AMERICAN RETIREMENT ASSOCIATION
Working for America's Retirement
4245 North Fairfax Drive | Suite 750 | Arlington, VA 22203 • P. 703.516.9300 • F. 703.516.9308

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Room 5203
Internal Revenue Service
P.O. Box 7604, Ben Franklin Station
Washington, DC 20044
Submitted via www.regulations.gov

Re: NPRM Regarding Proposed Exception to the Application of the Unified Plan Rule for a Defined Contribution Multiple Employer Plan. RIN 1545-BO97

The American Retirement Association ("ARA") appreciates this opportunity to comment on the Department of the Treasury's and Internal Revenue Service's ("IRS") Notice of Proposed Rulemaking regarding an exception to the "unified plan rule" (the "unified plan rule" or "the one bad apple rule") for defined contribution multiple employer plans ("MEPs"), published in the Federal Register on July 3, 2019, and referenced above (the "Proposed Rule"). ARA commends the IRS for addressing this rule, which has been a disincentive to many employers considering joining a MEP.

The ARA is the coordinating entity for its five underlying affiliate organizations representing the full spectrum of America's private retirement system, the American Society of Pension Professionals and Actuaries ("ASPPA"), the National Association of Plan Advisors ("NAPA"), the National Tax-Deferred Savings Association ("NTSA"), the ASPPA College of Pension Actuaries ("ACOPA"), and the Plan Sponsor Council of America ("PSCA"). ARA's members include organizations of all sizes and industries across the nation who sponsor and/or support retirement saving plans and are dedicated to expanding on the success of employer-sponsored plans. In addition, ARA has more than 25,000 individual members who provide consulting and administrative services to sponsors of retirement plans. ARA's members are diverse but united in their common dedication to the success of America's private retirement system.

Summary

The President's August 31, 2018, Executive Order 13847[1] directs the Secretary of the Treasury to consider proposing amendments to regulations or other guidance regarding when MEPs may satisfy plan qualification requirements even if one or more employers sponsoring or adopting the plan fails to take the necessary steps to meet those requirements. ARA appreciates the Department of the Treasury's and IRS' proposal to except certain MEPs from the application of the unified plan rule in response to the Executive Order. ARA welcomes such efforts to reduce costly regulatory burdens and complexities on businesses, particularly small businesses, in establishing workplace retirement plans. As explained more fully below, ARA recommends an

[1] 83 Fed. Reg. 45321 (Sept. 6, 2018).

even more expansive process to cover situations in addition to the most common type of qualification failure in a MEP, as well as specific recommendations on the procedures in the Proposed Rule:

- ARA believes that the procedures for complying with the notice requirements of the exception should be simplified, particularly in futile situations, and the notice periods should be modified.
- ARA recommends clarifying that if qualification failures are attributable to multiple employers, and those failures are each independently attributable solely to the individual employers, that the failures be treated as qualification failures solely with respect to those individual employers.
- ARA recommends expanding the Proposed Rule to address situations where the section 413(c) plan administrator itself has taken actions (or not taken actions) that result in a plan qualification failure.
- ARA believes that the procedures for complying with spinoff-termination requirements of a plan with a known qualification failure should be simplified. At the same time, ARA believes that a final rulemaking should include additional detail about proper reporting of spinoffs to the IRS.
- ARA recommends that a spinoff not be required where an employer is unresponsive or refuses to take corrective action. ARA recommends that the direct partial termination from a MEP due to an unresponsive participating employer instead be treated as a distributable event.

Discussion

1. Notice Requirements. ARA appreciates the necessity of notifying unresponsive participating employers. However, ARA believes the structure under the Proposed Rule, involving three notices to employers and up to nine months to provide the notices, is too lengthy and burdensome for the section 413(c) plan administrator. It also places the individual participants that are employees of the unresponsive employers at risk of undesirable delays and unnecessary expenses. We believe that there are reasonable steps that could be taken in the final regulations to reduce this burden.

Because these notices are intended to offer employers the opportunity to take remedial action and any notices or communications would be going to already unresponsive participating employers, there are several effective options that would speed the process and achieve the spinoff-termination sooner. The first and second notices provide identical information. The difference between the two is that the second notice must state that if the employer is still not responsive, a third notice will be sent to participants who are employees of the unresponsive employer as well as the Department of Labor ("DOL"). This seems unnecessarily redundant. As one option, the first notice simply could be eliminated and the second notice in the proposed rule could be made into the first notice. Another option would be to shorten the second notice from 90 to 30 days.

If all three notices are retained in a final regulation, ARA believes that the response time should be shortened. For example, a 60-day response time for the second notice and a 30-day response time for the third notice could be substituted for the two 90-day periods: this alone would save

90 days. We do not see a particular reason to keep the third notice at 90 days when the first two notices have already been ignored. Additionally, in the case of a clearly futile situation—such as where the business owner is incarcerated and all business operations have ceased—an option to dispense with both the second and third notices seems reasonable. ***ARA recommends*** shortening the notice periods, eliminating the first notice, and/or providing a simpler rule in clearly futile situations that result in a speedier terminations.

2. Remedial Actions for Potential Qualification Failures. ARA is concerned that the regulations are not clear regarding which errors are eligible for relief. The proposed provision relating to appropriate remedial action with respect to a potential qualification failure seems only to contemplate a known qualification failure that is "attributable *solely* to that employer"[2] (emphasis added). ARA recommends clarifying the meaning of the phrase "attributable solely to that employer." In particular, ARA recommends clarifying whether this means that the participating employer must have caused the error and therefore errors caused by the MEP administrator are not eligible, even if they impact only one participating employer. In addition, ARA recommends clarifying that if there are multiple employers each with qualification failures and those failures are each independently attributable solely to the individual employers (even if the failures are substantially identical), then each failure is attributable solely to the applicable employer and therefore eligible to become known qualification failures with respect to those individual employers. To assist employers and practitioners, ***ARA recommends*** the final regulations provide examples of failures that are attributable solely to an employer and, perhaps more importantly, those that are not attributable solely to an employer.

3. Section 413(c) Plan Administrator Failures. In some situations, the section 413(c) plan administrator may have taken actions that result in a potential or known qualification failure. For example, we are aware of situations in which a section 413(c) plan administrator was not correctly applying service crediting rules to one or more participating employers. It is not clear whether the rule for remedial actions for potential qualification failures discussed in #2 above applies in the situation where a section 413(c) plan administrator itself contributes to a failure. ***ARA recommends*** clarifying how this rule applies where the section 413(c) plan administrator has taken actions resulting in a plan qualification failure and, in particular, recommends that an employer be permitted (and section 413(c) plan administrator required to permit the employer) to separate itself from the multiple employer plan if there is a plan-wide failure (i.e., involving multiple employers), to correct the qualification failure with respect to its separate plan, and the failure of the section 413(c) plan administrator to correct the remainder of the plan will not impact the qualification of the employer's corrected plan.

4. Employer-Initiated Spinoffs. If an unresponsive participating employer initiates a spinoff by directing the section 413(c) plan administrator to spin off assets for the employer's employees, the section 413(c) plan administrator must implement this direction and complete a spinoff within 180 days of the date the employer initiates the spinoff. Then, the section 413(c) plan administrator "must report the spinoff to the IRS (in the manner prescribed by the IRS in forms, instructions, and other guidance)."

[2] See section 1.413-2(g)(5)(ii) of the Proposed Rule.

ARA has a few concerns with this reporting requirement. First, because the spinoff is employer-initiated, the section 413(c) plan administrator may not know of the qualification failure. In other words, there could be a potential qualification failure, but not a known failure. Further, the employer-initiated spinoff may be followed by correction of the failure, of which the section 413(c) plan administrator might have no knowledge, so the information that the section 413(c) plan administrator is required to report to the IRS is critical to know. The purpose of reporting to the IRS is not clear. Is this merely an information return, is it intended to provide abundant data on the spinoff that the section 413(c) plan administrator must attest to, or is it to provide the IRS with information on plans to follow up with on examination? If the purpose is to permit the IRS to follow up with spun-off plans through examinations, reporting such information to the IRS would be unduly punitive to the employer who is taking affirmative action and control of its plan (and may be electing to do a spinoff because of disagreements with the section 413(c) plan administrator). Employers should not be penalized for acting affirmatively with respect to plan errors. The Proposed Rule does not specify how this reporting is to be made, what information is required to be reported, and what the IRS is expected to do with this information. At the time the section 413(c) plan administrator is making the report to the IRS, the administrator may in fact have insufficient knowledge about whether or not there is a qualification defect and to what extent it has been corrected. Nevertheless, the section 413(c) plan administrator may believe it is obligated to report a potential qualification failure as a known failure depending on how the IRS constructs the reporting form. ***ARA recommends*** more detail be provided about how the spinoff is reported to the IRS before this section of the Proposed Rule is finalized.

5. Involuntary Spin-Off Termination

Under the Proposed Rule, if a participating employer does not take appropriate corrective action or initiate a spinoff, the section 413(c) plan administrator is required to initiate a spinoff of the plan assets and account balances of the employees of the unresponsive employer. A termination of the spun-off plan (a "spinoff-termination") follows. ARA believes that the specificity of the Proposed Rule as to the requirements to spin off the unresponsive employer's portion of the plan to a separate plan—with the same administrator and trustee, followed by plan termination and distributions to participants—could involve practical problems and unduly impact participants negatively. For example, there may be questions as to whether segregation of the assets for the affected employer's portion of the plan in a separate trust would be required of the trustee. Further, the spinoff will involve significant administrative costs, including new plan documentation and, potentially, a plan audit—all of which will likely be charged to participant accounts. In general, ARA recommends that a spinoff not be required in these cases. The costs of the additional administrative expenses involved in the spinoff, negatively impacting the value of their accounts, outweigh the value of such actions where a termination will follow shortly. ***ARA recommends*** that, as an additional option in appropriate cases, a direct partial termination from a MEP due to an unresponsive participating employer be allowed to instead be treated as a distributable event.

6. Comments Requested

Finally, the Proposed Rule requests comments on four specific topics.

1. The first question is whether and in what circumstances an exception to the unified plan rule should be available to defined benefit plans. ARA believes that a spinoff-termination of defined benefit plan assets attributable to a noncompliant unresponsive employer presents undue risk to the employees of the remaining (compliant) employers in the open MEP. This risk can be existential for the remaining employers if the plan's funding and demographics are such that such a spinoff-termination favors the employees of the noncompliant employers. ARA strongly opposes providing an exception to the unified plan rule for defined benefit plans that would allow or require a section 413(c) plan administrator or participating employer to unilaterally effect a spinoff.

2. The second question is whether a DC MEP should be required to meet additional requirements to be eligible for the exception. Given our experience with a few MEP administrators that have not been completely diligent at all times, a threshold test that the section 413(c) plan administrator has not been sanctioned or penalized by the IRS in recent years could be a reasonable measure for preventing actions not in the best interest of plan participants of the MEP. In addition, to be eligible for the exception, the section 413(c) plan administrator should be required to permit an employer to spin off its portion of the plan and to correct any qualification errors impacting that portion of the plan of which the employer is aware. The section 413(c) plan administrator should be required to cooperate in any employer's attempt to correct errors occurring during the period the section 413(c) plan administrator operated the plan.

3. The third question is, in a spinoff, how should the MEP treat participants with assets attributable to multiple employers. In this situation, ARA believes that it would be reasonable to treat participants with assets attributable to multiple employers either (1) as two (or more) separate individuals for purposes of these proposed rules, or (2) as a single individual whose entire account is attributable to the last employer for whom they performed services. Thus, for example, under Option 1, a participant with assets attributable both to a compliant employer and an unresponsive employer would have an account that would be partially subject to the spinoff termination rules under the Proposed Rule, and whose remaining assets would simply remain in their "other" account under the continuing MEP. Alternatively, under Option 2, the participant would have his or her entire account attributable to the unresponsive employer if the unresponsive employer were the employer for whom they last performed services. Having both of these options available would help ensure that different section 413(c) plan administrators with varying recordkeeping systems could avail themselves of this relief.

4. The fourth question is what steps the Department of Labor ("DOL") should take to facilitate implementation of the Proposed Rule. As noted in the preamble to the Proposed Rule, a plan administrator implementing a spinoff may be concerned about its fiduciary responsibilities under ERISA as well as potential prohibited transactions. To address these concerns, ARA recommends issuance of interpretive ERISA guidance by

DOL applicable to a fiduciary's obligations in carrying out the process of complying with the Proposed Rule, including spinoff-terminations and giving consideration to partial plan terminations. General limitations on fiduciary liability in these circumstances as well as prohibited transaction relief may be appropriate.

These comments were prepared by the ASPPA Government Affairs IRS Subcommittee. Please contact Martin L. Pippins, MSPA, Executive Director of ACOPA and Director of Regulatory Policy (mpippins@usaretirement.org; 703.516.9300), if you have any comments or questions regarding the matters discussed above.

Thank you for your consideration of these comments.

Sincerely,

/s/
Brian H. Graff, Esq., APM
Executive Director/CEO

/s/
Martin L. Pippins, MSPA
ACOPA Executive Director

/s/
William Hansen
Chief, Government Affairs

/s/
Kelsey Mayo, Chair
ASPPA IRS Government Affairs Subcommittee