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COMMENT LETTER

October 1, 2019

ICI Comment Letter on Treasury Proposal to Amend Unified Plan Rule for MEPs (pdf)

Filed Electronically October 1, 2019 Internal Revenue Service CC:PA:LPD:PR (REG–121508–18) 1111 Constitution Avenue NW Washington, DC 20224 Re: REG 121508-18; Proposed Modification to Unified Plan Rule for Multiple Employer Plans Dear Sir or Madam: 𝕌e Investment Company Institute1 is pleased to submit comments on the regulation proposed by the Department of the Treasury (Treasury) and Internal Revenue Service (IRS) to provide relief from the unified plan rule under Internal Revenue Code section 413(c) for defined contribution plans maintained by more than one employer (i.e., a "multiple employer plan" or "MEP"). Under the unified plan rule, the failure by one employer maintaining the plan to satisfy an applicable qualification requirement generally will result in the disqualification of the MEP for all employers maintaining the plan.2 𝕌e proposal would provide an exception to the application of the unified plan rule in certain circumstances where a participating employer in a MEP fails to satisfy a tax qualification requirement or 1 𝕌e Investment Company Institute (ICI) is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's members manage total assets of US$23.4 trillion in the United States, serving more than 100 million US shareholders, and US$7.1 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in London, Hong Kong, and Washington, DC. 2 Treas. Reg. section 1.413-2(a)(3)(iv). Internal Revenue Service October 1, 2019 Page 2 of 5 fails to provide information necessary to determine compliance with a tax qualification requirement, if the plan administrator follows prescribed procedures for addressing the non-compliant employer. 𝕌e unified plan rule is considered a significant deterrent to greater adoption of MEPs, although it is not the only barrier.3 We expect the proposed relief to help facilitate the adoption of defined contribution MEPs by offering greater certainty to participating employers that failures attributable to other participating employers will not adversely impact the qualified status of the plan. 𝕌e Institute supports the proposal and its goal of expanding usage of MEPs, particularly by small employers. As explained further below, we believe the proposal would benefit from certain changes intended to streamline and simplify the requirements for addressing non-compliant employers. I. Expanded Use of MEPs Would Provide Significant Benefits 𝕌e proposed exception to the unified plan rule stems from a 2018 Executive Order titled "Strengthening Retirement Security in America,"

which is intended to expand access to workplace retirement plans for American workers, particularly through MEPs.4 According to the Executive Order, MEPs are an efficient way to reduce administrative costs of running a retirement plan and have the potential to increase workplace plan coverage, especially among small employers. We agree that MEPs could play a key role in increasing coverage for workers at small businesses—i.e., those with fewer than 100 employees—the employer segment most in need of solutions to encourage retirement plan sponsorship.5 Small businesses o🂫en face particular challenges in establishing and maintaining retirement plans. Studies have found that concern about administrative costs and burdens are a significant reason that more small businesses do not offer retirement plans. Small employers maintaining their own plan are required to prepare their own plan documents, summary plan descriptions and other participant disclosures, file individual Form 5500s, obtain a separate financial audit, and establish a single trust. 3 Other barriers to the wider use of MEPs exist. In the context of ERISA-covered plans, for example, current Department of Labor interpretive guidance limits the availability of MEPs to circumstances where the group of employers adopting the plan has a commonality of interest and satisfies other organizational criteria, where the MEP is offered by a Professional Employer Organization to its client employers, or where a state government acts in the interest of employers in the state to sponsor a MEP that employers could join voluntarily. See 29 CFR §2510.3-55 (Association Retirement Plan rule) and 29 CFR §2509.2015-02 (Interpretive Bulletin 2015-02). ICI has previously commented that limiting the availability of MEPs in this manner will do little to expand coverage or improve retirement security. See ICI Letter to the Department of Labor, December 21, 2018, available at https://www.ici.org/pdf/31534a.pdf. 4 Executive Order 13847, 83 Fed. Reg. 45321 (September 6, 2018). 5 According to the National Compensation Survey (March 2018), 55 percent of workers at employers with fewer than 100 workers are covered by a pension plan (DB, DC, or both), while 86 percent of workers at employers with 100 workers or more are covered by a pension plan (DB, DC, or both). 𝕌e survey is available at: www.bls.gov/ncs/ebs/benefits/2018/ownership/civilian/table02a.htm. For a discussion of how pension coverage varies by plan size, see Brady and Bogdan, “Who Gets Retirement Plans and Why, 2013,” ICI Research Perspective 20, no. 6 (October 2014), available at www.ici.org/pdf/per20-06.pdf. Internal Revenue Service October 1, 2019 Page 3 of 5 Because of the fixed administrative costs of sponsoring a plan, small plans may not qualify for lower-cost investment options or lower recordkeeping fees. In addition to administrative and compliance burdens, smaller employers may be challenged by the fiduciary responsibility and liability of selecting and monitoring service providers and plan investment options. In joining a MEP, many small employers could band together to offer their employees access to a 401(k) plan. 𝕌ese plans would spare smaller employers from shouldering all the administrative costs associated with setting up and maintaining a 401(k) plan and give small plans banding together the leverage of a larger asset base to reduce investment fees for their participants. 𝕌ey may even encourage some small employers to offer plans because doing so would be easier (for example, the MEP provider could handle preparation and maintenance of plan documents, participant notices and disclosures, annual report filing and audit requirements on behalf of the group, rather than each employer doing these things on its own). Fiduciary responsibility for selecting and monitoring investment options and other service providers could be allocated to the MEP sponsor as well. By providing an established process for dealing with qualification failures by participating employers, without disqualifying the entire plan, the proposed changes to the unified plan rule would bring certainty and assurance to the MEP space, which is essential to success in increasing coverage. II. Modest Changes to the Proposal Would Make the Unified Plan Rule Exception More Effective We commend Treasury and IRS for proposing amendments to the unified plan rule that will help administrators of MEPs ensure

compliance and the integrity of the plan. The proposed regulation would move the unified plan rule to a new paragraph (g) of Treasury Regulation 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, including eligibility criteria, a schedule of notices to the unresponsive or non-compliant employer and affected participants, and ultimately a spin- off/termination of assets attributable to the non-compliant employer. While the process outlined in the proposal generally provides a clear path for MEP administrators to follow, we recommend streamlining certain requirements so that the process is less burdensome but still protective of participants and beneficiaries in affected plans. Specifically, we support the Internal Revenue Service October 1, 2019 Page 4 of 5 recommendations set forth by the American Benefits Council (the "Council")6 in its letter responding to this request for comment.7 For example, in its letter, the Council recommends improvements to the schedule of required notices in order to reduce the potential for unnecessary delays and increase the likelihood that participants and beneficiaries receive the benefits to which they are entitled. In particular, the Council recommends reducing the waiting period between notices from 90 days to 60 days, and capping the number of required notices at four instead of six (relevant to situations where a potential qualification failure becomes a known failure). Reducing the total amount of time and number of steps between the discovery of a known or potential qualification failure and the ultimate spin off/termination of the affected portion of the plan in this manner will benefit all parties and minimize the chances that participants will become lost in the interim. The Council also recommends, and we support, permitting simultaneous spin off and termination with respect to the assets of non-compliant or unresponsive employers, instead of the two-step process outlined in the proposal whereby the assets attributable to the unresponsive employer are first spun off to a separate single-employer plan and then such plan is terminated. The two-step process would add unnecessary and meaningless administrative burdens, such as creating a new plan document, filing additional annual reports, and providing separate disclosures for the spun off plan, which will be terminated shortly therea er. Further, we agree with the Council's suggestions to eliminate the proposed eligibility requirement that the MEP must not be "under examination" at the time of the first notice to the unresponsive participating employer and to expand the relief to MEPs that are 403(b) plans (or otherwise clarify that the unified plan rule, or any similar rule, does not apply to MEPs that are 403(b) plans). In addition to these changes, we have one final recommendation responding to a question posed in the preamble to the proposal. The question requests clarification on 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 employer in connection with a spinoff. For ease of administration, we believe that where an account is designated in the MEP's records as attributable to the unresponsive employer, the account should be treated as part of the spun off plan regardless of whether any assets in 6 ICI is a member of the American Benefits Council, a Washington D.C.-based employee benefits public policy organization. The Council advocates for employers dedicated to the achievement of best-in-class solutions that protect and encourage the health and financial well-being of their workers, retirees and families. Council members include over 220 of the world's largest corporations and collectively either directly sponsor or support sponsors of health and retirement benefits for virtually all Americans covered by employer-provided plans. 7 Letter from Lynn D. Dudley, American Benefits Council, to Internal Revenue Service, dated September 30, 2019, available at https://www.americanbenefitscouncil.org/pub/49F9773E-1866-DAAC-99FB-AEE2C2B3EEB5.

Internal Revenue Service October 1, 2019 Page 5 of 5 the account originated with another employer. In this case, the spinoff/termination should not have any impact on other assets in the MEP that are attributable to those other employers. * * * 𝕌e Institute appreciates the opportunity to comment on the proposed rule. We support efforts to expand availability of MEPs in the retirement plan space and urge Treasury and IRS to finalize the proposal with modest changes that would offer a more effective framework for dealing with non-compliant participating employers. If you have any questions about our comment letter, please feel free to contact David Abbey (202-326- 5920 or david.abbey@ici.org) or Elena Barone Chism (202-326-5821 or elena.chism@ici.org). Sincerely, /s/ David Abbey /s/ Elena Barone Chism David Abbey Elena Barone Chism Deputy General Counsel Associate General Counsel Retirement Policy Retirement Policy

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