

2020 Advisory Council on Employee Welfare and Pension Benefit Plans

Examining Top Hat Plan Participation and Reporting

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The 2020 Advisory Council will examine the ERISA carve-outs for unfunded, nonqualified deferred compensation plans covering a “select group of management or highly compensated employees” (commonly referred to as “top hat” plans) and the alternative reporting option for such plans.

Sections 201(2), 301(a)(3), and 401(a)(1) of ERISA provide an exclusion from the requirements of Parts 2, 3 and 4 of Title I of ERISA (pertaining to participation, vesting, funding and fiduciary responsibilities, respectively) for “a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees”. Under a regulatory exemption under Part 1 of Title I of ERISA (reporting and disclosure), an employer maintaining a top hat plan is also eligible to utilize an alternative reporting option, which is satisfied through the filing of a one-time registration statement with the Department of Labor that identifies the employer, the plan administrator and the number of plans the employer maintains, and certifies that the plan only covers a select group of management or highly compensated employees.¹

The Department has not published formal guidance in this area but its long-standing view is that, in providing relief for top hat plans from the broad remedial provisions of ERISA, Congress recognized that certain individuals, by virtue of their position or compensation level, have the ability to affect or substantially influence, through negotiation or otherwise, the design and operation of their deferred compensation plan, taking into consideration any risks attendant thereto, and, therefore, would not need the substantive rights and protections of Title I.² In addition, the Department has not addressed the eligibility criteria for appropriate inclusion of employees in a top hat plan, for example, the types of jobs, roles, salary levels, access to information, or sophistication that are necessary to influence or negotiate the plan provisions on behalf of their interests. Additional approaches to defining eligibility also may be worthy of consideration.

Recently, at the behest of three U.S. Senators, the U.S. Government Accountability Office (“GAO”) published a report on top hat plans titled “Private Pensions: IRS and DOL Should Strengthen Oversight of Executive Retirement Plans”. The Report recommended that the Department determine:

¹ 29 C.F.R. section 2520.104-23.

² See, e.g., DOL Advisory Opinion 90-14A (May 8, 1990).

- whether its reporting requirements for top hat plans should be modified to provide additional information;
- whether employers are inappropriately including rank-and-file employees in top hat plans; and
- whether the Department should provide specific instructions for companies to follow to correct eligibility errors that occur when rank-and-file employees are found to be participating in top hat plans.

The 2020 Council's objective in reviewing top hat plan participation and reporting is to determine whether guidance is needed to define a "select group of management or highly compensated employees" and whether enhanced reporting would be helpful and appropriate.