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KMACIEL@EBGLAW.COM**MEMORANDUM****To:** National Grocers Association (NGA)**From:** Epstein Becker & Green, P.C.**Date:** January 7, 2013**Re:** ACA Implementation: Determining Common Ownership For the Employer Mandate

As discussed on our recent webinars, to ensure compliance with the Affordable Care Act (“ACA”), all grocers need to know the number of full time employees in order to evaluate whether the Employer Mandate obligations are triggered. This calculation is complicated when several stores are owned by common family members even though the stores may be registered as separate legal entities. The recent Notice of Proposed Rulemaking issued on December 28, 2012, clarifies that companies that have common ownership or are otherwise related, such as certain franchises, are combined together for the purposes of determining whether or not they employ at least 50 full-time employees. This determination is made using an established test codified in Section 414 of the Internal Revenue Code.¹ If the combined total of employees meets the 50 employee threshold, then each separate company is subject to the Employer Mandate even if the separate companies do not individually have enough employees to meet the threshold. For example, if an applicable large employer is comprised of a parent corporation and 10 wholly owned subsidiary corporations, each of the 11 corporations, regardless of the number of employees, is an applicable large employer.

Importantly, the aggregation rules are not applied to companies for the purposes of determining potential liability and the payment amount under the Employer Mandate. For example, if a parent corporation owns 100 percent of all classes of stock of 10 subsidiary corporations, and the controlled group is an applicable large employer, each of the 11 members of this controlled group (the parent corporation and the 10 subsidiaries) is considered separately in computing and assessing the penalty. In calculating liability, the applicable large employer, is permitted one reduction of 30 full-time employees, and that reduction must be allocated ratably among the members of the applicable large employer based on each member’s number of full-time employees.

¹ See IRC §§ 414(b), (c), (m), and (o).

The following is a brief overview of the IRS tests applied to determine whether common ownership in different companies would result in ACA compliance obligations. There are 3 types of control group relationships: 1) Parent-Subsidiary; 2) Brother-Sister; and 3) Combination of the above.

A. Parent-Subsidiary Group

A parent-subsubsidiary group exists when one or more chains of corporations are connected through stock ownership with a common parent corporation *and* 80% of the stock of each corporation (except the common parent) is owned by one or more corporations in the group; *and* the parent corporation owns 80% of at least one other corporation.

Example 1:

A Corporation Owns:

- 90% of the stock of B Corporation
- 80% of the stock of C Corporation, and
- 65% of the stock of D Corporation.

Unrelated persons own the remaining percentages of the stock not owned by A Corporation.

A Corporation is the common parent of a parent-subsubsidiary group consisting of A, B, and C Corporations. D Corporation is not a member of the group because A Corporation's ownership is less than 80%.

Example 2:

A Corporation Owns:

- 90% of the stock of B Corporation
- 80% of the stock of C Corporation,
- 65% of the stock of D Corporation, and

Unrelated persons own the remaining percentages of the stock not owned by A Corporation.

C Corporation owns 80% of the profits interest in E Partnership.

A Corporation is the common parent of a parent-subsidary group consisting of A, B, and C Corporations as well as E Partnership. D Corporation is not a member of the group because A Corporation's ownership is less than 80%.

B. Brother-Sister Group

A brother-sister controlled group is a group of two or more corporations, in which five or fewer common owners (a common owner must be an individual, trust, or an estate) own directly or indirectly a controlling interest of each group and have "effective control."

"Controlling interest" generally means 80% or more of the stock of each corporation (but only if such common owner own stock in each corporation). "Effective control" generally means more than 50% of the stock of each corporation, but only to the extent such stock ownership is identical with respect to such corporation.

Example 3:

Shareholder	A Corp.	B Corp.	Identical Ownership
Adam	80%	20%	20%
Brad	10%	50%	10%
Craig	5%	15%	5%
Daniel	5%	15%	5%
Total	100%	100%	40%

In this example, the threshold requirement of two or more corporations is met and there are five or fewer common owners. We next have to determine whether there is the requisite "controlling interest" and "effective control."

To meet the "controlling interest" part of the test, you must review the combined ownership totals of the common owners. The common owners must own more than 80% interest in all members of the controlled group. In this example, this requirement is met because the shareholders own 100% of each corporation.

To meet the "effective control" test, you must review amount of interest each shareholder has in each company compared to the other shareholders. In this example, although the four shareholders together own 80% or more of the stock of each corporation, they do not own more than 50% of the stock of each corporation, taking into account only the identical ownership in each corporation as demonstrated above. Accordingly, the "effective control" requirement is not met because the total of the identical ownership percentage in both corporations is only 40%.

Example 4:

Shareholder	A Corp.	B Corp.	Identical Ownership
Adam	12%	12%	12%
Brad	12%	12%	12%
Craig	12%	12%	12%
Daniel	12%	12%	12%
Edward	13%	13%	13%
Frank	13%	13%	13%
George	13%	13%	13%
Harry	13%	13%	13%
Total	100%	100%	100%

The above group meets the “effective control” test, because any grouping of five of the shareholders will own more than 50% of the stock in each corporation and all shareholders in any of the groupings own identical amounts.

The above group, however, does not meet the “controlling interest” test because the same five or fewer individuals do not own at least 80% of each corporation’s stock.

C. Combined Group

A combined group consists of three or more organizations that are organized as follows: 1) each organization is a member of either a parent-subsidary or brother-sister group; *and* 2) at least one corporation is the common parent of a parent-subsidary; and is also a member of a brother-sister group.

Example 5:

Adam is an individual owning:

- 80% in Y Partnership; and
- 90% in Z Corporation.

Y Partnership owns 85% of X Corporation.

Y Partnership, Z Corporation and X Corporation are each members of the combined group of trades or businesses under common control because:

- Y Partnership, Z Corporation and X Corporation are each members of either a parent-subsidary or a brother-sister group, *and*

- Y Partnership is:

- The common parent of the parent-subsidiary group consisting of Z Corporation and X Corporation; *and*
- A member of a brother-sister group consisting of Y Partnership and Z Corporation.

D. Attribution

In determining whether a brother-sister group exists, the rules of attribution must be applied. Under the concept of attribution, a person can be treated as owning an interest in a business that is not actually owned by that person. This often results from family or business relationship.

The following chart provides a overview of the general principles of attribution that apply to brother-sister controlled groups, the do not apply to a parent-subsidiary controlled groups.

Ownership Interest	Are attributed to:	
Spouse	Spouse	Exception: No attribution between spouses if there is no: - direct ownership, - participation in company, and - no more than 50% of business gross income is passive investment.
Minor Child (under 21)	Parent	
Parent	Adult child (age 21 or older)	Only if: Adult child owns greater than 50% of that business.
Adult Child	Parent	Only if: Parent owns greater than 50% of that business.
Grandparent	Minor or Adult Child	Only if: Minor/Adult child owns greater than 50% of that business.
Minor or Adult Child	Grandparent	Only if: Grandparent owns

		greater than 50% of that business.
Sibling	None	

Example 6:

Alice and Brad are married. Brad is a business owner owning 100% of his grocery store. Alice is also a business owner and owns 50% of her retail store (the other 50% is owned by an unrelated individual).

Brad is not an employee or owner of a direct interest in Alice's store and less than 50% of the gross income in Alice's store is from passive investments. Brad, however, is in charge of significant management activities of Alice's store.

Alice does not directly own an interest or participate in Brad's store and less than 50% of the gross income from Brad's store is from passive investments.

- Brad is attributed the 50% interest that Alice owns in her store (due to Brad's participation in Alice's store).
- Alice is not attributed any ownership interest in Brad's store.

Example 7:

Clare, age 25, is the daughter of Dana. Dana owns 75% of XYZ Corporation and Clare owns the remaining 25%.

Since Dana owns more than 50% of XYZ, her ownership is attributed to Clare.

Since Clare does not own more than 50% of XYZ, her ownership is not attributed to D.

In sum, application of these tests is extremely fact-specific depending on the nature of the relationship between the separate entities and controlled group. For more information about a grocer's specific relationships and whether ACA coverage is triggered for the Employer Mandate, please contact the NGA Hotline at (202) 861-5238.

Best regards.

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