AMERICAN RETIREMENT ASSOCIATION

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Working for America's Retirement

May 27, 2022

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

Submitted via Regulations.gov

Re: **NPRM Regarding Relief from Unified Plan Rule for Multiple Employer Plans**

The American Retirement Association ("ARA") is writing in response to the request for comments on the Notice of Proposed Rulemaking published in the Federal Register on March 28, 2022 (the "Proposed Rule"), regarding an exception to the application of the "unified plan rule" for multiple employer plans. ARA thanks the Department of the Treasury ("Treasury") and the Internal Revenue Service's ("IRS" or "Service") for the opportunity to provide input on these matters.

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 American Society of Enrolled Actuaries ("ASEA"), 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 savings plans and are dedicated to expanding on the success of employer-sponsored plans. In addition, ARA has over 30,000 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

ARA recommends that the Service:

- Revise the notice requirements for unresponsive employers as follows:
  - Shorten the time for the unresponsive participating employer's response to the second and third notices from 60 days to 30 days, with an optional extension, and
  - Provide a special rule for consolidation of notices in clearly futile situations.
- Specify a remedial amendment period of at least two years after finalization of the regulation to allow section 413(e) plan administrators to use the Exception immediately, before the plan is amended, and confirm the Exception is available to MEPs that previously adopted good faith amendments to comply with the SECURE Act.
- Permit MEP administrators to maintain detailed procedures for complying with the Exception outside of the MEP plan document.
- Require the section 413(e) plan administrator to perform "*substantially all"* rather than "*all"* of the administrative duties to be eligible for the Exception.
- With regard to an employer who elects a spinoff:
  - Extend the 180-day safe harbor period for completion of a plan spinoff to 12 months;
  - Provide that an employer who does not act timely to complete the spinoff will be treated as having a second failure to Act and eligible for the combined first and second notice; and

    - Do not impose requirements on a section 413(e) plan administrator to exercise discretion in evaluating other circumstances to retain participant accounts after the employer has specifically directed that a spinoff be effected.
- Clarify which participants are affected participants for purposes of full vesting.
- Confirm that the Exception applies to defined contribution MEPs maintained by an employer group or association or by a professional employer organization ("PEO") as described under Department of Labor Regulation § 2510.3-55.
- Provide the following with respect to retained participant accounts:
    - Participants who perform service for an employer that is no longer participating in the plan have had a severance of employment from the employer maintaining the plan, and
    - Accounts may be distributed only when otherwise permitted by the MEP's terms,
    - The section 413(e) plan administrator is authorized to amend the MEP's provisions with respect to participants who elect to retain their accounts in the MEP if otherwise permitted by the terms of the MEP and the applicable provisions of the Code and ERISA (such as to add a distribution event).

Discussion

I. Simplify and condense the notice requirements by shortening the response timeframe and providing a special rule for futile situations.

ARA recommends the IRS reduce the amount of time necessary to complete the notice process. As noted in ARA's September 26, 2019 comment letter,[1] ARA appreciates the necessity of notifying unresponsive participating employers. However, ARA believes the structure of the current Proposed Rule, involving three notices and up to six months to provide the notices (nine months after considering the last response deadline), while admittedly shorter than the timeframe previously proposed, is still too lengthy and burdensome. The nine-month timeframe places individual participants who are employees of the unresponsive employers at risk of undesirable delays, potentially limited access to their funds, and unnecessary expenses.

ARA recommends the IRS shorten the second and third notice response period from 60 to 30 days, with the ability of the employer to request a 30-day extension of time. ARA appreciates the need to balance speed to protect participants with sufficient time for the employer to respond. ARA does not see a particular reason to continue using a 60-day response period when the first notice has already been ignored—but believes the ability to request an extension provides the employer with sufficient protection if it is acting in good faith to take remedial action.

ARA also recommends that in the case of a clearly futile situation—such as where the owner of the unresponsive participating employer is incarcerated and all business operations have ceased—the IRS should provide a special rule allowing a section 413(e) plan administrator to reduce the number of required notices—either qualifying for a combined first and second notice or proceeding directly to the third notice. Similar to the above comment, in this situation participants may be at risk of undesirable delays, potentially limited access to their funds, and unnecessary expenses. Providing a streamlined notice in this situation will protect participants without hampering the rights of the employer.

II. Specify a remedial amendment period to allow immediate use of the Exception.

Section 1.413-3(a)(2)(i) of the Proposed Rule requires the terms of a MEP to set forth the procedures that will be followed to address a participating employer's failure, including specific plan

[1] See https://araadvocacy.org/wp-content/uploads/2020/03/19.09.26-ARA-Comment-Letter-to-IRS-Unified-plan-rule-for-DC-MEPs.pdf

provisions. A MEP that does not satisfy the plan language requirements under the Proposed Rule is not eligible for the Exception. The Preamble to the Proposed Rule states that Treasury and IRS intend to publish guidance setting forth model language for this purpose.

Although the Proposed Rule indicates §413(e) plan administrators may utilize the Exception before the Proposed Rule is finalized by complying with its requirements, the Proposed Rule does not address whether a §413(e) plan administrator must first amend their MEP to provide for the Exception. Given that guidance for the model language has not yet been published, **ARA recommends** the IRS provide a specific remedial amendment period in order to allow §413(e) plan administrators to use the Exception immediately and amend their MEPs at a later date, and provide for a period of no less than two years from publication of the final regulation.

In addition, **ARA recommends** the IRS clarify whether a §413(e) plan administrator may utilize the Exception where the MEP was previously amended to comply in good faith with the SECURE Act. ARA specifically recommends the IRS confirm the Exception is available to MEPs that were previously amended to comply with the SECURE Act via good faith amendments executed prior to the publication of the Proposed Rules.

III. Do not require the MEP to specify detailed notice procedures

The Proposed Rule requires the MEP document to specify detailed notice procedures. **ARA recommends** that detailed procedures for notifications not be required in the MEP document. While certain provisions regarding notices might be appropriately set forth in the document, detailed procedures would be burdensome to maintain in the plan document itself as these may be tweaked over time. Instead, a §413(e) plan administrator should be permitted to establish these procedures in a separate written document or policy that is communicated to participating employers.

IV. Revise the Proposed Rule to reflect that a §413(e) plan administrator is required to perform *substantially* all of the administrative duties

The SECURE Act requires the §413(e) plan administrator to perform *substantially all* of the administrative duties. The Proposed Rule, by contrast, requires the §413(e) plan administrator to perform *all* of the administrative duties. This distinction is significant as many administrators subcontract small portions of the required functions, such as executing trades. Therefore, **ARA recommends** the Service revise the Proposed Rule to conform with the statutory language and require a §413(e) plan administrator to perform *substantially all* of the administrative duties to be eligible for the Exception.

V. Revisions related to spinoff of participant employer's plan

If an unresponsive participating employer initiates a spinoff, Section 1.413-3(d)(2) of the Proposed Rule requires a §413(e) plan administrator to implement and complete the spinoff as soon as reasonably practicable. The Proposed Rule provides a safe harbor that treats a §413(e) plan administrator as satisfying this requirement if it completes the spinoff within 180 days. A spinoff requires significant coordination between the §413(e) plan administrator, the participating employer, and other service providers, and in some cases a spinoff cannot be completed within 180 days even where all parties involved are timely communicating and cooperating to facilitate the process. Accordingly, **ARA recommends** that IRS extend the 180-day safe harbor period to complete the plan spinoff to 12 months.

In addition, the level of coordination required by a participating employer who has not been responsive may lead to additional failures if the employer does not timely execute on its responsibilities. The Proposed Rule is not clear how the §413(e) plan administrator should proceed

in that event. **ARA recommends** the Service clarify that a failure of an employer to perform spinoff-related tasks requested by the §413(e) plan administrator is treated as a second failure to act, qualifying for the combined first and second notices.

ARA appreciates the Service's request for comments regarding whether there are any circumstances in which it would be appropriate for any of the amounts attributable to the employees of the unresponsive participating employer to remain in the MEP after that employer has specifically directed that a spinoff be effected. **ARA recommends** that the final regulations not impose a requirement on §413(e) plan administrators to determine whether circumstances exist to retain accounts of an unresponsive participating employer's participants where the sponsor has elected a spinoff.

VI. Clarify which participants are affected participants for purposes of full vesting.

Where an unresponsive participating employer fails to take any remedial action after the final notice is provided under the Exception, the Proposed Rule requires the §413(e) plan administrator to fully vest the unresponsive participating employer's participants with respect to amounts attributable to their employment with the unresponsive participating employer. The Proposed Rule does not differentiate between active and terminated participants with regard to the vesting requirement. **ARA recommends** that the IRS clarify the Proposed Rule to confirm that only participants who are actively employed by the unresponsive participating employer at the cessation of participation are "affected participants" who will be fully vested for purposes of the Exception.

VII. Confirm that the Exception applies to defined contribution MEPs maintained by an employer group or association or by a PEO

The Service specifically requested comments on guidance regarding whether employers have a "common interest" other than having adopted a common plan. The Department of Labor (DOL) issued final regulations[2] on the "commonality rule" for defined contribution MEPs in response to Executive Order 13847 (Strengthening Retirement Security in America)[3], with the goal of expanding coverage in workplace retirement plans. The DOL rule specifically provides for commonality where a MEP is maintained by an employer group or association or by a Professional Employer Organization (PEO). **ARA recommends** the IRS confirm that plans meeting the DOL commonality rules also be treated as having a common interest for purposes of the Exception.

VIII. Revise the Proposed Rule regarding retained participant accounts

ARA recommends the Proposed Rule be revised to reflect that participants of an employer who ceases participation have had a severance of employment from the employer maintaining the MEP. IRS Notice 2002-4 reflects that severance from employment is based on whether the participant is still employed by the employer maintaining the plan. In that Notice, participants employed by an employer who ceased being a controlled group member of the plan sponsor ceased to be employed by the employer maintaining the plan (although there was no actual termination of employment). In the context of a MEP, the participating employers are treated as a single employer maintaining the plan for many purposes—including for purposes of service crediting and severance of employment. Thus, the "employer maintaining the plan" is the MEP sponsor and all participating employers. When an employer ceases to participate in the MEP, it is no longer part of the employer maintaining the plan, and the participants should be treated as having a severance from employment (as long as the other requirements in Notice 2002-4 are met, such as no spinoff is taken). **ARA recommends** the final rule reflect that where an unresponsive participating employer is treated as no longer

[2] https://www.govinfo.gov/content/pkg/FR-2019-07-31/pdf/2019-16074.pdf
[3] https://www.federalregister.gov/documents/2018/09/06/2018-19514/strengthening-retirement-security-in-america

participating in the MEP, and that unresponsive participating employer does not initiate a spinoff or otherwise transfer assets out of the MEP, the participants of that participating employer are considered to have had a severance from employment and thus have experienced a distributable event.

As this is a distributable event, the final rule should also reflect that distribution of a participant account that remains in the Plan does not require the participant to certify they no longer work for the unresponsive participating employer, and the participant should be permitted to take a distribution at such times as the terms of the MEP would otherwise permit.

ARA further recommends that the IRS confirm that the §413(e) plan administrator has the right to amend benefits, options, rights, and features as they pertain to retained participants' accounts as long as such amendments do not otherwise violate the Code or ERISA.

These comments are submitted on behalf of the ARA and were prepared by ASPPA's IRS Subcommittee, Claire P. Rowland, Esq., QPA, QKA, Chair. If you have any questions regarding the matters discussed herein, please contact Kelsey N.H. Mayo, Director of Regulatory Policy, at (704) 342-5307. Thank you for your time and consideration.

Sincerely,

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