AMERICAN BENEFITS COUNCIL

October 29, 2019

Internal Revenue Service
CC:PA:PR (REG–121508–18)
Room 5205
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Request to Testify at the December 11 Hearing on Proposed Multiple Employer Plan Relief (REG–121508–18)

Dear Sir or Madam:

On behalf of the American Benefits Council ("Council"), I am writing to request the opportunity for a Council representative to testify at the December 11 hearing on the proposed multiple employer plan (MEP) modifications published by the Department of the Treasury and Internal Revenue Service (IRS) on July 3, 2019.

The American Benefits Council is 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.

Attached is the comment letter that we filed on the proposal. We intend to address the following issues in our testimony.

- The Council supports the proposed relief and believes it will increase retirement plan coverage by removing existing barriers to plan sponsorship through a MEP. (2 minutes)

- The Council recommends that Treasury and IRS expand the proposed relief by eliminating the "under examination" condition and making relief available to

403(b) plans, and consider making relief available to defined benefit plans. (3 minutes)

- The Council recommends that Treasury and IRS simplify the conditions for relief by accelerating the timeline for completing a spinoff when participating employers fail to take action, creating reasonable cause relief for plan administrators when implementing an employer-initiated spinoff, and permitting simultaneous spinoffs/terminations. (4 minutes)

- The Council recommends that Treasury and IRS provide additional guidance on the proposed relief by publishing model amendments and clarifying that certain beneficiaries are not subject to the proposed relief's notice requirements. (1 minute)

Thank you for your consideration.

Sincerely,

Lynn D. Dudley
Senior Vice President, Global Retirement and Compensation Policy

AMERICAN BENEFITS COUNCIL

September 30, 2019

Internal Revenue Service
CC:PA:PR (REG–121508–18)
1111 Constitution Avenue NW
Washington, DC 20224

Re: Proposed Multiple Employer Plan Relief (REG–121508–18)

Dear Sir or Madam:

On behalf of the American Benefits Council ("the Council"), I am writing in support of the proposed multiple employer plan (MEP) modifications published by the Department of the Treasury and Internal Revenue Service (IRS) on July 3, 2019. Additionally, I am writing to recommend ways that Treasury and IRS can improve the proposed relief by expanding its scope, simplifying its conditions and providing additional guidance.

The American Benefits Council is 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.

We also respectfully request a public hearing and the opportunity to testify at it.

BACKGROUND

Access to a workplace retirement plan can be the most important factor in determining whether American workers are adequately preparing for a financially secure retirement. When employees are offered the ability to save at work, they overwhelmingly choose to set money aside for their future. For example, according to a study conducted by the Empower Institute, U.S. households that are eligible for a

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workplace retirement plan are on track to replace 79% of their income in retirement. By comparison, households that are not eligible for such a plan replace just 45% of their income in retirement.[1] Also, according to research from the nonprofit Transamerica Center for Retirement Studies, 89% of workers who are offered a 401(k) or similar plan are saving for retirement, either through the plan and/or outside of work, compared to just 49% of workers who are not offered such a plan.[2]

Workplace retirement plans offer benefits that are not available in the individual savings marketplace – for example, fiduciary oversight, the potential for employer contributions, clear automatic enrollment options, and economies of scale. Accordingly, the Council has long supported legislative and regulatory proposals to expand access to workplace retirement plans by reducing the administrative burdens and costs of sponsoring such plans. This includes support for policies that would make it easier for employers to join a MEP. MEPs offer economies of scale and administrative simplifications that are not otherwise available to small employers entering into the retirement plan marketplace on their own. Additionally, if designed properly, a MEP can limit fiduciary liability for participating employers by allowing them to delegate some of those responsibilities.

Under current Treasury Regulations, the unified plan rule creates a barrier to increased MEP participation. First, some employers are reluctant to join a MEP because the failure of one employer to comply with the Internal Revenue Code's qualification rules can result in the entire MEP being disqualified. Additionally, even if actual disqualification is unlikely, the existence of that possibility can be very off-putting for risk-averse small business owners who do not want to risk their business in any way based on the actions of unrelated businesses.

The Council commends Treasury and IRS for proposing rules that would create an exception to the unified plan rule. We especially are pleased with how the proposed regulations would not only provide relief for known failures, but also provide relief for cases in which participating employers do not respond to requests for information or other directions from a MEP administrator. The Council believes that the proposed exception to the unified plan rule would increase retirement plan coverage by removing existing barriers to plan sponsorship through a MEP.

RECOMMENDATIONS

Although the proposed regulations will help expand access to workplace retirement plans, we also believe that Treasury and IRS should amend the proposed regulations to

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[1] Empower Institute, *Scoring the Progress of Retirement Savers*, April 2018.

[2] Nonprofit Transamerica Center for Retirement Studies, *Wishful Thinking or Within Reach? Three Generations Prepare for Retirement,* 18th Annual Transamerica Retirement Survey of American Workers, p. 98, available at: https://transamericacenter.org/docs/default-source/retirement-survey-of workers/tcrs2017_sr_threegenerations_prepare_for_retirement.pdf.

further eliminate barriers for employers that are interested in joining a MEP. Accordingly, the Council recommends that Treasury and IRS expand the scope of the proposed relief, simplify the proposed conditions, and offer additional guidance. Each of these recommendations is further discussed below.

I. Expand the Scope of the Proposed Relief

A. Expand Relief to Plans that Do Not Identify Failures

A MEP is not eligible for the proposed exception to the unified plan rule if the plan is “under examination” at the time of the first notice to the unresponsive employer. For this purpose, a plan is under examination if it is actually under examination by the Employee Plans Office of the Tax Exempt and Government Entities Division or the Criminal Investigation Division. Further, a plan is treated as “under examination” if the plan has a determination letter application pending with the IRS and an IRS agent requests additional information that indicates the existence of a failure not previously identified by the applicant. The preamble to the proposed regulations explains that the definition of “under examination” for this purpose is similar to the definition of “under examination” used by the Employee Plans Compliance Resolution System (“EPCRS”).

The Council recommends that Treasury and IRS eliminate this eligibility condition from the final regulations. We are concerned that this rule could create pressure on MEP administrators to provide a first notice very quickly, without working with uncooperative employers that may have simply been busy with pressing business needs. The administrator would feel this pressure because by delaying the first notice, all employers in the plan are put at risk. Moreover, the first notice assumes a degree of adversity between the administrator and the unresponsive employer that may be inappropriate; for example, the first notice must raise the possibility of expelling the employer from the plan. This type of notice is not conducive to an ongoing strong relationship between the employer and the plan, increasing the chances that the employer leaves the MEP and ceases to maintain any plan.

Moreover, in our view, there is no justification for punishing innocent employers for the violations of others. So, even when a violation with respect to employer #1 is discovered on audit, that should not result in potentially disastrous consequences for employers ##2 - 1,000.

Alternatively, if the “under examination” condition is generally retained as proposed, we recommend that Treasury and IRS eliminate “verbal notifications” of impending Employee Plans examinations and possible failures relating to a determination letter application from the list of circumstances that will cause a plan to be treated as “under examination.” Given the impact of these notifications on the

proposed relief, only written notifications of impending examinations or possible failures should cause a plan to be treated as "under examination."

B. Expand Relief to 403(b) MEPs

The Council recommends that Treasury and IRS either (1) clarify that nothing similar to the unified plan rule applies to 403(b) MEPs, or (2) expand the scope of its proposed relief to cover 403(b) MEPs when one or more participating employers cause a 403(b) failure.

Public and non-profit employers currently participate in MEPs that are designed in accordance with Code Section 403(b). These 403(b) MEPs are not subject to the unified plan rule ("one-bad-apple rule") described in Treasury Regulation Section 1.413-2, and therefore would not be covered by the proposed relief, which is an exception to the rules described in Treasury Regulation Section 1.413-2.[3]

Unlike MEPs that are maintained pursuant to Code sections 401(a) or 403(a), 403(b) MEPs are subject to the 403(b) regulations. Those regulations do not incorporate the one-bad-apple rule described in Treasury Regulation Section 1.413-2, but they do contain principles that are similar to the one-bad-apple rule described in Treasury Regulation Section 1.413-2. And although Treasury and IRS apparently designed the 403(b) regulations with single-employer 403(b) plans in mind, those regulations can be read to indicate that the employees of employers that participate in a 403(b) MEP can face adverse tax consequences if there is a failure attributable to unrelated employers participating in the MEP. Thus, for the same reasons Treasury and IRS are proposing relief for 401(a) and 403(a) MEPs, it is appropriate and necessary for Treasury and IRS to either (1) clarify that nothing similar to the one-bad-apple rule applies to 403(b) MEPs, or (2) provide relief for 403(b) MEPs that is similar to the proposed relief for 401(a) and 403(a) MEPs.

Treasury Regulation Section 1.403(b)-3(d)(1)(ii) says that "a failure to operate in accordance with the terms of a plan adversely affects all of the contracts issued by the employer to the employee or employees with respect to whom the operational failure

[3] The coordination rules described in Code Section 413(c) do not apply to 403(b) plans. Also, according to the proposed regulations, "the qualification of a Section 413(c) plan under Section 401(a) or 403(a) . . . is determined with respect to all participating employers. Consequently, the failure by one participating employer . . . will result in the disqualification of the 413(c) plan for all participating employers." Thus, because the Code does not apply the Section 413(c) coordination rules to 403(b) plans and the interpreting regulations only reference MEPs maintained under Code Section 401(a) and 403(a) – i.e., to the exclusion of Code Section 403(b) – the one-bad-apple rule described under Treasury Regulation Section 1.413-2 does not apply to MEPs maintained under Code Section 403(b). Most relevant to this comment, this also means that the proposed relief for MEPs maintained pursuant to Code Sections 401(a) or 403(a) would not be available to MEPs maintained pursuant to Code Section 403(b).

occurred. Such a failure does not adversely affect any other contract if the failure is neither a failure to satisfy the nondiscrimination requirements . . . nor a failure of the employer to be an eligible employer. . ." Moreover, the regulations go on to state that "any failure that is not an operational failure adversely affects all contracts issued under the plan," including a failure to have contracts issued pursuant to a written plan that satisfies the requirements of Code Section 403(b), a nondiscrimination failure, or an employer eligibility failure.

Although not completely clear, in certain circumstances, the regulations quoted above can be read to impose adverse consequences for 403(b) MEPs that are very similar to the one-bad-apple rule described in Treasury Regulation Section 1.413-2. In other circumstances, the 403(b) regulations clearly do not apply a one-bad-apple rule like the one described in Treasury Regulation Section 1.413-2. For example, if one employer participating in a 403(b) MEP is not an eligible employer, the 403(b) regulations indicate that all contracts issued under the plan would face adverse consequences. This is very similar to the one-bad-apple rule imposed by Treasury Regulation Section 1.413-2. By contrast, if certain operational failures occur – e.g., an impermissible distribution – a plain reading of Treasury Regulation Section 1.403(b)-3(d)(1)(ii) indicates that the only contracts that would be affected are the contracts issued to the employee or employees with respect to whom the operational failure occurred.

403(b) MEPs offer participating employers and employees the same economies of scale, administrative simplifications, and fiduciary relief that are available to their counterparts established under Code sections 401(a) and 403(a). As currently drafted, however, the 403(b) regulations can create a barrier for expanded retirement plan coverage because employers that are otherwise interested in offering their employees a retirement savings option through a 403(b) MEP are concerned that the actions of other employers can adversely affect the benefits they offer to their own employees. For the same policy reasons supporting the proposed relief for 401(a) and 403(a) MEPs, the Council recommends that Treasury and IRS either (1) clarify that the one bad apple rule does not under any circumstances apply to 403(b) MEPs, or (2) expand the scope of its proposed relief to offer similar relief to MEPs that are maintained under Code Section 403(b). Under such relief, the assets attributable to employees of unresponsive and noncompliant employers should be spun off from a 403(b) MEP and the assets attributable to the employees of compliant employers should be protected from adverse tax consequences. These protections should be available to all 403(b) MEPs regardless of whether the failure stems from the plan's operation, its form, or the eligibility of its employers.

C. Expand Relief to Defined Benefit Plans

Treasury and the IRS declined to apply the proposed relief to defined benefit plans.

The Treasury Department and the IRS considered alternatives to the proposed regulation. One alternative would have been to extend the proposed regulations to include defined benefit MEPs. However, this alternative was rejected because defined benefit plans raise additional issues, including issues arising from the minimum funding requirements and spinoff rules, such as the treatment in such a spinoff of any plan underfunding or overfunding. Commenters are asked, in the Comments and Requests for Public Hearing section of the preamble, to address those issues, as well as the circumstances in which the exception to the unified plan rule should be available to defined benefit plans.

We ask that the relief be expanded to cover defined benefit plans. There are rules for defined benefit plan spinoffs under Code Section 414(l). These rules establish certain baseline requirements that must be satisfied, but also provide plans with certain flexibility to determine how to structure a spinoff, provided those baseline requirements are satisfied.

A spinoff of a noncompliant employer from a defined benefit MEP would be required to satisfy the baseline requirements. With respect to the issues where flexibility is provided (regarding, for example, surplus assets), we believe that this issue is well covered by the proposed requirement that the plan terms specify how to address participating employer failures. In other words, the plan terms would be required to specify how spinoffs would work. So all participating employers would know how the spinoffs would work. And the notice regime could be clarified to require the notices to remind employers of how spinoffs would work.

In this context, we see no reason not to cover defined benefit MEPs. Spinoffs from defined benefit MEPs are common and occur under plan terms. Why shouldn't the same plan terms govern spinoffs in this context?

Covering defined benefit plans under the proposed relief would also be consistent with the fundamental principle underlying this entire project: compliant employers should not be punished for the actions of unrelated noncompliant employers.

II. Simplify the Conditions for Satisfying the Proposed Relief

A. Reduce Unnecessary Delays and Administrative Burdens Created by Proposed Notice Requirements

The proposed exception to the unified plan rule would require MEP administrators to provide at least three notices, with at least 90 days in between each notice, to any participating employer that has created a known or potential qualification failure. The proposed notices are intended to offer employers the chance to take remedial action and

to ensure that employers and employees are aware of the consequences that can occur if action is not taken. The Council agrees with the notice requirement and its underlying rationale but is concerned that the requisite notices and waiting periods will unnecessarily create delays and administrative burdens for MEP administrators. Moreover, unnecessarily long waiting periods will make it more difficult to track down participants that will be owed a benefit when spun-off plans are terminated.

Employers that create qualification failures are often struggling to survive financially and have difficulty retaining their workforce. Long delays between the identification of a known or potential qualification failure and the distribution of plan benefits to former employees make it more likely that employees will have moved on to a new employer without updating their contact information with a former employer or MEP administrator.

In order to reduce the potential for unnecessary delays and make it more likely that participants will receive benefits owed to them from any spun-off plans, the Council recommends that Treasury and IRS: (1) reduce the 90-day waiting period between notices to 60 days; and (2) cap the number of potential notices at four, instead of six as proposed.

- **Reduce the Waiting Period From 90 Days to 60 Days.** The proposed 90-day waiting period means that the minimum time between the first notice of a known qualification failure and an eventual spinoff will be approximately nine months, but it could take as long as a year. Additionally, if a potential qualification failure turns into a known qualification failure, the entire spinoff process could take as long as two years. This is too long and makes it more likely that participants will become lost. Accordingly, the Council recommends that Treasury and IRS reduce the waiting period in between notices from 90 days to 60 days.

- **Cap the Requisite Notices at Four, Instead of Six.** Under the proposed regulations, the general requirement for three notices to be provided before a spinoff is reset if a *potential* qualification failure becomes a *known* qualification failure. This means that the timeline for completing a spinoff can be doubled when a suspected failure becomes a known failure. This potential reset would only exacerbate the concerns described above. Accordingly, the Council recommends that Treasury and IRS cap the requisite number of notices at four, instead of six.

    - Under such a regime, employers who began the spinoff process based on a potential qualification failure would be given one extra notice if a known failure is identified after the third notice.[4] The final notice should be (1)

[4] Corresponding changes would be recommended if the potential qualification failure becomes a known failure after the first or second notices, so that in all cases, no more than four notices are required.

sent to the unresponsive employer, its employees participating in the plan and the DOL within a reasonable period after the administrator has determined that there is a known qualification failure, and (2) subject to the final notice requirements that would otherwise apply to a participating employer who began the spinoff process based on a known qualification failure.

- On the other hand, we recognize that once a failure is identified, the employer may need time to implement the correction. So after the fourth notice, the employer should be provided with 180 days to correct the known failure before the MEP administrator must take steps to implement a spinoff.

B. Provide Reasonable Cause Relief When Circumstances Beyond the Plan Administrator's Control Prevent a Timely Employer-Initiated Spinoff

In the case of an employer-initiated spinoff, the proposed regulations require the plan administrator to implement the spinoff within 180 days of the date on which it was initiated. Although the Council recommends that Treasury and IRS accelerate the timeline for completing a spinoff when a participating employer fails to take action, we also believe there may be circumstances that will warrant an extended spinoff timeline when events beyond the control of the plan administrator prevent a spinoff before the 180-day deadline set by Proposed Treasury Regulation Section 1.413-2(g)(6)(ii). Accordingly, we recommend that Treasury and IRS provide reasonable cause relief for plan administrators who cannot complete an employer-initiated spinoff within 180 days of the date that the employer initiates the spinoff, if such deadline cannot be met due to events beyond the control of the plan administrator.

C. Permit Simultaneous Spinoffs/Terminations

As a condition for the proposed relief, the assets attributable to an unresponsive employer must be spun off to a separate single-employer plan and distributed as part of a termination. The proposed regulations envision this occurring as a two-step process: (1) first, the assets must be spun off to a separate single-employer plan that has the same administrator, trustee, and substantive plan terms as the MEP; and (2) second, the spun-off plan must be terminated. This two-step process is unnecessarily staggered and complex.

The Council recommends that Treasury and IRS permit MEP administrators to spin off and terminate assets attributable to unresponsive employers in one step. One-step spinoffs/terminations already occur pursuant to explicit plan provisions in existing

MEP documents, which have been approved by the IRS many times. This one-step process has been an effective means of avoiding unnecessary costs for employees.

The proposed two-step spinoff/termination is unnecessarily burdensome. For example, if a separate single-employer plan is required, MEP administrators will, among other conditions, be required to create new plan documents, get IRS approval for the new plan documents, file Form 5500s (and possibly obtain an audit), and design and furnish separate disclosures required by the Code and ERISA, like 408b-2 disclosures, benefit statement, and summary plan descriptions. These steps, which would only be required for a plan that will be terminated as soon as possible, will unnecessarily increase the cost of MEP administration – a cost that will ultimately be borne by participants.

A simultaneous spinoff/termination can be completed by simply terminating the portion of the plan attributable to the unresponsive employer. In such a situation, there is a deemed spinoff, since that portion of the MEP could not be terminated without being spun off first. There is clear precedent for collapsing two steps into one step where requiring a two-step process would be unnecessary and disruptive. For example, Treasury Regulation Section 1.414(l)-1(o) permits plan-to-plan transfers, even though technically such transfers are spinoffs followed by mergers. In the transfer context, the spun-off plan would exist for an instant before it is merged into the transferee plan. This would be a meaningless step that the law appropriately does not require. Similarly, in the case of a MEP where the MEP administrator decides to spin off and terminate an unresponsive employer's plan, the spun-off plan would only exist for an instant before it is terminated. There is no apparent policy reason to require such a meaningless step.

III. Provide Additional Guidance

A. Model Amendments to Encourage Further MEP Participation

Once the proposed regulations are finalized, MEP administrators will be responsible for operationalizing the new relief. The Council requests that Treasury and IRS publish model amendments that plans – both pre-approved and individually designed – could use to satisfy the requirement that the plan document must describe the procedures to be taken if there is a "participating employer failure."

B. Notices for Beneficiaries

Under the proposed regulations, MEP administrators will be required to furnish certain notices to the participants of unresponsive participating employers "and their beneficiaries." *See e.g.,* Proposed Treasury Regulation Section 1.413-2(g)(7)(i)(A). The Council believes that Treasury and IRS intend these notices to be sent to the participants

of unresponsive participating employers and to *beneficiaries who are currently receiving or currently eligible to receive benefits from the plan*. That is, we do not see any reason why MEP administrators should be required to send notices to beneficiaries before a participant has died, when a participant could exhaust their account or designate a different beneficiary or beneficiaries. Accordingly, the Council recommends that Treasury and IRS clarify that MEP administrators are not required to provide notices to any beneficiaries unless such beneficiaries are currently receiving or currently eligible to receive benefits from the plan.

Sincerely,

Lynn D. Dudley
Senior Vice President, Global Retirement and Compensation Policy