

MEMO# 31843

July 9, 2019

Treasury and IRS Propose Regulations Modifying Unified Plan Rule for MEPs

[31843]

July 9, 2019 TO: ICI Members
Pension Committee

Pension Operations Advisory Committee SUBJECTS: Pension RE: Treasury and IRS Propose Regulations Modifying Unified Plan Rule for MEPs

Treasury and IRS have released a [notice of proposed rulemaking\[1\]](#) that would amend regulations under Internal Revenue Code section 413(c) for multiple employer plans (MEPs) (a MEP is a tax-qualified plan maintained by more than one employer). The proposal would provide a mechanism for a defined contribution MEP to deal with certain tax-qualification failures attributable to a participating employer without jeopardizing the tax-qualified status of the entire MEP. Ordinarily, under the Unified Plan Rule (also known as the “one bad apple” rule), all of the employers maintaining a MEP (participating employers) are treated as a single employer for purposes of certain Code section 401(a) tax-qualification requirements.

Background

The proposal relates to an [Executive Order](#) issued in August 2018 by President Trump directing the Departments of Labor and Treasury to take various actions to strengthen retirement security through expanding access to workplace retirement plans.[\[2\]](#) In regard to MEPs, the Order directs Treasury to consider proposing regulations or other guidance for MEPs on satisfying tax-qualification requirements when one or more adopting employers fails to meet such requirements (i.e., to address the Unified Plan Rule). The Order also directs DOL to examine policies that would expand availability of MEPs, particularly for small and mid-sized businesses, and expand access to workplace plans generally (including MEPs) for part-time workers, sole proprietors, and others with “non-traditional” employment relationships. In October 2018, DOL proposed a regulation regarding the availability of a MEP to a group or association of employers.[\[3\]](#) The final DOL rule is pending.

Proposed Changes to Unified Plan Rule

Under the Unified Plan Rule in section 1.413-2(a)(3)(iv) of the existing Treasury regulations, “the failure by one employer maintaining the plan (or by the plan itself) to satisfy an applicable qualification requirement will result in the disqualification of the MEP for all employers maintaining the plan.” The proposed regulation would move the Unified Plan Rule to a new paragraph (g) of section 1.413-2 and add an exception for situations where a

participating employer in a defined contribution MEP either (1) has a qualification failure that it is unable or unwilling to correct, or (2) fails to comply with the MEP plan administrator's request for information about a qualification failure that the plan administrator reasonably believes might exist.

The proposed regulation describes certain conditions for plans to be able to use the exception to the Unified Plan Rule upon a qualification failure (or potential failure) of a participating employer, including requiring that:

1. The MEP satisfies certain eligibility requirements such as:
 - a requirement to have established practices and procedures to promote compliance,
 - a requirement to adopt relevant plan language, and
 - a requirement that the MEP not be "under examination" (as defined in the regulation) at the time of the first notice to the unresponsive participating employer.
2. The MEP plan administrator provides notice and an opportunity for the unresponsive participating employer to take remedial action with respect to the participating employer failure. The initial notice must describe:
 - the participating employer failure,
 - the remedial actions the employer would need to take to remedy the failure,
 - the employer's option to initiate a spinoff of plan assets and account balances attributable to participants who are employees of that employer, and
 - the consequences under plan terms if the unresponsive participating employer neither takes appropriate remedial action with respect to the participating employer failure nor initiates a spinoff, including the possibility that a spinoff of assets and account balances attributable to participants who are employees of that employer would occur, followed by a termination of that plan.

Additional follow up notices would be required at specified times if the unresponsive participating employer fails to take actions described in the first notice.
3. If the unresponsive participating employer fails to take appropriate remedial action with respect to the participating employer failure after the MEP administrator's final required notice (including by initiating its own spinoff), the MEP plan administrator must:
 - implement a "spinoff" of the plan assets and account balances held on behalf of employees of the unresponsive participating employer (and that are attributable to employment with that employer) to a separate plan,
 - provide specified notices to participants and beneficiaries of the spun-off plan, and
 - terminate the spun-off plan.
4. The MEP plan administrator complies with any information request that the IRS or a representative of the spun-off plan makes in connection with an IRS examination of the spun-off plan, including any information request related to the participation of the unresponsive participating employer in the MEP for years prior to the spinoff.

Comments

Comments on the proposal are due October 1, 2019. In addition to comments on the proposed regulatory amendments, the proposal asks for comments on several open questions, including whether the Department of Labor should provide guidance to facilitate implementation of the exception to the Unified Plan Rule, particularly with respect to fiduciary liability and prohibited transaction concerns of the MEP plan administrator. Other specific requests for comment include:

- Whether the exception to the Unified Plan Rule should be available to defined benefit plans.
- Whether the regulations should add appropriate mechanisms to avoid the potential for repetitive notices or to shorten the notice period for a potential qualification failure that becomes a known qualification failure.
- For purposes of a spinoff, how to treat participants who have a single account with assets attributable to service with the unresponsive participating employer and one or more other participating employers, or who have a separate rollover account that is not attributable to service with the unresponsive participating employer.
- What additional guidance should be provided on terminating a plan in the case of a spinoff-termination.
- Whether there are any studies that would help to quantify the impact of the proposed regulations.

The proposal specifies that taxpayers may not rely on the proposed regulations until final regulations are issued.

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endnotes

[1] The proposal is available here:
<https://www.govinfo.gov/content/pkg/FR-2019-07-03/pdf/2019-14123.pdf>.

[2] The Executive Order touches on three main areas for change: MEPs, notice and disclosure requirements, and required minimum distribution (RMD) rules. It is available here:
<https://www.whitehouse.gov/presidential-actions/executive-order-strengthening-retirement-security-america/>.

[3] For a description of the DOL proposal, see ICI Memorandum No. 31451, dated October 23, 2018 available at https://www.ici.org/my_ici/memorandum/memo31451. For ICI's comment letter on the proposal, see ICI Memorandum No. 31534, dated December 21, 2018 available at https://www.ici.org/my_ici/memorandum/memo31534.

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