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February 8, 2016

Related Entities and Their Impact on Employer Obligations Under the Affordable Care Act

Disclaimer

- This presentation provides general information regarding its subject and explicitly may not be construed as providing any individualized advice concerning particular circumstances. Persons needing advice concerning particular circumstances must consult counsel concerning those circumstances. Indeed, health care reform law is highly complicated and it supplements and amends an existing expansive and interconnected body of statutory and case law and regulations (e.g., ERISA, IRC, PHS, COBRA, HIPAA, etc.). The solutions to any given business's health care reform compliance and design issues depend on too many varied factors to list, including but not limited to, the size of the employer (which depends on complex business ownership and employee counting rules), whether the employer has a fully-insured or self-funded group health plan, whether its employees work full time or part time, the importance of group health coverage to the employer's recruitment and retention goals, whether the employer has a collectively-bargained workforce, whether the employer has leased employees, the cost of the current group health coverage and extent to which employees must pay that cost, where the employer/employees are located, whether the employer is a religious organization, what the current plan covers and whether that coverage meets minimum requirements, and many other factors.

Your Presenter Today

- Kathleen Barrow, Shareholder, Jackson Lewis, P.C.
 - Over 20-years experience in ERISA employee benefit, executive compensation and employment-related tax matters
 - Practice focuses on employer and plan defense of IRS and DOL audits of plans, payroll and compensation systems
 - Over 20-years experience litigating employee plan and compensation-related tax issues before the United States Tax Court, US District Courts and Courts of Appeal
 - Has trained over 5000 employers nationwide on issues arising under the Affordable Care Act

Related Entities

- Under Section 414 related entities are treated as a single employer for certain employee benefit plan purposes
- Section 414 defined three types of Related Entities
 - Controlled Groups of Corporations
 - Partnerships and Proprietorships Under Common Control
 - Affiliated Service Groups (including management organizations)

One Employer for Certain Purposes

- 401 –qualified pension, profit-sharing, defined contribution plans
- 408(k)—Simplified employee pension plans
- 408(p)—Simple retirement plans
- 410—minimum participation rules
- 411—minimum vesting requirements
- 415—limitations on benefits and contributions
- 416—special provisions for top heavy plans
- **NEW—Ascertaining employer size for applicable large employer analysis and SHOP eligibility under the Affordable Care Act**

OLD RULE—Why Relevant Now?

Employer reporting obligations—specifically Form 1094-C reporting mandates that employer entities identify and report their related entities to the IRS!

Penalty for incorrectly reporting is \$250 per form per year up to \$3 million. Intentional disregard penalty is \$500 per return per year.

Form **1094-C**

Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns

CORRECTED

120116
OMB No. 1545-2251

2015

Department of the Treasury
Internal Revenue Service

► Information about Form 1094-C and its separate instructions is at www.irs.gov/form1094c

Part I Applicable Large Employer Member (ALE Member)

| | | | |
|-------------------------------------------------------------|----------------------|-------------------------------------------|--|
| 1 Name of ALE Member (Employer) | | 2 Employer identification number (EIN) | |
| 3 Street address (including room or suite no.) | | | |
| 4 City or town | 5 State or province | 6 Country and ZIP or foreign postal code | |
| 7 Name of person to contact | | 8 Contact telephone number | |
| 9 Name of Designated Government Entity (only if applicable) | | 10 Employer identification number (EIN) | |
| 11 Street address (including room or suite no.) | | | |
| 12 City or town | 13 State or province | 14 Country and ZIP or foreign postal code | |
| 15 Name of person to contact | | 16 Contact telephone number | |

For Official Use Only



17 Reserved

18 Total number of Forms 1095-C submitted with this transmittal ►

19 Is this the authoritative transmittal for this ALE Member? If "Yes," check the box and continue. If "No," see instructions

Part II ALE Member Information

20 Total number of Forms 1095-C filed by and/or on behalf of ALE Member ►

21 Is ALE Member a member of an Aggregated ALE Group? Yes No

If "No," do not complete Part IV.

22 Certifications of Eligibility (select all that apply):

- A. Qualifying Offer Method B. Qualifying Offer Method Transition Relief C. Section 4980H Transition Relief D. 98% Offer Method

Under penalties of perjury, I declare that I have examined this return and accompanying documents, and to the best of my knowledge and belief, they are true, correct, and complete.

Signature _____ Title _____ Date _____

For Privacy Act and Paperwork Reduction Act Notice, see separate instructions.

Cat. No. 61571A

Form **1094-C** (2015)

Part II ALE Member Information

20 Total number of Forms 1095-C filed by and/or on behalf of ALE Member ▶

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▶ _____ ▶ _____ ▶ _____
Signature Title Date

For Privacy Act and Paperwork Reduction Act Notice, see separate instructions.

Cat. No. 61571A

Form **1094-C** (2015)

Part IV Other ALE Members of Aggregated ALE Group

Enter the names and EINs of Other ALE Members of the Aggregated ALE Group (who were members at any time during the calendar year).

| Name | EIN | Name | EIN |
|------|-----|------|-----|
| 36 | | 51 | |
| 37 | | 52 | |
| 38 | | 53 | |
| 39 | | 54 | |
| 40 | | 55 | |
| 41 | | 56 | |
| 42 | | 57 | |

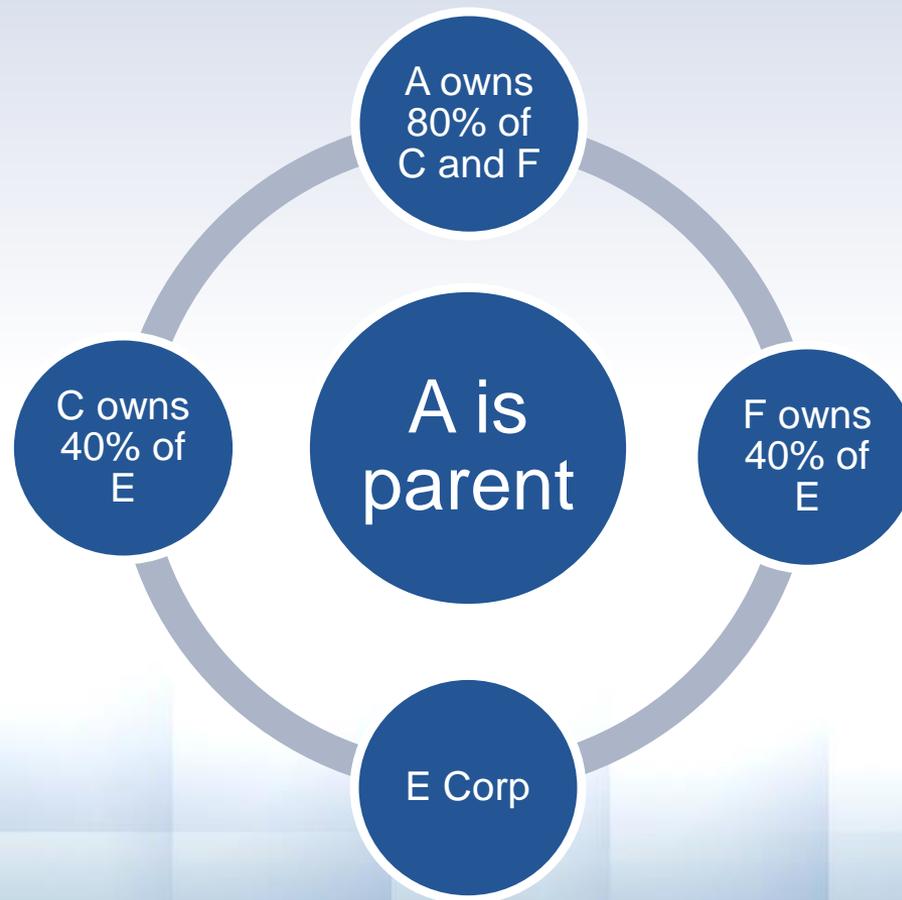
Controlled Group of Corporations

- 414(b)—all members of a controlled group of corporations are treated as a single employer
 - Parent-subsidary controlled group--one or more chains of corporations connected through stock ownership with a common parent, and the common parent owns 80% of the combined voting power of all classes of stock or at least 80% of the total value of all classes of stock of at least one of the subsidiary corporations.
 - Brother-sister controlled group—two or more corporations if the same 5 or fewer persons own stock with more than 50% of the total combined voting power of all classes of stock, and such ownership is identical, and in these same persons the combined voting power is at least 80% of the total voting power or value of all classes of stock in the corporations
 - Combined group—three or more corporations, one of which is a common parent corporation and that parent is also a member of a brother-sister group of corporations

Example, Parent-Subsidiary

- A corporation owns 80% of the common stock of C corporation
- C corporation owns 40% of E corporation
- A corporation owns 80% of F corporation
- F corporation owns 40% of E corporation

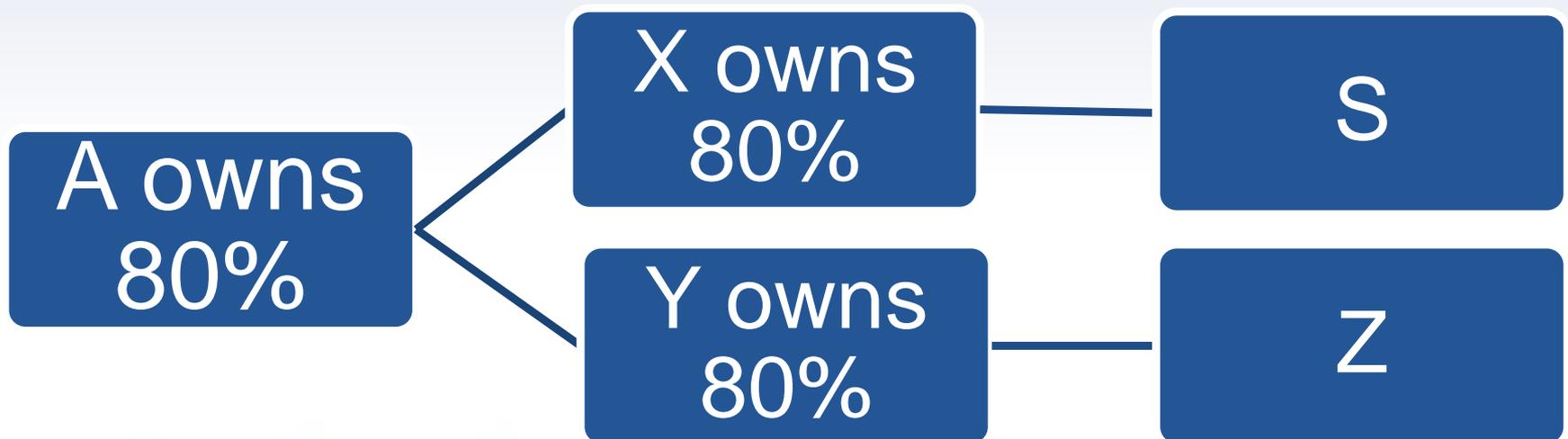
A is the Parent of C, F, E



P and W are Brother-Sister

| One Class of Stock | | | | | |
|--------------------|------|------|------|------|------|
| Individual | P | W | X | Y | Z |
| A | 55% | 51% | 55% | 55% | 55% |
| B | 45% | 49% | | | |
| C | | | 45% | | |
| D | | | | 45% | |
| E | | | | | 45% |
| | 100% | 100% | 100% | 100% | 100% |

A Combined Group



Partnerships/Proprietorships Under Common Control

- Partnerships and proprietorships under common control
 - Determined similarly to parent-subsidiary and brother-sister relationships
 - Focus is on “controlling interest”—actual control and effective control
 - 80% of ownership or controlling, voting interest
 - Effective control exists if a party owns more than 50% interest in an organization
 - In non-profit analysis, the examination focuses on whether 80% of the control of the non-profits rests, directly or indirectly with the same Board of Director members.

Attribution of Ownership/Control

- Option to own stock is attributed to holder of stock
- Stock owned by trust attributed to beneficiary who has actuarial interest of 5% or more in stock
- Stock owned by corporation attributed to holders of 5% or more of the stock (proportionate ownership)
- Stock owned by spouse is attributed, with exceptions for corporations where
 - Individual does not own any stock directly
 - Individual does not participate in management or directorship
 - Not more than 50% of income of corporation derived from rent, royalties, dividends (i.e. passive investments)
 - No restrictions against alienation in favor of children under age 21
- Stock owned by children under age 21 is attributed
- A person who owns more than 50% of stock has ownership of parents, grandparents, grandchildren and adult children attributed.

Affiliated Service Group

● A group consisting of

- A service organization (the “First Organization”— a professional service org.), and
- Another organization if
 - A significant portion of the business is the performance of services for the First Organization, and
 - 10% or more of the interests in the organization is held by highly compensated employees; OR
- Another service organization which
 - is a shareholder or partner in the First Organization; and
 - Regularly performs services for the First Organization or is associated with the First Organization in performing services for 3rd persons

Management Organizations

- A group of organizations consisting of
 - An organization which has a principal business of performing management functions for another organization; and
 - The organization which is receiving such services.

Significance under the ACA

- The Applicable large employer analysis
 - In general, 50 or more FTEs in the prior 12-month period = Applicable Large Employer
 - Code § 4980H(c)(2)(C)(i) expressly references the aggregation rules contained in Code § 414(b), (c), (m), and (o) when discussing the count of FTEs relevant to the Applicable Large Employer analysis.
 - Treas. Reg. § 54.4980H-2(d) highlights that the count of FTEs includes all members of a controlled or affiliated services group as discussed in this presentation.

Potential Consequences of Missing Related Entities

An employer that fails to count all employees of all related entities:

- May fail to realize it is an Applicable Large Employer and thus fail to offer minimum essential, affordable coverage with minimum value to Full-time employees and thereby suffer the failure to offer penalties under the ACA
- Will fail to report insurance coverage on Form 1095-C and Form 1094-C and therefore suffer the \$250 or \$500 per form penalty for such failure
- Will likely also have failed minimum participation and/or discrimination test and disqualified the tax-qualified pension plans of the related entities.

Employers who qualify for SHOP

- The “Small Business Health Options Program” or “SHOP” allows a small employer to offer a qualified group health plan in the small group market to employees—group health plan must permit employee choices concerning level of coverage
- To be a “qualified employer”—one eligible to offer coverage through the SHOP, the employer-
 - Must be a “small employer”
 - Must elect to offer coverage under a qualified health plan to at least all full-time employees
 - Must offer coverage through SHOP servicing employer’s area or a SHOP servicing the employer’s worksite.

“Small Employer”

- Employer is “Small Employer” if the employer has 50 FTEs—but states may elect to define “Small Employer” as one with less than 100 FTEs. States must notify CMS of this election.
- “Small Employer” determination is made with consideration given to the aggregation/related entity rules of Code § 414(b), (c), (m), (o).

Consequences of Missing Employee Count

- Insurance carriers who believe employer is inappropriately participating in SHOP because the employer is not “Small”—is encouraged to notify CMS.
- The CMS notification is done to assure large employer experience is not mistakenly reported as small employer experience
- Application for employer signed under penalty of perjury.
- Tax Credits must be returned to IRS, plus interest and penalties

THE END

QUESTIONS?