

U.S. DEPARTMENT OF LABOR
ADVISORY COUNCIL ON EMPLOYEE WELFARE AND
PENSION BENEFIT PLANS

Written Statement of Michael Webb, Cammack Retirement Group

Examining Top Hat Plan Participation and Reporting

Friday October 23, 2020

10:30 a.m.

EXECUTIVE SUMMARY:

- In my opinion, specific guidance as to the definition of a select group of management or highly compensated employees would be welcomed by top hat plan sponsors
- In my experience with top hat plan sponsors, due to the lack of clarity as to the definition of a select group of management or highly compensated employees, many sponsors err on the side of caution and only allow an extremely limited group of c-suite or equivalent employees to participate, limiting the utility of such plans.
- In my opinion, the current alternative reporting option for top hat plans is both administratively efficient and appropriate, given the fact that relatively few employees are covered under such plans, and thus the standard annual reporting option under ERISA would not be warranted. Having said this, expansion of the reporting in the area of specifying the employees who are eligible under such arrangements may be appropriate in the context of providing clarity as to the definition of a select group of management or highly compensated employees

Full Written Statement:

For my entire working career at Cammack Retirement Group, it has always been an odd dichotomy to me as a practitioner that we have such clear rules for what constitutes a highly compensated employee in qualified retirement plans, but such a vague notion of what constitutes a member of a select group of management or highly compensated employees in nonqualified top hat plans. And, based on my experience, the dichotomy is a source of confusion for plan sponsors, many of whom sponsor both qualified and nonqualified plans and must address a term which is nominally similar, but carries a vastly different meaning depending on plan type.

Though one would think that the lack of formal guidance in the area of defining a select group of management or highly compensated employees would provide plan sponsors with a greater degree of flexibility than a standardized definition would allow, as a practical matter, the opposite is true in my experience. For fear of violating the unclear standard of who is a member of a select group of management or highly compensated employees, plan sponsors often allow a much smaller number of employees to participate in top hat plans that might likely be allowed if a clear definition were in

place. In my experience, many employers, in consultation with plan counsel, only allow an extremely limited group of c-suite or similar employees to participate. This is true even if many other employees exist at the sponsor who have the ability to affect or substantially influence, through negotiation or otherwise, the design and operation of their deferred compensation plan. Such extreme selectivity diminishes the utility of such plans as an employee benefit. In addition, recordkeeping and administrative expenses for such plans can be prohibitive, due to their tiny size.

For these reasons, I believe that specific guidance as to the definition of a select group of management or highly compensated employees would be welcomed by top hat plan sponsors. Any eligibility criterion that the Department of Labor can provide for appropriate inclusion of employees in a top hat plan would be an improvement over the current state of affairs, in my opinion. Yes, there will be employers for who such standards might prove to be more restrictive than the standards they are currently employing, but I suspect that such plan sponsors will be outliers, based on my experience.

In contrast to the definition of a select group of management or highly compensated employees, I have heard no concerns from plan sponsors about the alternative reporting option for Top Hat plans, which allows for the filing of a one-time registration statement with the Department of Labor. Given the small size of many of these Top Hat plans, a one-time filing seems appropriate, and certainly preferable to any sort of annual reporting requirement. Significant reporting requirements would also presumably conflict with the notion that employees covered under top hat plans would not need the substantive rights and protections of Title I of ERISA.

Having said this, enhanced reporting may be helpful and appropriate if it serves to address the definition of a select group of management or highly compensated employees. For example, providing context as to the types of employees currently covered in such top hat plans might assist the Department in crafting a workable definition of a select group of management or highly compensated employees.