commonality," the advisory opinions conclude that, for purposes of Title I of ERISA, the arrangements are to be treated as a collection of separately maintained individual retirement plans. The consequence of this analysis is that the individual plans would then be separately subject to ERISA's reporting and disclosure requirements, at least for Title I purposes, and would have to individually file their own Form 5500.

[1] IRC §413(c).
[2] ERISA §3(2).
[3] In Advisory Opinion 2012-03A, the Department stated that National Retirement Plan, Inc. could not sponsor an open MEP because it did not appear to be an employee organization within the meaning of section 3(4) of ERISA. In Advisory Opinion 2012-04A, the Department also stated that the materials they reviewed for the Advantage Plan gave no indication that the plan was established or maintained by an employee organization.

There is no similar "commonality" requirement under the IRC. To the contrary, the treatment of a qualified plan as a multiple employer plan is mandatory under the rules of IRC §413(c) if the plan is adopted and contributed to by unrelated employers.

This inconsistency between Title I and the IRC puts plan sponsors in an impossible circumstance with no guidance from either the Department or the IRS. The quandary this causes plan sponsors was highlighted by a recent report issued by the United States Government Accountability Office ("GAO") on this topic.[4] In that report, the GAO said:

> The advisory opinions mean that an open MEP is simultaneously considered both a single plan by IRS, for purposes of certain tax laws, and a series of plans by Labor. This presumably means that an open MEP will have to file annual reports on behalf of each individual employer to satisfy Labor and also as one single plan to satisfy IRS. Filing both ways would create duplications in reporting and redundancies in Form 5500 data.[5]

As might be expected, the lack of guidance on how to deal with this inconsistency has caused a great deal of consternation. Many plan sponsors participating in MEPs have been relying on the guidance in Revenue Procedure 2001-21 and view it as governmental approval of these arrangements. The absence of any indication in the Form 5500 instructions of a "commonality" requirement has led many plan sponsors to the good faith belief that this approach had been sanctioned by both agencies. Even today, there still is no mention in the latest iteration of the Form 5500 instructions of a "commonality" requirement that must be satisfied in order for a MEP to file a single Form 5500 for the entire arrangement.

It should be noted that this issue has ramifications beyond the filing of a separate Form 5500 for each participating employer. If each participating employer is treated as maintaining a separate plan for Title I purposes, then the requirement for an independent audit would also apply individually. Requiring a plan to incur the substantial expense of an audit before formal guidance is issued is unfair to plan participants and plan fiduciaries who must decide if this is truly a reasonable and necessary plan administrative expense. For this reason, coordinated guidance from the DOL and IRS is necessary. Until such time, it is only fair to continue to permit these plans to file as they had before the release of the advisory opinions.

II. Form 8955-SSA

IRC § 6057 generally requires a plan administrator to file a registration statement for plan years in which a participant with a deferred vested benefit separates from service covered by the plan.[6] Treasury Regulation § 301.6057-1(b) provides that a plan subject to IRC § 413(c) should report such participants no later than on the form for the plan year in which the second of two consecutive one-year breaks in service occur.[7]

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[4] United States Government Accountability Office, "*Federal Agencies Should Collect Data and Coordinate Oversight of Multiple Employer Plans*", GAO-12-665 (Sep. 2012), available at http://www.gao.gov/assets/650/648285.pdf.

[5] *Id.* at 25.

[6] Dep't of the Treasury, *2011 Internal Revenue Service Instructions for Form 8955-SSA* at 5, available at http://www.irs.gov/pub/irs-pdf/i8955ssa.pdf.

[7] The plan can elect to voluntarily report separated participants one year earlier than is required.

There remains some confusion as to whether the recent advisory opinions from the Department would in any way impact the rules for reporting under IRC §6057. Guidance which affirms that nothing has changed for this purpose is needed to eliminate any confusion.

Recommendations

ASPPA recommends that the Department and IRS jointly provide guidance that clarifies and resolves the apparent inconsistent reporting obligations under Title I of ERISA and the IRC for plan sponsors participating in MEPs. The GAO report indicates that both agencies agreed with the GAO recommendation to provide for this coordination, but it is critical that guidance be issued as soon as possible to resolve the apparent conflict. Until clarified, transitional relief should be provided that would deem a plan sponsor participating in a MEP to have satisfied its reporting obligations under Title I of ERISA and the IRC if a Form 5500 has been filed for the MEP as a single plan. The relief should be made available for any plan year that begins on or before formal coordinated guidance is issued by the Department and IRS. Affected plan sponsors should also be given the option to file individually prior to this deadline.

ASPPA further recommends that the IRS affirm through formal guidance that a single Form 8955-SSA should be filed under IRC §6057 by the plan administrator for any plan subject to IRC §413(c).

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These comments were prepared by ASPPA's Reporting and Disclosure Subcommittee of the Government Affairs Committee, Ross Solverud, Chair. We welcome the opportunity to discuss this further with you. Please contact Craig Hoffman, General Counsel and Director of Regulatory Affairs at ASPPA, at (703) 516-9300 with respect to any questions regarding the matters discussed herein.

Thank you for your time and consideration.

Sincerely,

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/s/
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