U.S. Chamber of Commerce

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Via Electronic Delivery

May 4, 2022

CC: PA: LPD: PR (REG-121508-18)
Room 5203
Internal Revenue Service
PO Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Proposed Rule, Internal Revenue Service, Multiple Employer Plans, RIN 1545-B097, 87 FR 17225

To Whom It May Concern:

The U.S. Chamber of Commerce (Chamber) appreciates the opportunity to comment on RIN 1545-B097: Multiple Employer Plans (Proposed Regulation), which the Department of the Treasury, Internal Revenue Service (IRS) issued to implement Section 101 of the Setting Every Community Up for Retirement Enhancement Act (SECURE Act).

Background

The unified plan rule for multiple employer plans provides that one participating employer's failure to fulfill an Internal Revenue Code (Code) qualification requirement disqualifies the plan for all employers. The SECURE Act Section 101 added a new Code Section 413(e) which is an exception to this rule. Section 413(e)(1) provides that for defined contribution plans maintained by employers that have a common interest other than having adopted the plan or for defined contribution plans that have a pooled plan provider, a failure by one participating employer to meet the Code's qualification requirement will not disqualify the entire plan.

Under Section 413(e)(2)(i), the exception will not apply unless the terms of the plan provide that with respect to an unresponsive participating employer, the plan assets attributable to that employer will be transferred to a plan that employer maintains or to an eligible retirement plan, unless the Secretary of the Department of the Treasury (Secretary) determines it is in the best interest of the unresponsive employer's employees for their assets to remain in the plan. The terms of the plan also must provide that an employer that does not meet the applicable requirements is responsible for any liabilities attributable to its employees.[1]

If a pooled plan provider does not perform substantially all the required administrative duties,

[1] 26 U.S.C. § 413(e)(2)(ii).

the Secretary may determine whether the unified plan rule will apply. Section 413(e)(3) defines a pooled plan provider and lays out the administrative duties it must perform and what acknowledgments it must make.

Section 413(e)(4) spells out what guidance the Secretary must issue, including the pooled plan provider's administrative duties, the procedure to be taken to terminate a plan that is no longer maintained by more than one employer with a common interest or that is maintained by a pooled provider and identifying appropriate cases where the assets of an unresponsive participating employer will be transferred or remain in the plan.

The Secretary is required to issue model plan language which may be adopted for a plan to be treated as a pooled provider plan under both the Code and the Employee Retirement Income Security Act of 1974, as amended (ERISA).

Analysis of the Proposed Regulation

Plan language (Prop. Treas. Reg. § 1.413-3(a)(2)(i))

As noted above, Section 413(e) requires the terms of the plan to provide how assets attributable to a non-responsive employer will be transferred and that the non-responsive employer is responsible for any liabilities attributable to that employer's employees. The statute does not require the plan terms to include the process for the transfer, including notifications and timing.

The Proposed Regulation requires the plan document to include language describing the procedures to address a participating employer failure, including a description of the notices to be sent and the times by when the first notice must be sent, depending on the type of failure.

The final regulation should not require all details of the procedures to correct a failure to provide information and a failure to take action be included in the plan document. Instead, the plan document should be required to include a statement that the plan will establish procedures to correct a failure to provide information or take action in accordance with any applicable regulation, but not require the procedures to be included in the plan document so that the section 413(c) plan administrator is not required to amend the plan each time the procedures change. Furthermore, as the IRS noted, because the Proposed Regulation requires the procedures to be included in the plan document, failure to follow the procedures (even by failing to send a required notice by one day) would be considered an operational failure, which would discourage plans from being able to use this rule.[2]

Pooled plan provider administrative duties (Prop. Treas. Reg. 1.413-3(a)(3)(ii)(B))

Section 1.413-3(a)(3)(ii)(B) lists the administrative duties a pooled plan provider must perform

[2] Requiring the procedures to be in the plan document also would result a breach of fiduciary duty under ERISA Section 404(a)(1)(D) (29 U.S.C. §1104(a)(1)(D)) if the procedures are not followed exactly. This seems beyond the intent of Congress to turn what should be a remedial provision in the SECURE Act to a possible trap that could be a breach of fiduciary duty.

to be eligible for the exception to the unified plan rule. However, certain of these, such as maintaining accurate plan data, including up-to-date participant and beneficiary information and satisfying reporting and notice requirements are predicated on each participating employer providing the pooled plan provider with correct and updated data and information. As such, subclauses (3)(ii)(B)(2) and (5) should have the following clause added at the end: "to the extent such necessary information is provided by each participating employer."

In listing the administrative duties, any final regulation should make clear that that the pooled plan provider is not responsible for determining eligibility or severance from service.

Spinoff (Prop. Treas. Reg. 1.413-3(d)(2))

A plan administrator is treating as satisfying the spinoff requirement if the spinoff is completed within 180 days of the date the unresponsive participating employer initiates the spinoff. The final regulation should provide a caveat that this time is tolled if the unresponsive participating employer does not provide information or perform actions needed to complete the spinoff.

Effective date and model language

Under the proposed regulation, any final regulation would be effective on the date of publication in the Federal Register. However, although required under the statute, at this time, the IRS has not issued model language for plans to include in their plan document. We urge the IRS to issue model language in time for plans to incorporate such language into the plan document. We also encourage the IRS to issue model notices, including specific language discussing what tax consequences the IRS could impose on the individuals responsible for the noncompliance.

Employers with a common interest

In the preamble, the IRS requested comments on what guidance would be helpful regarding whether employers have a common interested other than adopting a plan. In 2019 the Department of Labor (DOL) issued a final regulation relating to Association Retirement Plans (ARP). Under this regulation, members of a group or association of employers will have commonality of interest if:

- The employers are in the same trade, industry, line of business or profession; or
- Each employer has a principal place of business in the same region that does not exceed the boundaries of (i) a single state or (ii) a metropolitan area (even if it crosses state lines).[3]

The IRS should coordinate its guidance on whether employers have a common interest other than adopting a plan with the DOL by adopting the requirements in the final ARP regulation.

[3] 29 C.F.R. §2510.3-55(b)(2).

Conclusion

We appreciate the changes in the Proposed Regulation, and we look forward to working with the IRS in finalizing the regulation.

Sincerely,

Chantel Sheaks

Chantel Sheaks
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U.S. Chamber of Commerce