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Insider

IRS issues additional guidance on ARPA COBRA subsidy

By Maureen Gammon and Anu Gogna

On July 26, 2021, the IRS issued **Notice 2021-046** to clarify certain issues related to the COBRA premium assistance provisions of the American Rescue Plan Act (ARPA).

The ARPA includes 100% COBRA premium subsidies for up to a six-month period (from April 1, 2021, until September 30, 2021) for individuals who are eligible for COBRA due to an involuntary termination of employment or reduction in hours and are either (1) currently enrolled in COBRA, or (2) in their COBRA continuation period but have not elected or discontinued payments for COBRA coverage.[1]

In April 2021, the Department of Labor (DOL) issued a set of FAQs to help individuals understand the ARPA COBRA subsidy provisions, as well as model notices for group health plans and health insurance issuers.[2] Subsequently in May, the IRS issued Q&As to assist employers with administering the ARPA COBRA subsidy requirements.[3]

Notice 2021-046 supplements earlier guidance for employers (and their COBRA vendors/third-party administrators) regarding who is an assistance eligible individual (AEI) and which entity is entitled to claim the tax credit. Details and employer implications are outlined below.

Eligibility for COBRA premium assistance – extended coverage periods

Employers are responsible for determining who is eligible for premium assistance. The new guidance covers who is an AEI during an extended election period. Assuming the original qualifying event was a reduction in hours or an involuntary termination of employment, COBRA premium assistance is available to an individual who is entitled to elect COBRA continuation coverage for an extended period due to a disability determination, second qualifying event, or extension under a state coverage continuation mandate if the extended period of coverage falls between April 1, 2021 and September 30, 2021.

The above applies even if the individual had not notified the plan or insurer of the intent to elect extended COBRA continuation coverage before the start of that period. Due to the COVID-19 pandemic, the Departments of Labor and Treasury provided relief – known as the Outbreak Period rules – to employer-sponsored group health plans and their participants from having to comply with certain deadlines, including those under applicable COBRA rules for notifying the group health plan of certain qualifying events or disability determination.[4]

Dental and vision coverage

COBRA premium assistance is available for COBRA continuation coverage of any group health plan, including dental-only and vision-only plans, but not health flexible spending accounts provided through a section 125 cafeteria plan. Eligibility for COBRA premium assistance ends when an individual becomes eligible for disqualifying group health plan coverage or Medicare.

The Q&As address whether eligibility for this disqualifying coverage ends premium assistance for dental-only and vision-only plans. If an AEI previously elected COBRA coverage with

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[1] See "**Health and benefit implications of ARPA**," *Insider*, March 2021.
[2] See "**DOL issues ARPA COBRA subsidy model notices and FAQs**," *Insider*, April 2021.
[3] See "**IRS issues guidance on ARPA COBRA premium assistance**," *Insider*, June 2021.
[4] See "**DOL guidance on end of COVID-19 'Outbreak Period**,'" *Insider*, March 2021.

premium assistance for dental-only or vision-only coverage, the AEI will no longer be eligible for the premium assistance if he or she subsequently becomes eligible to enroll in other disqualifying group health plan coverage or Medicare, even if that other coverage does not provide dental or vision benefits.

Claiming the COBRA premium assistance tax credit

The "premium payee" for COBRA continuation coverage is eligible for the premium assistance tax credit. The premium payee is either (1) the multiemployer plan, (2) the common law employer maintaining the group health plan that provides coverage that is subject to federal COBRA (whether fully insured or self-insured), or (3) the insurer providing coverage under a fully insured plan subject to state continuation coverage requirements or "mini-COBRA."

The Q&As cover who is entitled to claim the premium tax credit:

- Subject to certain exceptions, the common law employer maintaining the plan is entitled to claim the tax credit. The common law employer is the current common law employer for the individuals whose hours have been reduced or the former common law employer for those individuals who have been involuntarily terminated from employment.
- For a group health plan that is subject to federal COBRA and comparable state-mandated continuation coverage that extends beyond the applicable federal COBRA period, the common law employer is the premium payee who is entitled to claim the COBRA premium assistance tax credit. This is true even if the AEI would have been required to pay any required premiums directly to the insurer after the end of the federal COBRA period.

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Employers should ensure that they understand who is entitled to claim the tax credit and are properly completing Form 941.

- If a plan (other than a multiemployer plan) subject to federal COBRA covers employees of two or more members of a controlled group, each common law employer that is a member of the controlled group is the premium payee entitled to claim the COBRA premium assistance tax credit with respect to its employees or former employees.
- If a group health plan (other than a multiemployer plan) subject to federal COBRA covers employees of two or more unrelated employers, the premium payee entitled to claim the premium assistance tax credit is the common law employer, unless an exception applies or there is a business reorganization.
- In regard to business reorganizations, if the selling group remains obligated under applicable COBRA rules to make COBRA continuation coverage available to M&A qualified beneficiaries after the sale, the entity in the selling group that maintains the group health plan is the premium payee entitled to claim the COBRA premium assistance tax credit. If the common law employer (which may be an entity in the buying group) is not obligated to make COBRA continuation coverage available, the common law employer is not entitled to the COBRA premium assistance tax credit after the business reorganization.

The tax credit can be claimed on the federal payroll tax return, Form 941, Employer's Quarterly Federal Tax Return. The deadline for the second quarter Form 941 was August 2, 2021.

Going forward

- Employers should review the Q&As in Notice 2021-46 to ensure that they have completely captured everyone who is potentially an AEI and provided them with the required notices.
- Employers should be sure that their COBRA materials regarding ARPA clearly explain when an individual ceases to be an AEI.
- Employers should ensure that they understand who is entitled to claim the tax credit and are properly completing Form 941.

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SEC considering mandatory climate risk disclosures

By Gary Chase and Steve Seelig

In a **July 28, 2021 speech**, Securities and Exchange Commission (SEC) Chair Gary Gensler announced that the SEC would consider adopting proposed regulations for mandatory climate risk disclosures for public companies before the end of 2021. Although the timing is uncertain for final regulations, these disclosures may be required at some point during 2022 for fiscal-year companies and by year-end 2022 for calendar-year companies.

As part of efforts to formulate recommendations for the regulatory proposal, Gensler has asked the SEC staff to consider the extent to which disclosures should be required, including: (1) What actions can a company take to combat climate change? and (2) How will climate change affect a company's business and how can a company address its impact?

Below we outline the key components of Gensler's speech:

- **Disclosure locations.** While Gensler favors mandatory climate change disclosures, he did not go so far as to say those disclosures must be in annual Form 10-Ks. This suggests that the SEC might accept them disclosed elsewhere, such as in a company sustainability report. If disclosure is required in Forms 10-K and 10-Q, these disclosures would be considered as "filed," bringing with them a higher level of scrutiny from SEC staff and the potential for plaintiffs to sue if those disclosures were inaccurate or misleading to shareholders.
- **Consistency and comparability.** Gensler believes that mandatory climate risk disclosures would provide investors with consistent and comparable information. They should be "decision-useful," with enough detail to provide helpful information instead of just generic text.
- **Quantitative versus qualitative.** Gensler suggested that the climate risk disclosures include both qualitative and quantitative information about climate risk. "Qualitative disclosures could answer key questions, such as how the company's leadership manages climate-related risks and opportunities and how these factors feed into the company's strategy." Gensler pointed out that quantitative disclosures could include metrics related to greenhouse gas emissions, financial impacts of climate change and progress toward climate-related goals.
- **Scope of quantitative disclosures.** As an example of the scope of quantitative disclosures, Gensler noted that a disclosure framework already exists for greenhouse emissions from a company's operations (referred to as Scope 1) and use of electricity and similar resources (Scope 2). While not endorsing those necessarily as metrics the SEC will require to be disclosed, Gensler suggested investors may also benefit from a disclosure that measures the greenhouse gas emissions of other companies in an issuer's value chain (a potential Scope 3).

  While crediting those companies that have announced plans to become "net zero" by a certain date, Gensler noted that companies aren't currently required to disclose which scope of emissions they plan to reduce.

  Gensler also directed the staff to consider which data or metrics a company would disclose to inform investors how it is meeting local jurisdiction commitments to reduce emissions, such as those made under the Paris Agreement, a legally binding international treaty on climate change.
- **Industry-specific disclosures.** Gensler asked staff to consider whether "there should be certain metrics for specific industries, such as banking, insurance, or transportation." Other industries could also potentially have their own metrics.
- **Scenario analyses.** Gensler questioned whether companies should be required to provide scenario analyses on how a business might adapt to the range of possible future physical, legal, market and economic changes. These could include forecasts of the physical risks associated with climate change as well as transition risks associated with stated commitments by companies or requirements from jurisdictions.
- **Existing standards/frameworks or a new disclosure regime.** Gensler believes the SEC should establish a new climate risk disclosure regime appropriate for U.S. markets. However, he directed the staff to "learn from and be inspired" by existing frameworks and standards for climate-related disclosures, including the **Task Force on Climate-related Financial Disclosures** (TCFD) framework, which was recently endorsed by the Group of Seven (made

[D]isclosures may be required at some point during 2022 for fiscal-year companies and by year-end 2022 for calendar-year companies.

up of representatives of Britain, Canada, France, Germany, Italy, Japan and the U.S.). This leaves open the possibility that the SEC's proposal for U.S. markets may share common traits with the TCFD framework.

- **More clarity on "green" or "sustainable" funds.** Separate from the company disclosure issue, Gensler is concerned that no specific naming convention exists that accurately guides investors on fund goals, nor do funds have guidance on how to describe the criteria for deciding which companies are included in their portfolios. He noted that while some funds screen out certain industries, others focus on greenhouse gas emissions or water sustainability of their underlying assets, use human judgment or track outside indices. He wants staff to consider recommendations about whether fund managers should disclose the criteria and underlying data they use. He also wants staff to consider what naming convention these funds can or can't use depending on their focus.

Going forward

Companies should begin to budget time and resources toward complying with the anticipated mandatory climate change and climate risk disclosures, which may be finalized as early as mid-2022.

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DOL issues FAQs on lifetime income disclosure requirement

By Gary Chase and Bill Kalten

The Department of Labor (DOL) recently issued **Temporary Implementing FAQs** on the interim final regulations (IFR) that will require plan administrators of ERISA-covered defined contribution plans to include lifetime income illustrations (LII) on participant benefit statements at least once annually.[1] The IFR take effect on September 18, 2021, and implement provisions of the Setting Every Community Up for Retirement Enhancement Act.

The FAQs cover the applicability date of the IFR (i.e., when the first statement that includes the LII must be sent) and whether the DOL will provide transition relief to comply with any changes to the IFR when the final rule is issued.

Specifically, the FAQs provide that:

- The first LII for a participant-directed account must be included in the benefit statement for a quarter that ends prior to September 18, 2022. In other words, the initial LII may be provided as late as the statement for the second calendar quarter of 2022 (ending June 30, 2022).
- The first LII for a nonparticipant-directed account must be included in the benefit statement for the first plan year that ends on or after September 18, 2021. For a calendar-year plan, this means the initial LII must be included in the statement for calendar year 2021, which must be furnished no later than the last date for timely filing the annual return for the 2021 plan year (October 15, 2022).

Plan administrators may wish to begin determining how to comply with the LII requirements in the event transition relief is not provided.

- A LII based on a participant's account balance projected to normal retirement age would not satisfy the LII requirement but could be issued as an additional LII.
- The DOL intends to issue a final rule "as soon as practicable" (but did not commit to doing so before the September 18 effective date of the IFR). The DOL also acknowledged concerns about the need for sufficient transition time if the final rule differs materially from the IFR (but stopped short of stating that transition relief would be provided).

Going forward

Plan administrators may wish to begin determining how to comply with the LII requirements in the event transition relief is not provided and assuming the final rule does not differ significantly from the IFR.

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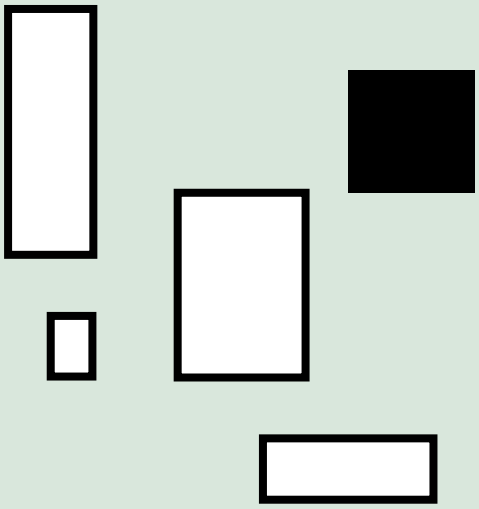
[1] See "**DOL issues interim final rule on lifetime income illustrations**," *Insider*, October 2020.



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