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FAQs: Code Section 410(b) Transition Period Following a Corporate Transaction

What is a "410(b) Transition Period"?

A 410(b) transition period is a period following a transaction in which a company or organization becomes or ceases to be a member of a controlled or an affiliated service group (the "Transition Period"). During the Transition Period, all qualified retirement plans maintained by the affected company or other members of the controlled or affiliated service group are deemed to satisfy coverage testing if certain requirements are met. This Transition Period allows time for the plans to be evaluated and, if necessary, amended to ensure that the plans pass coverage testing considering the company's new controlled or affiliated service group status. Note that the Transition Period does not apply to health and welfare plans or nonqualified deferred compensation plans.

What are the requirements to qualify for a Transition Period? All of the following criteria must be satisfied to qualify for a Transition Period:

- There must be a change in the controlled or affiliated service group status of a company (i.e., ownership changes within a related employer group, or mere corporate restructuring, *may* not be sufficient).
- The plan must have met the coverage requirements under Code Section 410(b) immediately prior to the closing of the Transaction.

How long does a Transition Period last? Generally, the Transition Period lasts from the date of the closing of the transaction to the end of the Plan Year following the year in which the transaction closed. The Transition Period may end earlier if the below requirements to maintain the maximum period are not met.

Are there any requirements to maintain the Transition Period? All of the following criteria must be satisfied to maintain the Transition Period for its maximum period:

- In general, no substantial amendments may be made to the terms of the plan during the maximum Transition Period.
- In general, no substantial changes in coverage under the plan may occur during the Transition Period (other than as a result of the transaction).

What types of corporate transactions may result in a Transition Period? Per regulations and IRS guidance, asset or stock acquisitions, mergers, or other similar transactions may result in a Transition Period, but keep in mind that asset acquisitions do not always result in a change to the controlled or affiliated service group.

Can a company request an IRS determination on the application of the Transition Period rules to its situation? The IRS no longer accepts determination letter requests to demonstrate compliance with coverage and nondiscrimination testing. See Announcement 2011-82. However, a company may consider engaging ERISA counsel for a legal opinion.

Must a plan sponsor use the Transition Period? No, use of the Transition Period is optional. If there is any uncertainty about whether and to what extent a plan qualifies for the Transition Period, the plan sponsor may take a conservative position and perform coverage testing for the entire controlled or affiliated service group.

What happens if there is no Transition Period? The plan must meet the minimum coverage requirements under Section 410(b) on a controlled or affiliated service group basis as of the later of the date of closing of the transaction or the last day of the Transition Period (if it is shortened). If the plan does not satisfy the minimum coverage requirement, it could be disqualified unless corrected. See http://www.boutwellfay.com/wp-content/uploads/2016/06/Plan-Disqualification-FAQ-160609.pdf

How do the changes made by Section 315 of the SECURE 2.0 Act with respect to the determination of affiliated or controlled groups affect these transition rules? The SECURE 2.0 Act made changes to the determination of controlled or affiliated group status by clarifying and amending the treatment of state community property rules and rules regarding attribution to a minor child when the parents own their own businesses. If companies become related or unrelated due to the updated rules, plans sponsored by them will have a Transition Period for coverage testing in the year of the change and the following plan year. For more information, see https://www.boutwellfay.com/post/secure-2-0-updates-family-attribution-rules-for-aggregation-of-businesses.

How does the Transition Period affect the mandatory auto enrollment requirements of Section 101 of the SECURE 2.0 Act in the context of plan mergers? If a plan that is subject to the mandatory auto enrollment requirements is merged with a plan that is not subject to the mandatory auto enrollment requirements, and the latter plan is the ongoing plan, the mandatory auto enrollment requirements will not apply to the ongoing merged plan if the merger stems from a transaction described under Code §410(b)(6)(C), and the merger occurs during the Transition Period.

If you have any questions about the Transition Period and how it might apply to your plan, please contact a Boutwell Fay attorney.