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**MEMO# 34109**

April 12, 2022

# Treasury Issues Proposed Regulations Implementing SECURE Act Changes for MEPs

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TO: ICI Members
Pension Committee
Pension Operations Advisory Committee SUBJECTS: Pension RE: Treasury Issues Proposed Regulations Implementing SECURE Act Changes for MEPs

On March 28, 2022, the Treasury Department and IRS published proposed regulations relating to the "unified plan rule" for multiple employer plans (MEPs).[1] The unified plan rule (also known as the "one bad apple" rule) 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.[2] The proposed regulations implement changes to the unified plan rule enacted in section 101 of the Setting Every Community Up for Retirement Enhancement Act (SECURE Act) of 2019.[3]

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.[4] The SECURE Act then modified the unified plan rule, allowing pooled employer plans (PEPs)[5] (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.

While withdrawing the 2019 proposed regulations, the preamble indicates that the new proposal reflects public comments made with respect to the earlier proposal. Comments on the new proposal are due May 27, 2022, and a public hearing is scheduled for June 22, 2022.

## Proposal

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[6] 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.[7]

### Conditions for Using the Unified Plan Exception

The proposed regulations set forth criteria for eligibility for the unified plan exception:

- Plan language. The terms of the plan must provide 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.
- Plan administrator obligations. The plan administrator must satisfy the notice requirements described below, implement a spinoff if initiated by an unresponsive participating employer, and take certain actions if an unresponsive participating employer fails to take remedial action or initiate a spinoff by the final deadline described below.
- Pooled plan provider obligations. If the plan is a PEP, the pooled plan provider must meet certain additional requirements, which generally track the requirements established by section 101 of the SECURE Act.

### Definitions

The proposed regulations define various relevant terms, including "participating employer failure," "unresponsive participating employer," "failure to provide information," and "failure to take action." Notably, the definition of "amounts attributable to the employees of the unresponsive participating employer" provides that if there is no separate accounting for amounts that are attributable to employment with the unresponsive participating employer and with other participating employers, and a participant's account balance includes amounts that are attributable to current employment with the unresponsive participating employer and to previous employment with one or more other participating employers, the entire account balance is treated as attributable to employment with the unresponsive participating employer.[8] An exception to this general rule would provide that when a participant's account balance includes amounts that are attributable to current employment with a participating employer that is not the unresponsive participating employer and to previous employment with the unresponsive participating employer, none of the account balance is treated as attributable to employment with the unresponsive participating

employer.

**Notice Requirements**

The proposal sets forth a schedule of notice requirements with respect to a participating employer failure.

- First notice. The plan administrator must send a first notice[9] to the unresponsive participating employer describing the participating employer failure, the actions the employer must take to remedy the failure, and the employer's option to initiate a spinoff of amounts attributable to the employees of the unresponsive participating employer to a separate single-employer plan maintained by the employer. It also must describe the consequences of not taking such actions.
- Second notice. If the unresponsive participating employer fails to either take remedial action or initiate a spinoff by 60 days after the first notice is provided, the plan administrator must send a second notice to the employer within 30 days after the aforementioned 60-day period.
- Final notice. If the unresponsive participating employer fails to either take remedial action or initiate a spinoff by 60 days after the date the second notice is provided, the plan administrator must send a final notice to the employer, again within 30 days after the aforementioned 60-day period. The plan administrator also must send the final notice to participants employed by the unresponsive participating employer and to the Department of Labor. The final notice should include all information from the first notice and specify the final deadline for the unresponsive participating employer to take remedial action or initiate a spinoff (i.e., 60 days after the final notice).

**Plan Administrator's Response to Employer's Remedial Action**

The proposal provides special rules for situations when an employer's failure to provide information turns into a failure to take action (i.e., because the unresponsive employer eventually provides information that shows a tax-qualification failure), including how to satisfy the notice requirements. In addition, this section of the proposal explains how to implement an employer-initiated spinoff. The plan administrator must complete the spinoff as soon as reasonably practicable, which is deemed to be satisfied by completing the spinoff within 180 days after initiation of the spinoff.

**Required Actions Following Employer's Failure to Meet Final Deadline**

If the unresponsive participating employer fails to either take remedial action or initiate a spinoff by the final deadline (i.e., 60 days after the final notice), the plan administrator must undertake the following actions:

- Stop accepting contributions from the unresponsive participating employer and its employees;
- Provide notice to participants who are employees of the unresponsive participating employer (and their beneficiaries) with certain information,[10] including explaining that amounts in their accounts attributable to employment with the unresponsive participating employer will be fully vested;
- Provide participants who are employees of the unresponsive participating employer (and their beneficiaries) with an election regarding treatment of their plan accounts, including electing a direct rollover to an eligible retirement plan (except for amounts not eligible for rollover) or electing to keep their accounts in the MEP (except for

amounts subject to mandatory distribution); and
- Distribute benefits as soon as administratively feasible following an individual's election or following the plan administrator's determination that it is not required to provide an individual with an election (i.e., certain mandatory distributions).

## Proposed Applicability Dates and Reliance

The regulations are proposed to apply beginning on the date of publication of the final regulations. Until the final regulations are published, the proposal indicates that an employer or pooled plan provider may rely on a good faith, reasonable interpretation of Code section 413(e) and that compliance with the proposed regulations is considered reliance on a good faith, reasonable interpretation of Code section 413(e).

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**endnotes**

[1] The proposed regulations are available at https://www.govinfo.gov/content/pkg/FR-2022-03-28/pdf/2022-06005.pdf.

[2] Internal Revenue Code (Code) section 413(c) contains the unified plan rule for MEPs.

[3] For a summary of the SECURE Act, see ICI Memorandum No. 32118, dated December 20, 2019, available at https://www.ici.org/memo32118.

[4] For a summary of the 2019 proposed rule, see ICI Memorandum No. 31843, dated July 9, 2019 available at https://www.ici.org/memo31843. For a summary of ICI's comments on the 2019 proposal, see ICI Memorandum No. 31990, dated October 1, 2019, available at https://www.ici.org/memo31990.

[5] 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, DOL established registration requirements for providers of PEPs, including creating new Form PR (Pooled Plan Provider Registration). See ICI Memorandum No. 32921, dated November 18, 2020, available at https://www.ici.org/memo32921.

[6] The proposed regulations do not provide guidance on whether a section 413(e) plan is maintained by employers that have a common interest other than having adopted the plan. The proposal requests comments on what (if any) guidance would be helpful regarding whether employers have such a common interest, including how any guidance should be coordinated with guidance issued by the Department of Labor.

[7] The 2019 proposed rule would have required the plan administrator to initiate a spinoff without a request by the unresponsive participating employer.

[8] This determination is relevant for purposes of the vesting and disposition of the participant's account upon taking final action to deal with a participating employer failure.

[9] For a failure to provide information, the first notice would be due 12 months following the end of the plan year for which the information is necessary to determine whether the plan is in compliance. For a failure to take action, the first notice would be due 24 months

following the end of the plan year in which the failure to satisfy a tax-qualification requirement occurs.

[10] Notice may be written or electronic, subject to Treas. Reg. section 1.401(a)-21 (rules permitting the use of electronic media to provide applicable notices and make participant elections with respect to retirement plans).

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