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Internal Revenue Service
CC:PA:LPD:PR (Reg-121508-18)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Notice of Proposed Rulemaking – Multiple Employer Plans (REG-121508-18)

To Whom It May Concern:

The Investment Company Institute (ICI)[1] appreciates the opportunity to provide our views to the Treasury Department ("Treasury") and Internal Revenue Service (IRS) on the proposed regulations relating to the "unified plan rule" for multiple employer plans (MEPs).[2] The unified plan rule (also known as the "one bad apple" rule) under Internal Revenue Code ("Code") section 413(c) provides that the failure by one employer maintaining a MEP, or by the plan itself, to satisfy an applicable tax-qualification requirement will result in the disqualification of the MEP for all participating employers. The proposed regulations implement an exception to the unified plan rule enacted in section 101 of the Setting Every Community Up for Retirement Enhancement Act ("SECURE Act") of 2019. That exception allows plan administrators of certain types of MEPs to address a participating employer failure without impacting the tax-qualified status of the entire plan.

[1] The Investment Company Institute (ICI) is the leading association representing regulated investment funds. ICI's mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. Its members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in Europe, Asia and other jurisdictions. Its members manage total assets of $31.3 trillion in the United States, serving more than 100 million investors, and an additional $10.0 trillion in assets outside the United States. ICI has offices in Washington, DC, Brussels, London, and Hong Kong and carries out its international work through ICI Global.

[2] *See* 87 Fed. Reg. 17225 (March 26, 2022), available at https://www.govinfo.gov/content/pkg/FR-2022-03-28/pdf/2022-06005.pdf.

We support the proposed regulations and believe that, overall, they provide a reasonable framework for implementing the SECURE Act's exception to the unified plan rule. We describe below a few recommended improvements to the proposal and two related concerns.

BACKGROUND

Prior to the SECURE Act's passage, Treasury and IRS proposed changes in July 2019 to the existing regulations under Code section 413 that would have provided a process for dealing with violations of tax-qualification requirements by one or more participating employers in a defined contribution MEP, without jeopardizing the tax-qualified status of the entire MEP.[3] The SECURE Act then modified the unified plan rule, allowing pooled employer plans (PEPs)[4] (as well as other MEPs consisting of related employers) to continue to be treated as satisfying the tax-qualification requirements despite the violation of those requirements with respect to one or more participating employers. In the case of a violation of the tax-qualification requirements by a participating employer, the SECURE Act allows the plan to spin off the portion of the plan's assets attributable to that participating employer, into a separate plan maintained by that employer.

The proposed regulations implement the exception to the unified plan rule set forth in Code section 413(e), as added by the SECURE Act (the "unified plan exception"). The proposed regulations define a section 413(e) plan as a defined contribution plan described in Code section 401(a), or a plan that consists of individual retirement accounts described in Code section 408, that is a Code section 413(c) plan (i.e., a MEP) and that (1) is maintained by employers that have a common interest other than having adopted the plan or (2) has a pooled plan provider. Under the framework of the proposal, a participating employer that fails to satisfy tax-qualification requirements (or fails to provide information necessary to determine compliance with tax-qualification requirements) may choose to either (1) take remedial action to correct the failure (including by providing the information necessary to determine compliance) or (2) initiate a spinoff. The employer would initiate a spinoff by directing the plan administrator to spin off amounts attributable to the employees of the unresponsive participating employer to a separate single-employer plan maintained by that employer.

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[3] *See* 84 Fed. Reg. 31777 (July 3, 2019), available at https://www.govinfo.gov/content/pkg/FR-2019-07-03/pdf/2019-14123.pdf. ICI submitted a comment letter on the 2019 proposal, available at https://www.ici.org/doc-server/pdf%3A31990a.pdf.

[4] Section 101 of the SECURE Act also established a new type of defined contribution MEP arrangement for otherwise unrelated employers, referred to as a "pooled employer plan" or "PEP." In November 2020, the Department of Labor established registration requirements for providers of PEPs, including creating new Form PR (Pooled Plan Provider Registration). See 85 Fed. Reg. 72934 (November 16, 2020), available at https://www.govinfo.gov/content/pkg/FR-2020-11-16/pdf/2020-25170.pdf.

EXECUTIVE SUMMARY

Our comments and recommendations include the following:

- *Inclusion of Procedures in Plan Terms*. Eliminate the proposed requirement for the plan document to include detailed procedures for addressing a participating employer failure. **(Section 1)**
- *Time Limit for Completing Spinoff.* Clarify that the 180-day safe harbor period for completing a spinoff would not include periods during which the plan administrator waits for information or action from the unresponsive participating employer. **(Section 2)**
- *Option for Spinoff Initiated by Plan Administrator*. Provide an *option* for the plan administrator to voluntarily initiate a spinoff of the assets attributable to the employees of the unresponsive participating employer to a separate single-employer plan, followed by a termination and distribution of the assets of such plan. **(Section 3)**
- *Model Plan Language*. Provide model plan language as soon as possible to allow plans adequate time to incorporate the model language. **(Section 4)**
- *Crediting Service for Employment with Other Participating Employers*. Reconsider, in a separate rulemaking, the preamble's presumption that employers participating in a PEP would be required to credit an employee with service for periods the employee was employed by another employer participating in the PEP, for purposes of plan eligibility and vesting. **(Section 5)**

1. Inclusion of Procedures in Plan Terms

Section 1.413-3(a)(2) of the proposed regulations describes criteria for eligibility for the unified plan exception. One condition for eligibility is that the terms of the plan must set forth the procedures to address a participating employer failure, including describing the notices the plan administrator must send regarding the failure, the timing of the notices, the actions the plan administrator will take if the unresponsive participating employer fails to take remedial action or initiate a spinoff, and a statement regarding full vesting of participant accounts if the unresponsive participating employer fails to take remedial action or initiate a spinoff. We urge Treasury and IRS to eliminate the proposed requirement for the plan document to include the procedures to address a participating employer failure.

Section 413(e)(2)(A) of the Code, as added by the SECURE Act, requires the terms of the plan to provide that, in the case of any participating employer failure, the assets of the plan attributable to employees of such employer (or beneficiaries of such employees) will be transferred to a plan maintained only by such employer (or its successor), to an eligible retirement plan as defined in Code section 402(c)(8)(B) for each individual whose account is transferred, or to any other arrangement that the Secretary determines is appropriate, unless the Secretary determines it is in the best interests of the employees of such employer (and the beneficiaries of such employees) to retain the assets in the plan. The statute does not require the plan terms to include the procedures for transferring such assets.

The proposed requirement for the plan to set forth in detail the various procedural steps for addressing a failure, including the content and timing of various notices, is impractical and unnecessary. Under such a rule, the plan document would need to be amended any time the procedures are modified. Furthermore, this could lead to more operational failures for failure to follow the terms of the plan document, in the case of minor insignificant deviations from the procedures. It would be more practical for the plan administrator to maintain separate written procedures for addressing participating employer failures, which could be easily modified as appropriate.

2. Time Limit for Completing Spinoff

We appreciate the changes from the 2019 proposed rule regarding the spinoff of assets attributable to unresponsive participating employers. The 2019 proposal would have required the plan administrator to initiate a spinoff without a request by the unresponsive participating employer and would have required completion of the spinoff within 180 days. The new proposal requires the unresponsive participating employer to initiate a spinoff by providing direction to the plan administrator[5] and provides that the plan administrator must implement and complete the spinoff as soon as reasonably practicable, with a safe harbor of 180 days from the date the spinoff is initiated.[6]

We request clarification in the final regulation that the 180-day safe-harbor period would not include time periods during which the plan administrator cannot perform actions to complete the spinoff because the initiating employer itself must provide information to the plan administrator or take other actions to accomplish the spinoff. These periods during which the plan administrator is waiting for action by the employer should not count toward the safe harbor time frame.

3. Option for Spinoff Initiated by Plan Administrator

As mentioned above, we are pleased that the proposal no longer *requires* the MEP plan administrator to initiate a spinoff without a request by the unresponsive participating employer. We recommend, however, that the final regulations provide an *option* for the plan administrator to initiate a spinoff, as an alternative to satisfying the conditions described in the proposal. Under this approach, a MEP would qualify for the unified plan exception if, pursuant to the terms of the plan document and following the applicable procedures, the MEP administrator initiates a spinoff of the assets attributable to the employees of the unresponsive participating employer to a separate single-employer plan, followed by a termination and distribution of the assets of such plan.

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[5] Proposed Reg. sec. 1.413-3(c)(3).

[6] Proposed Reg. sec. 1.413-3(d)(2).

This approach would be consistent with the unified plan rule relief proposed by Treasury and IRS in 2019. Given the lack of clear guidance on a MEP administrator's obligations with respect to employees of unresponsive participating employers, we believe that this alternative approach would give MEP administrators additional flexibility to handle the issues caused by unresponsive participating employers and further facilitate the establishment of MEPs.

In the absence of the MEP administrator's ability to spin off the assets attributable to the employees of unresponsive participating employers, MEPs could be faced with a number of challenging scenarios, including:

- A lack of connection with the employer, which could make the ongoing maintenance of accurate contact information for participants much more difficult;
- MEP expense structures that apply an "employer-level" fee as part of their expense structure could be forced to collect those fees from participant accounts, with the pro-rata portion of those expenses gradually increasing as participant numbers for the former participating employer dwindle; and
- MEPs could, over time, be saddled with numerous small accounts abandoned by employers.

4. Model Plan Language

The preamble to the proposed regulations indicates that, after final regulations are issued, the Treasury Department and the IRS intend to publish model plan language, as required under Code section 413(e)(5).[7] Given that the regulations are proposed to apply beginning on the date the final regulations are published, we urge Treasury and IRS to provide the model plan language as soon as possible in conjunction with final regulations. Plans will need time to incorporate the model language if they so choose.

5. Crediting Service for Employment with Other Participating Employers

The preamble to the proposed regulation includes a concerning statement[8] implying that employers participating in a PEP would be required to credit an employee with service for periods the employee was employed by another employer participating in the PEP, for purposes of plan eligibility and vesting. We share the concerns raised by the American Benefits Council in its letter dated April 20, 2022,[9] explaining that section 101 of the SECURE Act "is best

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[7] *See* 87 Fed. Reg. 17234.

[8] The preamble states that "[b]ecause a section 413(e) plan is a type of section 413(c) plan, a section 413(e) plan is subject to all of the rules of section 413(c), including the rules for participation in section 413(c)(1) and the rules for vesting in section 413(c)(3)." *See* 87 Fed. Reg. 17227.

[9] *See* letter from Lynn Dudley to Carol Weiser, Benefits Tax Counsel, Treasury and Rachel Leiser Levy, Associate Chief Counsel, IRS, dated April 20, 2022; available at https://www.americanbenefitscouncil.org/pub/?id=09457732-1866-DAAC-99FB-0E760DE4D138. *See* also letter from Lynn Dudley to Carol Weiser, Benefits Tax Counsel, Treasury and Rachel Leiser Levy, Associate Chief Counsel, IRS, dated November 11, 2020 (providing a statutory

interpreted to mean that, unlike in the case of other types of MEPs, employers participating in a PEP are not required to provide employees with credit for service with other employers in the PEP for purposes of eligibility and vesting."

Having to credit service with unrelated employers would be a significant detriment to employers participating in a PEP. The associated administrative burdens, along with the increased costs of having to provide earlier plan eligibility and earlier vesting of employer contributions, could discourage employers from joining a PEP. This issue should be addressed and clarified in a separate regulatory proposal, as it is not a necessary component of the unified plan exception rulemaking.

We also reiterate the concern raised in the American Benefits Council's letter that the agencies' interpretation of the service crediting rules for PEPs is characterized as representing current law rather than as a proposed interpretation of a new statutory provision. There are PEPs currently operating pursuant to the rational interpretation that cross-employer service crediting is not required in a PEP. At the very least, this approach should be considered a reasonable, good-faith interpretation of the statute, which is treated as compliance by the SECURE Act until guidance is issued.[10]

CONCLUSION

ICI and its members appreciate the opportunity to comment on the proposed regulations to implement the unified plan exception. We are committed to working with Treasury and the IRS to implement the SECURE Act changes in an effective manner. If you have any questions, please contact me at elena.chism@ici.org or 202-326-5821.

Sincerely,

/s/ Elena Barone Chism

Elena Barone Chism
Associate General Counsel
Retirement Policy

analysis supporting the recommended interpretation); available at https://www.americanbenefitscouncil.org/pub/?id=980FD343-1866-DAAC-99FB-A0F436F013FF.

[10] Code section 413(e)(4)(B) states that "[a]n employer or pooled plan provider shall not be treated as failing to meet a requirement of guidance issued by the Secretary under this paragraph if, before the issuance of such guidance, the employer or pooled plan provider complies in good faith with a reasonable interpretation of the provisions of this subsection to which such guidance relates."